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In the Commonwealth Court of Pennsylvania

No. 722 CD 2019

DOROTHY RIVERA, EDDY OMAR RIVERA, KATHLEEN O'CONNOR, ROSEMARIE O'CONNOR, THOMAS O'CONNOR, and STEVEN CAMBURN

v.

BOROUGH OF POTTSTOWN and KEITH A. PLACE.

Brief of Appellees, Borough of Pottstown and Keith A. Place

Filed in Response to Appellants' Appeal from the Orders of the Honorable Court of Common Pleas of Montgomery County, dated April 3, 2018, February 5, 2019, May 3, 2019 and May 6, 2019, at Docket No. 2017-04992

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COUNTER-STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction over this appeal under Pa. R.A.P. No. 341(a) and 42 Pa.C.S. § 762(a)(4)(i)(B), as it relates to the final order dated May 6, 2019. Despite the Trial Court's request that jurisdiction be relinquished, and the matter be remanded, Appellees assert the granting of the Motion for Judgment on the Pleadings was proper and not based upon a novel constitutional claim. (Applt. Brief, Appendix E, p. 4). Even assuming a novel issue, Appellees request that this Court maintain jurisdiction.

If this matter is remanded to the Trial Court, it is asserted that the discovery Orders dated April 3, 2018, February 5, 2019 and May 3, 2019 (R. 400a, 693a, 1003a) constitute interlocutory orders outside this Court's jurisdiction.

As it relates to the Trial Court's dismissal of Appellee Keith Place, the legal issues supporting his dismissal do not stem from a novel constitutional claim, requiring this Court to maintain jurisdiction in accordance with Pa. R.A.P. No. 341(a) and 42 Pa.C.S. § 762(a)(4)(i)(B).

COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

1. Whether this Court should retain jurisdiction over this matter and decide the issue as a matter of law on the merits?

   Suggested Answer: Yes.

2. Whether the Trial Court's Order should be affirmed where the Pottstown Ordinances comply with Art. I § 8?

   Suggested Answer: Yes.

3. Whether the Trial Court's Order dismissing Keith Place should be affirmed where he is entitled to Official Immunity?

   Suggested Answer: Yes.

4. Whether the Trial Court's discovery Orders (3) should be upheld where and no discovery was relevant as Appellants are precluded from pursing an "as applied" constitutional challenge?

   Suggested Answer: Yes.

COUNTER-STATEMENT OF THE CASE

A. Procedural History

1. Pleadings.

On March 13, 2017, Dorothy Rivera, Eddy Omar Rivera, and Steven Camburn, ("Landlord/Tenants") filed a Declaratory Judgment action in the Court of Common Pleas for Montgomery County seeking a determination that the Borough of Pottstown's rental-inspection ordinance (Chapter 11, Housing, § 201 *et seq.*) is unconstitutional pursuant to Article I, Section 8 of the Pennsylvania Constitution. (R. 1a).

On July 26, 2017, pursuant to a Stipulation, Landlord/Tenants filed an Amended Complaint adding factual allegations and Thomas O'Connor, Kathleen O'Connor and Rosemarie O'Connor (Appellants collectively referred to as "Landlord/Tenants"). (R. 23a). Named as defendants therein were the Borough of Pottstown ("Pottstown") and Keith Place, Director of Licenses and Inspections ("Dir. Place") named in his official capacity, only. On August 15, 2017, Preliminary Objections to the Landlord/Tenants' Amended Complaint were filed, and, denied on December 14, 2017. (R. 48a; R. 158a). An Answer to the Amended Complaint with New Matter was filed

(R. 159a); and on January 15, 2018, Landlord/Tenants filed an Answer to Defendants' New Matter. (R. 319a).

Pottstown and Dir. Place filed a Motion for Judgment on the Pleadings seeking dismissal of the Landlord/Tenants' Amended Complaint. (R. 401a). An Answer and Memorandum of Law in Opposition to the Motion for Judgment on the Pleadings was thereafter filed by Landlord/Tenants. (R. 434a). A Reply Brief in Support of the Motion for Judgment on the Pleadings was filed on September 26, 2018 (R. 497a); and on February 5, 2019, Landlord/Tenants filed a Sur-Reply in Opposition to the Motion for Judgment on the Pleadings. (R. 683a).

2. Discovery Motions.

On January 15, 2018, after Pottstown and Dir. Place served timely and proper objections to Landlord/Tenants' first set of Interrogatories and Requests for Production of Documents, Landlord/Tenants' filed a Motion to Compel.[1] Following briefing and oral argument, the Trial Court entered an Order limiting discovery to a start date of June 2014 and to "information and

[1] Landlord/Tenants admit in their Motion to Compel that they only sought discovery "in connection with their single constitutional claim – that Article I, Section 8 of the Pennsylvania Constitution mandates a higher level of probable cause than the federal constitution for so-called 'administrative warrants' the Borough obtains to inspect rental housing." (R. 214a).

documents related to the named plaintiffs in this action, as plaintiffs lack standing to pursue an "as applied" constitutional challenge regarding landlords, tenants and citizens who are not parties to this case." (R. 400a).

On November 16, 2018, after conducting two depositions of Dir. Place, one in his official capacity, and one as the Pottstown's Designee, the Landlord/Tenants filed a Second Motion to Compel, seeking a second deposition of a Pottstown Designee and the production of additional documents. (R. 515a). On February 6, 2019, the Trial Court entered an order denying the Landlord/Tenants' request for documents, but granted a second corporate designee deposition with the scope of questioning limited to "questions relating to the Borough of Pottstown's policy in enforcement of its Code of Ordinances, Residential Rental Licensing and Registration and Licensing of Residential Rental Units." (R. 693a). The Court did not grant Landlord/Tenants' request for specific responses as noted in the voluminous discovery motion. (R. 515a).

Dir. Place was deposed a second time as Pottstown's designee – his third overall deposition. (R. 699a). Landlord/Tenants' thereafter served five (5) additional Notices of Deposition, unilaterally scheduling depositions for a Pottstown designee on the same scope of discovery established in the

Trial Court's February 6, 2019 Order and four (4) individual code inspectors. (R. 699a).

Pottstown and Dir. Place thereafter filed a Motion for Protective Order seeking to preclude the recently noticed depositions as the information sought was outside the scope of discovery as established by the Trial Court's orders. (R. 694a). On May 3, 2019, the Trial Court, granted, in part and denied, in part, the Motion for Protective Order, directing Pottstown to produce one (1) code inspector to answer questions limited to the same scope established in the February 6, 2019 Order. (R. 1003a). The deposition did not occur as the Trial Court granted the Motion for Judgment on the Pleadings. (R. 1004a).

B. Factual Background

1. The Borough of Pottstown Rental Licensing and Inspection Ordinance.

Pottstown has lawfully promulgated and adopted "The Code of Ordinances, Borough of Pottstown," (hereinafter the "Ordinance"), which includes, but is not limited to Chapter 5, Code Enforcement and Chapter 11,

Housing.[2] (R. 29a; R. 162a). The purpose of the Ordinance is to "protect and promote the public health, safety, and welfare of its citizens, to establish rights and obligations to owners and occupants relating to residential rental units in the Borough and to encourage owners and occupants to maintain and improve the quality of life and quality of rental housing within the community." (R. 166a; *see* Ordinance, Chap. 11 § 201(1), R. 86a). The Ordinance "provides for a systematic inspection program, registration and licensing of residential rental units and penalties." (R. 34a; R. 162-163a, 166a).

All residential rental units in the Borough are subject to registration, licensing, and a systematic inspection for lawful rentals to third parties and occupancy by third parties unless the residential rental unit is exempt from the licensing provisions. (R. 160-161a, 163a, 171-172a; R. 80-94a). An owner shall permit an inspection by the Borough's Licensing and Inspections Officer at a reasonable time with reasonable notice. (R. 167-168a). If the owner does not permit such inspection, an application for administrative search warrant is permitted. (R. 35a; R. 167a, 171a, 173a; R. 91a). Failure to

[2] While portions of the Ordinance are included in the record and attached to Preliminary Objections, the Ordinance is likewise a public document.

comply with the biennial inspection may result in the suspension and revocation of the residential license. (R.167-168a; R. 94a).

