

Land Use Enforcement Training

Sponsored by MCAA/MCIT

Thursday, April 12, 2012

Marcus Miller

Chief – Civil Division

Stearns County Attorney's Office

Introduction

- Role of County Board, Staff & County Attorney
- Sources of Enforcement Authority
- Methods of Enforcement
- Collection of Abatement “Clean-up” Costs
- Practical Issues and Strategies for Enforcement
- Dealing with State Agencies (Friend or Foe?)
- Data Practices Issues in Enforcement Context

Role of County Board

- The County Board Sets Policy & Priorities:
 - Enacting Ordinances
 - Entering Delegation Agreements with State
 - Establishing Policies & Priorities
 - Contracts/ Joint-Powers Agreements
 - Budget and Resource Allocation
 - Authorization of Specific Expenditures (Abatement Costs)

Role of Planning Director

- To carry out the purposes of sections 394.21 to 394.37 the board may employ a planning director and such staff as it deems necessary to assist the planning director in carrying out assigned responsibilities, including but not limited to a zoning administrator, sanitary inspector and a building official. If no planning director is appointed, the board shall designate a chief administrative officer who shall administer the official controls. The board may employ or contract with a planning authority or commission, any agency of the state or federal government, a regional development commission or with planning consultants, or with other specialists for such services as it requires.

Minn.Stat. § 394.29 (2010)

See page 16 of written materials.

Role of Planning Director

4.2.1 Environmental Services Department

The Environmental Services Department and its Director shall administer the provisions of this Ordinance.

4.2.2 Powers and Duties

The Director shall have the following powers and duties and may delegate them to Department staff as necessary:

- A. To receive and review applications for permits and issue permits if such permit applications are in full compliance with the provisions of this Ordinance.
- B. To receive and review applications for action by the Shoreland Technical Panel, Board of Adjustment and/or Planning Commission and to provide additional information, recommendations, data, and testimony as may be necessary for action to be taken.
- C. **To conduct compliance and other inspections. If violations of this Ordinance are discovered, the Director shall notify the violator(s) and take such other steps as are necessary to ensure compliance with this Ordinance, including issuing Stop Work Orders and Abatement Orders.**
- D. To maintain records of all actions taken pursuant to the provision of this Ordinance.
- E. To assist the public in complying with and understanding their responsibilities and rights under this Ordinance.

Role of Planning Director

- Administer Requirements of Official Controls
- Develop Application Materials
- Review Permit Applications for Completeness
- Collect Permit Fees
- Provide Ordinance Interpretations
- Investigate Complaints/ Conduct Compliance Inspections
- Issue Administrative Orders

Role of County Attorney

- Legal Advice (§388.051, subd. 1(b))
- Representation/ Advocacy (§388.051, subd. 1(a))
- Enforcement (§394.37, subd. 2 & 3)

Role of County Attorney

The County Attorney shall give opinions and advice, upon the request of the county board or any county officer, upon all matters in which the county is or may be interested, or in relation to the official duties of the board or officer.

Minn.Stat. §388.051, subd 1(b)

Role of County Attorney

The County Attorney shall appear in all cases in which the county is a party.

Minn.Stat. §388.051, subd. 1(a)

Role of County Attorney

In the event of a violation or a threatened violation of sections 394.21 to 394.37 or of any ordinance, regulation, or other official control adopted hereunder, the board, or any member thereof, in addition to other remedies, may institute appropriate actions or proceedings to prevent, restrain, correct, or abate such violations or threatened violations and it is the duty of the county attorney to institute such action.

Minn.Stat. §394.37, subd. 3

See written materials page 59

Role of County Attorney

- Civil Enforcement vs. Criminal Enforcement

(This is based on solid law – e.g. criminal prosecutorial discretion.)

- Remedial Enforcement vs. Regulatory Enforcement

(This is a the Stearns County Attorney's Office legal interpretation and subject to debate.)

Try to get on the same page.

- Discussion – full Board or individual Commissioners.
- Trainings and Workshops
- Determine Priority for Cases
- Policies for Referral to County Attorney's Office

*The time to do this is before you have already commenced legal action! It will never be perfect.

Legal Authority for Enforcement

- Zoning – Minn.Stat. §394.37
- Subdivision – Minn.Stat. Chapter 505
- Public Health Violations - Chapter 145A/ Delegation
- Solid Waste – Statutes/ Agency Rules/ Ordinances
- Wetland – Minn.Stat. Chapter 103G, Agency Rules, Ordinances
- Hazardous Building or Property – Chapter 463
- Feed Lot – Zoning/ Delegated County
- Public Nuisance – Statutes/ Ordinance
- Noxious Weeds – Statute/ Agency Rules
- Meth Lab Cleanup – Statute/ Agency Rules/ Ordinance

Methods of Enforcement

- Criminal Prosecution – Misdemeanor
- Civil Action (lawsuit)
- Administrative Enforcement
- Permit Revocation
- Ineligibility for Permits/ Land use Approval while property noncompliant (Under Consideration)

Authority for Enforcement Methods

- Misdemeanor Prosecution – Authority is Clearly Within the Traditional Authority of County Attorney to Prosecute Crimes that Occur Within the County.
- It is declared unlawful for any person to violate any of the terms and provisions of sections 394.21 to 394.37 or the provisions of any ordinance, regulation, or other official control adopted by the board. Violations thereof shall be a misdemeanor. Minn.Stat. §394.37, subd. 2
- Remedy is fine (up to \$____), and/or jail (up to ____ days) and/or restitution.

