

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PA
CIVIL ACTION

DOROTHY RIVERA, an Individual,	:	NO. 2017-04992
EDDY OMAR RIVERA, an Individual,	:	
KATHLEEN O’CONNOR, an Individual,	:	
ROSEMARIE O’CONNOR, an individual,	:	
THE ESTATE OF THOMAS O’CONNOR,	:	
an Individual and STEVEN CAMBURN,	:	
an Individual	:	
	:	
	:	
v.	:	
	:	
	:	
BOROUGH OF POTTSTOWN and	:	
KEITH A. PLACE, in his official capacity as	:	
Pottstown Director of Licensing and	:	
Inspections	:	

MEMORANDUM

I. Introduction and Procedural Background

Plaintiffs (Tenants) filed an Amended Complaint on July 26, 2017 alleging, inter alia, that Defendants’ use of administrative warrants to conduct inspections of suspected housing code infractions violated the Pennsylvania Constitution because said warrants were issued without individualized probable cause. Defendants filed an Answer an New Matter and the parties engaged in limited discovery.

In June, 2018, the Borough and Keith Place (“Place”) filed a motion for judgment on the pleadings which was opposed by the Tenants. On May 10, 2019, the Honorable Gail Weilheimer entered an Order granting judgment on the pleadings in favor of the Borough of Pottstown and Place, the Borough’s Director of Housing and Inspection, who is responsible for overseeing enforcement of the Borough’s ordinances regarding rental unit inspections.

Tenants appealed and the Commonwealth Court issued an Opinion dated January 6, 2020, which vacated the trial court's Order granting judgment in favor of the Borough and remanded the case for development of a full factual record and a reasoned opinion.

The Commonwealth Court succinctly set forth the background and claims in its Opinion as follows.

The (Pottstown) Borough's Code of Ordinances includes provisions governing rental properties. The purpose of those provisions is "to encourage owners and occupants to maintain and improve the quality of rental housing" in the Borough. Borough of Pottstown, Pa., code of Ordinances §11-20(1)(2002). (footnote omitted)

* * *

Tenants argue the ordinance provisions for unwanted inspections, both facially and as applied violate their rights of privacy and freedom from unreasonable searches under Article I, Section 8 of the Pennsylvania Constitution. See Pa. Const. Art. I, §8. They assert the use of administrative warrants is unconstitutional because such warrants are issued without requiring any individualized probable cause to believe any building code violation exists. Tenants also point out that each inspector is instructed to share with police any observation of an item in a rental unit that the inspector, in his total discretion, considers an indicator of criminal activity, Reproduced Record at 804a-09a, 814a, thus allowing police to obtain information about the contents of the dwelling without the need to obtain a search warrant based on individualized probable cause. Tenants further contend the ordinance fails to impose reasonable limits on the inspections, allowing unfettered access to private information such as Tenants' religious beliefs and medical information. See *Id.* at 456a, 467a, again, in the total discretion of each inspector. See *Id.* at 812a-13a, 846a-47a, 861a (regarding inspectors' broad discretion). Tenants argue the Pennsylvania Constitution provides more extensive protection than the United States Constitution concerning individual rights of privacy and freedom from unreasonable searches.¹

¹ Commonwealth Court Opinion 2020 WL 57181 dated January 6, 2020, pages 1-2.

The parties completed discovery and filed cross motions for summary judgment. Disposition of these motions will be discussed below.²

II. The Parties' Positions

Plaintiffs seek a judicial declaration that the mandatory inspection requirements of Sections 5-801 to 5-809 and 11-201 to 11-206 of the Borough Code of Ordinances are unconstitutional under Article I, Section 8 of the Pennsylvania Constitution. Plaintiffs request the Borough be enjoined from seeking search warrants to conduct inspections authorized under the Ordinances with less than traditional, individualized probable cause.

The Borough requests the court grant summary judgment in its favor and dismiss all claims against Defendants. Defendants argue that administrative warrants to inspect rental housing for public health and safety reasons are entitled to reduced Article I, Section 8 protections and that its rental inspection Ordinances are facially constitutional. The Borough also argues that Plaintiffs' "as applied" challenge fails because the rental inspection program is applied in neither an arbitrary nor discriminatory manner.

