SUING THE CODE ENFORCEMENT SCOFFLAW

Texas City Attorney's Association
Ronald D. Stutes
Potter Minton
Tyler, Texas

I. Introduction

A city I represent once decided, as a code enforcement initiative, to attempt to get greater compliance with a city ordinance requiring address numbers to be painted on the curb. This took the form of knocking on lots of doors and reminding residents of this requirement. Most residents, of course, simply took steps to comply. I do not believe that there was a single citation issued. There was probably some grumbling, but the average citizen simply decided to come into compliance without the necessity of any formal enforcement action. This is the typical reaction to informing a resident of a code violation.

In contrast is the property owner who simply believes that the rules do not apply to him. I recently have encountered this situation. This resident had violations of about a dozen different code provisions, spread across five adjacent tracts of land in the city. There were zoning violations, litter violations, animal control violations, vegetation control violations, and junked motor vehicle violations.

This owner had been cited in the past for these violations and brought into municipal court. There, the owner told the story of how he relocated to his current location years earlier, at the behest of "the city," who he said told him that he was permitted to run his business—a lawnmower repair shop—at this location. The jury found him not guilty.

A suggestion was immediately made that a civil suit be filed in state courts seeking an injunction requiring compliance with city codes. This recommendation was not followed until years later.

This paper is the story of that lawsuit. I hope to outline the statutory bases for civil litigation to enforce city codes, and give practical tips for the best way to prosecute the civil case. As I write this paper, I have a jury verdict and a judgment for civil penalties and a permanent injunction. The appellate deadline has not run, but a hearing is set on a motion for contempt. The story is not complete as I write this, nor is it likely to be complete by the time of the presentation in June. Most disappointingly, the gross violations are unabated. The struggle continues.

II. Step one – Notice of Violation

The first step in the process was the issuance of a notice of violation. In a situation like this, where the violations are numerous and multifarious, it is important to document exactly what violations there are and what the code provides. Be as specific as

possible. In the first place, it is possible that the property owner is not aware of what the code requires. (Although, it should be an unusual instance where the actual initial step—the knock on the door and the friendly reminder—has not taken place.) Even so, it would not be uncommon that the property owner isn't familiar with the specific provisions in the ordinance.

Beyond this practical aspect, however, two important functions are completed by a good, detailed notice. First, under §54.017l of the Local Government Code, a municipality may recover a civil penalty if the city proves that "the defendant was actually notified of the provisions of the ordinance," and committed acts in violation of the ordinance or failed to take necessary steps to comply with the ordinance *after* receiving notice. The better practice is, therefore, to attach copies of every ordinance section which is being violated.

The second function is not a legal requirement, but can affect the chances of recovery. Every time you tell the jury that property owner is not complying with the ordinance, this allows you to point out that the property owner is not being blindsided, is not being unfairly surprised by this suit. The property owner will have received documented, written instructions about what the ordinance requires, and clear instructions that there will be consequences if the ordinance is not obeyed.

A sample notice of violation is attached. I suggest that you start with the form notice of violation that your code enforcement department usually sends out, and then modify it as necessary to ensure that you fulfill the requirements of Chapter 54.

III. Step two – The Lawsuit

After an adequate period has passed (depending on the nature and number of the violations, I would say a minimum of 10 days – probably 20), if no progress is being made, suit should be filed. However, at every step of this process, it is important to recognize and account for efforts to come into compliance. If good faith attempts are being made, it seems equitable to delay the next step.

A sample petition is attached.

A. The Statutory grounds

1. Chapter 54

Authority to enforce city codes through the civil courts are primarily found in two different provisions of the Local Government Code. Chapter 54 is entitled "Enforcement of Municipal Ordinances." Subchapter B, entitled "Municipal Health and Safety Ordinances," sets out 12 categories of ordinances that may be enforced by civil action. They are generally:

- Preservation of public safety, including building codes;
- Fire safety;
- Zoning;
- Subdivision regulations;

- Conduct classified by statute as a Class C Misdemeanor;
- Dangerously dilapidated structures;
- Accumulations of refuse or vegetation that creates breeding and living spaces for insects and rodents;
- Sexually-oriented business regulations;
- Discharge of pollutants into sewer systems;
- Floodplain control;
- Animal care and control; and
- Water conservation.

Although the subchapter's title would imply that the enforcement provisions are limited to health and safety ordinances, several of the categories are not so circumscribed. The Texas Supreme Court has confirmed that there is no such limitation. *City of Dallas v. TCI West End, Inc.*, 463 S.W.3d 53, 58 (Tex. 2015).

