No. _____

In The Supreme Court of the United States

Florine and Walter Nelson,
Jill Cermak and Bruce Henry,
Petitioners,

v.

The City of Rochester, New York,
Respondent.

On Petition for Writ of Certiorari to
the New York State Supreme Court, Appellate
Division, Fourth Judicial Department

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. Whether the Fourth Amendment prohibits the issuance of general warrants to search occupied private dwellings, without individualized suspicion of wrongdoing, for the purpose of seeking evidence of zoning, housing code and other "administrative" violations that are punishable by fines and/or incarceration.

2. Whether the Fourth Amendment's requirement that warrants particularly describe the things to be seized applies to an "administrative" search warrant authorizing the search of an occupied private dwelling.

3. Whether a local law that authorizes the periodic issuance of general warrants against *rented* homes without any factual showing of wrongdoing, while requiring traditional probable cause and particularity to obtain a warrant against the home of a *landowner*, offends the Equal Protection Clause.

PARTIES TO THE PROCEEDING

The parties to the proceeding are as set forth in the caption. In their application for an extension of time within which to file a Petition for a Writ of Certiorari, Petitioners named Carlos Carballada, in his official capacity as Commissioner of Community Development of the City of Rochester, New York in the caption thereof. Since the City of Rochester is the Respondent party in this proceeding and Mr. Carballada is an employee of the City of Rochester, his name has been omitted from the caption herein.

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Petition for Writ of Certiorari

Petitioners Florine Nelson, Walter Nelson, Jill Cermak and Bruce Henry jointly petition for a Writ of Certiorari to review the orders of the Supreme Court of the State of New York, Appellate Division, Fourth Department, in these consolidated cases. S. Ct. R. 12.4.

OPINIONS BELOW

The opinion of the Supreme Court of the State of New York, Appellate Division, Fourth Department is reported at 90 A.D.3d 1480 (N.Y. App. Div. 2012). Appendix ("App.") at pp. 3 – 8. The Court consolidated these four cases for appeal. App. 46 – 49. Companion decisions are reported at 90 A.D.3d 1483, 90 A.D.3d 1485 and 90 A.D.3d 1486. App. 1 – 2, 9 – 12. The New York Court of Appeals denied leave to appeal and dismissed Petitioners' appeal as of right on June 27, 2012. 19 N.Y.3d 937. App. 64 – 67. The trial court's decisions are unreported. App. 13 – 45; *see also* Record on Appeal in *In re City of Rochester for a Warrant to Inspect 187 Clifton Street, City of Rochester, County of Monroe, State of New York* ("Nelson R.") at 3-14, 16-17 and Record on Appeal in *In re City of Rochester for a Warrant to Inspect 449-451 Cedarwood Terrace, City of Rochester, County of Monroe, State of New York* ("Cermak R.") at 3-15, 17-18.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The New York Court of Appeals dismissed Petitioners' appeals as of right and denied leave to appeal on June 27, 2012. 19 N.Y.3d 937 (2012). *See* Sup. Ct. R. 13.1. On September 18, 2012, this Court granted Petitioners' Application No. 12A265 for an extension of time to file this Petition up to and including November 26, 2012. *See* Sup Ct. R. 13.5.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> 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 Warrants 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.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

MUNICIPAL LEGISLATIVE PROVISIONS INVOLVED

The Charter of the City of Rochester, New York (Charter), Article I, PART B, sections 1-9

through 1-25, is lengthy and the pertinent text is set out in the Appendix at pages 68 – 84.[1]

Charter section 3-15 is lengthy and the pertinent text is set out in the Appendix at pages 85 – 95.

The Code of the City of Rochester, New York (Code), section 90-16, is lengthy and the pertinent text is set out in the Appendix at pages 96 – 104.

S. Ct. R. 14(1)(f) & (i).

STATEMENT OF THE CASE

In 1997, the City of Rochester enacted an ordinance requiring owners of one and two family homes to obtain and periodically renew a "certificate of occupancy" ("CO") if the home is "not occupied by an owner". Rochester Municipal Code (Code or RMC) § 90-16 (App. 96 – 104). The City will issue or "renew" the certificate only after an interior inspection by City officers. Code § 90-16F(1);); Cermak R. 603.

The City frequently prosecutes property owners who decline to consent to these inspections. *See, e.g., Burns v. Carballada*, 79 A.D.3d 1785 (N.Y. App. Div. 2010); *Cappon v. Carballada*, 93 A.D.3d 1179 (N.Y. App. Div. 2012). City officials

[1] The full Charter and Code of the City of Rochester are available at http://www.ecode360.com/RO0104.

may also inspect "as often as may be necessary" to enforce the code. Code § 90-16I(1).

Until 2009, the City applied for and obtained "administrative search warrants" in the absence of enabling legislation. In 2009, the City passed its own local law authorizing "judicial warrants for the inspection of premises," codified at Charter §§ 1-9 to 1-25. *See* App. 68 – 84. The warrants need not particularize or describe any things to be seized and do not require any allegation that any law has been broken. The law provides for "a fine or imprisonment, or both" to be imposed on "any person" who should "willfully deny or unduly delay entry or access to any premises to a designated City officer or employee with an inspection warrant". App. 68 – 84. [Charter § 1-25; *see* Nelson R. 27-28.]

Petitioners Florine and Walter Nelson

Petitioners Florine and Walter Nelson are a married couple in their seventies. They have lived at 187 Clifton Street, Rochester, New York for over twenty years – since long before the City enacted its "certificate of occupancy" inspection requirement. Nelson R. 23-29, 113-17, 120-26. They are not suspected of any crime, and the City harbors no individualized suspicion that relevant evidence is concealed at 187 Clifton Street.

This action is the culmination of the City's repeated efforts to search the Nelsons' home for more than eight years. Nelson R. 25. App. 15 –18. This lengthy history includes a 2005 motion by the

City, in Rochester City Court, seeking to imprison and/or fine the Nelsons for "contempt" of an "administrative" search warrant. Nelson R. 6, 27, 91-99; *see Nelson v. City of Rochester*, 492 F. Supp. 2d 282 (W.D.N.Y. 2007). City Court denied that motion, driving the City to enact its warrant law. Nelson R. 6, 27-28, 289-92.

Petitioners Jill Cermak and Bruce Henry

Petitioner Jill Cermak resides at 449 Cedarwood Terrace, the upstairs unit of a two-family house, with her significant other and their school-aged daughter. Petitioner Bruce Henry, Jill's landlord, holds a fee simple absolute title to the house and has since 1969. Mr. Henry maintains exclusive use of the garage on the property where he keeps personal effects. Cermak R. 156.

This warrant application is the culmination of an effort on the part of the City to search Ms. Cermak's home and Mr. Henry's garage that began more than nine years ago. Cermak R. 26-27. In short, the City claims that code violations existed at the house in 2004, before Ms. Cermak moved in. Cermak R. 26, 36-39. The City sought the warrant to search for evidence that it may use to prosecute Mr. Henry for those violations. Cermak R. 26-29; 636-42.

Warrant Court Proceedings

On July 27, 2009, Carlos Carballada, the City of Rochester's "Commissioner of Neighborhood and Business Development," applied to Supreme Court, Monroe County for a "judicial warrant for inspection" of the Nelsons' home. Nelson R. 23-29. The following day, Mr. Carballada applied for a warrant to search Ms. Cermak's home. Cermak R. 24-29. Mr. Carballada's supporting affidavits were made "upon information and belief," without stating any source of such information or grounds for such belief. Nelson R. 372. The Petitioners submitted affidavits and evidence in opposition to the warrants. Cermak R. 89-94; 154-573; Nelson R. 107-299.

On February 5, 2010, in interim orders, the warrant court, relying principally upon *Camara v. Municipal Court*, 387 U.S. 523 (1967), overruled the Petitioners' state and federal challenges to the warrant applications[2] and directed the City to adduce proof in support of its application at hearings. Nelson R. 3-14; Cermak R. 3-15.

The hearings were held on May 3 and 6, 2010. Cermak R. 589-660; Nelson R. 369-400. The

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[2] Before the warrant court and on appeal, Petitioners consistently asserted that the City's warrant applications ran afoul of the Fourth Amendment. *See*, *e.g.*, App. 6 – 7, 19 – 25, 35 – 41.

City's sole witness was Gary Kirkmire, a City employee in charge of housing code enforcement, who had never seen the Petitioners' homes. Nelson R. 379. In sum, Mr. Kirkmire testified that: (1) the City had enacted a law requiring periodic searches of rented homes by City officers; (2) that the owner of each property had applied for a CO (as the City contends they must do to avoid prosecution); and (3) that the property owners had not consented to warrantless searches of their tenants' homes.

The warrant court ruled that these facts alone constitute "a prima facie showing" for the issuance of a warrant. Nelson R. 398; Cermak R. 653. At that point, the warrant court opined, the burden shifts to the tenant to "alleviate an administrative warrant", Cermak R. 616, by showing:

> that the inspection has been done, consent has been given and the property is not one which requires a C of O, that there was abuse of process by the city or that there is abuse or harassment of the tenant and/or landlord or that there is a communicable disease in the house or some other unusual circumstances...

Cermak R. 654. On May 21, 2010, state supreme court issued the requested "Judicial Warrant for Inspection" against the Nelsons' home and a second

warrant against Ms. Cermak's home and Mr. Henry's garage. App. pp. 50 – 58.

These "inspection warrants" do not describe any persons or things to be seized. Instead, the warrants authorize a boundless "search of the interior and exterior" of the Nelsons' single-family home and Ms. Cermak's duplex unit "in order to ascertain whether there exist violations" of over three thousand pages of specified laws and regulations, or any other "federal, state, county or city law, ordinance, rule or regulation relating to the construction, alteration, maintenance, repair, operation, use, condition or occupancy of a premises located within the City…" App. 50 – 58. The warrants thus allow inspectors to "search" wherever an ant or a housefly might hide, and to inspect the "interior surfaces" of closets, drawers and cabinets to determine whether those surfaces are "clean and sanitary." *Cf.* NY PROP. MAINT. CODE §§ 305.1, 308.1.

The warrants remained in effect for 45 days and allowed multiple entries as well as the photographing and videotaping of the interiors of Petitioners' homes. Petitioners remain subject to prosecution for "contempt of court" under the warrants' terms. App. 50 – 58.

Appellate Proceedings

The Petitioners appealed each of the warrant court's orders, and the warrants themselves, to the

Appellate Division of the Supreme Court, Fourth Department.[3]

The Fourth Department affirmed. Notably, that court did not find that these warrants were supported by probable cause; indeed that term does not appear in the court's opinion. Instead, the court held that the warrants were not "inconsistent with the principles enunciated in *Camara* [*v. Municipal Court*, 387 U.S. 523 (1967)]".[4] App. 7.

The court further found no infirmity with "the scope of the subject inspection warrants" or with the fact that "only tenants and not homeowners are subject to inspections of their homes", concluding that there is "a valid public policy basis" for this "statutory discrimination". App. 8.

Petitioners took an appeal as of right to New York's Court of Appeals. On June 27, 2012, the

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[3] The first appeal was deemed procedurally defective. *See Nelson v. Stander*, 79 A.D.3d 1645 (N.Y. App. Div. 2010); *cf. B.T. Productions v. Barr*, 44 N.Y.2d 226, 234 (1978).

[4] The state appellate court also stated that Petitioners failed to assert that the warrant applications did not meet *Camara*'s criteria. This is factually incorrect. Petitioners argued precisely this in their briefs. Nelson Appellate Brief at pp. 40 – 48; Nelson Reply Brief at pp. 4 – 15; Cermak Appellate Brief at pp. 41 – 49; Cermak Reply Brief at pp. 4 – 15. On timely motion to reargue, the court declined to correct this error, without explanation. 93 A.D.3d 1257 (N.Y. App. Div. 2012). App. 59 – 63.

Court of Appeals dismissed both appeals as of right "upon the ground that no substantial constitutional question is directly involved." On the same date, the Court denied the Petitioners' motions for leave to appeal. App. 64 – 67.

The Nelsons, Ms. Cermak and Mr. Henry now petition this Court to review the lower courts' decisions and reverse.

REASONS FOR GRANTING THE PETITION

The lower courts held, in heavy reliance on *Camara v. Municipal Court*, 387 U.S. 523 (1967), that search warrants may be routinely issued to building inspectors, allowing general searches of private homes for evidence of violations of property codes, based on nothing more than the existence of a local law authorizing periodic searches and the passage of the statutory period. Thus, law-abiding tenants may be subjected to such searches while landowners (and suspected criminals[5]) separately retain the traditional protections of the Fourth Amendment.

The decision below merits this Court's review for four reasons:

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[5] The court wrote that its decision "should not be construed as determining whether a local government could enact laws governing search and seizure by police conducting criminal investigations". App. 6.

First, *Camara* turns the Fourth Amendment on its head, affording suspected criminals greater property and privacy rights than innocent tenants. Subsequent decisions of this Court have eroded *Camara*'s pronouncements regarding dilution of the Fourth Amendment's requirements for the issuance of a valid warrant. And the ubiquity of administrative regulations and their expansion in the forty-five years since *Camara* has undermined the majority's assumptions about the "invasion which the search entails". *Camara*, 387 U.S. at 537; *cf. Cermak* R. 644 (photographs and videotapes of the "inspections" will be publicly available under Freedom of Information Laws and could be posted on the internet).

Second, the broad statements in *Camara* have created conflict in both federal and state courts.

Third, the text of the Fourth Amendment expressly dictates that "no Warrants shall issue" without "probable cause" and "particularly describing the place to be searched, and the persons or things to be seized." The Amendment makes no exception for "inspection warrants".

Fourth, this case demonstrates that the loosening of constitutional standards for the issuance of warrants will allow local governments to unequally set lower standards for searches targeting the homes of people who, by choice or circumstance, rent their homes, while separately protecting the privacy of those wealthy enough to

own their homes. Presumably, any other non-suspect groups could also be singled out for searches.

If the lower court's holding sets the correct standard for judicial warrants of inspection, then no inspection warrant will ever be denied. And if no warrant will ever be denied, then "[w]hy go through such an exercise, such a pretense?" *See v. City of Seattle*, 387 U.S. 541, 554 (1967) (CLARK, *J.*, *dissenting*).

I. *CAMARA*'S REASONING WOULD ACCORD SUSPECTED CRIMINALS MORE RIGHTS THAN INNOCENT TENANTS

A. *Camara* Creates a Double Standard for the Issuance of Warrants

Part II of the *Camara* decision creates contradictions of logic for the lower courts. Adopting *Camara*'s rationale would result in the anomalous situation where an individual is fully protected by the Fourth Amendment only when she is suspected of criminal behavior. *Cf.* 387 U.S. at 530. While the privacy of suspected criminals remains constitutionally protected, the Petitioners are subject to search at the nearly unfettered discretion of the City Council.

Just twenty years after *Camara*, this Court wrote that a system that would "would retain a judicial warrant requirement" while nonetheless

holding that "reasonableness of the search does not require probable cause" is "a combination that neither the text of the Constitution nor any of our prior decisions permits." *Griffin v. Wisconsin*, 483 U.S. 868, 877 (1987). "While it is possible to say that Fourth Amendment reasonableness demands probable cause without a judicial warrant, the reverse runs up against the constitutional provision that 'no Warrants shall issue, but upon probable cause.'" *Id.*

B. *Camara* Conflates the Fourth Amendment's Reasonableness Standard for Searches with the Probable Cause and Particularity Requirements for Warrants

All governmental searches must be reasonable, but a warrant may not issue, even for a "reasonable" search, unless Constitutional probable cause exists and the warrant particularly describes the persons or things to be seized.

> The text of the Amendment thus expressly imposes two requirements. First, all searches and seizures must be reasonable. Second, a warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity.

Kentucky v. King, 131 S.Ct. 1849, 1856 (2011). *Camara* conflates these two distinct requirements. A legislative perception that a search is reasonable cannot *ipso facto* substitute for the necessary elements for a warrant. The *Griffin* Court recognized the logical difficulty in squaring *Camara* with the text of the Fourth Amendment:

> Although we have arguably come to permit an exception to that prescription for administrative search warrants, which may but do not necessarily have to be issued by courts, we have never done so for constitutionally mandated judicial warrants. There it remains true that "[i]f a search warrant be constitutionally required, the requirement cannot be flexibly interpreted to dispense with the rigorous constitutional restrictions for its issue."

Griffin, 483 U.S. at 877-78.

Camara directly holds only that warrants *are* constitutionally required for code inspections. The *Camara* Court did not "pass on the validity of the use of administrative warrants." *See v. City of*

Seattle, 387 U.S. 541, 548 n.1 (1967) (CLARK, *J.*, *dissenting*).[6]

In declining to issue a Writ of Certiorari in *Huber v. New Jersey Dep't of Envtl. Prot.*, 562 U.S. ___, 131 S.Ct. 1308 (2011), four Justices agreed that this "Court has not suggested that a State, by imposing heavy regulations on the use of privately owned residential property, may escape the Fourth Amendment's warrant requirement." The question raised here is whether a State, by imposing heavy regulations on privately owned residential property, may direct that warrants periodically issue against private homes based solely on the existence of those regulations, impinging the right of the people to exclude the government from their homes. *Cf. Hendler v. United States*, 952 F.2d 1364, 1374 (Fed. Cir. 1991) ("In the bundle of rights we call property, one of the most valued is the right to sole and exclusive possession — the right to *exclude* strangers, or for that matter friends, but especially the Government.").

