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# MEMORANDUM

**To:** Robert D. Butters  
**From:** Thadford A. Felton  
**Subject:** Issues to be Addressed Regarding the Waukegan Ordinance  
**Date:** December 18, 2002

This memorandum sets forth the issues that need to be addressed with the City of Waukegan regarding the issuance of rental property licenses in light of Ordinance and the "Regulations" recently promulgated by the City's Building Department

**Issue 1: Conditioning the issuance of the rental license on an annual inspection of the rental property.**

Section 14-4(d)(i) of the Ordinance provides that "[a]ll rental residential property except those units occupied by the owner shall be subject to an annual inspection as a condition to the issuance of the business license."

In order to give a valid consent to a search, consent for the search must be voluntary. In determining voluntariness of the consent to the search, the totality of the circumstances surrounding the search must be considered. *See Makula v. Village of Schiller Park*, 1995 WL 755305 \*5 (N.D. Ill. Dec. 14, 1995). Under the Waukegan Ordinance, if a landlord wishes to rent a unit, that landlord is compelled to give consent to have the rental unit inspected because the business license to rent the unit will be suspended, revoked and/or not renewed absent an inspection. Consequently, the landlord's consent is not voluntary. *See Id.*; *Makula v. Village of Schiller Park*, 1998 WL 246043 \*7 (N.D. Ill. 1998); *see also Bolden v. Southeastern Pennsylvania Transportation Authority*, 953 F.2d 807 (3d Cir. 1991)(Employee did not give voluntary consent to drug test, based on the totality of circumstances, where test was required for employee to return to work.); *Sololov v. Village of Freeport*, 52 N.Y.2d 341, 420 N.E.2d 55, 57 (1981)(Nor may it be said that the business of residential rental is of such a nature that consent to a warrantless administrative search may be implied from the choice of the appellant to engage in this business.)

In the 1998 *Makula* decision cited above (*Makula II*), the Court held that the issuance of license could not be conditioned on the conduct of an inspection of the unit. Construing *Makula*

*II*, a City could have a licensing scheme. The City could also have an inspection program, which would have to satisfy the Fourth Amendment requirements that any search be undertaken to an administrative search warrant in the event the tenant, or the owner if the unit is not leased, do not voluntarily consent to the inspection. But a City cannot refuse to issue a license to engage in the business of renting real estate on the landlord arranging for a warrantless inspection of the landlord's units. This is what the Waukegan Ordinance seems to require..

**Issue 2: Imposition of a criminal penalty for operation of a business without a business license.**

Section 14-15 provides as follows:

Pursuant to the provisions of Illinois Consolidated Statutes, Chapter 65, Section 5/1-2-1.1, the operation of a business in the City of Waukegan without a business license when the same is required under the terms of the code of ordinances of the City of Waukegan, including this Chapter, hereby declared to be [sic] a misdemeanor, punishable by incarceration in a penal institution other than the penitentiary not to exceed six (6) months. This penalty shall be in addition to any and all other penalties and fines provided by law.

In *Sokolov v. Village of Freeport*, 52 N.Y.2d 341 (1981), the ordinance at issue required that one obtain a rental permit before one could rent or re-rent a residential rental property. *Id.* at 343. The court held that the imposition of a penalty upon a landlord for renting his premises without first consenting to a warrantless inspection violated the property owner's Fourth Amendment rights. The court further found the ordinance to be unconstitutional because the property's owners consent to a search was not voluntary, but instead was a product of coercion because if a property owner rented the property without a rental permit, that property owner was subject to criminal penalties. *Id.* at 346. "A property owner cannot be regarded as having voluntarily given his consent to a search where the price he must pay to enjoy his rights under the Constitution is the effective deprivation of any economic benefit from his rental property." *See Id.*, 52 N.Y.2d 341, 420 N.E.2d 55, 57 (1981).

**Issue 3: The Ordinance does not require that Waukegan obtain a search warrant if consent to inspect the property is withheld.**

Section 14-13 provides as follows:

If any owner, property agent, tenant, occupant or other person in control of a rental residential property or a dwelling unit therein fails or refuses to consent to free access and entry to the property or dwelling unit under his control for any inspection pursuant to this ordinance, the Code Official or his designee may apply to the Circuit Court for a search warrant or other appropriate court order authorizing such inspections.

