Rental Registries: A New Orleans Case Study

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About Me

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- Zoning
- Healthy Homes
- Short Term Rental
- Special Events
- Alcoholic Beverage Outlets
- Adjudication

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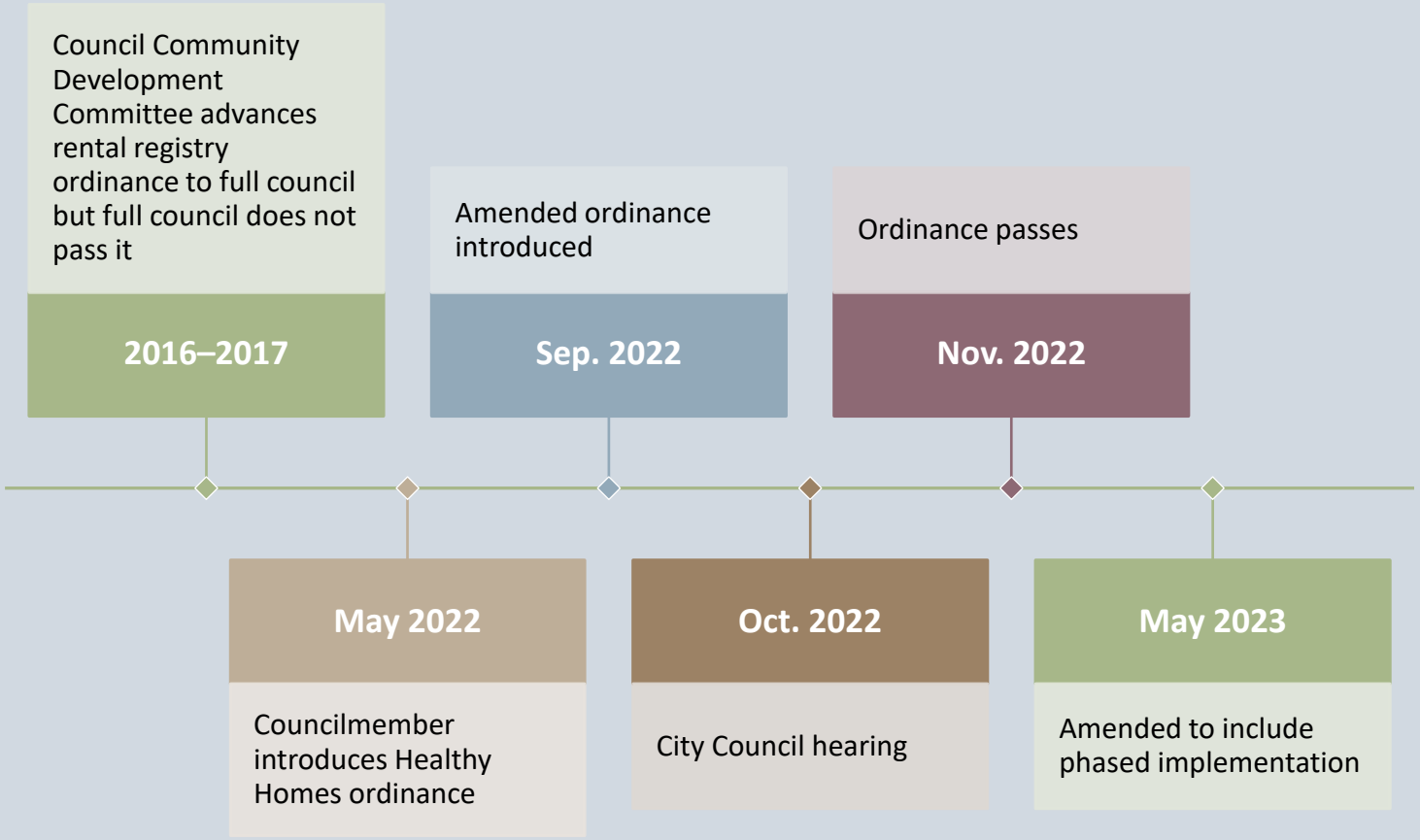
What is a rental registry?