In recent times this Court has noted that It is aware:

> of no historical indication that those who ratified the Fourth Amendment understood it as a redundant

[6] Rochester's City Charter does not authorize "administrative" warrants, but rather "*judicial* warrants for inspection". Charter § 1-9 (emphasis added).

> guarantee of whatever limits on search and seizure legislatures might have enacted. *** No early case or commentary, to our knowledge, suggested the Amendment was intended to incorporate subsequently enacted statutes.

Virginia v. Moore, 553 U.S. 164, 169 (2008). *Moore* directly conflicts with *Camara*'s suggestion 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.

Camara, 387 U.S. at 538.

C. The City Did Not Satisfy *Camara*'s Alternative Warrant Standard

Camara tells us that the "standards" for the issuance of a warrant "may be based upon the passage of time, the nature of the building (*e.g.*, a multifamily apartment house), or the condition of the entire area..." Examining each of these criteria seriatim reveals that they are inadequate and unsatisfied.

Nature of the Building

The Nelsons live in a free-standing single family house and Ms. Cermak lives in a duplex on a quiet residential street. These are not the "multi-family apartment houses" *Camara* envisioned.

Condition of the Entire Area

The City's sole witness at the warrant hearings testified that that the Nelsons' neighborhood is "an area that's been improved over the past five to ten years" and "is not one of our worse [*sic*] areas." Nelson R. 392. The witness testified that Ms. Cermak's neighborhood is "an area that's still in good shape".

The City's interest is piqued solely because "there are rental properties" in the area. Cermak R. 631 (City Attorney: "The city is not relying on area in this particular case. It is relying on the situation involved."); *cf.* Charter § 1-23A(2) ("the condition of the area in which the dwelling is located" cannot "constitute the sole basis for the issuance of an inspection warrant");

Passage of Time

The City's warrant scheme only applies to non-landowners. Thus, Rochester has diluted the "passage of time" criterion for the issuance of a warrant: by applying it only when there is also a lack of property ownership. Since 1967, the "unanimous agreement" that such inspection

programs must apply to "all structures", 387 U.S. 535-36, has mutated into searches directed solely at the homes of those who, by choice or circumstance, rent their homes. The passage of time since the "unlanded" have been searched cannot be a constitutionally acceptable basis for the invasion of our privacy.

This Court has more recently reaffirmed that the probable cause standard is "not readily, or even usefully, reduced to a neat set of legal rules", and that "[e]ach case is to be decided on its own facts and circumstances." *Ornelas v. United States*, 517 US 690, 696 (1996). A rule that allows warrants to issue against private homes simply because they haven't been searched recently is a neat legal rule that "reduces the Fourth Amendment to a form of words." *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

D. *Camara* Did Not Involve a Warrant

Camara involved neither a warrant nor an application for one. Accordingly, the issue of a diluted probable cause requirement permitting "periodic inspections of certain facilities without a further showing of cause to believe that substandard conditions dangerous to the public are being maintained" was not briefed. Cermak R. 415-557. And probable cause to search Roland Camara's illegal residence in a commercial portion of a mixed use building was abundant. *See*

Camara, 387 U.S. at 526; *See v. City of Seattle*, 387 U.S. 541 at 549 (CLARK, *J.*, *dissenting*).

Thus, it is fair to conclude that the five justice Camara majority migrated beyond the issue confronted, *i.e.*: whether or not such a search required a warrant and whether *Frank v. Maryland*, 359 U.S. 360 (1959), should be overruled. 387 U.S. at 538; *cf. Ashwander v. Tennessee Valley Auth.*, 297 U.S. 298, 347 (1936); *County Court of Ulster County v. Allen*, 422 U.S. 140, 154 (1979).

In other and subsequent cases, where narrowly drawn issues were squarely presented, this Court has held that some closely-regulated "facilities" may be subjected to such periodic searches. *See, e.g., See v. City of Seattle*, 387 U.S. 541 (1967) (warehouse); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (catering establishment); *United States v. Biswell*, 406 U.S. 311 (1972) (pawn shop); *Donovan v. Dewey*, 452 U.S. 594 (1980) (stone quarry); *Donovan v. Lone Steer, Inc.*, 464 U.S. 408 (1984) (public areas of motel and restaurant); *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (electrical and plumbing installation business); *New York v. Burger*, 482 U.S. 691 (1987) (automobile junkyard). The standards that might authorize a search of closely-regulated commercial facilities should not be mechanically applied to private houses. *See Anobile v. Pelligrino*, 303 F.3d 107, 118-21 (2nd Cir. 2002). Further, the circumstances that render a

search of a nuclear power plant reasonable should not apply to a private dwelling.

The history of the Fourth Amendment shows why the Framers established far more detailed requirements for warrants than for searches:

> Our constitutional fathers were not concerned about warrantless searches, but about overreaching warrants. . . . Far from looking at the warrant as a protection against unreasonable searches, they saw it as an authority for unreasonable and oppressive searches.

Marshall v. Barlow's, Inc., 436 U.S. 307, 328 (1978) (STEVENS, *J.*, *dissenting*). The Court has since written that "founding-era citizens were skeptical of using the rules for search and seizure set by government actors as the index of reasonableness." *Virginia v. Moore*, 553 U.S. 164, 169 (2008).

E. The Lower Courts Have Dispensed with Individualized Review

The *Camara* Court wrote that "broad statutory safeguards are no substitute for individualized review". 387 U.S. at 533. But the New York Courts have determined that these warrants satisfy the *Camara* "standards". The principle of *stare decisis* will discourage future challenges to the thousands of warrants that the

City is now authorized to seek "in broadcast fashion as a matter of course." *See v. City of Seattle*, 387 U.S. at 554 (1967) (CLARK, HARLAN AND STEWART, *JJ.*, *dissenting*). And if these "standards" are based, as here, essentially upon the passage of time, then the "reviewing" magistrate is reduced to a data entry clerk using calendaring software to determine whether the statutory time period has elapsed since a prior search (invariably based upon an *ex parte* application telling the magistrate when the last search occurred).

F. Inspection Warrants are Highly Intrusive

Most disturbing of all, the *Camara* Court opined that "because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy." 387 U.S. at 537. Petitioners fail to understand how a search of every room, closet and cabinet of their homes is not "personal". Cermak R. 177, 178, 635; *cf. Kyllo v. United States*, 533 U.S. 27, 37 (2001) (in the home, "all details are intimate details, because the entire area is held safe from prying government eyes"). And the contention that these searches are not "aimed at the discovery of evidence of crime" is factually wrong. *See* NY EXEC. L. § 382(2) (failure to correct a violation of the New York State Uniform Fire Prevention and Building Code Act is a crime punishable by a fine of $1,000.00 per day and imprisonment for one year); Cermak R. 26, 36-

38 (accusing Mr. Henry of 15 such violations); *cf. Blanton v. City of North Las Vegas*, 489 U.S. 538 (1989) (a crime which carries a penalty of more than six months' imprisonment is a serious crime); *see also Commissioner v. Ophardt*, 74 A.D.3d 1742, 1744 (N.Y. App. Div. 2010) (City of Rochester need not provide property owner with notice of a violation prior to prosecution).

The proposition that the search would be less invasive if the punishment for the crime were less onerous is remarkable; surely "the individual's interest in privacy and personal security suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards". *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987). The Fourth Amendment protects personal privacy; its purpose is not to shield citizens from the "public opprobrium" of a "criminal" search. *Cf. Jardines v. State*, 73 So.3d 34, 36 (Fla. 2011), *cert. granted*, 132 S.Ct. 995 (2012). And this Court has rejected the contention that the government has a greater interest in detecting minor offenses than in gathering evidence of more serious crimes. *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984).

As MR. JUSTICE CLARK wrote in the *Camara* dissent, this "administrative warrant" exception

> prostitutes the command of the Fourth Amendment that "no Warrants shall issue, but upon probable cause" and

> sets up in the health and safety codes area inspection a newfangled "warrant" system that is entirely foreign to Fourth Amendment standards.

Camara, 387 U.S. 523, 547 (1967) (dissent). Since *Camara* did not involve a warrant, the decision could only address these questions in the abstract. This Court should grant a Writ of Certiorari to address the questions in this live, ripe and justiciable controversy.

II. THE LOWER COURTS NEED GUIDANCE

Although there is disagreement among the lower courts regarding the use, validity and scope of code inspection warrants at private homes, the tide appears to have turned against Petitioners and in favor of municipal governments. *See, e.g.*, *Matter of City of Rochester*, 4 Misc.3d 310 (Rochester City Ct.) ("administrative search warrant" valid where "the sole basis for the warrant is the landlord's refusal to permit the City … to inspect his rental property …."), *vacated*, 800 N.Y.S.2d 344 (Monroe Co. Ct. 2004).

This is hardly surprising in light of the sweeping language employed by the *Camara* Court. Few courts will struggle against an apparent legal rip tide to rule in favor of a homeowner, in light of *Camara*'s talismanic language. Just as *Ohio v. Roberts*, 448 U.S. 56, 67-70 (1980), was abrogated if not overruled by

Crawford v. Washington, 541 U.S. 36, 65, 69 (2004), restoring the confrontation clause to its original meaning, this case offers the Court the opportunity to restore the warrant clause to its original meaning by restoring the protections of the common law against these modern-day writs of assistance.

The New York appellate court upheld the warrant issued against the Nelsons' home based solely on the passage of time and the existence of a local law requiring periodic searches of rented homes. *But cf. Black v. Village of Park Forest*, 20 F. Supp.2d 1218, 1226 (N.D Ill. 1998) ("*Camara* does not establish that the passage of time between inspections will invariably be sufficient to establish probable cause for an administrative inspection of a residence.").

In *Hughett v. City of Louisville*, 855 S.W.2d 340, 342 (Ky. App. 1986), a Kentucky appellate court held that

> while the standard of probable cause applicable to an administrative search warrant is more relaxed than that applicable to a criminal case, there still must be *some* probable cause to allow intrusion into one's home to inspect for health and safety code violations.

Id. While the government need not show evidence of a specific violation, it must at least "establish probable cause that a code violation may exist". *Id.*

Similarly, in *Mosher Steel-Virginia v. Tieg*, 327 S.E.2d 87, 92 (Va. 1985), the Supreme Court of Virginia held that a "general inspection warrant comes uncomfortably close to being the kind of warrant proscribed by the Virginia Bill of Rights". Article 1, § 10 of the Virginia Constitution was of course an "important forerunner" of the Fourth Amendment. *Marshall v. Barlow's Inc.*, 436 U.S. 307, 311 (1978).

In enacting its own discrete warrant law, Rochester City Council expressly and specifically targeted the Petitioners' homes. Nelson R. 289-92. In contrast, in *Town of Bozrah v. Chmurynski*, 36 A.3d 210, 218-19 (Conn. 2012), the Supreme Court of Connecticut held that, even in the "administrative" context, the Fourth Amendment provides heightened protection to the home: "[w]hen a zoning inspection is aimed at a particular property, we find that the government's interest does not sufficiently outweigh the threat to individual privacy to warrant suspension of the fourth amendment requirement of particularized suspicion." The Connecticut Court thus rejected *Camara*'s "diluted probable cause standard". *Id.*

Dissenting in *New York v. Burger*, 482 U.S. 691, 728 (1987), MR. JUSTICE BRENNAN questioned "whether a State could take any criminal conduct, make it an administrative

violation, and then search without probable cause for violations of the newly created administrative rule." The City of Rochester says it can.

The lower court upheld the warrants on the ground that the City was *not* "conducting criminal investigations". But under the City's "nuisance" ordinance, Charter § 3-15, many state law felonies are also legislatively declared to be housing code violations. For instance, possession of illegal narcotics, firearms, or child pornography *in a house* is considered an "administrative" housing code violation. Charter § 3-15(1)(a, g, i). Of course, these crimes remain felonies under State law, and any evidence uncovered during an "administrative" search may be turned over to the District Attorney for felony prosecution. Cermak R. 646-47. The *Camara* Court's distinction between criminal investigations and code inspections becomes even more confusing where code violations are prosecuted as serious crimes, and serious felonies are simultaneously considered to be property code violations.

The Sixth Circuit Court of Appeals has held that a code inspection that carries "the very real threat of criminal sanctions", including incarceration, is a "criminal investigation" subject to the traditional safeguards of the Fourth Amendment. *Jacob v. Township of West Bloomfield*, 531 F.3d 385, 390 (6th Cir. 2008); *see also Michigan v. Clifford*, 464 U.S. 287, 294 (1984); *Michigan v. Tyler*, 436 U.S. 499, 512 (1978) ("access to gather evidence for a possible prosecution"

requires a warrant based "upon a traditional showing of probable cause applicable to searches for evidence of crime.").

Both state and federal courts have found difficulty in applying a "standard" of probable cause that is not dependent on individualized suspicion. The Petition should be granted to allow this Court to refine the standard that applies to searches and warrants where a local government targets individual citizens for code violations that are punishable by incarceration.

III. THIS COURT SHOULD TAKE THIS CASE TO DECIDE IF THESE WARRANTS ARE SUPPORTED BY THE FOURTH AMENDMENT'S TEXT

A. The Original Meaning of the Fourth Amendment Forbids These Warrants

The questions raised in this appeal are whether the terms "probable cause" and "particularly describing ... the things to be seized" retain the same meaning today that the Framers ascribed to them in 1791, or whether those meanings were changed or eradicated by Part II of this Court's opinion in *Camara v. Municipal Court*, 387 U.S. 523 (1967). *See Entick v. Carrington and Three Other King's Messengers,* 19 How. St. Tr. 1029 (1765) (for a warrant to issue, it is "necessary that there should have been a felony committed in fact"); *United States v. Jones*, 132 S.Ct. 945, 949 (2012); *Paxton's Case*, 1 Quincy 51 (Mass. 1761) (James Otis' argument that *all* valid warrants must

provide the protection of English common law [or "stolen goods"] warrants); 2 *Works of John Adams* 524 (Boston: Little & Brown 1850).

> It cannot be doubted that the Fourth Amendment's commands grew in large measure out of the colonists' experience with the writs of assistance and their memories of the general warrants formerly in use in England. These writs, which were issued on executive rather than judicial authority, granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods.

United States v. Chadwick, 433 U.S. 1, 7-8 (1977), *abrogated by California v. Acevedo*, 500 U.S. 565 (1991).

The Writs of Assistance were fully authorized by English Law. Untaxed goods found in execution of the writs resulted in confiscation of the goods, not in "criminal" charges. Under the *Camara* Court's reasoning, the Fourth Amendment would permit *the very evil* that it was written to proscribe: suspicionless investigatory searches. *See Illinois v. Krull*, 480 U.S. 340, 364 (1987) (O'CONNOR, *J.*, *dissenting*) (describing statutes authorizing "administrative" searches as "the 20th-century equivalent of the Act authorizing the writ of assistance.") In fact, these warrants bear a striking resemblance to the Paxton Writ. Stern,

Warrants Without Probable Cause, 59 BROOKLYN L. REV. 1385, 1389 n.16 (1994), *citing* Josiah Quincy, Jr., MASS. REPORTS, App. I, at 404-05 (1865).

More recent decisions of this Court have made clear that the Fourth Amendment must provide "the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing." *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995); *see Richards v. Wisconsin*, 520 U.S. 385, 392 n.4 (1997); *County of Riverside v. McLaughlin*, 500 U.S. 44, 60 (1991) (SCALIA, *J.*, *dissenting*); *California v. Hodari D.*, 499 U.S. 621, 624-25 (1991); *Chimel v. California*, 395 U.S. 752, 761 (1969); *see also District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (right to keep and bear arms); *Crawford v. Washington*, 541 U.S. 36 (2004) (right to confrontation).

Camara conflicts with other precedent, prompting the question: Would these warrants have been regarded as valid under the common law in 1791? *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999). Only if the answer is "no" will the Court need to do any "balancing" between "an individual's privacy" and "promotion of legitimate governmental interests". *Id.* at 299-300; *see also Vernonia School District 47j v. Acton*, 515 U.S. 646, 652-53 (1995). Suspicionless government searches of homes were uniformly considered unreasonable in 1791 and this Court should accept this case to clear the path blazed by the Founders.

The *Camara* Court wrote that "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." 387 U.S. at 536-37. But this Court has since written that local governments cannot "revise the 'judgment [of] the American people'" by using a "balancing test" to create new exceptions from constitutional rights where such exceptions were unknown in 1791. *See Brown v. Entertainment Merchs. Ass'n*, 131 S.Ct. 2729, 2734 (2011); *Crawford*, 541 U.S. at 68-69 ("[b]y replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to [the Framers'] design."). And the invasion that a search entails is at its greatest where the police seek a general warrant to search a private residence. *United States v. United States District Court*, 407 U.S. 297, 313 (1972); *Kyllo v. United States*, 533 U.S. 27, 37 (2001).

The rise of the administrative state only increases the need for vigorous enforcement of the probable cause and particularity requirements. "If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important." *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971).

B. Warrants Must Particularly Describe the Things to be Seized

Camara left the question of particularity unanswered. Where, as here, the warrant does not describe any things to be seized, the search must of necessity be a general one. The generality of these warrants violates bedrock Fourth Amendment precepts. *See Payton v. New York*, 445 US 573, 583 (1980); *Coolidge v. New Hampshire*, 403 US 443, 467 (1971); *Marron v. United States*, 275 U.S. 192, 196 (1927). Whether the word "particularly" is to be retained or effectively excised from the Fourth Amendment is a matter worthy of this Court's attention.