III. Rental Inspection Ordinances

1. Rental Inspection Ordinances

The Borough is a municipal entity subject to the Pennsylvania Borough Code, 8 Pa. C.S.A. §101, *et. seq.* Pursuant to Pottstown's Code, Pottstown has the power to enact and amend ordinances consistent with Pennsylvania law. 8 Pa.C.S.A. §1006. In June, 2015, Pottstown

² The Borough's motion for summary judgment (Seq. #205) was filed on July 31, 2023 and contains twenty-two "Statement of Facts." The Tenants' response (Seq. #209) disputes some of the Borough's factual assertions. The Tenants' motion for summary judgment (Seq. #206) filed on July 31, 2023, contains one hundred and fifty "Statement of Undisputed Material Facts," some of which are disputed or denied by the Borough (Seq. #210).

promulgated and adopted the Code of Ordinances, Chapter 5, *Code Enforcement* and Chapter 11, *Housing, June 8, 2018* (collectively referred to herein as the “Inspection Ordinances”).

As amended by Ordinance 2137 on June 8, 2015, the Ordinances require residential rental licenses along with biennial residential rental inspections.

The Borough inspectors utilize a Rental Checklist which is used as a guideline during the inspection. In addition to the Rental Checklist, the housing inspectors are guided by Rental Inspection Standard Operating Procedures (“SOP”). The SOPs and the Rental Checklist are designed to ensure all inspectors operate in a consistent and transparent manner.

2. Purpose and Findings for Enactment

As set forth in the Registration and Licensing of Residential Rental Units:

The purpose of this Part and the policy of the Borough of Pottstown shall be to protect 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 Borough and to encourage owners and occupants to maintain and improve the quality of rental housing within the community. As a means to these ends, this Part provides for a systematic inspection program, registration, and licensing of residential rental units and penalties. §201(1) *Purpose*.

In consideration of the adoption of the Inspection Ordinance, Pottstown made the following findings:

- A. There is a growing concern in the community about the appearance and physical condition of many residential rental units.
- B. There is a perception and appearance of greater incidence of problems with the maintenance and upkeep of residential properties which are not owner occupied as compared to those that are owner occupied.
- C. There are a significant number of disturbances at residential rental units.
- D. Violations of the various maintenance codes are generally less severe and more quickly corrected at owner-occupied units as compared to residential rental units. §201(2) *Purpose*.

3. Inspections

The Borough's Ordinance requires each residential unit be inspected biennially, upon a property transfer, upon a complaint that a violation has occurred, or where there is reasonable cause to believe a violation is occurring. (Chapter 5, Part 8, §801).

As it relates to the power to inspect,

The owner shall permit inspections of the premises by the Licensing and Inspections Officer at reasonable times upon reasonable notice. If the owner does not permit such inspection of the premises by the Licensing and Inspections Officer, the Licensing and Inspections Officer may apply for an administrative warrant to inspect the premises.

(Chapter 11 §203(1)(3); (as amended by Ord. 2137 (6/8/2015)). Additionally,

The occupant(s) shall comply with all obligations imposed by this Part and all applicable codes and ordinances of the Borough of Pottstown, as well as all state laws and regulations.

(Chapter 11 §203(J)(2)(A); §203(J)(1)).³

IV. Issuance of the Search Warrant

In the event an owner does not consent to the biennial search, the Ordinances authorize the Borough to obtain an administrative search warrant from a magisterial district judge (MDJ). The Borough has attached a copy of an actual warrant sought and obtained in this case by Borough Code Enforcement Officer Charles Weller for the property located at 70 N. Hanover Street, Apartment 15, located in Pottstown (Exhibit R, Borough's motion for summary judgment). Application for the search warrant was made on March 15, 2018 at 9:45 a.m.

³ The Commonwealth Court observed that "[N]o party has addressed the mechanism, if any, by which the above provisions, which basically apply to owners, is legally enforceable against Tenants," p. 2, fn. 3. Neither party developed this issue after remand. Presumably, the Borough would argue that the above provisions require an occupant to comply with the same obligations imposed upon an owner although owners and occupants have different interests, responsibilities, standing and liabilities.

