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March 28, 2003

Certified Mail
Return Receipt Requested
(Article No: 7160 3901 9842 1800 1879)

Anne C. Conzelman Linn, Esq.
915 N. Sheridan Road
Waukegan, Illinois 60085

Re: Ordinance Requiring General Business Licenses For
Individuals and Businesses Engaged in Rental Housing ("Licensing
Ordinance")

Dear Ms. Linn:

As you know, we represent the Lake County Apartment Owners Association ("LCAOA"). While we do not represent the Mexican American Legal Defense and Education Fund (MALDEF), MALDEF, through its counsel, Alonzo Rivas, Esq., joins in this letter.

LCAOA is committed to providing quality rental housing throughout Lake County, including within the City of Waukegan ("Waukegan"). MALDEF is committed to protecting and asserting the civil rights of persons of Mexican and Hispanic national origin. Numerous Waukegan apartment owners and the vast majority of new rental housing occupants in Waukegan are persons of Hispanic national origin, and, as such, persons of Hispanic national origin are the disproportionate victims of the Fourth Amendment violations that result from Waukegan's enforcement of its current Licensing Ordinance.

As you know, on previous occasions, LCAOA has expressed concerns to Waukegan regarding the substantive provisions of the Licensing Ordinance, and the manner in which Waukegan has enforced that Ordinance. Based on those concerns, LCAOA has proposed that portions of the Ordinance and Regulations be repealed or revised. LCAOA's proposals do not undermine the legitimate goal of maintaining safe and sanitary housing within Waukegan, but rather ensure that the Fourth Amendment rights of the landlords and tenants are respected in any rental housing licensing and inspection program. Despite LCAOA's repeated proposals, Waukegan has, to date, not even acknowledged LCAOA's concerns

about the content of the Licensing Ordinance or the manner in which it is being enforced.

Because of Waukegan's refusal thus far to address the Fourth Amendment flaws in its Licensing Ordinance, LCAOA and MALDEF have determined to support a Complaint by selected Waukegan apartment owners and tenants to be filed in the United States District Court for the Northern District of Illinois against Waukegan and certain of its officials seeking, among other forms of relief, a declaration that the Licensing Ordinance, on its face and as applied, violates the Plaintiffs' Fourth Amendment rights. LCAOA and MALDEF also have the support of Associations of Realtors[®], at the local and state level, and possibly the national level as well.

But, in a final effort to avoid litigation, LCAOA requests that Waukegan repeal by May 5, 2003 the inspection provisions of the current Licensing Ordinance, which on their face and as applied, violate the Fourth Amendment. If Waukegan chooses to consider an alternative inspection procedure, that procedure must, at a minimum, cure the Fourth Amendment defects in the current Licensing Ordinance as set forth below.

THE INSPECTIONS ARE NOT LIMITED IN SCOPE

As an initial matter, the Licensing Ordinance does not appropriately limit the scope of the inspections to be conducted by the Code Official, as required by the Fourth Amendment. Instead, the Code Official is granted unrestricted powers to search any and all portions of a person's dwelling in any manner that the Code Official chooses under the guise of ascertaining compliance with unspecified provisions of a variety of Waukegan Codes. Section 14-4(d)(iii) of the Licensing Ordinance states only that the inspection "shall determine whether the residential property is in conformance with the Building, Zoning, Property Maintenance and Life Safety Codes of the City of Waukegan, and shall include a physical inspection of the rental residential property including the building exterior, common areas, basement, and the interior of each residential unit." There is not any statement in the Ordinance of the specific provisions of these numerous Codes that are the object of the inspections.

The court in *Black v. Village of Park Forest*, 20 F. Supp. 2d 1218, 1229 (N.D. Ill. 1998) held that the United States Supreme Court's decision in *Camara v. Municipal Court*, 387 U.S. 523 (1967) requires that administrative searches must be supported by reasonable legislative and administrative standards that, at a minimum, "contain a clear indication of the evils sought to be prevented by the inspection program (presumably supported by some legislative findings indicating that the evils in question exist) and some indication of the appropriate parameters for the searches."

The Licensing Ordinance at Section 14-4(d)(iii) simply refers generally to the Waukegan "Building, Zoning, Property Maintenance and Life Safety Codes." To pass the Fourth Amendment test announced in *Camara*, as construed in *Black*, the Licensing Ordinance must, at a minimum, (1) identify the specific violations of applicable provisions of the Building, Zoning, Property Maintenance and Life Safety Codes that the City is seeking to discover and correct by reason of the inspections, (2) contain legislative findings of fact that these specific violations are present in rental properties to a disproportionate extent that justifies the intrusiveness of inspections of the interior of personal residences, and (3) sets forth a clear limitation on the scope of the inspection that the Code Official is authorized to conduct to insure that any inspection is confined only to those portions of the dwelling that may contain the specific Code violations at which the Ordinance is targeted.

