September 2018
Legal Q&A
By **Evelyn Kimeu**, TML Assistant General Counsel

Q. Who can enforce city ordinances?

A. Under the broad enforcement authority granted to cities under Section 54.001 of the Texas Local Government, a city may designate certain individuals to enforce city ordinances. Some cities call such individuals "code enforcement officials." Cities are not required to employ or contract with a person who is registered as a code enforcement officer in order for the city to engage in code enforcement activities. *See* TEX. OCC. CODE §1952.003. However, a person may not claim to be a code enforcement officer or use the title "code enforcement officer" unless such person has a certificate of registration from the Texas Department of Licensing and Regulation (TDLR). *See* TEX. OCC. CODE §1952.101. Requirements to qualify for registration as a code enforcement officer include at least one year of full-time experience in the code enforcement field, passing an exam administered by TDLR, and taking continuing education classes after registration. *See* TEX. OCC. CODE §§1952.102 and 1952.1051.

Q. Can a code enforcement official or code enforcement officer issue a citation?

A. A citation is a document issued by a peace officer, in lieu of arrest, to an individual accused of committing an offense. *See* TEX. CODE CRIM. PRO. ART. 14.06(b) and TEX. TRANSP. CODE §§543.002-543.005. Because only a peace officer can arrest a person accused of committing a criminal offense, the most conservative advice is that only a peace officer certified by the Texas Commission on Law Enforcement is authorized by state law to issue a citation compelling a person to appear in court on a certain day. That advice holds true for a violation of either state law or a city ordinance.

Q. What non-citation enforcement options are available to enforce city ordinances?

A. Many cities give certain employees, including code enforcement officials, code enforcement officers, and animal control officers, the power to issue a "notice of violation" on behalf of the city in cases where there is an alleged ordinance violation. *See* TEX. LOCAL GOV'T CODE §54.005. The notice of violation usually includes information such as: (1) the text of the ordinance being violated; (2) the conduct that violates the ordinance; and (3) how to come into compliance. The notice of violation serves as a warning to the alleged violator that he or she is in violation of the ordinance. Typically, it also provides for a period of time in which the alleged violator may rectify the situation. In addition, a notice of violation will often include a warning that, if the situation is not brought into compliance within a certain period of time, a complaint will be filed in municipal court.

Q. Who may file a complaint in municipal court?

A. A complaint is a sworn allegation charging a person with the commission of an offense under either state law or a city's ordinance. *See* TEX. CODE CRIM. PROC. ART. 45.018. As a general rule, anyone who is acquainted with the facts of an alleged offense may file a complaint in municipal court alleging a violation of a state law or city ordinance. *See id*. at 45.019. Accordingly, if a code enforcement official or code enforcement officer did not see or witness the alleged offense, a citizen must file a complaint. In order for the court to act upon a complaint, the complaint must be sworn to before any officer authorized to administer oaths, including the municipal judge, clerk or deputy clerk of the court, city secretary, city attorney or deputy city attorney. *Id.* at 45.019(d) and (e). After receiving a sworn complaint regarding an ordinance violation, the municipal judge may issue a summons requiring such person to appear before the court. *Id.* at 15.03(a). If the alleged violator does not appear on the date

listed on the summons, the municipal judge may not issue an arrest warrant for failure to appear unless the judge provides notice by telephone or mail that includes: (a) the date and time defendant must appear; (b) the name and address of the court; (c) information regarding alternatives to full payment of any fine or costs if the defendant is unable to pay; and (d) an explanation of the consequences if the defendant fails to appear. *Id.* at 45.014(e).

Q. Can a code enforcement official or code enforcement officer go onto private property without a search warrant to determine whether a code violation exists on the property?

A. The Fourth Amendment to the United States Constitution protects against unreasonable searches. It requires searches to be conducted with a warrant that is issued based upon probable cause, unless an exception for a warrantless search exists. Before 1967, the Supreme Court of the United States had upheld the legality of warrantless administrative inspections of private premises for purposes of nuisance abatement and detecting code violations. *See e.g. Frank v. State of Maryland*, 359 U.S. 360 (1959). However, in 1967, the Supreme Court, in two separate cases, held that (except in carefully defined classes of cases) routine administrative inspections of both residential and commercial premises for purposes of detecting code violations is unreasonable, unless authorized by a search warrant. *See Camara v. Municipal Court of City and County of San Francisco*, 387 U.S 523, 534 (1967) (entry onto residential premises to conduct routine annual inspection for possible violations of city's housing code) and *See v. City of Seattle*, 387 U.S. 541, 545 (1967) (entry onto commercial warehouse without warrant and probable cause to conduct routine, periodic city-side canvass to obtain compliance with the city's fire code). The Court in *See*; however, distinguished the facts of that case with the "accepted regulatory techniques [such] as licensing programs which require inspections prior to operating a business or marketing a product." *Id*. at 546. The court further provided that "[a]ny constitutional challenges to such programs can only be resolved . . . on a case-by-case basis under the general Fourth Amendment standard of reasonableness." *Id.*