2. Camburn and Rivera.

Steven Camburn owns and operates rental properties in the Borough of Pottstown, including the property located at 326 Jefferson Avenue. (R. 27-28a; R. 160-161a; R. 80-85a). Dorothy Rivera and Eddy Omar Rivera, h/w, live in and rent the Jefferson Avenue property from Camburn. (R. 27-28a; R. 160-161a). In accordance with the Pottstown Ordinance, the Jefferson Avenue property was scheduled for a routine inspection on March 13, 2017 at 11:00 a.m., for which with notice was provided. (R. 30a; R. 163a). On March 8, 2017, five (5) days before the scheduled inspection, Camburn and tenants Rivera wrote to the Borough objecting to a voluntary inspection, requesting that a warrant to inspect be obtained. (R. 31a; R. 163a).

On March 13, 2017, the Borough applied for and was issued an administrative warrant to inspect the Jefferson Avenue property by Magistrate Judge Scott T. Pallidino. (R. 31a; R. 163a). On the same date, the Magisterial District Court stayed the execution of the administrative warrant upon Landlord/Tenants' request. Id. To date, no inspection has taken place.

3. Appellants O'Connor.

Thomas O'Connor owns the property located at 466 N. Franklin Street. (R. 33a; R. 165a). His daughters, Kathleen and Rosemarie O'Connor reside in one of the apartments at Franklin Street. Id. On March 3, 2017, Pottstown informed T. O'Connor that the Franklin Street property was due for an inspection pursuant to the Borough Ordinance and proposed the inspection occur on April 10, 2017, which was rescheduled for July 6, 2017. (R. 33-34a; R. 165-166a). The O'Connors objected to a voluntary inspection without a warrant and informed the Borough of their intent to join this litigation. (R. 34a; R. 166a). No inspection has taken place to date.

C. Trial Court Order on Motion for Judgment on the Pleadings.

On May 6. 2019, the Trial Court Granted Pottstown and Dir. Place's Motion for Judgment on the Pleadings dismissing both Pottstown and Dir. Place. (R. 1004a). On July 11, 2019 following the filing of the Notice of Appeal, and Landlord/Tenants' Statement of Matters Complained of (R. 1015a) the Trial Court entered an Opinion, "conced[ing] that the claim should not have been dismissed on the pleadings as Appellants present a novel constitutional claim" and respectfully requested the Commonwealth Court to relinquish jurisdiction and remand the matter to the Trial Court. (R

1023a, Landlord/Tenant Bf., Appendix E, p. 4). Landlord/Tenants proceeded to brief their appeal asserting the Trial Court "entered final judgment in a matter involving the application, interpretation, and enforcement of a local ordinance." (Landlord/Tenants Bf., p. 3).

SUMMARY OF THE ARGUMENT

The Trial Court appropriately granted judgment on the pleadings in favor of Pottstown and Dir. Place.

First, Pottstown and Dir. Place assert that the constitutional claim involving the interpretation of the Pennsylvania Constitution, Art. I §8 is not a novel constitutional claim that precluded the Trial Court from rendering an opinion on the merits. The Pennsylvania Supreme Court has previously addressed the issue determining that a requirement to inspect subject to constitutional restrictions, is adequate to protect against unreasonable searches and seizures as protected by Art. I § 8 of the Pennsylvania Constitution.

Additionally, this Court must necessarily review the merits of this matter to determine if the issue is indeed a novel constitutional claim. Considering that a review of the merits is necessary, Pottstown and Dir. Place request that the Court retain jurisdiction to decide the constitutional issue. This is especially true where the Landlord/Tenants' claim an interpretation of the Pennsylvania Constitution, Art. I § 8, a purely legal question. Applying the appropriate legal analysis, the Pottstown Ordinance

does not violate Article I, Section 8 of the Pennsylvania Constitution and Landlord/Tenants' Complaint was correctly dismissed.

Second, Landlord/Tenants assert a facial challenge to the Constitutionality of the Pottstown Ordinance, which can be determined without a factual record, and which the Trial Court correctly disposed of on the pleadings alone. To the extent that the Landlord/Tenants argue that they presented an "as-applied" Constitutional challenge as to the named Landlord/Tenants only, **the Ordinance was not applied to any of the named parties as no inspections occurred.**

Third, the Pottstown Ordinance is an administrative search warrant that need not be supported by individualized probable cause. As the subject ordinance is subject to constitutional restrictions, it is protected by Art. I §8 of the Pennsylvania Constitution. Simpson v. City of New Castle, 740 A.2d 287, 291 (Pa. Cmwlth. 1999). Additionally, Pennsylvania Courts have relied upon Camara v. Municipal Court of San Francisco, 387 U.S. 523, 538 (1967) for decades to uphold the constitutionality of administrative search warrants to conduct rental inspections in the interests of the health, safety and welfare of citizens where reasonable legislative or administrative standards are in place. *See, e.g.*, Com. v. Tobin, 828 A.2d 415 (Pa. Cmwlth. 2003); Simpson, 740

A.2d 287 (Pa. Cmwlth. 1999); Greenacres Apts., Inc. v. Bristol Twp., 482 A.2d 1356 (Pa. Cmwlth. 1984); Com. v. DeLuca, Nos. 8095-07 and 8101-07, 2008 WL 5691584, 6 Pa. D&C. 5th 306, 318 (Pa. Ct. C.P., Del. Cty. 2008), *aff'd without opinion* at 981 A.2d 309 (Pa.Super.2009).

Likewise, applying the factors set forth in Com. v. Edmunds, 586 A.2d 887, 895 (Pa. 1991), it is clear that the Pennsylvania Constitution does not confer more rights than the Fourth Amendment in the context of administrative search warrants, despite Landlord/Tenants' protestations of the same.

Fourth, the dismissal of Dir. Place, named in the lawsuit in his official capacity, only, is entitled to Official Immunity. This is not a novel constitutional issue and his dismissal should be affirmed.

Finally, this Court should not disturb the Trial Court's discovery orders where they are interlocutory in nature and were determined within the Trial Court's discretion. Additionally, the discovery orders are moot should this Court affirm the Trial Court's dismissal of the lawsuit.

ARGUMENT

A. This Court has Jurisdiction to Address All Issues.

Although the Trial Court requested this jurisdiction be relinquished and the matter be remanded (R. 1023a; Landlord/Tenants Bf., Appendix E, p. 4) Pottstown and Dir. Place assert that this Court has jurisdiction as to both the Constitutional claim and the dismissal of Dir. Place.

1. Dir. Place is entitled to Official Immunity.

Dir. Place is entitled to Official Immunity, which is not a novel constitutional issue. The entitlement to Official immunity has been specifically addressed by the Pennsylvania Supreme Court and codified in statute. *See* 42 Pa.C.S.A. § 8546(2); *see also* Doe v. Franklin County, 174 A.3d 593 (Pa. 2017), Durham v. McElynn, 772 A.2d 68 (Pa. 2001). Therefore, Dir. Place's dismissal is properly before this Court.

2. The Pottstown Ordinances are Not Unconstitutional.

i. Taylor does not control.

As it relates to the application of Art. I § 8 to the claims presented, Landlord/Tenants' cite to a sole Commonwealth Court decision that when there are no clear answers in case law and the trial court is presented with novel issues, judgment on the pleadings is inappropriate. Taylor v. Pa. State

Police, 132 A.3d 590, 604 (Pa. Cmwlth. 2016). Taylor, however, was limited to the circumstances presented. Specifically, the Taylor court, in ruling upon preliminary objections, was to determine whether the Ex Post Facto Clause in the Pennsylvania Constitution provided more protection than the Ex Post Facto Clause in the United States Constitution as they applied to the internet notification provisions of Pennsylvania Sexual Offender Registration and Notification Act ("SORNA"). Id. at 597-98.

The only cases that were available for the court's examination were distinguishable from the matter before it. Id. at 602-04. One case addressed the internet notification provisions of a *previous version* of SORNA, known as Megan's Law III (less expansive than SORNA's internet notification provision),[3] while the other addressed the *registration requirements* of SORNA under the Federal Constitution but not the Pennsylvania Constitution.[4] Id. at 603-604. Accordingly, the court found, based on the specific issue it was presented with, it was not certain that the Pennsylvania Constitution did not provide greater protection than its Federal counterpart. Id. at 604.