A database of all properties in a given area offered for rent

Can include:

- Owner information
- Property management information
- Emergency contact information
- Inspection requirements and inspection results
- Occupancy data
- Rent charged
- Requirements that a property offer certain amenities or be in a specified condition

Timeline


Council Community Development Committee advances rental registry ordinance to full council but full council does not pass it
2016–2017
Amended ordinance introduced
Sep. 2022
Ordinance passes
Nov. 2022
May 2022
Councilmember introduces Healthy Homes ordinance
Oct. 2022
City Council hearing
May 2023
Amended to include phased implementation

Why Are These Laws So Contentious?

BENEFITS	DRAWBACKS
Helps to ensure quality housing stock	Unwieldy administration
Collects critical data about City housing stock	Perceived government overstep
Protects vulnerable tenants	Costly
Can be leveraged to address other problems	Unanticipated consequences

Policy Goals of Rental Registries

Quality	Ensure that housing stock is of adequate quality for habitation
Data	Gather information to develop housing and development policies
Police Power	Regulate the rental market
Leverage	Support other code enforcement activities
Protection	Protect vulnerable tenants from unscrupulous landlords

Practical Considerations

- Budget
- Data gaps
- Licensing infrastructure
- Enforcement capacity
- Proving rental relationships
- Removing housing units from the market

Legal Concerns

- Inspections
- Takings
- FHA Disparate Impact
- Right to privacy
- Land use prescription
- Preemption
- Public Records

New Orleans' Ordinance Overview

Requires annual registry from anyone seeking to lease residential property for any duration

Property may not be leased for residential purposes without Certificate of Compliance

Rental housing must comply with specified minimum standards

No fees for timely registration but late fees apply

Licenses are non-transferable

Licensee must swear and attest that they have inspected the property and found it to comply with specified minimum standards

City may require an inspection before issuing a Certificate of Compliance to ensure compliance with law

Non-compliance may lead to enforcement subject to City's administrative adjudication procedures

Includes non-retaliation provisions and anti-displacement funding

Phased implementation based on number of units on the property



Phased Implementation



Data Sharing

The City must make the following information publicly available:

- The address of the Rental Housing Unit;
- Information regarding past and pending inspections, including the result of any inspection;
- The date the Certificate of Compliance was received;
- Violations of the Minimum Rental Standards cited at the property;
- Revocations (if any) of Certificate of Compliance

Application Process

Voluntary registration

- City is establishing an online registration portal for landlords to comply with registration requirements
- Application will include attestations related to condition of the property
- Information entered by applicants will feed into the City's Land Management (LAMA) system, which controls all permitting and licensing citywide
- Information will be reviewed by an analyst to ensure compliance with the law and an analyst will issue the certificate
- LAMA system will feed information to ordinance-mandated database

Application Process

Landlords that don’t voluntarily register provide a challenge

Locating rental properties without information is difficult

- To assist with this, the City will phase implementation, starting with the largest complexes which are the most visible
- Initial approach will be reaching out to educate regarding the need to register and providing technical assistance with the process

Recalcitrant landlords may require enforcement actions

Enforcement for Landlords Unwilling to Register

This would include bringing a code enforcement action

Elements of the City's case: violation of CCNO 26-660 ("It shall be unlawful for any person who does not possess a valid Certificate of Compliance to permit occupancy of a Rental Housing Unit in Orleans Parish.")

- 1. The housing unit meets the definition of a Rental Housing Unit ("a room, or group of rooms, providing complete, independent living facilities, including permanent provisions for living, sleeping, eating, cooking, and sanitation for one or more persons that is or will be occupied by a lessee for residential purposes in exchange for any form of consideration"
- 2. The Rental Housing Unit is being occupied
- 3. There is no valid Certificate of Compliance

Biggest challenge: proving the existence of a lease

- City has subpoena power
- Many leases are oral or tacitly reconducted

Registration Enforcement Practical Issues

Significant outlay of city resources – attorneys, adjudication teams, inspectors, hearing officers

- Many code enforcement cases can proceed without assistance from City attorneys; however, these cases will likely involve legal arguments related to the existence of a landlord/tenant relationship and conflicting testimony that will be best handled by attorneys rather than laypersons

Maximum fine per violation under state law: $1000

While a separate violation may be issued for each day the property is in violation of 26-660, each violation must be separately proved

City adjudication system is already backlogged, so cases cannot be brought very frequently

Need to ensure that these fees are not a nuisance or “cost of doing business”

Finding Unregistered Landlords Is a Problem

Large apartment complexes are very clearly rental units, but smaller properties are much more difficult to ascertain

