

Legal Aspects – Ethics in Government



Shums Coda Associates, Inc.

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Instructor



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In the construction industry since 1973
Designer/ builder 16 years
Combo Inspector 30+ years
Plans Examiner 25+ years
Served on IEBC committee 9 years
IBC General comm 3 years
8+ years CBO
8+ years as Consultant and Instructor for CCC/Shums Coda Associates
Author of ICC Resource book "Firestopping, Joint Systems & Dampers" 2024

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What are we going to talk about

- Part I – Legal
 - Legal Terms used in the enforcement of Building Codes
 - The impact of the law on the administration and operation of a building department
- Part II
 - ETHICS!



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...Liability...

- “an obligation that one is bound in law or justice to perform.”



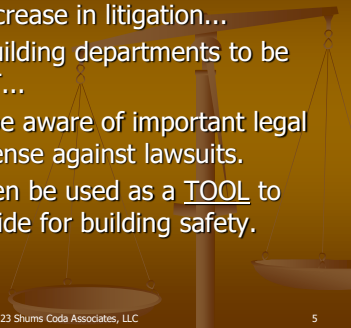
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“The Litigation Wave”

- Tremendous increase in litigation...
- Very rare for building departments to be held liable, BUT...
- It still pays to be aware of important legal issues as a defense against lawsuits.
- The law can then be used as a TOOL to effectively provide for building safety.



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Current state of the law has remained favorable to building departments...

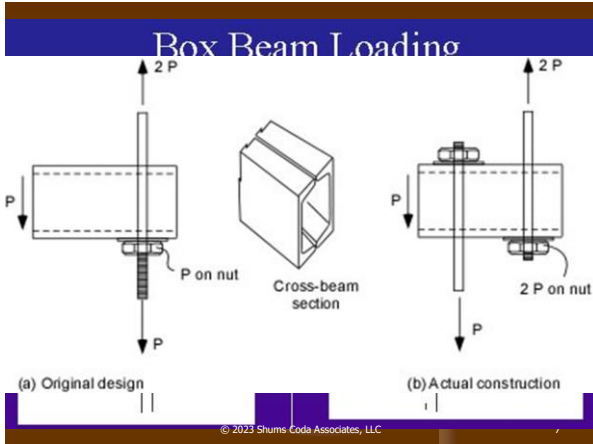
- Kansas City Hyatt
 - 114 dead
 - 180 injured
 - \$100 Million in damages
 - Both engineers lost their license
- Catastrophes that could have led to adverse decisions
- Importance of meticulous enforcement



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Historical Basis of Building Codes

- Historically...
- No regulation at the start
- Leads to consequences for the whole community

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First Building Codes

- Central City, Colorado
- 1874 Fire - No Regulations
- Circa 1878 - With Regulations

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Historical Basis



- Chicago Fire 1871
- Central City 1874
- Chicago Building and Fire Code 1875



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Forms of Local Government



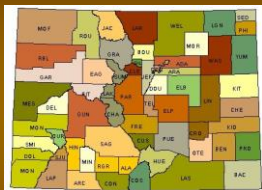
- Counties
- Municipalities
- Home Rule

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Forms of Local Government



- Counties
 - Arm of the state
 - Enjoy privileges of the state
 - Immune from lawsuit (Sovereign Immunity)

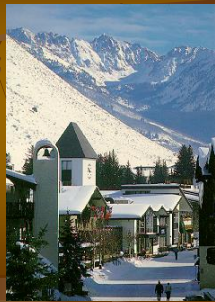
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Forms of Local Government

- Municipalities
 - Corporation established by state legislature
 - Typically not immune if activity duplicated in public sector
- Cities
- Towns
- Villages
- Boroughs...
 - Each has different forms of power



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Forms of Local Government

- Home Rule
 - May act in areas without specific authorization from the state



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Home Rule Municipalities

- Generally makes it easier for local gov't. to enact legislation to protect public welfare
- A way to prevent state interference in local affairs
- Must be specific provisions in state statutes to permit home rule
- Governed by charter approved by voters



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Some features of Home Rule...

- Home rule always bars state interference in purely local affairs
- A home rule charter is derived from authorization in the state's constitution.
- Home rule charters may contain unlimited powers, limited only by state and federal constitutional law, or may contain limited powers limited by the charter itself or by state law.

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Dillon's Rule

- A municipal corporation has only those powers which are:
 - expressly granted to it by charter or other state legislation;
 - implied or necessarily incident to the express powers; and
 - essential and indispensable to the declared objects and purposes of the corporation.
- If no authorizing legislation, **NO AUTHORITY**.
 - Must be traceable, directly or indirectly back to some state authorizing legislation.

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Expressed power...

- "...one which has been set forth and declared exactly."
- Examples are state & federal constitutions & state & federal laws of general application, i.e., a state statute mandating the adoption of a building code.



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Implied Power...

- Arises from powers expressly granted
- Essential to powers expressly granted
- EXAMPLE: Legislation doesn't specifically authorize issuance of a Certificate of Occupancy ("C.O."), but implies it by authorizing adoption of the building code.



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Essential and Indispensable Powers...

- "essential and indispensable to the declared objects and purpose of the corporation"
- Might allow building code adoption without enabling legislation
 - Varies from one state to another
- Safer route is to obtain state enabling legislation before adopting municipal legislation, i.e., adoption of building code



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Enabling Legislation...



- Differences between statutory municipalities, statutory counties and home rule entities
- Courts in some states feel that adoption of a building code is an inherent power of fundamental importance to health and welfare of the community.
- Still best to have **expressed power**

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Ultra Vires Legislation...



- Means *Beyond Power*
- Occurs when a municipality oversteps its bounds and exercises a power not granted by its charter or the state.
 - i.e. adopting and enforcing a building code without expressed power

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Local Adoption of a Building Code



- Requires close working relationship between attorney and building official
 - Building Official: selection & development of building code.
 - Attorney: getting it legally operative, making sure there is authority to adopt.

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Building Code Adoption

- Must be some authority for code's adoption at the state level.



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Adoption Steps...

- Coordinate with your attorney to confirm authority to adopt, review ordinance, etc.
- Publish a public notice in accordance with applicable charter or state law provisions.
 - 11-864. Publication of ordinance adopting code
 - 9-802 (Similar for Cities and Towns)
 - Any code authorized by this article may be enacted without setting forth in full such provisions, but the adopting ordinance shall be published in full. At least three copies of the code shall be filed in the office of the clerk of the board of supervisors and kept available for public use and inspection. A code enacted by reference may be amended in the same manner.
- File the code with county or municipal clerk prior to the adoption.
- Hold a public hearing.
- File copies for public reference.

