JAMES W. EVANS
KURT P. FROEHLICH
KENNETH N. BETH
JOSEPH P. CHAMLEY

MARK C. PALMER

LAW OFFICES OF
EVANS, FROEHLICH, BETH & CHAMLEY
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
44 MAIN STREET, THIRD FLOOR
CHAMPAIGN, ILLINOIS 61820

TELEPHONE 217-359-6494
FAX NO. 217-359-6468

Safety v. Sanctity – The Balancing Act of Rental Property Inspections
By Mark C. Palmer, Evans, Froehlich, Beth & Chamley, Champaign
February, 2010

Prefatory Remarks

The Fourth and Fourteenth Amendments to the United States Constitution safeguard the right of individuals against unreasonable searches.[1] Although many variations exist in both the criminal and civil contexts, the governing principle is simple: "a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."[2] Yet, when a variation exists that does not call for a warrant, "there can be no ready test for determining reasonableness other than by *balancing the need to search against the invasion which the search entails*."[3]

Purpose of Rental Property Inspection Programs

A municipality's rental property inspection program commonly requires owners to register their rental property with the municipality and to have these rental properties inspected for compliance with the housing, building, zoning and environmental codes and ordinances. Such inspections allow the municipality to better promote and maintain safe and viable housing and address issues concerning the health, safety and welfare of its citizens. Without local property regulations, more buildings would catch fire, collapse, become unsightly, attract squatters or cause environmental damage, not to mention reduce the value of other property in the neighborhood.[4]

Notice of Inspection & Right to Refuse

Illinois municipalities are granted authority under the Illinois Municipal Code to "pass all ordinances and make all rules and regulations proper or necessary, to carry into effect the powers granted to municipalities, with such fines or penalties as may be deemed proper."[5] The leading case in this area of rental property inspections is *Camara v. Municipal Court of San Francisco*.[6] In *Camara*, the Plaintiff sued to enjoin prosecution for violation of a housing code, which was filed because Plaintiff refused to consent to an inspection of his property.[7] The United States Supreme Court held that when a tenant does not consent to the inspection, the City must obtain a search warrant before conducting an administrative search or inspection.[8]

The crux of the issue becomes (1) who should receive the notice of inspection, (2) what should the notice contain, and (3) how should the notice be transmitted. Numerous cases affirm that the landlord's/owner's consent alone is insufficient to authorize a search of the tenant's property, as the right to consent or not consent to a search

belongs to the tenant.[9]

Municipalities implementing an "owner *or* tenant" notice requirement may find such disjunctive language troubling, as the court did in *Black v. Village of Park Forest*.[10] In Black, the court agreed that, when the subject property was not occupied or was occupied by the owner, then the owner may consent to the inspection.[11] However, in lieu of the Village providing any evidence that the landlords had a further duty to seek the consent of tenants or that the Village obtained the tenants' consent to inspect (beyond simply informing the tenants), the precedent of *Camara* would not be met.[12] Thus, a notice requirement to owner *and* tenant is prudent.

The written notice to the owner or authorized agent and tenant should include information on when the inspection would take place, by whom and why, as well as their right and how to refuse consent to the inspection, along with notice of the municipality's right to seek a search warrant in the event of such refusal. The mode of refusing consent should be as flexible as possible, while ensuring that such an objection properly stays the inspection. Some municipalities allow objections to be made by mail or in person, as well as telephone, fax or email.

Written notice delivered by mailing first class U.S. Mail should be sufficient, as long as a reasonable amount of time is given to deliver the notice and allow for refusing consent, if applicable. A mailing to tenants may be achieved by addressing notice to "Occupants" or "Tenants" or by personal service to a tenant. Notice to the owner/landlord would likely be mailed to its known address or tax bill address. A municipality may prefer to implement a rental registration program and use the provided address for such notice.

A Twist: "Presumed Consent"

While rental property inspection ordinances should make it clear that upon receiving the notice of inspection, the owner or occupant may object, requiring the municipality to obtain a warrant, it may not be that simple. A complication arises when the municipality, absent refusal to inspect, *presumes consent* from the owner and occupant(s). Such a complication may be exacerbated with concerns of unopened, misdirected or lost mailings of the notice of inspection, especially in, for example, a largely transient university-based community. This concern tends to focus on the notice to tenants because there is less concern about unopened or misdirected mail on the part of an owner of rental property who should maintain a valid mailing address and be readily available.

Nonetheless, a prudent owner, facing accountability for the cost of re-scheduling an inspection for failure to grant access to a dwelling, would provide notice as well, i.e. back-up notice, to the occupant(s) and ascertain the tenant's consent or objection for the municipality. In addition, a municipality may construct a landlord-tenant ordinance to go hand in hand with the rental property inspection ordinance. Such an ordinance would grant an owner or agent access to the property for inspection purposes. By doing

so, a procedural safeguard is established so that the occupant(s) should learn of a scheduled inspection, not only from the municipality, but when notified of the landlord's intent to enter the property. While the primary governmental interest at stake (prevent hazards to public health and safety) may differ from a landlord's interest (protect the condition of the property, make repairs, show unit), the right to access and the procedural safeguards in both ordinances preserve a tenant's Fourth and Fourteenth Amendment rights against unreasonable and nonconsensual searches.

