"Take Your Hands Off the Monkey!" Administrative Search Warrants and Local Code Enforcement

by Thomas M. Carpenter



A couple purchases a macaque. The monkey is cute, but the city's code prohibits keeping exotic animals, including monkeys, as pets. On learning of this code violation, the local animal services officer finds the monkey caged in a garage and attempts to seize it. The monkey "goes bananas," and its owner intervenes and carries the screaming monkey into the house. When the police officers, called in to keep the peace, refuse to enter the house, the animal services officer does so and seizes the monkey. The animal services officer reasons that his actions are proper because the local government bans keeping monkeys as pets, and because macaques carry a meningoencephalitis virus that may pose a major public health hazard. Even so, the search of the home and the seizure of the monkey are illegal.[1]

Local governments have clear authority to protect the public health, safety, and welfare through the exercise of their police powers. This authority is manifested by way of municipal codes, such as building codes that permit periodic inspections of rental housing and other residential structures, commercial buildings and businesses, and other establishments. These inspections can be conducted with consent, but what happens when consent is denied?[2] If the purpose of the entry is to inspect for evidence of a specific violation (e.g., defective or non-compliant plumbing), the municipality may lack the facts to establish probable cause to believe that a specific code violation will be found at that particular address. For the administrative search, however, this lack of evidence of a specific violation does not defeat the issuance of a search warrant.[3] If municipal code provisions are to be enforced, it is important to know how these administrative searches operate, and what legal issues should be considered before such a warrant is sought.

Background

Warrantless searches are generally unreasonable, and this caveat applies to commercial premises as well as to residences.[4] To meet constitutional muster, an ordinance which permits such inspections must meet three criteria: (1) it must further a substantial governmental interest; (2) the inspection must be required to serve or meet that interest; and (3) the terms of the inspection program must be clear enough to substitute for a warrant by limiting the scope of the search and the discretion of the officer.[5]

The seminal United States Supreme Court cases on administrative search warrants are *Camara v. Municipal Court of San Francisco*,[6] and a companion case handed down the same day, *See v. City of Seattle*.[7] In *Camara*, the Court (noting that, like most regulatory laws, "fire, health, and housing codes" were enforced by criminal processes and the discovery of a violation by the inspector could lead to a criminal complaint[8]) held that a warrantless search of residential property for code violations contravened Fourth Amendment protections of legitimate privacy interests.[9] The Court began with the premise that the "basic purpose of [the Fourth Amendment] is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."[10] After deciding that a search warrant was needed for code enforcement inspections, the Court focused upon the probable-cause element of the Fourth Amendment and its application in such a situation.[11] In determining whether a particular inspection was reasonable, the need for the inspection was to be weighed in terms of the government interests involved and the

goals of code enforcement (including the need to prevent "even the unintentional development of conditions which are hazardous to public health and safety"[12]). The warrant requirement was one way to ensure that the occupant was aware that the inspection would include a search of the premises and of the scope of the search, and that the inspector was operating under the proper authority.[13] Probable cause existed "if reasonable legislative or administrative standards for conducting an area inspection [were] satisfied with respect to a particular dwelling."[14] Using this reasoning, the Court balanced the government's need for building code compliance with the individual's need that any residential intrusion be kept to a minimum and permitted (in the absence of consent) only after review by an independent magistrate. The Court found the strong governmental interest in enforcing administrative or legislative standards for inspection satisfied the probable-cause element for issuance of a warrant.[15] In *See*, these principles were extended to commercial property.

Basic Guidelines

The fundamental point, though, is that any administrative search must be reasonable.[16] In the administrative search context, the U.S. Supreme Court has held that:

> [where] a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, ... [w]e have concluded ... that the appropriate standard for administrative searches is not probable cause in its traditional meaning. Instead, an administrative warrant can be obtained if there is a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied....[17]

The first guideline, then, is to ensure that the legislative or administrative scheme which leads to the administrative search is reasonable.[18] To do so, the scope, subject, and frequency of the searches it permits must be reasonable.[19] For example, an ordinance which does not focus upon safety and health violations but requires compliance with *all* code provisions is unreasonable, because there is no such limit in its scope.[20] A search which significantly exceeds the scope of what is required is unreasonable. The U.S. Court of Appeals for the Seventh Circuit articulated the following reasonableness standard for administrative searches in relation to the places to be searched: "the object determines the reasonable scope of the search, and all searches, to pass muster under the Fourth Amendment, must be reasonable. If you are going to look for an adult elephant, searching for it in a chest of drawers is not reasonable."[21]

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Clearly, though, looking in closets will be appropriate in certain circumstances. For example, if an electrical panel is located in a closet, then a code officer certainly may look there to assess compliance with an electrical code. Still, in this situation, the application for the administrative search warrant should note that one of the things to be reviewed is the electrical panel, and that this is not always attached to the outside of a structure. While this notation will not permit a search of the occupant's chest of drawers, it certainly provides protection for a search of areas of the house that are not clearly in view.

