

REAL ESTATE

Does Refused Search Equal Probable Cause to Search Incident to Rental Permit Application?

By Andrew M. Lieb

What do you have to do to make a buck these days? You have a vacant residential property that you aren't using and you are willing to rent it. Can you make a buck? Well, you need to get a tenant. So you hired a real estate broker and you got a prospective tenant. Can you make a buck? Well, you may need a rental permit from your local municipality, but what municipality is your property located within? So you check your tax bill to ascertain the town, city or village that your property is located within? Did you know that there are 13 incorporated towns, two cities, and 97 incorporated villages within Nassau and Suffolk Counties of Long Island and each has its own individual rental permit rules? That means that there are 112 possible local municipality's rules that cover renting on Long Island. Did you know that 33 of these 112 or approximately 29 percent require a rental permit? Assuming that yours does, what's next before you can earn a buck?

Did you know that you may find out that you are already too late with getting the permit at this point? Did you know that 31 of these 112 or approximately 28 percent also hold a real estate broker responsible to get a permit before listing the property?

For the purposes of this article, let's assume that you realized that your local municipality does require a permit and that you are attempting to obtain the permit with your real estate broker before you attempt to solicit a tenant. How do you get the permit? Well, many municipalities seek an inspection of the premises incident to issuing a permit. In fact, a typical

code will authorize the municipality's building inspector to inspect for safety, on consent of the owner, incident to the issuance of a permit. Yet, what happens when the owner denies such consent?

In 1981, the Court of Appeals dealt with this issue in *Sokolov v. Village of Freeport*¹ and held that "the imposition of a penalty upon a landlord for renting his premises without first consenting to a warrantless search violates the property owner's Fourth Amendment rights." Thereafter, many codes were modified to authorize the municipality's attorney to make application for a search warrant in order to conduct the inspection if consent was denied. So, today, is there any getting around a search of your premises by the municipality if you want to make a buck? Meaning, can you apply for a permit, deny consent to an inspection and avoid a search warrant?

Sokolov appears to say yes in the court's rationale for its holding; that "A property owner cannot be regarded as having voluntarily given his consent to a search where the price he must pay to enjoy his rights under the Constitution is the effective deprivation of any economic benefit from his rental property." Yet, the court also made a point to state "the strict standards attending to the issuance of a warrant in criminal cases are not applicable to the issuance of a warrant in administrative inspections." So, what is the standard?

To understand the standard for an administrative inspection's search warrant we look first to the United States Supreme



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Court decision in *Camara v. Municipal Court of City and County of San Francisco*² for guidance wherein the court distinguished between a criminal search warrant and an administrative warrant and stated that probable cause for an administrative warrant "will not necessarily depend upon specific knowledge of the condition of the particular dwelling."

Thereafter, we look to *In re City of Rochester* where the issue before the court was precisely whether probable cause existed solely as a result of the "landlord's refusal to permit the City" to inspect his rental property. First, the City Court³ heard the issue and held that probable cause existed based solely upon the refusal. Yet, the County Court⁴ later held that the decision was moot and constituted a prohibited advisory opinion. So, where are we left now?

As the City Court suggests in its moot and prohibited opinion, "if a property owner believes that an administrative search warrant has been issued illegally, he or she may seek to have it quashed upon proper motion." When seeking to quash the motion remember the words of the Court of Appeals in *Sokolov*. If the sole basis for the issuance of a search warrant of a rental property is the property owner's refusal to consent to a search warrant, then what was the point of *Sokolov's* rationale that a property owner should not have to give up his constitutional rights in order to reap the economic benefits of his property. It seems that municipalities have learned to comply

with the letter of the precedent in *Sokolov*, but our legislature needs to step in to enforce *Sokolov's* stated rationale.

In this economy where homeowners are required to rent in order to avoid foreclosure and young Long Islanders are fleeing the Island because they cannot find affordable housing, your author submits that legislative changes are necessary to let a landlord earn a buck. The county and / or state legislature should step in and create uniformity in the rental permit laws within our 112 divergent municipalities and define whether probable cause exists for a search warrant solely as a result of a property owner's refusal to consent to a search⁵. Then, at least, property owners will know if they can earn a buck.

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1 52 NY2d 341 (1981)

2 387 US 523 (1967)

3 4 Misc.3d 310 (Cy. Ct., Rochester, 2003)

4 6 Misc.3d 1013(A) (Monroe Cty. Ct., 2004)

5 Matter of City of Rochester (449 Cedarwood Terrace), 90 AD3d 1480 (4d Dept., 2011)(Held Criminal Procedure Law Article 690 does not preempt the law of search and seizures and preclude a municipality from enacting inspection warrant procedures)