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STATE AND COUNTY ABUSES IN INITIATING ENFORCEMENT ACTIONS

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The Fourth Amendment to the United States Constitution provides: "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." State and local governments also must honor this constitutional right. Under this provision, it is unconstitutional for government to conduct a search of a private house or property without a search warrant issued by a court and no such warrant shall issue except upon probable cause.

To illustrate examples of governmental abuse of this constitutional provision, I have selected the California Coastal Commission (CCC) and the County of Santa Cruz. At the state level, the California Coastal Act provides that the executive director of the Commission may cause a notification of intention to serve a notice of violation on a person if "the executive director has determined, based on substantial evidence, that real property has been developed in violation of 'the Coastal Act.'" Upon receipt of such notification, the Act provides that the property owner is entitled to an opportunity to object and a fair hearing before any determination that a violation has, in fact, occurred.

The CCC, however, often acts without substantial evidence or probable cause. In 2005, a Southern California family bought a 40-acre parcel in the Santa Monica Mountains in order to provide their children with a nonurban experience and expose them to various outdoor pursuits such as hiking, camping, gardening and recreational and agricultural activities. No development was planned or intended. After purchasing the property, the family began to clear a driveway which was built in the 1940s and which preceded, and was therefore exempt from, the California Coastal Act enacted in 1976.

Clearance of the preexisting driveway and the pad where it ended required dirt removal and brush clearance. On June 6, 2005 the CCC received an e-mail from a confidential informant alleging that significant development assisted by heavy machinery was occurring on the property. Although the identity of the confidential informant was never previously disclosed by CCC staff, it has become known through a subsequent Public Records Act request that the identity of that informant is an official with the National Park Service, a federal agency. No evidence exists that the CCC staff had any prior relationship with this person, and yet one CCC official stated in his declaration to the court in support of the

search warrant that this information came from "a very reliable source."

On June 8, 2005 the CCC attempted to corroborate the informant's allegations. However, the property and the activities alleged to be occurring thereon were not visible from the street. Thus it was not possible to verify or corroborate the informant's allegations.

The informant trespassed, despite "No Trespassing" signs around the property. Indeed, the informant acknowledged her own trespasses on the property in her initial e-mail to the CCC. On July 12, 2005 the CCC went ahead and issued a Notice of Violation based on the informant's uncorroborated reports. The CCC ordered that all work be stopped on the property.

The property owners consented to the CCC's request to inspect the property. However, they insisted on their right to videotape the inspection. In a legal proceeding, the CCC normally has the benefit of offering substantial evidence that supports its position. Thus if the Commission states there was a new road being constructed and the property owner states that it was a driveway built in 1940, the CCC will likely prevail. However, if the property owner produces videotape of the inspection which shows a driveway being cleared, the property owner would prevail. Therefore, videotaping an inspection can be vitally important to all Californians.

The CCC staff refused to allow the property owners to videotape the proposed inspection. The staff secretly obtained a search warrant from the Los Angeles County Superior Court based on the uncorroborated evidence supplied by their "very reliable source." The search warrant prohibited the property owners from videotaping the inspection. However, the warrant also prohibited any forcible entries.

The CCC gave notice of the inspection but would not provide the warrant in advance or name the issuing judge. On

October 19, 2005, CCC agents, accompanied by local law enforcement, arrived at the property. The property owners indicated that the CCC could conduct an investigation but insisted on their constitutional right to videotape the inspection for their own records. CCC staff refused and the inspection did not proceed. However, while the discussion with CCC agents took place, one agent quietly departed from the group and, while out of sight of the others, proceeded to take photographs of the property from a vantage point where he had no permission to be. This constituted a "forcible entry" onto the property without the consent of the property owners and as precluded by the terms of the search warrant. The judge who issued the warrant was contacted in order to schedule a hearing to quash the warrant or, at a minimum, to allow for videotaping. However, the warrant had a 14-day expiration date provision and nothing further ever happened.

In January 2006, some three months later, the CCC again secretly, and without notice, sought another search warrant that included a right of forcible entry. The Court denied the request and set the matter for a noticed hearing. That hearing never occurred and the property owners did not hear of this effort until a year later.

Nothing happened for weeks, during which time the property owners continued to assume the initial warrant had expired after 14 days. However, on November 9, 2005, warrants were issued by the Superior Court in Malibu for the arrest of the property owners and their land use consultant for refusing to comply with the terms of the initial warrant. Notice thereof was received on January 8, 2007, approximately 14 months later than the original "inspection." Despite requests to the CCC and to the Court, the property owners never received notice or participated in the various warrant proceedings in Los Angeles and Malibu.

In February 2007, the property owners filed moving papers with the Los Angeles County Superior Court for an ex parte order to quash the inspection and arrest warrants. Notice was given to the CCC, and the hearing was held on February 14, 2007.

The property owners argued that the search warrant lacked probable cause because the CCC had relied on the uncorroborated reports of a confidential, unknown informant. Furthermore, the evidence obtained as a result of the National Park Service official's unlawful search of the property may not be used to establish probable cause in subsequent proceedings. Indeed, to be subjected to unauthorized and secretive surveillance by governmental officials on your own property is the hallmark of an oppressive and intrusive governmental presence directly targeted by the framers of our Constitution in drafting the Fourth Amendment.

The property owners further argued that as a matter of public interest and as a matter of protecting their own private interests, they had the right to videotape and exercise their constitutional rights. Their position is supported by the case law on this subject.

At the February 14, 2007 hearing, the court indicated that it wanted a formal noticed hearing and as a result denied the ex parte motion but without prejudice to filing a noticed motion.

