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May 17, 1988

ATTORNEY GENERAL OPINION NO. 88-68

The Honorable Ben E. Vidricksen
State Senator, Twenty-Fourth District
713 N. 11th Street
Salina, Kansas 67401

Re: Constitution of the United States--Fourth Amendment--Searches and Seizures

Synopsis: Ordinance No. 88-9230 of the city of Salina prescribes that a refusal by the owner and/or occupant of certain property (dwellings, lodging houses, hotels, and apartments) to submit to an inspection "shall lead to a presumption that the premises is not equipped with approved smoke detectors and will result in a citation being issued." As the ordinance does not establish a warrant procedure under the standard set forth in Camara v. Municipal Court, 387 U.S. 523, 18 L.Ed.2d 930 (1967), it is our opinion that the "presumption" set forth in the ordinance violates the Fourth Amendment to the United States Constitution, and is void. Cited herein: U.S. Const., Fourth Amendment.

* * *

Dear Senator Vidricksen:

You request our opinion as to the constitutionality of ordinance no. 88-9230 of the city of Salina. The ordinance mandates smoke detectors in various residential properties, and subsection (b) thereof provides as follows:

> "Inspections. Whenever a permit [is] issued by the Permits and Inspection Division for any alteration, addition or repair to a Group R, Division 1 or 3 occupancy, a code enforcement inspection shall be conducted by the building inspection staff to determine compliance with this section. Group R, Division 1 occupancies and commercial structures with sleeping rooms shall also be inspected annually by the fire department to determine compliance with this section. A refusal by the owner and/or occupant to submit to an inspection shall lead to a presumption that the premises is not equipped with approved smoke detectors and will result in a citation being issued."

In considering the constitutionally of the presumption established by the above-quoted ordinance, a review of United States Supreme Court cases dealing with administrative inspections is appropriate. These cases provide that under the Fourth Amendment, warrantless searches presumptively are unreasonable. Beginning with Camara v. Municipal Court, 387 U.S. 523, 18 L.Ed.2d 930 (1967), the court held that a warrantless search of residential property by a municipal inspector violated the Fourth Amendment. In Camara an apartment dweller was charged with a misdemeanor for violating a San Francisco building ordinance (that allowed inspectors to enter a building and check for possible building code violations without a warrant) by refusing to consent to an inspection. The ordinance in question did not require a warrant. In holding the ordinance unconstitutional, the Court rejected the argument that the ordinance provided enough protections for occupants without a warrant and that the warrant process could not function effectively in the area of municipal inspections. The Court said:

> "Under the present system, when the inspector demands entry, the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the full limits of the inspectors power to search, and no way of knowing whether the inspector himself is acting under proper authorization . . . the practical effect of this system is to

> leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search . . . we simply cannot say that the protections provided by the warrant procedure are not needed in this context; broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may only be invoked at the risk of a criminal penalty." 387 U.S. at 532, 18 L.Ed.2d at 937.

This rationale was applied to commercial premises in See v. Seattle, 387 U.S. 541, 18 L.Ed.2d 943 (1967), where the court held that a non-consensual administrative inspection upon commercial premises not open to the public must be made pursuant to a warrant.

Applying the principles laid down in the above-cited cases, it is apparent that the Salina ordinance does not establish a warrant procedure that follows the standard for administrative inspections set forth in Camara. While property owners are not subject to criminal penalty per se , for refusing to submit to an inspection, such fact does not insulate the ordinance from scrutiny under the Fourth Amendment. See Hometown Coop Apartments v. City of Hometown, 495 F.Supp. 55, 60 (1980). In our judgment, the "presumption" established by the Salina ordinance does violence to the protections afforded by the Fourth Amendment, and is unnecessary where a valid warrant procedure could be established.

In summary, ordinance no. 88-9230 of the city of Salina prescribes that a refusal by the owner and/or occupant of certain property (hotels, apartments, dwellings and lodging houses) to submit to an inspection "shall lead to a presumption that the premises is not equipped with approved smoke detectors and will result in a citation being issued." As the ordinance does not establish a warrant procedure under the standards set forth in Camara v. Municipal Court, 387 U.S. 523, 18 L.Ed.2d 930 (1967), it is our opinion that the

"presumption" set forth in the ordinance violates the Fourth Amendment to the United States Constitution, and is void.

Very truly yours,

Robert T. Stephan

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JRD

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