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State Legislative Law



- Enabling Legislation
- State Building Codes
- Related Legislative Provisions
- Preemption
- Sovereign Immunity

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Enabling Legislation

- For adopting local building codes
- May specify title, duties and even qualifications of the building official and deputies
- Also usually provides for a board of appeals
 - appeals to decisions of building official
 - alternate methods and materials
 - may specify method to appeal to courts

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State Building Codes

- Some states regulate construction at the state level, ranging from:
 - Enabling legislation, to
 - Minimum codes, to
 - Minimum/maximum codes, to
 - Full preemption
 - Or partial such as schools and hospitals



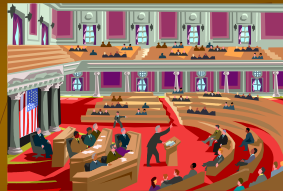
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Preemption

- "A judicially created doctrine which says that a state may not pass a law which is inconsistent with federal law. If a state enacts such a law, the federal law will take precedence over the state law to the extent that there is conflict."



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Examples of Preemption

- States that have adopted building codes prohibiting adoption of any other codes by local jurisdictions
- Federal Manufactured Housing Law
- Federal Safety Glazing Act
- The Consumer Product Safety Act (CPSA)
- ADA, FFHA, 1973RH, etc.

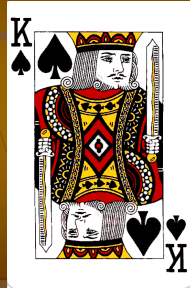
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Sovereign Immunity

- “The King Can Do No Wrong.”
- “A judicially created doctrine which prevents a party from bringing a suit against the government.”
- Applies to state and its agents.
- Applies to tort liability and regulation



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Sovereign Immunity - Regulation

- State buildings are exempt from obtaining permits, plan reviews and inspections by local jurisdictions.
- In some cases, states have waived their immunity for all or certain types of state facilities
- Important to know what types of state buildings are subject to local control

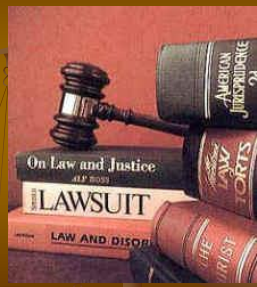
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Sovereign Immunity

- Building Official action:
- If in question, suing the state for **declaratory relief** to obtain an **injunction** could be a legal option.
- Determines if state is “immune”
 - Declaratory relief: Determination by court as whether state is immune in this particular case



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Injunction...



- **Injunction / injunctive relief.** A judicial order prohibiting a specified conduct; it may be *temporary* or *permanent*.
- An injunction could operate for or against the building department.

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Reversal



- **Reverse.** To overturn by contrary opinion, for example, a lower court's decision.
- A board of appeals might also **reverse** a decision of the building official.

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Federal Legislative Law

- Terms
- Role of the Federal Government
- The Consumer Product Safety Act
- Immunity


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Federal Legislative Law: Terms

- **Acts.** Another name for a statutory law, and thus having the same power as a statute. Federal law is law in the form of statutes, acts or rules which are enacted by Congress.




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Federal Legislative Law: Terms

- **Common Law.** The body of law which developed and evolved in England from judgments and decrees of the courts and which has general application
- It may also mean laws created by judges, and not legislatures.



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Role of the Federal Government

- Generally, a very limited and indirect role in the area of local building codes
- Examples of some preemptive federal laws:
 - Consumer Product Safety Act
 - Manufactured Housing ("mobile homes")
 - Federal Safety Glazing Act
 - Low Flow Plumbing Fixtures Requirements
 - Americans With Disabilities Act ("ADA")

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Consumer Product Safety Act...

- Based on Congressional finding that "...unacceptable number of...products which present unreasonable risks of injury are distributed..."
- Consumer Product Safety Commission (CPSC) can ban hazardous products.



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Consumer Product Safety Act...

- Building codes often contain safety standards related to products.
 - Consumer Fireworks
 - Cellulose Loose Fill Insulation
 - Interior Floor Finish Critical Radiant Flux
 - Safety Glazing
- If products are already covered or will be covered by the CPSA, the local provisions are preempted by the act.

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CPSC Case Study



- National Kerosene Heater Assoc. v. Commonwealth of Massachusetts
- Mass. banned unvented kerosene heaters
- CPSC concluded low incident of injury – No rules made.
- Court found that Mass. could still enforce local rules.

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Federal Immunity



- Federal government is immune from effect of municipal police power.
- Local Building Codes have no impact on federal construction.

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Administration and Enforcement...

- Permit Issuance and Revocation
- Inspection
- Plans Examiner
- Administrative Search Warrants
- Civil prosecutions
- Injunctive Relief
- Handling Complaints
- Evidence
- Administrative Guidelines

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Permit Issuance

- This is the most important step in building code administration and enforcement.
- The application and the permit itself are the two most important documents to determine what the contractor is doing on the job site.
- It is crucial that permits are issued in a standard fashion & that all necessary steps are taken to insure that they are issued properly.

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Permit Issuance

- Plan reviewer must be carefully instructed as to duties.
- An error may affect safety of inhabitants
- Plan reviewer work should be double checked.



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Permit Revocation

- *105.6 Suspension or revocation.*
 - *The building official is authorized to suspend or revoke a permit issued under the provisions of this code wherever the permit is issued in error or on the basis of incorrect, inaccurate or incomplete information, or in violation of any ordinance or regulation or any of the provisions of this code.*

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Revocation Reality



- Once permit is granted:
- Difficult to revoke permit...even when mistakes occur.
- Courts often lean toward NOT enforcing the code rather than revoking the permit

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Revocation: Theories

- **Equitable estoppel**
- **Vested rights**
- Could the building official be held liable for the costs incurred by the builder in relying on a permit that was issued in error?

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The "E" Word

- **Estoppel.** A rule of law that when person A, by act or words, gives person B reason to believe a certain set of facts upon which person B takes action, person A cannot later, to his/her benefit, deny those facts or say that his/her earlier act was improper.

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More to the point...

- **Equitable estoppel.** "A doctrine by which the municipality may be precluded by its actions, or by its failure to act, from asserting a right which it otherwise would have had."

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Revocation



- Snyder v. Minneapolis
- City issued permit to demolish existing building and build new one.
- City revoked permit for new building after existing was demolished. Permit was issued in error.
- Court found for owner due to negligent issuance of permit.

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Building Official Culpability

- Could the building official be held personally liable for costs incurred due to his/her error?
- Yes...in the State of Washington and some others
 - Courts find that it is acceptable to revoke permits, but person making the mistake is monetarily responsible.



