



ABATING NUISANCES THE “RIGHT” WAY
SD CODE MUNICIPAL LEAGUE CONFERENCE
RYAN SAGE & DAVE PFEIFLE
OCTOBER 7, 2021

The Problem



The Problem (Cont.)



Fourth Amendment, U.S. Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Also adopted almost verbatim by SD Constitution, Art. VI, § 11.



“Search” of premises:

Historically, a “physical intrusion” was usually needed to be deemed a “search.”

As surveillance technology improved, courts wrestled with the issue of the reasonable expectation of privacy.

U.S. Supreme Court: flyover at 1,000 ft by naked eye; surveillance from a “public vantage point.”

SD Supreme Court in 2017 decides State v. Jones: use of pole camera 24/7 over several weeks.

Court held violated Fourth Amendment but good faith exception was applied.

Invasion of privacy is the key; now established standard in SD

Surveilled front yard of a residence. What about backyard with bushes, fencing?

Code Enforcement & Law Enforcement

Both functions are enforcing laws and regulations.

Both are considered a “government actor” for purposes of the U.S. and S.D. Constitutions

Abating a nuisance is the exercise of “police power,” per the SD Supreme Court.

Same responsibilities but also same protections—qualified immunity.

The Solution

COURT ORDERED JUDGMENT



The Solution (Cont.)

IT IS FURTHER ORDERED ADJUDGED AND DECREED that Plaintiff may remove any and all items from the property that constitute nuisance items and /or conditions and zoning violations under City Ordinances and dispose of the items as the Plaintiff sees fit including but not limited to removal and disposal of any and all vehicles that are inoperable and/or parked in violation of the zoning ordinances pursuant to City Ordinance(s)

IT IS FURTHER ORDERED ADJUDGED AND DECREED that Defendant continually over the next five (5) years, maintain the property as described in paragraph #2 of the Complaint in compliance with Chapters 92, 93 and 160 of the *Code of Ordinances of Sioux Falls, South Dakota*, or any other nuisance and/or zoning related ordinances.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that Plaintiff shall be allowed to continually maintain the property in compliance with and free from any violations of the *Code of Ordinances of Sioux Falls, South Dakota*, or any other health or zoning code of the City of Sioux Falls or other applicable laws for five (5) years.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that Plaintiff, at its discretion over the next five (5) years, shall hereby be allowed to fully enter upon the Defendant's property and remove and/or abate any and all nuisance conditions and to dispose of the items as it deems appropriate and further to immediately assess the costs of such cleanup and removal to the property, without Court approval or intervention, as provided in the *Code of Ordinances of Sioux Falls South Dakota or other applicable law(s)*. If nuisance items removed from the property are sold by the City of Sioux Falls the proceeds of the sale shall be applied to the costs of the abatement first and any additional proceeds of the sale shall be returned to Defendant.

Notice of Abatement

IT IS FURTHER ORDERED ADJUDGED AND DECREED that Plaintiff shall send notice of abatement by mailing a letter to Defendant, Stephen W. Raczynski, by first class postage prepaid mail to his address at 1409 South Severn Lane, Sioux Falls, South Dakota 57106 and/or post a notice on Mr. Raczynski's front door at 1409 South Severn Lane, Sioux Falls, South Dakota informing him of a date and time at least five (5) business days in the future when the City will abate the nuisance. However, if Defendant has been notified by the City previously by mailing and/or posting a notice to abate within sixty (60) days of the discovery of any additional nuisance, zoning or building service conditions, the timeframe for Notice will be shortened and the City may abate the nuisance, zoning or building service conditions by posting a notice on the front door of the property within twenty-four (24) hours of abating the nuisance.

Clean Ups



Clean Ups (Cont.)



Clean Ups (Cont.)



Clean Ups (Cont.)



Clean Ups (Cont.)



Qualified Immunity: defense from suit

Two-step inquiry to determine (1) whether the facts viewed most favorably to the injured party “show the officer's conduct violated a constitutional right” and (2) whether the constitutional right was clearly established. Thornton, 2005 S.D. 15, ¶ 11, 692 N.W.2d at 530-31.