The purpose of the search must also be legitimate. If the primary reason for a search is to find evidence of a crime, then the exceptions permitted for administrative searches will not apply.[22] When 20 police officers and SWAT-team members participate in an administrative inspection or search, the courts are likely to find the "administrative" or regulatory nature of the operation to be pretextual.[23] The frequency of administrative searches can also be a basis for declaring them to be unreasonable. In one situation, a federal appeals court condemned a police officer's conduct where allegedly administrative inspections were performed numerous times without any justification as to the number of inspections.[24]

Warrants

Respecting the application for an administrative search warrant, the process is the same as that for a regular search warrant. The affiant should demonstrate the reason for the search, the scope of the search, and, if applicable, some indication as to why the search is one of several requested. The reasons should relate to the administrative or legislative scheme that is the basis for the exercise of the municipal police power. In addition, the reasons should indicate that the opposing party refused to consent to a search. The scope of the search will be determined by the reason: for example, if the reason is suspected plumbing code violations, there is likely no need to include a search in closets for a fuse box. Finally, if the search is one of several that have occurred recently, the application should note why previous searches were necessary (and successful, or not), and demonstrate why this particular search is necessary. One search may yield the probable cause for another, but the request may not be pretextual.

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This point is particularly important in residential searches. While *Camara*, *See*, and their progeny permit this type of search, it is possible the courts will change their view once any suggestion of a trend towards pretextual searches appears. As Justice White warned in *Camara*, "[b]ecause of the nature of the municipal programs under consideration ...these conclusions must be the beginning, not the end, of our inquiry."[25] It is possible that Justice White was only referring to the analytical framework in *Camara*, but his words are also a clear warning for local governments because that framework mandates a consideration of reasonableness. In other words, what was reasonable based on the facts of *Camara* may be deemed unreasonable in a subsequent case if the natural limitations on administrative searches are not followed.

What happens, then, if a code enforcement officer finds evidence of a crime? If the administrative search is not pretextual, nothing prohibits the information the enforcement officer finds in plain view to be the probable cause for issuance of a criminal warrant. For example, if, in checking the electrical outlets, the inspector proceeds into a room where a controlled substance is in plain view, the affidavit of the code enforcement officer can properly be used to obtain a regular search warrant. Of course, there may be a concern that before this warrant can be issued and executed, the property owner will destroy the evidence, but this can be addressed by the law enforcement officers, if present, requiring the occupants to leave or stay outside the structure until a search warrant can be obtained.[26]

It is also important to realize that an administrative inspection can turn into a criminal search in other circumstances (absent the evidence of a crime in plain view). A time difference between the inspection and a seizure may be a key factor: a fire marshal, for example, has the authority to do an initial review of a fire scene for arson, but if the marshal returns at a later time to obtain evidence of a crime, a search warrant may be required.[27]

Other Issues

A periodic review of an inspection scheme and the associated ordinances is important to guard against a scheme that is flawed for being too broad, or that fails to comply with recent changes in the law.

A local government must train its code officers respecting administrative searches: an administrative search cannot be a pretext for a criminal evidence search.

What happens if there is a reasonable legislative or administrative inspection program in place, but the program is never really followed? This will not defeat the legality of an administrative search warrant. This argument is likely to arise as a challenge to the assertion of public health and safety concerns when an inspection under an ordinance is not carried out in a timely manner. Although this argument may have political ramifications, its legal significance is limited. All the complaint tends to show is that the inspection scheme was imperfect in how it was implemented, but not that it was unreasonable in what it sought to achieve.[28]

A local government must train its code officers respecting administrative searches: an administrative search cannot be a pretext for a criminal evidence search. The failure to train officers can lead to municipal liability for an invasion of privacy because it suggests deliberate indifference to the rights of the individuals that code officers or inspectors come into contact with. One practical suggestion is to make sure there is cooperation between law enforcement officials and their code enforcement counterparts. Code enforcement officers are required to limit the scope of a search, and law enforcement officers must understand there are good reasons for doing so. The training discussions, then, should extend to both code enforcement and law enforcement personnel, even if the training sessions are held separately. It is clear that code inspectors are likely to face situations where there will be law enforcement assistance, or where law enforcement officials ask for their assistance. The failure to make a proper choice on how to proceed may lead to a violation of an individual's Fourth Amendment rights. Such wrong choices may frequently cause a violation of Fourth Amendment rights, and the failure to be aware of this possibility—and the failure to train code enforcement officers accordingly—may subject a municipality to civil rights liability based on a claim of deliberate indifference.[29]

