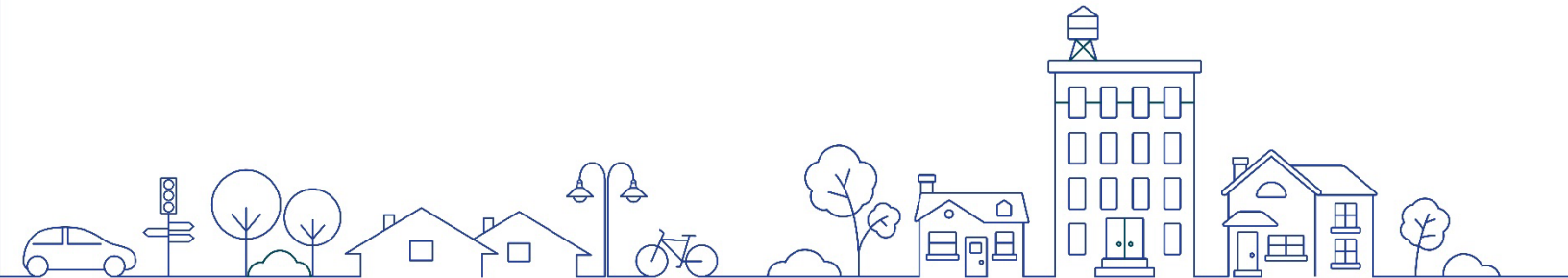


# — Oregon Municipal Handbook —

## **CHAPTER 29: CODE ENFORCEMENT**



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## Chapter 29: Code Enforcement

Code enforcement is the enforcement of local government ordinances and state laws that are designed to protect the public’s health, safety, and welfare. “Code enforcement” is a general term that describes the processes and tools that local governments use to gain compliance with property maintenance, housing, building, and zoning codes.

This chapter will discuss the applicable laws and legal issues for gaining compliance. The legal issues discussed below include: (i) the benefits of code enforcement; (ii) the regulation authority of local governments; (iii) types of code enforcement ordinances; and (iv) enforcement methods such as court action taking control of problem properties. Lastly, this chapter will provide tips to achieve successful outcomes.

### I. WHY CODE ENFORCEMENT?

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*“One unrepaired broken window is a signal that no one cares, and so breaking more windows costs nothing.”<sup>1</sup>*

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The purpose of code enforcement could best be described as based on the broken window theory.<sup>2</sup> The broken window theory asserts that if a damaged window or graffiti is quickly repaired or removed, the neighborhood maintains its appearance of order and care.<sup>3</sup> On the other hand, if damage is not repaired, more graffiti, vandalism, and damage may result due to the seeming apathy.<sup>4</sup> In other words, the theory is that you can change the social norms by repairing damage and increase the feeling of safety, value of property, quality of life and prevent further decline.<sup>5</sup> This theory as applied to law enforcement is controversial, but largely remains unstudied as applied to code enforcement.<sup>6</sup>

Code enforcement often serves as communities’ first line of defense for addressing deteriorating homes, substandard housing conditions, vacant properties, and neighborhood decline.<sup>7</sup> As discussed below, complaint and strategic code enforcement programs organize critical assets, resources, and actions into a dynamic and adaptive system.<sup>8</sup>

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<sup>1</sup> George L. Kelling & James Q. Wilson, *Broken Windows*, VANITY FAIR (1982).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 73 (2006) (finding that a program that rehoused inner-city project tenants in New York into more-orderly neighborhoods did not reduce crime).

<sup>7</sup> Joe Schilling, *Stabilizing Neighborhoods through Strategic Code Enforcement*, HOUSING MATTERS (March. 13, 2019), available at: <https://housingmatters.urban.org/articles/stabilizing-neighborhoods-through-strategic-code-enforcement> (last accessed August 31, 2023).

<sup>8</sup> *Id.*

For many cities, dedicated code enforcement employees investigate and work with property owners and tenants to obtain voluntary compliance with state and local codes.<sup>9</sup> These informal efforts in notice, negotiation, and community education can take a substantial amount of time and resources, but they serve as the primary methods for gaining compliance.<sup>10</sup>

When dealing with specific properties, the most important question is to ask is, “What is the cause of the blight?” A structure is blighted when it exhibits objectively determinable signs of deterioration sufficient to constitute a threat to human health, safety, and public welfare.<sup>11</sup> Determining the cause of the blight on a specific property or neighborhood can be the most effective tool to identify the tool to use in obtaining compliance. As discussed below, some of the potential tools include:

- Implementation of cross-functional teams to work toward common goals in areas where the community has become blind to code compliance issues;
- Creation of “land banks” to acquire and clean up land for development;
- Seeking court-ordered receivership for bank-foreclosed properties where the banks have little incentive to improve and sell properties;
- Adoption of the International Property Maintenance Code as a housing standard to improve substandard housing; and
- Requiring vacant properties to register with cities to allow cities to track and monitor vacant properties.

In addition to blight issues, code enforcement can be used to enforce land use or business regulations. Property used or developed without the proper local government approvals often presents health and safety issues. Code enforcement can be a tool to investigate and obtain compliance with land use and business regulation ordinances. This chapter focuses on blight, however, many of the tools discussed below may be applied to land use and business regulation enforcement. More information about business regulations can be found in this Handbook – Chapter 23: Licensing and Regulation. Information about land use can be found in Chapter 25: Land Use and Development.

## II. CODE ENFORCEMENT LAW

### A. Police Power

If a local government has identified that it wishes to enact an ordinance to deal with an issue impacting its community, the local government should review its own authority to enact the regulation. The source of the authority for local governments to enact laws for the public health,

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<sup>9</sup> See, e.g., City of Tualatin, <https://www.tualatinoregon.gov/building/code-compliance-and-enforcement>; (last accessed August 31, 2023).

