THE NEW MODEL—AN ANALYSIS OF THE APHA-PHS RECOMMENDED HOUSING MAINTENANCE AND OCCUPANCY ORDINANCE*

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The primary governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous to public health and safety. Because fires and epidemics may ravage large urban areas, because unsightly conditions adversely affect the economic values of neighboring structures, numerous courts have upheld the police power of municipalities to improve and enforce such minimum standards even upon existing structures. Camara v. Municipal Court, 387 U.S. 523, 535 (1967).

Almost twenty years ago, Congress recognized that the achievement of decent housing for all Americans was a most important national objective. With the passage of the Housing Act of 1949,[1] the Federal Government undertook to offer financial assistance to cities and towns across the country; but it was understood that in at least one vital area, the conservation or rehabilitation of existing housing, primary responsibility must be borne by local jurisdictions.[2] These local governments were called upon to enact and enforce ordinances for the protection of the public health, safety and welfare, generally known as "housing codes."

To assist the localities in this endeavor, the American Public Health

*The views expressed herein are those of the author and should not be understood as expressions of any official positions.

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1. Housing Act of 1949, ch. 338, 63 Stat. 413 (codified in scattered sections of 12, 42 U.S.C.).

2. S. Res. 84, 81st Cong., 1st Sess. (1949).

Association promulgated A Proposed Housing Ordinance,[3] which was released in 1952. This prototype has served as the basis of much local legislation in the years between its publication and the present. Until recently, it did not appear necessary to effect any substantial changes in what had for so long served as an essential reference for legislators.

Appearances, however, can be deceiving, as we have become painfully aware in the past few years, when the magnitude of our urban problems has surfaced in a sudden and dramatic fashion. It is now clear that in spite of our efforts, substantial numbers of our citizens still live in the midst of substandard housing and inadequate sanitation, which are as inimical to social well-being as they are damaging to health. When the last housing census was taken in 1960, it was estimated that almost twenty-eight per cent of the housing units then existing were without one or more essential plumbing facilities, or else could be classified as deteriorating or delapidated.[4] There are indications that in at least some parts of the country the situation may have worsened substantially since the time of this study of its scope.[5] The frustration produced by life under such circumstances has been cited by some observers as a factor contributing to the repeated civil disorders which have disrupted the peace of American cities.[6] Certainly, some of this frustration seems attributable to the problems of lax or haphazard enforcement of housing codes and to a continuing lack of attention to the conservation and rehabilitation of existing housing.

Together with a deepening environmental crisis, the past fifteen years have witnessed numerous significant developments in the physical and social sciences, and in the law of the land. In recognition of the availability of new techniques for the solution of old problems, the American Public Health Association, with the assistance of the United States Public Health Service, determined to modify and modernize its previous publication. The APHA-PHS Recommended Hous-

3. AMERICAN PUBLIC HEALTH ASSOCIATION, INC., COMMITTEE ON THE HYGIENE OF HOUSING, A PROPOSED HOUSING ORDINANCE (New York, 1952).

4. STATISTICAL ABSTRACT OF THE UNITED STATES 730 (1967).

5. *Hearings on the Federal Role in Urban Affairs Before the Subcommittee on Executive Reorganization of the Senate Committee on Government Operations,* 89th Cong., 1st Sess., 148, cited in REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 468 (Bantam Books ed. 1968).

6. *See* testimony of Senator Charles Percy, *Hearings on Urban America: Its Goals and Problems, Before the Subcomm. on Urban Affairs of the Joint Economic Comm. of the United States Congress,* 90th Cong., 1st Sess., 178.

ing Maintenance and Occupancy Ordinance[7] was therefore released on a one year's trial basis on July 1, 1967. The ordinance takes novel approaches in combatting housing blight. Already, some of its provisions have been made useless or at least have been placed in serious doubt by the decisions of those courts which must constantly refine the meaning of the Constitution. Other suggestions are as yet largely untested, although hopefully they will generate the interest which often accompanies innovation. But a beginning has been made in applying the experience of the last fifteen years to the preparation of a housing code.

No attempt will be made here to review the substantive portions of this code, this being the province of an expert in urban sanitation. The administrative and enforcement sections of the ordinance, however, may be grouped generally under five subjects: right of entry and inspection; the gathering and use of evidence; the licensing of multiple dwellings; administrative procedure; and financing. It is with reference to these subject headings that this portion of the ordinance will be reviewed.

I. Right of Entry and Inspection

In order to be useful in protecting the public health and safety, a housing code must provide for a plan of inspection which extends far beyond a mere response to individual complaints. Prophylaxis for existing housing envisions periodic inspection of whole neighborhoods or segments of the community. This method of code enforcement has raised a number of Constitutional questions which even yet have not been fully resolved, although the Supreme Court has quite recently indicated that the law governing inspections is far more limiting than was once believed. Effecting entry of a private dwelling to search for violations of a housing code provides a focus for the conflict between two of the great concepts of popular government: the right of the community to safeguard the public health, safety or welfare, often called the "police power," and the right of the individual to be secure from unwarranted intrusions by government officials—the so-called "right to privacy." An understanding of the nature of this conflict and of the attempts of the courts to reconcile the two doctrines has

7. APHA-PHS Recommended Housing Maintenance and Occupancy Ordinance, (Revised First Action Copy November 1, 1967) [hereinafter cited as APHA-PHS Code].

become necessary for anyone involved in the drafting or enforcing of a housing code.

It is on the basis of the police power that the State is empowered to devise and administer legislation governing the repair, condition, and sanitation of local housing. While the exact nature of the police power has never been defined with precision, a California court has called it "the power inherent in a Government to enact laws within Constitutional limits to protect the order, safety, health, morals, and general welfare of society."[8] In a Federal system such as ours, inherent powers reside in the States, which have granted to the Federal Government only such powers as are expressly conferred by the Constitution.

A state government may vest a locality or other subdivision with the police power only by means of delegation.[9] Once delegated, however, the range of authority possessed by the local jurisdiction pursuant to the police power may be quite broad. The police power has been held to permit a city or town to compel owners or occupants of private houses or multiple dwellings to provide windows and ventilation,[10] screens,[11] maintenance of hot water,[12] and even equal access to tenants of all races,[13] in spite of the cost of repair, alteration or renovation, and the interference with the enjoyment of private property imposed by such statutes and ordinances.[14] This is not to imply that municipalities are allowed complete liberty in these matters. Any community which desires to enforce certain standards of conduct must state them with specificity. Vague or indefinite requirements are open to attack on the ground that the locality has received an unlawful grant of legislative authority from the State.[15] Until June, 1967, however, the Supreme Court appeared to find favor with housing codes governing a wide range of behavior, including the obligation to admit housing inspectors.