[3] Commonwealth v. Ackley, 58 A.3d 1284, 1287 (Pa.Super.2012).
[4] Commonwealth v. Perez, 97 A.3d 747, 759 (Pa.Super.2014).

Significantly, no other cases have cited to Taylor for the broad proposition that Landlord/Tenants assert. Rather, the cases citing Taylor are limited to addressing SORNA. *See*, *e.g.*, Dougherty v. Pennsylvania State Police, 138 A.3d 152 (Pa.Cmwlth. 2016); Bill v. Noonan, No. 437 M.D. 2017, 2019 WL 2400676 (Pa.Cmwlth., May 16, 2019); Malone v. Pennsylvania State Police, No. 577 M.D. 2015, 2017 WL 1533870 (Pa.Cmwlth., Apr. 28, 2017). Similarly, Taylor cites to no precedent for its holding that because case law provided no clear answers, and because of the early stage of the proceedings, it could not say with certainty whether the Pennsylvania Constitution provided more protection than the Federal Constitution. Taylor, 132 A.3d at 604.

Finally, Taylor does not address whether there was a "compelling reason" to interpret the Pennsylvania Constitution as providing greater protection than the U.S. Constitution, so its applicability to the instant matter is, at best, tangential. *See* Com. v. Moore, 928 A.2d 1092, 1101 (Pa. Super. 2007).

ii. The Constitutional Question is Not Novel.

Likewise, the issues presented are not a novel constitutional question. The primary issue presented by the Landlord/Tenants is whether the

Pottstown Ordinance, which permits the issuance of an administrative search complies with Art. I §8 of the Pennsylvania Constitution. (See, Am. Cmplt. Request for Relief requesting that the Court "Declare unconstitutional the mandatory inspection requirements of…Pottstown Code of Ordinances…" (R. 44a)). A further review of caselaw reveals that when this Court was previously called upon to determine if a municipal inspection ordinance similar to Pottstown's Ordinance violated the Pennsylvania Constitution, Art. I §8, it determined it did not. *See*, Simpson, 740 A.2d at 291.

Plaintiff therein, Brian Simpson, a landlord filed a complaint in equity claiming his Pa. Constitutional rights a landlord were violated stemming from an ordinance requiring that all landlords register their property and submit to a bi-annual mandatory inspection, pay a fee and obtain a permit for the property. The court therein determined that:

> Because Section PM-105.3[5] imposes on code officials the requirement to inspect subject to constitutional restrictions, it is adequate protection against unreasonable searches and seizures as protected by the Fourth Amendment to the United States

[5] PM-105.3 of the BOCA Code provides that a search warrant must be obtained: The code official is authorized to enter the structure or premises at reasonable times to inspect subject to constitutional restrictions on unreasonable searches and seizures. If entry is refused or not obtained, the code official is authorized to pursue recourse as provided by law.

> Constitution and Article One, Section Eight of the Pennsylvania Constitution. As such, Landlord's claim is without merit.

Id.

The Pottstown Ordinance provides that an owner shall permit inspections by the Licensing and Inspections Officer "at reasonable times upon reasonable notice. If the owner does not permit such inspection of the premises…the Licensing and Inspection Officer may apply [for] a administrative warrant to inspect the premises." (Ordinance, Chap. 11 § 203(I)(3), R. 242a).

As the Pottstown Ordinance also provides constitutional protections, it complies with the Pennsylvania Constitution, Article I, § 8, and is not a novel issue. Simpson, 740 A.2d at 291.

iii. The Interpretation of the Ordinances is Purely Legal.

There was no legal impediment precluding the Trial Court from determining the state constitutional question before it where the subject ordinances are part of the pleadings. (*See* Preliminary Objections, R. 48a – 95a). Landlord/Tenants' argument to the contrary is not supported by the caselaw and this Court should disregard the Trial Court's subsequent

suggestion in its Opinion that this court should cede jurisdiction back to it. (R. 1023a; Landlord/Tenants' Brief, Appendix E, p. 4).

Even assuming Taylor applies, (which is denied) this Court may maintain jurisdiction, and decide the merits, if doing so serves the interests of judicial economy. Estate of Kinert v. Pennsylvania Dept. of Revenue, 693 A.2d 643, 645 n.1 (Pa.Cmwlth. 1997) (holding that even though it was doubtful that the Commonwealth Court properly had jurisdiction over the matter under 42 Pa.C.S. § 762, the court would retain jurisdiction and decide the case on the merits); Bukics v. Bukics, 570 A.2d 1364, n.1 (Pa.Cmwlth. 1990) (while the court had serious doubts about jurisdiction, it retained the appeal and addressed the merits in the interest of judicial economy). *See also*, Derry Township School District v. Suburban Roofing, 517 A.2d 225, 227 (Pa.Cmwlth. 1986).

In addressing Landlord/Tenants' claimed relief – whether the ordinances are unconstitutional, it would necessarily require an analysis on the merits to determine whether the issue is truly novel. Judicial economy supports this Court's adjudication rather than returning the matter to the Trial Court, with an additional appeal to this Court being likely.

B. The Pottstown Ordinance is Constitutional.

The Landlord/Tenants seek to deem the mandatory inspection requirements of the Pottstown Ordinances unconstitutional. (Am.Cmplt., p. 19, R. 44a). A review of the referenced inspection provisions, Chapt. 5, § 301, et seq. and Chapt. 11 § 201 and § 203, confirm, in accordance with Simpson, that they comply with both the Fourth Amendment and the Pennsylvania Constitution. *Also see*, Camara.

A review of the Ordinances provides that an owner must register the property and the property is then subject to bi-annual inspections, at a reasonable time upon reasonable notice. If there is no consent, an administrative warrant is to be obtained. Accordingly, like the provision in Simpson, there are constitutional protections to preclude unreasonable inspections; or, the necessity of obtaining an administrative warrant. As this has already been deemed to comply with Article One, Section 8, this Court must affirm the Trial Court's dismissal of the Constitutional Claim. Simpson, 740 A.2d at 291.

C. Pottstown's Ordinance Need not be Supported by Individualized Probable Cause.

The Landlord/Tenants also seek to enjoin Pottstown from seeking

warrants to conduct inspections with less than "traditional, individualized probable cause" and from seeking "Camara-style administrative warrants…" (R. 44a). Considering that the Pottstown Ordinance complies with the Pennsylvania Constitution, this relief is moot. Out of an abundance of caution, however, Pottstown asserts that no such individualized probable cause is required pursuant to Art. I, § 8 of the Pennsylvania Constitution.

For at least half a century, *federal* constitutional law has been clear: an administrative search warrant need not be supported by individualized suspicion of a code violation to justify an unconsented-to rental housing inspection. Camara v. Municipal Court of San Francisco, 387 U.S. 523, 538 (1967). An administrative warrant satisfies the probable cause requirement in the Fourth Amendment to the United States Constitution "if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling." Id. Pennsylvania courts have relied upon the sound reasoning in Camara pertaining to the issuance of administrative warrants to conduct rental inspections. *See, e.g.*, Tobin, supra; Simpson, supra; Greenacres Apts., Inc., supra. On each occasion, the health, welfare and safety of citizens was favored over the landlord's rights. Id.

Landlord/Tenants ask this Court to depart from decades of established law and hold that Article I, Section 8 of the Pennsylvania Constitution requires more: probable cause of the sort required in a criminal investigation. No jurisdiction has adopted Landlord/Tenants' position.

Conversely, Pennsylvania courts have confirmed the issuance of Camara-style administrative search warrants to inspect rental units. *See* e.g. Com. v. DeLuca, Nos. 8095-07 and 8101-07, 2008 WL 5691584, 6 Pa. D&C. 5th 306, 318 (Pa. Ct. C.P., Del. Cty. 2008), *aff'd without opinion* at 981 A.2d 309 (Pa.Super.2009)[6]; Tobin, supra.

