MUNICIPAL SEARCH WARRANTS IN MISSOURI
by Paul Martin

This article considers the use of local search warrant procedures in Missouri for municipal code violations related to the condition, use or occupancy of property. Specifically it addresses the need for local search warrant authority, the legality of municipal search warrant legislation, the "probable cause" needed for warrant issuance, the scope of and limitations on such legislation and the possible content of a municipal warrant ordinance.

The Need For Local Search Warrant Authority

One of the most vexing problems faced by municipalities in Missouri is the enforcement of building, housing and occupancy codes. One particular enforcement problem stems from the privacy guarantees of the Fourth Amendment to the United States Constitution, which provides that "[t]he right of the people to be secure in their … houses … 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 …" In *Camara v. Municipal Court of the City and County of San Francisco*, the United States Supreme Court applied the amendment to municipal code enforcement searches, holding that entries onto private property were "significant intrusions upon the interests protected by the Fourth Amendment." The Supreme Court concluded that the constitution required either the owner's consent to search or a warrant.[1]

The Eastern District of the Missouri Court of Appeals followed suit in *Bezayiff v. City of St. Louis*, declaring unconstitutional an ordinance permitting warrantless entry onto private property to remove a derelict vehicle.[2] And while the *Bezayiff* court considered only the application of the Fourth Amendment, the Missouri Constitution also protects against warrantless, non-consensual private property searches.[3] It seems plain that to satisfy the privacy protections established by the federal and state constitutions, a municipal official generally needs either the owner's consent or a warrant to enter property for code enforcement purposes.[4]

Unfortunately when an owner refuses consent, state law offers no warrant assistance to local governments for property inspections or nuisance abatement. While Missouri statutes establish a warrant procedure for the investigation and prosecution of criminal actions,[5] municipal ordinance proceedings by law are civil in nature,[6] and there is no complementary statutory warrant procedure for investigating or enforcing municipal regulations. Without warrant authority, owners and occupants of property can frustrate the enforcement of applicable ordinances simply by refusing entry even though local officials may have actual knowledge of code violations.

Local officials in Missouri presumably have responded to this situation by exercising one of two options. Either they ignore the constitutional privacy provisions and enter private property without a warrant and regardless of owner consent, or they delay or abandon any attempt to enforce their property codes. By ignoring the warrant requirement, officials place themselves and their governments at obvious risk; warrantless, non-consensual searches can obviously escalate an already tense encounter and property owners can sue for the violation of privacy rights.[7] On the other hand, abandoning the enforcement effort leads to increased safety risks and additional public welfare concerns, such as the possible spread of blight to neighboring properties and a consequential decline in property values. The need for code enforcement mechanism to permit lawful, non-consensual private property entry is manifest.

The Legality Of Municipal Search Warrant Legislation

A possible solution to the code enforcement dilemma came to light in Missouri when the state Supreme Court decided the case of *Frech v. City of Columbia*.[8] The city of Columbia, a home

rule charter city, adopted a Rental Unit Conservation Law. The ordinance authorized the City's municipal judge to issue a warrant "for searches or inspections" of apartments and rooming houses to determine the existence of violations of the City's minimum building standards and zoning classifications. Building owners challenged the law on the basis that it exceeded the City's legislative power, arguing that the ordinance contravened the state's criminal warrant statute and the Missouri Supreme Court's authority to regulate warrant procedure.[9] The Supreme Court rejected both claims. The Court found that Columbia's search warrant ordinance was limited to municipal code violations and accordingly did not intrude on the state's criminal warrant authority. The Court also found that the ordinance did not impinge upon its own constitutional rule-making power.[10]

While *Frech* did not address the question of the City's authority to enact the ordinance in the first place, this legal authority appears to exist for both charter and statutory cities. With regard to charter cities, Article VI, § 19(a), the Missouri Constitution grants all powers which the legislature is authorized to grant, regardless of whether a singular power is specified in the charter itself.[11] Since the Missouri Legislature can establish the practice and procedure of courts to issue search warrants in the absence of applicable Supreme Court rules,[12] charter cities would also have this authority.

Statutory cities (third and fourth class cities and towns and villages) are bound by Dillon's Rule. They possess only those powers that are (1) expressly granted by statute or (2) necessarily or fairly implied in or incidental to express grants, or (3) essential, i.e., indispensable, to the declared objects of the municipality.[13] No Missouri statute authorizes third or fourth class cities, towns or villages to establish procedures for administrative search warrants. In the absence of an enabling statute, the authority to establish search warrant procedures must necessarily be found in either the second (implied/incidental) or third (essential) standard of Dillon's Rule.