8. Lees v. Bay Area Pollution Control Dist. 238 Cal. App. 2d 930, 48 Cal. Rptr. 295, 299 (1965).

9. Mansfield & Swett, Inc. v. Town of West Orange, 120 N.J.L. 145, 151, 198 A. 225, 229 (1938).

10. Richards v. City of Columbia, 227 S.C. 538, 88 S.E.2d 683 (1955); State v. Schaffel, 4 Conn. Cir. 234, 229 A.2d 552 (1966).

11. Paquette v. City of Fall River, 338 Mass. 368, 155 N.E.2d 775 (1959).

12. Danker v. City of New York, 20 Misc. 2d 557, 194 N.Y.S. 975 (Sup. Ct. 1959).

13. Massachusetts Comm'n Against Discrimination v. Colangelo, 344 Mass. 387, 397, 182 N.E.2d 595, 602 (1962).

14. Apple v. City and County of Denver, 154 Col. 166, 390 P.2d 91 (1964); *see generally* NATIONAL ASSOCIATION OF HOUSING AND REDEVELOPMENT OFFICIALS, THE CONSTITUTIONALITY OF HOUSING CODES (2d ed. 1964).

15. *Cf.* Richards v. City of Columbia, 227 S.C. 538, 88 S.E.2d 683 (1955).

Inspection of a citizen's premises impinges upon his right to remain free from intrusions by local officials and interferes with the right to privacy, which has long been respected in this country. In the year 1765, an English court set the stage for what was to follow when it decided the celebrated case of *Entick* v. *Carrington*.[16] An action in trespass was brought against a government official who had searched the plaintiff's premises and seized some private papers. In language which has since often been quoted the court held that:

> . . . every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license but he is liable to an action, though the damage be nothing . . . .[17]

This desire to prohibit incursions into private property prompted the debate which led to the ratification of the Fourth Amendment to the Constitution. In urging that the Amendment be adopted, Patrick Henry of Virginia stated that otherwise:

> . . . excisemen . . . may . . . go into your cellars and rooms, and search, ransack and measure everything you eat, drink and wear.[18]

The Fourth Amendment was subsequently added to the Constitution, and warned those who would conduct searches and seizures that:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched and persons or things to be seized.[19]

Right of entry disputes have always turned upon the question of what constitutes an "unreasonable" search within the meaning of the Constitution. But it was not until 1959 that the Supreme Court, in a 5-4 decision, held that a housing code inspection, although conducted without a warrant, did not violate the proscriptions mentioned, when the evidence obtained was not intended for use in a criminal prosecution. This was the holding in the case of *Frank* v. *Maryland*,[20] in

16. 19 Howell's St. Tr. 1029 (1765).

17. Brief for Appellant at 12, Camara v. Municipal Court, 387 U.S. 523 (1967).

18. *Id.* at 13.

19. U.S. CONST. amend. IV.

20. 359 U.S. 360 (1959).

which a construction which was to last for eight years was placed upon the Fourth Amendment.

Frank's neighbor had complained of rats, and a housing inspector was detailed to investigate the complaint. A large pile of debris and rodent feces was discovered at the rear of the lot. On the basis of this evidence, the inspector sought entry under a Baltimore ordinance which contained a section imposing a fine upon anyone refusing him. He was not permitted to enter the dwelling, although he asked to do so on two occasions. The appellant was tried and convicted, pursuant to the applicable section of the Baltimore Housing Code.

Mr. Justice Frankfurter, for the majority, stated that there are two separate protections afforded the householder through the Constitution's limitations upon official invasion. First, there is the right to privacy, the right to shut one's door against officials of the State, unless their attempt at entry is under proper authority of law. This right is subject to certain conditions. Secondly, the individual has a right to resist unauthorized entry designed to secure evidence which may be used to deprive him of life, liberty or property in a criminal proceeding. This is the more important type of protection offered.[21] The Court held that there is no absolute right to refuse consent to an inspection designed solely for the protection of the community's health, and that, assessing the right to privacy with due respect for the importance of the free exercise of the police power, the right to privacy must be qualified. Therefore, it was stated, only those searches for evidence to be used in a criminal prosecution which can deprive one of life, liberty or property can be Constitutionally resisted when made without a warrant.

This line of reasoning, which interpreted the Fourth Amendment's protections in light of the Fifth Amendment's provision that no person shall be deprived of life, liberty or property without due process of law, provided the original basis for the sections of the APHA-PHS Code dealing with inspection.[22] These sections read:

> **11.01 The (Appropriate Authority) is hereby authorized and directed to make inspections pursuant to one or more of the plans for inspection authorized by Section 10.01; or in response to a complaint that an alleged violation of the provisions of this ordinance or of applicable rules or regulations pursuant thereto has been committed; or when the (Appropriate Authority) has**

21. 359 U.S. 360, 365; *see* Note, 42 N.Y.U.L. REV. 1119 (1967).
22. APHA-PHS CODE §§ X, XI.

valid reason to believe that a violation of this ordinance or any rules and regulations pursuant thereto has been committed.

11.02 The (Appropriate Authority) is hereby authorized to enter and inspect between the hours of 8:00 a.m. and 5:00 p.m. all dwellings, dwelling units, and rooming houses, rooming units, and dormitory rooms subject to the provisions of this ordinance for the purpose of determining whether there is compliance with its provisions.

11.03 The (Appropriate Authority) is hereby authorized to inspect the premises surrounding dwellings, dwelling units, rooming units, and dormitory rooms subject to this ordinance, for the purpose of determining whether there is compliance with its provisions.

11.07 If any owner, occupant, or other person in charge of a dwelling, dwelling unit or rooming unit, or a multiple dwelling or rooming house subject to the provisions of Section XII refuses, impedes, inhibits, interferes with, restricts or obstructs entry or free access to every part of the structure or premises where inspection authorized by this ordinance is sought, the (Appropriate Authority) may seek in a court of competent jurisdiction an order that such owner, occupant or other person in charge cease and desist with [sic] such interference.