Additionally, Pennsylvania Courts already recognize two types of search warrants. A general search warrant permitting law enforcement officials to search for fruits of a crime; and (2) an administrative warrant which permits an municipal official's inspection of premises to ensure compliance with municipal codes, i.e. construction codes, fire codes. Tobin, 828 A.2d at 419, *citing* Camara. As noted by this Court in Tobin, citing Camara, probable cause for an administrative warrant exists if "reasonable legislative or administrative standards for conducting an area inspection are

[6] DeLuca is a Court of Common Pleas that is cited herein for its persuasive value only.

satisfied with respect to a particular dwelling." Tobin, 828 A.2d 420; Camara, 387 U.S. at 538. Another basis for finding probable cause for an administrative warrant is the presence of a general administrative plan for the enforcement of the ordinance which is derived from neutral sources. Tobin, at 420. Reasonableness remains the ultimate standard and is assessed by balancing the need to search against the level of invasion. Tobin, at 420, citations omitted. The Tobin court again noted that if the code requirement to inspect is subject to constitutional restrictions, it is adequate protection against unreasonable searches and seizures pursuant to the Fourth Amendment and "Article One, Section Eight of the Pennsylvania Constitution." Tobin at 424, citing Simpson, 740 A.2d at 291.

Although the Tobin court overturned the underlying criminal conviction, it upheld the underlying ordinance, which required an administrative warrant to inspect (if no consent). Tobin, 828 A.2d at 424.

Simply, there is no "compelling reason" to interpret Article I, Section 8 differently than the Fourth Amendment in the context of an administrative search warrant to conduct rental housing inspections. Com. v. Moore, 928 A.2d 1092, 1101 (Pa. Super. 2007). Such a warrant, when issued by a magisterial district court and satisfying an ordinance containing reasonable

standards, need not be supported by individualized suspicion of a code violation.

In evaluating compliance with the Fourth Amendment's warrant and probable cause requirements, the United States Supreme Court concluded:

> [I]t is obvious that 'probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards, which will vary with the municipal program being enforced, may be based on the passage of time, the nature of the building, (e.g., a multi-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling.

Camara, 387 U.S. at 538.

Through the application of a balancing test focused upon reasonableness, the Camara Court also concluded that rental-housing inspections are regulatory, not criminal. Id. at 538. Because there was no other effective way to enforce the code, the Supreme Court held that criminal-type probable cause was an ***unreasonable standard*** for administrative warrants. Id. (emphasis added). Here, the Pottstown Ordinance supplies the requisite probable cause for an administrative

warrant because it requires non-discriminatory, routine, periodic inspections as part of code compliance, which is consistent with both Camara and Pennsylvania precedent.

D. The Pottstown Ordinance is Legally Consistent with Article I, Section 8.

Like the Fourth Amendment, Article I, Section 8 of the Pennsylvania Constitution does not ban all searches and seizures; it bans ***unreasonable*** searches and seizures. *See* U.S. CONST. amend. IV; PA. CONST. art. I § 8; Com. v. Miller, 518 A.2d 1187, 1191 (Pa. 1986) (emphasis added). In this case, the pleadings, along with a careful reading of the Ordinance, and particularly Chapter 11, in conjunction with the general provisions of the Property Maintenance Code, (Ordinance, Chap. 5 § 301, *et seq.*), reflect that the Pottstown Ordinance provides adequate protections against *unreasonable* searches. (R. 86-94a; R. 76-79a). It provides for inspections at reasonable times with reasonable notice; and, if there is no consent, an administrative warrant is required.

Landlord/Tenants argue that Pottstown must have individualized probable cause to inspect their private property. (R. 42-43a). Yet, Pennsylvania Courts already recognize a distinction between criminal

searches and regulatory rental-housing inspections with advance notice. See, Tobin, DeLuca, supra.

The objective of the search determines whether an administrative or a criminal warrant is required. Mich. v. Clifford, 464 U.S. 287, 294 (1984) (requiring administrative warrants for inspections by fire officials in absence of exigent circumstances). If the primary objective of a search is to gather evidence of criminal conduct, then a criminal search warrant is required. Id. Such a warrant must be supported by criminal-type probable cause, meaning "there is a fair probability that contraband or evidence of a crime will be found in a particular place." Com. v. Otterson, 947 A.2d 1239, 1244-45 (Pa. Super. 2008) (*quoting* Com. v. Brown, 924 A.2d 1283, 1286-87 (Pa. Super. 2007)). This high standard is appropriate considering the heightened consequences for a criminal conviction, such as incarceration, disenfranchisement, prohibition on gun ownership, registration as a sex offender, revocation of professional licensure, and other collateral consequences. *See, e.g.*, Sentencing Code, 42 Pa.S.C. §§ 9701, *et seq.*; Sentencing Guidelines**,** 204 Pa. Code §§ 303.1, *et seq.*

Second, administrative warrants are not intended for seizure of criminal evidence, but merely for inspection of homes or businesses to

ensure compliance with health and safety codes. Tobin, *supra.* An administrative search warrant is required where the primary objective of the search is to ascertain compliance with the minimum standards set forth in regulatory ordinances. Id., at 419. (*citing* Griffin v. Wisconsin, 483 U.S. 868, 877 (1987)); *see also* Camara, 387 U.S. at 530. This is reasonable because rental-housing inspections are less intrusive than criminal searches. The inspection is of the rental housing itself, not the tenant's body or possessions, so it is "a relatively limited invasion" of the tenants' privacy. Camara, at 537; Tobin, *supra* at 422-23. Regardless, if there is a need for an additional search related to criminal activity, the police would still need to obtain a criminal warrant. See DeLuca, supra.

Finally, rental-housing inspections also are less intrusive because landlords and tenants receive advance notice. (R. 167a; R. 91a). The fact that tenants are entitled to advance and reasonable notice before an inspection illustrates that the target of the inspection is the housing's condition, not its occupants or their possessions. Advance notice "mitigates [the inspection's] intrusiveness to some degree." City of Golden Valley v. Wiebesick, 881 N.W.2d. 143, 148 (Minn. Ct. App. 2016); *see also* Camara, 387 U.S. at 531, n. 10 (noting that advance notice supports the reasonableness of an

administrative search). As recognized in Pennsylvania, an administrative search warrant does not require as high a level of probable cause as a criminal search warrant. Tobin, 828 A.2d. at 423.

In Tobin, this Court cites Camara with approval, observing:

> [Camara] reasoned that because an agency's decision to conduct an area inspection is based on conditions in the area as a whole, the "criminal" probable cause standard asserted by the appellant was unworkable and would result in area inspections being eliminated, dealing a "crushing blow" to the goals of code enforcement. Relying on the long history of judicial and public acceptance of inspection programs, the public interest in preventing and abating dangerous conditions, and the impersonal nature of the search, which does not seek to "discover a crime," **it held, as we noted earlier in this opinion, that probable cause to issue an administrative search warrant exists if "reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling." We too, must determine "probable cause" within this context.**

Tobin, 828 A.2d at 423 (emphasis added).

The Landlord/Tenants' arguments that the Pennsylvania constitution provides greater protection than the Fourth Amendment, as a generalized statement is misplaced. In fact, the Pennsylvania Supreme Court has previously concluded that Article I, §8 is co-extensive with the Fourth

Amendment. *See*, Commonwealth v. Harris, 176. A.3d 1009 (Pa.Super. 2017) *citing* Com. v. Gary, 91 A.3d 102 (Pa. 2014). And, while the Court "may" extend greater protections under the Pennsylvania Constitution than those afforded under the U.S. Constitution, it should only be done when an independent analysis indicates a distinct standard should be applied. Com. v. Edmunds, 586 A.2d 887, 894-95 (Pa. 1991). Here, no such distinct standard is indicated, especially where the Pennsylvania Commonwealth Court cites Camara with approval. See, Tobin, supra.

Courts are to construe the Pennsylvania Constitution as providing greater rights to its citizens than the federal constitution **only where there is a compelling reason** to do so. Com. v. Gray, 503 A.2d 921, 926 (Pa. 1985); Moore, *supra* at 1101 (emphasis added). There is no such compelling reason to do so.

E. The *Edmunds* Factors Do Not Require Greater Protection for Rental-Housing Inspections.

To determine whether the Pennsylvania Constitution confers more rights than its federal counterpart, courts must examine: (1) the text of the Pennsylvania constitutional provision; (2) the history of the provision, including Pennsylvania case law; (3) related case law from other states; and

(4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence. Com. v. Crouse, 729 A.2d 588, 594 (Pa. Super. 1999), *appeal denied,* 747 A.2d 364 (Pa. 1999) (*citing* Com. v. Edmunds, 586 A.2d 887, 895 (Pa. 1991)). Pennsylvania courts may give weight to federal decisions where they "are found to be logically persuasive and well reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees." Edmunds, 586 A.2d at 895 (*citing* Commonwealth v. Tarbert, 535 A.2d 1035, 1038 (Pa. 1987)).