Keep in mind that causes of action for an invalid search and inadequate training may be maintained not only against the local government. The code enforcement officer and the police officer (if any) may be subject to individual liability in a civil rights case if they exceed the scope of their respective authority. In fact, the municipal employees may be subject to punitive damages for a Fourth Amendment violation.[30]

Conclusion

Effective code enforcement requires the judicious use of administrative search warrants as an essential tool. Code enforcement actions are necessary to protect the public health, safety, and welfare. If care is taken with the drafting of code provisions to ensure a proper focus in the scope, then the mere fact that an occupant refuses consent to a search of a structure establishes probable cause for the issuance of a warrant. In the execution of a warrant, it is essential that the scope of the search be consistent with the purpose of the warrant. On occasion, law enforcement officers may be called to assist in maintaining the peace while the search is being conducted. If this happens, care should be taken to prevent the search from being transformed into a criminal search, where a greater particularity is required for the issuance of a search warrant. Otherwise, a pretextual search can lead not only to the exclusion of the evidence obtained in

any later criminal trial, but to municipal liability for a Fourth Amendment violation.

Train code enforcement officers that the administrative search provides an exception to the normal warrant requirements for a search of an individual's property. If consent to a search is withheld, there are means to ensure that any evidence of a code violation is maintained pending a warrant being obtained. To put it another way, someone should have told the animal services officer, featured at the beginning of this article, to "Take your hands off the monkey!"