The Affidavit of Probable Cause states as follows:

On March 9, 2018, the License & Inspections Department of the Borough of Pottstown received a signed letter from XXXXX, the current tenant of apartment #1S at 70 N. Hanover Street. The letter was delivered by the owner of the building, Hal Sprecher, saying we do not have permission to enter his apartment #1S at the above mentioned address.

This address is located in the Borough of Pottstown, Montgomery County, PA. Mr. XXXXX, the current tenant, (XXXXX are requiring that the Borough of Pottstown get a search warrant to do the Biennial inspection of his property).

Per Ordinance 2137 Section 9, 206 enacted and ordained on the 8th day of June 2015, requires that the Borough of Pottstown does a biennial inspection. The inspection date has been set for March 15, 2018 at 2:00 PM with Code Enforcement Officer Charles Weller or any other qualified code enforcement officer from the Borough of Pottstown.

The Pottstown MDJ (Judge Pallidino) granted the above application and issued the search warrant to be served on March 17, 2018 at 9:45 a.m.⁴ The Ordinances do not contain a notice requirement for the owner or occupant of a residence to be apprised of the date or time the affiant would appear before the issuing magistrate for application of the search warrant. Similarly, the Ordinances do not require that the owner or occupant of a residence be notified of the date and time of execution of the warrant (i.e., the search).

The affidavit in support of probable cause informs the magistrate that the requested warrant authorizing the inspection is pursuant to a biennial inspection, but no date is provided to the magistrate of the date of the last inspection. Tenants allege the Borough often re-inspects units within months of a previous inspection, even if the unit passed the previous inspection.

⁴ As noted by the Commonwealth Court in its remand opinion, “[t]he record does not disclose what criteria, if any, the Borough must satisfy in order to obtain such a warrant.” (p. 2) The record still does not contain that information.

(Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment, Seq. #209, p. 12).

V. Execution of the Search Warrant

The Borough's Rental Inspection Report ("Inspection Checklist") contains one hundred and thirty separate items to be inspected with a corresponding box to check confirming all areas to be inspected. (Exhibit M, Borough's motion for summary judgment). The Borough's inspection form in 2016 required inspectors to check for about 30-35 different items. See No. 10 of Plaintiffs' response to Defendants' motion for summary judgment. The record is unclear why the 2017 Checklist contained so many additional areas to be inspected. The parties dispute the extent to which inspectors look into closets, drawers, etc.

The Borough states the following in its brief in support of its motion for summary judgment.⁵

The rental inspections are also less intrusive as landlords and tenants receive advance notice, unlike criminal searches permitted by general warrants. The advance notice clearly demonstrates the purpose of the inspection is to inspect the conditions of the unit, not the tenant or the tenant's possessions. Further, advance notice mitigates any intrusiveness; and no constitutional protections are waived for the inspection.

The above representation is untrue. Neither the Borough's written inspection procedures nor Ordinances provide advance notice to owners or occupants of the date, time or location the search warrant will be requested or the date or time it will be executed. The Ordinances do not provide owners or occupants with an opportunity to appear before the magistrate and be heard regarding the issuance, scope or timing of the warrant.

⁵ Defendants' Motion for Summary Judgment, Sequence #205, p. 20.

In addition, the Borough's Ordinances do not distinguish between the owner and occupier who have different interests, standing, responsibilities and liabilities.

VI. Legal Discussion

In *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523 (1967), a tenant challenged a city code provision that allowed safety inspectors to conduct warrantless searches of apartments to check for code violations. The court noted that administrative inspections for housing code violations, as contrasted with searches of specific residences for evidence of criminal activity, were "aimed at securing city-wide compliance with minimum physical standards for private property" and that even a single unintentional violation could result in serious hazards to public health and safety such as a fire or an epidemic that could ravage a large urban area. *Camara*, 387 U.S. at 535. Under this unique circumstance, the court concluded that probable cause for a housing inspection exists "if reasonable legislative or administrative standards" for conducting an area inspection are satisfied with respect to a particular dwelling.⁶ *Id.* at 538. The court noted that routine periodic inspections were "the only effective way to seek universal compliance with minimum standards required by municipal codes." *Id.* at 535-536.

The court explained 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" which may be satisfied by the passage of time. *Id.* at 538. *Camara* articulated the following weakened probable cause standard:

⁶ The Borough's motion for summary judgment did not cite any evidence in the record regarding the reasonableness of its standards.