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Building Official Culpability

- Section 104.8 – Liability
- Any suit 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 representative 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.

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Other Revocation Terms

- Writ of mandamus
- Due process

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Writ of Mandamus



- Denial of issuance of a permit may result in a Writ of Mandamus
- Essentially orders municipality to perform one of the duties it is responsible for performing.
- Plaintiff must demonstrate that he/she is entitled
- Might require board of appeal action prior to court action.

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Due Process

- "The legal aspects of building department administration are composed of two major components - enforcement and prosecution. The mechanics of administering, carrying out or invoking either are governed by a broad spectrum of legal maneuvers, restrictions, prohibitions and mandates. Omitting or ignoring any required legal step dilutes the intent and effectiveness of law and raises serious questions of the integrity or intelligence of the individual who is responsible."
- -Robert E. O'Bannon, *Building Department Administration*-

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Due Process

- A party has the right to be granted all remedies available.
 - Hearing in front of the BO
 - If aggrieved, hearing in front of the Construction Board



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DeBry v. Noble/Salt Lake Cty.

- DeBry purchased an office building under construction.
- Seller failed to disclose that only a foundation permit had been issued to Noble and requested a TCO.
- County determined that there was not a building permit issued past the foundation permit.
- County performed an inspection and notified DeBry that a permit was required and outlined several repairs.
- DeBry did nothing, received two more notices to repair the issues.
- Building Department issued a notice to vacate.
- DeBry took County to Court.
- Court found that DeBry's due process rights had not been violated.

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The "L" Word

- **Laches.** A legal doctrine whereby those who take too long to assert a legal right, lose their entitlement to compensation.

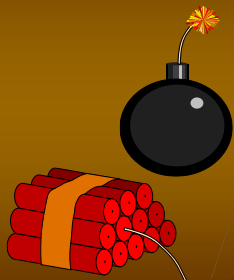


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The Deadly "E" & "L" Combination Punch:



- When it is claimed that your suit against a person is not valid due to laches, it is called "estoppel by laches."

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Estoppel by Laches

- Failure to take legal action until the other party is prejudiced by the delay.
 - Statute of limitations
 - Why? ...documents might be destroyed; witnesses may die, become incapacitated, or be otherwise unavailable; and human memory has its limitations



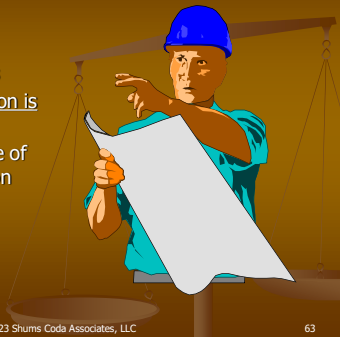
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Inspections

- Standard forms for inspection records
- Standard procedures
- Written documentation is extremely important
- date, address, nature of violation, code section
- photos or videos of violations wherever possible




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Plans Examination




- An area of potential liability
- Use the most highly qualified individuals possible
- Architect or engineer's stamp not always sufficient
- Documentation: notes, records, standard plan review form

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Documentation:

- Date stamp everything that comes into the office.
- Keep a record of all conversations, including names and phone numbers and as many other details as possible.
- If you aren't sure, tell people that you will call them back later with an answer. Don't guess.



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Documentation, cont'd


- Respond in writing if at all possible, especially if the response is to a letter sent to you stating an assumption of facts unless the sender hears otherwise. Section 104.11 requires written documentation stating specific code reasons why an appeal was not granted.
- Have regularly scheduled meetings with your enforcement team, at least monthly, but more often as needed to discuss current issues.
- Keep your attorney informed on issues and people who may be contacting them. Don't let them be "blind-sided." Keep information & copies of files supplied to the attorney up to date.

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Form Letters...use that computer!

- "Automatic" Enforcement Process
 - Complaint
 - Inspection to verify
 - Notice of violation
 - Re-inspection
 - 2nd Notification
 - Legal Action




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"The Whole File And Nothing But The File..."

- In preparing for trial, include originals or copies of all of the following, if applicable, all of which should already be in the building permit or violation file:
 - A summary or chronology of the case
 - Record of receipt of initial complaint(s)
 - Record of attempt(s) to contact owner of property
 - Affidavit for administrative search warrant
 - Administrative search warrant
 - Report from initial site investigation

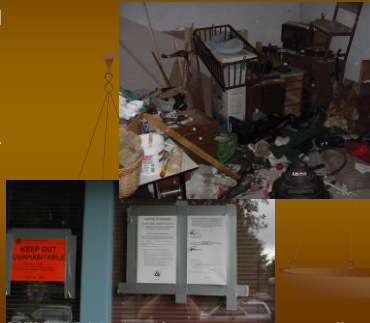


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"The Whole File And Nothing But The File..." (cont'd)

- Photos from initial site investigation
- Video tape from initial site investigation
- Copy, stub and/or photo/video of posted stop work notice



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“The Whole File And Nothing But The File...” (cont'd)

- Initial violation letter sent to property owner
- Follow up inspection report
- Any additional photos or video tape



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“The Whole File And Nothing But The File...” (cont'd)

- Follow up letter sent to property owner
- All correspondence received from property owner
- Records of all phone calls or other conversations with property owner
- Building permit application
- Plans, specifications and all other documents received as part of any building permit application
- All correspondence sent to property owner
- Applicable codes or ordinances adopted by the jurisdiction

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Administrative Law

- Terms and Definitions
- Creation of the Board of Building Code Appeals
- Application to the Board
- Powers of the Board
- Appeals Procedures

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Terms And Definitions

- **Answer.** In a lawsuit, a written response by the defendant which either denies in part or in whole the allegations lodged by the plaintiff.
- **Burden of Proof.** Refers to who must prove the issue in a controversy and how much proof must be presented to an administrative tribunal or to a court of law in order to be awarded the sought after relief.

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The Board of Building Code Appeals...

- **Creation of the Appeals Board or Board of Review.** IBC Section 112, Appendix B
- **State Law.** In some instances, including for statutory counties, some state statutes specify the nature and powers of the appeals board.



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The Board of Building Code Appeals...



- **Powers.** The board shall have no authority to waive requirements of the code.
- But can grant administrative modifications

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Application to the Board...

- Building official denies permit.
- Applicant must be informed in writing of right to appeal.
- Important for Board of Appeals to be in place, with members appointed.
- Provide printed form for appeal.



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Application to the Board...



- Important for applicant to express in writing what they want as a result and to **“answer”** why they believe board has power or jurisdiction.
- Appeal form becomes part of court record if case is appealed to a court of law.

