

CASE NO. A10-0332

OFFICE OF
APPELLATE COURTS

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**STATE OF MINNESOTA
IN COURT OF APPEALS**

Robert McCaughtry, et al.,

Appellants,

vs.

City of Red Wing,

Respondent.

**BRIEF OF *AMICUS CURIAE*
LEAGUE OF MINNESOTA CITIES**

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STATEMENT OF THE LEGAL ISSUE

Minnesota law provides that an ordinance is facially unconstitutional only if there is no set of circumstances under which it could be constitutionally applied. Can this difficult test be met for an ordinance that establishes a neutral process for routine inspections of residential rental property and that authorizes city employees to seek an administrative search warrant from a judicial officer when consent to an inspection is refused without specifying the type of probable cause required?

STATEMENT OF THE IDENTITY OF *AMICUS CURIAE*

The League of Minnesota Cities (League) has a voluntary membership of 830 out of 853 Minnesota cities including the city of Red Wing (City).¹ The League represents the common interests of Minnesota cities before judicial courts and other governmental bodies and provides a variety of services to its members including information, education, training, policy-development, risk-management, and advocacy services. The League's mission is to promote excellence in local government through effective advocacy, expert analysis, and trusted guidance for all Minnesota cities.

The League has a public interest in this appeal because it will directly impact cities' ability to protect the health, safety, and welfare of thousands of rental-housing tenants throughout Minnesota. The League also has a public interest in ensuring that courts properly enforce the difficult test that a challenger must meet before a city ordinance is invalidated under a facial challenge to its constitutionality.

STATEMENT OF THE CASE AND FACTS

The League concurs with the City's statement of the case and facts.

INTRODUCTION

The Minnesota Supreme Court concluded that this appeal presents a justiciable controversy and remanded for this Court to consider a "facial challenge" to the constitutionality of the City's Rental Dwelling Licensing Code (Code). *McCaughtry v.*

¹ The League certifies under Minn. R. Civ. App. P. 129.03 that this brief was not authored in whole or in part by counsel for either party to this appeal and that no other person or entity besides the League made a monetary contribution to its preparation or submission.

City of Red Wing, ___ N.W.2d ___, No. A10-0332, 2011 Minn. LEXIS 768 at 21 (Minn. Dec. 28, 2011). In a case of first impression in the context of rental-housing inspections, Appellants claim that Article 1, Section 10 of the Minnesota Constitution provides more protection for privacy rights than does the identical language of the Fourth Amendment to the U.S. Constitution. In addition, Appellants claim that the Minnesota Constitution prohibits what the U.S. Supreme Court has already concluded that the U.S. Constitution authorizes—the issuance of administrative search warrants if “reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling.” *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 535-36 (1967); *Search Warrant of Columbia Heights v. Rozman*, 586 N.W.2d 273, 276-277 (Minn. Ct. App. 1998), *rev. denied* (Minn. Jan. 21, 1999) (treating *Camara* as governing law). Appellants ask this Court to ignore its limitations as an error-correcting court, and instead, ask it to reject the U.S. Supreme Court’s holding in *Camara*, weigh competing public policies, and make a dramatic change in Minnesota law by expanding the Minnesota Constitution’s interpretation to prohibit the use of administrative search warrants in the absence of individualized probable cause to believe that a housing-code violation exists.

The City’s brief demonstrates why its Code is facially constitutional under the Minnesota Constitution. The League concurs with the City’s legal arguments and will not repeat them here. Instead, this brief discusses the statewide significance of this case and evaluates the public policies at stake from a broader municipal point of view.

LEGAL ARGUMENT

I. THIS CASE WILL HAVE A SIGNIFICANT, STATEWIDE IMPACT ON MINNESOTA CITIES.

A. If individualized probable cause is required for administrative search warrants, it will severely impair the effectiveness of rental-housing standards that are adopted to protect the health, safety, and welfare of tenants throughout Minnesota.