While it is acknowledged that the Landlord/Tenants address the Edmunds factors in their Brief, they use their argument merely to mount an ad hominem assault on the Pottstown Ordinance as a proxy for all privacy concerns as opposed to addressing whether administrative rental search warrants that are constitutional under the Federal Constitution are also constitutional under the Pennsylvania Constitution. Notably, the Landlord/Tenants do not argue how the Pennsylvania Constitution provides greater protections than the U.S. Constitution in the area of rental inspections and administrative search warrants, but rather, they make blanket arguments that the Pennsylvania Constitution provides greater protection. In doing so, Landlord/Tenants conflate criminal cases

addressing the Fourth Amendment with the instant civil matter and conflate the sanctity of the home with rental properties. Neither comparison is relevant.

First, Landlord/Tenants' exhaustive citation to criminal cases in which they argue that the Pennsylvania Constitution provides greater protection than the Fourth Amendment is an irrelevant and unpersuasive comparison. The rental inspection Ordinance is an administrative program designed to secure and advance the health, safety and welfare of those citizens who reside in rental properties, which they do not own, and, accordingly, cannot ensure that they are safe. The criminal cases to which Landlord/Tenants cite involve the application of the Pennsylvania Constitution to criminal evidentiary searches that can lead to criminal convictions and deprivations of liberty and property. The Ordinance and its application do not carry such weighty life and liberty concerns; to the contrary, it is designed to promote health and welfare. For example, the DeJohn case, upon which Landlord/Tenants hang much of their argument, is a ***murder and theft by extortion*** case, where the appellant was convicted, in part, upon evidence obtained pursuant to a search of her bank records upon a "court subpoena," which she alleged should have been suppressed. Com. v. DeJohn, 403 A.2d

1283, 1287 (Pa. 1979). Landlord/Tenants also rely on the Brion case, which is a ***narcotics case*** in which the plaintiff sought the suppression of ***conversations recorded by a confidential informer*** who wore a wire into his home to record conversations for the police. Com. v. Brion, 652 A.2d 287, 287-288 (Pa. 1994).

The criminal cases do not consider the reasonableness or other municipal interests in ensuring the safety of rental properties, which have a significant impact on the health, safety and welfare of the citizens, and particularly the renters themselves. Pennsylvania Courts have expressly addressed these issues and, in reference to the same safety issues raised in Camara, have upheld the administrative warrants. *See*, *e.g.*, Tobin, Simpson, and Greenacres, *supra*.

Accordingly, this Court should reject Landlord/Tenants' attempt to conflate the instant matter with criminal searches and address the issue that is presented, whether an ordinance providing for rental inspections upon administrative search warrants is constitutional, and whether individualized probable cause is necessary, which Pottstown denies.

The Landlord/Tenants also improperly conflate the searches of one's home with administrative health and safety inspection of a rental property.

In repeatedly asserting broad themes such as the sanctity of the home and the sacredness in Pennsylvania for privacy in one's home, Landlord/Tenants ignore the fact that safety interests in one's home is different than regulating and ensuring the safety of a tenant. Pottstown has an interest in ensuring that rental properties that are available to its citizens are safe and well maintained, where the renters do not necessarily have the ability to ensure their safety. *See* Greenacres, supra. Accordingly, Landlord/Tenants' invitation to lump home owners and rental properties under one broad "privacy" theme should be rejected.

Moreover, Landlord/Tenants do not challenge the legitimacy or the validity of the purpose of the Ordinance; nor do they assert discriminatory enforcement. (*See* R. 23a, et. seq.). Rather, Landlord/Tenants allege that the substance of the Ordinance permitting administrative warrants on less than "traditional" probable cause is violative of the Pennsylvania Constitution. Id. Yet, Pottstown and Dir. Place assert that the Ordinance *does not* permit illegal searches of rental properties because a warrant is required for non-consensual searches. (R. 167a; R. 91a). This is wholly consistent with federal and state precedent.

i. Article 1, Section 8 of the Pennsylvania Constitution.

Article 1, Section 8 of the Pennsylvania Constitution provides:

> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

PA. CONST. art. I, § 8. Although the protections against unreasonable searches and seizures in the Pennsylvania Constitution predate those contained in the United States Constitution, the guarantees under the Fourth Amendment are similar.[7] Edmunds, *supra*. Accordingly, this factor does not provide a compelling reason for this Court to declare the Pottstown Ordinance unconstitutional.

ii. The History of Article 1, Section 8.

The requirement of probable cause in Pennsylvania traces its origin to

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[7] The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

its original Constitution of 1776. Edmunds, 586 A.2d at 394. As explained by the Pennsylvania Supreme Court, the language of Article 1, Section 8 remains nearly identical to the language drafted over 200 years ago and "embod[ies] a strong notion of privacy, carefully safeguarded in this Commonwealth . . . ." Edmunds, *supra* at 394.

The Commonwealth Court has provided several instructive cases that support the constitutionality of the Pottstown's inspection (and warrant) provisions utilizing the Camara probable cause for administrative search warrants. On each occasion, the health, welfare and safety of citizens was favored over the landlord's rights. For example, the Commonwealth Court in Tobin, citing Camara with approval, provided:

> While probable cause is required for both types of warrants, for the administrative search warrant, probable cause exists if "reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling." Relevant factors for evaluating probable cause are the passage of time since a prior inspection, the condition of the premises, and the condition of the general area. Another basis for finding probable cause to support the issuance of an administrative search warrant is the presence of a general administrative plan for enforcement of the ordinance, which is "derived from neutral sources."

Tobin, *supra*, at 419-20 (citations omitted).

In Simpson, this Court determined a landlord's claim was without merit where the code provision adequate protection against unreasonable searches and seizures in compliance with Article One, Section Eight of the Pennsylvania Constitution. Simpson, 740 A.2d at 291.

Additionally, this Court upheld the process:

> The Appellant additionally argues that the ordinance is unconstitutional and invalid as violative of state and federal constitutional guarantees protecting against illegal searches, seizures, and self incrimination. It notes that Section 11 of the ordinance provides that a Building Officer who has been unable to obtain consent to enter a unit and conduct an inspection may apply to a Justice of the Peace for a warrant to inspect any such units if he has reason to believe, based upon a complaint, that a violation exists therein. He may also obtain a warrant for such entry and inspection where he asserts that the inspection is sought due to the lapse of time since the last inspection or because of conditions in the general area within which the premises are located. We agree with the court below that these warrant provisions contradict the Appellant's search and seizure contentions.

See, Greenacres Apts., Inc. v. Bristol Twp 82 A.2d 1356, 1359-60 (Pa. Cmwlth. 1984) (citations omitted).

The history of related Pennsylvania case law provides that administrative warrants may be issued on a lesser basis than traditional

criminal-based probable cause for reasonable legislative or administrative standards, derived from neutral sources. Accordingly, this factor does not provide a compelling reason for this Court to declare the Pottstown Ordinance provision unconstitutional based upon the necessity of a stricter criminal-based probable cause.

iii. Related Case Law from other States.

The next factor to consider is a review of case law from other jurisdictions. As cited by the Landlord/Tenants, Minnesota chose not to be the first state to depart from the U.S. Supreme Court's decision in Camara and hold that administrative search warrants require probable cause of the sort in criminal investigations. *See*, City of Golden Valley v. Wiesbesick, 899 N.W.2d. 152 (Minn. 2017). While the Landlord/Tenants focus on the dissent, rather than the holding of the case, Pottstown directs this Court to the holding which declined to extend probable cause for administrative warrants. Id., at 167-68. Likewise, the Landlord/Tenants' attempt to distinguish Minnesota's reliance on the federal constitution, arguing Pennsylvania does not so rely, is also misplaced. *See*, Harris, Gary, *supra*, noting the co-existence of the Fourth Amendment and Art. I, § 8.