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Exercise

- The members of the building code board of appeals meet privately with the building official to discuss the appeals cases that they will hear later that day. Why could this potentially cause problems?

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Appeals Procedures



- IBC 112.3 Qualifications
 - The board of appeals shall consist of members who are qualified by experience and training to pass on matters pertaining to building construction and are not employees of the jurisdiction.
 - ARS 11-862 - D. Each appointee shall have substantial experience in the field covered by the particular code.
- Rules of Procedures

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Appeals Procedures



- Open Public Meetings
- Quorum
 - Number not code defined.
- Notice Required
 - Generally only to the board and the appellant

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Appeals Procedures



- Burden and Presentation of Proof
- Rests with the appellant.
- Board generally has wide discretion on what evidence may be heard.

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Appeals Procedures



- Building Official
- Explain to board why appeal was brought...
- Why dept. denied application...
- Scope of relief being sought.

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Appeals Procedures



- Two types of review by court if appealed beyond the BOA:
- Based on the administrative record of the BOA ...or...
- De Novo

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De Novo

- **De novo.** A hearing that is re-held in front of a court.
- The court disregards the facts (the record) collected in front of the administrative tribunal, i.e., the board of appeals, and gathers its own facts.



Da Nova ??

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Rehearings



- Varies tremendously state by state
- By higher authority
 - City Council
- Most don't make them available

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Orders



- Orders and decisions of the board should be handed down in writing.
- Should contain reasons for the decision

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Constitutional Law

- Search and Seizure
- Substantive Due Process
- Equal Protection Clause



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Terms and Definitions...



■ **Appeal.** After a decision, a party may ask a higher court to change or set aside a lower court's ruling or an administrative body's decision. Therefore, an appellate court can overrule a lower court's decision.

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Terms and Definitions, cont'd



■ **Appellate Court.** A court having the power to hear and review lower court decisions.

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Administrative Search Warrants



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Terms and Definitions, cont'd

- **Per Se.** "In itself." Negligence, *per se*, means that a person's conduct is in itself negligent without considering the acts and circumstances of the behavior.
- Supreme Court has held that a search is *per se unreasonable* if it takes place without a warrant having been issued.

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IBC Entry

- **104.6 Right of entry**
- Where it is necessary to make an inspection to enforce the provisions of this code,
- or where the building official has reasonable cause to believe that there exists in a structure or upon a premises a condition which is contrary to or in violation of this code which makes the structure or premises unsafe, dangerous or hazardous,
- the building official is authorized to enter the structure or premises at reasonable times to inspect or to perform the duties imposed by this code,

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IBC Entry

- provided that if such structure or premises be occupied that credentials be presented to the occupant and entry requested.
- If such structure or premises is unoccupied, the building official shall first make a reasonable effort to locate the owner or other person having charge or control of the structure or premises and request entry.
- If entry is refused, the building official shall have recourse to the remedies provided by law to secure entry.

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Camara v. San Fransisco



- Supreme court held:
 1. If any occupant of a residential structure does not consent to an inspection, a warrant must be obtained to gain legal entry.
 2. An occupant who does not consent to an inspection cannot be prosecuted for any law requiring obedience to a municipal official.

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Administrative Search Warrants

- State provisions for administrative search warrants, rules, procedures
- **Probable cause**
- Important to work with your attorney
- Avoid potential liability under federal civil rights acts or state law tort of trespass
- Also good to have a good working relationship with local judge(s)

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Consent



- 4th Amendment Exception....
- The easiest way to gain entry is to obtain consent.
- Do not rely on a minor's consent.

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Consent



- Generally, a tenant may give consent for entry (Jackson v. Davis)
- Not landlord *unless* specifically permitted in the lease.
- Tenant may give consent to common areas.
- 2 Tenants – only to that under their control

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Consent



- Trespassers may not give consent.
- Not on lease, no consent.
- However...courts grant latitude to those that *believe* they have received lawful consent.

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Plain View Doctrine



- Exception to the fourth amendment
- Holds that an inspector is not required to obtain a warrant to find a violation that is visible from a location they are entitled to be.
- Commercial property is public

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Enter? Or go get a warrant?

- Do not enter through locked gates or "No Trespassing" signs, except with the owner's permission.
- Areas that might normally be accessed by someone like the mailman, a delivery man or a salesperson, or anything that can reasonably be seen from those kinds of public areas or from a public road or street, may usually be investigated without the owner's permission and without a search warrant.
- If there is any doubt, consult with your attorney before entering!



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Emergencies



- 4th Amendment Exception
- If an inspector believes an emergency exists, he/she may lawfully inspect the premises without consent or a warrant
- Should be relied on ONLY in very limited circumstances.

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Substantive Due Process



- Any and all legislation enacted by a government must bear some rational relationship to a legitimate government function; i.e., the law must make sense.
- Elemental way to ATTACK the building code.
 - "The Building code does not apply to this particular case".

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Equal Protection Clause

- Clause to the Fourteenth Amendment
- Ensures that state governments do not arbitrarily discriminate in applying laws to different individuals or groups of people.
- Code provisions must be applied consistently to persons and buildings.
 - Residential provisions to residential

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Facial Validity



- Means that, "on its face," the words of a statute are valid, although, in reality, they may not be applicable. ???
- Equal protection clause is applicable
- It remains permissible to classify a building with higher requirements when it can be justified.
 - Building Classification – H provisions in an R

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Discriminatory Enforcement



- A legal concept that looks at whether some person or group was impermissibly singled out for enforcement.
- Permit issuance and enforcement can be discriminatory IF inconsistent

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Related Property Law Concepts

- Zoning Ordinances
- Covenants
- Easements
- Subdivision Regulations

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Liability for Intentional Wrongdoing

- Intentional Torts
- Malicious Prosecution
- Wrongful Civil Proceedings
- Abuse of Process
- False Imprisonment
- Intentional Infliction of Emotional Distress
- Assault and Battery
- Trespass

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Intentional Tort v. Negligence

- **Intentional Tort.** Wrongful conduct which was intended, i.e., punching an alleged code offender in the mouth (battery).
- **Negligence.** Involves conduct which was not intended to cause harm or injury but which, nonetheless, did so, and which also breached some duty of care imposed by the law, i.e., running a red light and causing a traffic accident.