In response to the Supreme Court decisions, the Legislature enacted Article 18.05 of the Code of Criminal Procedure, which expressly allows a magistrate to issue a search warrant to a fire marshal, health officer, or code enforcement official of the city for "the purpose of allowing the inspection of any specified premises to determine the presence of a fire or health hazard or unsafe building condition or a violation of any fire, health, or building regulations, statute, or ordinance." TEX. CODE CRIM. PROC. ART. 18.05(a). Such warrant is often referred to as an "administrative search warrant." Each city or county may designate one or more code enforcement officials for the purpose of being issued an administrative search warrant. *Id*. at 18.05(d). Administrative search warrants do not allow for the seizure of persons or property, and can only be issued for the purposes of allowing an inspection of specific premises to determine the presence of hazardous conditions prohibited by law. *Id*. at 18.05(c); Tex. Att'y Gen. Op. MW-228 (1980). Accordingly, unless an exception applies, an administrative search warrant is required before a code enforcement officer or code enforcement official may enter onto private property to conduct administrative inspections of residential or commercial premises for code violations. Alternatively, a peace office may secure a broader search warrant that is not specific to code enforcement. *See* TEX. CODE CRIM. PROC. ART. 18.02(10).

Q. Are there instances in which a code enforcement official or code enforcement officer may conduct code enforcement inspections on private property without a search warrant?

A. A code enforcement official or code enforcement officer may, in limited instances, conduct code enforcement inspections on private property without first obtaining an administrative search warrant. A person who receives the voluntary consent of a property owner to search the property may enter onto

the property without a search warrant. *See e.g.*, *Schneckloth v. Bustamante*, 412 U.S. 218, 227 (1973) and *Dearmore v. City of Garland*, 519 F.3d. 517 (5th Cir. 2008), *cert. denied*, 555 U.S. 938 (2008). Additionally, if an emergency exists, such as threat of fire, a search could be conducted without a warrant. *See Michigan v. Tyler*, 436 U.S. 499 (1978).

State law also allows a public official, agent, or employee of the city to enter, at a reasonable time, a residential property that is reasonably presumed to be abandoned or that is uninhabited due to foreclosure and is an immediate danger to the health, life or safety of any person to inspect such property for the purpose of mosquito abatement. *See* TEX. HEALTH & SAFETY CODE §341.019.

In addition, certain highly regulated industries are exempted from the administrative search warrant requirement. *See e.g. Colonnade Catering Corp. v. United States*, 397 U.S 72 (1970) (sale of liquor), *United States v. Biswell*, 406 U.S. 311 (firearms dealing), and New York v. Burger, 482 U.S. 691 (1987) (automobile junkyards). In these industries, a warrant is not required because "when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation." *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). However, in a recent case, the Supreme Court invalidated a City of Los Angeles ordinance requiring hotel operators to keep a record of specific information concerning guests and make such records available to any officer for inspection on demand. *See City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015).

The Fifth Circuit Court of Appeals has also upheld the inspection of massage parlors for code violations without a search warrant. *See Pollard v. Cockrell*, 578 F.2d 1002, 1014 (5th Cir. 1978). Similarly, in *Harkey v. deWetter*, the court upheld the reasonableness of a city ordinance requiring the inspection of areas where animals are kept on residential premises, but did not opine on whether the enforcement of the ordinance would be constitutionally valid because the citizens challenging the ordinance never applied for a permit, no inspection was conducted, and no animals had been impounded. 443 F.2d 828, 829 (5th Cir. 1971), *cert. denied*, 404 U.S. 858 (1971).

The Supreme Court has concluded that no privacy interest or protected property interest exists in what is observable from a "public vantage point" in which one has a right to be. *See California v. Ciraolo*, 476 U.S. 207, 213 (1986). As such, inspections can be made from a public street or from a neighboring property with the property owner's permission, and without the need of a warrant. Additionally, the use of aids to enhance inspections doesn't infringe on a property owner's constitutional rights. *See e.g.*, *Florida v. Riley,* 488 U.S. 445 (1989) (upholding naked-eye surveillance of interior of a partially covered greenhouse in a residential backyard from the vantage point of a helicopter located 400 feet above the greenhouse); *Ciraolo,* 476 U.S. at 215 (upholding naked-eye aerial observation of backyard from aircraft 1,000 feet high); and *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986) (aerial photography taken from an aircraft lawfully in public navigable airspace was not a search prohibited by the Fourth Amendment). Additionally, under the "open fields" doctrine, the Supreme Court has held that no expectation of privacy exists in fields that are far removed from a property owner's home and curtilage, such as open fields, pastures, or wooded areas, even if such areas are fenced with "no trespass" signs posted. *See Oliver v. United States*, 466 U.S. 170 (1984); *Hester v. United States*, 265 U.S. 57 (1924); and *Rosalez v. States*, 875 S.W. 2d 705 (Tex. App. – Dallas 1983).

Cities should consult with local legal counsel before adopting regulations that allow for warrantless inspections of properties for code violations.