

## **How to Have a Good Code Enforcement Hearing And Help Prevent a Reversal upon Appeal**

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We all want good cases and good rulings. None of us like to be reversed on appeal. It all starts with the original complaint whether it comes from a citizen report, a Code Enforcement Officer observation, or a referral from another agency, and runs through your presentation to your Special Magistrate or Board.

1 Why we do what we do. Code violations affect owners, neighborhoods' aesthetics, stability, and property values and if not corrected, a neighborhood can turn into a collection of deteriorating properties, resulting in declining real property values, which result in substantial reductions in tax revenue which reduce the amount of funding for schools, local services, and threatening quality of life, public health, safety, and welfare in the community.

2 Make sure that your file is complete.

2.1 Make sure that the complaint made is addressed by the applicable code. Don't make one up, and don't stretch a code to fit the situation.

2.2 Make the initial site inspection.

2.3 Keep good notes of each inspection, including date and time and time of your inspection. More detail is better than less.

2.4 Take a lot of images. Make sure that the time stamp function on your device is turned on. Again, more is better. Check your device before you leave the inspection to make sure that your images are good. Check focus, lighting, detail and perspective. You don't want to have to return for a particular inspection because you failed to check before you left. Always try to have something in your image that shows the scale of the issue you are investigating. You can select the best images for use at the hearing later.

2.5 You cannot enter onto any private property, other than to knock on the front door, to inspect for code regulations without the consent of the owner, operator, or occupant of the property, unless you obtain a duly issued search warrant or an inspection warrant. An inspection warrant must state that it is to be used

to observe whether local government codes as to "building, fire, safety, environmental, animal control, land use, plumbing, electrical, health, minimum housing, or zoning standards" are being met. An inspection warrant may not be used for owner-occupied family residences.

2.6 A search or inspection warrant or court order is required in the absence of the following four circumstances: (1) if the person in control of the property gives his or her permission to the official to enter onto the property; (2) if there are exigent or emergency circumstances that pose an imminent danger to the public's health, safety, and welfare that warrant entering onto the property; (3) if violations are observed in plain view during a lawful observation; and (4) if entry may be made into common areas of a residential building, such as the lobby and common hallways and stairs, because there is no reasonable expectation of privacy in those common areas and they are open to the general public.

2.7 Be careful of unreasonable search/trespass issues. Don't jump fences. Don't enter structures unless invited, subject to the exceptions listed above. Knock on the door to speak to occupants who may be owners or tenants. Ask for permission to look around. Include the name or description of the person who grants you access to the property. If invited to leave, do so. Get the proper warrant and come back.

2.8 Can you use a drone? Fla. Stat. 934.50 prohibits code enforcement from using drones to gather evidence where there is a reasonable expectation of privacy, which means that if the condition is not observable from ground level in a place where you have a legal right to be, regardless of whether the condition is observable from the air by the drone. You can use a drone only if granted permission by the owner tenant or if you obtain a search warrant. Evidence gathered in violation is not admissible as evidence. You and your agency are exposed to civil lawsuit, damages, punitive damages and attorneys fees for violations.

2.9 Helicopter inspection is normally allowed, as long as the helicopter is flown in an area that any member of the public could legally fly. The US Supreme Court, in Florida v. Riley, 488 US 445 (1989), held that an observation of marijuana being grown in a greenhouse from an altitude of 400 feet was legal evidence. Any member of the public could have flown in the same area in the same manner.

2.10 Make contact with the property owner, even before serving a Notice of Violation. Explain the nature of the violation, and try to get cooperation in clearing the violation. Code enforcement is meant to insure compliance with codes, not to punish.

2.11 Make sure that you know who the actual property owner is. Use the property appraiser's and the county clerk's web-sites to ensure that you know with certainty. If you are not sure how to do this, ask for help in your agency, from the county attorney's office, or run a formal title search.

2.12 The notice of violation must state the date(s) the inspector found the violation(s).

2.13 Once the investigation is complete and a Notice of Violation is issued the file becomes public record and is subject to discovery by the Respondent. Document everything that you do, including site visits, observations, telephone calls, emails, photos.

2.14 You must serve a Notice of Violation ("NOV").

2.15 The NOV can be sent by Certified Mail, Return Receipt Requested. The NOV must be sent to the owner at the legal address of the owner as listed by the Property Appraiser. Any adult residing at that address mail accept and sign for the NOV. You may send a copy to the owner at other addresses, but unless the actual owner signs the Return Receipt, you cannot count on it being good service. This is often the easiest way to serve the NOV.