<sup>10</sup> *Id.*

<sup>11</sup> <https://www.govinfo.gov/content/pkg/FR-2010-10-19/pdf/2010-26292.pdf> Federal Register vol. 75, No. 201 (10/19/2010) p.64325.

safety and welfare of its citizens, is known as “police powers.”<sup>12</sup> Per the U.S. Constitution, the states are reserved the police powers.<sup>13</sup>

For cities in Oregon, the police power is contained in the Oregon Constitution.<sup>14</sup> In addition, the Oregon Legislature has delegated to the cities to define their own public nuisances by ordinance.<sup>15</sup> The exception to this delegation of police power is when the state has expressly or impliedly preempted the local government’s authority to regulate.<sup>16</sup>

Local governments may also be limited by the U.S. and Oregon Constitutions. One example of this limitation is the U.S. Constitution’s Eighth Amendment. In *Martin v. City of Boise*, the Ninth Circuit Court of Appeals held that it was a violation of the U.S. Constitution’s Eighth Amendment of cruel and unusual punishment to enforce criminal penalties for sitting, sleeping, or lying outside on public property for individuals who cannot obtain shelter.<sup>17</sup>

More information about police powers and Oregon’s home rule can be found in this Handbook – Chapter 2: Home Rule and Its Limits.

## **B. Types of Local Ordinances**

Cities have the authority to regulate conduct impacting the safety and welfare of their citizens unless preempted by state law and may choose whether to enact administrative or court enforcement procedures. As discussed below, a city may choose to adopt model codes published by commercial enterprises or enact its own ordinances.

### **i. International Property Maintenance Code**

The International Code Council (“ICC”), a commercial enterprise, publishes the International Property Maintenance Code (“IMPC”) as model code for local governments.<sup>18</sup> The IMPC is intended to establish the “minimum maintenance standards for basic equipment, light, ventilation, heating, sanitation and fire safety” in existing buildings.<sup>19</sup> The code provides administrative procedures for enforcement, as well as general requirements for maintenance.<sup>20</sup> It

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<sup>12</sup> See US Const, Amend X states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”

<sup>13</sup> *Id.*

<sup>14</sup> See Or Const, Article XI, § 2, and Article IV, § 1(5).

<sup>15</sup> ORS 221.915; See *Lincoln Loan Co. v. City of Portland*, 317 Or 192 (1993).

<sup>16</sup> See *City of La Grande v. Public Emp. Retirement Bd.*, 281 Or 137, 140 (1978); *Thunderbird Mobile Club, LLC v. City of Wilsonville*, 234 Or App 457, 474 (2010); LEAGUE OF OR. CITIES, LEGAL GUIDE TO OREGON’S STATUTORY PREEMPTIONS OF HOME RULE (2020), [https://www.orcities.org/download\\_file/385/0](https://www.orcities.org/download_file/385/0) (last accessed April 27, 2023)

<sup>17</sup> 920 F3d 584, 616 (9th Cir 2019); See also *Johnson v. Grants Pass*, the Ninth Circuit extended Martin to tents, cars and civil citations when the homeless person engages in conduct to protect themselves from the elements when there is no shelter space is available. 50 F4<sup>th</sup> 787 (9<sup>th</sup> Cir 2002); See also ORS 195.530 prohibiting regulations for enforcement.

<sup>18</sup> See INTERNATIONAL PROPERTY MAINTENANCE CODE, PREFACE (2021) available at [https://codes.iccsafe.org/content/IPMC2021P1/preface#IPMC2021P1\\_FmPREFACE\\_FMSecAdoption](https://codes.iccsafe.org/content/IPMC2021P1/preface#IPMC2021P1_FmPREFACE_FMSecAdoption) (last accessed on August 31, 2023).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

is a copyrighted code, and the ICC prohibits local governments from distributing the model code, including but not limited to publishing the code on its website as part of its ordinances.<sup>21</sup> Rather, the ICC makes the IPMC available for free in a non-downloadable form on the ICC’s website.<sup>22</sup> If a local government is concerned about public access to the IPMC, the local government can choose to adopt its own ordinances.<sup>23</sup>

## ii. Enacting Own Ordinances

If a local government wishes to adopt its own ordinances, in lieu of or in addition to the IPMC, the local government generally adopts an ordinance that punishes the offense by municipal court or circuit court. When the city chooses a court enforcement procedure, state law provides the procedures for enforcement of an ordinance in court.<sup>24</sup> Local governments wishing to adopt their own ordinances generally adopt ordinances addressing blight in the following areas:

### Exterior

- Broken windows
- Broken doors
- Loud noise
- Junk vehicles
- Trash and debris
- High grass or weeds
- Peeling paint
- Sagging roof
- Deteriorated porch
- Couches on porch

- Boarded Property<sup>25</sup>

### Interior

- Broken windows
- Fire alarms
- Mold
- Sewage backup
- No heat
- No water
- Bug infestation
- Lead paint hazards

When drafting code enforcement ordinances, a city should consider the following:

- Who will be subject to the ordinance?
- What is the purpose?
- How will you enforce the ordinance?
- What is the recommended penalty?

### ***Example ordinance***

No person shall park or allow to park a vehicle in the front or side yard of a residential property, except on a driveway or other approved surface. Violation of this section is a Class C violation.

<sup>21</sup> See INTERNATIONAL PROPERTY MAINTENANCE CODE, COPYRIGHT (2021) available at <https://codes.iccsafe.org/content/IPMC2021P1/copyright> (last accessed on August 31, 2023).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> ORS 153.010 to 153.121.

<sup>25</sup> Some cities have not only required that all windows and doors are securable, but that in the case of windows, that a type of unbreakable plexiglass is used. See Jessica Dupnack & Amber Ainsworth, *Detroit adds plexiglass instead of boards to windows of vacant homes that can be saved*, DETROIT FOX NEWS, Sept. 16, 2021, available at <https://www.fox2detroit.com/news/detroit-adds-plexiglass-instead-of-boards-to-windows-of-vacant-homes-that-can-be-saved> (last accessed August 31, 2023).

Although cities may specify what acts create an offense, the penalty and procedure to prosecute the violation follow ORS chapter 153. Cities may specify the class of the offense such as a Class A, B, C, D or E violation, or specify the amount of the fine.<sup>26</sup> However, the specified maximum fine must in an amount less in amount that the maximum fine for the offense by the statute, or if a specified class, that is lower than the statutory classification for the offense.<sup>27</sup> Excellent examples of code enforcement ordinances can be found online.<sup>28</sup>

### iii. Vacant Property Registration

Vacant property registration is a tool intended to address abandoned or vacant properties.<sup>29</sup> Properties which have been abandoned, and where structures are left open and unsecured, not only have a negative impact on community value, but also create conditions that invite criminal activity and foster an environment that is unsafe and unhealthy.<sup>30</sup>

The purpose of vacant residential property registration programs is to protect neighborhoods from becoming blighted through the lack of adequate maintenance and security of vacant properties.<sup>31</sup> With registration, cities can better track, monitor and address issues associated with abandoned and foreclosed properties.<sup>32</sup> Most Oregon cities do not require a fee to register, but property owners are required to provide and maintain current contact information.<sup>33</sup> Some cities require regular inspections and to post contact information in the event of an emergency.<sup>34</sup>

Not all vacant properties are due to blight; some vacant properties are caused by seasonal housing and demand for vacation rentals.<sup>35</sup> Cities may wish to weigh how a vacant property registration requirement coordinates with business regulations on short-term rental housing.

