

LEGAL DISCLAIMER



The following presentation includes general principles of law regarding building and safety code administration and enforcement. It is not intended to be used as legal advice, nor is it exhaustive in the areas referenced. Questions on legal administration and enforcement of code should in all cases be directed to legal counsel in your jurisdiction.

CODE OFFICIAL LIABILITY

(How to Avoid Getting to Know Your Lawyer Better!)



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CODE OFFICIAL LIABILITY

(How to Avoid Getting to Know Your Lawyer Better!)

Objectives:

- Review general legal concepts pertaining to civil, administrative and criminal liability.
- Identify ministerial vs. discretionary acts.
- Identify common areas of liability.
- Review a code official's right of entry under the U.S. Constitution and case law.

CAN A CODE OFFICIAL BE HELD LIABLE FOR FAILING A DUTY?

- Not usually (**Sovereign Immunity**)
... but it is possible (**under the exceptions**)
 - Under most circumstances, government and its official agents are immune from lawsuits.
 - The exceptions are where the federal, state or other political subdivision has legislatively permitted civil, administrative or criminal action.

Respondeat Superior

- **Respondeat Superior** holds the principal responsible for the wrongful acts of the agent. Therefore in theory, your supervisor and employer can be held responsible for your failures.
- However, most states extend **Sovereign Immunity to the government** employer and supervisors for negligent performance of acts by the employee caused by accident or mistake.
- Liability of the employee, supervisor and agency depends on applicable jurisdictional laws.

Worst case scenarios for the Code Official

- Violation of duty in a jurisdiction that assigns liability personally in cases where the official's conduct (by act or omission) is:
 - Willful, malicious, or intentional.
 - Outside the scope of authorized acts.
 - Example: CT General Statutes 7-101a
 - Protects acts of negligence, or alleged infringement of any person's civil rights while in the discharge of lawful duties.
 - Excludes protection for malicious, wanton or wilful acts or *ultra vires* acts (*outside scope of authority*).

Criminal Liability

- Code officials who intentionally or recklessly fail to perform a required duty and thereby cause injury may be prosecuted in those states which have criminal law provisions for such actions.
- Intentional, malicious and grossly negligent conduct against code are not defensible under Sovereign Immunity.

LIABILITY AND DEFENSES

- THEORIES OF LIABILITY
 - Negligence (failed a duty – no intent needed)
 - Intentional tort (knowingly violating duty)
 - Civil Rights Violation (violated protected right)
 - Criminal Violation (intentional or reckless act)
- GOVERNMENTAL DEFENSES
 - Public Duty Doctrine
 - Sovereign Immunity

ICC 2015 IBC LIABILITY SECTION

[A] 104.8 **Liability**. The building official, member of the board of appeals or employee charged with the enforcement of this code, while acting for the jurisdiction **in good faith and without malice** in the discharge of the duties required by this code or other pertinent law or ordinance, shall not thereby be civilly or criminally rendered liable personally and is hereby relieved from personal liability for any damage accruing to persons or property as a result of any act or by reason of an act or omission in the discharge of official duties.

[A] 104.8.1 Legal defense. Any suit or criminal complaint instituted against an officer or employee because of an act performed by that officer or employee in the **lawful** discharge of duties and under the provisions of this code shall be defended by legal representatives of the jurisdiction until the final termination of the proceedings. The building official or any subordinate shall not be liable for cost in any action, suit or proceeding that is instituted in pursuance of the provisions of this code.

Duties: The Basics Discretionary vs. Ministerial

- When the law requires that an official perform any certain action, failure to perform is a violation of duty. This is the case particularly where the acts are **ministerial** in nature, rather than **discretionary**.

Inspections

- The most common debate concerning ministerial vs. discretionary acts centers on inspections. Some are **discretionary**, while others are **mandatory**.
- Two large sources of litigation:**
 - Failure to inspect where required by law.
 - Performing an inspection in violation of law.

Duties: The Basics Discretionary vs. Ministerial

- When is an act "discretionary?"
- When a law, policy or directive includes some act or omission, and the decision of how to perform the act or whether to act at all requires or allows for professional judgment. These are referred to as "**discretionary acts**."
- Terms often used are "may" and "is authorized."