This appeal will have a significant, statewide impact on Minnesota cities. Cities throughout Minnesota have adopted housing codes to protect the health, safety, and welfare of their residents. Housing codes have a long history and are common today, having been adopted in every state at either a state-wide or local level. *See, e.g.*, Int'l Code Council, *Int'l Code Adoptions*, <http://www.iccsafe.org/gr/pages/adoptions.aspx> (last visited Feb. 23, 2012). In fact, our own state legislature has recognized the importance of local housing codes by defining a “violation” of a landlord’s legal obligations to include a violation of any “city health, safety, housing, building, fire prevention, or housing-maintenance code applicable to the building.” Minn. Stat. § 504B.001, subd. 14.

Minnesota cities commonly adopt housing ordinances that establish minimum housing standards for rental property, provide for routine inspections to enforce the standards, and authorize city employees to seek administrative search warrants from a judicial officer if consent to such an inspection is refused. Large urban cities like Minneapolis, for example, have adopted this type of ordinance. Minneapolis, Minn., Code of Ordinances, Title 12, Chapter 244. Likewise, cities with a large number of college students like the city of Morris have adopted this type of ordinance. *See Cardinal*

Estates, Inc. v. City of Morris, No. CX-02-1505, 2003 Minn. App. LEXIS 435 (Minn. Ct. App. Apr. 15, 2003), *rev. denied* (Minn. June 25, 2003) (unpublished decision) (upholding under a 4th Amendment analysis the constitutionality of the city's housing ordinance that authorized inspections of residential rental housing without requiring individualized probable cause). In addition, cities in greater Minnesota like the City in this case as well as suburban cities in the metropolitan area like Columbia Heights have adopted this type of ordinance. Columbia Heights, Minn., Code of Ordinances, Chapter 5A. In short, cities throughout Minnesota have a public interest either in preserving the constitutionality of their current housing ordinances or in preserving their authority to adopt this type of ordinance in the future.

If the Minnesota Constitution's interpretation is expanded to require individualized probable cause for administrative search warrants, it will seriously impair the effectiveness of rental-housing standards throughout our state. Cities with rental-housing standards commonly adopt inspection requirements because inspections are the most effective way to ensure compliance with the standards. If cities no longer have the option of seeking administrative search warrants to enforce routine inspections, there will be no such thing as mandatory inspections; and as a result, there will be no effective way to ensure anything even approaching universal compliance with rental-housing standards. *Camara*, 387 U.S. at 535-536 (noting "[t]here is 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"). If routine rental-housing inspections are not mandatory, fewer

inspections will occur and fewer violations of rental-housing standards will be caught and corrected. This will negatively affect thousands of rental-housing tenants throughout our state.

Tenants are a vulnerable population that generally does not have the time or knowledge to effectively enforce rental-housing standards on their own. It isn't realistic, for example, to expect that tenants in Minneapolis will have the time or ability to acquire the knowledge of a housing inspector so that they will recognize when their electrical outlets or ventilation systems violate the city's housing code. Likewise, it isn't realistic to expect tenants in Columbia Heights to recognize when the heating and mechanical equipment in their rental housing violates the city's housing code or to expect them to be willing to report housing-code violations without fear for repercussions (whether real or imagined) for reporting on their landlords. In fact, courts have recognized that there are a variety of reasons why rental-housing tenants do not have leverage to require landlords to address problems with habitability standards on their own.

Tenants have very little leverage to enforce demands for better housing. Various impediments to competition in the rental housing market, such as racial and class discrimination and standardized form leases, mean that landlords place tenants in a take it or leave it situation. The increasingly severe shortage of adequate housing further increases the landlord's bargaining power and escalates the need for maintaining and improving the existing stock.

Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1079 (D.C. Cir. 1970) (citations omitted) (landmark case establishing an implied warranty of habitability in residential leases measured by the standard set out in the Housing Regulations for the District of Columbia); *Fritz v. Warthen*, 298 Minn. 54, 59, 213 N.W.2d 339, 342 (Minn. 1973)

(recognizing that “[t]he legislative objective in enacting the implied covenants of habitability is clearly to assure adequate and tenantable housing with the state”). Our own state legislature has recognized the inequality of bargaining power between landlords and tenants and has responded by adopting a whole chapter of state statutes that includes many legal protections for tenants. *See, e.g.*, Minn. Stat. § 504B.161 (codification of a landlord’s covenant of habitability including the covenant to “maintain the premises in compliance with the applicable health and safety laws of the state, and of the local units of government where the premises are located”).