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<sup>26</sup> ORS 153.025.

<sup>27</sup> *Id.*

<sup>28</sup> See, e.g., city of Salem, Salem Revised Code § 50.100 *et seq.*, [https://library.municode.com/or/salem/codes/code\\_of\\_ordinances?nodeId=PTIICOOR\\_TITIVHESA\\_CH50PRMA\\_S50.265ABJUMOVE](https://library.municode.com/or/salem/codes/code_of_ordinances?nodeId=PTIICOOR_TITIVHESA_CH50PRMA_S50.265ABJUMOVE) (last accessed August 31, 2023); See, e.g., City of Bend, Bend Code §13.10 *et seq.* <https://bend.municipal.codes/BC/13> (last accessed August 31, 2023).

<sup>29</sup> See Symposium, *New Data on Local Vacant Property Registration Ordinances*, 15 CITYSCAPE: A JOURNAL OF POLICY DEVELOPMENT AND RESEARCH CITYSCAPE 289 (2013).

<sup>30</sup> Michele Steinberg & Meghan Housewright, *Addressing Vacant Property in the Wildland Urban Interface*, 55 IDAHO L. REV. 59 (2019).

<sup>31</sup> Benton C. Martin, *Vacant Property Registration Ordinances*, 39 REAL ESTATE LAW JOURNAL 6 (2010).

<sup>32</sup> See, e.g., city of Medford, Vacant Residential Property Registration Ordinance of the City of Medford, Medford Code § 7.950 *et seq.*, <https://medford.municipal.codes/Code/VRPR> (last accessed August 31, 2023).

<sup>33</sup> See, e.g., city of Sweet Home, <https://www.sweethomeor.gov/ced/webform/vacant-building-registration> (last accessed August 31, 2023).

<sup>34</sup> *Id.*

<sup>35</sup> Tim Henderson, *The Nation's Vacant Homes Present an Opportunity — and a Problem* (Nov. 22, 2022) available at: <https://stateline.org/2022/11/22/the-nations-vacant-homes-present-an-opportunity-and-a-problem/> (last accessed August 31, 2023).

#### iv. Chronic Nuisance Ordinances

Chronic nuisance ordinances, also known as “excessive police calls for service” ordinances, have been adopted by many cities to respond to properties that regularly demand attention from local government for less serious, but regular, offenses.<sup>36</sup>

Such ordinances require a specific number of calls within a period of time for specific calls such as disorderly conduct, theft, prostitution or controlled substances. The city tracks the number of violations and can issue penalties to the property owner. If the enforcement mechanism is administrative, rather than enforced in court, it is important to provide due process (written notice and right to be heard) to the property owner.<sup>37</sup>

Critics of chronic nuisance ordinances criticize enforcement of chronic nuisance ordinances as a potential violation of the First Amendment or discrimination of people of color, domestic violence survivors or those with disabilities.<sup>38</sup> Cities should be cautious about enforcement of chronic nuisance ordinances to ensure that enforcement, as applied to the property, do not violate the business or resident’s constitutional rights.

### III. ENFORCEMENT METHODS

Code enforcement relies on several tools to remedy blight in our communities. When the property poses serious threats to public safety and/or the responsible parties refuse to comply, cities can issue citations, take cases to court, and in some cases, directly abate these public nuisances and recover the costs against the property owner.

#### A. Voluntary Compliance

The first goal for code enforcement is voluntary compliance.<sup>39</sup> Voluntary compliance involves notifying the responsible party of a violation and educating the person on the code requirements. The “responsible party” is often identified by cities as the property owner and/or

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<sup>36</sup> Kathleen Gallagher, *Chronic Nuisance Ordinances*, Local Initiatives Support Corporation, available at: [https://www.lisc.org/media/filer\\_public/16/04/16046c59-6f06-45f7-89f9-274da3430edf/chronic\\_nuisance\\_ordinances.pdf](https://www.lisc.org/media/filer_public/16/04/16046c59-6f06-45f7-89f9-274da3430edf/chronic_nuisance_ordinances.pdf) (last accessed August 31, 2023).

<sup>37</sup> See, e.g., city of Portland, *Chronic Nuisance Property*, Portland Code Chapter 14B.60, available at: <https://www.portland.gov/code/14/b60> (last accessed August 31, 2023).

<sup>38</sup> Jarwala, Alisha and Singh, Sejal, *When Disability Is a 'Nuisance': How Chronic Nuisance Ordinances Push Residents with Disabilities Out of Their Homes*, 54 HARV. C.R.- C. L. L. REV. 875 (2019), available at: <https://ssrn.com/abstract=3415952> (last accessed August 31, 2023).

<sup>39</sup> See, e.g., city of Tualatin, available at <https://www.tualatinoregon.gov/building/code-compliance-and-enforcement> (last accessed August 31, 2023); See, e.g., city of Newberg available at <https://www.newbergoregon.gov/police/page/code-compliance> (last accessed August 31, 2023).

the person responsible for the control, use and condition of the property.<sup>40</sup> If the person fixes the issue, this is voluntary compliance. This is the most effective way to solve the problem.

These informal efforts including notice, negotiation, and community education can take a substantial amount of time and resources but avoid costly court actions and abatement. If a city pursues an action in court or a hearings officer, it may be important to demonstrate that the city gave many opportunities to the responsible party to allow voluntary compliance and to educate them.