Although these sections were somewhat inartistically drafted, their constitutionality appeared free of doubt, so long as the *Frank* rule obtained. One year after that decision, the Supreme Court reviewed its position in *Ohio ex rel. Eaton v. Price.*[23] In this case, a householder in Dayton refused entry to a health inspector, in violation of a local ordinance. Eight Justices of the Court took part in the decision, and, because they divided equally, the decision of the Supreme Court of Ohio affirming the penalty was allowed to stand.

The four dissenters pointed out that unlike the *Frank* case, in which the inspection had also been conducted without the homeowner's consent or a warrant, there was present in this situation no physical indication of a probable violation of the City's housing code, and the inspector's actions therefore appeared harder to justify. But the rule in the *Frank* case remained in force until June 5, 1967, and provided the legal foundation for the imposition of fines and penalties against those who impeded the free access of local officials in routine inspections.[24]

23. 364 U.S. 263 (1960).

24. *See, e.g.,* Commonwealth v. Hadley, 351 Mass. 439, 222 N.E.2d 681 (1966), *vacated,* 388 U.S. 464 (1967).

With the overturning of *Frank*, the concept of employing penalties to coerce an unwilling householder to admit the housing inspector who does not possess a warrant, has met its end, and the sections of the proposed ordinance just described must be stricken from the recommended legislation. But in the recent decisions which have declared that it is unconstitutional to penalize a householder for resisting the warrantless inspection of his dwelling,[25] or to invoke criminal procedure against a businessman who refuses to allow firemen to survey the interior of his locked warehouse,[26] the Supreme Court has indicated that it is still possible to pursue area-wide inspections pursuant to a housing code.

The landmark decision, in which the scope of the Fourth Amendment was declared to extend far beyond the situation in which evidence for use in a criminal prosecution is sought, came in the case of *Camara* v. *Municipal Court*.[27] Roland Camara occupied the premises at the rear of an apartment building in San Francisco which was inspected pursuant to a local ordinance covering the licensing of such multiple dwellings. The inspector was admitted by a building manager, who informed him of this residential use of the ground floor, which use allegedly violated the terms of the occupancy permit assigned to the building. Camara freely admitted that he occupied an apartment behind the store which he leased in the building, but refused to allow the inspector to enter his rooms without a warrant. The inspector returned to seek entry on two further occasions, but never did equip himself with a warrant, and Camara, therefore, would not permit the inspection of his apartment. He was cited for violating a section of San Francisco's housing code which imposed a fine of up to $500 or imprisonment for six months, or both, for each refusal to give an inspector free access, and his subsequent conviction was upheld by the Supreme Court of California.

Camara's principal contention on appeal was that the interpretation given the Fourth Amendment in the *Frank* case was erroneous, and should be overruled. The history of the Amendment, it was argued, amply demonstrates that the drafters of the Bill of Rights were concerned with the protection of private citizens against unreasonable invasions by the government and did not consider the purpose of the Amendment, later carried into operation in the States by the pro-

25. Camara v. Municipal Court, 387 U.S. 523 (1967).
26. See v. City of Seattle, 387 U.S. 541 (1967).
27. 387 U.S. 523 (1967).

visions of the Fourteenth Amendment's Due Process Clause, to be the mere protection against illegal searches for evidence to be employed in criminal cases.[28]

Speaking for a majority of the Court, Mr. Justice White reasoned that:

> The basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasion by governmental officials.[29]

He went on to state that it would be anomalous to say that the individual and his property are to be given constitutional protection against intrusions only when the person whose rights are invaded is suspected of criminal activity. The *Camara* case expressly overruled *Frank* and held that the citizen may lawfully refuse to admit the housing inspector in a non-emergency situation, when the inspector is not possessed of a warrant, or cannot demonstrate probable cause to believe that the local housing code is being violated.

But the Court did not stop at this point. Camara had argued that any valid warrant obtained in connection with a housing inspection must particularly set forth probable cause to believe a given dwelling is in a condition violative of the local housing ordinance, just as a warrant sworn out in a criminal case must specifically describe the premises to be searched and the persons or property to be seized. Since the whole purpose of area-wide inspection is to determine the state of existing housing, it would be impossible for any agency desiring to conduct such a program to state in advance exactly what is hoped to discover.

Accordingly, the Court refused to accept this portion of appellant's argument. Rather, it developed the concept of "area" probable cause, for warrants designed to facilitate housing inspection. This means that where reasonable legislative or administrative standards applicable to area-wide inspections exist, the locality must permit a magistrate to review its application for a warrant, but should receive such a warrant if these minimum standards properly may be applied to the structure to which entry is sought. These requirements, happily, are in keeping with the directives given by the Model Ordinance in its Section 10:

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28. Brief for Appellant at 12-14.

29. 387 U.S. at 533.

10.01 The (Appropriate Agency) is hereby authorized and directed to develop and adopt plans for the inspection of dwelling units subject to the provisions of this ordinance, including:

(a) A plan for the periodic inspection of multiple dwellings and rooming houses subject to the provisions of Section XII, governing the licensing of the operation of such dwellings;

(b) A plan for the systematic inspection of dwelling units contained in such contiguous areas within this (Name of Corporate Unit) as may from time to time be designated by the (Appropriate Agency).

In the companion case to *Camara, See* v. *City of Seattle,*[30] a penalty was provided for interfering with the inspectors who wished to enter defendant's locked warehouse without a warrant. The *Camara* doctrine was extended to commercial premises, as the Court stated:

> . . . we see no justification for . . . relaxing Fourth Amendment safeguards where the official inspection is intended to aid enforcement of laws prescribing minimum physical standards for commercial premises.[31]

It should be understood that the obtaining of these civil warrants, which represents an entirely new procedure in most jurisdictions, will be dependent upon the law of each state and should not be dealt with specifically in a local ordinance. Few states have as yet acted to implement a procedure for the issuance of these warrants.[32]

The Court did not require that these warrants issue in every case,[33] but only where the householder refuses to consent to the inspection of his premises. While the number of those who object to warrantless searches may exceed what Mr. Justice Douglas once referred to as "one rebel a year",[34] proper education of the community in the general importance of housing inspections should form a part of the responsibility of any agency charged with the administration of a housing code,

30. 387 U.S. 541 (1967).

31. *Id.* at 543.

