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Writing Sample

The following unedited writing sample comes from a memo that I wrote while interning at the San Francisco City Attorney's Office in the summer of 2008. It addresses the City's powers in the context of blight abatement, particularly the power to enter onto private property, the criteria for summary abatement, and notice and hearing requirements.

RE: **Blight abatement: municipal powers; criteria; notice and hearing requirements**

Questions Presented

1. What are the legal limits to the City's ability to enter onto private property to abate a public nuisance?

2. What are the criteria for summary abatement?

3. What are the due process requirements?—What kind of notice and hearing are required, and is there a right to appeal?

Brief Answer

1. Unless the owner or occupants consent to an inspection of the property, the City must obtain an inspection warrant. In most circumstances, the City must afford the owner or occupants of a property notice of the abatement proceedings and an opportunity to register objections at an informal hearing. The City retains the right to summarily abate nuisances that pose an "immediate threat to public health or safety." Cal. Gov. Code § 25845(a).

2. The City may commence summary abatement without notice, hearing, or warrant if it can show by a preponderance of the evidence that there is an immediate threat to public health or safety. *Leppo v. City of Petaluma*, 20 Cal. App. 3d 711, 718 (1971). The testimony of a single expert contesting a city's claim of an immediate threat can be enough to invalidate summary abatement actions. *Id.* at 719.

3. Owners and occupants must be given notice of the abatement proceedings at least five days before the scheduled hearing. In most cases, if the board of supervisors or the presiding hearing officer finds that there is a nuisance on the subject property, cities must give owners and occupants at least five days' notice before actually commencing abatement. Cal. Gov. Code § 39567. *See also Kruger v. City of Oakland*, 123 Cal. App. 2d 270, 271 (1954) (detailing Oakland's procedure for abatement, which included five-day notice periods at both steps of the process requiring notice). If the nuisance is in or around a building, the City must give 30 days' notice before commencing abatement. Cal. Health & Safety Code § 17980(a). Case law suggests that this provision applies primarily to major structural defects or other problems of a larger scale than an accumulation of weeds or rubbish. *See, e.g.*, *Hawthorne Sav. & Loan Ass'n v. City of Signal Hill*, 19 Cal.App.4th 148 (1993) (applying section 17980 to an apartment building that had fallen into disrepair, and reviewing a municipal demolition order).

Discussion

1. *Legal limits to City's ability to enter private property for nuisance abatement.*

Obtaining a warrant. The Supreme Court has noted that the kind of evidence required to obtain a warrant for inspection is "different" from the evidence required for a criminal search warrant. *Camara v. San Francisco*, 387 U.S. 523, 538 (1967) (quoting *Frank v. Maryland*, 359 U.S. 360, 383 (1959) (Douglas, J., dissenting)).

For area inspections, knowledge of conditions in particular buildings is not always necessary; "probable cause" can be satisfied by the passage of time, the kind of building in question (the *Camara* court mentions a "multi-family apartment house"), or the condition of the area. *Id.* The ultimate standard for an inspection warrant is "reasonableness"—there must be a "valid public interest" that justifies the intrusion of privacy. *Id.* at 539. The *Camara* court also noted that "most citizens allow inspection of their property without a warrant," and recommended that warrants only be sought after entry has been refused. *Id.* at 539–40.

California law echoes and builds upon *Camara*. An inspection warrant is a written order, signed by a judge of a court of record, directed to a state or local official. Cal. Code Civ. Pro. § 1822.50. Inspection warrants must be supported by affidavit, which must particularly describe the property in question. *Id.* There must be "cause" to issue the warrant, *id.*, which will be found if the particular property meets the "reasonable legislative or administrative standards for conducting a routine or area inspection," or if there is "reason to believe that a condition of nonconformity exists" on a particular property. *Id.* § 1822.52. Warrants can be used to enter buildings only between 8 AM and 6 PM of any given day, and only when an owner or occupant is present. Cal. Health & Safety Code § 17970–72; Cal. Code Civ. Pro. § 1822.56; San. Fran. Housing Code § 201(b).