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Malicious Prosecution



- The wrongful institution of criminal proceedings by one private citizen against another.
- Building Official may be vulnerable

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Malicious Prosecution

- 4 Issues:
 1. The person who makes the complaint may be sued
 1. Always have a complainant sign a complaint
 2. Always perform your own investigation.
 2. Must have termination of the proceeding favoring the accused
 1. Consult w/ Atty. to determine termination policy

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Malicious Prosecution

- More issues:
 3. Probable Cause
 1. Plaintiff has burden of determining if BO had probable cause. ALWAYS HAVE PROBABLE CAUSE!!!!
 2. Know who you are serving! Is it REALLY the owner?
 3. Date the citation on the day the violation occurred, not the date the citation was served. 30 days – reinspect the site.
 4. Malice
 1. Can be easily found by the court. Usually assumed if no probable cause is found. Be very cautious with enforcement actions.

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Assault and Battery



- Usually involves physical contact
- BO will NOT be indemnified!
- Words alone are usually not sufficient to constitute an assault
 - But may be deemed emotional distress

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Intentional Infliction of Emotional Distress



- Results when someone exceeds the limits of "reasonable bounds of decency".
- Cases are often brought, but rarely proven.
- Be consistent and professional.

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Trespass



- Acting in good faith does not constitute a defense.
- Most important defense is CONSENT.
 - Consent is valid only as long as it is given.
 - If asked to leave...LEAVE!
- A valid warrant is another defense.

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Negligent Wrongdoing

- Terms and Definitions
- Elements of Negligence
- Defenses
- Immunities
- State Tort Liability Acts
- Indemnification and Insurance

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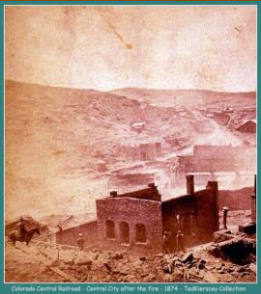
Elements of Negligence

- The defendant must have:
 1. Owed a duty to another to act to a certain standard
 2. Failed to act in accord with that standard
 3. Therefore breached that duty
 4. Thereby causing injury or damage to another.

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Public Duty Doctrine

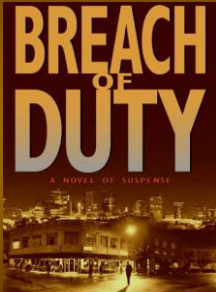


- To whom is the *duty* owed?
- Must prove that the duty is individually owed and not just to the general public.
- The purpose of the building code tells us which.

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Breach of Duty




- Neglect or failure to fulfill in a just and proper manner the duties of an office.
- Can be breached by either:
 - Action
 - Inaction (most common)

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The Feasance Family



- **Mal Feasance.** The performance of some act which a person ought not to do at all.
- **Mis Feasance.** The improper performance of some act which a person may lawfully do.
- **Non Feasance.** The nonperformance of some act which a person is obligated or has the responsibility to perform.

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Immunities



- A building official may be able to claim absolute immunity.
- However, courts reluctant to grant.
- Should always attempt to use as a defense in all cases.

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Qualified Immunity

- As outlined by the Supreme Court in *Harlow v. Fitzgerald* 457 U.S. 800 (1982)[1], qualified immunity is designed to shield government officials from actions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known".

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State Tort Liability Acts



- May protect the building official
- Often extends to citizen volunteer boards
 - Construction Board of Appeals

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Civil Rights Actions

- Terms and Definitions
- The Civil Rights Act of 1871 (42 U.S.A. Section 1983)
- The Fair Housing Act
- The Americans with Disabilities Act
- The Attorney's Fee Award Act (Section 1988)

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Civil Rights Actions

- **Procedural Due Process.** Parties whose rights are to be affected are entitled to be heard, and therefore must be notified.
- **Respondeat Superior.** A doctrine which states that the master or employer is responsible for the wrongful acts of his/her servant or employee.

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The Civil Rights Act of 1871, Section 1983

- "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

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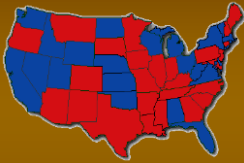
The Civil Rights Act of 1871, Section 1983

- In order to establish a cause of action against a public official, a plaintiff must prove:
 - The public official acted under color of state law.
 - There was a deprivation of federal constitutional or statutory rights.
 - *You use your power as a code official to deprive some person of their rights...the God Complex*

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“Under Color of State Law”



- Monroe v. Pape (365 U.S. 167 (1961)). U.S. Supreme Court decision considering the meaning of “under the color of state law.”
- Basically...a municipal official cannot violate the constitutional rights of another merely because they work for a governmental agency.

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Municipal Liability (post Monroe)

- In the absence of written policy, even a single action by the official local legislative body constitutes an official policy
- An action taken by someone with final policy making authority will constitute an official policy.
 - Watch those precedents!

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Deprivation of Federal Constitutional or Statutory Rights



- Examples:
 1. Illegal search and seizure
 2. Prosecution without reasonable cause.
- Always give a builder the opportunity to be heard.

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Immunities

- BO's have qualified or good faith immunities under Section 1983.
- Governmental officials are generally shielded from liability...if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.
 - If the BO acts in a manner that is specifically unconstitutional, then no immunity
 - If the BO acts in a manner that is not specifically unlawful under a statute or the constitution, then he/she is immune.

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Other Acts:

- The Fair Housing Act (FHA)
 - May be locally enforced through enabling legislation.
- The Americans With Disabilities Act (ADA)
 - ADA Technical Assistance Center, 1-800-949-4232
- The Attorney's Fee Award Act (Section 1988)
 - Defendant may be liable for fees in a civil rights action.

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The Role of the Witness

- Terms and Definitions
- Fact Witness
- Guidelines for Witnesses
- Sequestration of Witnesses
- Expert Witness
- Consulting Experts

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Fact Witness

- "A witness who testifies to facts of which he or she has personal knowledge."



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The Role of the Witness

- On the witness stand:
 - Take your time
 - Use common sense
 - Be reasonable
 - Speak naturally
 - Try to communicate directly with the jury



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Guidelines for Witnesses...and nothing but the truth...

- Be prepared. Review all pertinent documents prior to your testimony.
- Dress neatly and act appropriately.
- Be respectful of the judge and everyone else involved in the process.
- Be polite, courteous and professional.
- If you have any questions at all about the issues or procedures, ask your attorney.

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Witness Guidelines...and nothing but the truth..., cont'd

- LISTEN CAREFULLY to all of the questions.
- If you don't understand a question or need more time to think about it, ask to have the question repeated.
- Speak clearly and audibly.
- Answer briefly, with a simple "yes" or "no" if possible. Do not volunteer additional information.

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...and nothing but the truth...cont'd

- If you don't know or don't remember the answer to a question, simply say "I don't know" or "I don't remember."
- Feel free to consult exhibits, notes or records that you may have been permitted to bring to the stand before answering questions.
- Be truthful. Don't get caught up in gamesmanship or what the questioning attorney is trying to do.

