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October 28, 2019

VIA UPS NEXT DAY DELIVERY

Dan Draper, City Attorney
City of Lake Geneva
626 Geneva Street
Lake Geneva, WI 53147

Re: Demand letter regarding the City of Lake Geneva's home rental ordinance

Dear Mr. Draper,

The Wisconsin Institute for Law & Liberty ("WILL") is a public policy legal center that seeks to protect the constitutional rights of our clients and advance the rule of law. WILL represents Mary Black, Tammy Brody, and Todd Huemann, all of whom are homeowners in the City of Lake Geneva.

Certain portions of Lake Geneva's home rental ordinance (section 98-206(8)(y)) violate our clients' constitutional and statutory rights. Specifically: (1) the ordinance contains two inspection provisions that violate the Fourth Amendment to the United States Constitution, (2) the ordinance's requirement that homeowners install a "Knox Box" to provide city officials with the keys to their home also violates the Fourth Amendment, and (3) the City's \$2,000 licensing fee violates Wisconsin Statute Section 66.0628(2).

Our clients are hopeful that Lake Geneva will work with them to promptly resolve all of these issues, and we set forth below our proposals for doing so. To the extent such a resolution is not possible, however, we have attached a draft complaint addressing the inspection and Knox Box provisions that our clients have authorized us to file, if necessary. Similarly, our clients will seek relief before the Tax Appeal Commission if the licensing fee is not reduced, as described below.

1. Inspection Provisions

Building Inspection Provision

Subsection (y)(1)(e)(i) of the ordinance authorizes Lake Geneva to "enter and examine any building, structure, or premises, for the purpose of ensuring compliance" with the ordinance. The ordinance does not require the City to obtain a warrant before conducting an inspection; instead, it allows inspections at any "reasonable time" and solely upon "reasonable notice to the owner." Subsection (y)(1)(e)(i) then states that any homeowner "who refuses to permit, or prevents or interferes with any entry into or upon the premises by any such inspector shall be in violation of

this section.” Each violation—which includes merely declining to consent to a warrantless inspection—subjects homeowners to a fine of up to \$1,000, and two or more violations allow the City to revoke a short-term-rental license. Lake Geneva Ordinances §§ 98-206(y)(1)(f); 1-12; 98-936(2).

These provisions directly violate the United States Supreme Court’s holding in *Camara v. Mun. Court of City & Cty. of San Francisco*, 387 U.S. 523 (1967), to the extent they allow the City to conduct an inspection without an administrative warrant or the homeowner’s consent and to the extent they allow the City to penalize homeowners who decline to consent to a warrantless inspection. The ordinance at issue in *Camara* is equivalent to Lake Geneva’s—it authorized the City of San Francisco to inspect apartment buildings “at reasonable times” “upon presentation of proper credentials,” but did not contain a warrant procedure. *Id.* at 526. The Supreme Court held that building inspections are “significant intrusions upon the interests protected by the Fourth Amendment” and therefore require either an administrative warrant or some other recognized exception to the Fourth Amendment, such as consent or exigency. *Id.* at 534. The Court also held that property owners have “a constitutional right to insist that [] inspectors obtain a warrant to search,” and that property owners “may not constitutionally be [penalized] for refusing to consent to [a warrantless] inspection.” *Id.* at 540.

Since *Camara*, courts have consistently held that inspection regimes must contain an administrative warrant procedure. In *Redevelopment Auth. of City of Milwaukee v. Uptown Arts & Educ., Inc.*, 229 Wis. 2d 458, 462, 599 N.W.2d 655 (Ct. App. 1999), for example, the Wisconsin Court of Appeals considered a Fourth Amendment challenge to a statute that allowed the Milwaukee Redevelopment Authority to inspect properties in Milwaukee without a warrant. The Court agreed with the plaintiffs that “the statute, on its face, provides no guarantee of either a minimum warrant procedure or a constitutionally adequate substitute.” *Id.* at 467. The Court resolved the case by “read[ing]-in [a warrant] requirement in order to construe the statute in a constitutional manner.” *Id.*

Guest Registry Inspection Provision

Lake Geneva’s home rental ordinance also requires homeowners to maintain a “Guest Register” containing the “true names and addresses” of all guests, as well as records of “each rental” of the property, and to keep these records “intact and available” for one year “for inspection by representatives of the City.” Ordinance § 98-206(y)(1)(c)(x)–(xi). As with the Building Inspection Provision, the ordinance does not require city officials to obtain a warrant before inspecting the guest registry or rental records, even if a homeowner declines to consent to a warrantless inspection.