What constitutes a nuisance. A city council may define a nuisance by ordinance. Cal. Gov. Code § 38771. California law requires that three conditions be met before city officials can enter private property to abate a nuisance: (1) there must be notice given of the abatement proceedings; (2) there must be some kind of informal hearing; and (3) the City must obtain a warrant or consent from the owner or occupant. Cal. Gov. Code § 25845(a); *Camara v. San Francisco*, 387 U.S. 523, 528–29 (1967) ("[E]xcept in certain carefully defined classes of cases, a search[1] of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."). In the event of an emergency or an immediate threat to public health, the City may pursue summary abatement without affording due process. Cal. Gov. Code § 25845(a).

A good example of the abatement process, upheld against challenge in court, comes from a 1999 case involving an unpermitted conversion of a garage to apartments. A landowner had converted half of her garage into two studio apartments in violation of an ordinance prohibiting the use of residential off-street parking facilities for other purposes. *Flahive v. City of Dana Point*, 72 Cal. App. 4th 241, 243 (1999). After a duly noticed hearing that plaintiff Flahive did not attend, the hearing officer ruled that the apartments were a

[1] The *Camara* court distinguished between a criminal search warrant and an administrative/civil inspection warrant, noting that the kind of evidence required to obtain an inspection warrant is different. *Camara v. San Francisco*, 387 U.S. 523, 538 (1967).

nuisance. *Id.* The officer gave Flahive three choices: (1) allow city staff to inspect the premises; (2) produce permits authorizing the conversion; or (3) obtain the permits or return the garage to its original state within 60 days. *Id.*

Several months later, Flahive had not complied. *Id.* The City scheduled a hearing for a nuisance abatement warrant and notified Flahive, who attended. *Id.* The court issued the warrant, the City's contractors removed the apartments, and Flahive sued the City for negligence and trespass. *Id.* The Court of Appeal upheld the City's action against Flahive's challenges, ruling that an abatement warrant issued after an administrative hearing was sufficient to allow city officials onto Flahive's property[2] and that the process afforded the requisite "minimum administrative due process protections." *Id.* at 245, 245 n.5.

2. *Criteria for summary abatement.*

California law reserves to cities the right to summarily abate public nuisances that are "immediate threat[s] to public health or safety."[3] Cal. Gov. Code § 25845(a). *See also Camara v. San Francisco*, 387 U.S. 523, 539 (1967) ("[N]othing we say today is intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations."); *Thain v. Palo Alto*, 207 Cal. App. 2d 173, 189 (1962) (finding it "long and well recognized" that cities can summarily abate nuisances in emergencies). In such "emergency situations," a city may take action to abate a public nuisance without notice or a hearing, but must be prepared to prove the immediate threat by a preponderance of the evidence. *Leppo v. City of Petaluma*, 20 Cal. App. 3d 711, 718 (1971).

Cities are not always able to meet their burden of proof in establishing an immediate threat. In *Leppo*, a one-story structure abutting a three-story building on the subject property was demolished, exposing the "dilapidated condition" of the three-story building. *Id.* at 715. City officials inspected the three-story building and concluded that it was unsafe for occupancy. *Id.* The city council passed a resolution favoring condemnation and gave notice to the building's owner of the resolution, saying that the city would proceed with demolition if the owner did not. *Id.* The owner hired a structural engineer, who disputed the city's finding of immediate threat. *Id.* When the owner of the building failed to take action, the city demolished the building. *Id.* After hearing the structural engineer's testimony, the trial court concluded that the city had failed to meet its burden of proof by a preponderance of the evidence, and held that the city had violated the owner's due process rights; the Court of Appeal upheld this decision. *Id.* at 719. The appellate court found that the engineer's testimony constituted substantial evidence in opposition to the city's conclusion that the building was an immediate threat. *Id.*

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[2] Note that the warrant issued by the administrative law judge was for conducting the abatement itself, not for an inspection. Only a judge of a court of record can issue an inspection warrant. Cal. Code Civ. Pro. § 1822.50.

[3] This critical phrase—"immediate threat to public health or safety"—goes undefined in the statute and has received scant attention in the case law. For one example of something a court found *not* to be an immediate threat, see *Leppo v. City of Petaluma*, 20 Cal.App.3d 711 (1971) (discussing a "dilapidated" three-story building that the City claimed was an immediate threat, but that adverse testimony showed was in a condition similar to other buildings in the area).