## **B. Inspection Warrants**

Inspection warrants are a useful way to determine whether someone has violated the ordinance. If the code enforcement officer is denied entry to the property, an inspection warrant is an order, in the name of the court, directing an inspection of a property.<sup>41</sup> An inspection warrant can be by administrative order issued by a hearings officer as well.<sup>42</sup>

Regardless of whether the inspection warrant is obtained in municipal court or through an administrative hearings officer, it is best practice to adopt an ordinance that allows for application for an inspection warrant. To apply for an inspection warrant, the court requires probable cause (a substantial objective basis for believing that, more likely than not, an offense has been committed) to believe that there is a violation of the ordinance.<sup>43</sup> The affidavit applying for such a warrant should demonstrate that it is likely that there is a code enforcement violation.<sup>44</sup>

## **C. Municipal Court**

If a city's efforts to obtain voluntary compliance are ineffective, the city may prosecute code enforcement violations in municipal court.<sup>45</sup> A violation is an offense created by a "county, city, district or other political subdivision of the state" by enacting an ordinance that declares an act to be an offense"<sup>46</sup> Specific types of code offenses created by ordinance are discussed above.

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<sup>40</sup> See, e.g., city of Creswell, Creswell Municipal Code § 2.70.020, available at <https://www.codepublishing.com/OR/Creswell/html/Creswell02/Creswell0270.html> (last accessed August 31, 2023).

<sup>41</sup> See *Parks v. City of Klamath Falls*, 82 Or App 579 (1987) (inspection warrant not a violation of the Fourth Amendment and Article I, Section 9); see also *Accident Prevention Division v. Hogan*, 37 Or App 251 (1978) (holding that when cause is demonstrated that inspection warrants do not violate the Fourth Amendment).

<sup>42</sup> "We have upheld the constitutionality of administrative searches at a time when Article I, section 9, was construed the same as the Fourth Amendment. *State ex rel. Accident Prev. Div. v. Foster*, 31 Or App 291 (1977)." *Parks v. City of Klamath Falls*, 82 Or App 576 (1987).

<sup>43</sup> *Camara v. Municipal Court*, 387 US 523, 87 S Ct 1727, 18 L Ed 2d 930 (1967) (probable cause required for housing inspection warrant); *State v. Bridewell*, 306 Or 231 (1988).

<sup>44</sup> *Id.*

<sup>45</sup> ORS 221.339.

<sup>46</sup> ORS 153.008(1)(c).



Complaints for code enforcement violations must contain the name of the court, the name of the city, the name of defendant, a statement of the violation “that can be readily understood by a person making a reasonable effort to do so,” the date time and place of the alleged violation and signed by the enforcement officer.<sup>47</sup> Often, code enforcement complaints use the uniform citation form adopted by the Oregon Supreme Court because it meets the statutory requirements. Such uniform citation forms include a summons that meets state law for the time and place at which the person cited is to appear in court.<sup>48</sup>

Service of the complaint is accomplished by delivery to the person cited.<sup>49</sup> Many cities adopt ordinances specifying the methods of how service may be accomplished; for example, many cities state that service may be done by mail or by personal service.<sup>50</sup>

The defendant must appear by the time indicated by the summons, which accompanies delivery of the complaint.<sup>51</sup> The defendant can either request a trial or plead no contest.<sup>52</sup> The city attorney will not represent the city unless counsel for the defendant appears.<sup>53</sup> However, the code enforcement officer or official issuing the citation may present evidence, examine and cross examine witnesses and make arguments.<sup>54</sup> Trials are bench trials without a jury.<sup>55</sup> In addition, the pretrial discovery rules in ORS 135.805 to 135.873 apply.<sup>56</sup> The Oregon Supreme Court may adopt rules for the conduct of violation proceedings, but at the time of this publication, no such violation-specific rules exist.<sup>57</sup> The defendant is not entitled to a defense counsel provided at public expense if only violations are included.<sup>58</sup>

In lieu of a trial, a municipal court may establish a violations bureau, which may specify certain violations that, in the opinion of the violations bureau, result in the reduction of a fine or dismissal of the ticket if the offense is fixed (also known as a “fix it” ticket).<sup>59</sup> Such violations include violations of state law that may include traffic offense, wildlife law violations and boating laws.<sup>60</sup>

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<sup>47</sup> ORS 153.048.

<sup>48</sup> ORS 153.051.

<sup>49</sup> ORS 153.054

<sup>50</sup> *See, e.g.*, Lincoln City, Municipal Code § 1.16.060, available at <https://www.codepublishing.com/OR/LincolnCity/> (last accessed August 31, 2023).

<sup>51</sup> ORS 153.061.

<sup>52</sup> *Id.*

<sup>53</sup> ORS 153.076.

<sup>54</sup> ORS 153.083.

<sup>55</sup> ORS 153.076; *but see State v. Benoit*, 354 Or 302 (2013) (where defendant was arrested and charged with a crime, but prosecutor elects to treat offense as a violation, defendant is entitled to a jury trial).

<sup>56</sup> *Id.*

<sup>57</sup> ORS 153.033.

<sup>58</sup> ORS 153.076.

<sup>59</sup> ORS 153.800.

<sup>60</sup> *See, e.g.*, Presiding Judge Order No. 22-007 for the Counties of Umatilla and Morrow, available at: [https://www.courts.oregon.gov/rules/Documents/UMA\\_PJO\\_22-007\\_ViolationsBureauReauthorized.pdf](https://www.courts.oregon.gov/rules/Documents/UMA_PJO_22-007_ViolationsBureauReauthorized.pdf) (last accessed August 31, 2023).

If the court finds the defendant guilty, the court can impose a fine, costs allowed by law and any other provision authorized by law.<sup>61</sup> The court retains a large amount of discretion. For example, a court could impose the following:

- Up to the maximum fine authorized by ordinance;
- A daily fine amount until the offense is remedied if authorized by ordinance;
- Award of costs to the city for work done to abate the violation; or
- Work to be completed by a certain date, or the imposition of fines.

Appeals from municipal court judgments depend on whether the court is a court of record. If the municipal court is not a court of record, the appeal is made to the circuit court.<sup>62</sup> If the municipal court is a court of record, the appeal is made to the court of appeals.<sup>63</sup> The state of Oregon maintains a registry of the courts of record available at:

<https://www.courts.oregon.gov/courts/Pages/other-courts.aspx>

Once a municipal court enters its judgment and all appeals have been resolved, the city may enforce the court's judgment. For a detailed discussion on how to enforce municipal court judgments, see Chapter 6, Municipal Courts.