Authority for Enforcement Methods

- Civil Actions – Minn.Stat. §394.37, subd. 3 provides that “[i]n the event of a violation or a threatened violation of sections 394.21 to 394.37 or of any ordinance, regulation, or other official control adopted hereunder, the board, or any member thereof, in addition to other remedies, may institute appropriate actions or proceedings to prevent, restrain, correct, or abate such violations or threatened violations and it is the duty of the county attorney to institute such action.”

Authority for Enforcement Methods

- Administrative Enforcement – “The board of adjustment shall have the authority to order the issuance of variances, hear and decide appeals from and review any order, requirement, decision, or determination made by any administrative official charged with enforcing any ordinance adopted pursuant to the provision of §§ 394.21-394.37”

Misdemeanor Prosecution

■ Advantages:

- Easy to Initiate
- Process Familiar to Every County Attorney's Office
- Comparatively Quick Process (Mostly)
- Deterrence due to possible criminal history

■ Disadvantages:

- Higher Burden of Proof
- Possible Right to Appointed Counsel
- 5th Amendment Privilege
- No "Outs" Short of Trial or Consensual Resolution
- Potentially Complicated PVH and Restitution Issues
- Some Judges Don't Like.
- Blunt Remedies

Civil Action

■ Advantages:

- Lower Burden of Proof
- Resolution Possible Short of Trial or Consent
- Better Tailored Remedies – e.g. authority to go on and do abatement work (assessment)
- More Refined Discovery Tools
- No Right to Appointed Counsel
- Stipulated Settlements
- OTSC vs. PVH
- Lis Pendens/ Cloud Title
- Some Judges Prefer

■ Disadvantages:

- Process Lengthy and Cumbersome (Sometimes)
- **Counter Claims**
- Can Be More Work Intensive
- Discovery
- Possibly Less Familiar Process Compare to Criminal Prosecution

Administrative Enforcement

■ Advantages:

- Zoning Staff Can Assist in Preparation of Documents
- Possible Record Review Case (Decision on Briefs)
- Procedurally Less Cumbersome (Sometimes)
- Possible Resolution Short of Trial or Consent
- More Effective Use of Staff Resources (Possibly)
- Possible Defense by MCIT

■ Disadvantages:

- Substantial Up Front Work to Implement
- Authority to Do It Less Clear and Familiar to Judges
- Can Lead to Complicated Public Hearings Before the Board of Adjustment
- Role of County Attorney Unclear; Appearance of Conflict
- Not Available for All Types of Violations. (Zoning, statutory process, ordinance)

Revoking CUP/ Permit Denials

- Two Examples of Revoking a Conditional Use Permit: Outdoor Storage/ Junk Yard.
- Ineligibility for Permit/ Land use approvals for noncompliant property. (Under consideration.)

Collection of Abatement Costs

- There Are Two Basic Methods of Collection: Civil Judgment and Special Assessment Against the Property.
- When possible, seek both – e.g. authority to assess costs against property and/ or have reduced to civil judgment. (No double collection.)

Authority for Assessments

- Minn.Stat. §429.101 (Arguably/ Bill Pending)
- Minn.Stat. §145A.08 (Public Health Issues)
- Minn.Stat. §§463.151 and 463.21 (Hazardous Building/ Property)
- Minn.Stat. §375.18 (Solid Waste)
- By Stipulation of Parties in Settlement
- By Court Order

A Note on Special Assessments

- Can't just throw them on.
- Absent a court order or settlement agreement, you need to be able to point to a statutory process or ordinance.
- Statute or ordinance must afford sufficient due process.
- Consult your County Attorney's Office before putting assessments on.

Assessments – Practical Considerations

- Be Clear on Term/ Number of Installments and Interest Rate for Collection.
 - May be specified by particular statutory authority.
 - Include in any settlement agreement or court order.
 - In absence of clear authority, consider using civil judgment interest rate.
 - Check Title Records for Any Obstacles or Potential Problems in Collection.

