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October 20, 2010

Via Email and U.S. Mail

Roger Akin, Esquire
Akin & Herron, P.A.
1500 Shallcross Ave., Suite 1-A
Wilmington, Delaware 19806

Dear Roger:

I write with regard to proposed amendments to Chapter 17 of the Newark City Code being considered for adoption on October 25, 2010. I was asked by several Newark property owners, who have a concern about the Fourth Amendment implications of some of the amendments, to determine whether they would in fact violate the Fourth Amendment. Having researched the question and determined that they do, I write to urge you to advise Council that those provisions are unconstitutional and should not be adopted.

The proposed ordinance would amend Chapter 17 of the Code, Housing and Property Management, in part, by replacing the present Section 404.8.1 with new language that includes the following:

3. Inspection - the interior and exterior of the premises shall be inspected annually by the code official prior to the approval or renewal of the rental license. Failure to complete or permit such rental inspection prior to the renewal date shall cause a late fee to be assessed in accordance with Section 404.8.2.

4. Lease - any agreement, contract, lease or sublease which provides for, permits, allows, contemplates, or facilitates the occupancy of any structure for which a rental license is required herein shall be in writing, if such agreement, contract, lease, or sublease is for a period in excess of thirty (30) days. *Such written agreements shall state that the tenant shall provide access for all required inspections by the City of Newark when provided with forty-eight hours written notice as per 25 Del. C., Part III, Landlord Tenant Code. Such written agreements shall be submitted to the official upon request.*

The italicized language would limit the rental of certain housing units, those for which a rental license is required by Section 404.8, to persons who agree to forfeit their Fourth Amendment right to insist that housing inspectors not perform warrantless inspections of their homes. A United States Supreme Court decision dealing with this precise issue makes clear that that is unconstitutional.

The case is *Camara v. Municipal Court*, 387 U.S. 523 (1967), which dealt with a tenant who refused entry to a San Francisco Department of Public Health inspector who sought to perform a routine inspection for possible housing code violations, but did not have a search warrant. Recognizing that permitting warrantless housing code inspections would impermissibly leave tenants “subject to the discretion of the official in the field precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search,” *id.* at 532-33, the Court held that administrative searches of this type were “significant intrusions” that could only be done in compliance with the Fourth Amendment.” *Id.* 534. The Court went on to say that absent good cause, which it described, the warrant should be sought only if entry was refused. *Id.* at 539-40.

The proposed amendment to the Newark Code appears to be an attempt to circumvent this constitutional requirement by mandating that tenants consent to the inspections in advance, when they sign leases. That Newark may not do, since it may not require people to waive their constitutional rights as a condition of renting in Newark. There is, of course, a presumption against the waiver of constitutional rights, *Brookhart v. Janis*, 384 U.S. 1, 86 S. Ct. 1245, 1247 (1966), citing *Glasser v. United States*, 315 U.S. 60, 70-71 (1942), and the state may not ignore constitutional rights under the guise of regulation *NAACP v. Button*, 371 U.S. 415, 439 (1963).

Moreover, as you know, the state may not penalize the exercise of a constitutional right unless that is necessary to promote a compelling governmental interest. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). The proposed ordinance would do just that, since it would bar potential tenants from renting in Newark if they insisted on maintaining their Fourth Amendment rights. There is no compelling governmental interest justifying this. Newark has no need to be excused from complying with the Fourth Amendment and demonstrating to a judge that issuance of an inspection warrant is justified. The probable cause standard established by *Camara* is not unduly burdensome, and does not foreclose inspections in emergency situations. *Id.* at 549. As the Supreme Court recognized in *Camara*, a reasonable search requirement does not prevent fire, health and housing code inspection programs from achieving their goals. *Id.* at 533.

Also, like a similar ordinance invalidated in *Black v. Village of Park Forest*, 20 F. Supp. 1218 (N.D. Ill. 1998), the proposed ordinance is deficient because it lacks the “reasonable legislative and administrative standards,” required by *Camara*, so that “it both fails to cabin the discretion of searching officials and fails to inform residents of the appropriate extent of the searches.” 20 F. Supp. at 1229. In addition, given the non-uniform nature of the Section 404.8 rental license requirement and the absence of findings supporting

application of different requirements, there are equal protection problems with the proposed ordinance. *See id.* at 1226-27.

For all of these reasons, the proposed ordinance is facially unconstitutional. It is also likely to be unconstitutional as applied, for several reasons. First, Section 404.8.1(3) appears to make a late fee applicable when a property inspection is delayed past a particular date, which is likely to happen if a tenant insists that Newark comply with the Constitution and obtain a warrant. That would be impermissible because the "state may not impose a charge for the enjoyment of a right granted by the federal constitution." *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943). Thus, in *Black, supra*, the court invalidated an ordinance imposing a fee on tenants who insisted that housing inspectors obtain warrants.

Second, for the waiver of a right to be effective it must be clearly established that there was "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). It is doubtful that a court would find acquiescence to one sentence in a multipage lease, signed without benefit of counsel months before a search was attempted, to satisfy that requirement.


It appears from the proposed ordinance and a September 29, 2010 memorandum from Mr. Sonnenberg to the Mayor and Council that the proposed language I have addressed is a deviation from the 2009 International Property Maintenance Code that has otherwise been generally proposed for adoption. It is not surprising that the International Code does not have this provision. First, for the reasons I have stated, it violates the United States Constitution. (Since Article I, § 6 of the Delaware Constitution is similar, it also violates that, for the same reasons.) Second, the proposed language would expose any city that adopts it and its housing officials to liability in a damages suit. If the language is adopted, Newark's housing personnel might seek to apply it, or to penalize landlords and tenants who refuse to comply with it. If they did so, the persons against whom it was applied would have a cause of action for damages against Newark and its employees under 28 U.S.C. § 1983.

While researching this matter I ran across Justice Brandeis's prescient observation in *Olmstead*:

In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

Those words are as true today as when Brandeis wrote them. Thus, for that reason, too, I urge you to advise Council not to approve these proposed changes.

Sincerely yours,


Richard H. Morse
LEGAL DIRECTOR

cc: Mr. John Bauscher
Mr. Bruce Harvey