The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant. *Cf. Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614. Such an approach neither endangers time-honored doctrines applicable to criminal investigations nor makes a nullity of the probable cause requirement in this area. It merely gives full recognition to the competing public and private interests here at stake and, in so doing, best fulfills the historic purpose behind the constitutional right to be free from unreasonable government invasions of privacy.” See *Eaton v. Price*, 364 U.S., at 273-274, 80 S.Ct., at 1468-1469 (opinion of Mr. Justice Brennan). 387 U.S. at 539.

In *the Interest of Y.W.B.*, 265 A.3d 602 (Pa. 2021), a child protection service agency argued that the probable cause requirement to permit entry into a private home to investigate a report of child neglect should be governed by the *Camara* standards. The Pennsylvania Supreme Court rejected this argument by stating:

“*Camara* has no application with respect to home visits to investigate allegations of child neglect. Unlike in *Camara* which involved an agency’s decision to conduct an area inspection based upon its appraisal of the conditions in the area as a whole to protect the public, probable cause to conduct a home visit depends upon whether probable cause exists to justify the entry into a particular home based upon credible evidence that child neglect may be occurring in that particular home.” 265 A.3d at 622.

The *Y.W.B.* court held that “nothing short of probable cause, guided by the traditional principles that govern its federal and state constitutional limitations, will suffice when a trial court makes a determination as to whether or not to authorize a home visit.” *Id.* at 625.

The *Y.W.B.* court made a clear distinction between the scope of an administrative housing search and a traditional search:

“Moreover, and importantly, the scope of the search in the present case was in no respect limited to ensuring compliance with certain identified housing code violations. The search here allowed DHS investigators to search the home, including every room, closet and drawer in the home, based entirely upon their own discretion. In short, while the search here was not conducted by law enforcement, its scope bore little or no relation to a traditional administrative search. As such, the contention that *Camara*’s holding that administrative searches on an area basis are permitted where ‘reasonable legislative and administrative standards are satisfied’ is insufficient to allow the exhaustive search of the entirety of family’s home without a clear showing, based upon competent and, as necessary, corroborated, evidence establishing individualized suspicion exists allowing entry into a private home.” 265 A.3d at 602.

In the instant matter, both parties have represented that only one state court has squarely analyzed whether *Camara* should be adopted as state constitutional law. In *Golden Valley v. Wiebesick*, 899 N.W. 2d, 152 (Minn. 2017),⁷ a landlord challenged a city ordinance allowing the issuance of an administrative warrant to inspect a rental unit for housing code violations without individualized suspicion of a code violation under Article I, Section 10 of the Minnesota Constitution.⁸ The court engaged in an extensive discussion of the history of its constitution, state and federal jurisprudence regarding search warrants and the applicability of *Camara*. The Court concluded:

“For these reasons, we conclude that there is no principled basis for interpreting Article I, Section 10 of the Minnesota Constitution to require greater protection of tenants than the Fourth Amendment to the United State Constitution under the circumstances. We therefore hold that, under Article I, Section 10 of the Minnesota Constitution, an administrative search warrant need not be supported by individualized suspicion of a code violation when the warrant issued by a district court satisfies an ordinance containing reasonable standards.”

⁷ The Pennsylvania Supreme Court cited *Golden Valley* in the *Y.W.B.* case at 265 A.3d 622.

⁸ Article I, Section 10 reads as follows: “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 person or things to be seized.” Minn. Const. Art. I, Section 10.

* * *

“We discern no principled basis to depart from the legal framework our nation’s highest court announced a half-century ago so as to interpret the Minnesota Constitution differently than the United States Constitution. To do otherwise would do what no other state supreme court has done. This is not to say that, when Minnesotans’ liberty interests are at stake, we are not willing to consider novel, thoughtful arguments. We have do so – carefully – here. And, in so doing, we have given guidance that protects Minnesotans’ privacy, health and safety.”

To protect tenants’ privacy interests, the court in *Golden Valley* decided that administrative warrant procedures must include notice, an opportunity to be heard and judicial consideration of reasonable restrictions on the inspection. 899 N.W. 2d at 155.