And while it may be true that there are additional tenant remedies and resources since *Camara* was decided in 1967, it does not change the fact that there is still a vital need for effective enforcement of rental-housing standards. In fact, there are several reasons why this enforcement is even more important today including the fact that our state’s housing stock has aged an additional 45 years since *Camara* was decided, the fact that as our state population continues to grow so too will the number of rental-housing tenants, the fact that the number of tenants in our state that do not speak English continues to grow and these tenants face additional hurdles in identifying and reporting housing-code violations and in accessing tenant resources, and the fact that our sluggish economy has increased both the number of tenants and the number of first-time, inexperienced landlords attempting to raise revenue in hard economic times.

It is also important to remember that—contrary to Appellants’ argument—when a court issues an administrative search warrant, it does not do so because it has concluded that a law-abiding tenant has a diminished expectation of privacy. Supplemental Brief of

Appellants at 12-15. Instead, a court issues an administrative search warrant because it has recognized that there is a legitimate health-and-safety purpose for the inspection, that it is being carried out under a legitimate regulatory scheme, and that it is not intended to uncover criminal wrongdoing by the tenant, but rather, is intended to prevent unsafe housing conditions. Tenants do not have a diminished privacy right, but rather, their privacy rights are being balanced against the government's legitimate interest in making a legislative determination about how best to protect the health, safety, and welfare of its residents.

There are undoubtedly good landlords in Minnesota. But there are also undoubtedly landlords (both good and bad) that will quickly understand that there is no such thing as "mandatory" rental-housing inspections if administrative search warrants are no longer available as an enforcement tool. Many of these landlords will logically decide that it is not in their financial interest to cooperate with housing inspections because they will have to pay to correct any housing-code violations that are discovered. This is especially a concern given the many "absentee" landlords in our state that already have less of an incentive to maintain their property in compliance with housing standards because they don't live in the property that they are renting and they may not even live in the same city or state where their rental property is located. *See, e.g., Dome Realty, Inc. v. City of Paterson*, 416 A.2d 334, 351-352 (N.J. 1980) (noting that landlords who live in their buildings have greater incentive to maintain them in accord with minimum standards of habitability). In this case, for example, the City adopted its Code after performing a housing study that found significant problems with absentee landlords and

violations of codes. *McCaughtry v. City of Red Wing*, ___ N.W.2d ___, No. A10-0332, 2011 Minn. Lexis 768 at 3 (Minn. Dec. 28, 2011).

B. All Minnesota cities have a public interest in ensuring that courts properly enforce the difficult test that must be met to invalidate an ordinance on a facial challenge to its constitutionality.

This case will also have a significant, statewide impact because all Minnesota cities have a public interest in ensuring that courts properly enforce the difficult test that must be met before a city ordinance is invalidated under a facial challenge to its constitutionality. It is well established that courts must presume that an ordinance is valid and that the burden of proving that it is unconstitutional is on the person challenging the ordinance. *City of St. Paul v. Dalsin*, 245 Minn. 325, 329, 71 N.W.2d 855, 858 (Minn. 1955); *City of St. Paul v. Kekedakis*, 293 Minn. 334, 336, 199 N.W.2d 151, 153 (Minn. 1972); *Arcadia Dev. Corp. v. City of Bloomington*, 552 N.W.2d 281, 285 (Minn. Ct. App. 1996). But a facial challenger must also satisfy the difficult test of establishing that there is no set of circumstances under which the challenged ordinance could be constitutionally applied—a challenge that courts have characterized as the “most difficult” to mount successfully. *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Minn. Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683, 688 (Minn. 2009). All Minnesota cities have a public interest in ensuring that courts properly enforce this difficult test because a successful facial challenge imposes the severe remedy of striking down a city ordinance in its entirety. This difficult test cannot be met in this case.