Duties: The Basics

Discretionary vs. Ministerial

- When is an act “ministerial?”
- When a law, policy or directive clearly establishes that an act **must** be performed, the relevant officials are not free to exercise their own judgment in determining whether to perform the act. These are call “**ministerial acts.**”
- Often uses terms “shall”, “must” or “will.”

ICC 2015 INTERNATIONAL BUILDING CODE

- SECTION 104.1-104.5 DUTIES AND POWERS OF BUILDING OFFICIAL
- [A] 104.1 General. The building official is hereby authorized and directed to enforce the provisions of this code. The building official has authority to render interpretation of the intent and intent of codes, policies and procedures in order to carry the standards into effect. Such interpretations, policies and procedures **shall** be in compliance with the intent and purpose of this code. [A] 104.2 Applications and permits. The building official **shall** receive application, review construction documents and issue permits for the erection, and alteration, demolition and moving of buildings and structures, inspect the premises for which such permits have been issued and enforce compliance with the provisions of this code. [A] 104.3 Notices and orders. For substantially new or substantial improvement of existing buildings or structures in flood hazard areas. For approvals for reconstruction, rehabilitation, repair, alteration, addition or other improvement of existing buildings or structures located in flood hazard areas, the building official **shall** determine if the proposed work constitutes substantial improvement or repair of substantial damage. Where the building official determines that the proposed work constitutes substantial improvement or repair of substantial damage, and where required by this code, the building official **shall** issue the building official’s permission of such work. [A] 104.3 Notices and orders. The building official **shall** issue necessary notices or orders to insure compliance with the provisions of this code. [A] 104.4 Inspections. The building official **shall** make the required inspections, or the building official **shall** have the authority to accept reports of inspection by approved agencies or individuals. Reports of such inspections **shall** be in writing and be certified by a responsible officer of such approved agency or by the responsible individual. The building official is authorized to engage such expert opinion as deemed necessary to report upon unusual technical issues that arise, subject to approval of the appointing authority. [A] 104.5 Identification. The building official **shall** carry proper identification when inspecting structures or premises in the performance of duties under this code.

The Public Duty Doctrine

- **The General Rule: The Public Duty Doctrine**
- According to the court, the public duty doctrine is a “focusing tool” used to determine whether the state owed a specific duty to a particular individual, the breach of which is actionable, or merely a duty to the “nebulous public,” the breach of which is not actionable.

The Public Duty Doctrine Areas of Exception

■ The Four Areas of Exception

The are generally four circumstances, referred to as "exceptions," where a claimant might be able to maintain an action despite the Public Duty Doctrine:

- (1) where there is a "**legislative intent**" to impose such a duty,
- (2) where there is a "**failure to enforce**" a **statutory duty**,
- (3) where the government has engaged in "**volunteer rescue**" efforts, and
- (4) where a "**special relationship**" exists between the plaintiff and the state.

42 U.S.C. 1983 Civil Rights Claims

- Persons who deprive another of federally protected rights while acting under color of state law.
 - Liable for damages, injunctive relief, attorney's fees.
 - Applies to governmental agency acting per written or verbal policy, or custom.

Procedural Due Process Claims

- Constitutional Right to Notice and Opportunity to be Heard
 - At meaningful time & manner
 - Usually prior to deprivation of property, permit revocation or demolition of property
 - Emergency exceptions exist for situations involving imminent and substantial risk of injury to persons or to property.

Unlawful Delay Claims

- Generally, damages include direct provable costs and non-speculative fluctuation in property value plus the injured party's attorney's fees.

First Amendment: Freedom of Religion

- Constitutional provisions do not prevent all governmental regulation of churches and religious organizations, and they may be subject to religiously neutral regulation for a secular governmental purpose under the police power, such as, fire inspection and building and zoning regulations. *Wisconsin v. Yoder*, 406 U.S. 205, 214, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972);

The Religious Land Use and Institutionalized Persons Act

- (The RLUIPA) prohibits the government from imposing substantial burdens on religious exercise unless there exists a compelling governmental interest and the burden is the least restrictive means of satisfying the governmental interest.