The *Camara* Court envisioned "a suitably restricted search warrant." 387 U.S. at 538; *see also New York v. Burger*, 482 U.S. 691, 703 (1987) (administrative searches must be "carefully limited in time, place and scope"). But the challenged warrants each authorize a plenary "search" of Petitioners' homes:

> in order to ascertain whether there exist violations of the Property Conservation Code, Building Code, Plumbing Code, Fire Prevention Code, Zoning Code, Health Ordinance, New York State Uniform Fire Prevention and Building Code, or any other federal, state, county or city law, ordinance, rule or regulation relating to the construction, alteration,

> maintenance, repair, operation, use, condition or occupancy of a premises…

App. 51 – 52, 55 – 56.

Nowhere in this expansive warrant is there any description of any "persons or things to be seized" or any limitation on the places to be searched. This Court's opinion in *Groh v. Ramirez*, 540 U.S. 551, 557-58 (2004) held that a warrant that does "not describe the items to be seized *at all*" is "obviously deficient" and "plainly invalid". Yet *Camara's* dictum led the lower court to the diametrically opposite conclusion. *Cf. United States v. George*, 975 F.2d 72, 75 (2nd Cir. 1992) (warrant authorizing seizure of "'any other evidence relating to the commission of a crime' plainly is not sufficiently particular"); *Cassady v. Goering*, 567 F.3d 628, 632 (10th Cir. 2009) (warrant authorizing seizure of "all other evidence of criminal activity" is a prohibited general warrant).

Navigating its way through the under-charted seas of property code searches, the Seventh Circuit has written that, while this Court may have relaxed the probable cause requirement, It has not as yet held that the warrant clause's requirement that the warrant "describe with particularity … the persons or things to be seized" may be similarly diluted. *Platteville Area Apartment v. City of Platteville*, 179 F.3d 574, 581 (7th Cir. 1999) (POSNER, *C.J.* AND FLAUM AND EASTERBROOK, *JJ.*) (warrant cannot authorize a search of closets

and cabinets for evidence "that more than four unrelated persons are living in a single-family dwelling unit"); *cf.* Cermak R. 177-79, 635 (Rochester's searches extend into closets and cabinets; inspectors read tenants' personal papers searching for evidence of zoning violations); RMC § 120-208 (prohibiting occupancy of a single family home by a "family" of more than four unrelated persons). The scope of the City's "inspections" is boundless and defined only by the executing City inspector.

Seventeen years after *Camara*, this Court wrote that "[i]f evidence of criminal activity is discovered during the course of a valid administrative search", that evidence "may be used to establish probable cause to obtain a criminal search warrant," and only upon obtaining such a warrant may officials "expand the scope of their administrative search". *Michigan v. Clifford*, 464 U.S. 287, 294 (1984). But where the "administrative" warrant authorizes a boundless search, no criminal search warrant will ever be needed.

The City has obtained these warrants to engage in precisely the type of general searches that the Fourth Amendment was written to abolish. This Court should grant a Writ of Certiorari to enforce and clarify the meaning of the Fourth Amendment's warrant requirement.

IV. A WRIT OF CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER A LOCAL GOVERNMENT VIOLATES THE EQUAL PROTECTION CLAUSE BY AUTHORIZING GENERAL WARRANTS TO ISSUE AGAINST RENTERS BUT NOT AGAINST LANDOWNER-OCCUPANTS[7]

The *Camara* Court contemplated a law that required "periodic inspections of all structures". 387 U.S. at 535-36. But in Rochester, warrants are issued only against the homes of non-landowners. *See* Nelson R. 24-25; RMC § 90-16A(2)(e); *cf. Black v. Village of Park Forest*, 20 F.Supp.2d 1218, 1227 (N.D Ill. 1998) ("differential treatment of tenants . . . may suggest discrimination [and] undermines the argument that the annual searches of rented single-family homes are necessary to ensure compliance with the Housing Code.").

"General searches have long been deemed to violate fundamental rights." *Marron v. United States*, 275 U.S. 192, 195 (1927); *Mapp v. Ohio*, 367 U.S. 643 (1961). The lack of ownership of real property is not a basis for denial of any right, even one not characterized as "fundamental". *See Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 628-29 (1969); *Turner v. Fouch*, 396 U.S. 346, 361-64 (1970); *Quinn v. Millsap*, 491 U.S. 95 (1989); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Hill v. Stone*, 421 U.S. 289 (1975). When the

[7] Preserved below. *See* App. 7 – 8, 22 – 23.

government discriminates against a disfavored group in the exercise of such rights, it must demonstrate a compelling need for the discrimination.

Certiorari should be granted to allow this Court to determine whether there is a compelling need for this disparate treatment of landowners and renters, effectively reserving the right to privacy for landowners, while sanctioning suspicionless searches of those residing in rented homes.

IMPORTANCE OF THE ISSUES

Camara stands alone in this Court's jurisprudence. While it is true that "where the privacy interests implicated by the search are minimal", individualized suspicion "is not a constitutional floor, below which a search must be presumed unreasonable", *Skinner v. Railway Labor Executives' Ass'n.*, 489 U.S. 602, 624 (1989), only the *Camara* court has opined that a *warrant* may issue against a private residence without the constitutionally mandated individualized suspicion and particularity. The Fourth Amendment does not distinguish between types or classes of warrants.

The extent of property code regulations has exponentially multiplied since *Camara* was decided. *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 755 (2002) ("[t]he proliferation of Government, State

and Federal, would amaze the Framers, and the administrative state with its reams of regulations would leave them rubbing their eyes.") And the advent and proliferation of freedom of information laws assure that what was once a disconcerting invasion of privacy may today be an enduring public humiliation and security risk magnified and preserved for posterity on the world wide web.

The decision of the lower court in this case subjects tens of thousands of Rochesterians and millions of New Yorkers to searches of their bedrooms, bathrooms, closets and cabinets whenever a local Town Board or City Council decides that such searches are desirable (the members of such bodies can exempt themselves from these searches by owning their own homes). Since no factual showing will be required beyond the mere fact that the search is authorized by local law, once-impartial judges will be reduced to rubber stamps for the building inspector (or the police).

The lower court's holding will also vastly expand the ability of municipalities to search the homes of other disfavored groups for "administrative" violations, and to augment their coffers through the collection of fines. The revenue provided by those fines provides an almost irresistible temptation to municipal officials to violate their citizens' privacy. *See, e.g., City of Chicago v. Old Colony Partners L.P.*, 847 N.E.2d 565 (Ill. App. 2006) (City sought fines of $1,945,000 for two code violations; court found that no

violations existed); *City of Chicago v. RN Realty, L.P.*, 827 N.E.2d 1077 (Ill. App. 2005) (City sought fines of $321,000; court found that fines were improper where all violations were corrected); *Beneke v. Town of Santa Clara*, 61 A.D.3d 1079 (N.Y. App. Div. 2009) (Town awarded $200,000 fine for an unlawful boathouse).

This Petition seeks review of the judgment of an intermediate appellate court. But New York's highest court having denied review, all trial courts in the state are now bound by this precedent, *see Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663, 664 (N.Y. App. Div. 1984); *Weaver v. State,* 91 A.D.3d 758, 761 (N.Y. App. Div. 2012), *lv. denied,* 19 N.Y.3d 804 (2012), rendering future challenges to these warrants practically futile.

In light of *Camara*, only review by this Court can clarify whether any "inspection warrant" will ever be denied under the Fourth Amendment. *See, e.g., Dunaway v. New York*, 442 U.S. 200, 206 (1979) (granting Writ of Certiorari to the New York State Supreme Court, Appellate Division, Fourth Department "to clarify the Fourth Amendment's requirements"); *cf. Ybarra v. Illinois*, 444 U.S. 85, 90 (1979) (granting Writ of Certiorari to the second district appellate court); *Brown v. Texas*, 443 U.S. 47, 50 (1979) (appeal from the El Paso County Court where further review was unavailable under Texas law).

> The trend in state supreme courts towards discretionary review has

> resulted in the intermediate state appellate courts taking on a large and significant role in the development and application of state and federal law …. This Court should not deny review on the basis of an outdated perception of the role of state intermediate appellate courts.

Arizona v. Kempton, 501 U.S. 1212, 1212-13 (1991) (WHITE, *J.*, *dissenting*).

Cases presenting this important issue are unlikely to present themselves in the normal course due to *Camara*'s strong suggestion that "administrative" warrants may issue without any individualized factual showing. Few tenants will possess the substantial funds required to defend themselves against such a warrant in the face of seemingly overwhelming odds. And few lower courts will rule in favor of such tenants when *Camara* presents a "safer" alternative. Even fewer state courts of last resort will elect to hear such a case presenting a question of federal law that this Court has already foreshadowed. The possibility of an appeal by the government is remote because the government is likely to be the prevailing party. Finally, lawyers in private practice are unlikely to risk accepting such a case on a contingency basis.

Warrants are typically issued in an ex parte fashion.[8] The records in these cases, by contrast, reflect full briefing of the issues at every level and live testimony by a City employee, under direct and cross examination. These cases present a uniquely developed record to allow this Court to reconsider the *Camara* court's broad pronouncements.

The Fourth Amendment is often publicly derided for "letting guilty and possibly dangerous defendants go free" under the exclusionary rule. *Herring v. United States*, 129 S.Ct. 695, 701 (2009); *cf. People v. Defore*, 242 N.Y. 13, 201 (1926) (CARDOZO, J.) ("The criminal is to go free because the constable has blundered."), *abrogated by Mapp v. Ohio*, 367 U.S. 643 (1961) and *Linkletter v. Walker*, 381 U.S. 618 (1965). This Court should grant certiorari to correct this misapprehension of the Fourth Amendment, lest the Amendment's *only* effect be to impede the police in the investigation of crime, while leaving those *not* suspected of wrongdoing, but perhaps too poor to own land, presumptively subject to searches of their homes based upon standards that may vary by state and even by municipality.

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[8] Indeed, Petitioners received only a "courtesy copy" of the application but waived this procedural infirmity in favor of reaching the substantive issues. App. 18 – 19, 34 – 35. Nelson R. 108-0909, 120; Cermak R. 90-91, 288.

CONCLUSION

The *Camara* Court's preference for warrants apparently stemmed from the premise that routine issuance of warrants would provide *protection* to the citizen. 387 U.S. at 532-33. But a perfunctory warrant issued without individualized probable cause or particularity and authorizing a 45-day general search, including videotaping of every room of a private residence, provides no such protection. And this Court has since recognized that a "warrant is not simply a device providing procedural protections for the citizen; it also grants the government increased authority to invade the citizen's privacy." *Michigan v. Tyler*, 436 U.S. 499, 514 n.2 (1978) (STEVENS, *J.*, concurring).

This Court should decide whether legislatively-created probable cause runs counter to the historical basis of the Fourth Amendment. To the Framers, the function of a warrant was not to provide protection to the citizen; rather "the warrant was a means of insulating officials from personal liability assessed by colonial juries." *California v. Acevedo*, 500 U.S. 565, 581-82 (1991) (SCALIA, *J.*, *concurring*); *see Henry v. United States*, 361 U.S. 98, 102 (1959). Such judicial "insulation" is only available from the courts under the strictures of the Fourth Amendment; "the political Branches" may not "cloak their work in the neutral colors of judicial action". *Mistretta v. United States*, 488 U.S. 361, 407 (1989).

This Court should grant a writ of certiorari to reexamine the *Camara* Court's suggestion that these legislatively-mandated "area inspections" are *ipso facto* reasonable, and may routinely be insulated from a jury's deliberations by the prior issuance of general "inspection" warrants.

Respectfully submitted,

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SUPREME COURT OF
THE STATE OF NEW YORK
APPELLATE DIVISION
FOURTH JUDICIAL DEPARTMENT

1099 CA 11-00181

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

IN THE MATTER OF THE APPLICATION OF CITY OF ROCHESTER FOR AN "INSPECTION WARRANT" TO INSPECT 187 CLIFTON STREET, CITY OF ROCHESTER, COUNTY OF MONROE, STATE OF NEW YORK.

MEMORANDUM AND ORDER

(Entered: December 23, 2011)

FLORINE NELSON AND WALTER NELSON, APPELLANTS,

v.

CITY OF ROCHESTER, RESPONDENT.
(APPEAL NO. 1.)

DAVIDSON FINK LLP, ROCHESTER (MICHAEL A. BURGER OF COUNSEL), FOR APPELLANTS.

JEFFREY EICHNER, ACTING CORPORATION COUNSEL, ROCHESTER (IGOR SHOKOFF OF COUNSEL), FOR RESPONDENT.

DIBBLE & MILLER, P.C., ROCHESTER (CRAIG D. CHARTIER OF COUNSEL), FOR NEW YORK STATE COALITION OF PROPERTY OWNERS & BUSINESSES, INC., AMICUS CURIAE.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered February 8, 2010. The order denied the challenge to Local Law No. 3 of the City of Rochester and ordered a hearing on the application for a judicial warrant for inspection.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Same Memorandum as in *Matter of City of Rochester* (*Cermak*) ([appeal No. 1] _ AD3d _ [Dec. 23, 2011]).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF
THE STATE OF NEW YORK
APPELLATE DIVISION
FOURTH JUDICIAL DEPARTMENT

1093 CA 11-00089

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

IN THE MATTER OF THE APPLICATION OF CITY OF ROCHESTER FOR AN "INSPECTION WARRANT" TO INSPECT 449 CEDARWOOD TERRACE, CITY OF ROCHESTER, COUNTY OF MONROE, STATE OF NEW YORK.

MEMORANDUM AND ORDER

(Entered: December 23, 2011)

JILL CERMAK AND BRUCE HENRY, APPELLANTS,

v.

CITY OF ROCHESTER, RESPONDENT.
(APPEAL NO. 1.)

DAVIDSON FINK LLP, ROCHESTER (MICHAEL A. BURGER OF COUNSEL), FOR APPELLANTS.

JEFFREY EICHNER, ACTING CORPORATION COUNSEL, ROCHESTER (IGOR SHOKOFF OF COUNSEL), FOR RESPONDENT.

DIBBLE & MILLER, P.C., ROCHESTER (CRAIG D. CHARTIER OF COUNSEL), FOR NEW YORK STATE COALITION OF PROPERTY OWNERS & BUSINESSES, INC., AMICUS CURIAE.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered February 8, 2010. The order, inter alia, denied the challenge to Local Law No. 3 of the City of Rochester and ordered a hearing on the application for a judicial warrant for inspection.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: The first proceeding at issue in these appeals pertains to property at 449-451 Cedarwood Terrace in respondent City of Rochester (City). Jill Cermak is the tenant residing on the second floor of that property, and Bruce Henry is the owner. The second proceeding at issue pertains to property at 187 Clifton Street in the City, and

Florine Nelson and Walter Nelson are the tenants residing in that single-family dwelling. The City requires that such rental properties have a valid certificate of occupancy (CO), which must be renewed every six years (see Rochester City Code § 90-16 [G) [1] [a)). The City must inspect a rental property to issue or renew a co and, for several years, Cermak, Henry and the Nelsons (collectively, appellants) have refused to allow the City's inspectors to access the properties in order to determine if there are any code violations. In March 2009, the City enacted Local Law No. 3, which amended the Charter of the City of Rochester (City Charter) to establish a procedure for issuing judicial warrants for inspections of premises (inspection warrants) in cases where the City has failed to obtain the cooperation of the homeowners or tenants (*see* City Charter § 1-9). After the City again made unsuccessful attempts to obtain permission to inspect the subject properties, it applied to Supreme Court to obtain an inspection warrant with respect to each property.

In appeal No. 1 in the first proceeding, Cermak and Henry appeal from the order that, inter alia, denied their challenge to Local Law No. 3. In appeal No. 2, Cermak and Henry appeal from an order, entitled "judicial warrant for inspection," authorizing the City to inspect the property at 449-451 Cedarwood Terrace. In appeal No. 1 in the second proceeding, the Nelsons appeal from the order that, inter alia, denied their challenge to Local Law No. 3. In appeal No. 2, they appeal from

an order, entitled "judicial warrant for inspection," authorizing the City to inspect the property at 187 Clifton Street. The issues raised by appellants in each of the appeals are, with one exception, identical.

Appellants contend that the inspection warrants are invalid because they did not comply with article 690 of the Criminal Procedure Law and that article 690 preempts the law of search and seizure, thereby precluding the City from enacting the inspection warrant procedures contained in Local Law No. 3. We reject that contention. "A local law may be ruled invalid as inconsistent with State law not only where an express conflict exists between the State and local laws, but also where the State has clearly evinced a desire to preempt an entire field[,] thereby precluding any further local regulation" (*Jancyn Mfg. Corp. v County of Suffolk*, 71 NY2d 91, 96-97). There is nothing in article 690 expressly governing administrative search warrants, nor is there anything suggesting that article 690 was intended to preempt local governments from enacting laws governing such warrants[1].

Appellants further contend that the inspection warrants violate their rights under the Fourth Amendment of the United States

[1] Our decision herein should not be construed as determining whether a local government could enact laws governing search and seizure by police conducting criminal investigations.

Constitution. In *Camara v Municipal Ct. of City & County of San Francisco* (387 US 523, 537-538), the Supreme Court determined that an area inspection of private property conducted pursuant to an administrative search warrant for purposes of determining compliance with rules governing public health and safety, e.g. building codes, could be accomplished in a manner that was consistent with the rights protected by the Fourth Amendment. Notably, appellants do not contend that the subject inspection warrants are inconsistent with the principles enunciated in *Camara*. Instead, they contend that the Supreme Court's discussion of the standards for administrative warrants is merely dictum because *Camara* involved a local law that made it unlawful to refuse a warrantless inspection (*see id.* at 526-527). We reject that contention. Based on the record before us, we cannot conclude that the City violated the Fourth Amendment with respect to either the procedures involved in issuing inspection warrants in general or the scope of the subject inspection warrants in particular. Moreover, we see no basis for imposing a higher standard with respect to the rights in question under the New York State Constitution (*see generally* NY Const, art I, § 12; *Sokolov v Village of Freeport*, 52 NY2d 341, 348 n 2).