Tenants in the instant matter urge the court to adopt the reasoning by Justice Anderson who dissented from the majority in *Golden Valley*. Justice Anderson noted that no state supreme court has interpreted its constitution more broadly than the *Camara* court because no state supreme court directly addressed whether its constitution provides more protection than *Camara* for routine inspections of housing code violations. Justice Anderson observed that obtaining administrative search warrants under the ordinance scheme under review were “mere formalities” and the housing search would be “a general, exploratory rummaging in a person’s belongings.” (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971)).⁹

⁹ Justice Stras joined the dissent regarding the issuance of the warrant analysis only.

Tenants further request this court to declare that the Borough's Ordinances are facially unconstitutional because the warrants are issued on less than individualized probable cause in violation of Article I, Section 8. Plaintiffs urge this court to interpret and apply Article I, Section 8 of our Constitution to provide greater privacy rights to owners and occupiers of rental units than provided under the Fourth Amendment as interpreted by *Camara*.

The Pennsylvania Supreme Court has held that the Pennsylvania Constitution provides broader protection of citizens' rights of privacy and freedom from unreasonable searches than does the Fourth Amendment. *Commonwealth v. Alexander*, 243 A.3d 177 (Pa. 2020) (holding that Article I, Section 8 affords greater protection than the Fourth Amendment regarding owners and occupants in automobiles). *Theodore v. Del. Valley Sch. Dist.* 836 A.2d 76, 88 (Pa. 2003) (in the context of a challenge to a school district's policy of suspicionless testing of certain students for drug and alcohol use); see e.g., *Commonwealth v. Melendez*, 676 A.2d 226 (Pa. 1996) (Article I, Section 8 gives greater protection than the Fourth Amendment to the privacy of one's dwelling); *Commonwealth v. Melilli*, 555 A.2d 1254, 1259 (pa. 1989) (Article I, Section 8 guards individual privacy rights against unreasonable searches more zealously than the Fourth Amendment "by serving as an independent source of supplemental rights"); *Commonwealth v. Sell*, 470 A.2d 457 (Pa. 1983) (Article I, Section 8 has been consistently interpreted as mandating greater protection than the Fourth Amendment from governmental intrusion on the right of privacy).¹⁰

¹⁰ The Fourth Amendment to the United States Constitution provides that "[t]he 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 warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the person or things to be seized." U.S. Const. amend. IV.

Similarly, Article I, Section 8 of the Pennsylvania Constitution provides that "[t]he people shall be secure 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. 1, Section 8.

However, in other circumstances, our high court has held that our state constitutional protections from unreasonable searches and seizures were coextensive with the Fourth Amendment. See *e.g.*, *Commonwealth v. Duncan*, 817 A.2d 455 (Pa. 2003); *Commonwealth v. Glass*, 754 A.2d 655 (Pa. 2000); *Commonwealth v. Cleckley*, 738 A.2d 427 (Pa. 1999); *Commonwealth v. Waltson*, 724 A.2d 289 (Pa. 1998); *Commonwealth v. Williams*, 692 A.2d 1031 (Pa. 1997); and *Commonwealth v. Melendez*, 676 A.2d 226 (Pa. 1996).

When reviewing 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. *Commonwealth v. Crouse*, 729 A.2d 588, 594 (Pa. Super. 1999), *appeal denied*, 747 A.2d 364 (Pa. 1999) (citing *Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991)).¹¹

The purpose and scope for issuing *Camara*-type administrative warrants to promote public health, safety and welfare is distinguishable from the purpose and scope of issuing probable cause search warrants to investigate criminal activity. In *Commonwealth v. Tobin*, 828 A.2d 415 (Pa. Cmwlth. 2003), an apartment owner appealed his conviction for violating a local ordinance requiring him to submit to real estate inspections and pay the inspection fee. *Tobin* was convicted for refusing to permit a warrantless search of his apartments. On appeal, the Commonwealth Court found that the ordinance complied with *Camara*'s "neutral sources"

¹¹ In *Commonwealth v. Russo*, 934 A.2d 1199, 1207-1213 (Pa. 2007) and *Commonwealth v. Alexander*, 343 A.3d 177 (Pa. 2020), the court extensively examined the text and history of the *Edmunds* factors in determining the scope of protection afforded under the search and seizure provisions of the Pennsylvania Constitution compared to the United States Constitution. As previously noted, no other state jurisdiction has squarely analyzed whether its constitution requires individualized suspicion of a housing code violation to establish probable cause for issuance of an administrative warrant.

requirement under a Fourth Amendment analysis and that “obtaining an administrative warrant should be a matter of routine.” 828 A.2d at 423. The *Tobin* court did not discuss or apply a constitutional analysis under Article I, Section 8 of the Pennsylvania Constitution.