## **D. Circuit Court**

### **i. Local Ordinance Violations**

If a city does not have a municipal court, the city may prosecute code enforcement offenses in circuit court. Circuit court has concurrent jurisdiction with municipal court for ordinance violations.<sup>64</sup> A city with a population of 300,000 or less may enter into an agreement with the state to provide municipal court services with "all judicial jurisdiction, authority, powers, functions and duties of the municipal court."<sup>65</sup> Prosecution of violations in circuit court shall be by the city attorney and in the name of the city.<sup>66</sup>

The prosecution of code ordinance violations in circuit court follows ORS chapter 153 like municipal court, as discussed above. However, since circuit courts primarily adjudicate criminal and civil cases, many local governments choose to utilize their own municipal courts to ensure that the code enforcement cases are given sufficient attention.

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<sup>61</sup> ORS 153.090.

<sup>62</sup> ORS 138.057.

<sup>63</sup> ORS 138.057.

<sup>64</sup> ORS 221.339.

<sup>65</sup> ORS 221.357.

<sup>66</sup> ORS 221.315.

## ii. Civil Causes of Action

In addition to ordinance violations, a circuit court has jurisdiction over civil causes of actions such as public nuisance, injunctions, and restraining orders.<sup>67</sup> A local government may wish to pursue these causes of action if it does not have a municipal or justice court, or it wishes to have a circuit court order finding that a defendant is responsible for its actions. Such civil actions are used for the worst offenders.<sup>68</sup>

## iii. Public Nuisance

A public nuisance is interference with an interest or right common to the general public, by action of another, when the action is such that the law attaches responsibility for the action.<sup>69</sup> Types of acts to which the law attaches responsibility are culpable conduct including negligent, reckless or intentional invasions of public interests, or the operation of an abnormally dangerous activity.<sup>70</sup> Specific elements of a public nuisance are the following: (1) substantial interference with right or interest common to general public; (2) interference is unreasonable; (3) culpable conduct, and (4) causation.<sup>71</sup>

Interference with interest or rights common to the general public generally consists of interference with public health, public safety, public peace, the public comfort or public convenience.<sup>72</sup> A plaintiff in a nuisance case may recover compensatory damages (damages for incurred losses such as injuries) and, in appropriate cases, punitive damages.<sup>73</sup>

## iv. Injunctions and restraining orders

Pursuant to ORS 30.315, a city may bring an action to enjoin a person or property from violating its ordinances for the public morals, health, or safety.<sup>74</sup> If a court enjoins a person from further violating its ordinances and if a person violates the court order, the defendant risks contempt of court.

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<sup>67</sup> Or Const, Art VII (Original), § 9 (circuit courts have all judicial authority and jurisdiction not vested in another court).

<sup>68</sup> See Kyle Iboshi, 'Our worst nightmare': Squatters turn farmland into junkyard near Sandy, KGW8, June 6, 2018, available at: <https://www.kgw.com/article/news/investigations/our-worst-nightmare-squatters-trash-property-near-sandy/283-561758141> (last accessed August 31, 2023).

<sup>69</sup> RESTATEMENT (SECOND) OF TORTS § 821B; *Stroda v. State*, 22 Or App 403 (1975).

<sup>70</sup> *Id.*

<sup>71</sup> See e.g., *Jewett v. Deerhorn Enterprises, Inc.*, 281 Or 469, 473 (1978); *Carvalho v. Wolfe*, 207 Or App 175, 181-182 (2006); *Gronn v. Rogers Constr., Inc.*, 221 Or 226, 239 (1960).

<sup>72</sup> RESTATEMENT (SECOND) OF TORTS § 821B.

<sup>73</sup> *McElwain v. Georgia-Pacific Corp.*, 245 Or 247, 249(1966).

<sup>74</sup> ORS 30.315 states that a city may bring action, "against any person or property to enforce requirements or prohibitions of its ordinances or resolutions when it seeks: \* \* \* [t]o require or enjoin the performance of an act affecting real property; (d) [t]o enjoin continuance of a violation that has existed for 10 days or more; or (e) [t]o enjoin further commission of a violation that otherwise may result in additional violations of the same or related penal provisions affecting the public morals, health, or safety."

Temporary restraining orders and preliminary injunctions are available after a city files either a public nuisance action as described above or an action pursuant to ORS 30.315. To obtain the injunction or restraining order, the city must demonstrate a likelihood of success on the merits of the nuisance case and that continuation of the nuisance will cause irreparable harm.<sup>75</sup>

A city that chooses to undertake an injunction can be very effective because noncompliance results in a contempt proceeding. However, obtaining a judgment or injunction in circuit court may be time consuming and expensive.

## **E. Administrative Action**

Another type of enforcement is to utilize administrative action. Administrative action does not require a court; rather, the decision to impose a penalty is made by either the city or a hearings officer.

The Oregon Administrative Procedures Act (APA) does not apply to the decisions of local governments; rather, the APA deals exclusively with the administrative operation of Oregon agencies in the executive branch of state government.<sup>76</sup> The procedures to take administrative action are created by a city's ordinances.<sup>77</sup>

For example, cities use administrative actions for specific items such as abating a nuisance or utilizing the administrative process instead of a court process. The administrative process is best suited to non-serious, non-emergency violations. Administration enforcement may include fines and hearings.

Since the administrative process can be more informal, it can be faster and more cost effective than a court process. However, an administrative order does not carry the same weight as a court order and therefore, defendants may not heed the order.

A common administrative action is abatement of code enforcement violations by the city, with the city taking a lien for the out-of-pocket costs and a penalty to encourage prompt payment to the city. To take administrative action in such a case, the city needs to provide due process to the responsible party.<sup>78</sup> Due process is necessary to avoid liability for violating the property owner's constitutional rights.<sup>79</sup> Due process is obtained by giving written notice to the responsible party and providing an opportunity to be heard.<sup>80</sup>

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<sup>75</sup> ORCP 79.

<sup>76</sup> See ORS 183.310(1).

<sup>77</sup> See *Oregon Administrative Law* § 1.53 to 1.56 (Oregon CLE 2010 & Supp 2016).

<sup>78</sup> *State v. Koenig*, 238 Or App 297 (2010) (finding that "lawfully directed" for purposes of proving criminal trespass in the second degree required due process to be administratively excluded from the county offices).

<sup>79</sup> *Id.*

<sup>80</sup> See US Const, Amend XIV states that no state shall "deprive any person of life, liberty, or property without due process of law."