**WAUKEGAN'S ADMINISTRATIVE SEARCH WARRANTS DO
NOT SUFFICIENTLY IDENTIFY THE CODE VIOLATIONS
SOUGHT TO BE PREVENTED OR DISCOVERED.**

Second, the Administrative Search Warrants upon which Waukegan is relying to conduct searches to which a property owner or tenant has not consented are unconstitutional for reasons indicated in the *Black* decision. The court in *Black* held that the search warrants secured by the Village of Park Forest violated the Fourth Amendment. The warrants in that case "authorized a search for the purposes of conducting an inspection to determine the condition of the Premises in order to safeguard the health and safety of the general public, pursuant to Chapter 16, Section 16-3 of the Code of Ordinances of the Village of Park Forest which requires an annual inspection of renting the Premises." The *Black* court found these warrants to be unconstitutional because they "merely recite the open-ended authorizations found in the Housing Code." 20 F.Supp.2d at 1228.

Here, the Administrative Search Warrants that Waukegan has thus far obtained under the Licensing Ordinance are similarly defective. These warrants merely allow for the open ended inspection of "both interior and exterior of the premises to determine if the subject premises meets the requirements of the applicable codes of the City of Waukegan, Illinois, under the terms of Waukegan Ordinance 02-O-37."

The *Black* court found that both the complaint and the search warrants must be based upon an inspection ordinance that specifically identifies the various sections of the "applicable codes" with which the inspection is intended to determine compliance. As the *Black* court stated, "a warrant in the administrative search context can provide protection only when the underlying statute or ordinance indicates the appropriate scope and objectives of the search and identifies the criteria upon which the search is based." *Black*

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v. Village of Forest Park, 20 F. Supp. 2d at 1226. Neither the Licensing Ordinance, nor the Administrative Search Warrants upon which Waukegan has thus far relied meet the standard articulated by the court in *Black*.

**WAUKEGAN'S ADMINISTRATIVE SEARCH WARRANTS
ARE NOT LIMITED IN TIME, SCOPE OR DURATION.**

The Administrative Search Warrants that Waukegan is seeking, and that are being issued by the Lake County Circuit Court, are also fatally flawed on other grounds. The Administrative Search Warrants are not limited in time, scope or duration. The Administrative Search Warrants fail to state when the search is to occur, the scope of the search to be conducted by the Code Officer, or when the Warrant expires. Under the current wording of the Administrative Search Warrants, the property at issue can be searched at any time after the issuance of the Warrant; the inspector can search to determine compliance with any "applicable codes" of Waukegan; and the inspector can search the premises as often as he or she pleases.

In *Platteville Area Apartment Association v. City of Platteville*, 179 F.3d 574 (7th Cir. 1999), the Seventh Circuit recognized that while municipalities may conduct administrative searches pursuant to warrants, local governments are still bound by the provisions of the Fourth Amendment that require that search warrants describe with particularity the place to be searched and the persons or things to be seized. As the Court stated, the requirement that such searches be conducted in a reasonable manner entails "striking a balance between the benefits of an administrative search in implementing valid governmental programs and its costs to the property and privacy interests of the persons whose homes (whether owned or rented) are searched." *Id.* at 581.

According to the Seventh Circuit in *Platteville*, administrative search warrants must be appropriately limited to achieve the goals of the inspection programs while not intruding on privacy further than necessary to achieve those objectives. To pass this test, the warrant must state with particularity the specific code violations that are the object of the search, and likewise must limit the corresponding scope of the search to areas of the premises in which the stated code violations are likely to be found. In the Seventh Circuit's illustration in *Platteville*, it was unreasonable for the city to conduct a search of closets and dressers to discover evidence of violations of the city's occupancy standards when the statute and warrants pursuant to which the searches were being conducted only authorized searches to determine compliance with provisions of the city's property maintenance code.

Here, the Waukegan Administrative Search Warrants authorize open ended searches that extend far beyond any search arguably authorized under the Licensing Ordinance. As stated previously, the Administrative Search Warrant upon which Waukegan relies to conduct the inspections pursuant to the Licensing Ordinance authorize the inspector to conduct a search to determine compliance with the "applicable codes" of the City of Waukegan. This does not come close to satisfying the standard set forth by the Seventh Circuit in *Platteville*.

THE AFFIDAVITS SUPPORTING THE ADMINSTRATIVE
SEARCH WARRANT PETITIONS FAIL TO ESTABLISH
"PROBABLE CAUSE" TO ISSUE THE WARRANT.

