



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN  
ATTORNEY GENERAL

May 27, 1981

MAIN PHONE: (913) 296-2215  
CONSUMER PROTECTION: 296-3751  
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 81-118

Mr. Vic Marshall  
Director of Public Safety  
220 East First  
El Dorado, Kansas 67042

Re: Fire Protection -- Fire Safety and Prevention --  
Authority to Inspect Buildings Subject to Rules  
and Regulations of State Fire Marshal

Synopsis: K.S.A. 1980 Supp. 31-134(b) provides that the rules and regulations adopted by the state fire marshal shall be of uniform force and effect throughout the state. Pursuant to this statute, K.A.R. 1980 Supp. 22-3-1 adopts by reference the 1976 edition of the Life Safety Code, containing sections which regulate structures having combined mercantile and residential occupancies. For the purposes of enforcement, K.S.A. 1980 Supp. 31-139 gives the state fire marshal and those persons designated by K.S.A. 1980 Supp. 31-137, the authority to inspect buildings subject to the code. If admittance to a building subject to the Code is denied, a search warrant, which may be issued ex parte, must be obtained prior to entry. Cited herein: K.S.A. 1980 Supp. 31-133, 31-134, 31-137, 31-139, K.A.R. 1980 Supp. 22-3-1, U.S. Const., Amend. IV.

\*

\*

\*

Dear Mr. Marshall:

As Public Safety Director for the city of El Dorado, you request the opinion of this office concerning the authority of city officials to inspect a building which is part com-

Mr. Vic Marshall  
Page Two  
May 27, 1981

mercial, part residential in use, in that two apartments are located above a retail store. You also wish to know whether, if admittance is refused, a search warrant is required before the inspection may be made.

We would note at the outset that the basic legislative enactment which concerns fire safety in Kansas is K.S.A. 1980 Supp. 31-132 et seq. One part of this act, K.S.A. 1980 Supp. 31-133, empowers the state fire marshal to adopt rules and regulations for, among other things, the safeguarding of property from fire. Rules and regulations so adopted are of uniform force and effect throughout the state, and a municipality cannot enforce any ordinance in this area which is inconsistent. K.S.A. 1980 Supp. 31-134(b). Pursuant to this authority, the state fire marshal has adopted K.A.R. 1980 Supp. 22-3-1, which adopts by reference the 1976 edition of the Life Safety Code, which is a nationally recognized publication dealing with fire protection standards in all types of buildings, regardless of the use to which they are put. Prior to this regulation, portions of the Code had been adopted by reference beginning in 1973.

One of these sections, first adopted in 1973 and then updated in 1980, deals with the standards to be applied to "mercantile occupancies," i.e., stores selling merchandise, either retail or wholesale. (Life Safety Code, ch. 12.) Also included are buildings which are used for both mercantile and residential purposes, which you indicate is your situation in this case. Restrictions placed upon such dual-purpose structures include a requirement for multiple means of egress (Life Safety Code, §12-1.2.3.1.1) and a prohibition on multiple dwellings being located above a mercantile occupancy (Life Safety Code, §12-1.2.3.1.2). Exceptions to the latter rule are made if automatic sprinklers, automatic fire detection devices or fire-resistant walls and floors are installed.

Inspections to enforce these and other provisions of the Code are authorized by K.S.A. 1980 Supp. 31-139, which states in part:

"The state fire marshal and those persons designated in K.S.A. 1972 Supp. 31-137 shall have the authority during all reasonable hours of operation to enter, in accordance with existing laws, in and upon all buildings and premises subject to this act for the purpose of examination, inspection and investigation to determine compliance with the rules and regulations promulgated under the authority of this act."

Mr. Vic Marshall  
Page Three  
May 27, 1981

"Designated persons," it may be noted, include the chief of any municipal fire department or an authorized member thereof.

In your request, you indicate that the owner of the building in question has taken the position that, while the mercantile area may be inspected, the two apartments above the store may not. He apparently bases this refusal on K.S.A. 1980 Supp. 31-133(a)(9), which excludes from the act's coverage these buildings "used wholly as dwelling houses containing no more than two (2) families." In our opinion, such reliance is misplaced, for the building here is not "wholly" used as residential property, but is partly residential, partly commercial in use. As only specified structures which are entirely residential are excluded by the statute, it may be presumed that all others are included, using a principle of statutory construction (expressio unius est exclusio alterius) repeatedly recognized in Kansas. Southwestern Bell Telephone Co. v. Miller, 2 Kan. App. 2d 558 (1978); In re Olander, 213 Kan. 282 (1973). Therefore, the building in question may be inspected, in its entirety, by those officials empowered to do so.