Appellants contend that Local Law No. 3 deprives tenants of their right to equal protection of the law because only tenants and not homeowners are subject to inspections of their homes. We reject

that contention. State and local governments are given "a wide scope of discretion in enacting laws [that] affect some groups differently than others, and a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it" (*Lighthouse Shores v Town of Islip*, 41 NY2d 7, 13). Here, there is a valid public policy basis for treating residential property differently based on whether the occupants are renters or homeowners.

With respect to appeal No. 1 in the first proceeding, we conclude that the court properly denied the motion of Cermak and Henry to suppress the results of a May 2009 inspection of the first-floor apartment at 449-451 Cedarwood Terrace, which was occupied by a tenant who is not a party to the proceeding and who apparently consented to the inspection. Both Cermak and Henry lack standing to challenge that inspection (*see generally People v Shire*, 77 AD3d 1358, 1359-1360, *lv denied* 15 NY3d 955).

We have reviewed appellants' remaining contentions in each appeal and conclude that they are without merit.

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF
THE STATE OF NEW YORK
APPELLATE DIVISION
FOURTH JUDICIAL DEPARTMENT

1100 CA 11-00363

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

IN THE MATTER OF THE APPLICATION OF CITY OF ROCHESTER FOR AN "INSPECTION WARRANT" TO INSPECT 187 CLIFTON STREET, CITY OF ROCHESTER, COUNTY OF MONROE, STATE OF NEW YORK.

MEMORANDUM AND ORDER

(Entered: December 23, 2011)

FLORINE NELSON AND WALTER NELSON, APPELLANTS,

v.

CITY OF ROCHESTER, RESPONDENT.
(APPEAL NO. 2.)

DAVIDSON FINK LLP, ROCHESTER (MICHAEL A. BURGER OF COUNSEL), FOR APPELLANTS.

JEFFREY EICHNER, ACTING CORPORATION COUNSEL, ROCHESTER (IGOR SHOKOFF OF COUNSEL), FOR RESPONDENT.

DIBBLE & MILLER, P.C., ROCHESTER (CRAIG D. CHARTIER OF COUNSEL), FOR NEW YORK STATE COALITION OF PROPERTY OWNERS & BUSINESSES, INC., AMICUS CURIAE.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered February 18, 2011. The order authorized the inspection of certain real property.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Same Memorandum as in *Matter of City of Rochester* (*Cermak*) ([appeal No. l] _ AD3d _ [Dec. 23, 2011]).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF
THE STATE OF NEW YORK
APPELLATE DIVISION
FOURTH JUDICIAL DEPARTMENT

1094 CA 11-00362

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

IN THE MATTER OF THE APPLICATION OF CITY OF ROCHESTER FOR AN "INSPECTION WARRANT" TO INSPECT 449 CEDARWOOD TERRACE, CITY OF ROCHESTER, COUNTY OF MONROE, STATE OF NEW YORK.

MEMORANDUM AND ORDER

(Entered: December 23, 2011)

JILL CERMAK AND BRUCE HENRY, APPELLANTS,

v.

CITY OF ROCHESTER, RESPONDENT.
(APPEAL NO. 2.)

DAVIDSON FINK LLP, ROCHESTER (MICHAEL A. BURGER OF COUNSEL), FOR APPELLANTS.

JEFFREY EICHNER, ACTING CORPORATION COUNSEL, ROCHESTER (IGOR SHOKOFF OF COUNSEL), FOR RESPONDENT.

DIBBLE & MILLER, P.C., ROCHESTER (CRAIG D. CHARTIER OF COUNSEL), FOR NEW YORK STATE COALITION OF PROPERTY OWNERS & BUSINESSES, INC., AMICUS CURIAE.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered February 18, 2011. The order authorized the inspection of certain real property.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Same Memorandum as in *Matter of City of Rochester* (*Cermak*) ([appeal No. 1] _ AD3d _ [Dec. 23, 2011]).

Entered: December 23, 2011

Frances E. Cafarell
Clerk of the Court

SUPREME COURT
STATE OF NEW YORK MONROE COUNTY

IN THE MATTER OF THE APPLICATION OF CITY OF ROCHESTER FOR AN "INSPECTION WARRANT" TO INSPECT 187 CLIFTON STREET, CITY OF ROCHESTER, COUNTY OF MONROE, STATE OF NEW YORK.	Index #2009/11292 DECISION & ORDER (Filed: February 8, 2010)

APPEARANCES ON EX PARTE APPLICATION:

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Appearance on Submitted Papers:
David Ahl
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DECISION and ORDER

Thomas A. Stander, J.

The City of Rochester ("City") submits an application for a "Judicial Warrant For Inspection" of premises at 187 Clifton Street, City of Rochester, County of Monroe, New York. The format of this application is an ex parte application to the Court.[1] The application is based upon the City of Rochester Charter, Local Law No. 3.

I. BACKGROUND

A. History

This action arises from a lengthy history with the Court. There were three actions commenced in 2004 regarding the application of the City of Rochester's Code regarding the right to obtain administrative search warrants. During the pendency of those proceedings, the City advised that they were revising the City Code regarding inspection warrants. After many discussions, the attorneys determined in the interest of justice to wait and pursue proceedings in accordance with the new Code provisions. In this manner, the most current Code would be addressed by the litigation.

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[1] As set forth below, notwithstanding the ex parte nature of this application all interested parties are on notice of the application.

The Council of the City of Rochester passed Local Law No. 3 on February 17, 2009, and the Mayor approved it. Local Law No. 3 was adopted March 16, 2009. Local Law No. 3 amends the City Charter with respect to inspection warrants and sets forth the procedure for obtaining judicial warrants for inspection of premises.

B. Facts

The City of Rochester has now made an application to the court for an Inspection Warrant to inspect 187 Clifton Street in the City of Rochester. The tenants residing at 187 Clifton Street are Walter and Florine Nelson. The property owner is Eula Dozier.

1. History between the City and 187 Clifton Street:

* City has no record of inspecting the interior of the premises

* **April 5, 2004** City Letter notifying property owner, Eula Dozier, of an Amendment to the Property Maintenance Code of the City of Rochester requiring a Certificate of Occupancy for the property.

* **April13, 2004** Property Owner Dozier made application for a Certificate of Occupancy – checked box on application that did not consent to have property inspected by City – added "not new construction"

* **June 18, 2004** Neighborhood Empowerment Team ("NET") issued a Notice and Order of a violation of §90-16 of the City Code that the property is occupied without a valid Certificate of Occupancy.

* **April 5, 2005** City Letter sent to owner explaining need for inspection before Certificate of Occupancy could be issued and seeking consent to inspect; also advised that administrative search warrant would be applied for from City Court

* **April 14, 2005** City Letter sent to "Occupant" at premises of the scheduled Certificate of Occupancy inspection date. If unable to inspect property, then will apply for administrative search warrant from Rochester City Court.

* **Apri1 15, 2005** Letter of tenant Florine Nelson refusing consent to inspection.

* **June 14, 2005** City Court grants an application for an administrative search warrant and issues a warrant by Judge Ann Pfeiffer.

* **June 21, 2005** Administrative search warrant personally served upon Florine and Walter Nelson as tenants of 187 Clifton Street – tenants refused to permit inspection.

* **City made application for contempt** for refusal to permit the Certificate of Occupancy inspection to be done of the entire premises at 187 Clifton Street

* **December 22, 2005** Hon. Melchor Castro declined to issue any order on City's application for contempt and on Respondents counterclaims.

* **March 16, 2009** City adopted new Local Law No. 3 amending City Charter on Inspection Warrants – effective **April 9, 2009.**

2. Procedural Steps After Local Law No.3 in Effect:

* **May 13, 2009** "Notice of Intent to Conduct an Inspection of the Premises" sent to occupants of 187 Clifton Street advising of scheduled Certificate of Occupancy inspection. Also if inspection not allowed the City will seek an administrative inspection warrant from Court

* **May 18, 2009** Letter from Michael Burger to the City of Rochester Law Dept (Ex. L) stating:

> the Nelsons do not waive any of their rights, rather they request that the City observe their right to be represented by counsel in this matter and to have all communications and correspondence directed to the undersigned. Concomitantly, I agree to accept service on behalf of the Nelsons of the City's warrant applications and any predicate notices."

The letter also indicated that the Nelson' decline to consent to any search or inspection.

* **July 21, 2009** City letter to both owner, Eula Dozier, and Tenants, Mr. & Mrs. Walter Nelson, c/o Michael Burger, Esq., advising City intends to apply to State Supreme Court for an Inspection Warrant to inspect premises at 187 Clifton Street in not less than five days.

* **August 6, 2009** Application for Judicial Warrant for Inspection received by Supreme Court

II. PROCEDURAL ISSUES (Waived)

The premise occupants, Walter and Florine Nelson, and premise owner, Eula Dozier, raise a number of procedural issues to this Inspection Warrant. These procedural issues include, among others, that they are not named parties in the proceeding; that their attorney, Michael Burger, Esq., was never asked to accept service of the inspection warrant application; and that there was no service of the warrant application, but merely sending of the inspection warrant application denominated as a courtesy copy.

Counsel concede that all involved in this inspection warrant application, the premise occupants and owner, and the attorney, have notice of the application to the Court. Further the Court has accepted opposition papers and oral argument

on behalf of the occupants and owner of the premises. At oral argument counsel for the occupants and owner waived their procedural arguments in opposition to the inspection warrant application because everyone in this case has notice and an opportunity to be heard.

The City followed the notice provisions required by Local Law No. 3 leading up to an application for a Judicial Inspection Warrant.

III. CONSTITUTIONAL ARGUMENTS

The opposition to this application for judicial Inspection Warrants asserts that the occupants have a constitutional right to be left alone pursuant to the Fourth Amendment of the United States Constitution; that the City Local Law 3 denies tenants of rental property the equal protection of the laws; and the tenants have been deprived of the Certificate of Occupancy without due process. The occupants and owner also argue that the City's Inspection Warrant procedure conflicts with Article 690 and 700 of the Criminal Procedure Law; illegally supersedes Article 18 of the Executive Law and Section 3102 of the Civil Practice Law and Rules; and violates the New York State Constitution and Human Rights Law.

The Courts have determined that administrative searches are authorized, and do not violate the safeguards of the United States Constitution Fourth Amendment, when obtained

through a warrant application where reasonable cause is determined to exist (*Camara v Municipal Court of the City and County of San Francisco*, 387 U.S. 523 [1967]; *Sokolov v Village of Freeport*, 52 NY2d 341 [1981]). A municipal permit ordinance is unconstitutional when it effectively authorizes and requires a warrantless inspection of rental prope1ty in order to obtain a permit (*Sokolov* at 346).

The Rochester City Code provision for property owners "to apply for renewal of certificates of occupancy for their residential rental properties every five years" is constitutional (*Arrowsmith v City of Rochester*, 309 AD2d 1201 [4th Dept. 2003]). The Court determined that this Code provision is "sufficiently precise to satisfy the requirements of due process," "does not authorize warrantless, nonconsensual inspections of their properties in violation of their Fourth Amendment rights," and "bears a reasonable relationship to [the City's] legitimate goals of promoting public health and safety and maintaining property values" (*Arrowsmith* at 120 1-02). The Kingston City Code allowing the municipality to seek a search warrant when the owner fails to allow an inspection of rental property where there is reasonable cause to believe there is a violation was held constitutional (*McLean v City of Kingston*, 57 AD3d 1269 [3d Dept. 2008]). The Town of Babylon ordinance which authorized inspections for residential rentals was held constitutional (*Pashcow v Town of Babylon*, 53 NY2d 687 [1981]).

The Courts have determined that inspection warrants of the type sought in this application are constitutional. On the standard to be applied for municipalities applications for inspection warrants, the New York Court of Appeals states

> The agency's particular demand for access will of course be measured, in terms of probable cause to issue a warrant, against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved.

(*Sokolov* at 348). The Court of Appeals acknowledges the United State Supreme Court case of *Camara* on the standards to review when assessing whether to authorize inspection warrants:

> The standards articulated as justifying an area inspection include the passage of time, the nature of the building, or the condition of the entire area.

(*Sokolov* at 349, fn 2, *citing Camara* at 538). Further, New York Court of Appeals expanded this standard:

> This list is not exhaustive, and we believe that another factor to be considered in justifying a search warrant is whether a residential rental property is being introduced onto the marketplace for the first time, without having undergone prior inspection.

(Sokolov at 349, fn 2). Where the code requires either consent to inspect or a valid search warrant to inspect, the ordinance is facially constitutional (*McLean* at 1271). The law is clear that inspection warrants do not violate the Fourth Amendment.

The owner and tenant argue that the City Local Law 3 denies tenants of rental property the equal protection of the laws because an inspection warrant based upon applying for a certificate of occupancy only applies to homes of non-landowners. However, the Rochester City Code ordinance requiring residential rental properties to reapply eve1y five years for a certificate of occupancy was held to be "sufficiently precise to satisfy the requirements of due process" (*Arrowsmith* at 1201). Further the Court determined that "[t]he requirement that plaintiffs apply for renewal of certificates of occupancy every five years bears a reasonable relationship to [City of Rochester's] legitimate goals of promoting public health and safety and maintaining property values [ ] and [City's] decision not to impose the same requirement on owner-occupied residential

property has a rational basis" (*Id.* at 1202). This same reasoning applies to Local Law 3 setting forth a procedure to conduct the necessary inspection of premises for a certificate of occupancy. The requirements of due process have been met because the procedures for an inspection warrant bear a reasonable relationship to the City's legitimate goals. Equal protection of the laws exists because there is a rational basis for the certificate of occupancy requirements not being imposed on owner-occupied residential property.

Although the occupants and owner also argue that the City's Inspection Warrant procedure conflicts with Article 690 and 700 of the Criminal Procedure Law; illegally supersedes Article 18 of the Executive Law and Section 3102 of the Civil Practice Law and Rules; and violates the New York State Constitution and Human Rights Law, it was conceded at oral argument that the ordinance, Local Law 3, is valid on its face. This Court agrees. The City has the authority to implement procedures in its Code for inspection warrants. However, the City may not require a warrantless inspection of residential rental property (*see Sokolov* at 345-46; *Camara* at 534). The City cannot obtain an inspection warrant to search the rental premises solely on the owner or occupant's denial to inspect; the Court must review based on "a flexible standard of reasonableness" (*Sokolov* at 348).

The general search warrant requirements under a criminal investigation are not the same as an inspection warrant "aimed at securing city-wide compliance with minimum physical standards for private property" (*Camara* at 535).

> Where considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different form those that would justify such an inference where a criminal investigation has been undertaken

(*Id* at 538). The attempt to argue that these inspection warrants conflict with or illegally supersede the Criminal Procedure Law, Executive Law or Civil Procedure Law and Rules are not supported by law. The inspection warrants are based upon the Local Law 3.

The only portion of the Local Law 3 continuing to be contested is the contempt provision if the occupant refuses to allow entry when the judicial inspection warrant is presented at the premises. All counsel agree that this issue is not ripe for determination at this point. Whether there is an issue regarding the code provisions contained in Local Law 3 for a contempt proceeding is premature.

However, all constitutional and statutory challenges to City of Rochester's Local Law 3 which are ripe for determination are DENIED.

IV. PROBABLE CAUSE FOR AN INSPECTION WARRANT

In assessing whether probable cause exists for a judicial inspection warrant of 187 Clifton Street, the Court must consider the following:

> The standards articulated as justifying an area inspection include the passage of time, the nature of the building, or the condition of the entire area.
>
> This list is not exhaustive, and we believe that another factor to be considered in justifying a search warrant is whether a residential rental property is being introduced onto the marketplace for the first time, without having undergone prior inspection.

(*Sokolov* at 349, fn 2, *citing Camara* at 538). In addition, Rochester City Charter Local Law 3 specifically authorizes the Court to conduct a hearing regarding the application for a judicial inspection warrant:

> (1) In determining an application for an inspection warrant, the court may examine, under oath, any person who it believes may possess pertinent information. Any such examination may be recorded or summarized on the record by the court.

Although there may be instances where granting a judicial inspection warrant only on the papers submitted may be proper, since there is no contraband that may be lost or emergency situation presented or any exigency set forth, the best process is to conduct a hearing on notice to the occupant of the premises and the owner.[2]

This Court shall require a hearing, on notice to the occupants of the premises and to the owner. A conference will be scheduled by the Court; at which time a hearing date on this application for a judicial inspection warrant of 187 Clifton Street, Rochester, Monroe County, New York, shall be scheduled.

ORDER

Based upon all the papers submitted in support and in opposition to this motion, upon the above Decision, and after due deliberation, it is hereby

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[2] In fact, if the violations are resolved during the pendency of the proceedings, then it is a beneficial outcome.

ORDERED that the challenges to the City of Rochester's Local Law 3, which are ripe for determination, are DENIED; and it is further

ORDERED that the City of Rochester's application for a Judicial Warrant for Inspection of 187 Clifton Street, City of Rochester, County of Monroe, New York is set down for a HEARING as provided above.