In *Simpson v. City of New Castle*, 740 A.2d 287 (Pa. Cmwlth. 1999), a landlord brought an equity action to enjoin the city from enforcing its ordinance requiring landlords to register and obtain permits for rental properties. The court held, inter alia, that because the ordinance imposed the requirement to inspect subject to “constitutional restrictions,” the landlord was adequately protected against unreasonable searches and seizures under both the United States and Pennsylvania Constitutions. In spite of this conclusion, the court did not analyze the state constitutional claim. See also *Greenacres Apts. v. Bristol Twp.*, 482 A.2d 1356 (Pa. Cmwlth. 1984) (same).

Many hazardous conditions cannot be seen from the outside of the residence. “Many such conditions – faulty wiring is an obvious example – are not observable from outside the building and indeed may not be apparent to the inexperienced occupant himself.” *Camara*, 387 U.S. at 537. For example, an external inspection cannot determine plumbing issues, electrical issues, smoke detector issues, fire hazards, mold and bed bugs.

Courts often are called upon to strike the proper balance between the government’s legitimate interest in protecting public health and safety and the competing rights of citizens to their constitutional rights to privacy. This is particularly challenging when balancing a suspicionless search, as in the instant case, with the government’s interest in public safety.

In *Skinner v. Railway Labor Executives’ Assn.*, 489 U.S. 602 (1989), the court found that suspicionless drug testing of railroad employees was constitutional. The *Skinner* court addressed the competing interests to consider in the context of a suspicionless search:

When the balance of interests precludes insistence on a showing of probable cause, we have usually required “some quantum of individualized reasonable suspicion” before concluding that a search is reasonable. See e.g., *United States v. Martinez-Fuerte*, 428 U.S. at 560. We made it clear, however, that a showing of individualized reasonable suspicion is not a constitutional floor, below which a search warrant must be presumed unreasonable. *Id.* (citation omitted). In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion. 489 U.S. at 624.

In *Commonwealth v. Cass*, 709 A.2d 350, 365 (Pa. 1998), the court held that suspicionless general searches by school officials are compatible with the limited protection provided to school students under Article I, Section 8 of the Pennsylvania Constitution so long as they are carried out based upon neutral clearly articulated guidelines.

The *Cass* court noted that the focus in suspicionless search cases is whether the search itself is reasonable considering the governmental interest in conducting the search when balanced against the level of intrusion occasioned by the search. *Cass* further noted that a general search will not pass constitutional muster unless an important state interest outweighs the level of intrusion occasioned by the search. *Cass* ultimately concluded, under the circumstances before it, the privacy interests of the students were “minimal” and outweighed by the important objective of keeping drugs out of the school.

In the case of *In re: F.B.*, 726 A.2d 361, 368 (Pa. 1999), the court found that the suspicionless search of the entire student body for weapons was not a violation of either the Pennsylvania or United States Constitution. The *In re: F.B.* court concluded that the appropriate state constitutional test for conducting suspicionless searches in a school environment involves balancing four factors: (1) the students’ privacy interests; (2) the nature of the intrusion created by the search; (3) notice; and (4) “the overall purpose to be achieved by the search and the immediate reasons prompting the decision to conduct the actual search.” 726 A.2d at 365.

In the case sub judice, the court believes that the suspicionless search test set forth *In re: F.B.* is applicable since it involves the same considerations of balancing a legitimate government interest in health and safety versus the need to make a suspicionless search without individualized probable cause.

The court recognizes that the school cases do not involve application and issuance of a warrant as is required for the non-consensual, biennial searches in Pottstown Borough. This is a distinction without a difference because the warrant procedure is a nullity. The application for the warrant is not based upon any suspicion of a code violation. It does not require any basis for the magistrate to exercise discretion to reject its issuance. The magistrate may as well be a “rubber stamp.”¹²

The warrant procedure authorized by the Ordinances is akin to a warrantless, suspicionless search specifically criticized in *Camara*.