Given the above, you next inquire whether it is necessary for persons who enforce the Code to obtain search warrants prior to conducting inspections. In view of the language of K.S.A. 1980 Supp. 31-139 quoted above, it is our opinion that an inspector may present himself at the building to be inspected, and, after being admitted, proceed to make such examinations, inspections or investigations as are necessary to determine compliance with the Code and any other applicable regulations. Accordingly, no warrant is required to make consensual inspections of this type.

However, in the event that an inspector is denied admittance after attempting to enter, we believe that recent court decisions require the obtaining of a warrant. The landmark case of Marshall v. Barlow's Inc., 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978), reached such a result for unannounced inspections made by Labor Department officials under the Occupational Safety and Health Act (OSHA). Following the refusal of Barlow's officials to admit them, OSHA inspectors resorted to Federal court for an order compelling their admittance. Barlow's attacked the ability of OSHA inspectors to conduct warrantless searches, and a majority of the United States Supreme Court agreed, applying the protections of the Fourth Amendment to the U.S. Constitution against unreasonable searches, despite the commercial nature of the property and the civil nature of the investigation. However, in a

Mr. Vic Marshall  
Page Four  
May 27, 1981

significant qualification to the holding, the Court lessened the degree of probable cause which need be shown, as it must only be alleged that reasonable administrative regulations exist which allow the inspection. Additionally, such "administrative" search warrants can be granted ex parte, i.e., with no notice or hearing to the property owner.

We believe the Court's holding to be applicable in this case, for the Fourth Amendment's guarantees have been extended in their application to the states. Ker v. California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963). While it might appear that the need to obtain a warrant in those cases where consent is not given will make enforcement of the Code less effective and more burdensome, this does not appear to be a sufficient consideration to override the Fourth Amendment. The Supreme Court, commenting on this issue in Barlow's stated:

"We are unconvinced, however, that requiring warrants to inspect will impose serious burdens on the inspection system or the courts, will prevent inspections necessary to enforce the statute, or will make them less effective. In the first place, the great majority of businessmen can be expected in normal course to consent to inspection without warrant; the Secretary has not brought to this Court's attention any widespread pattern of refusal.

. . . .

"Nor is it immediately apparent why the advantages of surprise would be lost if, after being refused entry, procedures were available for the Secretary to seek an ex parte warrant and to reappear at the premises without further notice to the establishment being inspected." 436 U.S. at 316, 319-20.

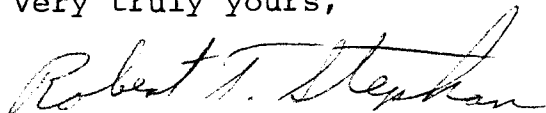
However, as the dissenting opinion noted, given the low standard of probable cause which must be shown and the fact that a warrant may be obtained ex parte, the procedure seems little more than a formality. 436 U.S. at 334 (Stevens, J., dissenting.)

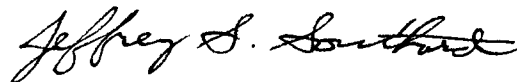
In conclusion, K.S.A. 1980 Supp. 31-134(b) provides that the rules and regulations adopted by the state fire marshal shall be of uniform force and effect throughout the state. Pursuant

Mr. Vic Marshall  
Page Five  
May 27, 1981

to this statute, K.A.R. 1980 Supp. 22-3-1 adopts by reference the 1976 edition of the Life Safety Code, containing sections which regulate structures having combined mercantile and residential occupancies. For the purposes of enforcement, K.S.A. 1980 Supp. 31-139 gives the state fire marshal and those persons designated by K.S.A. 1980 Supp. 31-137, the authority to inspect buildings subject to the code. If admittance to a building subject to the Code is denied, a search warrant, which may be issued ex parte, must be obtained prior to entry.

Very truly yours,

  
ROBERT T. STEPHAN  
Attorney General of Kansas

  
Jeffrey S. Southard  
Assistant Attorney General

RTS:BJS:JSS:hle:jm