Dated: February 5, 2010
Rochester, New York

s/Thomas A. Stander
Supreme Court Justice

SUPREME COURT
STATE OF NEW YORK MONROE COUNTY

IN THE MATTER OF THE APPLICATION OF CITY OF ROCHESTER FOR AN "INSPECTION WARRANT" TO INSPECT 449 CEDARWOOD TERRACE, CITY OF ROCHESTER, COUNTY OF MONROE, STATE OF NEW YORK.	Index #2009/10938 DECISION & ORDER (Filed: February 8, 2010)

APPEARANCES ON EX PARTE APPLICATION:

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Appearance on Submitted Papers:
David Ahl
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DECISION and ORDER

Thomas A. Stander, J.

The City of Rochester ("City") submits an application for a "Judicial Warrant For Inspection" of premises at 449 Cedarwood Terrace, City of Rochester, County of Monroe, New York. The format of this application is an ex parte application to the Court.[1] The application is based upon the City of Rochester Charter, Local Law No. 3.

Although this is an ex parte application, the attorney for Jill Cermak, tenant at the premises at issue, and for Bruce Henry, owner of the premises, submits a Notice of Motion on their behalf seeking an order suppressing any and all evidence and observations obtained during a search of the property located at 449-451 Cedarwood Terrace, Rochester, New York pursuant to an "administrative" search warrant issued by the Rochester City Court (Johnson, J.) on April 9, 2004; and such other and further relief as the Court deems just and proper.

[1] As set forth below, notwithstanding the ex parte nature of this application all interested parties are on notice of the application.

I. BACKGROUND

A. History

This action arises from a lengthy history with the Court. There were three actions commenced in 2004 regarding the application of the City of Rochester's Code regarding the right to obtain administrative search warrants. During the pendency of those proceedings, the City advised that they were revising the City Code regarding inspection warrants. After many discussions, the attorneys determined in the interest of justice to wait and pursue proceedings in accordance with the new Code provisions. In this manner, the most current Code would be addressed by the litigation.

The Council of the City of Rochester passed Local Law No. 3 on February 17, 2009, and the Mayor approved it. Local Law No. 3 was adopted March 16, 2009. Loca1 Law No. 3 amends the City Charter with respect to inspection warrants and sets forth the procedure for obtaining judicial warrants for inspection of premises.

B. Facts

The City of Rochester has now made an application to the court for an Inspection Warrant to inspect 449 Cedarwood Terrace in the City of Rochester. The tenants residing at 449 Cedarwood Terrace are Jill Cermak. The property owner of 449-451 Cedarwood Terrace since 1969 is Bruce

Henry. The property manager for 449-451 Cedarwood Terrace is Karl Weekes.

1. History between the City and 449-451 Cedarwood Terrace:

* **June 24, 1993** City issued a renewable Certificate of Occupancy on June 24, 1993, with an expiration date of July 1, 1998.

* **February 20, 2003** City Letter notifying property owner, Bruce Henry, of the expiration of the Certificate of Occupancy, and the requirement to secure a new one.

* **April 8, 2003** Property Owner Henry made an application for a Certificate of Occupancy – checking the box on the application that he did not consent to have the property inspected by the City.

* **June 19, 2003** City issued a Notice and Order, based on a June 17, 2003 inspection, advising Bruce Henry of code violations with the property.

* **April 9, 2004** City Court Judge Teresa Johnson issued an Administrative Search Warrant to make a search of the interior and exterior of 449-451 Cedarwood Terrace, Rochester to ascertain whether there are any violations of the property codes

* **April 13, 2004** Execution of an Administrative Search Warrant - City conducted a complete inspection of the premises.

* **April 16, 2004** City issues Notice and Order of violations.

* **May 10, 2005** City letter to Owner Henry about date to inspect the premises.

* **June 9, 2005** City letter from Neighborhood Empowerment Team ("NET") to Owner Henry advising that the City will begin the process to issue a ticket for the uncorrected violations on the property.

* **August 15, 2006** City charged Bruce Henry with Code Violations for 449-451 Cedarwood Terrace. The Code Violations were "Driveway needs repair," "Main building trim needs protective covering," Porch needs protective covering," and "Accessory building needs protective covering." Owner was summoned to appear before the Municipal Code Violations Bureau for a hearing.

* **September 18, 2006** Municipal Code Violations Bureau held a hearing on the code violations charges against Bruce Henry for the property. Exhibits and testimony were presented to the Hearing Examiner. The determination was that Henry was guilty and a fine of $150 was imposed.

* **June 21, 2007** The owner, Henry, filed an Appeal Record with the Municipal Code Violations Bureau. The Appeal determination dismissed two of the four charges, the ones for main building trim and

accessory building trim needing protective covering. The remaining fine was $50.

* **February 23, 2009** Date of inspection of the premises by the City.

* **February 24, 2009** City Notice and Order to Bruce Henry of property code violations. This lists violations which were issued on April16, 2004; June 19, 2003; and February 24, 2009.

* **March 16, 2009** City adopted new Local Law No. 3 amending City Charter on Inspection Warrants – effective April9, 2009.

2. Procedural Steps After Local Law No.3 in Effect:

* **May 13, 2009** City Letter and "Notice of Intent to Conduct a Re-Inspection of the Premises" sent to "Occupant, 449 Cedarwood Terrace, Down Apartment" and "Occupant, 449 Cedarwood Terrace, Up Apartment", with copies to the property owner, advising of the scheduled follow up Certificate of Occupancy inspection date. If unable to inspect property, then the city advises it will seek a Judicial Warrant for Inspection from the Court.

* **May 20, 2009** Inspection by a code enforcement official by consent of the tenant in the first floor unit. Tenant granted consent to inspect the hallway, her unit and the cellar.

* **May 21, 2009** City issued a "Notice and Order" to Bruce Henry, the owner of the premises, advising of code violations based on a May 20, 2009 inspection. This lists violations which were issued on April 16, 2004; June 19, 2003; May 21, 2009; and February 24, 2009.

***July 21, 2009** City letter to both owner, Bruce Henry, and Tenant (Up) advising City intends to apply to State Supreme Court for an Inspection Warrant to inspect premises at 449 Cedarwood Terrace in not less than five days.

* **August 6, 2009** Application for Judicial Warrant for Inspection received by Supreme Court.

* **September 15, 2009** Hearing on code violations ticket for "porch needs protective covering" and "porch railings are broken or missing." The charge for broken or missing railings was dismissed by the Hearing Examiner.

* **December 1, 2009** By affidavit in this proceeding Bruce Henry withdraws the pending application for a certificate of occupancy submitted in April 2003, which the City Claims is still outstanding.

II. PROCEDURAL ISSUES (Waived)

The premise occupants, Jill Cermak, and premise owner, Bruce Henry, raise a number of procedural issues to this Inspection Warrant.

These procedural issues include, among others, that they are not named parties in the proceeding; that they never received formal notice of the proceedings; and that there was no service of the warrant application. (They were merely sent an inspection warrant application denominated as a "courtesy copy".)

Counsel concede that all involved in this inspection warrant application, the premise occupant and owner, and the attorney, have notice of the application to the Court. Further the Court has accepted a notice of motion, opposition papers and oral argument on behalf of the occupant and owner of the premises. At oral argument counsel for the occupant and owner waived their procedural arguments in opposition to the inspection warrant application because everyone in this case has notice and an opportunity to be heard.

The City followed the notice provisions required by Local Law No. 3 leading up to an application for a Judicial Inspection Warrant.

III. CONSTITUTIONAL ARGUMENTS

The opposition to this application for Judicial Inspection Warrants asserts that the occupant has a constitutional right to be left alone pursuant to the Fourth Amendment of the United States Constitution; that the City Local Law 3 denies tenants of rental property the equal protection of the laws; and the tenants have been deprived of the

Certificate of Occupancy without due process. The occupants and owner also argue that the City's Inspection Warrant procedure conflicts with Article 690 and 700 of the Criminal Procedure Law; illegally supersedes Article 18 of the Executive Law and Section 3102 of the Civil Practice Law and Rules; and violates the New York State Constitution and Human Rights Law.

The Courts have determined that administrative searches are authorized, and do not violate the safeguards of the United States Constitution Fourth Amendment, when obtained through a warrant application where reasonable cause is determined to exist (*Camara v Municipal Court of the City and County of San Francisco*, 387 U.S. 523 [1967]; *Sokolov v Village of Freeport*, 52 NY2d 341 [1981]). A municipal permit ordinance is unconstitutional when it effectively authorizes and requires a warrantless inspection of rental property in order to obtain a permit (*Sokolov* at 346).

The Rochester City Code provision for property owners "to apply for renewal of certificates of occupancy for their residential rental properties every five years" is constitutional (*Arrowsmith v City of Rochester*, 309 AD2d 1201 [4th Dept. 2003]). The Court determined that this Code provision is "sufficiently precise to satisfy the requirements of due process," "does not authorize warrantless, nonconsensual inspections of their properties in violation of their Fourth Amendment rights," and "bears a reasonable relationship to [the City's]

legitimate goals of promoting public health and safety and maintaining property values" (*Arrowsmith* at 1201-02). The Kingston City Code allowing the municipality to seek a search warrant when the owner fails to allow an inspection of rental property where there is reasonable cause to believe there is a violation was held constitutional (*McLean v City of Kingston*, 57 AD 3d 1269 [3d Dept. 2008]). The Town of Babylon ordinance which authorized inspections for residential rentals was held constitutional (*Pashcow v Town of Babylon*, 53 NY2d 687 [1981]).

The Courts have determined that inspection warrants of the type sought in this application are constitutional. On the standard to be applied for municipalities applications for inspection warrants, the New York Court of Appeals states

> The agency's particular demand for access will of course be measured, in terms of probable cause to issue a warrant, against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved.

(*Sokolov* at 348). The Court of Appeals acknowledges the United State Supreme Court case of *Camara* on the standards to review when assessing whether to authorize inspection warrants:

> The standards articulated as justifying an area inspection include the passage of time, the nature of the building, or the condition of the entire area.

(*Sokolov* at 349, fn 2, *citing Camara* at 538). Further, New York Court of Appeals expanded this standard:

> This list is not exhaustive, and we believe that another factor to be considered in justifying a search warrant is whether a residential rental property is being introduced onto the marketplace for the first time, without having undergone prior inspection.

(*Sokolov* at 349, fn 2). Where the code requires either consent to inspect or a valid search warrant to inspect, the ordinance is facially constitutional (*McLean* at 1271). The law is clear that inspection warrants do not violate the Fourth Amendment.

The owner and tenant argue that the City Local Law 3 denies tenants of rental property the equal protection of the laws because an inspection warrant based upon applying for a certificate of occupancy only applies to homes of non-landowners. However, the Rochester City Code ordinance requiring residential rental properties to

reapply every five years for a certificate of occupancy was held to be "sufficiently precise to satisfy the requirements of due process" (*Arrowsmith* at 1201). Further the Court determined that"[t]he requirement that plaintiffs apply for renewal of certificates of occupancy every five years bears a reasonable relationship to [City of Rochester's] legitimate goals of promoting public health and safety and maintaining property values [ ] and [City's] decision not to impose the same requirement on owner-occupied residential property has a rational basis" (*Id.* at 1202). This same reasoning applies to Local Law 3 setting forth a procedure to conduct the necessary inspection of premises for a certificate of occupancy. The requirements of due process have been met because the procedures for an inspection warrant bear a reasonable relationship to the City's legitimate goals. Equal protection of the laws exists because there is a rational basis for the certificate of occupancy requirements not being imposed on owner-occupied residential property.

Although the occupant and owner also argue that the City's Inspection Warrant procedure conflicts with Article 690 and 700 of the Criminal Procedure Law; illegally supersedes Article 18 of the Executive Law and Section 3102 of the Civil Practice Law and Rules; and violates the New York State Constitution and Human Rights Law, it was conceded at oral argument that the ordinance, Local Law 3, is valid on its face. This Court agrees. The City has the authority to implement

procedures in its Code for inspection warrants. However, the City may not require a warrantless inspection of residential rental property (*see Sokolov* at 345-46; *Camara* at 534). The City cannot obtain an inspection warrant to search the rental premises solely on the owner or occupant's denial to inspect; the Court must review based on "a flexible standard of reasonableness" (*Sokolov* at 348).

The general search warrant requirements under a criminal investigation are not the same as an inspection warrant "aimed at securing city-wide compliance with minimum physical standards for private property" (Camara at 535).

> Where considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different form those that would justify such an inference where a criminal investigation has been undertaken

(*Id.* at 538). The attempt to argue that these inspection warrants conflict with or illegally supersede the Criminal Procedure Law, Executive Law or Civil Procedure Law and Rules are not supported by law. The inspection warrants are based upon the Local Law 3.

The only portion of the Local Law 3 continuing to be contested is the contempt provision if the occupant refuses to allow entry when the judicial inspection warrant is presented at the premises. All counsel agree that this issue is not ripe for determination at this point. Whether there is an issue regarding the code provisions contained in Local Law 3 for a contempt proceeding is premature.

However, all constitutional and statutory challenges to City of Rochester's Local Law 3 which are ripe for determination are DENIED.

IV. PROBABLE CAUSE FOR AN INSPECTION WARRANT

In assessing whether probable cause exists for a judicial inspection warrant of 449-451 Cedarwood Terrace, the Court must consider the following:

> The standards articulated as justifying an area inspection include the passage of time, the nature of the building, or the condition of the entire area.
>
> This list is not exhaustive, and we believe that another factor to be considered in justifying a search warrant is whether a residential rental property is being introduced

> onto the marketplace for the first time, without having undergone prior inspection.

(*Sokolov* at 349, fn 2, *citing Camara* at 538). In addition, Rochester City Charter Local Law 3 specifically authorizes the Court to conduct a hearing regarding the application for a judicial inspection warrant:

> (l) In determining an application for an inspection warrant, the court may examine, under oath, any person who it believes may possess pertinent information. Any such examination may be recorded or summarized on the record by the court.

Although there may be instances where granting a judicial inspection warrant only on the papers submitted may be proper, since there is no contraband that may be lost or emergency situation presented or any exigency set forth, the best process is to conduct a hearing on notice to the occupant of the premises and the owner.[2]

This Court shall require a hearing, on notice to the occupants of the premises and to the owner. A conference will be scheduled by the Court, at which time a hearing date on this application for a

[2] In fact, if the violations are resolved during the pendency of the proceedings, then it is a beneficial outcome.

judicial inspection warrant of 449-451 Cedarwood Terrace, Rochester, Monroe County, New York, shall be scheduled.

V. MOTION TO SUPPRESS EVIDENCE OBTAINED DURING SEARCH

The tenant, Jill Cermak, and owner, Bruce Henry of 449-451 Cedarwood Terrace submit a motion seeking an order to suppress evidence and

observations obtained by the City during a search of the premises, which was conducted pursuant to an administrative search warrant issued by the Rochester City Court, Judge Teresa Johnson, on April9, 2004. After the search was conducted on April 13, 2004 pursuant to the warrant, the City issued a Notice and Order to the owner on April 16, 2004 advising of code violations discovered during the search. Some of these violations still remain on the list of code violations for the premises.

The tenant and owner set forth numerous arguments to support their position that the Court should suppress evidence obtained during the April, 2004 search of the premises. However, this motion to suppress is based on the Rochester City Court not having authority to issue the underlying administrative search warrant and other constitutional arguments.

At this juncture of the case, the pending proceeding before this Court is the application by

the City for a Judicial Inspection Warrant. This application is based upon the City's Local Law 3 implementing a procedure effective April 9, 2009 for obtaining an inspection warrant. The Court has addressed above the myriad of arguments submitted in opposition to the application and found them to be unsupported by the law.

On this application for a judicial inspection warrant, there is no basis or reason for this Court to determine or review whether prior administrative search warrants issued by another court are valid. The motion of Jill Cermak and Bruce Henry to suppress any and all evidence and observation obtained during a search of the property located at 449-451 Cedarwood Terrace; Rochester, New York pursuant to an administrative search warrant issued by the Rochester City Court, Judge Teresa Johnson on April 9, 2004 is DENIED.

The Court is conducting a hearing on the application for a judicial inspection warrant and may allow arguments related to whether probable cause can be shown by alleged code violations from a significant time period prior to this application.

ORDER

Based upon all the papers submitted in support and in opposition to this motion, upon the above Decision, and after due deliberation, it is hereby

ORDERED that the challenges to the City of Rochester's Local Law 3, which are ripe for determination, are DENIED; and it is further

ORDERED that the City of Rochester's application for a Judicial Warrant for Inspection of 449-451 Cedarwood Terrace, City of Rochester, County of Monroe, New York is set down for a HEARING as provided above.

ORDERED that the motion of Jill Cermak and Bruce Henry to suppress all evidence and observations obtained during a search of 449-451 Cedarwood Terrace, Rochester, New York pursuant to an administrative search warrant issued by Rochester City Court on April9, 2004 is DENIED.

Dated: February 5, 2010
Rochester, New York

s/Thomas A. Stander
Supreme Court Justice

SUPREME COURT OF
THE STATE OF NEW YORK
APPELLATE DIVISION
FOURTH JUDICIAL DEPARTMENT

DOCKET NOS.: CA 11-00181 AND CA 11-00363

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

IN THE MATTER OF THE APPLICATION OF CITY OF ROCHESTER FOR AN "INSPECTION WARRANT" TO INSPECT 187 CLIFTON STREET, CITY OF ROCHESTER, COUNTY OF MONROE, STATE OF NEW YORK.

ORDER

(Entered: March 11, 2011)

FLORINE NELSON AND WALTER NELSON, APPELLANTS,

CITY OF ROCHESTER, RESPONDENT.