The Alternative: Municipality *Shall* Obtain a Warrant

An inspection ordinance and the notice of inspection should incorporate language as to *mandate* the inspections as well as *mandate* seeking warrants when consent is denied. In *Tobin v. City of Peoria*, the court emphasized that, "[b]ecause [Peoria's inspection ordinance] *requires* the City to inspect, it is read to *require* the City to seek a warrant to inspect when refused consent. This interpretation allows the City to fulfill the mandate of the Inspection Ordinance and avoids any unconstitutional application…"[13]

Without the implementation of a proper warrant requirement, the *Camara* court held that administrative searches for housing code violations are significant intrusions upon the interests protected by the Fourth Amendment.[14] Courts have found inspection ordinances unconstitutional when property owners are forced to choose between consenting to a warrantless search or face a criminal penalty.[15] As such, *Camara* requires consent or a warrant for a valid administrative search to occur.[16] Furthermore, a warrant was held to be preferable to prosecution for failure to consent to an inspection because:

> The occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization... Yet, only by refusing entry and risking a criminal conviction can the occupant at present challenge the inspector's decision to search.[17]

The *Camara* court set the standard for obtaining a warrant to search for housing code violations. The Court acknowledged that a health official,

> Need not show the same kind of proof to a magistrate to obtain a warrant as one who would search for the fruits or instrumentalities of crime. … Reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitable restricted search warrant.[18]

Overall, *Camara* balanced the need for a search against the invasion that the search entails.[19] The Supreme Court found three persuasive factors, as reiterated by the *Black* court, in approving of such municipal rental inspection ordinances:

> First, code-enforcement programs have a long history of judicial and public acceptance. Second, there is a strong public interest in

> preventing dangerous conditions and it is doubtful that any other canvassing technique would achieve acceptable results. Third, because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy.[20]

The Court went on to say, " 'probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling."[21] Reasonable legislative or administrative standards may vary depending on the municipality's registration and inspection program and "may be based upon the passage of time, the nature of the building (e.g. a multifamily apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling."[22] Therefore, administrative searches must meet a lesser requirement of reasonableness as opposed to the quantum of evidence necessary for a search warrant.[23]

Conclusion

The *Camara* court acknowledged the strong governmental interest in inspecting for housing code violations:

> The primary governmental interest at stake is to prevent even the unintentional development of conditions, which are hazardous to public health and safety. There is unanimous agreement among those most familiar with this field that the only effective way to seek universal compliance with minimum standards required by municipal codes is through routine periodic inspections of all structures.[24]

A municipal rental property inspection ordinance should pass constitutional muster with the proper notice procedures and content transmitted to both the landlord and tenant. Should an objection come from either party, the municipality should act on its right to seek a warrant, as detailed in the content of the notice. The administrative search warrant would be sought upon the terms set forth in *Camara*. With the addition of a landlord-tenant ordinance provision granting the landlord reasonable access to the property for inspection purposes, further safeguards are established to ensure an inspection ordinance can function to fulfill its purpose – safety.

---

[1] *Camara v. Municipal Court of San Francisco*,387 U.S. 523, 528, 87 S.Ct. 1727, 19 L.Ed.2d 930 (1976).
[2] *Id*. at 528-29.
[3] *Id*. at 536-37 (emphasis added).
[4] *Mann v. Calumet City, Illinois*, ---F.3d---, 2009 WL 4546352 (7th Cir. 2009).
[5] 65 Ill. Comp. Stat. 5/1-2-1 (2009).
[6] *Supra* at 1.
[7] *Id*.
[8] *Id.* at 539-540.
[9] *Black v. Village of Park Forest*, 20 F.Supp.2d 1218, 1222 (N.D.Ill., 1998) citing *Chapman v. U.S.*, 365 U.S. 610, 616-17 (1961); *U.S. v. Chaidez*, 919 F.2d 1193, 1201 (7th Cir. 1990).

[10] 20 F.Supp.2d 1218 (N.D. Ill. 1998).
[11] *Id*. at 1223.
[12] *Id*.
[13] 939 F.Supp. 628, 634 (C.D. Ill. 1996) (emphasis in original).
[14] *Camara* at 534.
[15] *Tobin* at 633, citing *Sokolov v. Village of Freeport*, 438 N.Y.S.2d 257, 260-261, 420 N.E.2d 55, 58-59 (1981); *Pashcow v. Town of Babylon*, 96 Misc.2d 1036, 410 N.Y.S.2d 192, 193-94 (1976); *Wilson v. City of Cincinnati*, 46 Ohio St.2d 138, 346 N.E.2d 666, 670 (1976).
[16] *Camara* at 532-534.
[17] *Id.* at 532.
[18] *Id.* at 538-539.
[19] *Id.* at 537.
[20] *Black* at 1227, citing *Camara* at 537.
[21] *Camara* at 538-540.
[22] *Camara* at 538.
[23] *Black* at 1225, citing *Griffin v. Wisconsin*, 483 U.S. 868, 877 n. 4 (1987).
[24] *Camara* at 535-536.