“Whether qualified immunity can be invoked turns on the ‘objective legal reasonableness’ of the official's acts. [The] reasonableness of official action, in turn, must be ‘assessed in light of the legal rules that were clearly established at the time the action was taken.’ ” Ziglar v. Abbasi, — U.S. —, 137 S. Ct. 1843, 1866, 198 L. Ed. 2d 290 (2017) (internal citations omitted).

Qualified immunity: government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known

Absolute Immunity:

Absolute immunity: Prosecutors are absolutely immune from suits for damages arising out of their official duties in initiating and pursuing criminal prosecutions. Absolute immunity may not apply when a prosecutor is not acting as 'an officer of the court,' but is instead engaged in other tasks, say, investigative or administrative tasks. Acts that are not associated with the prosecutor's role as advocate in the judicial process are protected by qualified immunity.

Segregate functions so City Attorney/State's Attorney is not involved in the investigation to the maximum extent possible.

Administrative Inspection Warrants:

SDCL ch. 34-43:

Allows a county or city official to conduct an inspection required or authorized by state or local law or regulation relating to building, housing, fire safety, plumbing, electrical, health or zoning.

Affidavit submitted to Circuit Court or Magistrate Court Judge.

Must state whether consent to search has been requested or whether the facts or circumstances reasonably justify not requesting consent.

If consent was refused, must give 24-hours notice of warrant's issue before executing it.

Must execute within 14 days or less. May not execute between 6 p.m. and 8 a.m. Must specifically authorize if execute without owner present. Must specifically authorize any forcible entry—and then only when direct threat to health or safety and previous attempts to execute a warrant had failed.

Affidavit in Support of Inspection Warrant

STATE OF SOUTH DAKOTA)
 :SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

IN THE MATTER OF THE
INSPECTION OF PROPERTY AT
2900 E 15TH STREET
SIOUX FALLS, SOUTH DAKOTA

AFFIDAVIT IN SUPPORT OF
INSPECTION WARRANT

STATE OF SOUTH DAKOTA)
 :SS
COUNTY OF MINNEHAHA)

Duane D. Stall, being first duly sworn upon his oath, deposes and states as follows:

1. Your Affiant is the Forestry Supervisor for the City of Sioux Falls, South Dakota and has been since approximately April of 2001.
2. An Ash tree on the property at 2900 E. 15th Street, Sioux Falls, South Dakota is dead/diseased and needs to be removed.
3. I am concerned about the health and safety of the citizens of Sioux Falls and anyone living near or walking by the tree since it is dead/diseased and could fall injuring people or property.
4. On July 31, 2020, I sent a letter to Matthew Harris, the owner of 2900 E. 15th Street, Sioux Falls, South Dakota indicating that the tree needed to be removed by October 1, 2020. (Exhibit "A" attached)
5. On October 5, 2020, Don Kearney, the Director of Sioux Falls, Parks and Recreation Department sent a letter to the same owners indicating that if the tree was not removed by November 1, 2020, the City of Sioux Falls would have the tree removed and assess the costs of the tree removal against the property. (Exhibit "B" attached)
6. On November 17, 2020, a letter sent to the same owner from the Assistant City Attorney Ryan Sage of the City Attorney's office indicated that the City would mark the tree for removal and that the owner should contact me to set up a time to mark the tree

Affidavit in Support (Cont.)

for removal. The letter further stated that a failure to contact me to mark the tree by December 1, 2020, would be considered a refusal to allow access to the property and the City would seek an inspection warrant to enter the property and mark the tree. (Exhibit "C" attached)

7. I believe it is extremely important for the City to be able to enter the property at 2900 E. 15th Street, Sioux Falls, South Dakota and mark the dead/diseased tree for removal to promote the health of the urban forest and protect the life and property of our citizens.

Dated this ___ day of _____, 2021.

Duane D. Stall

Subscribed and sworn to before me
this ___ day of _____, 2021.

Notary Public – South Dakota
My Commission Expires:

Execution of Warrant

Post warrant 24 hours before entry via warrant.

Leave warrant in inconspicuous place.

- Front Door, Side Door
- Photograph posted warrant

Return following day with certified copy of warrant.