32. *See* Address by Edelman, Search Warrants and Sanitation Inspections—The New Look in Enforcement (Presented at the 95th Annual Meeting of the American Public Health Association, Inc., Miami, Florida, October 25, 1967).

33. "We therefore conclude that administrative entry, *without consent,* . . . may only be compelled through prosecution or physical force within the framework of a warrant procedure." See v. City of Seattle, 387 U.S. at 545.

34. Frank v. Maryland, 359 U.S. 360, 384 (1959) (dissenting opinion of Mr. Justice Douglas).

and should assist in minimizing difficulties. Section 17 of the proposed ordinance therefore provides:

> **17.01 The (Appropriate Authority) is hereby authorized to collect and disseminate information concerning techniques of maintenance, repair, and sanitation in housing and concerning the requirements of this ordinance and applicable rules and regulations issued pursuant thereto.**

Coupled with good public relations, education of the public can do much to facilitate what has become the "privilege" of entry for housing inspectors.

II. The Gathering and Use of Evidence

Closely related to the problem of effecting legal entry of a structure is the question of what use may be made of any evidence obtained in the course of an inspection. Before the *Frank* decision, the Supreme Court had ruled that evidence obtained in a search and seizure conducted in a manner violative of the Fourth Amendment's requirements must be excluded from criminal prosecutions in the federal courts. In *Mapp v. Ohio*,[35] decided two years after *Frank*, this "exclusionary rule" was held applicable to the states, through the operation of the Fourteenth Amendment's Due Process Clause, which carries over to the states those portions of the Bill of Rights deemed essential to the preservation of liberty. The Court in *Frank* had spoken only of the actual right of entry and had made no mention of the use to be made of any evidence obtained. The *Mapp* decision now made it clear that quite apart from the right of entry question, evidence obtained without a warrant or probable cause to believe a statute or ordinance had been violated could not be employed to prosecute the alleged wrongdoer.

Several years later, the *Mapp* doctrine was applied to invalidate a criminal prosecution for doing business in a non-business zone, a violation of a New York village ordinance.[36] The village had authorized the building inspector to enter any building or premises at reasonable hours for the purpose of enforcing the local business zoning ordinance. On three occasions the building inspector entered the premises owned by one Laverne, and made certain observations. These observations became the basis for three separate criminal convictions for conducting

35. 367 U.S. 643 (1961).

36. People v. Laverne, 14 N.Y.2d 304, 200 N.E.2d 441, 251 N.Y.S.2d 452 (1964).

business in a non-business zone, contrary to law. The Court of Appeals of New York reversed these convictions, stating:

> But we do not have before us summary administrative action or civil proceedings to preserve health or public safety, but rather official searches of private premises without a warrant which have become the basis of criminal prosecutions and convictions.[37]

Warrants, then, would appear necessary both when the right of entry is disputed and when evidence intended for use in a criminal prosecution is to be seized without the householder's consent.

Penalties for violation form an integral part of any housing code. But if constitutional restrictions apply to the use of evidence in criminal prosecutions, there might be a significant advantage in creating purely civil penalties for the offender against housing codes. Civil penalties do not carry with them the stigma of a police record, and avoid the difficulty encountered when a criminal court is reluctant to impose a very stiff fine upon one whose only transgression is a violation of a local housing ordinance.[38] The civil penalty is contemplated by the APHA-PHS Code, which in Section 15 reads:

> **15.01 Any owner, occupant or other person in charge of a dwelling, dwelling unit or rooming unit who has received the second order or notice of a violation of this ordinance may be subject to a civil penalty of ——— dollars per day for each day the violation continues after expiration of the specified . . . period, or to ——— days in jail, or to both, provided that no such penalty shall be applicable while a reconsideration, hearing or appeal to a court of competent jurisdiction is pending in the matter.**

Whatever the other benefits to be derived from this kind of civil penalty, it is not immune from the operation of the exclusionary rule, as was once believed. As they have done in the area of right of entry, courts have divorced the protection of the Fourth Amendment—the protection of privacy, from that conferred by the Fifth Amendment—the protection against self-incrimination.

This process had its beginnings in the case captioned *One 1958 Plymouth Sedan v. Pennsylvania.*[39] In this proceeding, state liquor enforcement officers, without either search warrants or probable cause

37. *Id.* at 305, 200 N.E.2d at 442, 251 N.Y.S.2d at 453.

38. Gribetz and Grad, *Housing Code Enforcement, Sanctions and Remedies,* 66 COLUM. L. REV. 1254 (1966).

39. 380 U.S. 693 (1965).

to believe that any state law had been violated, stopped and searched appellant's automobile, and found thirty-six cases of liquor therein. The State filed a petition for forfeiture of the car, a civil proceeding. The Pennsylvania State Supreme Court upheld the action, stating that the exclusionary rule applies in criminal cases only. But the United States Supreme Court reversed, holding that evidence obtained in a search made in violation of the Fourth Amendment may not be relied upon by a state to sustain a forfeiture, under the prohibitions of the Fourteenth Amendment relating to Due Process of Law. A forfeiture under these circumstances could lead to even greater penalties than an impermissible criminal prosecution. Such an anomalous situation, said the Court, must not be permitted to occur.

Tribunals in several states have extended the rule somewhat further. The Supreme Court of Georgia reviewed a civil action to abate gambling as a public nuisance.[40] State officials sought to confiscate defendant's gaming equipment and to close his place of business. Applying the rules of *Mapp* and *One 1958 Plymouth Sedan,* the court reversed the judgment, stating that because the search was conducted pursuant to improperly issued warrants, it was improper under the Fourth and Fourteenth Amendments.

In a New York case, *Incorporated Village of Laurel Hollow v. Laverne Originals, Inc.,*[41] the same building inspector who had observed Laverne conducting business in a non-business zone, and who had failed in his efforts to prosecute the alleged violator, sought a court order to enjoin the further commission of the offense. The New York Court of Appeals applied the exclusionary rule of *Mapp,* and the Fourth and Fourteenth Amendments, stating that civil fines are basically penal sanctions, especially when imprisonment is an alternative to the imposition of the fine, as was true in this case. A lower court judgment that defendant could properly be found in contempt was overturned.