It is not clear whether the fifth category of ordinances is a broad category that grants a city civil penalty powers with regard to any sort of ordinance. The Attorney General, in 2004, opined that the provision that allowed a civil action to enforce an ordinance "implementing civil penalties under this subchapter for conduct classified by statute as a Class C misdemeanor" is limited to health and safety ordinances. Tex. Att'y Gen. Sp. No. GA-267 (2004). That opinion was cited, however, and the limitation was rejected by the court in *TCI West End*. 463 S.W.3d at 56-57.

On the one hand, there is nothing mentioning "health and safety" in §54.012(5). On the other hand, that subsection does say "under this subchapter." But does "under this subchapter" apply to "civil penalties?" I think that the primary limitation of the scope of §54.012(5) is that there must be a statute that creates a Class C offense in order to bring that offense within the city's ability to adopt an ordinance imposing a civil penalty for that conduct. Then, if there is both a statute and an ordinance, suit may be brought under §54.012(5).

2. Chapter 211

The other primary enforcement vehicle is found in §211.012 of the Local Government Code, which authorizes a city to provide for civil penalties for violations of zoning ordinances. The provision authorizes enforcement of violations of Subchapter A of Chapter 211 (which contains virtually all the zoning authority granted to cities) or "ordinances or regulations" enacted by the city under the subchapter.

B. The remedies

1. Chapter 54

Section 54.017 of the Local Government Code allows the recovery of civil penalties against a person who has actual notice of the provisions of the ordinance, and who either violated the ordinance or failed to take action to comply with the ordinance after receiving that notice. Civil penalties may not exceed $1,000 per day for violations, or $5,000 per day for violations related to the discharge of pollutants into a sewer system.

Section 54.016 of the Local Government Code allows for the issuance of an injunction prohibiting the violation of, or requiring conduct necessary to comply with, an ordinance. However, this remedy is limited to instances where the city can show a "substantial danger of injury or an adverse health impact to any person or to the property of any person other than the defendant." As a result, although a health/safety factor is not necessary for a civil penalty, it is necessary for an injunction under Chapter 54.

2. Chapter 211

Section 211.012 permits a city to enact, as part of its zoning ordinance, a provision providing for civil penalties for violations of the zoning ordinance. There is no limit in the statute on the amount of civil penalty. In fact, the statute empowers the city to adopt an ordinance providing for imprisonment for a zoning violation. I am not aware of any city that has adopted such an ordinance, however, nor an unusually high civil penalty.

Section 211.012 also authorizes a suit by a city to prevent, correct, or abate violations of the zoning statute or ordinances adopted under that statute. Unlike Chapter 54, there is no requirement that a city show a threat to health or property. *Hollingsworth v. City of* Dallas, 931 S.W.2d 699, 703 (Tex. App.—Dallas 1996, writ denied). In fact, the case law has held that a city is *entitled* to an injunction for enforcement of its zoning laws. *City of Fort Worth v. Johnson*, 388 S.W.2d 400 (Tex. 1964). "Adoption of a zoning ordinance by the governing body of a city represents the exercise of a delegated legislative discretion, and enforcement or nonenforcement of the ordinance is not a matter of judicial discretion. *Id.*, at 402.

IV. The Negotiations

Typically, in civil cases, the court will refer a suit to mediation for settlement. This type of case is no different. In fact, in this case the court halted the trial to urge the parties to return to mediation.

One of the difficulties with negotiating a settlement in cases such as this is the problem with "allowing" a property owner to violate a city ordinance. Certainly there can appropriately be compromises on the speed of compliance or the amount of a civil penalty. Further, many ordinances are couched in terms of standards that are amenable to judgment calls, such as whether property is "unsightly," or whether the vegetation is such that it creates breeding grounds for vermin. In addition, the line between a property that is used as a "lawnmower shop" with spare parts used for repairs on the premises and a property that is used as a junkyard where used and second-hand materials are stored for reuse and resale is not clear and bright.

In situations like this, the willingness to compromise must be evaluated in light of the cost of continued litigation, the potential for an unfavorable jury verdict, and the chance to get voluntary abatement of the most egregious violations. If, for example, possible remaining violations were judgment calls or were out of public sight, it could well be optimal to get voluntary compliance with the most important aspects of the case.

V. Discovery

One of the key advantages of the civil penalty/injunction enforcement option is that discovery is available. A municipal court citation is, while relatively minor, a criminal prosecution that invokes many legal protections that are afforded criminal defendants. A property owner defending a citation cannot be required to testify against himself, and is not subject to the discovery process.

In a civil case, on the other hand, the defendant may be deposed, may be required to answer interrogatories, may be required to produce documents, and may be required to answer requested admissions. Further, the property may be subject to inspection under Rule 196.7.