## F. Code Enforcement Liens

Code enforcement liens, also known as “municipal liens” are a method for recovering either the costs for abatement of code violations or penalties.<sup>81</sup> A lien is a fee or fine attached to a property that is out of compliance with city’s building, property maintenance and/or zoning codes.<sup>82</sup>

As discussed above, many cities use administrative actions such as abatement to address code violations. As part of the ordinance authorizing that action, cities may establish that such abatement action is a lien and immediately payable to the city. Failure to pay the municipal lien in a timely manner can result in increasing penalties or foreclosure of the lien, as discussed below. If a property has a lien on it, it may be difficult to sell, refinance or borrow against it.

Such liens are filed in a city’s lien docket, but that lien docket is not recorded with the county clerk.<sup>83</sup> Further, cities can use an electronic lien record if the city records in the county clerk’s real property records a notification giving constructive notice that all such municipal liens are maintained as electronic lien records with the city.<sup>84</sup> To determine whether there is a municipal lien, a property owner must contact the city in question.

Municipal liens are usually paid off when the property is sold. Although code enforcement liens can be an effective way of recover out-of-pocket costs, if those costs and/or monetary penalties are not reasonable, cities may never recover out-of-pocket costs because the responsible party will not pay.

## III. TAKING CONTROL OF PROBLEM PROPERTIES

For cities encountering difficult code enforcement properties, taking control of problem properties is the last resort. As discussed below, cities can take control of problem properties through land banks, receivership, or foreclosure of code enforcement liens.

### A. Land Banks

Land banks are local governments or non-profit organizations created to acquire unproductive, vacant, and developable property to be “banked” for development. Banked properties can be tax foreclosed, vacant or distressed properties. Land banks hold, manage, and redevelop property in order to return these properties to productive use to meet community goals, such as increasing affordable housing or stabilizing property values.<sup>85</sup> For example, vacant

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<sup>81</sup> ORS 93.643

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> See ORS 93.643(1)(b) (stating that a “city may give constructive notice of a governmental lien by maintaining a record of the lien in an electronic medium that is accessible online during the regular business hours of the city.”)

<sup>85</sup> See Local Housing Solutions, available at: <https://localhousingsolutions.org/housing-policy-library/land-banks/> (last accessed August 31, 2023).

properties that are too small to be developed can be acquired by land banks to combine with an adjacent property for development.<sup>86</sup> Or a land bank may acquire a distressed residence to redevelop it for affordable housing.<sup>87</sup>

No specific statute allows cities to operate residential land banks because it is within the general powers of the city to acquire and sell property.<sup>88</sup>

For brownfield properties, or properties that may have environmental contamination, cities were reluctant to acquire brownfield sites because of liability to share in the cost of cleanup due to ownership.<sup>89</sup> In response, the Oregon Legislature enacted ORS 465.600 to 465.621 to allow a public authority to acquire, hold, manage and transfer property to new owners without any environmental liability.<sup>90</sup>

Land banks are used by some of the nation’s biggest cities such as Detroit and Dallas. In Oregon, the city of Eugene has a land bank program for “future affordable housing development.”<sup>91</sup> Effective use of land banks requires a plan for acquisition and for development strategies.

## **B. Receivership**

The Oregon Housing Receivership Act authorizes local governments to apply to a circuit court to appoint a receiver for a problem property.<sup>92</sup> The appointed receiver secures the property, pays all expenses such as utilities, repair, and insurance costs, and cleans up the property.<sup>93</sup> Once the work is complete, the court reviews the costs. Costs awarded include an administrative fee and reimbursement for the work necessary to cure code violations, and the work to return the property to a “previous good state,” as long as the expenditures were reasonable and necessary.<sup>94</sup> If the responsible party fails to pay the costs within 60 days, the receiver can file a lien and that lien is superior to all other liens except taxes.<sup>95</sup>

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<sup>86</sup> See Center for Community Progress, Land Bank Frequently Asked Questions, available <https://communityprogress.org/resources/land-banks/lb-faq/> (last accessed August 31, 2023).

<sup>87</sup> *Id.*

<sup>88</sup> See ORS 223.005.

<sup>89</sup> 42 USC § 9601 *et seq.* (Comprehensive Environmental Response, Compensation, and Liability Act of 1980 holds the owner or operator of a contaminated property could be held responsible for the property's cleanup, based solely on their current ownership of the property).

<sup>90</sup> For an excellent discussion on ORS 465.600 to 465.621, see Kelsey Zlor, *Lots of Opportunity: Using Oregon’s Land Banking Legislation to Spur Brownfield Redevelopment*, available at: [https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/19955/Zlevor\\_final\\_project\\_2016.pdf?sequence=4&isAllowed=y](https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/19955/Zlevor_final_project_2016.pdf?sequence=4&isAllowed=y) (last accessed August 31, 2023).

<sup>91</sup> See, e.g., city of Eugene, available at [Housing Development Incentives | Eugene, OR Website \(eugene-or.gov\)](https://www.eugene-or.gov/housing-development-incentives) (last accessed August 31, 2023).

<sup>92</sup> ORS 105.420 to 105.455.

<sup>93</sup> ORS 105.435.

<sup>94</sup> ORS 105.435; See *City of Portland v. Ristick*, 150 Or App 1 (1997)

<sup>95</sup> ORS 105.445.

If a city wishes to utilize the Oregon Housing Receivership Act, it must serve a notice on all interested parties and apply for receivership with the circuit court.<sup>96</sup> Although the city does not need to be the receiver, the court may appreciate if the city identifies persons or entities willing to operate as a receiver.<sup>97</sup>

Since a receivership lien has a higher priority than all other liens, the Oregon Housing Receivership Act is a powerful tool to motivate reluctant impacted lienholders take responsibility to repair and cure code violations.

## **C. Foreclosure**

In general, foreclosure is a legal procedure to seize a property after the property owner fails to repay their debts secured by liens. Holders of liens will initiate foreclosure and may purchase the property for the amount of the lien. For cities, they can initiate foreclosure for municipal liens.

Why do foreclosure? Cities can collect some or all of their unpaid municipal liens. Further, foreclosure activity may spur resolution on many other properties. Lastly, for some properties, it may be difficult for the city to determine who is the owner and who is the person(s) responsible for the code violations.