Law requires landlords provide tenants with a copy of their Certificate of Compliance, so tenants can report their landlords

Neighbor reporting

Data sources we can leverage:

- Homestead exemption records
- ACS data
- Short term rental licenses
- “For lease” advertising
- Tolemi Building Blocks and similar software solutions

Practical Back-End Problems with Registration

Addressing

Verifying compliance with other laws—CCNO 26-661(d): “An applicant will not be eligible for a Certificate of Compliance if any of the following conditions exist: (1) There are delinquent property taxes on the subject property; (2) There are outstanding fines on the subject property; (3) There are open permits that would render the unit unfit for habitation; or (4) There are open violations on the subject property related to electrical or mechanical code violations or to work without permits.”

- Zoning
- Building Code: Open permits and violations will show in the same system and data is available to analysts
- Unpaid code enforcement fines are visible in the same system and available to analysts
- The City’s property tax payment status is visible online and available to analysts

Zoning Issues

Due to the age of the New Orleans housing stock, the City has little to no records related to many properties and most housing was built before the current CZO

What would be considered illegal conversions today—adding a dwelling unit to a structure without permits or converting an accessory structure into a dwelling unit without permits—was common practice for decades

20.3.W **DWELLING, ESTABLISHED MULTI-FAMILY AND DWELLING, ESTABLISHED TWO-FAMILY**

1. An established two family or multi-family use must meet the following requirements, as confirmed by Safety and Permits:

    a. The structure must have a documented legal history of two units for a two family dwelling or 4 or fewer units for a multi-family dwelling, as confirmed by Safety and Permits, where documented legal history is determined based on evidence of dwelling units which currently exist but may not be operating on a given property; OR

    b. The structure has a documented legal history of multi-family residential use providing more than 4 units, but reduces the number of dwelling units to 4 or fewer, where documented legal history is based on dwelling units which currently exist by may not be operating on a given property; OR

    c. The established multi-family structure with any number of units is within a zoning district where the Established Multi-Family use chart lists the use only as "P" - a permitted use; OR

    d. Legal, nonconforming status has been confirmed by the Department of Safety & Permits.

2. The decision to authorize an established two- or multi-family dwelling that does not meet any of the conditions in Section 20.3.W.1 shall be granted or denied based on the following considerations:

    a. The extent to which the physical character of the structure is indicative of a legal history of two- or multi-family residential use, respectively.

    b. The documentation of a legal history of two- or multi-family residential use, respectively.

Minimum Rental Standards

Operable fire and smoke detection system and alarm

One or more bathtubs or showers, toilets and kitchen sinks in good working order

All kitchen sinks, bathtubs and showers have hot and cold running water

Water heating facilities in good working order and capable of providing adequate water at a minimum temperature of 110°F

Heating facilities capable of maintaining a minimum room temperature of 68°F

Cooling system capable of maintaining a maximum bedroom temperature of 80°F 3’ above the floor and 2’ from exterior walls

Minimum Rental Standards (continued)

Properly maintained electrical system

Appliances provided by lessor are properly installed, operable and maintained in safe working condition

Roofs, windows and exterior doors adequate to prevent dampness or deterioration in walls or interior portions

No evidence of mold in unit

Interior surfaces maintained free of significant cracking or decay and holes are sealed

Housing unit and exterior property are free from visible rodent harborage and infestation

Setting Clear Expectations

Department of Safety and Permits will promulgate rules and regulations standardizing testing and inspection procedures

- Will include the exact specifications that must be met consistent with accepted home inspection practices, including specifying equipment to be used to measure
- Will include the checklists to be used by inspectors

Workability of these standards have been called into question, especially regarding temperature maximums and minimums, and may need revision

Gaining Access

Ordinance does not mandate inspections so interior inspections must occur with consent of landlord and/or tenant or with a warrant

CCNO 26-15:*103.6 Right of Entry.* Where it is necessary to make an inspection to enforce the provisions of this code, or where the Director has reasonable cause to believe that there exists in a structure or upon a premises a condition which is contrary to or in violation of this code which makes the structure or premises unsafe, dangerous or hazardous, the Director is authorized to enter the structure or premises at reasonable times to inspect or to perform the duties imposed by this code, provided that if such structure or premises be occupied that credentials be presented to the occupant and entry requested. If such structure or premises is unoccupied, the Director shall first make a reasonable effort to locate the owner or other person having charge or control of the structure or premises and request entry. If entry is refused, the Director shall have recourse to the remedies provided by law to secure entry.

