

Date: March 3, 2016

To: House Committee on Commerce, Labor
and Economic Development

From: Larry R. Baer, General Counsel

Re: House Bill 2665 – Testimony in Opposition

Thank you for allowing me to appear before the Committee today and present testimony in opposition to House Bill 2665 on behalf of the League of Kansas Municipalities and our member cities. This bill concerns us on several different levels.

As written, HB 2665 precludes cities from adopting rental property registration and licensing programs that require inspections without search warrants. It would also void any existing programs that require inspections without search warrants. It does permit inspections at a tenant's request, if the property owner is notified and the tenant is not subject to eviction proceedings.

Violates Constitutional Home Rule Local Control:

Rental registration and licensing programs are tools used by local government to manage its oversight of the community's rental inventory. Cities establish them by ordinance, which sets the ground rules for registration and licensing, including fees, if any, charged by the city. While all licensing and registration programs have commonalities, few are identical. Thus, each city with such a program exercises its Constitutional right to local control when crafting these programs to address the needs and priorities of its citizens. Therefore, HB 2665 has the potential of infringing upon local control.

Rental registration and licensing programs are in essence a part of a city's code enforcement ability. It is an opportunity for a city to craft and use local regulatory authority and enforcement actions to improve quality of life. This authority comes from a city's common law police powers. Forming a precise definition of police power is difficult – but some of the more conspicuous examples of the traditional application of police powers to municipal affairs include public safety, public health, morality, peace and quiet, and law and order.¹

The Kansas Supreme Court, when describing the exercise of police power², has said this:

“... [E]very exercise of police power will [almost] always either interfere with the enjoyment of liberty, or the acquisition, possession and production of property, or involve an injury to a person, or deprive a person of property within the meaning of the Fourteenth Amendment to the Constitution of the United States. ... [I]t is well settled that an exercise of

¹ *Berman v. Parker*, 348 U.S. 26, 32, 75 S. Ct. 98, 99 L. Ed. 27 (1954); *State ex rel Schnieder v. Liggett*, 223 Kan. 610, 576 P. 2d 221 (1978)

² *Grigsby v. Mitchum*, 191 Kan. 293, 302, 380 P. 2d 363 (1963)

police power ... will be valid if it bears a reasonable and substantial relation to the public health, safety, morals or general welfare of the public, and if it is not unreasonable or arbitrary.”

The Court³ goes on to say that the initial determination of whether the exercise of the police power is bears a reasonable substantial relation to the communities health, safety and welfare and whether or not it is unreasonable or arbitrary lays with the governing body when considering and adopting such action. And, only if the decisions appear to be clearly erroneous will the courts invalidate them.

Thus, again, the local elected officials are the ones to review the local needs and priorities, assess regulations that may be needed, and implement such rules and regulations as they believe bear a reasonable relationship to problem. HB 2665 would substitute the Legislature’s will and desire for that to be exercised by local elected officials, those closest to the problem.

Drafting Issues:

As written, HB 2665 is vague, somewhat confusing, and may actually violate Constitutional search and seizure (inspection) provisions that it may be purporting to cure. The bill does not delineate between interior and exterior searches when requiring a warrant. It has long been accepted that “plain view” inspections are permissible when the inspector is at a location (sidewalk, street, a neighbor’s yard) where the inspector is entitled to be or has permission to be. This is one way that exterior searches are conducted. The HB 2665 would preclude this type of inspection.

We will accept, for the sake of further discussion, that a warrant is required for an interior inspection. However, HB 2665, would preclude two readily and frequently accepted exceptions to this rule – consent by the owner or consent by the occupant. Under Kansas law, either an owner or an occupant may consent to an inspection. The bill says nothing about an owner’s consent. It does allude to the tenant’s consent. However, this is conditioned upon two events transpiring, being able to give notice to the owner and the tenant not being involved in an eviction action. The city’s ability to give notice or to determine the status of the tenant’s tenancy can be problematic. Again, neither one of these conditions is part of the body of law regarding warrantless searches. Finally, and perhaps this is more policy than legal, the fact that a tenant is in an eviction process or if the complaint by the tenant is purely retaliatory, there is still the need to be able to enforce safe and healthy housing.

Kansas law does recognize the issuance and use of administrative search warrants for the type of matters that appear to be contemplated by HB 2665. Administrative search orders must be obtained through district court. From the city’s perspective, this adds cost and time to investigating and addressing the complaint. To require a search warrant for every inspection is the equivalent of placing an unfunded mandate upon the city each time a warrant is required by the bill, but would not be required under our current body of law.

For the above reasons the League opposes HB 2665 and would prefer that it not be worked by the Committee. However, if the Committee feels that it is appropriate to work the bill, we would strongly encourage that action on the bill be delayed until such time as all interested parties have had ample time to meet, discuss, negotiate and compromise, if necessary, and bring proposed legislation back to this body. Proposed legislation should strive to reach a balance between property owner/landlord’s property rights and the right of local government to protect the health safety and welfare of its citizens, the tenants.

³ *Id.*