In Oregon, cities may use the summary foreclosure or the judicial foreclosure process. Regardless of the path chosen, there is not much case law or precedent on foreclosure of municipal liens. This uncertainty causes many elected officials to pause before undertaking a foreclosure action. If foreclosure is chosen, the public may perceive that the city is taking citizen's homes. Contrast that with the perception that the city is doing something to resolve the problem. Cities considering a foreclosure process should consider who will be responsible for the program and who will communicate with the citizens. Cities should also consider their proposed foreclosure properties carefully so that their actions reflect the public sentiment on foreclosure.

### **i. Summary Foreclosure**

Any local government is authorized to use the summary foreclosure process, also known as non-judicial foreclosure.<sup>98</sup> Although the statutes provide a procedure for summary foreclosure, the local government may adopt its own procedures.<sup>99</sup>

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<sup>96</sup> ORS 105.430.

<sup>97</sup> ORS 105.430(7) (stating that a receiver may be a “housing authority”, “urban renewal agency”, a “private not-for-profit corporation, the primary purpose of which is the improvement of housing conditions”, or a city agency designated as responsible for the rehabilitation of property).

<sup>98</sup> ORS 223.505 to 223.595.

<sup>99</sup> ORS 223.510.

A local government may foreclose a municipal lien one year from creation of the lien, assessment or installment becomes due and payable.<sup>100</sup> If the lien, assessment or installment is bonded, the local government may foreclose the lien 60 days after it is entered into lien docket.<sup>101</sup> After the lien is delinquent, the recorder may transmit to the treasurer a list describing each lien and the property description.<sup>102</sup> Upon receipt of the list, the treasurer shall try to collect the liens by advertising and selling the property upon which the municipal lien is filed.<sup>103</sup> The treasurer shall notice the sale of the property once a week for four successive weeks in a daily or weekly newspaper of general circulation in the county.<sup>104</sup> The published notice shall include the name and owner of the property, the amount unpaid on the lien and the date, time, and place of the sale.<sup>105</sup> In addition to the publication, notice is mailed to the owner of the real property at the last known address and the occupant or the property, if any.<sup>106</sup> Any interested person requesting notice under ORS 86.806 or any other person have a lien or any interest shall be sent the notice via registered or certified mail at least 60 days prior to the sale.<sup>107</sup> Like the judicial foreclosure process, when a city does not provide lienholder with notice of its foreclosure sale, as required by ORS 223.523(2), the lien is not foreclosed.<sup>108</sup>

After the sale of the property, the local government conveys a certificate of sale to the purchaser, subject to a one-year period of redemption.<sup>109</sup> The owner, legal representative, successor in interest or any other person having a lien on the property can redeem property for the foreclosure purchase price, interest and a penalty.<sup>110</sup> If no redemption is made within the year, the local government delivers a deed to the purchaser.<sup>111</sup> The deed is a fee simple title and shall grant immediate possession of the real property to the grantee.<sup>112</sup>

If no bid is received for the property, the local government may purchase the property for the amount of the lien and the cost of advertising and sale.<sup>113</sup> Or, alternatively, in the discretion of the recorder may again be offered for sale no sooner than three months after the sale, except for assessments for streets may be undertaken immediately.<sup>114</sup>

As a result, the summary foreclosure is non-judicial and therefore, a faster and more certain process. The foreclosure may require the administrative infrastructure to ensure that the proper procedures are followed, like providing notice. Cities like Portland have developed their

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<sup>100</sup> ORS 223.510.

<sup>101</sup> *Id.*

<sup>102</sup> ORS 223.515.

<sup>103</sup> ORS 223.520.

<sup>104</sup> ORS 223.523(1)

<sup>105</sup> *Id.*

<sup>106</sup> ORS 223.523(2).

<sup>107</sup> *Id.*

<sup>108</sup> *See State By and Through Director of Veterans Affairs v. Myers*, 114 Or App 291 (1992).

<sup>109</sup> ORS 223.530, ORS 223.535; ORS 223.550.

<sup>110</sup> ORS 223.656; ORS 223.593.

<sup>111</sup> ORS 223.570; Upheld in *State Const. Corp. v. Scoggins*, 259 Or 371 (1971), but see dissenting opinions.

<sup>112</sup> ORS 223.575; ORS 223.580.

<sup>113</sup> ORS 223.545.

<sup>114</sup> ORS 223.560.



own infrastructure and adopted procedures to ensure that the rights of the public and property owners are balanced.<sup>115</sup>

## ii. Judicial Foreclosure

In addition to the summary foreclosure process, local governments may foreclose liens through the courts.<sup>116</sup> Judicial foreclosure is the traditional manner of foreclosing a delinquent debt secured by any lien or mortgage. Foreclosure follows the procedure in ORS 88.010 to 88.100.<sup>117</sup>

In addition to the rights granted to the local government in ORS chapter 88 as a lienholder, the prevailing local government may be awarded reasonable attorney fees.<sup>118</sup> Further, the local government foreclosing the lien may bid at the execution sale an amount not exceeding the court judgment of the amount of the lien, along with the interest, costs, penalties and attorney fees.<sup>119</sup> Local governments are not entitled to deficiency judgments against the successful purchaser.<sup>120</sup>

The judicial foreclosure takes longer than the summary foreclosure because it requires judicial action. Similar to the discussion above, a judicial foreclosure may have more weight than a summary foreclosure. Local governments are encouraged to review both foreclosure methods for particular properties to determine if foreclosure may help it accomplish its compliance goals.

## IV. SUCCESSFUL CODE ENFORCEMENT

As discussed above, a successful code enforcement program relies on the following factors: (1) strong ordinances and laws; (2) strong code enforcement cases; and (3) taking control of problem properties. In addition to the legal factors, below are some best practices to supplement the factors creating a successful code enforcement.

### A. Code Enforcement Officers<sup>121</sup>

Effective code enforcement officers lead a city's efforts in code enforcement programs and build strong relationships with key stakeholders in the community. Hiring officers that can

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<sup>115</sup> See city of Portland, Foreclosure Administrative Rules LIC § 14.05 available at <https://www.portland.gov/policies/licensing-and-income-taxes/assessments-liens/lic-1405-foreclosure-administrative-rules> (last accessed August 31, 2023).

<sup>116</sup> ORS 223.610.

<sup>117</sup> ORS 223.620.

<sup>118</sup> ORS 223.615.

<sup>119</sup> ORS 223.645.

<sup>120</sup> ORS 223.650.