By failing to include a warrant procedure, these provisions directly violate the U.S. Supreme Court’s holding in *City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443 (2015). The Court, in that case, considered an ordinance equivalent to Lake Geneva’s—it required hotels to maintain a guest registry and rental records and to “ma[ke] [these records] available to any officer of the Los Angeles Police Department for inspection.” *Id.* at 2448. The Supreme Court held that the Fourth Amendment prohibits state and local governments from “requir[ing] hotel operators to make their

registries available to the police on demand ... without affording them any opportunity for precompliance review,” such as an administrative warrant procedure. *Id.* at 2451–57.

Demand with Respect to the Inspection Provisions:

On behalf of our clients, we ask the City of Lake Geneva to modify its home rental ordinance to clarify that city officials may not inspect homes, or their guest registries and rental records, without either an administrative warrant or the homeowner’s consent. We also ask the City to modify the enforcement provisions to make clear that homeowners will not be penalized for asserting their constitutional rights by declining to consent to a warrantless inspection and demanding an administrative warrant.

We would be happy to work with the City on language that would bring the ordinance into conformity with the Supreme Court’s holdings in *Camara* and *Patel*.

Please contact us **within 10 business days** and indicate whether Lake Geneva is willing to commit to modifying its ordinance in accordance with these requests within a short time. If Lake Geneva does not commit to modifying its ordinance **within 10 business days of this letter**, we intend to file the attached complaint asserting these claims.

2. Knox Box Provision

Subsection (y)(1)(e)(ii) of the ordinance requires owners of homes that are sometimes rented for periods of less than 29 days to install a “Knox Box” containing the keys to the home, ostensibly to “allow access to the [home] in emergency situations.” This requirement violates our clients’ rights under the Fourth Amendment “to be secure in their ... houses.” U.S. Const. amend. IV.

The United States Supreme Court has long recognized that the home is “‘the very core’ of the Fourth Amendment.” *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)). Indeed, it has become “axiomatic” that “physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.” *State v. Dumstrey*, 2016 WI 3, ¶ 22, 366 Wis. 2d 64, 873 N.W.2d 502; *United States v. U.S. Dist. Court for E. Dist. of Mich., S. Div.*, 407 U.S. 297, 313 (1972). And this “overriding respect for the sanctity of the home [] has been embedded in our traditions since the origins of the Republic.” *Payton v. New York*, 445 U.S. 573, 601 (1980).

The Knox Box requirement was purportedly adopted “to allow access ... in emergency situations,” but the ordinance does not define “emergency” or specify who in the City of Lake Geneva gets to decide when there is a sufficient “emergency” to justify a warrantless entry using the Knox Box. Nor does the ordinance state that the Knox Box may *only* be used in emergencies, or that only emergency personnel may access the key. In fact, the ordinance says nothing whatsoever about which city officials will have access to the Knox Boxes, and, in turn, access to the keys to private homes. Given all this ambiguity, the Knox Box requirement creates an excessive risk of abuse by city officials and therefore facially violates our clients’ Fourth Amendment rights “to be secure in their ... houses.” U.S. Const. amend. IV.

Moreover, while courts have long recognized that a burning building justifies a warrantless entry, *e.g.*, *Michigan v. Clifford*, 464 U.S. 287, 293 (1984), no appellate court anywhere in the country that we are aware of has ever endorsed the idea that government can require homeowners to turn over the keys to their homes to the government in anticipation of an emergency. Many homeowners, including our clients, would rather firefighters break through a window or door when necessary than be forced to give the government keys to their homes and trust its say-so that it will keep those keys safe and use them only in appropriate situations. And even if there were no risk of government abuse, a Knox Box still creates an unnecessary security threat from non-government actors. A Knox Box is just a miniature vault, after all, and vaults can be broken into.

The Knox Box requirement also amounts to an unconstitutional seizure. The United States Supreme Court has held that, for purposes of the Fourth Amendment, “[a] ‘seizure’ of property occurs when there is some meaningful interference with an individual’s possessory interests in that property.” *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). And “[o]ne of the main rights attaching to property is the right to exclude others.” *Byrd v. United States*, 138 S. Ct. 1518, 1527 (2018). The City’s Knox Box requirement essentially seizes the keys to private homes by eliminating homeowners’ right to exclude government access to those keys. Given the Fourth Amendment’s emphasis on the sanctity of the home, *e.g.*, *Kyllo*, 533 U.S. at 31; *Silverman*, 365 U.S. at 511; *Payton*, 445 U.S. at 601, seizing the keys to a home is both unreasonable and unconstitutional.

