

MEMORANDUM

TO: LGA Board Members

FROM: LGA Ad Hoc Committee on Hotel Registries

SUBJECT: Model Hotel Ordinance and Potential Broader Impacts of *City of Los Angeles v. Patel*

DATE: December 29, 2015

Task: Draft a model ordinance for hotel registry requirements and determine the broader impacts, if any, of the United States Supreme Court's decision in *City of Los Angeles v. Patel*, 576 U.S. ____ (2015).

Summary Conclusion: Attached is a proposed model ordinance. The *Patel* decision invalidates any requirement for inspection of hotel registries upon demand without consent, a search warrant, exigent circumstances, or an administrative warrant. Any statutory authority purporting to permit such inspection without process violates the Fourth Amendment. Instead, an ordinance should simply require hotel operators to keep and maintain the registries. Virginia local government inspectors and law enforcement officers should proceed with inspections according to Virginia law.

Discussion:

Case Law.

The Supreme Court held that administrative or civil searches are subject to the 4th Amendment prohibition against unreasonable search and seizure in *Camara v. Municipal Court*, 387 U.S. 523, 529 (1967). In *Patel*, the Court specifically ruled that a City of Los Angeles requirement that hotels make records available to any police officer for inspection on demand, or be subjected to criminal penalties, violated the 4th Amendment. *Patel* at _____. Specifically, the Court ruled that the requirement was unconstitutional because it failed to provide hotel owners with an opportunity for precompliance review. *Id.* at _____.

Unless consenting to the search, the subject of a search must be afforded an opportunity for precompliance review by a neutral decision maker, or served with a criminal search warrant or administrative warrant, unless exigent circumstances are present. *Id.* at _____. In *Camara*, the Court indicated that the neutral decision maker should be a judicial officer. *Camara* at 529. In *Patel*, the Court suggested that officers could issue an "administrative subpoena," for the records. *Id.* at _____. However, an administrative subpoena, issued by a law enforcement officer without a pending criminal case, is not a concept recognized in Virginia law.

Virginia Provisions.

Virginia recognizes administrative subpoenas in limited instances. For example the Commonwealth Attorney may issue administrative subpoenas to electronic communication service providers for the purpose of investigating child pornography or solicitation. Virginia Code § 19.2-10.2. The more widely accepted process for investigative matters is to obtain an administrative or inspection warrant.¹ There are different types of administrative warrants recognized in the Code of Virginia, as well as an Attorney General opinion indicating the process for administrative warrants in cases not enumerated in the Code. (AG Opinion citation.)

Administrative warrants differ from criminal search warrants by the probable cause required to obtain them. Criminal search warrants require a reasonable belief that items related to a crime are located in the premises sought to be searched. An administrative warrant, on the other hand, can rely on general factors such as the passage of time since the last inspection, the nature of the building to be searched, the condition of the surrounding area or the need for periodic inspections in an entire area of the community. *Camara*, at 538-539. An administrative search warrant need not be based on specific knowledge of a violation in a particular building; if a valid public interest justifies the search requested, then there is probable cause to issue the administrative search warrant. *Id.* However, the affidavit must provide the specific facts underlying each step of the procedure by which a location has been chosen for inspection, including the inspection history for that location and the status of general inspections of all hotels subject to inspection.

The Virginia Attorney General has opined that, absent a specific Virginia Code provision describing the method for obtaining an administrative warrant,² the scheme found in Virginia

¹ These terms are used interchangeably.

² The statutory provisions for specific administrative warrants are as follows:

A. Fire Code

Inspection warrants for fire code violations are governed by Virginia Code § 27-98.1 - § 27-98.5. These inspection warrants can be issued by a magistrate or judge having jurisdiction over the property. The Code specifically states that:

Probable cause shall be deemed to exist if such inspection, examination, testing or collection of samples for testing are necessary to ensure compliance with the Fire Prevention Code for the protection of life and property from the hazards of fire or explosion. The supporting affidavit shall contain either a statement that consent to inspect, examine, test or collect samples for testing has been sought and refused or facts or circumstances reasonably justifying the failure to seek such consent in order to enforce effectively the fire safety laws, regulations or standards of the Commonwealth which authorize such inspection, examination, testing or collection of samples for testing. In the case of an inspection warrant based upon legislative or administrative standards for selecting buildings, structures, property or premises for inspections, the affidavit shall contain factual allegations sufficient to justify an independent determination by the judge or magistrate that the inspection program is based on reasonable standards and that the standards are being applied to a particular place in a neutral and fair manner.

B. Building Code

Code § 19.2-393 -397 shall apply. 1999 Va. Op. Atty. Gen. 90 *2 (quoting 1978-79 Va. Op. Atty. Gen. 221, 222. The Attorney General also provided that the local official obtaining the warrant should provide the judicial officer with factual allegations sufficient to justify an independent determination that the inspection program is based on reasonable standards, and that the standards are being applied in a neutral and nondiscriminatory manner. *Id.* (quoting *Mosher Steel v. Teig*, 229 Va. 95, 103 (1985).

Virginia Code § 19.2-393, defines an inspection warrant as,

an order in writing, made in the name of the Commonwealth, signed by any judge of the circuit court whose territorial jurisdiction encompasses the property or premises to be inspected or entered, and directed to a state or local official, commanding him to enter and to conduct any inspection, testing or collection of samples for testing required or authorized by state or local law or regulation.

Therefore, for all Code inspections not specifically described in the Virginia Code, an inspector or officer must seek a warrant from the Circuit Court.

Enclosure: Draft Model Code

Virginia Code § 36-105 (C) (3) provides that a building code official may obtain an inspection warrant from a magistrate or a judge having jurisdiction over the property if the building code official has received a complaint about a certain property.

C. Zoning Code

Similarly, Virginia Code § 15.2-2286 (A) (15) authorizes inspection warrants, but only for enforcement of zoning violations where the zoning inspector needs to enter a dwelling.

D. Local Code Enforcement

For all other Local Code Enforcement, the inspector or officer should try to obtain consent from the hotel owner or manager, first. If consent is refused, the inspector or officer should then work with their local attorney to obtain an inspection warrant.