3. *Due process requirements: notice, hearing, right to appeal.*

"Procedural informality is the hallmark of administrative proceedings as opposed to judicial proceedings." *Mohilef v. Janovici*, 51 Cal. App. 4th 267, 291 (1996) (quoting *Baker v. City of Detroit*, 483 F. Supp. 919, 928 (E.D. Mich. 1979)).

California state law allows a board of supervisors the discretion to create, by ordinance, its own procedures for nuisance abatement.[4] Cal. Gov. Code § 25845(a). Nuisance-abatement procedures must provide the owner of the parcel, as well as "anyone known to the board of supervisors to be in possession of the parcel," notice of the abatement proceeding and an opportunity to appear and be heard by the board before abatement commences. *Id.* The statute reserves to municipal authorities the right to summarily abate any nuisance that "constitutes an immediate threat to public health or safety." *Id.* Parcel owners can be held liable for any costs of abatement. *Id.* subdiv. (b).

The board of supervisors may delegate the hearing to a hearing board, which would then make recommendations for the board's approval; the board may also delegate all its powers under section 25845 to a hearing officer. *Id.* subdivs. (h), (i).

Notice requirements for abatement proceedings. *Generally.* The length of time between giving notice and holding a hearing may be as little as five days. A section of the California Code addressing weed and rubbish abatement states that "notices shall be posted at least five days prior to the time for hearing objections." Cal. Gov. Code § 39567. California Courts of Appeal have condoned the use of similarly short timeframes in other nuisance-abatement circumstances as well.

The City of Oakland had a five-day notice period in its abatement ordinance in the 1950s. In *Kruger v. City of Oakland*, plaintiff-appellant Kruger maintained his residential property in a condition "similar to a junkyard." *Kruger v. City of Oakland*, 123 Cal. App. 2d 270, 272 (1954). Following Oakland procedure, the health officer filed a complaint with the city manager, who presented the matter to the city council. *Id.* at 271. A copy of the council's resolution and the complaint were served to Kruger at least five days before the hearing. *Id.* After the hearing, the council ordered abatement. *Id.* The Oakland ordinance provided that if abatement did not start within five days of the owners' receipt of written notice, and then continue to be "diligently prosecuted to completion," the health officer was authorized to take action on behalf of the City. *Id.* at 272. The court took no issue with this procedure and the appellant did not challenge it.

Abatement of a nuisance on a developed lot.[5] Notice requirements for nuisance abatement on developed lots are outlined by statute. In most cases of a nuisance "in [a] building or upon the lot on which it is situated," the enforcement agency must give 30 days' notice to

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[4] Section 25845 provides general discretion for formation of nuisance-abatement procedures, but Cal. Gov. Code section 39567 stipulates the notice requirements for abatement proceedings relating to developed parcels, as discussed below.

[5] Cal. Health & Safety Code section 17980 appears concerned more with structural problems, such as failing walls or holes in the roof, than with blight conditions. *See, e.g., Hawthorne Sav. & Loan Ass'n v. City of Signal Hill*, 19 Cal.App.4th 148 (1993) (applying section 17980 to an apartment building that had fallen into disrepair, and reviewing a municipal demolition order).

abate the nuisance. Cal. Health & Safety Code § 17980(a). If there is an "immediate threat" or other compelling circumstances, the agency can provide fewer than 30 days' notice. *Id.* If the notice period expires without action from the responsible party, "the enforcement agency shall . . . institute any appropriate action or proceeding to prevent, restrain, correct, or abate the violation or nuisance." *Id.*

For any building found after inspection to be in substandard condition, the enforcement agency "shall commence proceedings to abate the violation by repair, rehabilitation, vacation, or demolition of the building." *Id.* subdiv. (b)(1). The owner has the choice of repairing or demolishing the building, but the enforcement agency may proceed at its discretion if the owner does not take timely action. *Id.* subdivs. (b)(1)(A)–(C). If it falls to the agency to address the violation, the agency "shall give preference" to repair over demolition if it is economically feasible and less than 75% of the building needs repair. *Id.* subdiv (b)(2).

Type of hearing required. Nuisance-abatement hearings require no sworn testimony, no absolute right to cross-examination, no prehearing discovery, and no ability to subpoena. Unlike in judicial proceedings, parties to an administrative nuisance-abatement hearing "are simply not entitled to 'anything like a judicial hearing' with all its adversarial trappings." *Mohilef v. Janovici*, 51 Cal. App. 4th 267, 301 (1996).

