

**LETTER OPINION
2002-L-08**

February 5, 2002

The Honorable Byron Clark
House of Representatives
3001 Hickory St
Fargo, ND 58102

Dear Representative Clark:

Thank you for your inquiry regarding portions of section 17-0211 of the Fargo Municipal Code. Your inquiry included a letter from Dane Carley who asserts that portions of that ordinance pertaining to the imposition of a surcharge penalty are unconstitutional. You have asked for my opinion on the constitutionality of this ordinance.

Mr. Carley's letter recites a portion of the Fargo "sump pump" ordinance which subjects a person to a "surcharge penalty" when the person refuses to allow their property to be inspected or fails to furnish a plumber's certificate showing ordinance compliance within 14 days of the date that city employees or its designated representatives are denied admittance to the property.

Section 17-0211(D) permits city personnel or its designated representatives to enter all properties constructed in Fargo after September 21, 1971, for the purpose of inspection and observation to identify whether sump pumps are improperly draining into the sanitary sewer system. In lieu of an inspection, a person may provide a certificate from a licensed plumber certifying that the property is in compliance with the city of Fargo's water drainage requirements. The specific portion of this section of concern to Mr. Carley reads:

Any person refusing to allow their (sic) property to be inspected (or failing to furnish a plumber's certificate in lieu thereof) within fourteen (14) days of the date city employees of (sic) their designated representatives are denied admittance to the property, shall immediately become subject to the surcharge penalty as required under 17-0211(E).

Fargo Municipal Code section 17-0211(D).

This language makes the person refusing inspection and not providing a plumber's certificate immediately subject to the surcharge penalty. This surcharge penalty is imposed pursuant to Fargo Municipal Code section 17-0211(E), which provides:

A monthly surcharge penalty, established by resolution of the board of city commissioners, shall be imposed and added to the regular sewer billing on and after June 1, 2001, to property owners who are not in compliance with this section. The surcharge shall be added every month through December 2001 until the property is in compliance. The surcharge shall continue to be levied monthly, every year on properties not complying with this section. It is provided, however, that the surcharge shall not be charged unless and until a property has been inspected and found to be not in compliance, or if the property owner refuses to allow an inspection and fails to provide a plumber's certificate in lieu thereof as set forth in this section.

Absent exemptions or waivers that may be permitted elsewhere in section 17-0211, this surcharge penalty will be imposed if property has been inspected and found not to be in compliance with the requirements of the section or if the property owner refuses the inspection and, in addition, fails to provide a plumber's certificate of ordinance compliance in lieu of the inspection. Nowhere does the ordinance refer to a search warrant or suggest that a homeowner's request that the city obtain a search warrant will suspend the imposition of the surcharge penalty.

A basic principle of constitutional law is that warrantless searches and seizures in a home are presumptively unreasonable, but this presumption may be defeated if the search or seizure was within a recognized exception to the warrant requirement. City of Fargo v. Ellison, 635 N.W.2d 151 (N.D. 2001). This basic principle is applicable as well to administrative inspections or searches. Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523 (1967).

A second basic principle of constitutional law is that a person may not be punished for exercising the person's right to refuse entry by governmental officials into the premises without the authority of a search warrant or recognized exceptions to the warrant requirement. In Camara, it was held that a person may not be criminally prosecuted for refusal to permit a warrantless administrative inspection of his personal residence.¹

Applying both of these principles to the limited inquiry you have made, a surcharge penalty may be imposed after an inspection of the property for those not in compliance with the Fargo ordinances if the inspections are conducted pursuant to a search warrant or one of the recognized exceptions allowing warrantless searches of property, such as consent or emergency. However, if the property owner refuses to allow the inspection and does not

¹ See, also Cincinnati Board of Realtors Inc. v. City of Cincinnati, 353 N.E.2d 898 (Ohio App. 1975) in which the court held that the city had no authority to impose a criminal penalty upon sellers of residential property for failing to submit a city housing inspection certificate to a prospective buyer. The certificate could only be obtained by allowing a warrantless search of the premises.

provide the plumber's certificate in lieu of an inspection, a penalty could not be imposed for such refusal of entry when entry is sought without a search warrant or without one of the recognized exceptions to the warrant requirement.