This seems well within reach when one considers the myriad Missouri statutes authorizing statutory cities to enter on private property for inspection and abatement purposes. All statutory cities have such power over construction on private property,[14] public health and nuisances,[15] and commerce.[16] All statutory cities are authorized to abate debris accumulation, including trash, rubbish, lumber, overgrown weeds and vegetation, derelict cars, broken furniture and other materials.[17] All cities are authorized to inspect milk and food,[18] and they have general legislative authority to abate nuisances and assess the costs of abatement against the property by special tax lien.[19] Local governments also may provide for the towing of derelict motor vehicles from private property.[20]

But because of constitutional privacy concerns, statutory cities may not fully enforce their regulatory authority without the property owner's consent. When an owner or occupant refuses entry, a warrant is necessary if the public health, safety and welfare is to be served. In these circumstances one could easily conclude that an administrative search warrant ordinance is "necessarily or fairly implied in or incidental to" express grants of authority and even "essential, i.e., indispensable, to the declared objects of the municipality."[21]

The "Probable Cause" Standard

Having established the legitimacy of a local search warrant ordinance as an enforcement tool, it is important to consider the quantum of "probable cause" needed for the issuance of a warrant. In *Camara* the United States Supreme Court relied on the "unique character" of code enforcement searches to require a standard different from that traditionally reserved for criminal cases.

In *Camara* the local authorities were conducting area-wide inspections and prosecuting those who refused to consent to a search for failure to cooperate. The appellant claimed that absent

consent, the officials needed a warrant, supported by evidence that this particular dwelling contained property conditions in violation of the city code; only then could an owner or occupant be insulated from "unreasonable" searches and seizures. *Camara*, 387 U.S. at 534, 87 S.Ct. at 1733-1734.

The Supreme Court observed that the proposed standard was borrowed from that used in criminal cases and that probable cause "is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness." The Court then distinguished administrative search warrants from criminal, noting the broader governmental interest at stake. Referencing examples of both safety (fires and epidemics) and general welfare (unsightly conditions adversely affecting property values) concerns, the Court summarized local government's interest as "to prevent even the unintentional development of conditions which are hazardous to public health and safety." Thus, in determining whether a particular search is reasonable and whether probable cause justifies warrant issuance, "the need for the inspection must be weighed in terms of these reasonable goals of code enforcement." *Camara*, 387 U.S. at 535, 87 S.Ct. at 1734.

With housing code enforcement, the Court noted, "the only effective way to seek universal compliance with the minimum standards … is through routine periodic inspections of *all* structures." The decision to inspect a given area, then, "is unavoidably based on … appraisal of conditions in the area as a whole." *Camara*, 387 U.S. at 535-536, 87 S.Ct. at 1734-1735 (emphasis added).

The Court found three factors that supported the reasonableness of area-wide inspections. Such programs "have a long history of judicial and public acceptance." In addition, "the public interest demands that all dangerous conditions be prevented or abated," and many of these could not be discovered other than by interior inspections. "Finally, because the inspections are neither personal in nature nor aimed at the discovery of evidence of a crime, they involve a relatively limited invasion of the urban citizen's privacy." *Camara*, 387 U.S. at 536-537, 87 S.Ct. at 1735.

After concluding that an area-wide search was reasonable under the Fourth Amendment, the Court noted that probable cause would exist to issue a warrant provided "reasonable legislative or administrative standards" were satisfied:

> Such standards … may be based on the passage of time [between inspections], the nature of the building (e.g., a multifamily apartment house), or the condition of an entire area, but they will not necessarily depend on the specific knowledge of the condition of the particular dwelling.

Camara, 387 U.S. at 538, 87 S.Ct. at 1735-1736.

Under *Camara*, then, while an administrative warrant application can specify a single property with known or suspected code violations, the application may also proffer more sweeping characteristics germane to the kind of property at issue, the nature of the surrounding neighborhood, and even the time lapse occurring between inspections. All of these factors can be used to support the issuance of warrant. Presumably other factors touching on property maintenance could also serve as legitimate standards for warrant issuance, such as property ownership (absentee landlords), high tenant turnover and being located in an area declared "blighted" pending redevelopment.

The Scope And Limitations Of Administrative Search Warrants

Several additional factors need to be considered in administering a search warrant ordinance for code enforcement purposes.

Missouri statutes should serve as the parameters of any local search warrant activity. State statutes authorize entry onto private property for enforcement purposes (both inspection and abatement) involving the condition, use or occupancy of property or structures; they do not authorize entry for the investigation or prosecution of any other municipal ordinance violations. Without such statutory authorization, the use of administrative search warrant procedures would be constitutionally suspect from the state perspective.[22] Moreover, in light of the reliance placed by the *Camara* court on the distinction between criminal and administrative investigations, the use of municipal warrants to pursue local prosecutions premised on state crimes might well tip the balance of public and private interests away from a finding of "reasonableness."[23]

Similarly, a police officer executing an administrative search warrant should do so in light of the statutory authority on which the city's warrant authority is based. This article does not consider the admissibility of criminal evidence seized as a result of an administrative warrant search, but use of the administrative warrant process as a pretext for a criminal investigation obviously raises the question. And if in the course of a legitimate administrative warrant search a police officer finds evidence of a crime, the officer must exercise his or her judgment with regard to the action taken, if any. The safest course of conduct would be for the officer to make application for a criminal search warrant to the circuit court, but if the circumstances justify immediate action, the officer's search warrant authority may (or may not) be sufficient for the seizure of criminal evidence or the arrest of the owner or occupant of the premises.