In this case, access to the property was temporarily obstructed based on the assertion that there were law enforcement officers that would be helping to conduct the inspection, and a concern that the officers would then bring criminal charges based on the inspection. I refused to stipulate that no evidence gathered could be used in a criminal prosecution because there was some suspicion that the property owner was engaged in criminal activities more serious than code violations. Ultimately, I agreed that there would be no criminal charges on the matters that were within the scope of the lawsuit based on the evidence discovered on this inspection. We were seeking civil penalties and injunctive relief, so there was no desire on our part to return to the municipal court citation path. (No evidence of other criminal activity was found.) The photographs we obtained, however, were crucial in convincing the jury.

VI. Interim Relief

The appropriateness of a temporary injunction in a code enforcement case may well depend on the facts of the case. In some instances, such as when a property owner is about to construct a facility that violates zoning laws or setbacks, a temporary injunction may be crucial to ensure that there remains a case to be decided. In other instances, the opposite situation may be found. For example, a temporary injunction requiring a facility to be demolished might be an inappropriate use of interim relief, because Texas law clearly holds that the temporary relief awarded by a temporary injunction cannot be such as "to accomplish the object of the suit." *Texas Foundries, Inc. v. International Moulders & Foundry Workers' Union*, 151 Tex 239, 248 S.W.2d 460,464 (1952); *Babu v. Zeeck*, 478 S.W.3d 852, 854 (Tex. App.—Eastland 2015, no pet.).

A more difficult question is when the violation is ongoing, and an order requiring the activity to stop would not equate to permanent relief. Examples might be a use of a structure for a retail store when that use is not permitted by the zoning law. Requiring that the store be shut down pending trial would not typically be a permanent solution. The store could reopen if the trial resulted in judgment for the defendant. It is my experience, however, that a defendant will argue that temporary suspension of operations will result in a permanent loss of the business.

In this case, temporary relief would have taken the form of requiring extensive cleanup of a vast sea of decrepit lawnmowers and other equipment. The court, sensing

that such a cleanup would functionally "accomplish the object of the suit," was reluctant to hold a hearing on a temporary injunction. Instead, the court ordered a swift trial setting. Even so, the defendant announced "not ready" for trial, and the court ultimately did hold a temporary injunction hearing. Unfortunately, the delay in receiving the transcript of the hearing and the submission of briefs kept the court from ruling on the temporary injunction prior to trial.

Remember that courts are reluctant to take "interim" action that effectively decides the case permanently. I have, however, had more than one judge "compromise" by ordering an expedited trial.

VII. The Trial

This case had received a moderate amount of publicity by the time it reached trial. Much of the media coverage had a "big bad city picking on the poor little lawnmower man" tone. Further, there was a significant social media aspect to the public awareness. As a result, jury selection was difficult, verging on disastrous. In a panel of 80, we had 12 venire members stricken for cause. Some of the potential jurors directly admitted that they could not be fair, because they thought the City was wrong to bring the case. Others thought the burden of proof (preponderance of the evidence) was too light. While we were able to get the venire members that expressed overt sympathy with the defendant removed, it would not be possible for the remaining jurors to "unhear" those comments.

The primary substantive defense in this case was based on the defendant's claim that the defendant had moved to this location 20 years earlier at the behest of unnamed city leaders, who wanted his lawnmower repair business moved from a location that the city wanted to develop into an entertainment district. This defense had been successful at the criminal trial years before. However, when the defense had to be revealed in advance of trial, it was possible to develop how scant defendant's evidence of this scheme was, and to fully brief that no city official is entitled to give a property owner "permission" to violate city ordinances. The estoppel and waiver defenses were found to be legally groundless as a matter of law, and the witness was not permitted to testify to support these theories.

Two neighbors agreed to testify at trial regarding rat infestation they blamed on the junkyard. Competing exterminators testified for and against whether the lot constituted a rat harborage. Two city witnesses testified, and photographs and videos were admitted.

The defense strategy appeared to be based on a criminal defense model. There was little substantive defense on the facts. Instead, there were attempts to challenge jurisdiction, argue waiver and estoppel, challenge the authority of the city attorney to file the suit, challenge whether the amended petition was sworn, and argue that the removal of the severed counterclaims to federal court divested the state court of jurisdiction. This made trying the case difficult, but ultimately it was not a productive strategy.

The jury found for the city on all jury questions, and imposed over $150,000 in civil penalties.

VIII. The Judgment

In addition to the usual post-judgment challenges to the evidentiary sufficiency to support the jury verdict, which were all denied, the issue remained about how to fashion injunctive relief.