Appellants having moved to consolidate the appeals taken herein from the orders of the Supreme Court entered in the Office of the Clerk of

the County of Monroe on February 8, 2010, and February 18, 2011, to extend the time to perfect the appeal from the order entered February 8, 2010, and to have the same panel of this Court hear certain appeals,

Now, upon reading and filing the affirmation of Michael A. Burger, Esq. dated February 22, 2011, and the notice of motion with proof of service thereof, and due deliberation having been had thereon,

It is hereby ORDERED that the motion is granted and the appeals from the orders entered February 8, 2011, and February 18, 2011, are hereby consolidated for the purposes of perfecting and arguing the appeals, and

It is further ORDERED that the motion insofar as it seeks an extension of time to perfect the appeal from the order entered February 8, 2010, is granted to the extent that the ordering paragraph of the order of this Court entered February 2, 2011, is hereby amended by deleting the date March 14, 2011, and inserting in its place the date May 13, 2011, and

It is further ORDERED that the motion is otherwise dismissed as premature.

Entered: March 11, 2011

Patricia L. Morgan, Clerk

SUPREME COURT OF
THE STATE OF NEW YORK
APPELLATE DIVISION
FOURTH JUDICIAL DEPARTMENT

DOCKET NOS.: CA 11-00089 AND CA 11-00362

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

IN THE MATTER OF THE APPLICATION OF CITY OF ROCHESTER FOR AN "INSPECTION WARRANT" TO INSPECT 449 CEDARWOOD TERRACE, CITY OF ROCHESTER, COUNTY OF MONROE, STATE OF NEW YORK.

ORDER

(Entered: March 11, 2011)

JILL CERMAK AND BRUCE HENRY, APPELLANTS,

CITY OF ROCHESTER, RESPONDENT.

Appellants having moved to consolidate the appeals taken herein from the orders of the Supreme Court entered in the Office of the Clerk of the County of Monroe on February 8, 2010, and

February 18, 2011, to extend the time to perfect the appeal from the order entered February 8, 2010, and to have the same panel of this Court hear certain appeals,

Now, upon reading and filing the affirmation of Michael A. Burger, Esq. dated February 22, 2011, and the notice of motion with proof of service thereof, and due deliberation having been had thereon,

It is hereby ORDERED that the motion is granted and the appeals from the orders entered February 8, 2011, and February 18, 2011, are hereby consolidated for the purposes of perfecting and arguing the appeals, and

It is further ORDERED that the motion insofar as it seeks an extension of time to perfect the appeal from the order entered February 8, 2010, is granted to the extent that the ordering paragraph of the order of this Court entered February 2, 2011, is hereby amended by deleting the date March 14, 2011, and inserting in its place the date May 13, 2011, and

It is further ORDERED that the motion is otherwise dismissed as premature.

Entered: March 11, 2011

Patricia L. Morgan, Clerk

STATE OF NEW YORK SUPREME COURT | COUNTY OF MONROE CITY OF ROCHESTER

In the Matter of the Application of the CITY OF ROCHESTER for an Inspection Warrant to inspect 187 CLIFTON STREET, City of Rochester, County of Monroe, State of New York.	JUDICIAL WARRANT FOR INSPECTION Index No. 2009-11292 (Entered: February 18, 2011)

TO: LORENA CUTT, CODE ENFORCEMENT COORDINATOR, BUREAU OF INSPECTION AND COMPLIANCE SERVICES, DEPARTMENT OF NEIGHBORHOOD AND BUSINESS DEVELOPMENT, THE CITY OF ROCHESTER under the authority of § 10-9 and §3-8.1 of the Charter of the City of Rochester:

Proof, by affidavit, having been this day made before me by Carlos Carballada, the Commissioner of the Department of Neighborhood and Business Development of the City of Rochester, that access has been denied to members of the Bureau of Inspection and Compliance Services, formerly known as the Bureau of the Neighborhood Service Centers, to the premises hereinafter described, for the purpose of conducting an inspection to ascertain compliance with the Property Conservation Code, the Building Code, the

Plumbing Code, the Electrical Code, and other state or local laws, ordinances or regulations enforced, in part, by the Department of Neighborhood and Business Development of the City of Rochester, and that such access is necessary to carry out the mandate of the Code of the City of Rochester; and the matter having come on to be heard at a Hearing before this Court on May 6, 2010 and Igor Shukoff, Esq. Municipal Attorney for the City of Rochester, Petitioner, in support of said application, and Michael Burger, Esq., appearing in opposition on behalf of, Walter & Florine Nelson, the tenants at said location, and upon the testimony of Gary Kirkmire after due deliberation;

YOU ARE THEREFORE DIRECTED AND AUTHORIZED to accompany inspectors of the Bureau of Inspection and Compliance Services of the City of Rochester to make a search of the interior and exterior of the single family dwelling commonly known as 187 Clifton Street, a two story dwelling that has brown and tan siding with white trim, located on the south side of the street, City of Rochester, County of Monroe, State of New York, for civil enforcement purposes only, between the hours of 7:00 a.m. and 8:00 p.m., in order to ascertain whether there exist violations of the Property Conservation Code, Building Code, Plumbing Code, Fire Prevention Code, Zoning Code, Health Ordinance, New York State Uniform Fire Prevention and Building Code, or any other federal, state, county or city law, ordinance, rule or regulation relating to the construction, alteration,

maintenance, repair, operation, use, condition or occupancy of a premises located within the City, which law, ordinance, rule or regulation is enforced by the Commissioner of Neighborhood and Business Development or his designee, within forty-five (45) days of the date of this warrant; and

YOU ARE THEREFORE FURTHER DIRECTED AND AUTHORIZED to enter the entire premises both interior and exterior of this single family dwelling to conduct the mandated inspection, which entry need not occur at the same date and time for all areas, but which entries must occur before the expiration of the warrant; and

YOU ARE THEREFORE FURTHER DIRECTED AND AUTHORIZED to deliver a copy of the warrant to the occupant(s) at the time of inspection. The inspection warrant may be additionally delivered by means of first class confirmation mail; and

YOU ARE THEREFORE FURTHER DIRECTED AND AUTHORIZED to record violations of the codes referenced above, if any, through personal observations, written notes, photographs, and/or videotape, and recording or nondestructive testing of property or physical conditions found therein as the situation justifies.

THE OWNER(S) AND OCCUPANT(S) ARE HEREBY ORDERED TO provide Lorena Cutt with a reasonable date and time to conduct the

inspection that is a weekday and falls between the hours of 7:00 a.m. and 8:00 p.m. and which date and time must fall within seven (7) days of receipt of the warrant if you were served with a copy of the warrant by first class confirmation mail; and

OWNER(S) AND OCCUPANT(S) YOU ARE HEREBY WARNED: *IT IS UNLAWFUL TO WILLFULLY DENY OR UNDULY DELAY ENTRY OR ACCESS TO ANY PREMISES TO A DESIGNATED CITY OFFICER OR EMPLOYEE WITH AN INSPECTION WARRANT AUTHORIZING INSPECTION OF SAID PREMISES, TO WILLFULLY DENY OR UNDULY DELAY OR INTERFERE WITH THE INSPECTION AUTHORIZED BY THE WARRANT, OR TO WILLFULL YFAIL TO TIMELY SET A REASONABLE DATE AND TIME FOR AN INSPECTION AS REQUIRED BY THIS COURT, AND SUCH ACTIONS MAY RESULT IN PUNISHMENT FOR CONTEMPT OF COURT PURSUANT TO ARTICLE 19 OF THE JUDICIARY LAW, WHICH PUNISHMENT MAY CONSIST OF A FINE OR IMPRISONMENT OR BOTH.*

Date of Issue: May 21, 2010
Rochester, New York

Warrant Valid Until: July 3, 2010

s/Thomas A. Stander
Supreme Court Justice

STATE OF NEW YORK SUPREME COURT | COUNTY OF MONROE CITY OF ROCHESTER

In the Matter of the Application of the CITY OF ROCHESTER for an Inspection Warrant to inspect 449-451 CEDARWOOD TERRACE, City of Rochester, County of Monroe, State of New York.	JUDICIAL WARRANT FOR INSPECTION Index No. 2009-10938 (Entered: February 18, 2011)

TO: LORENA CUTT, CODE ENFORCEMENT COORDINATOR, BUREAU OF INSPECTION AND COMPLIANCE SERVICES, DEPARTMENT OF NEIGHBORHOOD AND BUSINESS DEVELOPMENT, THE CITY OF ROCHESTER under the authority of § 10-9 and §3-8.1 of the Charter of the City of Rochester:

Proof, by affidavit, with supporting papers, having been made before me by Carlos Carballada, the Commissioner of the Department of Neighborhood and Business Development of the City of Rochester, that access has been partially denied to members of the Bureau of Inspection and Compliance Services, formerly known as the Bureau of the Neighborhood Service Centers, to the premises hereinafter described, for the purpose of conducting an

Inspection to ascertain compliance with the Property Conservation Code, the Building Code, the Plumbing Code, the Electrical Code, and other state or local laws, ordinances or regulations enforced, in part, by the Department of Neighborhood and Business Development of the City of Rochester, and that such access is necessary to carry out the mandate of the Code of the City of Rochester; and the matter having come on to be heard at a Hearing before this Court on May 3, 2010 and Igor Shukoff, Esq, Municipal Attorney for the City of Rochester, Petitioner, in support of said application, and Michael Burger, Esq., appearing in opposition on behalf of Bruce Henry, owner of said property, and Jill Cermak, a tenant and upon the testimony of Gary Kirkmire;

YOU ARE THEREFORE DIRECTED AND AUTHORIZED to accompany inspectors of the Bureau of Inspection and Compliance Services of the City of Rochester to make a search of the exterior of the subject property and the interior of the second floor unit, hallways, cellar, and third floor/attic of the two-family dwelling commonly known as 449-451 Cedarwood Terrace, a two and a half (2 ½) story dwelling painted white and blue located on the south side of the street, City of Rochester, County of Monroe, State of New York, for civil enforcement purposes only, between the hours of 7:00 a.m. and 8:00 p.m., in order to ascertain whether there exist violations of the Property Conservation Code, Building Code, Plumbing Code, Fire Prevention Code, Zoning

Code, Health Ordinance, New York State Uniform Fire Prevention and Building Code, or any other federal, state, county or city law, ordinance, rule or regulation relating to the construction, alteration, maintenance, repair, operation, use, condition or occupancy of a premises located within the City, which law, ordinance, rule or regulation is enforced by the Commissioner of Neighborhood and Business Development or his designee, within forty-five (45) days of the date of this warrant; and

YOU ARE THEREFORE FURTHER DIRECTED AND AUTHORIZED to enter the second floor unit, the common hallways, cellar, third floor/attic and the front, back, and side yards of this two-family dwelling to conduct the mandated inspection, which entry need not occur at the same date and time for all areas and units, but which entries must occur before the expiration of the warrant; and

YOU ARE THEREFORE FURTHER DIRECTED AND AUTHORIZED to deliver a copy of the warrant to the occupant(s) at the time of inspection. The inspection warrant may be additionally delivered by means of first class confirmation mail; and

YOU ARE THEREFORE FURTHER DIRECTED AND AUTHORIZED to record violations of the codes referenced above, if any, through personal observations, written notes, photographs, and/or videotape, and recording or nondestructive testing

of property or physical conditions found therein as the situation justifies.

THE OWNER(S) AND OCCUPANT(S) ARE HEREBY ORDERED TO provide Lorena Cutt with a reasonable date and time to conduct the inspection that is a weekday and falls between the hours of 7:00 a.m. and 8:00 p.m. and which date and time must fall within seven (7) days of receipt of the warrant if you were served with a copy of the warrant by first class confirmation mail; and

OWNER(S) AND OCCUPANT(S) YOU ARE HEREBY WARNED: *IT IS UNLAWFUL TO WILLFULLY DENY OR UNDULY DELAY ENTRY OR ACCESS TO ANY PREMISES TO A DESIGNATED CITY OFFICER OR EMPLOYEE WITH AN INSPECTION WARRANT AUTHORIZING INSPECTION OF SAID PREMISES, TO WILLFULLY DENY OR UNDULY DELAY OR INTERFERE WITH THE INSPECTION AUTHORIZED BY THE WARRANT, OR TO WILLFULL YFAIL TO TIMELY SET A REASONABLE DATE AND TIME FOR AN INSPECTION AS REQUIRED BY THIS COURT, AND SUCH ACTIONS MAY RESULT IN PUNISHMENT FOR CONTEMPT OF COURT PURSUANT TO ARTICLE 19 OF THE JUDICIARY LAW, WHICH PUNISHMENT MAY CONSIST OF A FINE OR IMPRISONMENT OR BOTH.*

Date of Issue: May 21, 2010
Rochester, New York

Warrant Valid Until: July 3, 2010

s/Thomas A. Stander
Supreme Court Justice

SUPREME COURT OF
THE STATE OF NEW YORK
APPELLATE DIVISION
FOURTH JUDICIAL DEPARTMENT

DOCKET NOS.: CA 11-00181 AND CA 11-00363
MOTION NOS.: 1099/1100/11

PRESENT: SMITH, P.J., CARNI, LINDLEY, SCONIERS, AND MAROCHE, JJ.

IN THE MATTER OF THE APPLICATION OF CITY OF ROCHESTER FOR AN "INSPECTION WARRANT" TO INSPECT 187 CLIFTON STREET, CITY OF ROCHESTER, COUNTY OF MONROE, STATE OF NEW YORK.

ORDER

(Entered: March 16, 2012)

FLORINE NELSON AND WALTER NELSON, APPELLANTS,

v.

CITY OF ROCHESTER, RESPONDENT.

Appellants having moved for reargument of or, in the alternative, leave to appeal to the Court of Appeals from orders of this Court entered December 23, 2011,

Now, upon reading and filing the affirmations of Michael A. Burger, Esq., dated January 25, 2012, and February 6, 2012, the notice of motion with proof of service thereof, and the affidavit of Adam M. Clark, Esq., sworn to February 3, 2012, and due deliberation having been had thereon,

It is hereby ORDERED that the motion is denied.

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF
THE STATE OF NEW YORK
APPELLATE DIVISION
FOURTH JUDICIAL DEPARTMENT

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

DOCKET NO.: CA 11-00089
MOTION NO.: 1093/11

IN THE MATTER OF THE APPLICATION OF CITY OF ROCHESTER FOR AN "INSPECTION WARRANT" TO INSPECT 449 CEDARWOOD TERRACE, CITY OF ROCHESTER, COUNTY OF MONROE, STATE OF NEW YORK.

ORDER

(Entered: March 16, 2012)

JILL CERMAK AND BRUCE HENRY, APPELLANTS,

v.

CITY OF ROCHESTER, RESPONDENT.
(APPEAL NO. 1)

DOCKET NO.: CA 11-00362
MOTION NO.: 1094/11

IN THE MATTER OF THE APPLICATION OF CITY OF ROCHESTER FOR AN "INSPECTION WARRANT" TO INSPECT 449 CEDARWOOD TERRACE, CITY OF ROCHESTER, COUNTY OF MONROE, STATE OF NEW YORK.

JILL CERMAK AND BRUCE HENRY, APPELLANTS,

v.

CITY OF ROCHESTER, RESPONDENT.
(APPEAL NO. 1)

Appellants having moved for reargument of or, in the alternative, leave to appeal to the Court of Appeals from orders of this Court entered December 23, 2011,

Now, upon reading and filing the affirmations of Michael A. Burger, Esq., dated

January 25, 2012, and February 6, 2012, the notice of motion with proof of service thereof, and the affidavit of Adam M. Clark, Esq., sworn to February 3, 2012, and due deliberation having bee had thereon,

It is hereby ORDERED that the motion is denied.

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court

STATE OF NEW YORK
COURT OF APPEALS

PRESENT: HON. JONATHAN LIPPMAN, Chief Judge, presiding.

Mo. No. 2012-494

IN THE MATTER OF THE APPLICATION OF CITY OF ROCHESTER & C.

FLORINE NELSON et al., APPELLANTS,

v.

CITY OF ROCHESTER, RESPONDENT.

ORDER

(Entered: June 27, 2012)

Appellants having appealed and moved for leave to appeal to the Court of Appeals in the above cause;

Upon the papers filed and due deliberation, it is

ORDERED, on the Court's own motion, that the appeal is dismissed, without costs, upon the

ground that no substantial constitutional question is directly involved; and it is further

ORDERED, that the motion for leave to appeal is denied.

s/Andrew W. Klein
Clerk of the Court

STATE OF NEW YORK
COURT OF APPEALS

PRESENT: HON. JONATHAN LIPPMAN, Chief Judge, presiding.

Mo. No. 2012-492

IN THE MATTER OF THE APPLICATION OF CITY OF ROCHESTER & C.

JILL CERMAK et al., APPELLANTS,

v.

CITY OF ROCHESTER, RESPONDENT.

ORDER

(Entered: June 27, 2012)

Appellants having appealed and moved for leave to appeal to the Court of Appeals in the above cause;

Upon the papers filed and due deliberation, it is

ORDERED, on the Court's own motion, that the appeal is dismissed, without costs, upon the

ground that no substantial constitutional question is directly involved; and it is further

ORDERED, that the motion for leave to appeal is denied.

s/Andrew W. Klein
Clerk of the Court

CHARTER OF THE CITY OF ROCHESTER

ARTICLE I
Corporate Provisions; Inspection Warrants

PART B
Judicial Warrants for Inspections of Premises

§ 1-9. Purpose and authority.