Even if this Court were to assume, for example, that individualized probable cause is required, the City’s Code is not unconstitutional on its face because there is an obvious

set of circumstances under which it could be constitutionally applied. The Code doesn't address what type of probable cause is required for the issuance of an administrative warrant. Instead the Code simply provides that if consent is withheld, the City may "seek permission, from a judicial officer through an administrative warrant, for its enforcement officer or his or her agents to conduct an inspection" and provides that "[n]othing in this Code shall limit or constrain the authority of the judicial officer to condition or limit the scope of the administrative warrant." Code § 4.04, subd. 1(C)(9). As a result, it is possible to imagine a set of circumstances where a judge reviewing an application for an administrative search warrant could decide to require individualized probable cause under the Code and the City could decide to voluntarily comply with this requirement even though it believes a lesser standard of probable cause is constitutional. The existence of this fact scenario demonstrates that Appellants' facial challenge must fail. *City of Rochester v. Bemel*, 181 Minn. 596, 599-600, 233 N.W. 862, 863 (Minn. 1930) (ordinances must be construed, if reasonably possible, to avoid their unconstitutionality).

Likewise, despite Appellants' arguments to the contrary, the fact that the Code doesn't specify the type of probable cause required or impose standards that a judicial officer must follow in making a probable-cause determination does not make it facially unconstitutional. Supplemental Brief of Appellants at 4. It is true that federal law requires housing codes to contain "standards" before an administrative search warrant can be issued, but the required standards relate to the process for selecting properties for inspections not to the process for making probable-cause determinations. Indeed, the *Camara* Court expressly held that probable cause to issue an administrative search

warrant for a rental-housing inspection “must exist if reasonable *legislative or administrative standards for conducting an area inspection* are satisfied with respect to a particular dwelling.” 387 U.S. at 538 (emphasis added). The *Camara* Court reasoned that the standards would vary with the municipal program being enforced, but that they could 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.” *Id.* In short, there simply is no federal constitutional requirement that housing ordinances must contain probable-cause standards.

Likewise, there is no state constitutional requirement to this effect. In fact, the Minnesota Constitution simply provides that “no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.” Minn. Const. art. I, § 10. It does not impose a requirement that statutes and ordinances must specify what type of probable cause is required for their enforcement or must establish standards that must be used to by judicial officers when making probable-cause determinations.

In fact, even statutes and ordinances that impose *criminal* penalties are not required to contain probable-cause standards. A review of the state criminal code, for example, confirms that these statutes do not establish probable-cause standards for their enforcement. Minn. Stat. ch. 609. This is because probable-cause determinations are an independent function of the court. *State v. Kahn*, 555 N.W.2d 15, 17 (Minn. Ct. App. 1996). Indeed, the purpose of the warrant requirement is to provide an independent judicial officer with the discretion needed to conduct an independent assessment of the

available evidence when making a probable-cause determination to protect citizens from unreasonable search and seizure. *State v. Nolting*, 312 Minn. 449, 452, 254 N.W.2d 340, 343 (Minn. 1977). The U.S. Supreme Court has recognized that “probable cause is a fluid concept...not readily, or even usefully, reduced to a neat set of legal rules.” *Illinois v. Gates*, 462 U.S. 213, 232 (1983). Likewise, our own Supreme Court has confirmed that “[t]here are no set rules or established formulae for determining probable cause or reasonable cause” and that “[e]ach case must be determined upon its own facts.” *State v. Bagley*, 286 Minn. 180, 191, 175 N.W.2d 448, 455 (Minn. 1970).

This Court should not change Minnesota law to require housing ordinances to contain probable-cause standards because it would be inconsistent with the plain language of the Minnesota Constitution, it would be a dramatic change from well-established law, and it would be bad public policy. Likewise, it would be bad public policy to expand the Minnesota Constitution’s interpretation to prohibit the use of administrative search warrants in the absence of individualized probable cause to believe that a housing-code violation exists.

II. It would be bad public policy to expand the Minnesota Constitution’s interpretation to prohibit the use of administrative search warrants in the absence of individualized probable cause to believe that a housing-code violation exists.