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...and nothing but the truth...cont'd

- Be careful about getting into a rhythm with the attorney's questions and your answers, leading you to say something that you really don't mean to say. If necessary, break the rhythm occasionally by asking a question before answering, asking to have the question repeated, taking a drink of water, etc.
- Try not to take things personally. Don't allow yourself to be provoked into an angry outburst. Try to maintain a cool, calm, detached attitude.

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Sequestration of Witnesses



- **Rule of sequestration.** "Requires that any witness who has not yet testified and who is not a party must be excluded from the courtroom".

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The Expert Witness



- Qualifying as an expert witness
- Differences about testifying as an expert witness:
 - "Here, you say...?"
 - "In my opinion,..."

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Expert Witness, continued

- **Expert witness.** "A witness who has specialized experience and knowledge and testifies in order to aid the jury in understanding complicated and technical topics."
- **Voir dire.** "Literally, 'to speak the truth.' The examination by attorneys of prospective jurors to determine their suitability, or of the opposing counsel's witnesses to determine competence to testify."

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Consulting Experts

- Not a witness
- An expert hired to help the attorney prepare for trial
- Need not be divulged to the other side
- A building official might serve as a consulting expert
- Could also sit with the attorney during trial

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Sources for Legal Terms and Definitions

- Black's Law Dictionary
- Building Department Administration
- Legal Aspects of Code Administration

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Internet Resources

- International Code Council
 - www.iccsafe.org
- Harvard Law Review
 - <https://harvardlawreview.org/>
- The Legal Pad
 - <http://legal-Pad.com>

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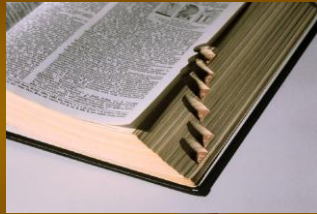
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Ethics in Public Life

- What is the definition of Ethics?

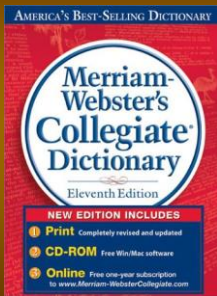


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Ethics?



- Webster's Dictionary
 - The discipline of dealing with what is good and bad with moral duty and obligation.
 - A set of moral principles and values
 - A theory or system of moral values

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Ethics

- Standard of Conduct
- Can be applied to personal behavior and to disciplines
- Distinguish between the right and wrong ways we should behave in our personal and professional lives.



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Ethical Behavior vs. Legal Behavior



- Conflict with each other at times
- Doing the right thing requires more than being legally justified
- Means being held to a higher standard



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Ethical Behavior vs. Legal Behavior

- Examples of legal behavior, but unethical?
 - Leaving work a few minutes early each day
 - Making a personal long distance call on your city/s phone line
 - Charging sick leave when you're not sick
 - Scapegoating
 - Blaming others for missed commitments, bad decisions, or poor results



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Ethical Behavior vs. Legal Behavior

Chicago Inspector Admits To Killing Time
 VIDEO: Pam Zekman reports.

(CBS 2) CHICAGO A Chicago building inspector, who was caught by the CBS 2 Investigators killing time on the city's dime, pleaded guilty Tuesday, admitting he didn't do the work he was paid to do.

Saying he was sorry for what he had done, a city building inspector pleaded guilty to charges of theft and official misconduct.

In November 2002, we showed Boris Gurevich at home for days, at the same time his log sheets showed he was inspecting buildings for the city.

When CBS 2 Investigator Pam Zekman confronted him, Gurevich took off.

"Mr. Gurevich, what are you doing at home in the middle of the day? Aren't you supposed to be inspecting buildings?" CBS 2's Pam Zekman asked as she ran down the street after Gurevich.

On Tuesday when confronted by a judge, Gurevich finally admitted he cheated the taxpayers on 14 out of 34 days he was followed by the city inspector general's office.

He was sentenced to two years of felony probation and ordered to pay about \$1,700 restitution for the salary he collected when he did not work -- an amount that prosecutors say is probably a fraction of the money lost.



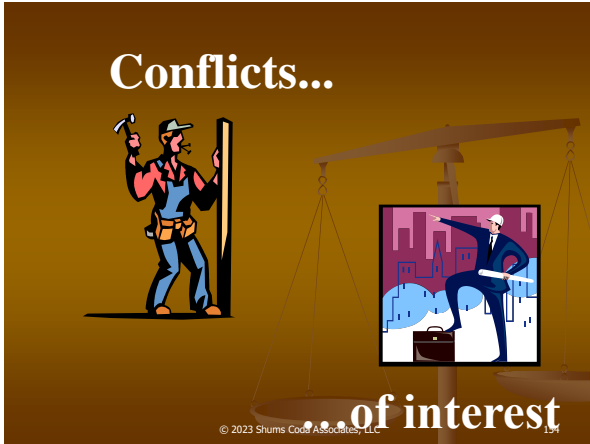
Some departments now monitor inspector activity via GPS enabled cellphones.

Article Courtesy: CBS2Chicago.com

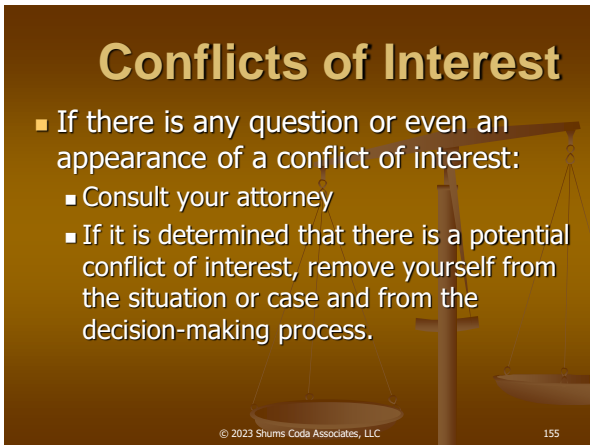
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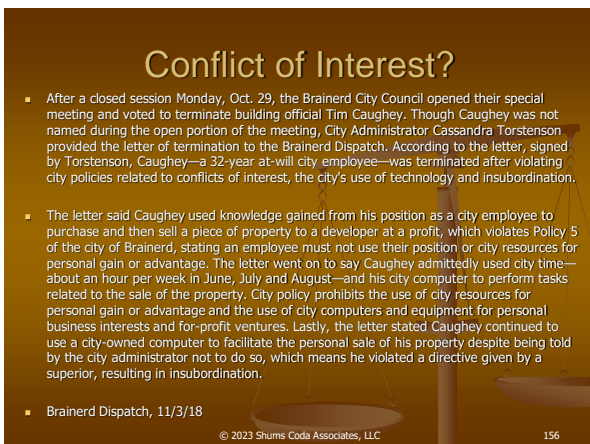
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Code of Ethics

- A jurisdiction's set of rules defining good and bad behavior in particular situations.
 - Defines the ethical behavior, values, and organizational norms that employees should follow.
 - Local ordinances
 - Policies
 - Procedure Manuals

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Policy Makers Not Following Policy

Witness: City aide told me to lie

June 13, 2006

BY NATASHA KORECKI, STEVE WARMBIR AND FRAN SPIELMAN Staff Reporters

A Mayor Daley press aide told a deputy commissioner to lie to the public and say the city hired a 19-year-old building inspector without knowing he was the son of a clout-heavy union official, a witness testified in the City Hall hiring trial Monday.


