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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

In re: the Application for an Administrative Search Warrant,

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

City of Golden Valley, Petitioner

Court File No. 27-CV-15-15657

The above-entitled matter came on for hearing before the Honorable Susan M. Robiner on September 17, 2015 upon Petitioner's application for an administrative search warrant. Ashleigh M. Lietsch, Esq. appeared on behalf of the City of Golden Valley, Minnesota. The subjects of the warrant, Landlords Jason and Jacki Wiebesick ("Landlords" or "Wiebesicks") and Tenants Tiffani Simons and Jessee Treseler ("Tenants") did not appear. Based upon all filings and proceedings herein, the Court makes the following:

FINDINGS OF FACT

1. The City of Golden Valley ("City") has a city code that establishes standards for rental housing and requires rental licenses for all rental dwellings in Golden Valley. Golden Valley City Code, § 6.29. The code contains minimum standards for structural integrity, ventilation, water heaters, fireplaces, lighting and electrical systems, smoke detectors, and other systems. These standards operate to protect residents from the risks to life and property posed by noncompliance.

2. The ordinance purports to allow the City to inspect all rental dwellings to ensure compliance with the City Code and state law. It states that "The Code Official shall determine

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the schedule of periodic inspections." It further provides that "each tenant shall grant access to any part of its Rental Dwelling at reasonable times for the purpose of effecting inspection, maintenance, repairs or alterations as are necessary to comply with the provisions of this Section" and that if the property manager or tenant fail to allow entry, the "Code Official may pursue any remedy at law or under the City Code, including, but not limited to, securing an administrative search warrant for the Rental Dwelling." Golden Valley City Code, §§ 6.29 Subds. (4) (E) and (F).

3. The City has designated its Fire and Property Manager Maintenance Inspector David Gustafson as its Code Official. Gustafson interprets the code language cited above as vesting him with "the authority to inspect a rental property at any time to determine whether it is in compliance with City Code and state law." Affidavit of David Gustafson at ¶7.

4. Gustafson's department has established a policy of conducting inspections every three years; however, Gustafson states that this "departmental policy" does not limit the City's authority set forth in the ordinance which he interprets as allowing inspections "at any time." Gustafson Aff., ¶¶ 10, 7.

5. The Wiebesicks own a rental property at 510 Jersey Avenue in Golden Valley, Minnesota where they also reside.

6. Tiffani Simons and Jessee Treseler are tenants at the same residence.

7. The Wiebesicks have had a rental license since 2011 associated with 510 Jersey Avenue. This residence was inspected in 2011 pursuant to an administrative search warrant issued by Judge Philip Bush.

8. The Wiebesicks applied to renew their rental license in April 2015.

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9. By letter dated April 9, 2015, the City notified the Wiebesicks that the rental property was due for inspection, asking them to call to schedule the inspection, and informing them that the tenants would have to receive 24 hours' notice of any inspection.

10. By letter dated April 30, 2015, The Wiebesicks and Tenants responded stating that they would not agree to a voluntary inspection, and relying on *McCaughtry v. City of Red Wing*, 831 N.W.2d 518 (Minn. 2013) to assert that an inspection without a search warrant supported by probable cause violated their Fourth Amendment rights and their parallel right under the state constitution.

11. The City now seeks an administrative search warrant from the Court. The City concedes that it has no individualized suspicion of any code violations at the rental property.

CONCLUSIONS OF LAW

1. Both the United States Constitution and the Minnesota Constitution provide that persons shall be free from unreasonable searches and seizures and impose a warrant requirement supported by probable cause. U.S. Const. amend IV; Minn. Const. art. I § 10.

2. The Wiebesicks and Tenants failed to appear at the hearing despite successful service of a notice of hearing upon Tenants, multiple service attempts upon Landlords and informal actual notice from the City. Their position regarding the search warrant can be deduced from their letter of April 30, 2015 in which they affirmatively do not consent to a search and assert that a search without probable cause would violate their Fourth Amendment rights and similar rights under the state constitution.

3. The Court chose to require a hearing in light of *McCaughtry v. City of Red Wing*, 831 N.W.2d 518 (Minn. 2013) (*McCaughtry II*) and the Minnesota Supreme Court's recognition that it is a judge's duty to exercise its warrant authority in a way that passes constitutional

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muster. *See also State v. Ness*, 834 N.W.2d 177, 185 (Minn. 2013) ("all acts of judicial discretion require conscientious judgment, not arbitrary action"). Specifically, it wanted to give the City an opportunity to present legal argument as to whether *McCaughtry II* required particularized suspicion before issuance of a search warrant and if so, to allow the City the chance to develop a record regarding individualized suspicion, if possible.

4. At the hearing, the City conceded that there was no individualized suspicion supporting its warrant application. Hence, the issue devolves to whether an administrative warrant for a rental housing inspection may issue in the absence of any individualized suspicion where, as here, the City seeks to inspect the residence of four persons, two of whom are landlords and hold a rental license, and two of whom are tenants with no license relationship with the City.

