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The Codes Inspector Cometh

BY STEVEN M. WILLIAMS, ESQ.

With an increasing number of municipalities enacting rental property inspection ordinances, uninformed owners could face substantial fees.



First came asbestos, then came lead paint, followed by mold. The challenges facing community owners and managers both large and small seem to come one after the next.

What is the next challenge for industry professionals? In some communities, it already exists: the rental property inspection ordinance (RPIO).

An increasing number of municipalities are enacting rental property inspection ordinances. For owners who have many units, these fees can be substantial. In some cases, owners must meet RPIO requirements on an annual basis. In others, owners are faced with them less frequently, such as bi-annually or only when there is resident turnover.

Important to note is that RPIOs are different from, and in addition to, resident registration ordinances that are currently in effect in many municipalities, which generally require that owners notify their local taxing authorities of the identities of their residents so that they can be added to the tax rolls.

Many of the proposed RPIOs or those currently in effect also provide that if an apartment does not pass the inspection, the owner's right to rent the apartment can be terminated until he or she remediates all problems. Some of the RPIOs also provide that owners whose communities have failed the inspections must pay re-inspection fees, which can be substantial.

Municipalities nationwide have RPIOs in effect, and many more likely are considering them. Owners should check with their local municipalities to determine whether RPIOs exist in their locales; and if they exist, determine the RPIO requirements.

Are RPIOs Constitutional?

For years, owners repeatedly have challenged RPIOs as being unconstitutional. However, for at least the last 26 years, courts across the country have upheld RPIOs as being valid.

Most recently, in *Jones v. Wildgen*, 450 F.Supp.2d 1265 (D.Kan. 2006), the Federal District Court for the District of Kansas held that the RPIO enacted by the City of Lawrence was valid. Also in *City of Vincennes v. Emmons*, 841 N.E.2d 155 (Ind. 2006), the Supreme Court of Indiana upheld the RPIO enacted by the City of Vincennes.

Over the past several years, the state and federal courts in Pennsylvania have upheld RPIOs in at least six municipalities. (See, for example, *Commonwealth v. Tobin*, 828 A.2d 415 (Pa.Comm. Ct. 2003) In *Search Warrant of Columbia Heights v. Rozman*, 586 N.W.2d 273 (Minn.App. 1998), the Minnesota Appeals Court held that the RPIO enacted by the City of Columbia Heights was valid.

In several related cases from 1993 through 1995, such as

Margola Associates v. City of Seattle, 121 Wash.2d 625, 854 P.2d 23 (1993), the Washington State Supreme Court upheld as valid a RPIO enacted by the city of Seattle. Also, in 1980 in *Dome Realty, Inc. v. City of Patterson*, 83 N.J. 212, 416 A.2d 334, the New Jersey Supreme Court upheld the RPIO enacted by the city of Patterson.

Equal Protection

The equal protection doctrine requires that similarly situated persons be treated alike under the law. Owners have repeatedly argued that RPIOs treat them disparately from owner-occupiers of residential communities. That is, while the municipalities can force inspections on—and assess fees against—owners, owner-occupiers are not subjected to the requirements of RPIOs. The courts have agreed that it is reasonable for municipalities to be concerned about the conditions and standards of rental properties more so than communities that are occupied by their owners. Thus, the courts have routinely dismissed equal protection arguments as being without merit.

Municipal Fees

The courts have also generally held that municipalities are entitled to require administrative fees to defray the costs of administering the RPIOs. However, the fees must bear a reasonable relationship to the actual costs involved. If the fees are unreasonable or do not bear a reasonable relationship to the actual costs involved in administering the RPIOs, they may be classified as illegal taxes.

Warrantless Searches

Finally, the courts have considered whether RPIOs provide a means for municipalities to improperly conduct warrantless searches of communities. Most RPIOs provide, or are interpreted to provide, that if the owner or resident of the property to be inspected refuses entry to the inspector, the inspector must obtain a search warrant before he can conduct an inspection. Where this protection exists in RPIOs, the courts have generally upheld them as valid.

In most of the court cases, the courts have found that the RPIOs do not violate the constitutional protections against warrantless searches. However, in at least one case, a court determined that a RPIO was invalid. In 1980 in *Hometown Co-Operative Apartments v. City of Hometown*, 495 F.Supp. 55 (D.C. Ill. 1980), the Federal District Court for Illinois invalidated the RPIO enacted by the City of Hometown because the ordinance did not provide for procedures whereby the city was required to obtain a warrant to search a rental

unit for which the occupant had refused to consent to the inspection.