A. Such an expansion would conflict with this Court’s limited role as an error-correcting court.

It would be bad public policy for this Court to expand the Minnesota Constitution’s interpretation to prohibit the use of administrative in the absence of individualized probable cause to believe a housing-code violation exists because it would

conflict with this Court’s own precedent and its limited role as an error-correcting court. See Sam Hanson, *The Minnesota Court of Appeals: Arguing to, and Limitation of, an Error-Correcting Court*, Wm. Mitchell L. Rev., Vol. 35, No. 4 (2009). Indeed, this Court has consistently recognized that in the absence of precedent it is not appropriate for it to construe a provision of the Minnesota Constitution more expansively than the U.S. Supreme Court has construed its federal counterpart. The court of appeals, for example, has declined to consider the issue of whether the Minnesota constitutional protection against self-incrimination should be expanded to preclude admission of evidence of the refusal to submit to alcohol testing made admissible by statute because the U.S. Supreme Court had already held that such a statute did not violate the Fifth Amendment of the U.S. Constitution. *State v. Berge*, 464 N.W.2d 595, 597 (Minn. Ct. App. 1990). The court of appeals declined the invitation to consider this issue because it concluded that it was the “province of the ‘state supreme court’ to extend protection of the state constitution beyond that offered by the United States Supreme Court.” *Id.* Likewise, the court of appeals has also declined an invitation to extend the application of the Minnesota Constitution's Confrontation Clause to sentencing-jury proceedings reasoning that the task of extending existing law falls to the Minnesota Supreme Court or to the legislature, and not to an error-correcting court like itself. *State v. Rodriguez*, 738 N.W.2d 422, 432 (Minn. Ct. App. 2007).

Appellants acknowledge that this Court’s statement about its limited role as an error-correcting court in *Rodriguez* is governing law. Brief of Appellants in Court of Appeals at 37. Therefore, they have stretched to characterize decisions by the Minnesota

Supreme Court that involve significantly different facts in significantly different contexts as providing the required “precedent” that this Court can “follow.” But Appellants’ attempts fall flat because there is no way to disguise the fact that there simply is no precedent from our Supreme Court on the specific issue of whether the Minnesota Constitution’s interpretation should be expanded to prohibit the use of administrative search warrants in the context of rental-housing inspections in the absence of individualized probable cause.

The Minnesota Supreme Court recently addressed the issue of what constitutes precedent when it rejected a constitutional challenge to a municipal election procedure authorizing voters to rank multiple candidates in Minneapolis. *Minn. Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683 (Minn. 2009). In this case, the Appellants argued that a prior decision by the Minnesota Supreme Court that overturned as unconstitutional the city of Duluth’s ordinance that also authorized voters to rank multiple candidates was binding precedent. But the Supreme Court declined to follow the Duluth case finding that it was not precedent because it involved significantly different facts. *Id.* at 692-693. Likewise, the cases that Appellants stretch to characterize as “precedent” here involve cases that not only contain facts that are significantly different but these facts occurred in contexts that are also significantly different. *See* Brief of Respondent City of Red Wing in Court of Appeals at 43-46 and Supplemental Brief of Respondent City of Red Wing at 12-18 (distinguishing these cases). Further, Appellants undercut their own argument about the existence of “precedent” for this Court to “follow” by characterizing the issue presented in this case as an “open question.” Supplemental Brief of Appellants at 3-4.

In short, if this Court were to expand the Minnesota Constitution’s interpretation as Appellants request, it would violate its limited role as an error-correcting court by weighing competing public policies and by making new law—law that would be a dramatic change from existing law, law that no other state has chosen to adopt, and law that would make Minnesota the most difficult place in the nation to enforce a rental-housing ordinance.