Demand with Respect to the Knox Box Provision:

On behalf of our clients, we ask the City of Lake Geneva to remove the Knox Box requirement entirely.

Please contact us **within 10 business days** and indicate whether Lake Geneva is willing to commit to modifying its ordinance in accordance with this request within a short time. If Lake Geneva does not commit to removing the Knox Box requirement, we intend to file the attached complaint asserting these claims.

3. Lake Geneva’s \$2,000 Licensing Fee

As you may know, under state law, fees imposed by cities must “bear a reasonable relationship to the service for which the fee is imposed.” Wis. Stat. § 66.0628(2). That is, fees “may not exceed [a city’s] reasonable direct costs that are associated with any activity undertaken by [a city] that is related to the fee.” *Id.* § 66.0628(1)(b). And cities “bear the burden of proof to establish that a reasonable relationship exists between the fee imposed and the services for which the fee is imposed.” *Id.* § 66.0628(4)(b).

We believe the \$2,000 annual fee that the City of Lake Geneva charges homeowners to occasionally rent their homes for a period of less than 29 days is not reasonably related to the costs the City incurs in administering its home rental ordinance.

The \$2,000 annual fee charged by the City of Lake Geneva is the largest such fee in the State that we are aware of, and by a significant margin. For example, most political subdivisions in Walworth County charge fees around a tenth of Lake Geneva's: the Village of Walworth's annual fee is \$200¹; the Village of Fontana's is \$250²; the Town of Delavan's fee is \$100³; and Walworth County's annual fee is \$300.⁴ The State charges a one-time "pre-inspection" fee of \$300 for a new tourist rooming house license, but the annual fee thereafter is only \$110. Wis. Admin. Code ATCP § 72.05. Similarly, the City of Madison charges an initial licensing fee of \$535, but annual renewals are only \$160.⁵ Sturgeon Bay, a city with a tourism industry similar to Lake Geneva, charges only \$100 per year.⁶

The \$2,000 annual license fee that the City of Lake Geneva charges homeowners is also disproportionate in relation to the City's other fees. A general business license is only \$25 per year; a massage establishment is \$50; a mobile home park is \$100; a theater is \$200 or \$275, depending on the number of seats; a bowling alley is \$20 per lane; and a taxi cab company is \$50 plus \$25 for each additional car. Even a Class A Liquor license is only \$500.

Demand with respect to Licensing Fee

We ask Lake Geneva to lower the fee to a reasonable level before January 1, 2020. If the City does not lower its fee to a reasonable level, we intend to challenge the fee before the Tax Appeals Commission, per the procedure set forth in Wis. Stat. §§ 66.028(4); 73.015.

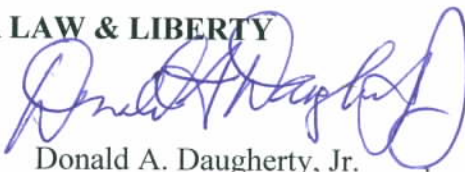
We look forward to working with you to reach a mutually-agreeable resolution, as proposed above. Please contact us at your earliest convenience, so that we can discuss our next steps for moving forward.

Sincerely,

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Encl

¹ https://villageofwalworth.gov/office2.com/vertical/sites/%7B9197016A-2CD3-4D78-9587-3FC839.912C0F%7D/uploads/Tourist_Rooming_Houses_Short-term_Rentals_Requirements_and_Application_2019.pdf.

² <https://villageoffontana.com/wp-content/uploads/APPLICATION-Short-Term-Rental-2018.06.20-7.pdf>.

³ <http://bit.ly/2ZufxuN>.

⁴ <http://www.co.walworth.wi.us/Government%20Center/Land%20Use%20and%20Resource%20Management/pdfs/ShortTermRental/STRLicensing-FINAL-Fillable.pdf>.

⁵ <https://www.publichealthmdc.com/documents/LicenseFeeSch-LodgingPoolTattoo.pdf>.

⁶ <https://www.sturgeonbaywi.org/wp-content/uploads/2019/08/2019-Fee-Schedule.xlsx>.