Civil Judgments

■ Advantages:

- Personal to Defendant
- Other potential targets/remedies for collection
- Order to Show Cause/ Contempt available for monetary and non-monetary judgment obligations.
- Garnishment

■ Disadvantages:

- Potentially Dischargeable in Bankruptcy
- Possibly Extinguished as Lien on Property in Event of Creditor Foreclosure.
- Subject to Lien/ Security Priority Against Real Property.
- Must remember to docket judgments

Assessments

■ Advantages:

- Constitute a Tax that Runs with the Land.
- Not Dischargeable Upon Bankruptcy.
- Survive Creditor Foreclosure

■ Disadvantages:

- Not Personal to Defendant.
- Authority to Impose May Be Unclear in Some Instances.

Assessments and Torrens Property

- General rule is that taxes and assessment must be paid up to date when a property is conveyed or subdivided.
- But, on Torrens property in a “Proceedings Subsequent” action to subdivide, you will not get notice of the action unless the assessments are listed on the Torrens Certificate – i.e. Court could grant subdivision without taxes paid.

Practical Issues and Strategies

- Access to Property for Inspection
 - Consent
 - Civil Discovery
 - Administrative Search Warrant

FOR STAFF: Do not go on property over owner's objection – primarily for safety reasons. Call the County Attorney's Office.

Practical Issues and Strategies

- Notice of Lis Pendens/ Recording Administrative Orders.
 - Avoid Problems Caused by Transfer in Middle of Enforcement Efforts
 - Potential Leverage Toward Resolution – cloud on title in the event of sale, refinance, etc.
 - Possible protection in foreclosure situation.

Practical Issues and Strategies

- What Needs to Be Done to Correct the Violation? (Try to get specific as possible.)
- How Much Will It Cost?
- Identify The Factors Early, Even Before Taking Action.
- Consider “Revolving Enforcement Fund”.
- Spread Enforcement Around the Jurisdiction.

Practical Issues and Strategies

- If Violation is Potentially Eligible for Permit or Approval, then Consider Seeking/ Issuing Order Requiring Such Permit or Approval.
- Consider Service of Non-Compliance Letters/ Administrative Order by Sheriff's Civil Process.
- Consider an Informal "De Minimus" Policy or Rule.
- Become Familiar With Forms of Expedited Remedies – e.g. Temporary Restraining Order/ Injunction.
- Don't Bluff.

Dealing With State Agencies

- MPCA, DNR and Department of Health
- Consider whether is a concurrent or delegated jurisdiction situation. (Can be both).
- When negotiating delegation agreement be mindful of scope of enforcement responsibilities included in the agreement. (Don't lock yourself in.)
- Include the County Attorney in discussions.

Dealing With State Agencies

- Consider Memorandum of Understanding or Joint Enforcement Agreement that addresses:
 - Clearly defined roles.
 - Who has authority to settle?
 - What technical expertise will the agency provide?
 - Will agency staff cooperate as witnesses?
 - Will County be reimbursed for expenses?
 - Will the State defend and indemnify the County in the event of counter-claims or collateral litigation?

Data Practices in Enforcement Context

- The identities of individuals who register complaints with government entities concerning violations of state laws or local ordinances concerning the use of real property are classified as confidential data – i.e. not accessible even by subject of the data.

See Minn.Stat. §13.44, subd. 1

Data Practices in Enforcement Context

Data collected by a government entity as part of an active investigation undertaken for the purpose of the commencement or defense or defense of a pending civil legal action, or which are retained in anticipation of a pending legal action, are classified as protective nonpublic data.

Minn.Stat. §13.39, subd. 2

Data Practices in Enforcement Context

- General rule is that active investigative data may not be released, except to “aid the law enforcement process, promote public health or safety or to dispel wide spread rumor or unrest.”
- See Torrey Westrom v. Minnesota Department of Labor and Industry, 686 N.W.2d 27 (Minn. 2004)

Data Practices in Enforcement Context

- Inactive civil investigative data are public, unless release of the data would jeopardize another pending civil legal action, and except those portions of a civil investigative file that are classified as not public data by this chapter or other law. *Any civil investigative data presented as evidence in court or made part of the court record shall be public.* §13.39, subd. 3.

Data Practices in Enforcement Context

- Investigation Becomes Inactive When:
 - A decision not to pursue the civil action.
 - Expiration of time to file – statute of limitation or contract.
 - Exhaustion or expiration of rights to appeal.

*NOTE: If decision is taken to renew litigation, then investigation again becomes active per statute.

Data Practices in Enforcement Context

- Discovery of Private Data:
 - Two provisions to look at: Minn.Stat. §13.03, subd. 6 (Discovery) and Minn.Stat. §13.39, subd. 2a. (Third-party or pre-litigation access)
 - Read them carefully. They are not the same!

Data Practices in Enforcement Context

- Case law says it is an abuse of discretion for a court to order nonpublic data released without first conducting *in camera* review.
- Don't hesitate to request protective orders as necessary.
- Attorney-client privilege and work product apply independent of the Data Practices Act.

Questions?