The exclusionary rule has recently been applied to civil proceedings even where the threat of any sort of penal sanction or deprivation of property is totally absent. In *Williams v. Williams,*[42] a divorce case, an Ohio court denied plaintiff's motion for a new trial. The motion was based upon the allegation that plaintiff was in possession of new evidence—evidence which he had obtained by breaking into

40. Carson v. State, 221 Ga. 299, 144 S.E.2d 384 (1965).

41. 17 N.Y.2d 900, 218 N.E.2d 703, 271 N.Y.S.2d 996 (1966).

42. 8 Ohio Misc. 156, 221 N.E.2d 622 (Ct. of Common Pleas 1966).

his former wife's automobile. In language prophetic of what was to be decided in the *Camara* case, the court held that the history of the Fourth Amendment indicates that it was never meant to be relegated to the mere protection of those accused of crime. Through the operation of the Fourteenth Amendment, the Fourth Amendment precludes the use of evidence obtained in this manner, and the *Mapp* rule must be broadened. Similarly, in the New Jersey case of *Del Presto v. Del Presto*,[43] evidence obtained in the forcible entry of a correspondent's home by private detectives was denied admission in a divorce proceeding.

It has become clear that while both area inspection and the use of evidence to impose civil penalties upon those who would violate the Model Ordinance have been given the sanction of the courts and authorities writing in the field, great care must be taken in entering structures and in gathering evidence to see that the requirements of the Constitution have been met. Wherever possible, consent to inspection activities should be obtained from the householder. Education of the public can help in inducing such consent, as can the assurances which appear in section 11.06 of the Ordinance:

> **11.06 The (Appropriate Authority) shall keep confidential all evidence not related to the purposes of this ordinance and any rules and regulations pursuant thereto, which he may discover in the course of inspection. Such evidence shall be considered privileged, and shall not be admissable in any judicial proceeding, without the consent of the owner, occupant, or other person in charge of the dwelling unit or rooming unit so inspected.**

III. The Licensing of Multiple Dwellings

Section 12 of the Ordinance establishes a licensing procedure for all multiple dwellings. This sort of licensing, when reasonably related to minimum standards of sanitation, has for some time been recognized as a proper exercise of the police power, even when the adoption of the plan has had a retroactive effect.[44] The first two portions of this part of the Ordinance represent nothing which differs radically from any comparable ordinances. They simply provide that no person may operate a multiple dwelling or rooming house unless he holds an unrevoked and current operating license to do so. These licenses may be renewed for successive periods of one year each, and in sec-

43. 92 N.J. Super. 305, 223 A.2d 217 (1966).

44. Savage v. Dist. of Columbia, 69 N.J.L. 11, 54 A.2d 562 (1947); Gilman v. City of Newark, 73 N.J. Super. 562, 180 A.2d 365 (1962).

tion 12.04, the filing of appropriate application and renewal forms, developed by the enforcing agency are declared to be necessary before an application can be honored. Section 12.06 provides for the payment of licensing fees, charges designed to provide part of the revenue with which the locality will undertake rehabilitation.

Section 12.03 calls for inspection of an applicant's premises prior to the issuance of any operating license, in these terms:

> **12.03 The (Appropriate Authority) is hereby authorized, upon application therefor to issue new operating licenses, and renewals thereof, in the names of applicant owners of multiple dwellings and rooming houses. No such licenses shall be issued unless the multiple dwelling or rooming house in connection with which the license is sought is found after inspection to meet the requirements of this ordinance and of applicable rules and regulations pursuant thereto.**

This prior inspection as a prerequisite to the issuance of a license to do business has not as yet been drawn into question by the Supreme Court, which in the *See* case gave an indication that it was in agreement with the regulation of businesses in the interest of the community.[45] This raises the rather intriguing question of whether licenses might not be made to expire fairly often, necessitating the granting of a "new" license after a new inspection procedure has been completed. But if initial inspection prior to the licensing of a multiple dwelling or rooming house appears not to give rise to serious questions as yet, the prior consent to periodic inspections made without warrants during the pendency of the license may well be vitiated by the teachings of the *See* case. There is also the exclusionary rule to be considered, as will be demonstrated shortly. Section 12.05 of the Ordinance requires prior consent to periodic inspections, stating:

> **12.05 No operating license shall be issued or renewed unless the applicant owner agrees in his application to such inspections pursuant to sections 10.01 and 11.01 as the (Appropriate Authority) may require to determine whether the multiple dwelling or rooming house in connection with which such license is sought is in compliance with the provisions of this ordinance and with applicable rules and regulations pursuant thereto.**

Whether this kind of enforced consent alone will be allowed to permit periodic entry of a licensed multiple dwelling or rooming house is not predictable, but that is only the beginning of the difficulty. The

45. 387 U.S. at 544.

procedure envisioned does not seem quite so secure after two rulings relating to administrative proceedings in connection with liquor licenses. In New York, an intermediate court of appeals applied the exclusionary rule to an administrative proceeding to divest a saloon keeper, who permitted gambling on his premises, of his license to do business.[46] The evidence employed was gathered by inspectors whose warrants were vacated as being issued without probable cause in a criminal prosecution based upon the same facts. The court reversed the agency decision against the owner, stating that the exclusionary rule applies to *all* evidence obtained in an illegal search, whether designed for use in criminal, quasi-criminal, civil, or even summary agency proceedings.

The case just described was reversed by the New York Court of Appeals on grounds not relevant to the present discussion,[47] but a similar line of reasoning was applied recently in Pennsylvania to invalidate a $250 fine imposed for the violation of the terms of a liquor license.[48] In this proceeding, the evidence was obtained without a valid search warrant, and deprived defendant of what the court described as the property right he had in his license, without the requisite due process of law.

Particular importance might be attached to the exclusionary rule because of an innovation which the Model Code contemplates. In order to discover and remedy violations of the terms of operating licenses more easily, the inspector is to have access to a sort of business record, charting the complaints of tenants and the response made to them. It is provided:

> **12.11 Every owner or other person in charge of a licensed multiple dwelling or rooming house shall keep, or cause to be kept, records of all requests for repair and complaints by tenants, which are related to the provisions of this ordinance and to any applicable rules and regulations, and of all corrections made in response to such requests and complaints. Such records shall be made available by the owner or other person in charge to the (Appropriate Authority) for inspection and copying upon demand. Such records shall be admissable in any administrative or judicial proceeding pursuant to the provisions of this ordi-**

46. Leogrande v. State Liquor Authority, 25 App. Div. 2d 225, 268 N.Y.S.2d 433.

47. 19 N.Y.2d 418, 227 N.E.2d 302, 280 N.Y.S.2d 381(1967).