In order to promote the health and safety of its residents and visitors, the City enforces numerous laws relating to the construction, alteration, maintenance, repair, operation, use, condition or occupancy of a premises. These laws include laws such as the New York State Uniform Fire Prevention and Building Code, which the City is required to enforce on behalf of the state. In many instances, enforcement is possible only through inspections conducted in or on the premises itself. Most owners and occupants of a premises consent to necessary inspections and, when violations are found, promptly make corrections necessary to bring the premises into compliance with applicable codes. However, the City has recently encountered increasing numbers of owners and/or occupants who do not allow, fail to schedule, or unduly delay inspections. The City has particularly found this to be the case in the enforcement of provisions significantly affecting the health or safety of City tenants, such as the Lead-Based Paint Poisoning Prevention Code, found in Article III of Chapter 90, the Property

Conservation Code. The City cannot allow the enforcement of these important health and safety codes to rest upon the desires of the owner or occupant of the premises. The enforcement of these provisions is especially important to a large number of residents of the City, such as children, the disabled and the elderly, who may be unable to recognize the dangers in their premises or to take the necessary steps to protect themselves. The United States Supreme Court and the New York State Court of Appeals have recognized the right of persons to require a warrant for inspections of premises in certain circumstances and have established standards for the issuance of such warrants. While New York Courts have issued warrants for the inspection of premises on the basis of the Supreme Court and New York Court of Appeals decisions and have applied in part the procedures for search warrants established in the Criminal Procedure Law, New York State statutes do not establish specific procedures or requirements for the issuance of warrants for inspections of premises. In the absence of state statutes, the City wishes to establish guidelines which meet constitutional requirements for the issuance by the courts of judicial warrants for the inspection of premises within the City. Such guidelines are particularly appropriate in the City due to absentee ownership of a significant number of premises, the age of City housing, and the difficulty in obtaining consent for necessary inspections. The guidelines will provide a process for issuing such warrants and will apprise

landlords, tenants and all persons of the procedures and requirements to be followed by the City in obtaining and executing inspection warrants. These provisions will promote the health, safety and welfare of the City and all of its residents and visitors. Authority for the adoption of such guidelines is found in, but not limited to, the home rule and police powers found in Article IX, Section 2, of the New York State Constitution, § 10 of the Municipal Home Rule Law and § 20 of the General City Law and are necessary for the proper administration and enforcement by the City of the Uniform Fire Prevention and Building Code as required in 19 NYCRR Part 1203, promulgated pursuant to § 381 of the Executive Law. **[§ 1, L.L. No. 3-2009]**

§ 1-10. Definitions.

As used in this part, the following terms shall have the meanings indicated:

DESIGNATED CITY OFFICER OR EMPLOYEE — An officer or employee of the City of Rochester who occupies a position in which he or she is authorized by New York State law or the City Charter of the City of Rochester to enforce the property codes in the City.

INSPECTION WARRANT or JUDICIAL WARRANT FOR INSPECTION OF PREMISES — A written order signed by a judge of the Rochester City Court, Monroe County Court or New York

State Supreme Court directing a designated City officer or employee to conduct an inspection of a premises for civil enforcement purposes only in conjunction with the administration and enforcement of the property codes, which inspection may include the photographing, recording or nondestructive testing of property or physical conditions found thereon or therein.

PREMISES — A lot, plot or parcel of land, together with the buildings and structures thereon.

PROPERTY CODE — The Property Conservation Code, Building Code, Plumbing Code, Fire Prevention Code, Zoning Code, Health Ordinance, New York State Uniform Fire Prevention and Building Code, or any other federal, state, county or City law, ordinance, rule or regulation relating to the construction, alteration, maintenance, repair, operation, use, condition or occupancy of a premises located within the City, which law, ordinance, rule or regulation is enforced by the City. **[§ 1, L.L. No. 3-2009]**

§ 1-11. Inspections for code compliance.

No local law or ordinance of the City shall be construed to require a person to consent to an inspection of a premises in order to determine compliance with applicable code provisions. However, this provision shall not be construed to remove the obligation of a person to apply for and secure a required license, permit, certificate or

other City approval relating to the construction, alteration, maintenance, repair, operation, use, condition or occupancy of a premises. When applying for a license, permit, certificate or other City approval which calls for an inspection, a person shall have the right to decline to consent to the inspection, and the issuing authority may, without further notice to the applicant, apply for an inspection warrant to conduct the required inspection. However, if the premises is occupied, notice to the occupant or other person with apparent right of possession in accordance with § 1-14 shall be required. **[§ 1, L.L. No. 4-2002; § 1, L.L. No. 3-2009]**

§ 1-12. Right of entry.

In the performance of official duties, subject to the further requirements established in this part and the obtaining of a warrant when the same is constitutionally required, designated City officers or employees may enter premises to enforce the property codes. **[§ 1, L.L. No. 3-2009]**

§ 1-13. Entry without notice or inspection warrant.

This part shall not be construed to require either an inspection warrant or prior notice to enter or inspect a premises under circumstances in which a warrant is not constitutionally required. **[§ 1, L.L. No. 3-2009]**

§ 1-14. Notice of intent to conduct inspection.

Before an application may be made for an initial inspection warrant, the designated City officer or employee must give prior notice of his or her intent to conduct an inspection to the occupant or other person with apparent right of possession or, in the case of an unoccupied premises, to the owner, the owner's agent or other person in apparent control of the premises. No notice is required to an applicant who has declined to consent to an inspection when applying for a license, permit, certificate or other City approval which calls for an inspection. No further notice is required before additional inspection warrants are sought to inspect a premises, including warrants to reinspect a premises to determine if cited violations have been corrected, or additional warrants necessitated by the expiration of a warrant before an inspection could be completed, in the same case or any cases relating to the same premises and arising concurrently. **[§ 1, L.L. No. 3-2009]**

§ 1-15. Contents of notice.

The notice of intent to conduct an inspection shall:

A. State the date and time at which the designated City officer or employee will be present to conduct an inspection;
B. Inform the person notified that he or she may reschedule the inspection to a reasonable date and time by contacting the designated City officer or employee before the stated date;

C. Advise that if the inspection is not allowed to be conducted, the designated City officer or employee may make an application to Rochester City Court, Monroe County Court or New York State Supreme Court for an inspection warrant; and
D. Advise that a tenant may be protected against retaliation by a landlord for making a good faith complaint of code violations pursuant to § 223-b of the New York State Real Property Law. **[§ 1, L.L. No. 3-2009]**

§ 1-16. Service of notice when premises is occupied.

If the premises is occupied, the notice of intent to conduct an inspection must be either sent by first-class mail or personally delivered to the occupant or person with apparent right of possession. The notice shall be addressed to the occupants of record if their names are provided to the City by the owner in writing, otherwise notice shall be sufficient if addressed to the "occupant" of the particular unit. **[§ 1, L.L. No. 3-2009]**

§ 1-17. Service of notice when premises is unoccupied.

If the premises is unoccupied, the notice of intent to conduct an inspection must be mailed by first-class mail to the owner's tax mailing address for the premises or be personally served upon the owner. **[§ 1, L.L. No. 3-2009]**

§ 1-18. Inspection warrant application with prior notice.

A department head or a designated City officer or employee authorized by the department head may make an application to Rochester City Court, Monroe County Court or New York State Supreme Court for an inspection warrant to conduct an inspection after notice of intent to conduct an inspection has been given, if the person notified does not allow, fails to schedule, or unduly delays the inspection. **[§ 1, L.L. No. 3-2009]**

§ 1-19. Inspection warrant application without prior notice.

A department head or a designated City officer or employee authorized by the department head may apply for an initial inspection warrant without giving the prior notice of intent to conduct an inspection as required by §§ 1-14 and 1-20 if there is credible evidence to believe that a violation of a property code exists which immediately and significantly endangers the health or safety of any person. **[§ 1, L.L. No. 3-2009]**

§ 1-20. Authority to seek inspection warrant.

A department head or a designated City officer or employee authorized by the department head may make an application in accordance with this part to Rochester City Court, Monroe County Court or New York State Supreme Court for an

inspection warrant to conduct an inspection or to take any other authorized action to administer and enforce the property codes. The Corporation Counsel shall send written notice of at least five days to the owner and occupant, if any, of a premises before an application is made for an inspection warrant. **[§ 1, L.L. No. 3-2009]**

§ 1-21. Factors to be considered when applying for an inspection warrant.

A department head shall consider whether one or more of the following guidelines have been met in determining whether to authorize an application for issuance of an inspection warrant:

A. There is credible evidence to believe that the construction, alteration, maintenance, repair, operation, use, condition or occupancy of the subject premises is in violation of any applicable property code; or

B. Reasonable legislative or administrative standards for conducting an inspection in conjunction with the administration and enforcement of the property codes are satisfied with respect to the subject premises, and the occupants and/or the owner have not allowed, have failed to schedule, or have unduly delayed the inspection of the premises; or

C. An application for a certificate of occupancy, business permit, permit, license or other similar instrument which authorizes the construction, alteration, maintenance, repair, operation, use, condition or occupancy of the premises has been

submitted, and the occupants and/or the owner have not allowed, have failed to schedule, or have unduly delayed the inspection of the premises; or

D. A reinspection of the premises is necessary to determine whether previously cited violations of the property codes have been corrected, and the occupants and/or the owner have not allowed, have failed to schedule, or have unduly delayed the inspection of the premises. **[§ 1, L.L. No. 3-2009]**

§ 1-22. Applications for inspection warrants.

The application for an inspection warrant must:

A. Be in writing, stating the name of the court to which it is addressed;
B. State the name, department, title and code enforcement authority of the department head or the designated City officer or employee authorized by the department head who is the applicant;
C. State the date of the making of the application;
D. Describe the limited nature and purpose of the inspection and the manner in which the inspection is to be conducted in order to assure that any observations, findings and evidence obtained through execution of the inspection warrant shall be restricted to use in civil enforcement proceedings only;
E. Identify the premises to be entered and inspected in sufficient detail and particularity

so that the designated City officer or employee executing the inspection warrant may readily ascertain the premises;

F. In cases where prior notice of intent to conduct an inspection is required, provide specific information showing how and when notice has been given, which most recent notice shall have been given within 90 days of the application for the inspection warrant, and how the inspection has not been allowed, has not been scheduled, or has been unduly delayed by the person notified;

G. State facts based upon personal knowledge of the applicant or upon information and belief, provided that in the latter event the sources of such information and the grounds of such belief are stated, sufficient to demonstrate probable cause for the issuance of an inspection warrant;

H. Where there are specific safety concerns directly related to the premises to be inspected, its owners or occupants, detail such safety concerns in order to request that a police officer provide protection to the designated City officer or employee during the execution of the inspection warrant;

I. Be subscribed and sworn to by the applicant; and

J. Request that the court issue an inspection warrant directing an inspection of the subject premises for civil enforcement purposes only, which inspection may include the photographing, recording or nondestructive testing of property or physical conditions found thereon or therein, subject to such limitations

and restrictions as may be provided by the court. **[§ 1, L.L. No. 3-2009]**

§ 1-23. Issuance of an inspection warrant.

A. Determination of application.

(1) In determining an application for an inspection warrant, the court may examine, under oath, any person who it believes may possess pertinent information. Any such examination may be recorded or summarized on the record by the court.

(2) If the court is satisfied that there is probable cause to issue an inspection warrant, it may grant the application and issue an inspection warrant directing an inspection of the premises described in the application, subject to such limitations and restrictions as may be provided by the court. For inspections of dwellings as defined in § 120-208 of the Zoning Code, mere refusal by the owner and/or occupant to consent to an inspection shall not constitute the sole basis for the issuance of an inspection warrant, nor shall the condition of the area in which the dwelling is located constitute the sole basis for the issuance of an inspection warrant; provided, however, that this provision shall not prevent the issuance of an inspection warrant in circumstances where there are additional factor(s) to support the issuance, including but not limited to cases where the owner and/or occupant has

declined to consent to a required inspection when applying for a license, permit, certificate or other City approval.

(3) The inspection warrant may be requested in the form of an original and two copies.

B. The City shall prepare and attach to its application to the court a proposed inspection warrant for its consideration which may:

(1) Be in writing, stating the name of the issuing court and containing a signature line for the subscription of the issuing judge;

(2) State the name, department, title and code enforcement authority of the designated City officer or employee authorized to conduct the requested inspection and to whom it is addressed;

(3) Contain a place for the court to indicate the time and date the warrant was issued and the duration of the warrant;

(4) State the limited nature and purpose of the inspection and the manner in which the inspection is to be conducted in order to assure that any observations, findings and evidence obtained through execution of the inspection warrant shall be restricted to use in civil enforcement proceedings only;

(5) Identify the premises to be entered and inspected in sufficient detail and particularity so that the designated City officer or employee executing the warrant may readily ascertain the premises to be inspected;

(6) Where specific safety concerns directly related to the premises to be inspected, its owners or occupants are identified, provide that a police officer may provide protection to the designated City officer or employee during the execution of the inspection warrant;

(7) For warrants for inspections of premises containing multiple dwelling units, contain a provision which authorizes a single entry into each unit, which entry need not occur at the same date and time for all units, but which entries must occur before the expiration of the warrant;

(8) Direct an inspection of the subject premises for civil enforcement purposes only, which inspection may include the photographing, recording or nondestructive testing of property or physical conditions found thereon or therein;

(9) Direct that the inspection warrant be executed between the hours of 7:00 a.m. and 8:00 p.m., or when the court has specially so determined based upon the use of the premises at other hours or other special circumstances of the premises, direct execution thereof at other times of the day or night, without the use of force;

(10) Direct that the inspection warrant authorizing entry to the premises shall be delivered to the occupant at the time of the inspection. The court may additionally authorize service of the inspection warrant

by means of confirmation mail, in which case the inspection warrant shall require the owner and/or occupants to provide the designated City officer or employee with a reasonable date and time to conduct the inspection, which date and time must be within seven days of receipt of the warrant; and

(11) Contain a notice to the owner and occupants that it is unlawful to willfully deny or unduly delay entry or access to any premises to a designated City officer or employee with an inspection warrant authorizing inspection of said premises, to willfully deny or unduly delay or interfere with the inspection authorized by the warrant, or to willfully fail to timely set a reasonable date and time for an inspection as required by the court, and that such actions may result in punishment for contempt of court pursuant to Article 19 of the Judiciary Law, which punishment may consist of a fine or imprisonment, or both. **[§ 1, L.L. No. 3-2009]**

§ 1-24. Execution of an inspection warrant.

A. Except as provided in Subsection B of this section, in executing an inspection warrant, the designated City officer or employee authorized by the court to execute the warrant shall, before entry, make a reasonable effort to present his or her credentials, authority and purpose to an

occupant or person in possession of the premises designated in the warrant and to deliver a copy of the warrant to the occupant or person in possession of the premises.

B. In executing an inspection warrant, the designated City officer or employee authorized to execute the warrant may promptly enter the designated premises if it is or is reasonably believed to be vacant and unsecured. Such designated City officer or employee need not provide notice of his or her authority and purpose as prescribed in Subsection A of this section.

C. When authorized in the inspection warrant, a police officer may provide protection to the designated City officer or employee during the execution of the inspection warrant. Absent such authorization, a police officer shall not accompany the designated City officer or employee during the inspection of the interior portions of a building not open to the public.

D. An inspection warrant issued shall be executed within:
   (1) The time specified in the warrant, not to exceed 45 days; or
   (2) If no time is specified therein, within 45 days from its date of issuance. **[§ 1, L.L. No. 3-2009]**

§ 1-25. Unlawful actions.

It shall be unlawful for any person to willfully deny or unduly delay entry or access to

any premises to a designated City officer or employee with an inspection warrant authorizing inspection of said premises, to willfully deny or unduly delay or interfere with the inspection authorized by the warrant, or after receiving a copy of an inspection warrant requiring the scheduling of an inspection, to willfully fail to schedule a reasonable date and time for the inspection as set forth in the inspection warrant. Any person who violates this section shall be subject to an application to be found in contempt of court pursuant to Article 19 of the Judiciary Law, and punishment as provided for therein may include a fine or imprisonment, or both. **[§ 1, L.L. No. 3-2009]**

CHARTER OF THE CITY OF ROCHESTER

ARTICLE III
Mayor

Abatement of Nuisances

§ 3-15. Abatement of nuisances.

A. Declaration of legislative findings. The Council finds that public nuisances exist in the City of Rochester in the operation of certain establishments and the use of property in flagrant violation of certain Penal Law and Municipal Code provisions, which nuisances substantially and seriously interfere with the interest of the public in the quality of life and total community environment, commerce in the City, property values and the public health, safety and welfare. The Council further finds that the continued occurrence of such activities and violations is detrimental to the health, safety and welfare of the people of the City of Rochester and of the businesses thereof and the visitors thereto. It is the purpose of the Council to authorize and empower the Mayor to impose sanctions and penalties for such public nuisances, and such powers of the Mayor may be exercised either in conjunction with, or apart from, the powers contained in other laws without prejudice to the use of procedures and remedies available under

such other laws. The Council further finds that the sanctions and penalties imposed by the Mayor pursuant to this law constitute an additional and appropriate method of law enforcement in response to the proliferation of the above-described public nuisances. The sanctions and penalties are reasonable and necessary in order to protect the health and safety of the people of the City and to promote the general welfare.

B. Public nuisances defined. For purposes of this section, a public nuisance shall be deemed to exist whenever through violations of any of the following provisions resulting from separate incidents at a building, erection or place, or immediately adjacent to the building, erection or place as a result of the operation of the business, 12 or more points are accumulated within a period of six months, or 18 or more points within a period of 12 months, in accordance with the following point system. Where more than one violation occurs during a single incident, the total points for the incident shall be the highest point value assigned to any single violation.

(1) The following violations shall be assigned a point value of six points:

(a) Article 220 of the Penal Law – Controlled Substances Offenses.

(b) Article 221 of the Penal Law – Offenses Involving Marihuana.