Avoiding Finger Pointing

All co-owners must be listed on the application for the Certificate of Compliance and are solidarily liable for violations

All sublessors and property managers must be listed on the application for the Certificate of Compliance and are solidarily liable for violations

Enforcement Options – Fines

Any violation subject to fees not to exceed maximum set by state law ($1,000)

Each day the violation exists is a separate and distinct offense

Multiple violations may be noticed and heard in a single administrative hearing

Unpaid fines are filed as a lien against the property and added to the property owner's property tax bill and the liens prime their property taxes

Enforcement Options – Loss of License



"The department may rescind any Certificate of Compliance or renewal thereof issued in error; on the basis of incorrect, inaccurate or false statements; or in violation of any law." CCNO 26-661(g)



Hearing officer may order revocation of the Certificate of Compliance "for repeated or intentional violations of this Article or in circumstances where occupancy of a Rental Housing Unit would be deleterious to the health and safety of its residents." CCNO 26-671(a)



"If the revocation of a Certificate of Compliance would result in the displacement of an existing lessee or occupant, the lessee of the unit shall be entitled to notice of the administrative hearing where revocation is decided and an opportunity to be heard, as well as 60 days to vacate the premises, unless exigent circumstances require a shorter period." CCNO 26-671(b)

Enforcement Options – Emergency Procedures (CCNO 26-242)

(a) In any emergency where life, health, property or public safety is in imminent danger, the code official may take any necessary action(s) to protect the endangered life, health, property or public safety without complying with the notice and hearing provisions of Chapter 6, Article II, of the Code of the City of New Orleans and of this Code.

(b) An imminent danger to life, health, property or public safety exists whenever there is a substantial likelihood that loss of life, health, property or public safety will occur prior to fully complying with the notice and hearing provisions provided in Chapter 6, Article II, of the Code of the City of New Orleans and of this Code.

An imminent danger to life, health, property or public safety exists whenever there is an extreme accumulation of household hazardous waste, including but not limited to paints, cleaners, oils, batteries, gasoline, and pesticides, or other leftover household products that can catch fire, react, or explode under certain circumstances, or that are corrosive or toxic.

(c) If a determination is made that an emergency exists, when practical, the code official shall immediately cause a notice of such determination to be posted conspicuously on the structure or at the entrance of the premises. The notice shall state the emergency that exists, that imminent action(s) may be taken to ameliorate the dangerous or unsafe condition(s) that created the emergency, and that these actions will be taken without further notice or a hearing. The notice shall include the name and contact information of the code official.

(d) In all emergencies the code official must cause the dangerous or unsafe condition(s) that created the emergency to be photographed before any work or operation is begun to eliminate the dangerous or unsafe condition.

Risks to Tenants

Very real danger of landlord retaliating against a tenant reporting complaints or cooperating with an investigation

Louisiana state law is very favorable to landlords and offers few protections to tenants

“Even when landlords are not responsive to requests for repairs, the fear of being evicted or blacklisted for reporting problems keeps many tenants from speaking up. Renters who were interviewed for this story, in fact, did not want their names disclosed for fear of retaliation. All of them related stories of issues running the gamut from leaking plumbing; holes in floors, walls and ceilings; broken or nonexistent appliances; mold, rot, insect and vermin infestations.” – Dwayne Fatherree, “Unhealthy Homes: ‘Gutted’ New Orleans Ordinance Allows Landlords to Neglect Run-Down Properties;” Southern Poverty Law Center, January 13, 2023; available at https://www.splcenter.org/news/2023/01/13/new-orleans-ordinance-neglected-rental-properties

Non-Retaliation Provisions

Lessees have the right to “protected activity” including:

- Notifying lessor of any violation of the ordinance;
- Requesting corrective action;
- Notifying regulatory authorities or members of the public of violations;
- Providing testimony in court or administrative proceedings.