48. Pennsylvania State Liquor Control Bd. v. Leonardziak, 210 Pa. Super. 511, 233 A.2d 606 (1967).

nance as prima facie evidence of the violation or the correction of violations of this ordinance or applicable rules and regulations pursuant thereto.

There is precedent for this requirement,[49] but it is possible that courts may compel an inspector who wishes to employ these records to revoke a license, to have obtained his evidence with a search warrant, if the licensed owner objects to their seizure.

Our principal emphasis in this discussion of licensing procedures, as in those involving inspections and evidence, has been with the spectre of unconstitutionality which has lately begun to haunt the local health officer and is rattling some chains in close proximity to the provisions of the Model Code. However, the proposed ordinance contains much that is worthy of discussion without reference to the emerging interpretations being fashioned daily by the courts. As a tool for enforcement, the use of licensing, including periodic inspections, represents an important modification of many of the housing codes now in force.

Another major problem with which the provisions on licensing attempt to deal is that of the absentee landlord who cannot be reached for notice of violations. Very stringent control is placed upon the licensed owner by sections 12.07, 12.08, and 12.09 of the Code. 12.07 deals specifically with nonresident owners:

12.07 No operating license shall be issued or renewed for a nonresident applicant, unless such applicant designates in writing the (Appropriate Local Official) his agent for the receipt of service of notice of violation of the provisions of this ordinance and for service of process pursuant to this ordinance.

This section borrows an idea from the law of most states with regard to foreign corporations, which generally compels the company which desires a local situs of operation to designate the secretary of state its agent for service of process. In the present context, the owner of a multiple dwelling or rooming house will similarly remain amenable to such service through the use of an agent.

With regard to the resident owner, who may temporarily be outside the jurisdiction, this ordinance requires that a substitute be named for purposes of service in certain cases. Free choice is allowed in selecting such an agent:

49. *Cf.* Sherman, Clay & Co. v. Brown, 142 Wash. 37, 252 P. 137 (1927); 3 E. McQUILLAN, THE LAW OF MUNICIPAL CORPORATIONS 24.332 (3rd ed. 1949).

12.08 No operating license shall be issued or renewed for a resident applicant, unless such applicant has first designated an agent for the receipt of service of violations of the provisions of this ordinance and for service of process pursuant to this ordinance when said applicant is absent from this (Name of corporate unit) for thirty (30) or more days. Such a designation shall be made in writing, and shall accompany each application form. The applicant may designate any person resident in this (Name of corporate unit) his agent for this purpose, or may designate the (Appropriate Local Official) his agent for this purpose.

Any licensed owner must give twenty-four hours notice of the transfer of legal control over his property and his license is not transferrable to other properties.[50] These provisions serve to assure the enforcing agency the greatest possible knowledge of the multiple dwellings in the locality, their owners, and their operators.

If violations of the terms of the ordinance are found upon the inspection of a licensed multiple dwelling or rooming house, the owner or agent will be served with notice of the existence of the violation and warned that if he does not act to correct it within a stated period of time, his license may be suspended.[51] At the end of this period, the structure is to be reinspected, and if the violation has been allowed to persist, the license can be suspended at the discretion of the enforcing agency.[52] As has been pointed out, the history of the recent interpretation of applicable constitutional provisions has given a strong indication that the gathering of evidence upon which such suspension would be premised must adhere scrupulously to the warrant requirement of the Fourth Amendment, as it has been interpreted by the courts. Should the suspension procedure be invoked, the owner could ask for an informal conference to reconsider the agency action, or for a full-scale formal hearing, but if this request is not received within twenty-one days following suspension, the license shall be revoked.[53] Prior to revocation, the owner may request reinspection to prove that the violations have been corrected. If reinspection reveals that the situation has indeed been rectified, the license will be reinstated, except that the application for reinspection cannot be used to extend the period of suspension.[54] Every effort should be made to in-

50. APHA-PHS Code § 12.10.
51. *Id.* at § 12.12.
52. *Id.* at § 12.13.
53. *Id.* at § 12.14.
54. *Id.* at § 12.15.

fluence the owner to cooperate with the locality and to retain control of his business. As the ordinance makes clear, revocation of a license is viewed as a measure of last resort, to be invoked only after the agency charged with enforcement has decided that suspension is necessary and that no action has been taken to correct the conditions which have produced the determination, or to dispute its fairness. This two-step process should help in persuading erring landlords to return to the fold without causing the closing of many multiple dwellings. In extreme cases, the municipality may have to purchase and assume the obligation of repairing, or otherwise correcting, the failings of the structure, thereafter selling and licensing their operation to more-law-abiding landlords. Such a procedure will depend upon financial resources, and will not entirely prevent what has remained a problem for administration: what to do with the unfortunate tenants of a landlord who prefers to allow his license to be revoked.

IV. Administrative Procedure

In an age which has witnessed a communications revolution as profound as the twentieth century's, it seems odd that the failure to receive timely and adequate notice of violations is so often raised as a defense by those who are charged with refusal or unwillingness to meet the minimum standards of a local housing code. The proposed ordinance's requirements for notice have been drawn with a view toward providing the locality with great flexibility, so as to respond to each jurisdiction's capabilities and financial posture. At the same time, it makes a real attempt to assure that adequate notice will be given of all violations, in order to provide the owner or occupant with full due process of law. Multiple notices will reach the perpetrator of a continuing violation in the hope of eliciting his cooperation in setting matters right. Section 14 of the Ordinance, which encompasses the methods for serving an alleged wrongdoer with notice, provides an administrative framework for the enforcement procedures contained in this model legislation:

> **14.01 Whenever the (Appropriate Authority) determines that any dwelling, dwelling unit, or rooming unit, or the premises surrounding any of these, fails to meet the requirements set forth in this ordinance or in applicable rules and regulations issued pursuant thereto, he shall issue a notice setting forth the alleged failures, and advising the owner, occupant or other person in charge that such failures must be corrected. This notice shall:**

14.01.01 Be in writing

14.01.02 Set forth the alleged violations of this ordinance or of applicable rules and regulations issued pursuant thereto.

14.01.03 Describe the dwelling, dwelling unit or rooming unit where the violations are alleged to exist or to have been committed.