On February 15, 2007, the CCC held its own separate administrative hearing on whether to find the property owners in violation of the California Coastal Act. To support its position, the CCC accepted the unlawful evidence prohibited by the Fourth Amendment and found that the property owners had been building a new road on their property. The CCC rejected the property owners' argument of an illegal search and seizure without probable cause and also rejected the constitutional argument that a property owner has the right to videotape inspections by state agents. The

Commission did not acknowledge the property owners' photographs of the preexisting driveway's surface or the previous day's pleading filed in court concerning the unlawfully obtained evidence.

Interestingly, on March 5, 2007, the property owners received the CCC's dismissal of the lawsuit in which their search warrant was issued. Presumably that also will result in the arrest warrants being dissolved. That action's effect on the CCC's reliance on the illegally obtained evidence remains to be seen.

At the county level, we have the County of Santa Cruz and its willful violation of the Fourth Amendment against certain property owners whose farm was recognized as the best-managed horse farm in the county. This vicious attack has gone on for nearly 10 years. Briarcliff Farm is a 12 ¼ acre horse ranch owned by a couple who used it primarily for the boarding, breeding and training of horses and related activities.

Beginning in 1997, the County of Santa Cruz began a concerted effort to run Briarcliff Farm out of business. The County has a history of claiming that certain property is not in accordance with applicable ordinances and, without notice or a hearing, placing red tags on all structures considered out of compliance. These actions are handled by the County's Enforcement Unit. The property owner cannot refinance or sell his or her property as long as there is a red tag on any structure. The County will not even lift a red tag so that the property owner can obtain financing to correct the problem in question.

In this case, the owners of Briarcliff had a problem with one of their trainers. The trainer left and took several students with her. At that time, the trainer's mother told one of the owners of Briarcliff Farm that she would report her to the county and other agencies. She said, "I'm going to cost you every cent you have and put you out of

business in this town.” By coincidence, one of the students who left with the trainer happened to be the daughter of an aide to the County Supervisor in whose district Briarcliff Farm was located.

In the last half of 1997, after the dismissal of the trainer, things began to happen. First, a strange man was seen walking across the Briarcliff Farm. He would not identify himself and was ordered off the property. His automobile indicated that he was with the county. He later said he had observed the farm operation by crossing a creek and trespassing. After that incident, a woman was found on the property and directed to leave. She also had a county automobile. Later that night after dark, she followed a customer through the gate and remained for a considerable time until discovered by the farm owner.

Next came the red tags. A complaint had been received stating that Briarcliff Farm had a high manure pile by the creek which was contaminating the creek and causing a major fly problem. Enforcement reported everything to federal and state governmental agencies having jurisdiction and red tagged the Briarcliff operation. As a result, angry federal and state enforcement personnel descended. Upon inspection they began to recognize that there was no pollution: the pile was compost – not manure – and had no flies. This incident ended with the California Regional Water Quality Control Board, Central Coast Region, writing that they were exempting Briarcliff Farm from Waste Discharge requirements “based on observed exemplary animal husbandry practices associated with your operation.”

Meanwhile, the county enforcement staff continued to harass the owners of Briarcliff Farm. On December 7, 2000 the husband owner died unexpectedly, leaving his wife to manage the farm alone as the red tags increased. Not having finances available due to the red tags meant that Briarcliff Farm lost its competitive advantage as other

farms began to add covered arenas. The farm, which had once had 80 to 100 horses, dwindled significantly.

Although the entire horse operation, home and accessory buildings were grandfathered since they pre-exist otherwise applicable county regulations or were permitted by the county, the farm now has nearly 50 red tags. While the county has finally accepted the grandfathered status and the permits, no red tags will be removed until all red tags can be eliminated. This has ruined any chance of selling the property. During 2006 more than five serious offers in the \$3 million-plus range fell through solely because of the red tags and erroneous information provided by the county to prospective buyers.

On May 2, 2006 Briarcliff’s attorney had a congenial conversation with the head of the County’s Enforcement Unit, and it appeared that everything was ready to be resolved. However, a different story was given by the enforcement head to Briarcliff Farm’s realtor later that same day. She was told that Briarcliff Farm was never again going to function as a horse farm, that it would only qualify for 24 horses, and that the best solution was to tear everything down and subdivide the property into four parcels and have huge houses built. This was stated even after the grounds for the red tags were found to be false or grandfathered. Briarcliff Farm is interested in knowing what happened between these two meetings.

In June 2006, Briarcliff sued the County of Santa Cruz and responsible individuals. On February 26, 2007 the deposition of the responsible County Supervisor was taken and the mysteries began to unravel. The supervisor had sent two significant letters concerning Briarcliff Farm to the County Planning Director, to the head of Enforcement and even to the individual enforcement officer handling Briarcliff Farm. The supervisor testified that while the letters indicated that she was the author, she

had in fact only reviewed and initialed the two letters, which were actually authored by her aide – the mother of one of the disgruntled young women who had departed Briarcliff Farm just before the red tags began. Unfortunately, the aide passed away in mid-2006. Hopefully, additional depositions will reveal the true role of the supervisor and others responsible for this 10-year ordeal.

Without going into details, all of the myriad offenses have been proven false, with the possible exception of a bunkhouse used by two workers and their families. This bunkhouse will have to receive an after-the-fact permit, be changed to storage, or be torn down.

These actions by two California government entities at both state and county levels, involving unlawful trespass, uncorroborated enforcement complaints and conflicts of interest, demonstrate the lack of protection provided to innocent property owners. The courts are available, but the property owners' resources normally are not sufficient. It is time for a statewide legislative solution.

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