(c) Article 225 of the Penal Law – Gambling Offenses.
(d) Article 230 of the Penal Law – Prostitution Offenses.
(e) Sections 165.15(4), (6), (7), and (8), 165.40, 165.45, 165.50, 165.52, 165.54, 165.71, 165.72, and 165.73 of the Penal Law – Criminal Possession of Stolen Property.
(f) The Alcoholic Beverage Control Law.
(g) Article 265 of the Penal Law – Firearms and other Dangerous Weapons.
(h) Sections 260.20 and 260.21 of the Penal Law – Unlawfully Dealing with a Child.
(i) Article 263 of the Penal Law – Sexual Performance by a Child.
(j) Section 415-a of the Vehicle and Traffic Law – Vehicle Dismantlers.
(k) Section 175.10 of the Penal Law – Falsifying Business Records.
(l) Sections 170.65 and 170.70 of the Penal Law – Forgery of and Illegal Possession of a Vehicle Identification Number.
(m) Possession, use, sale or offer for sale of any alcoholic beverage in violation of Article 18 of the Tax Law, or of any cigarette or tobacco products in violation or Article 20 of the Tax Law.
(n) Article 158 of the Penal Law – Welfare Fraud.
(o) Article 178 of the Penal Law – Criminal Diversion of Prescription Medications and Prescriptions.

(p) Section 147 of the Social Services Law – Food stamp program fraud.
(q) Section 3383 of the Public Health Law – Imitation controlled substances.
(r) The Agriculture and Markets Law.
(s) Operating a premises without the requisite business permit in violation of § 90-33 of the Code of the City of Rochester.
(t) Sections 240.36 and 37 of the Penal Law – Loitering in the First Degree and Loitering for the Purpose of Engaging in a Prostitution Offense.
(u) Section 2024 of Title 7 of the United States Code.
(v) Section 1324a of Title 9 of the United States Code.
(w) Suffering or permitting the premises to become disorderly, including suffering or permitting fighting or lewdness.
(x) Chapter 75 of the Municipal Code – Noise.

(2) The following violations shall be assigned a point value of four points:
(a) Chapter 20 of the Code of the City of Rochester – Refuse Collection.
(b) Chapter 29 of the Code of the City of Rochester – Amusements.
(c) Chapter 47 of the Code of the City of Rochester – Dangerous Articles.
(d) Chapter 54 of the Code of the City of Rochester – Fire Prevention Code.
(e) Chapter 90 of the Code of the City of Rochester – Property Code.

(f) Any commercial violations of Chapter 120 of the Code of the City of Rochester – Zoning.

(g) Allowing persons on the premises in excess of occupancy limits.

(h) Chapter 569, Article 8 (Service Food Establishments) and Article 9 (Food and Food Establishments) of the Laws of the County of Monroe – Sanitary Code.

(3) The following violations shall be assigned a point value of three points:

(a) Chapter 69 of the Municipal Code – Littering.

(b) Sections 31-5, 11 and 19 of the Municipal Code – Howling dogs, Number of Dogs, and Nuisances.

(c) Operating a business at the premises in a manner which causes it to be a source of disruption for the neighborhood and/or a focal point of police attention.

(4) For purposes of this section, a conviction for an offense in a court of competent jurisdiction or an administrative bureau shall not be required. Instead, the City shall prove by a preponderance of the evidence that the violations have occurred. However, a conviction as defined and applied in accordance with the provisions of Section 1.20 of the Criminal Procedure Law, in any court of competent jurisdiction, or a conviction or plea of guilty in the Municipal Code Violations Bureau, shall constitute conclusive proof of a violation. Conviction of

an attempt to commit a violation of any of the specified provisions shall be considered a conviction for a violation of the specified provision.

C. Powers of the Mayor with respect to public nuisances.

(1) In addition to the enforcement procedures established elsewhere, the Mayor or the Mayor's designee, after notice and opportunity for a hearing with respect to a public nuisance, shall be authorized:

(a) To order the closing of the building, erection or place to the extent necessary to abate the nuisance; or

(b) To suspend for a period not to exceed six months or revoke for a period of one year a business permit issued for such premises, and to prevent the operator from obtaining a new business permit for another location for the period of suspension or revocation; or

(c) To suspend for a period not to exceed six months or revoke for a period of one year any occupational license or permit issued by the City related to the conduct of a business or trade at the premises, which suspension or revocation shall also apply to any other locations operated by the holder for which the license or permit is required; or

(d) To suspend for a period not to exceed six months or revoke for a period of one year

eligibility to secure grants or loans from the City of Rochester; or

(e) Any combination of the above.

(2) Service of notice.

A. Prior to the issuance of orders by the Mayor or the Mayor's designee pursuant to this section, the Mayor or the Mayor's designee shall give notice and opportunity for a hearing to the owner, lessor, lessee and mortgagee of a building, erection or place wherein the public nuisance is being conducted, maintained or permitted. Such notice shall be served upon an owner pursuant to Article 3 of the Civil Practice Law and Rules, upon a lessor or lessee pursuant to § 735 of the Real Property Actions and Proceedings Law, and upon a mortgagee by means of first-class mail with delivery confirmation sent to the mortgagee's last known address, provided that any service other than delivery to the person to be served shall be complete immediately upon delivery, mailing or posting without the necessity of filing proof of service with the clerk of any court before the hearing. The person in whose name the real estate affected by the orders of the Mayor or the Mayor's designee is recorded in the office of the County Clerk shall be presumed to be the owner thereof. Proceedings shall be commenced by service of the notice and opportunity for a hearing within 90 days

after the occurrence of the most recent violation cited in the notice.

B. The lack of knowledge of, acquiescence or participation in or responsibility for a public nuisance on the part of the owners, lessors, lessees, mortgagees and all those persons in possession or having charge of as agent or otherwise, or having any interest in the property, real or personal used in conducting or maintaining the public nuisance, shall not be a defense by such owners, lessors and lessees, mortgagees and such other persons.

C. Every Certificate of Occupancy, Certificate of Zoning Compliance and real property tax bill issued by any City Department shall state the number of nuisance points, if any, assessed against the premises as of the date of the record being issued.

(3) Orders of the Mayor or the Mayor's designee issued pursuant to this section shall be posted at the building, erection or place where a public nuisance exists or is occurring in violation of law and shall be mailed to the owner of record thereof within one business day of the posting.

(4) Five business days after the posting of an order issued pursuant to this section and upon the written directive of the Mayor or the Mayor's designee, officers of the Rochester Police Department are authorized to act upon and enforce such orders.

(5) Where the Mayor or the Mayor's designee closes a building, erection or place pursuant to this section, such closing shall be for such period as the Mayor or the Mayor's designee may direct, but in no event shall the closing be for a period of more than one year from the posting of the order pursuant to this section. If the owner, lessor or lessee shall file a bond in an amount determined by the Mayor or the Mayor's designee but which may not exceed the value of the property ordered to be closed and submit proof satisfactory to the Mayor or the Mayor's designee that the nuisance has been abated and will not be created, maintained or permitted for such period of time as the building, erection or place has been directed to be closed by the order of the Mayor or the Mayor's designee, then the Mayor or the Mayor's designee may vacate the provisions of the order that direct the closing of the building, erection or place.

(6) A closing directed by the Mayor or the Mayor's designee pursuant to this section shall not constitute an act of possession, ownership or control by the City of the closed premises, nor will it constitute a closure caused by a government for purposes of nonconformity under § 120-199(G)(2) of the Zoning Code of the City of Rochester.

(7) It shall be a misdemeanor for any person to use or occupy or to permit any other person to use or occupy any building, erection or

place, or portion thereof, ordered closed by the Mayor or the Mayor's designee. Mutilation or removal of a posted order of the Mayor or the Mayor's designee shall be punishable by a fine of not more than $250 or by imprisonment not exceeding 15 days, or both, provided such order contains therein a notice of such penalty.

(8) Intentional disobedience or resistance to any provision of the orders issued by the Mayor or the Mayor's designee pursuant to this section, in addition to any other punishment prescribed by law, shall be punishable by a fine of not more than $1,000 or by imprisonment not to exceed six months, or both.

(9) The Mayor or the Mayor's designee may promulgate rules and regulations to carry out and give full effect to the provisions of this section.

(10) If any provision of this section or the application thereof to any person or circumstances is held invalid, the remainder of this section and the application of such provisions to other persons and circumstances shall not be rendered invalid thereby.

(11) The Mayor shall prepare a quarterly report to be submitted to City Council summarizing the actions taken under this section and indicating the results of such actions. **[§ 1, L.L. No. 7-1985; § 1, L.L. No. 1-1993; § 4, L.L. No. 3-1995; 46 L.L. No. 1-**

1996; § 1, L.L. No. 8-2003; § 1, L.L. No. 8-2006; § 1, L.L. No. 6-2009]

THE MUNICIPAL CODE OF
THE CITY OF ROCHESTER

PROPERTY CONSERVATION CODE OF
THE CITY OF ROCHESTER, NEW YORK

§ 90-16. Certificates of occupancy.

[Amended 2-14-2006 by Ord. No. 2006-22; 7-18-2006 by Ord. No. 2006-224]

A. When required:
   (1) All structures with two or more dwelling units and any mixed use structures containing one or more dwelling units.
   (2) In addition to the requirements of § 39-213 of the City Code, a certificate of occupancy or a conditional certificate of occupancy must be obtained within 90 days prior to the occurrence of any of the following:
      (a) The transfer of title to a new owner of any two-family dwelling unless a certificate of occupancy has been issued within two years of the transfer date.
      (b) The reoccupancy of a dwelling which has been entirely vacant for more than two months, unless a certificate of occupancy has been issued within a year of the reoccupancy.
      (c) A change of occupancy or use that would bring a dwelling under a different or additional classification of this chapter, the Building Code, Zoning Code, Fire

Prevention Code or other provisions of the City Code.

(d) The expiration or termination of a valid certificate of occupancy for a subject dwelling.

(e) A change of occupancy whereby a one-family dwelling is no longer occupied by the owner, or a spouse, child, sibling or parent of the owner. For one-family dwellings that are not occupied by an owner or a family member as required herein on January 1, 1998, a certificate of occupancy or a conditional certificate of occupancy shall be obtained immediately, but in no event later than 40 days after notice is sent by the City by regular first-class mail to the owner, at the owner's address on file with the City. [Amended 6-16-2009 by Ord. No. 2009-179]

(3) Subsequent to the occurrence of any event enumerated in Subsection A(2) herein, unless the Commissioner has issued a certificate of occupancy or a conditional certificate of occupancy, the Director or Commissioner may order occupants of the dwelling to vacate the dwelling. [Amended 6-16-2009 by Ord. No. 2009-179]

B. When waived.

[Amended 6-16-2009 by Ord. No. 2009-179]

(1) The Commissioner shall waive the requirement for a certificate of occupancy when title is transferred:

(a) By an executor or administrator in the administration or settlement of an estate.
(b) In lieu of foreclosure.
(c) By a court-appointed referee.
(d) By a trustee in bankruptcy.
(e) To or by an assignee for benefit of creditors.
(f) By the Monroe County Sheriff pursuant to a judicial sale.
(g) To a municipality as a result of tax foreclosure.
(h) Between husband and wife.
(i) To a person who had immediate, previous legal ownership in whole or in part.
(j) Pursuant to the formation, reorganization or dissolution of a partnership or corporation.
(k) By a corporation to its shareholders.
(l) To the United States Department of Housing and Urban Development or to the Administrator of Urban Affairs.
(m) By a person who retains life use of and/or interest in the property.

(2) Upon submission by the owner of credible evidence that a two-family dwelling is occupied in whole or in part by the owner or the owner's spouse, child, sibling or parent, the Commissioner shall waive the requirement of a certificate of occupancy for a period of one year. The owner shall be entitled to renew the annual waiver upon submission of credible evidence that the property continues to be occupied in whole or

in part by the owner or the owner's spouse, child, sibling or parent.

(3) The Commissioner shall issue or deny the waiver within five business days of receipt of a written request.

(4) The owner of a one-family dwelling who does not occupy the dwelling and whose dwelling is not occupied by a family member as required in Subsection A(2)(e) above may apply to the Commissioner for a waiver of the requirement for a certificate of occupancy. Such waiver shall extend for a period of one year. The application for a waiver must include written documentation that the owner has attempted to market the property without success. An owner of two or more one-family dwellings that are not occupied by an owner or a family member as required in Subsection A(2)(e) above shall not be eligible for such a waiver. The Commissioner shall issue or deny the waiver within five business days of the request. The Commissioner is authorized to establish rules and regulations relating to the time within which a waiver application shall be filed, the type of proof that will be accepted with respect to unsuccessful attempts to market the property, the time period within which such marketing efforts shall have been made, and such further regulations as the Commissioner shall deem necessary in order to assume that such waivers are not granted to dwellings which have a blighting influence

upon the neighborhood. The Commissioner shall also establish regulations providing for the revocation of such waivers if conditions leading to the granting of the waiver have changed, if false information was submitted with respect to an application, or if the dwelling has a blighting influence upon the neighborhood.

C. Contents of a certificate of occupancy. All certificates of occupancy shall state that the subject dwelling substantially conforms to the provisions of this chapter, the Building Code, the Zoning Code, the New York State Multiple Residence Law (if applicable) and other provisions of the City Code.

D. Conditional certificate of occupancy. The Commissioner, in his or her discretion, may issue a conditional certificate of occupancy prior to the occurrence of any of the events enumerated in Subsection A herein when occupancy or use of the building will not jeopardize life or property, and: [Amended 6-16-2009 by Ord. No. 2009-179]

(1) The subject dwelling is near substantial compliance with this section and all other applicable laws, ordinances and rules;

(2) The work required to bring the dwelling into full compliance is not essential to making the building habitable;

(3) The dwelling complies with the Zoning Code as evidenced by the endorsement of the head of the bureau or division responsible for administering the Zoning Code; and

(4) The owner of record, or contract vendee, or lessee has agreed with the Commissioner on a schedule of rehabilitation or demolition.

E. Contents of conditional certificate of occupancy. A conditional certificate of occupancy shall state that the subject dwelling complies with the requirements of Subsection D herein and shall specify the purposes for which the building may be used in its several parts. It shall also specify the date by which the owner of record must obtain the certificate of occupancy specified in Subsection C herein and warn that failure to obtain the certificate of occupancy by the date shall be sufficient cause for revoking the conditional certificate of occupancy without further notice to the owners and other interested parties. Time limitations set forth in conditional certificates of occupancy shall constitute amendments to time limitations imposed by prior notices and orders by the Department.

F. Issuance and filing.

(1) A certificate of occupancy shall be issued by the Department within 10 days after an inspection by the Department reveals that a subject dwelling is in substantial compliance with applicable laws, ordinances or rules.

(2) A record of all certificates of occupancy, and conditional certificates of occupancy and their status, shall be kept in the office of the Commissioner, and copies shall be furnished, upon request, to the public. [Amended 6-16-2009 by Ord. No. 2009-179]

(3) No certificate of occupancy shall be issued by the Department until the owner has registered with the City as required in § 90-20. [Added 1-20-2009 by Ord. No. 2009-5 Editor's Note: This ordinance also provided that it shall take effect 7-1-2009.]

G. Validity of certificate of occupancy.

(1) Expiration.

(a) A certificate of occupancy for either a single-family dwelling not occupied by the owner or a two-family dwelling issued on or after July 1, 2006, shall remain valid for a period of six years from the date of its issuance, unless sooner terminated by the occurrence of any of the events enumerated in Subsection A(2)(a) or (b) herein, or the failure of the dwelling to remain in substantial compliance with the provisions of this chapter and all other applicable laws, ordinances and rules.

(b) A certificate of occupancy for a building containing three or more dwelling units or a mixed occupancy building containing at least one dwelling unit issued on or after July 1, 2006, shall be valid for a period of three years unless sooner terminated by the occurrence of any of the events enumerated in Subsection A(2)(a) or (b) herein, or the failure of the dwelling to remain in substantial compliance with the provisions of this

chapter and all other applicable laws, ordinances and rules.

(2) Renewal. The owner of record shall obtain a new certificate of occupancy within 90 days prior to or following the expiration or termination of the valid certificate of occupancy pursuant to Subsection G(1) herein. If the new certificate of occupancy is not so obtained, the Commissioner, within 30 days of the expiration or termination of the valid certificate of occupancy, may cause an inspection to be made of the subject dwelling. [Amended 6-16-2009 by Ord. No. 2009-179]

H. Inspections.

[Amended 6-16-2009 by Ord. No. 2009-179]

(1) Notwithstanding the existence of the valid certificate of occupancy, the Commissioner, Fire Chief or head of the bureau or division responsible for administering the Zoning Code may cause the subject building to be inspected as often as may be necessary for the purpose of ascertaining and causing to be corrected any violations of the provisions of the laws, ordinances or rules which they enforce.

(2) Whenever violations of the Property Conservation Code, Building Code, Fire Prevention Code, Zoning Code or any applicable law, ordinance or rule are discovered and those violations affect the structure's substantial compliance with the applicable law, ordinance or rule, the existing certificate of occupancy may, at the

discretion of the Commissioner, be declared null and void. If such declaration is made, the Commissioner may order occupants of the building to vacate the building through notification to the owner(s) and the occupants of the property, in writing, in the same manner as the service of a notice and order, as set forth in § 52-6 of the Municipal Code, unless an emergency exists.

I. Liability for damages. This code shall not be construed to hold the City of Rochester responsible for any damages to persons or property by reason of inspections made pursuant to an application for a certificate of occupancy or issuance of or the failure to issue a certificate of occupancy.