Conducting Lawful Inspections: Follow the 4th Amendment

- The 4th Amendment of the U.S. Constitution prohibits “unreasonable searches and seizures.” This applies to a code official inspecting a private property, as that inspection constitutes a governmental search.
- Entry to private property therefore requires the search be both reasonable and by a proper warrant supported by oath or affirmation providing probable cause for the inspection, unless an exception to the warrant exists.
- A code inspection is a reasonable search if it is conducted in accordance with legislative standards.

Statutory Right of Entry

- Right of entry laws in your jurisdiction may grant entry to the code official onto private property, but that does not negate or preempt the requirement that such entry be in accordance with the U.S. Constitution.
- “A right of entry [statute], and even an authorization to seek a warrant to implement the right of entry, is not equivalent to a legislative authorization for a court to issue a warrant on less than probable cause.” City of Seattle v. McCready, 123 Wn.2d 260, (1994).

Administrative Search Warrants

- *Camara v. Municipal Court of City and County of San Francisco, U.S. Supreme Court (1967)*
 - When entry is needed to conduct a legislatively authorized inspection, lacking consent or exigent circumstances, the official cannot force entry without a warrant.
 - The official can apply to an impartial magistrate for an administrative search warrant to enter the property.

Consent in General

- Must be given freely by someone with authority of suitable age and discretion.
- May be limited and withdrawn.
- Does not authorize general entry of other agencies lacking legal right.
- Allows you to report what you find to all appropriate other authorities.
 - Ex. Plain view of imminent danger upon entry

Seek Consent

- Code provisions often require inspection. If possible, always seek entry by consent. Cooperative compliance is always preferable.
- And “[a]bsent express orders from the person in possession [of the property] ... there is no rule of private or public conduct which makes it illegal per se ... for anyone openly or peaceably, at high noon, to walk up the steps and knock on the front door of any man’s ‘castle.’ ” Davis v. United States, 327 F.2d 301, 303 (9th Cir.1964).

Consent to Search Rental Property

- Rental property
 - The right of privacy in a single family, apartment, hotel room or other recognized private dwelling belongs to the tenant/occupant, not the landlord or landlord's agent. Therefore, the code official must have consent to inspect from the tenant/occupant, unless legal exception exists.
 - Also applies to rental property guests
 - Also applies to hotel guests
 - Does not apply in the common areas of a three family or larger
 - Does not apply in commercial space open to the public
 - The owner must also have consent from the tenant, unless legal exception exists.

Exigent Circumstances Exceptions

- Exigent circumstances exceptions are premised on the need for entry when there is insufficient time to get a warrant - the government must be able to show that a warrant could not have been obtained in time or that it would have been infeasible or unsafe to take the time to obtain a warrant. *United States v. Good*, 780 F.2d 773, 775 (9th Cir. 1986); *State v. Bessette*, 105 Wn. App. 793, 798 (2001).

Exigent Circumstances: Emergency Exception under Community Caretaking Function

- Or enter a burning building to put out a fire and investigate its cause, *Michigan v. Tyler*, 436 U.S. 499, 509–510, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978)
 - Exigency ends upon elimination of danger. Once the emergency dissipates, the warrantless entry is no longer justified.

Open Permit Exception

- Open Permits
 - The right of the code official to inspect on an open permit has a regulatory exception to the warrant requirement, since there is an increased governmental interest in public safety during a building project to see it is done safely and to code, and a decreased individual right of privacy prior to any occupancy.
 - Inspection rights can be incorporated by specific language in the permit as a condition of the issuance and viability of a building permit, with the applicant consenting to such inspections by the making and signing of the application.

Plain View Exception

- If the inspector is in a place with right to be there, and discovers or views something that is immediately apparent to be contraband or evidence of violation of law. State v. Link, 136 Wn.App. 685, 696-7 (2007).
- Inadvertence discovery no longer required. Horton v. California, 496 U.S. 128, 130 (1990); State v. Hudson, 124 Wn.2d 107 (1994).

Open Fields Exception

- Exception to Warrant Requirement
- No reasonable expectation of privacy exists for areas that are "open fields". United States v. Dunn, 480 U.S. 294, 304 (1987)
- "Open field" is a legal term of art and is somewhat of a misnomer in that an "open field" need not be either 'open' nor a 'field' and may include "any unoccupied or undeveloped area outside of the curtilage." Oliver v. United States, 466 U.S. 170, 180 n. 11, (1984).

Questions?



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