Non-Retaliation Provisions

Prohibited acts of retaliation include but aren't limited to the following "where such acts are motivated by the good-faith exercise of protected activity":

- Unlawful termination of a lease
- Decreasing services
- Increasing the rent or fees
- Bringing or threatening to bring a lawsuit against a lessee for possession
- Refusing to renew a lease

Rebuttable Presumption of Retaliation

If the landlord does any of the listed activities within 6 months of a lessee engaging in protected activity and there is probable cause to believe a violation was committed, it creates a rebuttable presumption of retaliation

Lessor can overcome the presumption for increasing rent or reducing services:

- Under an escalation clause in a written lease;
- As part of a pattern of rent increases or service reductions for an entire residential building or complex if they can show by a preponderance of the evidence that they had justification for the activity and would have proceeded the same way, at the same time, whether or not the protected activity occurred;
- As part of an increase due to participation in a state or federal program; or
- By showing that the lessee failed to make reasonable attempts to notify the lessor of the needed repair

Rebuttable Presumption of Repair

If the landlord does any of the listed activities within 6 months of a lessee engaging in protected activity and there is probable cause to believe a violation was committed, it creates a rebuttable presumption of retaliation

Lessor can overcome the presumption for a dispossessory action or lease or rental agreement termination if:

- Lessee is delinquent in rent;
- Lessee or an invitee of lessee intentionally damages property or threatens the personal safety of the lessor, their agent/employees, or another tenant;
- Lessee otherwise breached the agreement; or
- By showing the lessee failed to make reasonable attempts to notify the lessor of the needed repair.

Do the Protections Go Far Enough?

"While the ordinance as enacted does include protection from landlord retaliation against tenants who file complaints with the city, it also depends on those tenants risking that blowback to report unsafe or unsanitary conditions. In practice, this does not offer much protection to renters, because if a renter is behind on paying their rent or technically not in compliance with other provisions of their lease, they can still face retaliation for those reasons."

–Dwayne Fatherree, "Unhealthy Homes: 'Gutted' New Orleans Ordinance Allows Landlords to Neglect Run-Down Properties;" Southern Poverty Law Center, January 13, 2023; available at https://www.splcenter.org/news/2023/01/13/new-orleans-ordinance-neglected-rental-properties

Anti-Displacement Fund

Creates Renter Anti-Displacement Fund

Grants from the RADF subsidize alternate housing for renters displaced as a result of lessor's failure to comply

Creates a legal obligation from the landlord to the City which must be satisfied before the landlord may secure or renew a Certificate of Compliance

Funded by code enforcement judgments from ordinance violations

Model City: Minneapolis

License required for each dwelling unit

Requires joint and several liability between owners and property managers

Application must identify a natural person to serve as contact

Requires first-time managers to attend a property management class

Provisional licenses issued until the full license can be issued

- Provisional license: applicant applied and paid fees
- Full license: dwelling has been inspected and found to comply with minimum standards

Provides criteria for prioritizing inspections

Provides penalties for failure to comply which may include revocation of license and subsequent requirement that tenants vacate the building

- Includes tenant relocation assistance program
- Includes appeal procedure

The Inspection Question

Many cities (like Minneapolis) require proactive and regular inspections

New Orleans original draft of this ordinance included these:

- All Rental Housing Units required “periodic” inspections to ensure compliance with minimum standards
- Lessor’s failure to allow a periodic inspection is itself a violation of the ordinance and constitutes prima facie evidence that the unit is in violation of the minimum rental standards; may serve as grounds for revocation of Certificate of Compliance
- Units on lots with 4 or fewer rental units with current Certificates and owned by natural persons were exempt
- New construction or new substantially renovated units were exempt
- Included limits on the number of units that could be periodically inspected on each lot in a given year
- Lessee could refuse inspection

The Inspection Question


Safety standards measure for New Orleans rentals passes, but advocates call it 'gutted'

Carly Berlin, WWNO, November 3, 2022; available at https://www.wwno.org/news/2022-11-03/safety-standards-measure-for-new-orleans-rentals-passes-but-advocates-call-it-gutted

The Inspection Question

Another tenant advocate said she was no longer able to support the measure. "You've gutted it, you've changed it, you made it less-than," said Andreanecia Morris, executive director of the group HousingNOLA. "It's not good enough, council member Morrell."