Under the Ordinance Waukegan is not required to obtain a search warrant if the consent to inspect the property is withheld. Therefore, Waukegan can request to inspect a property, have

that request denied and not petition the court for a search warrant thereby preventing the landlord from obtaining a business license to rent the property. The failure of the Ordinance to require Waukegan to obtain a search warrant whenever consent is withheld effectively coerces the landlord into voluntarily consenting, which is unconstitutional under the *Schiller Park* and *Sololov* cases.

However, in *Hometown Co-Operative Apartments v. City of Hometown*, 515 F.Supp. 502 (N.D. Ill. 1981), the plaintiffs argued that an inspection ordinance was unconstitutional because there could be instances in which the defendant does not or cannot procure a warrant, and in those instances, the property owner must either consent to the inspection or risk substantial fines. The court held that “the possibility that circumstances will arise in the future...in which residents...will be forced to consent to inspections against their will because the city either refuses to seek a warrant or is unable to procure one under the relatively liberal standards set down in the ordinance....does not state a case or controversy ripe for judicial determination.” *Id.* at 505.

Also, the Regulations recently promulgated by the Waukegan Building Department provide that in the event a tenant does not give permission to conduct an inspection, the City will petition the appropriate tribunal for the issuance of an administrative search warrant. Both the Regulations and the Ordinance, however, are silent on the impact on a landlord’s license if the City ultimately does not conduct the inspection required under the Ordinance. I understand that the Building Department attorney has stated that the City would not issue or reissue a license if an inspection of a unit does not occur, including if the inspection does not occur because the City’s petition for an administrative warrant is denied. If this should ever occur, this outcome would violate the Fourth Amendment.

**Issue 4: Waukegan’s Rules and Regulations Concerning Issuance of Rental Property Licenses.**

Waukegan’s Rules and Regulations related to the Ordinance require as an additional prerequisite to the issuance of the business license that the landlord attend the one-day Landlord Training Class offered by the Waukegan Police Department and present a certificate of completion as part of the license application process. (Section 8). While it appears that the LCAOA already has a relationship with the Waukegan Police department regarding this training, the Ordinance makes no mention of training as a prerequisite the issuance of a license, and, therefore, arguably, there is no “legislative basis” for this prerequisite. Further, there is no mention as to the frequency of when such training will be offered or whether a landlord must attend such training on a yearly basis.

**Issue 5: Notice to Tenants.**

While it appears that Waukegan can require that the landlord give the tenants notice of the inspection, neither the Ordinance or the Rules and Regulations provides a form for such

notice. In the interest of informing the tenant's of their rights and protecting the landlords, it is suggested that a form tenant notice be created that informs the tenants of their right to refuse to consent to the inspection and the consequences of such refusal; informs the tenants of the date of the inspection; and contains at least two boxes for the tenants to check regarding the inspection if the tenant will not be present for the inspection, which provide:

:

- ▶ I consent to have my unit inspected by the City of Waukegan and I consent to my landlord providing the City of Waukegan access to my unit to perform such inspection; or
- ▶

#### **Other Miscellaneous Issues:**

Section 14-4(d)(iii) provides “[l]icensing inspections of rental residential property shall be conducted within sixty (60) days of the issuance of an initial license or renewal license.” While not explicitly stated, it appears that upon receipt of a completed application for a license or a renewal license, including payment of all required fees and the scheduling of the inspection (Section 14- 4(d)(ii), that an initial license or renewal license is issued which is conditioned upon the inspection. LCAOA may want to make this more explicit.

Section 14-4(d)(vi) provides that “[i]ndividual units in a licensed premises that become vacant during the course of a license year may not be re-occupied until the are reinspected and approved for occupancy.” The related “Rule and Regulation” further provides that “if the unit is vacant for a period greater than 180 days after the initial inspection the City will require another occupancy inspection before the unit may be occupied.” Aside from the problems as recognized in Issues 1, 2 and 3 above, depending on the timing of Waukegan’s inspections, Waukegan can effectively prevent a landlord for entering into a lease at the time of his/her choosing by not inspecting the unit prior to the effective date of the lease. Furthermore, the mere passage of time does not necessarily constitute “probable cause” for the issuance of an administrative warrant. See *Black v. Village of Park Forest*, 20 F.Supp.2d 1218, 1226 (N.D. Ill. 1998)(the passage of time between inspections will not invariably be sufficient to establish probable cause for an administrative inspection of a residence.) *but see Runstrom v. City of Kalamazoo*, No. 95-CV-158 (W.D. Mich. Aug. 2, 1996) and *Smith v. Borough of Glenolden*, 1994 WL 672618 (E.D. Pa. Nov. 30, 1994)(rejecting attacks on residential inspection programs based on the passage of time between inspections.)