“[W]e hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual, and that the reasons put forth in *Frank v. State of Maryland* and in other cases for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendment’s protections.” 265 A.2d at 534.

The first prong of the *In re: F.B.* analysis identifies the privacy interest being asserted. In contrast to school students who have a minimal expectation of privacy, Pennsylvania jurisprudence repeatedly has recognized that a person’s privacy is at its greatest in the home. See *Commonwealth v. Brion*, 652 A.2d 287, 289 (Pa. 1994) (“Upon closing the door of one’s home to the outside world, a person may legitimately expect the highest degree of privacy known

¹² The Commonwealth Court was clearly concerned that “[t]he record does not disclose what criteria, if any, the Borough must satisfy in order to obtain such a warrant.” (p. 2) The Borough has not produced any evidence in this regard.

to our society.”) (quoting *Commonwealth v. Shawm* 383 A.2d 496, 499 (Pa. 1978)); *Commonwealth v. Mason*, 637 A.2d 251, 256-57 (Pa. 1993) (finding that the police’s forcible entry into an apartment without a warrant or exigent circumstances violated Article I, Section 8); *Commonwealth v. Bricker*, 666 A.2d 257, 261 (Pa. 1995) (“We have long recognized the sanctity of the home in this Commonwealth...”). That is because “[f]or the right to privacy to mean anything, it must guarantee privacy to an individual in his own home.” *Brion*, 652 A.2d 289. There can be no doubt that Tenants in the instant matter have the most valued and cherished privacy rights guaranteed by the Pennsylvania Constitution.¹³

The second prong in the *In re: F.B.* analysis considers the nature of the intrusion. The Borough’s application for a search warrant is not “suitably restricted” in its scope as required by *Camara. Id.*, at 539. The Borough’s application contains no restrictions whatsoever and, in fact, requires its inspectors to investigate approximately 130 areas in the residence. (Exhibit M in the Borough’s motion for summary judgment.) This is extremely intrusive and is far more like the extensive search in *Y.W.B.* which required traditional probable cause standards than the “suitably restricted” administrative search contemplated by *Camara*.¹⁴

The third prong relates to notice. Again, as previously discussed, the Ordinances do not provide any notice to the owners nor occupants of the date or time of the application for the search warrant or the date or time of its execution. Neither owners nor occupiers of rental units are provided with notice or an opportunity to contest the search or limit its scope or timing. In

¹³ The courts in Pennsylvania have traditionally provided significant protection for the privacy rights of its citizens. See *Commonwealth v. White*, 543 Pa. 45, 669 A.2d 896 (1995); *Commonwealth v. Brion*, 539 Pa. 256, 652 A.2d 287 (1994); *Commonwealth v. Riedel*, 539 Pa. 172, 651 A.2d 135 (1994); *Commonwealth v. Lewis*, 535 Pa. 501, 636 A.2d 619 (1994); *Commonwealth v. Kohl*, 532 Pa. 152, 615 A.2d 308 (1992); *Stenger v. Lehigh Valley Hospital Center*, 530 Pa. 426, 609 A.2d 796 (1992); *Commonwealth v. DeJohn*, 486 Pa. 32, 403 A.2d 1283 (1979).

¹⁴ *Camara* found that “[t]he search here allowed DHS investigators to search the home, including every room, closet and drawer in the home, based entirely on their own discretion. In short, while the search here was not conducted by law enforcement, its scope bore little or no relation to a traditional administrative search.” 265 A.3d at 602.

practice, housing code officers appear at a rental unit with a pro forma warrant authorizing them to perform an unlimited search without prior notice.

The fourth prong in *In re: F.B.* considers the overall purpose to be achieved by the search and the immediate reasons prompting the search. While this court recognizes a legitimate government interest in conducting searches for housing code violations, the absence of any suspicion of a code violation in any particular dwelling nullifies the immediacy of the search.

Application of the *In re: F.B.* factors to the suspicionless searches by the Borough compels a conclusion that the Borough's practices, as authorized by its ordinances, violate the Tenants' privacy protections embedded in Article I, Section 8 of the Pennsylvania Constitution.