In September 2004, Sun-Times columnist Carol Marin reported that Andy Ryan, 19, was hired as a building inspector even though the city requires all inspectors to have completed a four-year apprenticeship and have two years work experience. Ryan is the son of Tom Ryan, the secretary-treasurer of Carpenters Local 13. The union was Mayor Daley's largest campaign contributor in 2003.

Courtesy: Chicago Sun Times

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City scandal raises questions in porch collapse that killed 13



Which in turns leads to questions about qualifications of the entire department...

Courtesy: ABC7Chicago.com

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Paul Heinicke

October 26, 2004 - The City of Chicago Buildings Department scandal has raised new questions in connection to the deadly Lincoln Park porch collapse last year. Thirteen people died when a porch gave out at 713 Wrightwood. Now, officials want to know if the inspectors who said the porch was secure were qualified to make that call. Those inspectors have been deposed about their work.

RELATED LINKS

▶ ABC7 Video Clip

It raised more than eyebrows last month when it was revealed that a 19-year-old and a 23-year-old with little experience were on the payroll as Chicago building inspectors. Embarrassed, the city reviewed its recent hires, but not the qualifications of its more veteran inspectors. The deadly Wrightwood porch collapse case now raises questions about how and why some of them were hired years ago.

When the porch at 713 Wrightwood collapsed 16-months ago, 13 people died and 50 more were injured. The porch had passed five previous annual inspections despite the fact that the floor joists were undersized, the deck was too big, and was improperly secured to the building.

Now, court depositions of five building inspectors or supervisors who were involved in those Wrightwood inspections reveal that at least four of them had little or no experience in the building or construction trades when they were hired in the 70's and 80's. They were supposed to have had a minimum of five years in the trades to get hired.

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Cause or Perceived Cause?



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THE NEWSMAGAZINE OF MECHANICAL CONTRACTING

Feds indict 13 Philly inspectors

BY ROBERT P. MADER OF CONTRACTOR's staff

PHILADELPHIA — A federal grand jury has indicted 13 current or former Philadelphia plumbing inspectors for taking bribes from plumbing contractors for as long as 20 years. The inspectors, who worked for the city's Construction Services Department in the Department of Licenses and Inspections, were accused of taking bribes from \$5 to \$20 at a time, with the money concealed inside triplicate permit forms or palmed in handshakes.

The inspectors were arraigned in mid-March in U.S. District Court and entered not guilty pleas. A trial date has not been set.

U.S. Attorney Patrick L. Meehan announced the indictment, which calls the bribes a "systematic scheme of extortion of over \$169,000."

"This indictment represents an ongoing commitment by the U.S. Attorney's office and the FBI to prosecute systemic corruption by local government officials," Meehan said. He noted that the indictment charged local officials with misusing their office for personal gain.

- Chicago plumbing inspectors fired for taking gift certificates.
- Philly plumbing inspectors convicted of taking bribes.

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Code of Ethics

- International Code Council
- International City Manager's Association
- American Planning Associations



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Code of Ethics

- Code of Ethics is critical for maintenance of a department's credibility.
- It is very hard to overcome a reputation.
 - Chicago
 - New York City
- Management must stay in touch with staff...and visa versa.

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The Importance of Ethics

- Public Trust
- Democracy
 - Treat Citizens
 - Equally
 - Fairly
 - Honestly



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- Why do you think that ethics in government is important?
- What actions do you take to foster or further ethical behavior in your office?



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Commerce City official treats self well

List of luxuries isn't in line with metro counterparts

By CBS 4 News Reporter Brian Mansel
12/15/16

The city manager in Commerce City has bought \$200 and \$300 pens, ordered more than 40,000 worth of flowers from his wife's flower shop and spent nearly \$200 on sheepskin seat covers for his city-owned SUV — charging it all to taxpayers.

And last year, the City Council rewarded Perry Vandevanter, who was hired in 2001 and is paid \$140,000 a year, with a \$21,000 bonus and an all-expenses-paid, house-furnished trip to Hawaii.

A review of three years of Vandevanter's spending reports by CBS 4 News shows \$187,000 in expenses, including higher percentages on pens than his counterparts in similar jobs.

Among the purchases: A \$299 Salter Imperial fountain pen in July 2015.

Vandevanter's credit card showed approximately \$20,000 spent last year on meals, travel, recreation, meetings, entertainment, pens, gifts and other expenses.

Perry Vandevanter's resume

- 2001-present: City manager of Commerce City, population 22,000
- 2000-2001: Acting city manager of Commerce City
- 1995-2000: President, Tri-Town Plaza, Longmont
- 1987-1994: Chief professional officer, United Way of South Plains, Greeley
- 1986-1987: Managing Partner, Vandevanter Consulting, Colorado
- 1982-1986: Chief executive officer and chief financial officer of various oil and gas companies in Colorado

Watch Brian Mansel's follow-up report on CBS 4 News tonight at 5 p.m.

- \$1,391 on six pens in 8 months
- \$247 sheepskin seat covers
- \$300 for Starbucks coffee cards
- \$214 for a briefcase
- \$1,200 for flowers from wife's flower shop
- \$294 for a notebook and zipper carrier

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The Consequences of Unethical Behavior

It's Christmas time, and you are trying to get some plans approved in the building department where you live so that you can finish the new kitchen that you have been working on. You know that this approval process protects your safety, and you appreciate this requirement and the service you receive. You are hoping that you can complete the kitchen before your annual neighborhood party. You have taken an hour off from work to rush over to the county government building. As you enter, you see a huge line, mostly contractors and a few architects & engineers carrying huge bundles of building plans. The office is decorated for Christmas: pretty lights, a small tree, and three or four gift baskets. While you are milling around waiting for your turn, you see that the gift baskets are from the Arnold Construction Company, Burton Roofing, and Jon and Associates Electrical. What are you now thinking?