5. This issue was discussed in *Camara v. Municipal Court*, 387 U.S. 523 (1967) where the United States Supreme Court held that the Fourth Amendment did not require individualized suspicion in order to support an administrative search warrant in similar circumstances. There, the Court overturned its earlier case of *Frank v. State of Maryland*, 359 U.S. 360 (1959), which had permitted warrantless housing inspection searches. In *Camara*, the Court discussed in detail the fact that housing inspection searches were subject to the warrant requirement and probable cause requirement of the Fourth Amendment. However, the Court ultimately held, after balancing the privacy intrusion against the public benefit, that probable cause could be established without individualized suspicion. The Court did not identify precisely what would constitute a reasonable search within the meaning of the Fourth Amendment. Instead, it simply stated that standards could be based on "passage of time, the nature of the building (e.g., a multifamily apartment house), or the condition of the entire area" but did not

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require "specific knowledge of the condition of the particular dwelling." *Camara,* 387 U.S. at 538.

6. In *McCaughtry II*, the Minnesota Supreme Court also addressed the issue of administrative search warrants for rental housing inspections. There, the City of Red Wing had an ordinance allowing inspections of residential rental housing under certain conditions: upon reasonable belief of a code violation, or upon application for a rental license, or "on a scheduled basis." 831 N.W.2d at 520. The statute was challenged as facially in violation of the Minnesota Constitution, the appellants having acknowledged that the ordinance did not violate the Fourth Amendment pursuant to the standard set forth in *Camara*.

7. The Minnesota Supreme Court chose to address the issue of whether Art. I, § 10 of the Minnesota Constitution provided greater protection against rental housing inspections than the Fourth Amendment to the United States Constitution, even though the language of Art. I, § 10 is identical to the Fourth Amendment.

8. The Minnesota Supreme Court could have simply adopted *Camara* and applied its reasonableness analysis to the facts of *McCaughtry II*. If it had done so, it would have both upheld the Red Wing ordinance against a facial challenge and informed other municipalities that administrative search warrants for rental housing generally will survive state constitutional scrutiny if they meet the *Camara* standard. It did not. Instead, the Minnesota Supreme Court first stated that "whether the Minnesota Constitution requires individualized suspicion for housing code searches is an unsettled question." *Id.* at 522. It then concluded that the ordinance withstood a facial challenge because it "did not preclude a district court from requiring that the City establish individualized suspicion before a warrant will issue." *Id.* at 524. It summarized its decision by stating that Red Wing's "warrant mechanism for Licensing Inspections can be

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applied constitutionally, even under appellants' view of the law, because a district court may require individualized suspicion before issuing a warrant in a particular case." *Id.* at 525. Notably, it gave only one example of how the statute could be applied constitutionally: if the judge required individualized suspicion before issuing the warrant. Moreover, in the one case since *McCaughtry II* where the Minnesota Supreme Court has commented on *McCaughtry II*, the Justice who authored *McCaughtry II* summarized his earlier opinion by stating that the ordinance withstood a facial challenge "because it allowed a judge to require individualized suspicion in issuing an administrative warrant." *State v. Ness*, 834 N.W.2d 177, 183 (Minn. 2013).

9. The City presents strong arguments for not requiring individualized suspicion: the public interest in protecting persons from risk to life and property due to housing code violations is compelling. Additionally, housing inspections are often the only way to enforce compliance since tenants can be unaware of code violations or fearful of reporting such violations. These types of arguments supported the *Camara* Court's holding that particularized suspicion was not necessary to support probable cause for a housing inspection.

10. But this Court is not writing on a blank slate. These very same arguments were presented to the *McCaughtry II* Court and did not persuade the Minnesota Supreme Court to adopt the *Camara* standard – which is implicitly what the City seeks in this case.

11. Additionally, the *Ascher* case is instructive. *Ascher v. Commissioner of Public Safety*, 519 N.W.2d 183 (Minn. 1994). There, the Minnesota Supreme Court considered the use of temporary road blocks for DWI enforcement. The practice had survived Fourth Amendment scrutiny in *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990). In *Ascher*, the Court balanced the public interest in deterring drunk driving against persons' expectations of privacy in their automobiles and held that the right to privacy in one's car sufficiently

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outweighed the public safety interest to require "objective individualized articulable suspicion" to conduct an investigatory stop – which it considered "minimally intrusive." 519 N.W.2d at 187.

12. Here, it would seem that the public interest in enforcing housing standards is not any greater than the public interest against drunk driving. In contrast, the privacy interest in one's home is well-recognized as of greatest constitutional significance, (*see McCaughtry II*, 831 N.W.2d at 528, and cases cited therein (J. P. Anderson, concurring)) and indisputably greater than one's privacy interest in one's car. Hence, when one analogizes to the reasoning of *Ascher*, it would seem that the Minnesota Supreme Court would require at least some level of individualized suspicion to issue a warrant allowing the government to search one's home – even a minimally intrusive housing inspection.

13. Since the City concedes that it does not have even an objective, articulable suspicion of a code violation, *McCaughtry II* appears to foreclose issuance of a search warrant.

ORDER

For the reasons set forth herein, Petitioner City's application for an administrative search warrant is DENIED.

BY THE COURT:

Date: September 24, 2015

Susan M. Robiner
Judge of District Court