Additionally, Pottstown is not unique in its use of administrative

search warrants for non-consensual rental-housing inspections based upon Camara's probable cause standard. *See, e.g.*, City of Lebanon, Residential Rental Licensing and Inspection Ordinance, Art. 1907-06; Borough of Trappe, Residential Rental Licensing and Inspection Ordinance, Ord. No. 408; Township of Hanover, Residential Rental Permitting and Inspection Ordinance, Ord. No. 09-12 Borough of Lititz, Residential Rental Inspection Ordinance, Ord. No. C-523; City of Pottsville, Residential Rental Unit Registration and Inspection Law, Ord. No. 860 § 176-1.

Additionally, no state has rejected Camara's probable cause standard by finding greater rights under its state constitution. To the contrary, at least fifteen states, including Pennsylvania (*see* Tobin, *supra*), have applied Camara probable cause to administrative warrants for rental housing to enforce municipal codes: California, Connecticut, Kansas, Kentucky, Minnesota, Mississippi, Missouri, Nevada, New York, Virginia, Washington, Iowa, Florida, and Wisconsin. *See, e.g.*, Griffith v. City of Santa Cruz, 207 Cal. App. 4th 982, 993 (Cal.App.6th Dist. 2012) (affirming precedent rejecting Fourth Amendment challenge to an ordinance allowing inspection without consent only by way of an administrative warrant); City and County of San Francisco v. Mun. Court, 167 Cal. App. 3d 712, 720-21

(Cal.App.1st Dist. 1985) (applying Camara's balancing test to establish probable cause for inspection); Town of Bozrah v. Chmurynski, 36 A.3d 210, 215 (Conn. 2012) (requiring criminal-type probable cause to issue the warrant because "the proposed search is not part of a periodic or area inspection program," like in Camara); Board of Cnty. Comm'rs v. Grant, 954 P.2d 695, 699 (Kan. 1998) ("We are convinced ... based on the analysis found in Camara and *See* that the existence of an administrative policy or ordinance which specifies the purpose, frequency, scope, and manner of the inspection provides a constitutional substitute for probable cause that a violation has occurred."); Louisville Bd. of Realtors v. Louisville, 634 S.W.2d 163 (Ky. Ct. App. 1982) (applying Camara to affirm that requiring inspections of rental housing before tenant moves in does not violate landlord's rights under the Kentucky Constitution or Fourth Amendment); In re Search Warrant of Columbia Heights v. Rozman, 586 N.W.2d 273, 275-76 (Mn. Ct. App. 1999) (concluding administrative warrant for rental-housing inspection was properly issued and enforceable by civil contempt); Crook v. City of Madison, 168 So. 3d 930, 940 (Miss. 2015) (applying Camara probable cause to invalidate ordinance); Ashworth v. City of Moberly, 53 S.W.3d 564, 578-80 (W.D. Mo. App. 2001) (applying Camara to affirm that requiring

inspections of rental housing does not violate the Missouri Constitution or Fourth Amendment); Owens v. City of North Las Vegas, 450 P.2d 784, 787 (Nev. 1969) ("Where considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are different from those that would justify an inference when a criminal investigation has been undertaken."); Sokolov v. Freefort, 420 N.E.2d 55, 58 (N.Y. 1981) ("In addition, and of compelling significance, the Camara opinion expressly provided that the strict standards attending the issuance of a warrant in criminal cases are not applicable to the issuance of a warrant authorizing an administrative inspection."); Logie v. Town of Front Royal, 58 Va. Cir. 527, 533-34 (2002) (applying Camara probable cause to a rental inspection ordinance); City of Seattle v. Leach, 627 P.2d 159, 161 (Wash. 1981) ("Equally well established is the principle that a lesser degree of probable cause is necessary to satisfy issuing an inspection warrant than is required in a criminal case."); City of Seattle v. McCready, 931 P.2d 156, 159 (Wash. 1997) (upholding the constitutionality of an administrative warrant issued on the basis of Camara probable cause); State v. Carter, 733 N.W.2d 333, 337 (Iowa 2007) (applying Camara to find that administrative search warrant does not require the probable cause necessary for a criminal

warrant); Florida Dept. of Agriculture and Consumer Services v. Haire, 836 So.2d 1040, 1058 (Fl. App. 4 Dist. 2003) (applying Camara to find "relaxed" probable cause evaluation in administrative search situations); State v. Jackowski, 633 N.W.2d 649, 654 (Wis. Ct. App. 2001) ("Thus, Jackowski's claim that the application for the inspection warrant was deficient because it did not establish probable cause to believe code violations then existed in his building is unavailing.") (*citing* Platteville Area Apartment Assoc. v. City of Platteville, 179 F.3d 574 (7th Cir. 1999)).

iv. Policy Considerations.

Finally, courts are to take into account policy considerations in interpreting Article I, Section 8. The United States Supreme Court determined that providing for public health and safety in rental housing is so critical that nothing short of "universal compliance" with the property maintenance code is satisfactory. The Court held that "the public interest demands that all dangerous conditions be prevented or abated . . ." Camara, *supra* at 537. These same public health and safety interests identified by the Camara court are embraced in the Pennsylvania Constitution. The Pennsylvania Constitution states that the government is instituted for the "peace, safety and happiness" of its people. PA. CONST. art. I, § 2. As such,

the Borough's police powers permit it to promote the health, morals or safety and the general well-being of the community through its rental-inspection Ordinance. Adams Sanitation Co., Inc. v. Com. Dept. of Environmental Protection, 715 A.2d 390 (Pa. 1998). The policy of promoting public health and safety is exemplified by the undisputed purpose of the subject Ordinance which is to "[p]rotect and promote the public health, safety and welfare of its citizens, to establish rights and obligations of owners and occupants relating to residential rental units in the Pottstown and to encourage owners and occupants to maintain and improve the quality of life and quality of rental housing within the community." (R. 166a; R. 86a).

Additionally, periodic rental-housing inspections are the only effective way to enforce property maintenance codes. "There is unanimous agreement among those most familiar with this field that the only effective way to seek universal compliance with the minimum standards required by municipal codes is through routine periodic inspections of all structures." Camara, *supra* at 535-36. The Supreme Court found, "[i]t is doubtful that any other canvassing technique [other than periodic inspections] would achieve acceptable results." Id. at 537.

Furthermore, many property violations are internal to the residence,

and not visible from the public right-of-way. This echoes the Supreme Court's determination that "[m]any such [dangerous] conditions - faulty wiring is an obvious example - are not observable from outside the building and indeed may not be apparent to the inexpert occupant. . ." Camara, *supra* at 537. It is unreasonable to assume that tenants or landlords have the same technical expertise as the Borough's inspectors. Therefore, they are not well-situated to self-inspect rental properties. If no administrative search warrant is issued, then no inspection occurs, and the code violation continues unabated, putting the tenant's and the public's health and safety at risk. Camara probable cause is critical to the enforcement of the subject Ordinance.

Finally, as detailed above, a routine inspection of the physical condition of private rental properties is minimal intrusion compared to the typical police officer's search for the fruits and instrumentalities of crime. Tobin, *supra*. When a tenant/landlord does not consent to the periodic inspection, the subject Ordinance requires the application of an administrative warrant and approval by a neutral magistrate before inspecting the property. (R. 167a; R. 91a). Since reasonableness is the ultimate standard, the Pottstown Ordinance adequately protects a tenant's

or landlord's constitutional rights by providing notice of an inspection, and where objection, to require an authorized administrative search warrant before conducting a rental inspection. Tobin, *supra*; Camara, *supra*. It is sound public policy to allow routine rental inspections subject to the Camara probable cause where a valid public interest, such as the health and safety of the community, justifies the intrusion contemplated. Tobin, *supra.*

Based upon the analysis of the Edmunds factors, there is no compelling reason for this Court to declare the Pottstown Ordinance provision unconstitutional based upon the necessity of a stricter criminal-based probable cause.

F. Keith Place entitled to Official Immunity.

The Landlord/Tenants have waived the issue of whether the Trial Court properly granted Judgment on the Pleadings as to Dir. Place. It is well established that a party's failure to brief an issue on appeal is to waive it. Commonwealth v. Taylor, 451 A.2d 1360, 1361 (Pa.Super.1982) (holding that the defects in an appellant's brief represented more than mere matters of form, but were instead the complete absence of those material sections of the brief which facilitate appellate review).