Three additional points are important to understand regarding warrants obtained under RPIOs. First, it has been universally held that owners do not have the right to prohibit inspections of individual rental units. That right is reserved for the occupant of the unit, as determined by *Chapman v. United States*, 365 U.S. 610 (1961) in which the court held that the resident enjoyed the privacy rights in the leased premises, and only he could waive that right. If the occupant consents to an inspection, the owner cannot veto such consent. Likewise, if the occupant refuses to consent to the inspection, the owner cannot allow the inspection.

Second, in many cases, the resident may have the authority to consent to an inspection of the common and other areas of the owner's community, even in the face of the owner's objections. If



What is an RPIO?

RPIOs generally contain four requirements:

- 1 Owners must register their rental communities with the municipality;
- 2 Owners must submit their communities to inspections by the municipalities' codes enforcement personnel;
- 3 Owners must obtain certificates or licenses to operate their communities; and
- 4 Owners must pay fees to cover the municipalities' costs in administering the RPIOs and the costs of the inspections.

the resident and the owner enjoy joint authority and use over the targeted areas, such as entryways, laundry rooms and storage rooms, then either the resident or the owner can provide the requisite consent for the inspection.

Third, it is important to note that the warrants issued under RPIOs are administrative, not criminal, in nature. Administrative warrant issuance requires fewer protections than criminal warrant issuance. To issue a criminal warrant, the governmental entity must show probable cause that a crime has occurred. The issuance of an administrative warrant is conditioned only on the proposed inspection being done in compliance with "reasonable legislative or administrative standards for conducting an area inspection," as determined by *Camara v. Municipal Court*, 387 U.S. 523 (1967).

What Can Owners Do?

It is likely that most owners will be affected by RPIOs at some point in the future. Although it is highly unlikely that an owner can avoid this challenge altogether, there are several things owners can do to ease the pain.

Make sure properties meet code. As long as there are no code violations in their properties, owners will simply have to deal with the inconvenience and cost of the administration of the RPIOs. In contrast, code violations could result in lost rental income—if the inspectors order the properties to be vacated pending repair—and additional costs for re-inspections.

Maintain good relationships with codes inspectors. If owners have good working relationships with the codes personnel, the owners may avoid problems, even in the face of minor code violations. In contrast, owners who do not get along with the inspectors likely can expect no accommodations or courtesies.



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RPIOs and the Constitution

RPIOs opponents generally assert one or more of the following arguments when attacking RPIOs:

- 1** RPIOs violate owners' and residents' constitutional right to equal protection under the laws;
- 2** The fees charged pursuant to RPIOs are illegal taxes; and
- 3** RPIOs allow municipalities to conduct illegal searches of the owners' communities.

Amend leases. Although the resident can refuse entry to an inspector, it is the owner who may pay the price if an inspector must take legal action to obtain an order or a warrant to gain entry. Leases should provide that the owner, or his designees, may enter the property at any reasonable time with notice to the resident for the purpose of conducting inspections. Of course, a good lease, such as the NAA Lease, will have such a provision irrespective of the existence of a local RPIO. If the resident refuses entry to an inspector, the owner will have the right (under the lease) to grant access to the inspector. Furthermore, the owner will be able to conduct pre-emptive inspections and correct any problems before the codes inspector arrives.

Work with municipal officials. If owners find that the municipalities in which they own properties are considering enacting RPIOs, owners can offer to assist the municipalities in drafting them. This is not an uncommon practice; in many instances, residents of municipalities who will be affected by proposed legislation participate in the drafting of it. By doing this, owners can make known to the municipal officials their concerns and may be able to ensure that the RPIO is narrowly tailored so that it addresses the municipality's legitimate concerns while at the same time being the least offensive to owners' rights to own rental properties and their goals of maximizing the return on their investments.

Seek counsel. As with any legal issue, owners should consult their attorneys if they have any issues or concerns about the applicability of a RPIO or inspections of their properties that are being proposed by the local codes personnel. ■

Steven M. Williams, Esq., is the Resident Partner in the Harrisburg, Pa., office of the law firm Cohen, Seglias, Pallas, Greenball & Furman. Williams concentrates his practice in the areas of commercial and civil litigation, commercial and residential landlord/tenant law, employment law, general business law, construction law, real estate law and election law. He can be reached at 717/234-5530 or swilliams@cohenseglia.com.

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