"'Gutted' or a 'step forward'? New Orleans City Council approves rental registry law," Matt Sledge, New Orleans Times Picayune, November 3, 2022; available at https://www.nola.com/news/politics/gutted-or-a-step-forward-new-orleans-city-council-approves-rental-registry-law/article_62e6a26c-5bcb-11ed-a972-7f40de6071eb.html

The Inspection Question

"[A]bsent consent, exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker." *City of Los Angeles, Calif. v. Patel*, 576 U.S. 409, 420, 135 S. Ct. 2443, 2452, 192 L. Ed. 2d 435 (2015)

"[T]he Court finds that the Portsmouth RDC violates the Fourth Amendment insofar as it authorizes warrantless administrative inspections. It is undisputed that the RDC affords no warrant procedure or other mechanism for precompliance review. As in the above cases, the owners and/or tenants of rental properties in Portsmouth are thus faced with the choice of consenting to the warrantless inspection or facing criminal charges, a result the Supreme Court has expressly disavowed under the Fourth Amendment." *Baker v. City of Portsmouth, No. 1*: 14CV5L2, 2015 WL 5822659, at *5 (S.D. Ohio Oct. 1, 2015).

Where "a property owner refusing an inspection is subject to civil infractions and denial of a certificate of compliance without the enforcing officials first obtaining a warrant or other process," there is likely a 4th Amendment violation. *Landon v. City of Flint*, No. CV 16-11061, 2016 WL 7661390, at *5 (E.D. Mich. Nov. 30, 2016), *report and recommendation adopted,* No. CV 16-11061, 2017 WL 345854 (E.D. Mich. Jan. 24, 2017).

Takings

Property owners whose licenses are revoked lose the ability to rent their property. Some have alleged this is a regulatory taking.

Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)—Courts considering takings claims must review:

- The economic impact of the regulation on the person(s) suffering the loss,
- The extent to which the regulation interferes with distinct investment backed expectations, and
- The character of the government action.

Minneapolis's Rental Registry "serves a public harm prevention purpose, and, properly implemented, it will likely be advantageous to all involved. Accordingly, we see no taking here." *Zeman v. City of Minneapolis*, 552 N.W.2d 548, 555 (1996).

Fair Housing Act Disparate Impact Issues

Plaintiffs alleged that Minneapolis's pursuit of code enforcement proceedings against for-profit low-income housing providers disparately impacted individuals protected by the FHA.

"A plaintiff must, at the very least, point to an 'artificial, arbitrary, and unnecessary' policy causing the problematic disparity." *Ellis v. City of Minneapolis*, 860 F. 3d 1106, 1114 (2017); *citing Texas Dept. of Housing & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015).

Government entities "must not be prevented from achieving legitimate objectives, such as ensuring compliance with health and safety codes." *Inclusive Communities*, 576 U.S. at 544.

Right to Privacy

Rental registry ordinance that requires applicants to include the names, ages and relationships, if any, to the owner of the premises of the people residing in the dwelling unit unconstitutionally limits the tenants' right to privacy and are not narrowly tailored to achieve the government's compelling interest. *Anthony v. Town of North Hempstead*, 2. A.D.3d 378, 379 (2003).

Code Violation Statute of Limitations

La. R.S. 9:5626: Zoning and building violations prescribe after 5 years in most places, or 10 years in historic districts

- Prescription is the Napoleonic Code version of a statute of limitations
- La. R.S. 9:5626(A)(3) starts the clock on the date the municipality "first had been actually notified in writing of such violation."

Rental registry application would certainly start this clock

- Requires the City to quickly move to assess conformity with zoning laws and building code issues
- Creates capacity issues within the Department of Safety and Permits

Preemption

In no event may a local government do any of the following:

- (i) adopt or enforce any ordinance that would require any owner or manager of rental property to obtain any permit or permission under Article 11 or Article 12 of this Chapter from the local government to lease or rent residential real property or to register rental property with the local government, except for those individual properties that have more than four verified violations in a rolling 12-month period or two or more verified violations in a rolling 30-day period, or upon the property being identified within the top ten percent (10%) of properties with crime or disorder problems as set forth in a local ordinance,
- (ii) require that an owner or manager of residential rental property enroll or participate in any governmental program as a condition of obtaining a certificate of occupancy …

NC ST 160D-1207(c)

Public Records Laws

Protecting vulnerable tenants may be affected by public records requirements

“In connection with any code enforcement case or proceeding, no person shall be required to disclose by way of discovery, testimony, public record request, or otherwise a privileged communication, or be required to produce under subpoena or otherwise any records, documentary evidence, opinions, or decisions relating to such privileged communication.” – La. R.S. 33:4891(B)

Questions?

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