In this case, Landlord/Tenants failed to brief the issue of whether the Trial Court erred in granting judgment to Dir. Place. While Landlord/Tenants make the conclusory assertion in a footnote that Dir. Place is a proper party, they do not argue the matter or oppose his entitlement to official immunity. (*See* Landlord/Tenants' Brief, p. 13, n. 2). As the Landlord/Tenants fail to address the issue of Official Immunity, they have waived the issue and this Court should affirm the Trial Court's entry of judgment as to Dir. Place.

Even assuming Landlord/Tenants have not waived the issue of official immunity, Dir. Place is entitled to official immunity where his involvement solely arises out of his status as Pottstown's Director of the Licensing and Inspections Department. (R. 28a). Furthermore, Landlord/Tenants name Dir. Place ***only*** in his official capacity; and make no factual allegations against Dir. Place regarding his role in the Ordinance process, implementation, or enforcement of the rental inspection elements of the Ordinance. Id. The Declaratory Judgment claim asserted in Count I, is asserted ***only*** against Pottstown, not Dir. Place. (R. 42-43a).

As is well settled, official immunity from civil suits applies to government officials when the official acts within the course and scope of

their duties. *See* Heicklen v. Hoffman, 761 A.2d 207, 209 (Pa. Cmwlth. 2000). Section § 8546 grants official immunity for such employees when, *inter alia,* "the conduct of the employee which gave rise to the claim was authorized or required by law, or that he in good faith reasonably believed the conduct was authorized or required by law." 42 Pa.C.S. § 8546 (2).

Dir. Place is entitled to Official Immunity where his conduct – as alleged, was taken in his official capacity within the scope of his official duties. Moreover, there are no allegations in the pleadings to establish that his acts amounted to willful misconduct to make the defense of official immunity unavailable to him. Accordingly, the Trial Court's judgment in favor of Dir. Place must be affirmed.

G. Discovery is Not Necessary to Determine the Merits.

1. The Constitutionality of the Ordinance is a Question of Law, not Fact.

Contrary to Landlord/Tenants' argument, it is well-settled that the constitutionality of a statute presents a pure question of law for the court to resolve. Commonwealth v. Turner, 80 A.3d 754, 759 (Pa. 2013); Ario v. Ingram Micro, Inc., 965 A.2d 1194, 1200 (Pa. 2009); Buffalo Twp. v. Jones, 813 A.2d 659, 664 n.4 (Pa. 2002); Com. v. Thompson, 106 A.3d 742, 763 (Pa. Super.

2014). A purely legal question is appropriately disposed in the context of a judgment on the pleadings. Paustian v. Pennsylvania Convention Center Authority, 561 A.2d 1337, 1338 (Pa.Cmwlth. 1989). Since the constitutionality of the Ordinance is purely a question of law, there is no need to resolve any factual disputes. Indeed, Landlord/Tenants allege that the Pottstown Ordinance could ***never*** be applied in a ***constitutional*** manner. (R. 27a, 42-43a). Accordingly, discovery relating to the invasiveness of the inspections, the Borough's interest in the inspections, or whether alternatives exist, is superfluous to the inquiry. Moreover, because Landlord/Tenants did not have any inspections performed, the as-applied challenge fails.

Constitutional challenges are of two kinds: facial challenges or as applied challenges. Lehman v. Pennsylvania State Police, 839 A.2d 265, 275 (Pa. 2003). "[A]n as-applied attack . . . does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right." Nigro v. City of Philadelphia, 174 A.3d 693, 699–700 (Pa. Cmwlth. 2017). It is well-established that a different standard is applied when the challenge to an ordinance is "as-applied" as opposed to a "facial" challenge.

See Phila. Entm't & Dev. Partners v. City of Phila., 937 A.2d 385, 392, n.7 (Pa. 2007) (noting that "as-applied challenges require application of the ordinance to be ripe, facial challenges are different, and ripe upon mere enactment of the ordinance."). As it is not disputed that the Landlord/Tenants' properties have not been inspected under the Ordinance, there is no as-applied challenge nor is any such challenge ripe.

As the Landlord/Tenants fail to present an as applied challenge, discovery is irrelevant. *See* Berwick Area Landlord Ass'n v. Borough of Berwick, 48 A.3d 524 (Pa.Cmwlth. 2012) (holding that the plaintiffs could not assert an as applied challenge to the constitutionality of landlord registration ordinance because they had not been affected by it). In Berwick, the Berwick Area Landlord Association and the Pennsylvania Residential Owners Association filed a declaratory judgment action seeking to have an ordinance regulating rental units, and specifically requiring registration and inspection of units, to be declared invalid. Id. at 527-28. The trial court issued an order granting in part and denying in part plaintiffs' summary judgment motion, striking two provisions of the Berwick Ordinance because it was ambiguous and imposed obligations on landlords inconsistent with Pennsylvania law. Id. at 527.

The Berwick plaintiffs appealed, raising an issue on appeal that directly impacts whether discovery is necessary in this case, i.e. whether the trial court erred when it treated the Berwick plaintiffs' claims as a "facial" challenge rather than an "as applied" challenge. Id. at 533.

The Berwick plaintiffs failed to demonstrate an application of the Berwick Ordinance for the Court's review. Id. The Court also concluded that the notices could not form the basis of an "as applied" challenge because the individual landlords who had received the notices were not parties to the case. Consequently, the Berwick plaintiffs did not have standing to assert an "as applied" challenge on behalf of the non-party landlords. Id.

To the extent that Landlord/Tenants have asserted a "facial" challenge, discovery pertaining to non-parties and/or uninvolved properties, is outside of the relevant scope of discovery – i.e., whether the Pennsylvania Constitution mandates a higher level of probable cause. A facial challenge asserts that a law "always operates unconstitutionally," BLACK'S LAW DICTIONARY 223 (7th ed. 1999). Therefore, it is a purely legal question which does not open the door to seek the requested discovery since Landlord/Tenants' claim essentially is that the Pottstown Ordinance could never be applied in a constitutional manner. As such,

Landlord/Tenants' overly broad discovery requests as to how the inspections are accomplished, the background of the Borough's inspectors, whether other landlords and/or tenants have voluntarily allowed for rental inspections or how many administrative warrants have been issued are wholly irrelevant to the legal question at issue.

Second, to the extent Landlord/Tenants allege that they have asserted an "as applied" challenge (which is denied), the Berwick case instructs that discovery involving non-party landlords and/or tenants (and properties in this case) is irrelevant. Berwick, 48 A.3d at 533. Because Landlord/Tenants seek discovery about individuals (or properties) that ***are not parties to this action***, the requested information and/or documents have no bearing on whether the Pottstown Ordinance has been applied unconstitutionally to Landlord/Tenants. Landlord/Tenants may only challenge the Pottstown Ordinance ***as applied to them specifically***. They have no standing to assert an "as applied" challenge as to non-parties. Consequently, discovery is not necessary. Nigro, *supra.*

Third, there is no "application" of the Pottstown Ordinance for this Court to review as to the parties. An as-applied challenge is ripe only where a plaintiff has been affected. Phila. Entertainment and Development

Partners, L.P. v. City of Phila., 937 A.2d 385 (Pa. 2007) (dismissing "as applied" challenge to city zoning ordinance as unripe because plaintiffs had not yet been affected, despite presence of some evidence from city officials regarding how ordinance would be applied). Here, Landlord/Tenants' properties have not undergone inspection and, therefore, they are not affected.

Landlord/Tenants' citation to Theodore v. Delaware Valley School District is easily distinguishable. In Theodore, the Pennsylvania Supreme Court held that the Delaware Valley School District had not articulated a compelling rationale for instituting a warrantless drug testing policy that applied to only certain groups of students. Theodore, 836 A.2d 76, 91 (Pa. 2003).

In the case at hand, the purpose of the Ordinance is to "protect the public health, safety and welfare of its citizens, to establish rights and obligations to owners and occupants relating to residential rental units in the Borough and to encourage owners and occupants to maintain and improve the quality of life and quality of rental housing within the community." (R. 86a). It is not limited to a subset or selected group, like the policy in Theodore, but applies to "every owner, operator, responsible agent," "each

residential unit" and all "occupants," as those terms are defined, in the Borough. (R. 82a, 89-92a). Finally, in Theodore, the plaintiffs presented an "as applied" challenge, as they had taken drug tests pursuant to the school district's policy. Theodore, 836 A.2d at 80.

