



## Defending a Town or Village Prosecution for a Housing or Building Violation

By Christopher P. McGuire

General and criminal practitioners may be consulted by potential clients seeking assistance defending cases brought by local municipalities for housing or building violations. A designated town or village attorney in a local criminal court typically prosecutes these offenses. (County Law §700, CPL §10.30, Municipal Home Rule §10) The NYS Criminal Procedure Law applies to these actions and proceedings. (CPL §1.10(1)(a))

Your client may have been served with a summons to appear or might have been visited by an inspector seeking to discuss a complaint filed by a neighbor. Some examples of chargeable offenses include: Renting without a Rental Permit, Change of Use, Over Occupancy, Violation of Certificate of Occupancy/Compliance, Failure to Maintain, Debris in Yard, Unregistered Vehicles, Unreasonable Noise, and other violations. Offenses can be charged as violations or as misdemeanors. (CPL §1.20) Penalties typically range from fines of up to \$2,000.00 per offense and jail of up to 15 days. Presiding judges and local prosecutors consider offenses related to the health and safety of occupants of a residence to be the most serious offenses. Offenses, which affect the quality of life of local residents, are also often considered pressing.

As a former village prosecutor and judge, I prosecuted and presided over thousands of these cases. In addition, our office handles these cases on a regular basis. These divergent experiences have taught me that it is important to know the law and to consider the perspective of the local authorities

to be an effective advocate.

While many local ordinances authorize joint and several prosecutions against a tenant or owner, the vast majority of cases charged are against the owner of the property. When interviewing the client, request that they bring a copy of the Certificate of Occupancy/Compliance, survey, title policy, deed, and the contents of his or her property file for review. You will need these items to determine the legal use of the property.

Upon retention, counsel should call the building or housing inspector to advise that you have been retained and are in the process of familiarizing yourself with the case. Counsel should simultaneously follow-up the call with a letter of representation indicating that your client should not be questioned without you being present and not to visit the property without your written consent. My experience has taught me that it is important to be an advocate without being overly confrontational. In other words, protect your client's rights but be careful not to stir up a hornet's nest — in most cases municipalities have many more resources than your client.

Municipalities often designate housing and building offenses as continuing violations, meaning a separate offense can be charged for each day. You want to let the municipality know that if there are safety concerns you will address them right away so that your client is not charged with multiple counts for the same offense if it can be avoided.

As in all criminal cases, a defen-



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dant is entitled to be prosecuted by sufficient information, and has the right to discovery, motion practice, hearings and trial. In order to evaluate whether a case can be resolved by negotiation or should proceed to trial, counsel should first appear and conference the case to find out what the prosecution's goals are. Typically the People seek compliance (either pre-plea or by Conditional Discharge) and/or fines. Many times, your client will inform you that the illegal use pre-existed his purchase. Advise your client that while that is not a legal defense to the action, it does provide cause for mitigation, and explain the situation to the prosecutor.

Defenses include: insufficient accusatory instrument (CPL §100.15), unconstitutional statute (vague or overbroad) *People v. Schrader*, 162 Misc.2d 789 (Crim Court NY County 1994), *Asian Americans for Equality v. Koch*, 72 N.Y.2d 121 (1988), *People ex rel. DeMauro v. Gavin*, 92 N.Y.2d 963 (1998), non-conforming use *People v. Barun Bros. Brushes*, 15 Misc3d 1030 (Just. Ct. 2007), statute of limitations CPL §30.10, §170.30, speedy trial CPL §30.30, selective prosecution *People v. Acme Markets, Inc.* 37 N.Y.2d 326 (1975), *People v. Salmon*, 125 Misc.2d 221 (Nassau Dist. Ct 1984), and defendant's lack of control of the property *People v. Scott*, 26 N.Y.2d 286 (1970). If dismissal is not possible, fight to avoid a criminal conviction and jail time, to limit fines, and to ensure that your client is entitled to the legal use of her property.

In terms of compliance, your client will often be given a choice

to restore the premises to the last issued Certificate of Occupancy/Compliance, or to legalize the use. Counsel should consider consulting with a local land use attorney or reputable expeditor, and should ask their advice on the likelihood and cost of legalizing a particular use. Often an expeditor can apply for permits while a case is pending, and prosecution and the courts look favorably upon the attempts of a defendant to comply with the code. Whether you agree to legalize or restore, make sure if compliance is pursuant to a Conditional Discharge, you obtain sufficient time to avoid a Declaration of Delinquency. CPL 410.30

While the NYS Criminal Procedure Law governs, handling a town or village ordinance violation case requires at least a basic understanding of real estate and land use law. Learn the facts of the case, determine the legal use of your client's property, and, if necessary, consult with a local land use attorney or expeditor. Then zealously and professionally advocate for your client.

*Note: Christopher P. McGuire, Esq. is a senior partner with McGuire & Pelaez, P.C., and has practiced law in the local, state, and federal courts for more than 20 years. Mr. McGuire has also served as the Patchogue Village Justice and as a Special Assistant District Attorney for the County of Suffolk. Prior to practicing law, he worked in the U.S. Congress and State Department, and studied and taught in Beijing, China. He is a founder of HALO Missions, a registered non-profit providing health care and educational opportunities for AIDS orphans in developing countries.*