This, however, is only the first step in the review of the specific ordinance provisions. Whether these ordinance provisions are unconstitutional depends upon several principles and factors, one of these being the actual application of the ordinance.

Statutory provisions are construed to avoid constitutional conflicts and, if a statute may be construed in two ways, one that renders it of doubtful constitutionality and one that does not, the construction that avoids constitutional conflict is adopted. State ex rel. Heitkamp v. Family Life Services, Inc., 616 N.W.2d 826 (N.D. 2000). Statutes which may be found facially overbroad may not be declared unconstitutional when a limiting construction has been, or could be placed, on the challenged statute. Broadrick v. Oklahoma, 413 U.S. 601 (1973).²

When faced with claims that conditions of probation authorizing a search of a probationer are excessive or overbroad, the courts will place emphasis upon how the search was conducted and how the authority to search was actually exercised. Even where a search provision is overbroad, a search is permissible if the overbroad search authority is narrowly and properly exercised. United States v. Vincent, 167 F.3d 428 (8th Cir. 1999), cert. denied, 528 U.S. 848 (1999); United States v. Jeffers, 573 F.2d 1074 (9th Cir. 1978).

I have been advised that the City of Fargo has expressed, both in writing and orally, through its city attorney, that an administrative search warrant would be obtained by the city in cases where permission to inspect the premises has been denied. The City of Fargo agrees and understands that upon a property owner's refusal to permit an inspection, the city will not enter the premises without complying with the constitutional search and seizure requirements discussed previously.

Because the constitutional requirements for entry upon premises are clear and the City of Fargo acknowledges that Fargo Municipal Ordinance Section 17-0211 will be applied and enforced in accordance with those requirements, it would not be unreasonable for a court to read the ordinance as incorporating a search warrant requirement into the inspection procedure. This action would be consistent with the interest of our own courts in avoiding constitutional conflicts and resolving those conflicts in favor of constitutionality. State ex

² See also, State v. Ross, 889 P.2d 161 (Mont. 1995) holding that a statute which on its face appears to be overbroad may still be held constitutional if it is given a limited construction by the court.

rel. Heitkamp v. Family Life Services Inc., supra. It would also be consistent with holdings in cases where similar constitutional construction was required.³

By narrowly and properly exercising the inspection procedures in accordance with constitutional requirements as recognized by the City of Fargo, the ordinance, in its application, may be in compliance with the basic constitutional principles discussed earlier.

Reading the ordinance as incorporating these basic constitutional principles will require that, before the surcharge penalty may be imposed under section 17-0211(E), noncompliance with the ordinance requirements be established. This noncompliance may be established by an inspection of the premises pursuant to a search warrant, a consent, or one of the other recognized exceptions authorizing a warrantless search. If the property owner does not agree to permit an inspection, that property owner may submit a plumber's certificate establishing such compliance.

If a surcharge penalty is imposed after the city has determined that a property owner is not in compliance, that surcharge penalty will be imposed not because of a refusal to allow entry upon property but, rather, because the property itself is not in compliance with Fargo City ordinances.

In order to ensure that the ordinance language reflects the understanding and agreement of city officials to impose the surcharge penalty and conduct its inspection program in accordance with the constitutional principles discussed in this opinion, the city of Fargo would need to amend its ordinance to make it clear that a homeowner's request for the city to obtain a search warrant will not result in immediate imposition of the surcharge penalty.

I trust that I have adequately responded to your inquiry.

Sincerely,

Wayne Stenehjem
Attorney General

rpb/vkk

³ In Tobin v. City of Peoria, Ill., 939 F.Supp. 628 (C.D. Ill. 1996), the court read into a municipal ordinance a requirement that the city exercise its right to seek a warrant when denied consent to inspect a property. In such a case, the property owners could not claim any violation of their constitutional rights.