Theodore is distinguishable to the pending case as the Ordinance herein is not limited to a certain group, nor do Landlord/Tenants have a valid as-applied challenge. To the contrary, the Ordinance, on its face, provides sufficient rationale for an administrative warrant.

2. The Discovery Issues Must not be Conflated with the Substantive Issues.

This Court should reject Landlord/Tenants' attempt to meld the issues of whether the Pottstown Ordinance is Constitutional with whether the Trial Court properly adjudicated the discovery disputes. Not only is discovery irrelevant to the determination of a motion for judgment on the pleadings, but it is improper to consider such discovery. To wit, the question for a court to consider on a motion for judgment on the pleadings is whether, "the moving party's right to succeed is certain and the case is so free from doubt that trial would clearly be a fruitless exercise." Lewis v. Erie Insurance Exchange, 753 A.2d 839, 842 (Pa.Super.2000). An appellate court should

determine whether the trial court's grant of the motion for judgment on the pleadings "was based on a clear error of law or whether there were ***facts disclosed by the pleadings*** which should properly go the jury." Id. (emphasis added). Accordingly, the development of a factual record through discovery is irrelevant and, in fact, Landlord/Tenants' insistence on such demonstrates the insufficiency of their complaint and belies their attempt to fish for facts that might support a claim.

The Landlord/Tenants have formulated an argument that they were wrongfully denied discovery. This is a back-door attempt for this Court to re-interpret the Trial Court's Discovery Orders, to open the flood gate to unnecessary discovery on a purely legal issue, i.e., the constitutionality of the subject ordinances, based upon a facial theory. (There is no "as-applied" theory considering no inspections of the subject properties ever took place).

Second, the resolution of discovery disputes falls within the sound discretion of the Trial Court and it is not this Court's role to second-guess that discretion. The Landlord/Tenants, in consistently arguing that only if they were permitted to develop a factual record they would be able to show that the Ordinance is unconstitutional not only puts the cart before the horse (where the issue of whether the Ordinance is facially valid or invalid

requires no factual record) but also asks this Court to act as gatekeeper for discovery, which is not within its purview. *See* Berkeyheiser v. A-Plus Investigations, Inc., 936 A.2d 1117, 1125 (Pa.Super.2007).

This Court should not countenance Landlord/Tenants' attempt to develop and argue facts where they are not at issue and to have this Court substitute its discretion for that of the trial courts', in order to open a fishing expedition related to the Borough's rental inspection program.

H. The Discovery Orders Must Not be Disturbed.

1. The Discovery Orders are Interlocutory.

This Court does not have jurisdiction over orders that are not "final" within the meaning of the Rules of Appellate procedure and Pennsylvania statutes governing appellate jurisdiction. *See* Pa. R.A.P. 341(a) and 42 Pa.C.S. § 762 (a)(4)(i)(B). The instant discovery orders do not qualify as an interlocutory order over which this court may exercise jurisdiction. *See* Pa. R.A.P. 311 and 312. Should this Court remand this matter to the Trial Court on the basis of the merits, or in finding that a novel issue was presented that could not be resolved on a motion for judgment on the pleadings, the discovery orders should not be addressed as they are interlocutory.

Finally, the discovery orders are not collateral orders that are separable from the main cause of action and nor do they involve rights that will be irreparably lost if review is postponed until final judgment. "[I]n general, discovery orders are not final, and are therefore unappealable." Jones v. Faust, 852 A.2d 1201, 1203 (Pa.Super.2004). "A discovery order is collateral only when it is separate and distinct from the underlying cause of action." Feldman v. Ide, 915 A.2d 1208, 1211 (Pa.Super.2007). The issues presented by the discovery orders are not ones of privilege or confidentiality (which satisfy the collateral order doctrine), are not final orders, and therefore are not appealable on their own. T.M. v. Elwyn, Inc., 950 A.2d 1050, 1056-1057 (Pa.Super. 2008).

Accordingly, in the case of a remand on the merits, a review of the discovery orders is not ripe and is outside this Court's jurisdiction.

2. The Discovery Orders were Correctly Entered.

Should this Court rule on the merits of the Pennsylvania constitutional issue, it should not disturb the Trial Court's Orders. *See* Luckett v. Blaine, 850 A.2d 811, 818 (Pa.Cmwlth.2004).

As previously noted, to the extent that the Landlord/Tenants assert a purely legal question, no discovery is necessary; to the extent that the

Landlord/Tenants assert an "as applied" challenge, discovery involving non-party landlords and/or tenants is irrelevant. *See* Berwick Area Landlord Ass'n, supra.

Additionally, discovery related to the application of the Ordinance to non-parties is irrelevant because there is no "application" to review. (*See* Section VI.G of Pottstown and Dir. Place's Brief).

Rather than face these shortcomings, Landlord/Tenants merely attempt to lump the instant matter into an undefined and amorphous "constitutional litigation" category, which they claim requires discovery. This argument lacks any legal support and is simply too broad to have any merit. As analyzed extensively herein, a factual record is not necessary to resolve the purely legal question at issue.

Moreover, Theodore and League of Women Voters (relied upon by Landlord/Tenants) do not hold that discovery is required to determine the constitutionality of an ordinance. As addressed previously, Theodore merely denied preliminary objections to a Constitutional challenge to the facial validity of a school district's drug testing policy due to the policy's failure to provide an adequate rationale for its selective effect on different groups of students. Theodore, 836 A.2d at 93.

Landlord/Tenants apparently hang their "discovery through facial challenge" argument on the holding of League of Women Voters, failing to address the scope of permissible discovery in facial challenge.

In League of Women Voters, a group of voters challenged the legality of the Pennsylvania Congressional Redistricting Act of 2011 (the "2011 Plan"), presenting a gerrymandering argument. Id. at 740, 765-67.

The plaintiffs therein raised an "as applied" constitutional challenge, not a facial one. (Plaintiffs included one voter from each of the 18 congressional districts and the Court took pains to review how each voter had been affected in the three U.S. Congressional elections since the enactment of the 2011 Plan. Id. at 741, 762-770). As part of determining the effect on the voters, the Commonwealth Court took extensive evidence, including expert testimony and statistical analysis, which was necessary given the unique circumstances of the case. Id. at 770-781. Specifically, only such evidence would be able to show that an individual's voting rights had been diluted. Id.

The instant matter lacks relevance to League of Women Voters. First, the Landlord/Tenants' raise a facial challenge and cannot assert an as-applied challenge as to non-parties. Second, League of Women Voters was a

unique case, where only extensive statistical analysis could resolve the issue of whether their votes were diluted. This case does not require such analysis.

Incorporating the foregoing analysis, and in addition to it, the discovery orders were correct as follows:

i. First Motion to Compel.

The Trial Court correctly limited the scope of discovery to information relating to the "named Plaintiffs only" and correctly ruled that Landlord/Tenants could not pursue discovery through an as-applied challenge on behalf of non-parties. *See* Berwick, supra.

ii. Second Motion to Compel.

The Trial Court correctly denied Landlord/Tenants' Second Motion to Compel, insofar as it sought documents outside the scope of permissible discovery as established by the Trial Court's April 3, 2018 Order (R. 400a; Landlord/Tenants' Brief, Appendix A).

iii. Motion for Protective Order.

Notwithstanding Appellees' argument that no discovery is relevant, the Trial Court's order limiting Landlord/Tenants to the deposition of one of the inspectors was an exercise of discretion. To the extent that Landlord/Tenants' contend that five inspectors must be deposed to

understand the scope of the Ordinance, the argument is fallacious. By limiting discovery to one deposition, the Trial Court exercised its discretion. If any inspector depositions were permissible, which Appellees deny, the Trial Court's exercise in discretion was appropriate and should not be disturbed.

CONCLUSION

The Borough of Pottstown and Keith Place request that the Trial Court's Order dated May 6, 2019 be affirmed; and that Appellants' appeal as to the discovery orders dated April 3, 2018, February 6, 2019 and May 3, 2019, be dismissed, with prejudice.

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