2.16 If the owner refuses to accept the Certified Mail, you must use an alternative method.

2.17 Personal Service. You can hand a copy of the NOV to the owner. If you do this, the best practice is to have the owner sign a receipt, acknowledging that they received the NOV.

2.18 Posting. You can post the NOV in a prominent place on the actual property. You must also post the NOV in the place that your government unit customarily uses for posting Notices. Be sure and take photos of the posting - make sure to have the date stamp function on your device working.

2.19 Your NOV should provide a reasonable time to correct the problem. What constitutes reasonable may vary, depending on the the severity of the violation and whether the violation is an emergency because of life safety or other issues.

2.20 If the violation is not timely cured by the owner, and a hearing is required, you must serve a Notice of Hearing ("NOH"). The NOH may be served in the same manner as the NOV.

3 The actual board or magistrate hearing. Pre-mark all of your exhibits. Before the hearing, if the Respondent is present, go

over all of the exhibits that you are going to present. This serves two purposes. Often, you can make a deal with the Respondent for entry of an Agreed Order of Violation. Otherwise, you will save time in the hearing by being able to tell the hearing officer that you have already shown all of the exhibits to the Respondent. You can also find out if they have objections, and be prepared to address the objections when they make them.

3.1 Your presentation to the Magistrate or Board must, at a minimum, include the following, presented under oath. Some of this may seem repetitive, because the Magistrate may already know you and about your experience, but each hearing stands on its own for purpose of appeal, and the steps must be taken.

3.2 Make sure that all the parties are sworn in. If the Magistrate or Board forgets to swear the witnesses, remind them.

3.3 Even if you have known the hearing officer for many years, introduce yourself including your name, your position, and your badge or ID number.

3.4 Using "baby steps," tell the Magistrate about the violation - state the date of the first inspection and what you observed. State that the photos that you have "fairly and accurately represent the condition of the property" on the date that went to the property. If there were multiple visits, describe them as well. Tell about your interactions with the owner. Move the photos into evidence.

3.5 Tell the Magistrate about ownership of the property, and describe the steps that you took to make sure that you have the right owner, including any documents that you have. Move the ownership documents into evidence.

3.6 Tell the Magistrate about the service of the NOV and NOH. Have your affidavits of service ready and complete with photos or copies of the proof of service, whether by mail or posting. Move the notices into evidence.

3.7 Tell the Magistrate what the recommendation is for time to cure the violation and the amount of the fine that the Magistrate should order of the violation is not cured.

3.8 Tell the Magistrate that you have nothing further. Be prepared to answer questions from the Respondent and the Magistrate.

3.9 Pay attention to the Respondent's presentation. Be prepared to address any evidence or testimony that they present, but only if material. If immaterial, let it go.

3.10 The Magistrate must make the findings of fact and the order on

the record. Pay attention. If the Magistrate makes a mistake as to the facts, ask to Magistrate to clarify or correct the facts. Don't correct the ruling as to the amount of fine or length of time to pay, unless the ruling is conflicting.

4 The law surrounding code enforcement.

4.1 Fundamental due applies. What this means is that an alleged violator/owner is entitled to a notice of violation, notice of the hearing, and an opportunity to be heard at a hearing before your magistrate or board. The owner is not entitled to anything more.

4.2 The Florida Rules of Civil Procedure do not apply to code enforcement proceedings. There is no right to discovery in code enforcement proceedings. The owner is entitled only to request and obtain the code enforcement file, which is public record. After the code enforcement division complies with the owner's public records request, nothing else is required to be provided.

4.3 The formal rules of evidence do not apply.

4.4 The special magistrate or board has the authority to subpoena alleged violators and any witnesses to its final hearings, which would include those requested by the alleged violator and owner of the real property.

4.5 If the owner/respondent raises the issue of whether the code being enforced is constitutional, remind the magistrate or board that magistrates and boards are not authorized to determine the constitutionality of an ordinance. Their function is to determine if there is a violation of the local government ordinance that forms a basis to take action against the landowner.

5 Code enforcement is not a tool for harassment between neighbors. If there is no basis to support a violation, then code enforcement procedures should not begin, or if they are filed, then they should be dismissed. You are not going to do yourself or your agency any favors if you bring bad cases. Your Magistrate is going to remember that dog of a case for a long time. Let your thoroughness and integrity carry the day.