One should also note that warrants aren't always necessary for entry onto private property. The requirement applies "only to those entries which intrude on constitutionally recognized expectations of privacy." *Bezayiff v. City of St. Louis*, 963 S.W.2d 225, 234 (Mo. App. 1997). In *Schneider v. County of San Diego*, a property owner parked several inoperable vehicles on his own open land next to a house he rented to tenants; the Ninth Circuit held that the property owner lacked any reasonable expectation of privacy because he did not live in the rented house.[24] Similarly, the Eighth Circuit has held that a property owner had no legitimate expectation of privacy in dilapidated buildings demolished by a city without a warrant; the property had become a haven for transients and the owner did not live in the buildings and failed to take any steps to protect his property.[25]

And it is implicit that any property condition requiring immediate abatement for the public health, safety and welfare, such as fire or chemical spill would justify warrantless entry.[26] In *Camara* the United States Supreme Court recognized other emergency situations that would merit warrantless action, including food contamination, diseased cattle destruction and compulsory smallpox vaccinations.[27]

Some final observations should be made in conjunction with warrant limitations. Both the Fourth Amendment and Article I, Section 15 of the Missouri Constitution require that the warrant "describe[e] the place to be searched." The Fourth Amendment actually is more specific; it includes "particularly" as an adverb to the word "describing." This language leads to the conclusion that an administrative search warrant should identify the specific property to be searched, despite the existence of area-wide probable cause factors used to justify the particularized search.

Also, the Supreme Court in *Camara* alluded to this particularity requirement and made two additional observations pertaining to the implementation of administrative warrant authority. After noting that most inspections did not require immediate entry and most citizens consented to municipal inspections, the Court suggested that baring exigent circumstances, warrants "should normally be sought only after entry is refused." The Eastern District of the Missouri Court of

Appeals seemingly has embraced this as a warrant prerequisite.[28] In a similar vein, the Supreme Court observed that the "prevailing local policy" of most municipal inspections – entry by consent or lawful authorization rather than by force – should remain in tact. *Camara*, 387 U.S. at 539-540, 87 S.Ct. at 1736. Both of these concepts would tend to reinforce the reasonableness of the city's actions, both in adopting a warrant ordinance and in actual warrant execution.

Contents Of The Administrative Search Warrant Ordinance

An administrative search warrant ordinance in Missouri should establish detailed procedures for the application, issuance and return of the warrant consistent with the *Camara* and *Bezayiff* decisions. Using Missouri's criminal warrant statute as a guide (Section 542.261 et seq., RSMo. 2000), local warrant legislation could include the following:

- A local police officer, code enforcement officer or attorney must apply for the warrant to the municipal judge.
- The application must include a statement of probable cause, supported by affidavit, detailing the actual or suspected property conditions – whether applicable to a specific property or a general area – that justify entry. The statement normally would be prepared by the city's code enforcement officer with the assistance of the city attorney.
- The application should also show that the municipality requested entry on the property and that the owner or occupant refused such entry.
- If the judge finds that the facts establish probable cause to believe that a code violation may exist, the judge will sign the warrant and authorize the requested entry.
- The enforcement officer then has ten days to execute the warrant, during daylight hours. The municipality should require a police presence during warrant execution, both to encourage peaceful cooperation and to ensure the safety of the code enforcement officer.
- The police and enforcement officer(s) must inspect the property for code violations, record or seize appropriate property as evidence and/or abate existing nuisances, all as directed by the terms of the search warrant.
- The police and enforcement officer(s) must also prepare a "return," consisting of a report of the search and/or seizure including copies of receipts for any property seized as well as the seized property.
- The police and enforcement officer(s) must also leave copies of the warrant and any receipts for property seizure with the property owner or occupant or, if no one is available, in a conspicuous place on the property.

Conclusion

Local warrant authority promotes three laudable goals. First, it allows the municipality to act in those unique cases when a property owner refuses to allow access for property code enforcement purposes and so ensure the protection of the public health, safety and welfare. Second, it protects the constitutional rights of the property owner by requiring that a judge consider the known facts and determine whether probable cause exists for the municipality to inspect property or abate a nuisance. Finally, it establishes a defense if a property owner subsequently files a lawsuit claiming an illegal invasion of privacy rights. While the warrant procedure imposes additional administrative burdens, it also helps protect owners, occupants, the general public, local officials and the municipality itself from the adverse effects of private property entries.

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