The Administrative Search Warrants upon which Waukegan relies to conduct the searches pursuant to the Licensing Ordinance also are based upon Affidavits of Code Enforcement Officers that do not meet even the minimal standards for "probable cause" set forth by the Supreme Court in the *Camara* case. The Code Enforcement Officer's Affidavit merely states that the subject property "was chosen because it is a residential rental property which is subject to licensing." The Affidavit then states that the "schedule for such inspections is set according to areas, and is based on no other criteria other than the two above: rental character and area location."

In *Camara*, the United States Supreme Court held that administrative search warrants need not be based upon the traditional probable cause standard required for a search warrant to discover evidence of a crime. For this reason, the Court concluded that a municipality may procure an administrative search warrant without the need to establish a reason to believe that the specific building sought to be searched contains the code violation sought to be discovered or corrected. But the Court did hold in *Camara*, that reasonable standards must be met before an administrative warrant will issue. These administrative standards "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. . . ." 387 U.S. at 538. The Court then went on to say that "reasonableness is the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." 387 U.S. at 539.

The Affidavit upon which the Waukegan Administrative Search Warrants are based simply state that the subject property is a residential rental property and it is in the location presently selected by Waukegan for the conduct of administrative searches. The Code Official then affirmatively alleges that the City does not have any other bases to search the property, other than that its character as rental housing located within the City of Waukegan. The Affidavit does not in any way satisfy even the minimal standards permitted

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by the *Camara* case for the establishment of probable cause to issue an administrative search warrant.

**THE ORDINANCE DOES NOT CONTAIN ANY
LEGISLATIVE FINDINGS TO JUSTIFY AN INTRUSIVE
RENTAL HOUSING INSPECTION PROGRAM**

The *Black* court also found that administrative searches must be governed, at a minimum, by authorizing legislation, ordinance or regulation that contains a clear indication of the evils sought to be prevented by the inspection program, supported by some legislative finding indicating that such evils in fact exist, and some indication of the appropriate parameters for the searches. *Black v. Village of Forest Park*, 20 F. Supp. 2d at 1230. Here, there is nothing in the Licensing Ordinance that indicates why Waukegan has undertaken this intrusive inspection process. The Licensing Ordinance does not contain any findings that rental housing in Waukegan contains a disproportionate amount of Building, Zoning, Property Maintenance, or Life Safety Code violations, and that a regime of intrusive dwelling by dwelling searches of private residences is necessary to reduce or eliminate these violations. Absent such a finding, the Licensing Ordinance lacks the "reasonable legislative and administrative standards" that the Supreme Court in *Camara* held to be a requirement of the Fourth Amendment.

**CONDITIONING A RENTAL HOUSING LICENSE ON ACQUIESCENCE
TO A PROPERTY SEARCH UNCONSTITUTIONALLY COERCES THE
WAIVER OF A CONSTITUTIONAL RIGHT.**

Finally, as we have stated in several of our previous letters, the fact that Waukegan conditions the issuance of the business license on the completion of an inspection renders the Licensing Ordinance unconstitutional. The inability to secure a rental housing license, or re-rent a vacant apartment, until an inspection is completed effectively compels the apartment owner to acquiesce to the inspection. Several courts have held that a rental housing licensing program that requires a property owner to acquiesce to an administrative search as a condition of the issuance of a license to rent or re-rent the owner's apartment units renders any "consent" to the search involuntary. It is likewise unconstitutional to condition the issuance of a municipal license or permit on the applicant's waiver of a constitutional right. See *Makula v. Village of Schiller Park, Illinois*, No. 95 C 2400, 1995 WL

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755305, at *2 (N.D. Ill. Dec. 14, 1995); *Sokolov v. Village of Freeport*, 52 N.Y.2d 341 (1981).

For the reasons set forth in this letter, LCAOA and MALDEF request that Waukegan repeal the inspection provisions of the current Licensing Ordinance. Any substitute inspection program considered by Waukegan must comply with the Fourth Amendment requirements identified above. LCAOA and MALDEF would appreciate the courtesy of a statement from Waukegan of its intentions in light of this letter.

If Waukegan chooses not to respond and instead continues with the inspection program as defined in the current Licensing Ordinance and Regulations, LCAOA and MALDEF will have no choice but to authorize the litigation described herein. LCAOA and MALDEF representatives are willing to meet to discuss these issues. LCAOA and MALDEF would much prefer to resolve these issues through direct discussions rather than through proceedings in federal district court.

Very truly yours,



Thadford A. Felton

c: Brian Kaczynski, LCAOA President
Alonzo Rivas, Esq.
Robert J. Masini, Esq.

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