Notes

1. For a more detailed account of this event, *see* Kelly Young, *LR family sees no evil in having monkey*, Arkansas Democrat-Gazette, Aug. 17, 1999 at B1; Jennifer Liberto, *LR man fined $50, told he can't keep pet monkey*, Arkansas Democrat-Gazette, Aug. 22, 1999 at B5; *Family asks LR to adopt rule allowing them to keep monkey, Pet abused while in care of agency, wife alleges*, Arkansas Democrat-Gazette, Sept. 9, 1999 at B2; Linda Satter, *Seized monkey spurs federal suit, Pair say animal service agents violated their rights against illegal searches*, Arkansas Democrat-Gazette, Mar. 03, 2001 at B2. The monkey never returned to Arkansas; the lawsuit was subsequently non-suited.
2. This article deals with administrative search warrants. There is another exception to the warrant requirement for administrative inspections of pervasively-regulated businesses.
3. Marshall v. Horne Seed Co., Inc., 647 F.2d 96, 100 (10th Cir. 1981) (the judge "is not to give any consideration at all to the reliability of the evidence or the probability of violation"); *see also*, Jones v. Wildgen, 244 Fed. Appx. 859, 863 (10th Cir. 2007).
4. Marshall v. Barlow's Inc., 436 U.S. 307, 312 (1978) (OSHA inspector seeking to enter non-public areas of an electrical and plumbing installation business; no warrant and no consent; Warrant Clause of the Fourth Amendment held to protect commercial buildings as well as private homes).
5. New York v. Burger, 482 U.S. 691, 702-03 (1987) (warrantless search of automobile junkyard, conducted pursuant to New York administrative inspection statute, held not violative of Fourth Amendment); Brower v. Bolingbrook, 735 F. Supp. 768, 776 (N.D. Ill. 1990) (challenge to constitutionality of ordinance that required landlords and property managers to consent to and pay for an inspection whenever they rented to new residential tenants); *see also*, Susan M. McDonough, *Note*, *The Fourth Power? Administrative Searches v. The Fourth Amendment*, 20 New Eng. J. on Crim. & Civ. Confinement 195 (1993).
6. 387 U.S. 523 (1967).
7. 387 U.S. 541 (1967).
8. 387 U.S. at 531.
9. *Id.* at 534.
10. *Id.* at 528.
11. *Id.*
12. *Id.* at 535. The Court added that there was "unanimous agreement among those most familiar with this field that the only effective way to seek universal compliance with the minimum standards required by municipal codes is through routine periodic inspections of all structures." *Id.* at 535-36.
13. *Id.* at 532.
14. *Id.* at 538.
15. *Id.* at 538-40.
16. *Id.* at 536-37.
17. O'Connor v. Ortega, 480 U.S. 709, 723 (1987), citing *New Jersey v. T. L. O.*, 469 U.S. 325, 341 (1985), Marshall v. Barlow's, Inc., 436 U.S. 307, 320 (1978); and *Camara* at 538. Or, as the Court noted in *Camara*, there are a number of factors to justify such a conclusion: periodic inspection programs have a long history of judicial and public acceptance; the public interest demands the prevention of abatement of dangerous conditions; and some safety hazards, such as faulty wiring, may not be determined with an inspection. *See Camara*, 387 U.S. at 537; *see also*, City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000) (confirming a special exception to the warrant requirement for administrative searches).
18. Nothing in *Camara* precludes emergency inspections, even without warrants. *Camara*, 387 U.S. at 539.
19. Brower v. Bolingbrook, 735 F.Supp. 768, 776 (N.D. Ill. 1990).
20. *Id.* at 777 (ordinance at issue not focused on building and safety regulations but instead referred to "all violations of this Chapter or code adopted by this Chapter"; found to go beyond the legitimate interests in enforcing building and safety codes).
21. Platteville Area Apartment Ass'n. v. City of Platteville, 179 F.3d 574, 579 (7th Cir. 1999) (emphasis added).
22. *See* Bruce v. Beary, 498 F.3d 1232, 1239 (11th Cir. 2007). Although the case deals with the warrantless inspection of a regulated business, the court's conclusion that an administrative search cannot be primarily used as a criminal investigatory device is still valid. *See also*, United States v. Knight, 306 F.3d 534, 537 (8th Cir. 2002) (inspection of commercial vehicle by trooper extended to search of trucker's briefcase, without consent: motion to suppress the evidence discovered in briefcase on the ground that trooper exceeded the scope of the regulatory search authorized by law and thus, violated the Fourth Amendment, granted).
23. *Beary*, 498 F.3d at 1244.
24. *See* Turner v. Dammon, 848 F.2d 440, 446 (4th Cir. 1988) (over 100 searches performed by officers at a topless bar: court holds that, where a valid administrative search program authorized warrantless inspection but provided no rules governing the procedure for inspectors to follow, the Fourth Amendment applied, and affirmed the denial of summary judgment as to the two officers who conducted multiple administrative searches); *see also*, Brock v. Gretna Mach. & Ironworks, Inc., 769 F.2d 1110 (5th Cir. 1985).
25. 387 U.S. 523, 534 (1967).
26. *See* Illinois v. McArthur, 531 U.S. 326 (2001) (warrantless seizure; police officers with probable cause to believe defendant had marijuana in his home, prevented him from entering his home while they obtained a search warrant); Clark v. Webster, 384 F. Supp.2d 371, 378 (D. Me. 2005).
27. Michigan v. Tyler, 436 U.S. 499 (1978) (entry to fight a fire required no warrant but searches and seizures that occurred days after the fire had been extinguished were unconstitutional, being detached from the initial exigency and the