<sup>121</sup> This discussion on code enforcement officers is courtesy of League of Oregon Cities, *Successful Code Enforcement Considerations*, LOCAL FOCUS (2023), available at: <https://www.orcities.org/application/files/9116/7814/3966/Q12023LF.pdf> (last accessed April 31, 2023).

strike the balance between properly enforcing a city's codes and providing good customer service to its constituents is no easy task. A successful code enforcement officer excels in these areas:

1. **Knowing their code.** Successful code enforcement officers are experts on their city's codes. They are extremely proficient at knowing what the code regulates and what it does not. The best code enforcement officers can point to relevant sections of their city's code when questioned by superiors and members of the public.

2. **Reviewing their city's code annually.** Code enforcement officers likely work with their city's codes more than any other city employee. It is often the code enforcement officer who finds the code's flaws or the proverbial loopholes. Successful code enforcement officers annually review their city's code so that, when necessary, appropriate amendments can be submitted to their city council.

3. **Believing in interdepartmental cooperation.** An exemplary code enforcement officer works cooperatively with employees from various city departments. Code enforcement officers regularly interact with problem properties that necessitate the involvement of numerous city departments. Knowing which employees in the various departments need to be involved in resolving the issues at a property is a unique and ideal skill.

4. **Participating in successful community outreach.** A quality code enforcement officer not only knows their city's code, they also educate property owners and community members about the code's requirements. Code enforcement officers with high rates of success are those who frequent neighborhood association meetings, engage with the chamber of commerce, and have regular contact with key stakeholders in the community. Making sure the community knows the code as well as they do is the mark of a successful code enforcement officer. To accomplish this, code enforcement officers may need to communicate code changes to residents in ways such as putting information in utility bills or publishing updates in a city newsletter.

5. **Engaging with citizens who are in violation of the city code.** Notifying property owners that they are in violation of the city's code is never a fun task. While it can be easier to try and deal with code violations via written notices, emails, and phone calls, effective code enforcement officers know that sometimes face-to-face contact is the most efficient way to remedy a violation. Meeting with a person whose property is in violation of the city code allows the code enforcement officer the opportunity to fully explain the violation, listen to the reasons behind the violation, and engage with the property owner in how to successfully and most expeditiously achieve compliance.

6. **Enforcing the city's code consistently and equally.** Successful code enforcement officers are fair code enforcement officers. A fair code enforcement officer is one that enforces the city's code equally against all property owners, regardless of their position in the community or the location of the property.

## B. Methodology

Most cities practice only complaint-driven code enforcement, largely for cost reasons.<sup>122</sup> Complaints result in an inspection and a warning letter to the violator, followed by a notice of citation if action to correct the violation have not been taken by the property owner.<sup>123</sup> However, complaint-driven code enforcement will only result in addressing properties that have result in a complaint and may not address wide-spread issues.

The opposite approach, called systematic code enforcement, most typically is employed when a local community determines that a particular area needs a concentrated maintenance effort to remain vital.<sup>124</sup> A building code is methodical because inspections during new construction occur when certain items are complete and prior to their being enclosed by future phases of construction.<sup>125</sup> Systematic code enforcement could be used to address a large number of complaints in a particular geographic area or if a neighborhood contains a high percentage of rental properties and landlords can be forced to reinvest in their properties.<sup>126</sup>

For these reasons, cities should consider using systematic code enforcement, in addition to complaint-driven methods, in circumstances where a large number of properties in a neighborhood require investigation and review.<sup>127</sup>

## C. Effective Court Hearings

As discussed above, the purpose of code enforcement is to gain voluntary compliance through education. However, if the responsible party has not corrected the violation, it is best to prepare for a case in front of a judge or hearings officer. The following tips assist the code enforcement officer prepare for the officer's presentation of the case in chief to the judge:

(1) **Ensure legality.** It is crucial to avoid issues of trespass. Code enforcement officers should either get written consent to inspect a property, or as discussed above, obtain an

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<sup>122</sup> See Municipal Research and Services Center of Washington (MSRC), Code Enforcement, available at: <https://mrsc.org/explore-topics/legal/regulation/nuisances-regulation-and-abatement/code-enforcement#:~:text=Most%20code%20enforcement%20programs%20are%20complaint-driven.%20Complaints%20result.have%20not%20been%20taken%20by%20the%20property%20owner.> (last accessed May 31, 2023).

<sup>123</sup> *Id.*

<sup>124</sup> See Useful Community Development, How to Make Code Enforcement Work for Your Neighborhood, available at: [How to Make Code Enforcement Work for Your Neighborhood \(useful-community-development.org\)](https://www.usefulcommunitydevelopment.org/how-to-make-code-enforcement-work-for-your-neighborhood) (last accessed May 31, 2023).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> For additional tips, please see: Steven E. Barlow, Daniel M. Schaffzin, and Brittany J. Williams, *Ten Years of Fighting Blighted Property in Memphis: How Innovative Litigation Inspired Systems Change and a Local Culture of Collaboration to Resolve Vacant and Abandoned Properties*, 25 A.B.A. J. of Affordable Housing 347 (2017), available at: [https://www.americanbar.org/content/dam/aba/publications/journal\\_of\\_affordable\\_housing/volume\\_25\\_no\\_3/ah-25-3-07-barlow.pdf](https://www.americanbar.org/content/dam/aba/publications/journal_of_affordable_housing/volume_25_no_3/ah-25-3-07-barlow.pdf) (last accessed May 31, 2023).

inspection warrant. Consult with your city attorney to determine where the officer may legally be to avoid claims of trespass.

**(2) Pictures of the violations.** During the inspection, officers should take sufficient pictures. Pictures are more effective than words in describing code violations. Multiple pictures should be taken, starting from the sidewalk, and approaching the violation to demonstrate what the code enforcement officer is observing.

**(3) Sufficient notice.** It is often important to the hearings officer or judge to demonstrate that the city educated the defendant on the code violation and attempted to resolve the issue without resorting to a citation. Officers should be prepared to prove in court that they spoke to the responsible party and gave at least one opportunity to cure the violation.

**(4) Trial scripts.** Unlike police officers, code enforcement officers are often not experienced in testifying in court. If the defendant is not represented in counsel, the code enforcement officer is also responsible for not only presenting the case in chief, but also cross examining the defendant. For these reasons, a simple script about how to introduce evidence into the record and the information to present to the judge will often make the code enforcement officer more comfortable with trial preparation. Consult with your city attorney to prepare such a script or to get additional advice about trial preparation.