The Borough's interests in conducting non-consensual, suspicionless searches of rental residences without notice is outweighed by the Tenants' privacy rights under the Pennsylvania Constitution ("as applied" challenge). To accommodate the competing interests between the Borough and Tenants, it is necessary to provide certain safeguards to protect the Tenants' constitutional privacy rights in the inspection process. Accordingly, the court will enjoin the above inspection procedures until such time as the Borough enacts or amends its inspection ordinances regarding its non-consensual, non-exigent, suspicionless biennial searches to provide the following:

- a) at least seven days advance written notice to both owners and occupants of rental units of the date, time and location of application to a magistrate for an administrative search warrant including notice of the right to be heard; and
- b) at least seven days advance written notice to both owners and occupants of the date and time the search warrant will be executed; and
- c) judicial consideration of reasonable restrictions on the inspection.

The above safeguards will allow the Borough to conduct its code inspections and also provide an opportunity for owners and occupants of rental units to be heard regarding the scope, timing and issuance of administrative warrants. A fourteen day notice period before execution of the warrant will not adversely affect the Borough's health and safety concerns and will provide a fair opportunity for Tenants to prepare and/or ameliorate possible code violations.

Tenants claim that the Borough's Ordinances are facially unconstitutional because administrative warrants are issued with less than traditional, individualized probable cause. A facial challenge to a legislative act is the most difficult to challenge successfully since the challenges must establish that no set of circumstances exists under the Act would be valid. *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). A statute is facially invalid when its constitutional deficiency is so evident that proof of actual unconstitutional applications is unnecessary. Facial challenges are generally disfavored. *Clifton v. Allegheny County*, 969 A.2d 1197 (Pa. 2009).

Rental registration and inspection ordinances are a valid exercise of the government's police power "to ensure safe, healthful and habitable rental dwellings." *Berwick Area Landlord Assn. v. Borough of Berwick*, 48 A.3d 524, 537 (Pa. Cmwlth. 2012); *McSwain v. Commonwealth*, 520 A.2d 527 (Pa. Cmwlth. 1987). Here, the Borough's Ordinances are facially valid and rationally related to maintaining and promoting the health, safety and welfare of its citizens. The notice and hearing safeguards discussed above will protect the privacy rights of owners and occupants from the reduced, but reasonable, probable cause requirement for issuance of administrative warrants. *Cass*, 709 A.2d at 365.

VII. Conclusion

The Borough's inspection practices as applied are violative of Article I, Section 8 of the Pennsylvania Constitution.¹⁵ Tenants' claim that the Ordinances are facially unconstitutional because administrative warrants are issued without individualized probable cause is inconsistent with controlling Pennsylvania authority.

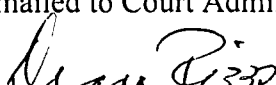
A corresponding Order shall accompany this Memorandum.

BY THE COURT:


RICHARD P. HAAZ, J.

Date: January 24, 2024

E-filed on 1/24/24
Copies sent via Prothonotary
Emailed to Court Administration – Civil Division


Judicial Secretary

¹⁵ Keith Place is the Director of the Borough's Licensing & Inspecting Department and is responsible for overseeing enforcement of the inspection procedures pursuant to the Ordinances. He has filed a motion for summary judgment claiming official immunity under the Political Subdivision Tort Claims Act, 42 Pa.C.S.A. 8546. Reliance on that Act and claim of immunity is misplaced. The Act imposes governmental immunity against damage claims on account of injury to person or property. The instant case is an action in the nature of declaratory and equitable relief and does not claim any negligence or bodily injury against any official. See *Mascaro v. Youth Study Center*, 523 A.2d 1118 (Pa. 1987). The two cases raised by Defendant in its motion for summary judgment are inapposite. In *Heicklen v. Hoffman*, 761 A.2d 207 (Cmwlth. Ct. 2000), the court found that a district justice had official immunity pursuant to claim that he imposed excessive bail. In *Watkins v. Pa. Dept. of Corrections*, 196 A.3d 272 (Cmwlth. Ct. 2018); the court held that actions against state officials in their official capacity "that seek only monetary damages" are barred. Here, Tenants seek declaratory and equitable relief and not monetary damages. It is appropriate that Defendant, Keith Place, remain as a Defendant in this case since he is the person in charge of enforcing the unconstitutional practices which are being enjoined.