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17, 21 (1993) (a sexually hostile work environment exists where "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.").
8. Cram v. Lamson & Sessions Co., 49 F.3d 466, 473 (8th Cir. 1995).
9. *See, e.g.,* Broderick v. Ruder, 685 F. Supp. 1269, 1280 (D.D.C. 1988).
10. Schobert v. Ill. Dep't of Transp., 304 F.3d 725, 733 (7th Cir. 2002).
11. 807 F.2d 304 (2d Cir 1986), *cert. denied*, 484 U.S. 965 (1987).
12. *Id.* at 308.
13. *Id.*
14. *Id.* at 306.
15. 397 F.3d 539 (7th Cir. 2005).
16. *Id.* at 541.
17. *See, e.g.*, Drinkwater v. Union Carbide Corp., 904 F.2d 853, 862 (3d Cir. 1990); Becerra v. Dalton, 94 F.3d 145, 149-50 (4th Cir. 1996); Wilson v. Delta State Univ., 143 Fed. Appx. 611, 614 (5th Cir. 2005); Tenge v. Phillips Modern AG Co., 446 F.3d 903, 907 (8th Cir. 2006); Taken v. Oklahoma Corp. Comm'n, 125 F.3d 1366, 1369-70 (10th Cir. 1997); Womack v. Runyon, 147 F.3d 1298, 1300 (11th Cir. 1998). *But see* King v. Palmer, 778 F.2d 878, 880 (D.C. Cir. 1985) ("unlawful sex discrimination occurs whenever sex is 'for no legitimate reason a substantial factor in the discrimination'") (citations omitted).
18. EEOC Notice No. 915-048 (Jan. 12, 1990), available at http://www.eeoc.gov/policy/docs/sexualfavor.html (hereinafter "Policy Guidance"). Supreme Court Justice Clarence Thomas signed the 1990 Policy Guidance in his capacity as the EEOC Chairman.
19. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986) (citing the 1980 EEOC policy guidelines).
20. Policy Guidance, *supra* note 18.
21. *Id.* (favoritism based upon coerced sexual conduct may constitute quid pro quo harassment, and widespread favoritism may constitute hostile environment harassment).
22. 570 F. Supp. 1197 (D. Del. 1983).
23. *Id.* at 1199, quoting 29 C.F.R. § 1604.11(g).
24. 634 F. Supp. 571 (N.D. Cal. 1986).
25. *Id.* at 581.
26. *Id.* at 582.
27. Policy Guidance, *supra* note 18, *but see* Leibovitz v. New York City Transit Auth., 252 F.3d 179, 185 (2d Cir. 2001) (female manager distraught over the sexual harassment of other women in workplace had standing to bring suit under Title VII, but was denied recovery because she did not witness such harassment).
28. Policy Guidance, *supra* note 18.
29. 685 F. Supp. 1269 (D.D.C. 1988).
30. *Id.* at 1280.
31. *Id.* at 1278.
32. *Id.* at 1280. *Cf.*, Drinkwater v. Union Carbide Corp., 904 F.2d 853, 862 (3d Cir. 1990) (co-worker's claim of sexually hostile environment denied absent evidence that boss and paramour "flaunted" their sexual relationship, or that such relationships were "prevalent" in the workplace).
33. 36 Cal. 4th 446 (Cal. 2005).
34. *Id.* at 471-72.
35. *Id.* at 471.
36. *Compare* McGinnis v. Union Pac. Ry., 496 F.3d 868, 874 (8th Cir. 2007) (male dispatcher failed to allege claim for widespread sexual favoritism in the workplace where supervisor had sexual affair with female subordinate, treated women more favorably than men in terms of job opportunities and work shifts, and protected females who violated company rules).
37. 680 F. Supp. 2d 502 (S.D.N.Y. 2010).
38. *Id.* at 514.
39. *Id.* at 515.
40. 716 F.2d 1167 (7th Cir. 1983).
41. *Id.* at 1172.
42. Keppler v. Hinsdale Township High School Dist. 86, 715 F. Supp. 862 (N.D. Ill. 1989).
43. *Id.* at 869. *See also* Succar v. Dade County School Bd., 229 F.3d 1343, 1345 (11th Cir. 2000) (harassment of male teacher by coworker, a female teacher, was motivated by "contempt" following their failed relationship, not by gender).
44. 511 F.3d 225 (1st Cir. 2007).
45. *Id.* at 229.
46. 488 F.3d 739 (7th Cir. 2007).
47. *Id.* at 746.
48. *Id.* at 746-47. *See also* In re C.F. Smith & Assocs., Inc., 235 B.R. 153, 165 (D. Mass. 1999) (former paramour may recover against boss for sexual harassment in wake of soured relationship). ML

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constitutional warrantless entry at the time of the fire).
28. Jones v. Wildgen, 244 Fed. Appx. 859, 864 (10th Cir. 2007).
29. City of Canton v. Harris, 489 U.S. 378, 388 (1989).
30. *See* Elkins v. District of Columbia, 527 F. Supp.2d 36, 47 (D.D.C. 2007) ("Punitive damages, however, are available against the [officers] where their conduct was 'motivated by evil motive or intent, or when it involve[d] reckless or callous indifference to the federally protected rights of others,'" quoting *Smith v. Wade*, 461 U.S. 30, 56 (1983)). ML

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officers had a responsibility to exercise their own reasonable professional judgment.

The questions in this appeal are whether, under *Malley,* the officers were entitled to qualified immunity where they obtained a facially valid warrant, a district attorney approved the application, no factually on-point case law prohibited the search, and the alleged overbreadth in the warrant did not expand the scope of the search. Second, whether the *Malley/Leon* standards should be reconsidered or clarified in light of the lower courts' inability to apply them in accordance with their purpose of deterring police misconduct, resulting in the imposition of liability on officers for good-faith conduct and the improper exclusion of evidence in criminal cases.

The NRA and the ACLU have filed *amicus* briefs in support of the Millenders. The Court heard oral argument on December 05, 2011, with few clues as to how far it will go in allowing courts to second-guess probable cause determinations in this context. We'll know by June whether the Court will revise the existing standard. ML