In addition, if this Court creates such a dramatic change in law, its effects will be felt well beyond the context of rental-housing inspections. Such a holding, for example, could also be used to challenge Minnesota’s fire-inspection statute which also authorizes the issuance of administrative search warrants for housing inspections without requiring individualized probable cause. Minn. Stat. § 299F.08. And it is also likely that the state statute that recognizes and limits a tenant’s right to privacy could be found unconstitutional under Appellants’ reasoning. Minn. Stat. § 504B.211. This statute recognizes that one of the many business purposes that authorizes a landlord to enter a tenant’s rental property is for “allowing inspections by state, county, or city officials charged in the enforcement of health, housing, building, fire prevention, or housing maintenance codes.” *Id.* But this entire statute—like the Code at issue in this case—would be constitutionally deficient under Appellants’ reasoning because it doesn’t contain any reference to a warrant procedure or to probable-cause standards. Likewise, the state rule relating to housing inspections under the State Building Code would also likely be constitutionally deficient under Appellants’ reasoning. Minn. R. 1300.0110 Subp. 7. And if statutes and ordinances must specifically establish the type of probable

cause required for their enforcement and must detail probable-cause standards that the judicial branch must apply, then a multitude of criminal ordinances and statutes would also be vulnerable to a constitutional challenge including many statutes in our state's criminal code as well as the state criminal search-warrant statute itself. Minn. Stat. ch. 609; Minn. Stat. § 626.07.

B. Such an expansion would create separation-of-powers conflicts.

It would also be bad public policy to expand the Minnesota Constitution's interpretation to prohibit the use of administrative search warrants in the absence of individualized probable cause to believe that a housing-code violation exists because it would create conflicts with the constitutionally required separation of powers. Minn. Const. art. III, § 1. One of Appellants' core arguments is that the City's Code should be invalidated because there are other options for enforcing rental-housing standards. *See* Brief of Appellants in Court of Appeals at 49. In making this argument, Appellants are asking this Court to substitute its own judgment for how best to achieve what Appellants acknowledge is a legitimate governmental purpose of adopting and enforcing rental-housing standards. But this substitution of judgment would conflict with separation-of-power principles and with well-established law that has consistently held that the fact that a less burdensome method might have been chosen to accomplish a governmental objective does not render an ordinance unconstitutional. *State v. Clarke Plumbing & Heating, Inc.*, 238 Minn. 192, 200, 56 N.W.2d 667, 672-673 (Minn. 1952); *Sverkerson v. City of Minneapolis*, 204 Minn. 388, 391-192, 283 N.W. 555, 557 (Minn. 1939). Indeed, even when a court thinks that the arguments against the policy, expediency, wisdom, and

propriety of an ordinance outweigh those in favor of it, it is the court's duty to sustain the ordinance's constitutionality if there is any reasonable basis for it. *Anderson v. City of St. Paul*, 226 Minn. 186, 204, 32 N.W.2d 538, 548 (Minn. 1948).

Essentially, what Appellants are asking this Court to do is to apply a strict-scrutiny analysis to the City's Code. But once again, Appellants are confronted with the problem of precedent. There simply is no precedent in Minnesota for applying a strict-scrutiny analysis to a rental-housing inspection ordinance. And it would be bad public policy to create new law to this effect because it would conflict with this Court's limited role as an error-correcting court and because it should be up to local elected officials and not to judges to make legislative determinations about how best to protect the health, safety, and welfare of their tenant residents.

CONCLUSION

This case will have a significant, statewide impact on Minnesota cities. All Minnesota cities have a public interest either in preserving the constitutionality of their current housing ordinances or in preserving their authority to adopt such an ordinance in the future. If individualized probable cause is required for administrative search warrants, it will severely impair the effectiveness of rental-housing standards that cities adopt to protect the health, safety, and welfare of thousands of tenants throughout Minnesota. In addition, all Minnesota cities have a public interest in ensuring that courts properly enforce the difficult test that a challenger must meet before a city ordinance is invalidated under a facial challenge to its constitutionality. This difficult test cannot be met in this case. Finally, it would be bad public policy to expand the Minnesota

Constitution's interpretation to prohibit the use of administrative search warrants to conduct housing inspections. Such an expansion would conflict with this Court's limited role as an error-correcting court and would create separation-of-power conflicts.

For all of these reasons, the League respectfully requests that this Court hold that the City's Code is constitutional on its face under the Minnesota Constitution and confirm that the Minnesota Constitution authorizes the issuance of administrative search warrants if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling.

LEAGUE OF MINNESOTA CITIES

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