The courts have legitimized the interest in "minimiz[ing] formalities" in administrative hearings. *Id.* at 289. Discussing a case involving the termination of a tenured professor, the *Mohilef* court noted that the professor's hearings were deliberately kept from being "too formal" in order to "retain the 'peer group' ambience." *Id.* at 290–91 (citing *Potemra v. Ping*, 462 F. Supp. 328, 334–35 (S.D. Ohio 1978)). Administrative hearings are designed to be efficient and nonadversarial rather than formal and contentious.

"The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. . . . [S]ubstantial weight must be given to the good-faith judgments" of an agency that its procedures assure fairness to the parties. *Id.* at 288–89 (quoting *Mathews v. Eldridge*, 429 U.S. 319, 348–49 (1976)). It would be impractical and counterproductive to require municipalities to adhere to the formal rules of evidence in nuisance abatement proceedings; costs would skyrocket and backlogs would worsen, turning an "efficient factfinding process into a technical, cumbersome procedure." *Id.* at 295.

Sworn testimony is unnecessary; oaths are part of a judicial system, not an administrative system. *Id.* at 289. The primary concern motivating the use of an oath is the risk of erroneous deprivation. *Id.* at 289–90 (quoting *Broussard v. Regents of Univ. of Cal.*, 131 Cal. App. 3d 636, 641 (1982)). In nuisance-abatement cases, this risk tends to be low. Witnesses tend not to be "self-interested with a motive to testify untruthfully," *id.* at 290; neighbors to a property harboring an alleged public nuisance are unlikely to testify to the presence of a nuisance if they are not in fact bothered. Oftentimes, few of the crucial facts, if any, are actually contested. Finally, as the *Mohilef* court noted, city investigators have already inspected the property at issue by the time of the hearing; much of the testimony is anecdotal evidence about an already-known condition. *Id.* at 296. In these kinds of hearings, the additional truth-finding measure of requiring oaths is unnecessary.

An absolute right to cross-examination is also out of place in nuisance-abatement hearings. Given the number of witnesses that may attend a hearing, the variety of interests and issues at stake, and "the problem of undue and repetitive cross-examination, . . . the potential for havoc is not insignificant." *Id.* at 300 (quoting *Chevy Chase Cit. Ass'n v. District of Columbia County*, 327 A.2d 310, 317 (D.C. Cir. 1974)). Limiting the right to cross-examination helps to keep the proceedings manageable, reinforces the air of informality, and obviates witnesses' perceived need to have a lawyer guide them through grueling cross-examinations. *See id.* at 301 (noting that an absolute right to cross-examination would "strip the public hearings of their informality").

Due process does not usually require pretrial discovery in administrative hearings. *Id.* at 302. Pretrial discovery is a matter left to the discretion of the administrative law judge, based on whether discovery is necessary to ensure a fair hearing. *See id.* (pointing out that common-law rules can augment administrative procedures when "necessary to promote fair hearings and judicial review").

Lastly, administrative hearings do not entail the right to subpoena witnesses. There are occasions when due process might require an agency to issue subpoenas, such as when the agency's decision would otherwise be based solely on written reports, *id.* at 304, but denying a party the ability to subpoena witnesses "is not a per se violation of his right to procedural due process," *id.* at 303 (quoting *U.S. v. Woods*, 931 F. Supp 433, 441 (E.D. Va. 1996)).

Right to appeal. No special provision need be made for appeals. Abatement actions can give rise to claims of nuisance, trespass, and inverse condemnation, *e.g.*, *Flahive v. City of Dana Point*, 72 Cal. App. 4th 241 (1999), and courts of record have entertained appeals from nuisance-abatement orders, *e.g.*, *San Francisco v. City Investment Corp.*, 15 Cal. App. 3d 1031 (1971).

Conclusion

Applicable law gives municipalities wide latitude to address problems of blight and nuisance as they see fit. Municipalities can define both nuisances and the procedures used to abate them. As little as five days can pass between notice and hearing, and between an abatement order and municipal abatement action, while still satisfying due process. Hearings can and should be informal, requiring little more than an opportunity for landowners and neighbors to speak. There need be no sworn testimony, no cross-examination, no pretrial discovery, and no subpoenaing of witnesses. Targets of nuisance-abatement orders or actions may take advantage of methods of appeal already established.