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Time for the department feeding frenzy!

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The Consequences of Unethical Behavior

- You have just started to work for the city. You are really excited about this opportunity because it is your first chance to supervise a team of other community planners. You are anxious to learn all about the neighborhoods in the city, and you ask your staff members to gather statistics about crime, housing stock, and the number of code enforcement violations. The most senior team member reports back to you that she has looked and talked to other city staff members and found that there are no statistics on the condition of the housing stock. At the time, you think that this is a little unusual, but you have faith in your staff. About a month later, you are reading through a file left in your office and you discover the statistics you are looking for in a memo. The memo had a large distribution list, including the staff person you originally asked. What are you now thinking?

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The Consequences of Unethical Behavior

- Lack of trust among staff
- Cynicism about government
- Lowered staff morals
- Public safety jeopardy
- Government work left unfinished
- Waste of government resources
- Citizens and staff not treated fairly in terms of public and personnel decisions
- The best decisions left unmade

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The Personal Ethics Quiz

- A fellow employee who is a friend of yours has been taking petty cash. You have some knowledge of your friend's actions. What would you do?
 - You tell the appropriate authority what you know.
 - You keep quiet because you do not want your friend to get into trouble over such a small matter.



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The Personal Ethics Quiz

- A prominent developer is about to put up a new housing development . You and your spouse would love to buy one of these premier homes. The trouble is timing. You have just sold your house and need to move quickly. You casually mention this to the developer, whom you know well from your work in the building department. He offers to rent you another unit temporarily at a really good price while he builds your home.
 - You thank the developer but turn down the offer.
 - You accept the temporary low-rent unit, because you do not anticipate that any issues involving the developer will come before the council in the next year



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The Warning Signs

- No one will ever know...
- I can still be objective...
- I deserve it...
- Let's keep this under our hats...
- Oh, don't be a prude...
- They'll never miss it...
- They had it coming...
- Don't tell me. I don't want to know...
- It's okay if I don't gain personally
- Technically, it's legal...
- Everybody does it...
- Yes, but...
- This won't affect my work

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City of Tempe, Arizona

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The Ethical Decision Making Process

- Phase 1
 - Understand the Issue
- Phase 2
 - Determine the Options and Consequences
- Phase 3
 - Take Action

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Phase 1: Understand the Issues

- Gather the facts
- Analyze the facts to determine whether there is a legal problem
- Analyze the facts to determine whether there is an ethical problem
- Define the ethical issues

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Theory of Utility

- Will this action provide the greatest good for the greatest number of people?



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Theory of Rights

- Will this action respect individual rights such as life, freedom, privacy, and property?

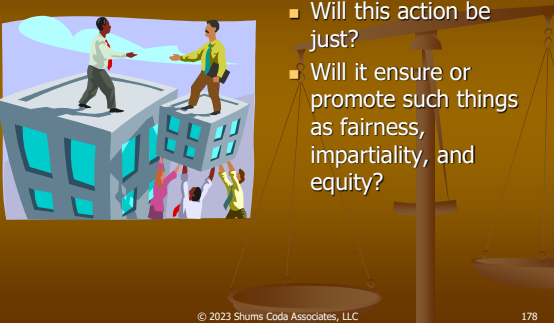


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Theory of Justice




- Will this action be just?
- Will it ensure or promote such things as fairness, impartiality, and equity?

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Phase 2: Determine Options and Consequences


- Determine whether there are options
- List the options
- Understand the consequences of each option



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Consequences



Will I need medication to sleep at night?

- Will this option violate any existing code of ethics?
- Does this option conform to my own values?
- Does this option conform to my community's values?

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Consequences



- How will this option affect the local government?
- How will this option affect other (staff, citizens, businesses, etc.)
- Will this option harm my profession?

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Consequences

- Will either a family member or I gain personally or avoid a negative consequence as a result of this option?
- What will be the public perception of this option?



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Consequences – Public Perceptions



- It is my break time, I can do what I want...



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Phase 3: Take Action

- Reach a conclusion
 - Would I feel comfortable reading about my decision in the newspaper?
 - How would I explain my decision to a newspaper reporter?
 - Could I explain this to my grandmother and look her in the eye while doing so?



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Lakewood To Foot Bill For Crash

Official's wife driving city vehicle caused I-25 wreck

- LAKEWOOD - A four-car accident caused by the wife of City Manager Mike Rock while she was driving his city-owned pickup will cost taxpayers nearly \$9,000. That figure includes the cost of repairs to three of the four vehicles and rental vehicles for two of the other drivers. The fourth car was undamaged. The city, which is self-insured, will bear the cost, said Ken Milano, Lakewood's employee relations director. The claims, including vehicle repair and rental car use, total \$8,846. Repairs to Rock's city-owned 2004 Chevrolet Silverado are included in the total. In an accident report filed with the city, Rock stated that his wife, Patricia L. "Trish" Layton, was driving the Silverado "because of allergy problems." Mayor Steve Burkholder said last week Layton was driving the vehicle because Rock was in a lengthy meeting the mayor also attended. When asked Wednesday about the accident report, Rock said his allergies at times cause his eyes to swell and he can't drive.

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 Charley Abie, Rocky Mountain News - May 25, 2005 185

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Some Common Examples

- You are offered a gift by a contractor, developer, etc:
 - Donuts
 - Tickets
 - Drinks after work
 - Equipment



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Some Common Examples

- Your jurisdiction:
 - Neighbor building without permit.

- Not your jurisdiction:
 - Neighbor building without a permit.



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Components of an Ethical Framework

- Leadership
 - Style
 - Systems that support employees
 - Identification of goals
- Organizational values and norms
- Ethical guidelines

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Components of an Ethical Framework

- A code of ethics
- Human resource systems
 - Hiring
 - New employee orientation
 - Additional ethics training
 - Performance evaluation
- Ethics counselors and advisors


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Ethics in Action

- There are many paths to the top of the mountain, but the view always remains the same. (Chinese proverb)

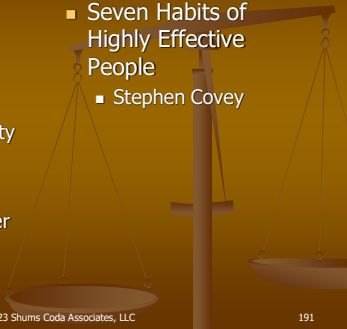


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Additional Resources

- The Ethics Edge
 - ICMA
- Ethics in America
 - Lisa H. Newton
 - Columbia University
- Ethics in America video series
 - Annenberg Learner
- Seven Habits of Highly Effective People
 - Stephen Covey



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Questions?



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