The court indicated that it would be difficult to fashion injunctive relief, because it would be necessary to make the injunction specific and clear enough to allow both the city and the defendant to know with clarity whether the injunction was being violated. For example, the jury found that the operation of the property owner was a "junkyard" under the zoning law, which was not a permitted use in the area. However, the defendant had always contended that he was operating a lawnmower shop. In my opinion, if a lawnmower shop had some lawnmowers stored outside the building, and used those lawnmowers for parts to repair other lawnmowers, that would not automatically make the property a junkyard. Nevertheless, the vast number of unusable mowers here clearly exceeded any number needed for making repairs.

Case law recognizes this dilemma, and provides guidance. In *San Antonio Bar Association v. Guardian Abstract & Title Company*, 156 Tex. 7, 291 S.W.2d 697, 702 (1956), the Supreme Court of Texas said:

> "'[A]n injunction decree must be as definite, clear and precise as possible and when practicable it should inform the defendant of the acts he is restrained from doing, without calling on him for inferences or conclusions about which persons might well differ and without leaving anything for further hearing.' *Villalobos v. Holguin*, 146 Tex. 474, 208 S.W.2d 871, 875. (Emphasis supplied.) But obviously the injunction must be in broad enough terms to prevent repetition of the evil sought to be stopped, whether the repetition be in form identical to that employed prior to the injunction or (what is far more likely) in somewhat different form calculated to circumvent the injunction as written."

Our solution was to define specifically how many lawnmowers (or other small engine equipment) the defendant could store outside. Further, as some of the property involved was zoned residential, the injunction specified that only two lawnmowers could be stored outside on any residential lot. Other violations were, of course, less difficult. The ordinance prevented outside storage in front of the primary building, or within a setback from the right of way. When the ordinance was in terms of an outright prohibition, the injunction could also be absolute.

My proposed injunction would also permit code enforcement personnel to enter the property without notice to determine if the property was in compliance. Although the court was understandably concerned about whether this violated the defendant's Fourth Amendment rights, I pointed out that search warrants were granted upon showing of probable cause after an ex parte presentation to a judge. Here, in contrast, the defendant had been found in violation of ordinances by a jury trial under a preponderance standard.

In *Freeman v. City of Dallas*, 242 F.3d 642 (5th Cir. 2001), the Fifth Circuit *en banc* found that when the City of Dallas entered onto private property and demolished a building, it was not required to obtain a warrant, because the property owner had already been given due process through notice and an administrative hearing before a city board. Similarly, in *Lowery v. City of Albuquerque*, 2011 WL 1336670 at *18-19 (D.N.M. 2011) pre-deprivation procedures were found to be adequate to protect the landowner's interests. Finally, in *Town of Amherst v. Keenan*, 60 Mass.App.Ct. 1126 (2004) (unpublished opinion),[1] the appellate court announced that it could not find (and the appellee had failed to cite) "a single court decision suggesting that a warrant might be required where, as here, a court has entered an injunction . . ." The court cited *Freeman* in support of its analysis.

The court also gave the defendant 60 days to come into compliance. I had requested the injunction require the defendant to *begin* efforts to comply within 7 to 10 days, but the court decided that this would be difficult or impossible to define (what would constitute beginning to comply? Moving one lawnmower?), so the permanent injunction did not require a start date.

IX. Enforcement

As it turns out, moving one lawnmower would have been more action than we have observed. (And this was the concern I had which prompted me to ask for the injunction requiring the defendant to *begin* cleanup.) The defendant, now *pro se*, has taken no action to comply with the injunction.

A motion for contempt has been filed, and one hearing day has already been postponed. The court has indicated that if there is the potential for imprisonment as a result of the contempt, the defendant is entitled to have an attorney provided to him if he cannot afford an attorney.

The criminal procedures that protect a defendant's rights are now in full play. The defendant is entitled to actual notice of the acts alleged to be in violation of the injunction. I had a copy of the motion for contempt personally served on the defendant. I have asked that the defendant be jailed for 7 days for his violations, and fined $500 per violation. Case law provides that a person may not be fined for each day of violation. *Ex Parte Hudson*, 917 S.W.2d 24 (Tex. 1996). However, courts have held that the court may impose a coercive fine, imposing a penalty for each day the violation continues until the defendant complies with the injunction. *Id.*, at 26; *The Cadle Co. v. Lobingier*, 50 S.W.3d 662 (Tex. App.—Fort Worth 2001, pet. denied).

[1] Rule 1.28 of the Massachusetts Rules of Appellate procedure provide that unpublished opinions cannot be cited as authority. The court was made aware of this limitation.

X. Conclusion

This case was difficult and stressful for counsel, and expensive for the client. It would be difficult to justify this magnitude of expenditure to get compliance with city codes, but it also seems necessary to ensure compliance is not viewed as "optional." Further, if the City can collect the judgment for civil penalties, it will offset a great deal of the cost.

If, however, I can drive into town one day soon and not be greeted with a gigantic junkyard, it will be very rewarding.