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January 2, 2003

**VIA FACSIMILE (847-623-7980)  
AND FIRST CLASS MAIL**

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

**Re: Ordinance  
Businesses Engaged in Rental Housing**

Dear Ms. Linn:

On several occasions, the Lake County Apartment Owners Association ("LCAOA") has brought to the attention of the City of Waukegan ("Waukegan") its concerns with regard to the unconstitutionality of Waukegan Ordinance No. 02-O-37 ("Ordinance"). In addition, representatives of LCAOA and Robert Butters of our firm met with you, Robert Masini, and Charles Perky on December 4<sup>th</sup> to further discuss LCAOA's concerns regarding the unconstitutionality of the Ordinance. At that meeting, Waukegan took the position that LCAOA's concerns would be satisfactorily addressed through implementing regulations promulgated by the Waukegan Building Department. However, after a review of the Ordinance's Rules and Regulations, we believe that certain aspects of the Ordinance remain unconstitutional and that the Ordinance together with the implementing Rules and Regulations violate the Fourth Amendment rights of both the landlords and the tenants.

LCAOA's principal concerns regarding the Ordinance and the implementing Rules and Regulations are as follows: (1) the issuance of the rental license is conditioned on a landlord consenting to an annual inspection of the rental property; (2) the imposition of a criminal penalty for the operation of a rental business without a business license; (3) the lack of any requirement that Waukegan must obtain a search warrant if the consent to inspect the property is withheld; (4) the requirement that landlords attend a one-day Landlord Training Class offered by the Waukegan Police Department; and (5) the lack of any process to inform tenants of their constitutional rights regarding Waukegan's right to search the rental property.

Section 14-4(d)(i) of the Ordinance provides that A[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.@ Because the Ordinance conditions the issuance of the business license on the inspection, the Ordinance violates the Fourth Amendment.

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.); *Sokolov 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.)

Another significant problem with the Ordinance is that, in the event consent to inspect is withheld by the person in control of the premises, Waukegan is **not required** to obtain a search warrant. Section 14-13 of the Ordinance specifically states that the "Code Official or his designee **may** apply..." for a search warrant. 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. Thus, the failure of the Ordinance to require Waukegan to obtain a search warrant whenever consent is withheld effectively coerces the landlord into voluntarily consenting to an inspection, which is unconstitutional under the *Schiller Park* and *Sokolov* cases cited above.

The Ordinance further violates the Fourth Amendment by imposing a criminal penalty upon any landlord that rents a rental unit that has not been inspected by Waukegan. As the *Sokolov* court found, under such circumstances a consent to search cannot be considered voluntary. AA 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.*

Related to the above, neither the Ordinance nor the implementing Rules and Regulations address what happens if consent to a search is withheld, and Waukegan subsequently is unable to show sufficient probable cause to obtain a search warrant. As the Ordinance and implementing Rules and Regulations now read, if the landlord or

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tenant exercises his or her constitutional rights and an annual inspection does not occur, the landlord cannot obtain a business license. Again, effectively coercing consent for a search violates the Fourth Amendment.

LCAOA also contends that provisions of the Building Department's Rules and Regulations go far beyond mere implementation of the provisions of the Ordinance. Specifically, Section 8 of the Rules and Regulations explicitly requires that as an additional prerequisite to the issuance of the business license, the landlord must attend a Landlord Training Class offered by the Waukegan Police Department. Support for this additional prerequisite is not found anywhere in the Ordinance, and is therefore without any legislative authorization.

Finally, as you are aware, a landlord cannot give consent to a search on behalf of a tenant, *see Black v. Village of Forest Park*, 20 F. Supp. 2d 1218, 1222 (N.D. Ill. 1998), and neither the Ordinance nor the implementing Rules and Regulations provide for a means of informing a tenant of his/her constitutional rights regarding Waukegan's right to search the rental property. LCAOA members cannot cooperate in such a violation of the constitutional rights of their tenants. Accordingly, LCAOA has prepared a form letter to be given to the tenants that (1) informs the tenant that Waukegan desires to inspect their rental unit on a certain date and time and (2) informs the tenant of their right to withhold consent to Waukegan's inspection of the rental unit. LCAOA members will not provide access to any unit unless a tenant has affirmatively given his or her informed written consent to permit their residence to be searched without a warrant.

Furthermore, even in the event a single tenant has consented to a search of the rental unit, there may be an additional tenant in the rental unit whose consent has not been procured for the search. Therefore, even if a search occurs with consent of one tenant, such a search can only be of a portion of the rental unit, unless the consent of the additional tenant is also obtained which would allow for a search of the entire rental unit.

In sum, on several occasions LCAOA has brought its concerns regarding the unconstitutionality of the Ordinance and implementing Rules and Regulation to the attention of Waukegan in the hopes that Waukegan would modify the Ordinance. Unfortunately, Waukegan has chosen not to address LCAOA's concerns and has proceeded with the implementation of the Ordinance, which is unconstitutional in several respects. LCAOA would once again request that Waukegan delay the implementation of the Ordinance until its unconstitutional provisions are addressed and resolved. However, should Waukegan insist on implementing the Ordinance and the Rules and Regulations, LCAOA will take the necessary steps to ensure that the landlords Fourth Amendment rights are upheld and to ensure that the landlords are not a party to Waukegan's violation of their tenant's Fourth Amendment rights.

Finally, if through the implementation of the Ordinance and Rules and Regulations Waukegan interferes with the ability of landlords to operate their rental

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properties because of the landlord and/or tenant has exercised of his or her Fourth Amendment rights, LCAOA will seek an immediate injunction against any such interference.

LCAOA remains willing to work with Waukegan to modify the Ordinance and implementing Rules and Regulations in a manner which allows Waukegan to attain its objectives, while at the same time protecting the Fourth Amendment rights of the landlords and tenants. Please contact me should Waukegan wish to discuss these matters further.

Very truly yours,

Thadford A. Felton

Cc: Brian Kaczynski  
*President, Lake County Apartment  
Owners Association*  
Robert J. Masini, Esq.

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