14.01.04 Provide a reasonable time, not to exceed sixty (60) days, for the correction of any violation alleged.

14.01.05 Be served upon the owner, occupant or other person in charge of the dwelling, dwelling unit, or rooming unit personally, or by registered mail, return receipt requested, addressed to the last known place of residence of the owner, occupant or other person in charge. If one or more persons to whom such notice is addressed cannot be found after diligent effort to do so, service may be made upon such person or persons by posting a notice in or about the dwelling, dwelling unit or rooming unit described in the notice, or by causing such notice to be published in a newspaper of general circulation for a period of ——— consecutive days; or

14.01.06 Be served upon a resident agent for the receipt of such service of notice designated pursuant to Section 12.08; or

14.01.07 Be served upon the (Appropriate Local Official) where he has been designated agent for such service pursuant to Section 12.07.

Notice, therefore, can be given a violator personally, by mail, by posting a placard, or by publication. Further sections of the Ordinance call for reinspection at the end of the stated period of time allowed for correction,[55] and for the filing of an order requiring the correction of all violations within a period of not more than sixty additional days, provided the alleged violator does not request an informal reconsideration or petition for a formal hearing.[56]

The violator who persists in his failure to meet the minimum standards provided in the Code is, of course, subject to penalties. But he is also subject to a cloud on his title by virtue of a system for the recording of second notices of violation:

14.05 The (Appropriate Authority), after the expiration of the time granted the persons served with such second notice to

55. *Id.* at § 14.02.
56. *Id.* at § 14.03.

seek reconsideration or a hearing in the manner hereinafter provided by this ordinance, or after a final decision adverse to such person served has been rendered by the (Hearing Agency) or by (a court of competent jurisdiction) to which an appeal has been taken, shall cause the second notice to be recorded in the (registry of deeds).

14.06 All subsequent transferees of the dwelling, dwelling unit or rooming unit in connection with which a second notice has been so recorded shall be deemed to have notice of the continuing existence of the violations alleged, and shall be liable to all penalties and procedures provided by this ordinance and by applicable rules and regulations issued pursuant thereto to the same degree as was their transferor.

Violations have been made to run with the property, so that a recorded second notice carries with it all the effect of an unsatisfied lien. This procedure adds the sanction of the marketplace to the traditional penal sanction in the attempt to produce compliance with the terms of the Ordinance. Because of its similarity to the prior lien situation, this sort of cloud upon title does not appear unduly restrictive of the free alienation of property, but the provision may have to be tested in the courts before stating with certainty that it does not illegally restrict the sale or exchange of property. Even so, the concept is one which should receive serious consideration in the preparation of housing codes for modern municipalities.

The person charged with a failure to comply with the provisions of a housing code must be given an opportunity to present his case. It is also necessary, however, that each jurisdiction rigorously enforce the provisions of its ordinance. To assure that fairness will be shown the alleged violator, within the capabilities of each jurisdiction to grant him his day before the agency, the Model Code has been drafted to include two separate procedures and is written in the alternative.

The first method for considering the case presented by the householder is rather informal, and is primarily designed for use in smaller localities, or in those lacking the resources of money or manpower necessary to implement the more formal procedures contained in the second alternative. Alternative A, the application for reconsideration, is presented in the first portion of Section 18 of the Code:

18.01.01 Any person aggrieved by a notice of the (Appropriate Authority) issued in connection with any alleged violation of this ordinance or of applicable rules and regulations issued pursuant thereto, or by any order requiring repair or demolition pursuant to Sections 16.01 or 16.02, may apply to the (Appro-

priate Authority) for a reconsideration of such notice or order within twenty-one (21) days after it has been issued.

18.01.02 The (Appropriate Authority) shall set a time and place for an informal conference on the matter within ten (10) days of the receipt of such application, and shall advise the applicant of such time and place in writing.

18.01.03 At the informal conference, the applicant shall be permitted to present his grounds for believing that the order should be revoked or modified to one or more representatives of the (Appropriate Authority).

18.01.04 Within ten (10) days following the close of the informal conference the (Appropriate Authority) shall advise the applicant whether or not it will modify or set aside the notice order issued by the (Appropriate Authority).

The purposes of the informal conference are persuasion and conciliation, to be achieved in a manner more akin to serious discussion than to formal adjudication. There is no separate administrative tribunal asking for the presentation of evidence. This process is an attempt to work things out in a personal way. Properly utilized, it can serve to educate a community and to earn a considerable degree of public good will.

If a person believing himself aggrieved by a notice or order, determines that he wishes an independent review of his case, and the one against him, he may by-pass the conference procedure and file, instead, for a hearing before a tribunal constituted for no other purpose. This course of action would also be available to those dissatisfied with the decision of the enforcing agency following an informal conference. It is described in Alternative A, Section 18.02 of the Ordinance:

18.02.01 Any person aggrieved by a notice of the (Appropriate Authority) issued in connection with any alleged violation of the provisions of this ordinance or of any applicable rules and regulations pursuant thereto, or by order requiring repair or demolition pursuant to Sections 16.01 and 16.02, may file with the (Hearing Agency) a petition setting forth his reasons for contesting the notice or order.

The petition, which must be filed within twenty-one days after the service of the notice or order complained of by the person aggrieved,[57] initiates a completely *de novo* review of the matter. The agency which receives the petition possesses the discretion to hear the case or not.[58]

57. *Id.* at § 18.02.02 (Alternative A).

58. *Id.* at § 18.02.03 (Alternative A).

A refusal to hear the case would seem sufficient to permit a court to review the proceeding. A petitioner will be notified in writing of the agency's decision.

If a hearing is granted, notice is given the petitioner in the following manner and the Hearing Agency will dispose of the case in accordance with the powers given it by Section 18.02:

18.02.04 When the (Hearing Agency) determines to hold a a hearing, it shall serve petitioner with notice of its decision in the manner provided for service of notice in Section 14. Such notice shall be served within ten (10) days of the receipt of the petition.

18.02.05 At the hearing, the petitioner shall be given an opportunity to show cause why the notice or order should be modified or withdrawn, or why the period of time permitted for compliance should be extended.

18.02.06 The (Hearing Agency) shall have the power to affirm, modify, or revoke the notice or order, and may grant an extension of time for the performance of any act required of not more than ——— additional month(s), where the (Hearing Agency) finds that there is practical difficulty or undue hardship connected with the performance of any act required by the provisions of this ordinance or by applicable rules or regulations issued pursuant thereto, and that such extension is in harmony with the general purpose of this ordinance to secure the public health, safety and welfare.