- Record time entered on property
- Record any action taken
 - Photos, measurements, etc.
- Record time you depart the property

Return of Warrant

STATE OF SOUTH DAKOTA)
)SS
 COUNTY OF MINNEHAHA)

SECOND JUDICIAL CIRCUIT
 MAGISTRATE COURT

CITY OF SIOUX FALLS,
 PLAINTIFF,

vs.
 3212 E. OLD ORCHARD TRAIL
 SIOUX FALLS, SD 57103

19-4
 RETURN OF
 INSPECTION WARRANT

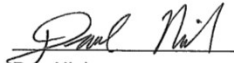
I, Dan Nielson, Park Forestry Caretaker, received the within court ordered Inspection Warrant on December 26, 2019.

On December 26, 2019, at 9:30 a.m., I posted a copy of the inspection warrant on the mailbox for the property (vacant lot) located at 3212 E. Old Orchard Trail, Sioux Falls, SD, 57103 indicating an Inspection Warrant had been issued and took 1 photograph and left the property at 9:32 a.m.

I returned to the property on December 27, 2019 at 9:02 am and marked the subject tree with an A9. I left the property at 9:07 a.m.

I duly executed the Inspection Warrant on December 27, 2019 at 9:02 a.m. by entering the premises described in the warrant, observing the condition, and marking the tree for removal.

The above return is a true and accurate account of all actions taken pursuant to the inspection warrant.


 Dan Nielson

Dated this 6 day of January, 2019.

IA M. GRIES, CLERK OF COURT



 Magistrate Judge

Some Warrant Exceptions:

1. Consent

2. Closely regulated business:

State of SD v. Klager (taxidermy)

State of SD v. Rechtenbach (Highway Patrol search of a truck—trucking industry)

Colonnade Catering Corp. v. U.S. (federal liquor regulations)

U.S. v. Biswell (federal gun laws)

New York v. Burger (junkyard and vehicle dismantling business)

Regulatory statutes must advise the owner of the commercial premises that the search is made pursuant to law and the statutes must limit the discretion of inspecting officers (i.e time, place and manner).

Some Scenarios:

Every local government contract with a donee contains a requirement that the donee shall permit inspection of their financial records to confirm the usage of the government funds.

Food Waste in a private yard: immediate threat to health and safety?

Daycare operated in a home: licensed by local government, license and regulations state that the operator must allow inspections during regular business hours.

SDCL 22-21-1 on Drones:

No person may, except as authorized by law:

- (1) Trespass on property with intent to subject anyone to eavesdropping or other surveillance in a private place;
- (2) Install in any private place, without the consent of the person or persons entitled to privacy there, any device for observing, photographing, recording, amplifying, or broadcasting sounds or events in such place, or uses any such unauthorized installation;
- (3) Intentionally use a drone to photograph, record, or otherwise observe another person in a private place where the person has a reasonable expectation of privacy; or
- (4) Land a drone on the lands or waters of another resident provided the resident owns the land beneath the water body in its entirety without the owner's consent, except in the case of forced landing and the owner or lessee of the drone will be liable for any damage resulting from a forced landing.

A person who violates this section is guilty of a Class 1 misdemeanor. **Subdivisions (2) and (3) do not apply to law enforcement officers, or to those acting under the direction of a law enforcement officer, while engaged in the performance of the officer's lawful duties.** Subdivisions (3) and (4) do not apply to a drone operator operating a drone for bona fide business or bona fide government purposes who unintentionally or incidentally photographs, records, or otherwise observes another person in a private place, nor do they apply to a designated emergency management worker operating a drone within the scope of the worker's duties.

Private Party Options:

SDCL 21-10-6 allows private individuals to abate a nuisance.

SDCL 21-10-5 and SDCL 21-10-9 allows private individuals to commence a civil action to abate a nuisance.

GOVERNMENT PRACTICES HOTLINE

1-888-313-0839



QUESTIONS?

Thank you!

Disclaimer: while the presenters are attorneys, this presentation is for general information purposes only and should not be construed as providing legal advice or opinions for a specific situation. The audience is encouraged to contact the attorney of their choice for any specific legal discussion and legal advice.