18.02.07 The (Hearing Agency) may grant variances from the provisions of this ordinance or from applicable rules and regulations issued pursuant thereto, when the (Hearing Agency) finds that there is practical difficulty or undue hardship connected with the performance of any act required by this ordinance and applicable rules and regulations pursuant thereto; that strict adherence to such provisions would be arbitrary in the case at hand; that extension would not provide an appropriate remedy in the case at hand, and that such variance is in harmony with the general purpose of this ordinance to secure the public health, safety and welfare.

Barring an accommodation reached at a preliminary conference, this hearing is the first opportunity for the individual to obtain relief for his grievances if they have been well taken. In addition to possessing the power to overturn an unjust notice or order, the agency chosen to preside at hearings can act to grant a period of time for compliance greater than that originally stipulated, can modify an order in any material respect, or can create special exceptions to the minimum standards set forth in the ordinance.

The hearing procedure proposed by the second alternative set of provisions is somewhat different from that just detailed, since it constitutes a review of an earlier proceeding and is based upon a record of this earlier administrative adjudication. This first step is a formal conference, presided over by a referee, who would be specially qualified for his role. It is designed primarily for jurisdictions with larger populations and greater resources:

18.01.01 Any person aggrieved by a notice of the (Appropriate Authority) issued in connection with any alleged violation of this ordinance or of applicable rules and regulations issued pursuant thereto, or by any order requiring repair or demolition pursuant to Sections 16.01 and 16.02 may petition the (Appropriate Authority) for a conference on the matter. The petition may be filed by means of a letter, setting forth the petitioner's grounds for contesting the notice or order and must be received by the (Appropriate Authority) within twenty-one (21) days after such notice or order was served on the petitioner.

18.01.02 The (Appropriate Authority) shall set a time and place for the conference and shall advise the petitioner in writing of such time and place, within ten (10) days of the receipt of his petition.

18.01.03 The (Appropriate Authority) shall designate one or more referees to preside at such conference.

18.01.04 The referee is hereby authorized to administer oaths and affirmations and to subpoena any witnesses or documents, which may be introduced before him.

18.01.05 A verbatim record of the proceedings before the referee shall be kept for each conference.

18.01.06 Within ten (10) days following the close of each conference, the referee shall affirm, set aside or modify the notice or order contested by the petitioner, and shall advise the petitioner and the (Hearing Agency) of his decision in writing.

No informal discussion is envisioned here. This is an adjudication before an administrative officer with quasi-judicial authority and the power to reverse the agency, if necessary. Any further administrative proceedings amount to an administrative review on the record of the hearing before the referee. An application for this review would have to be filed within twenty-one days following the petitioner's notification of an adverse decision by the referee, which would be served upon him in the manner for serving notice already described.[59] In this case,

59. *Id.* at § 18.02.01 (Alternative B).

the agency conducting the hearing would not be permitted to deny review and would notify the petitioner of the pending hearing within ten days of the receipt of the petition.[60] The enforcing agency would at the same time be requested to send a transcript of the proceedings before the referee to the hearing agency for its review.[61] The hearing agency, on the basis of the record, could affirm, modify, or revoke the notice or order which formed the basis of the petitioner's complaint. The ordinance describes this formalized review in this manner:

18.02.05 The hearing shall be on the record of the conference. The (Hearing Agency) after consideration of the record as a whole, may affirm, modify or revoke the notice or order, and may grant an extension of time for the performance of any act of not more than ——— additional months, where the (Hearing Agency) finds that there is practical difficulty or undue hardship connected with the performance of any act required by the provisions of this ordinance or by applicable rules or regulations issued puruant thereto, and that such extension is in harmony with the general purpose of this ordinance to secure the public health, safety and welfare.

18.02.06 The (Hearing Agency) may grant variances from the provisions of this ordinance or from applicable rules and regulations issued pursuant thereto, when the (Hearing Agency) finds that there is practical difficulty or undue hardship connected with performance of any act required by this ordinance and applicable rules and regulations pursuant thereto; that strict adherence to such provisions would be arbitrary in the case at hand; that extension would not provide an appropriate remedy in the case at hand; and that such variance is in harmony with the general purpose of this ordinance to secure the public health, safety and welfare.

All of the agency proceedings described, whether of a formal or informal nature, are specifically subjected to judicial review on the record by a court of competent jurisdiction to insure that all aggrieved persons are given due process of law. Section 18.03 sets forth this guarantee:

18.03 Any person aggrieved by the final decision of the (Hearing Agency) may obtain judicial review by filing on a court of competent jurisdiction within ——— days of the announcement of such decision a petition praying that the decision be set aside in whole or in part. A copy of each petition so filed shall be

60. *Id.* at § 18.02.02 (Alternative B.)
61. *Id.* at § 18.02.03 (Alternative B).

forthwith transmitted to the (Hearing Agency) which shall file in court a record of the proceedings upon which it based its decision. Upon the filing of such record, the court shall affirm, modify, or vacate the decision complained of in whole or in part. The findings of the (Hearing Agency) with respect to questions of fact shall be sustained if supported by substantial evidence on the record, considered as a whole.

V. FINANCING

Two essential questions must be faced by every jurisdiction which undertakes a program of housing maintenance and rehabilitation: "What should be done?" and "How can it best be financed?" The proposed ordinance reflects the belief of its authors that municipalities must move quickly to effect repair, and, when necessary, demolition of existing structures, and that these undertakings can be successfully financed. Section 16 of the Ordinance divides these questions into three areas: repair, demolition, and the revolving fund.

Repair by the jurisdiction is to be invoked as a measure of last resort, but should be considered as of great importance in preserving the public health, safety, and welfare. Section 16.01.01 provides:

16.01.01 Whenever an owner or other person in charge of a dwelling, dwelling unit or rooming unit fails, neglects or refuses to make repairs called for by a second order or notice of violation issued pursuant to Section 14.03, the (Appropriate Authority) may undertake such repairs, when in its judgment a failure to make them will endanger the public health, safety or welfare, and the cost of such repairs will not exceed fifty per cent (50%) of the fair market value of the structure to be repaired.

There is precedent in the law for such a procedure,[62] and the Ordinance assures that action will be taken immediately to ameliorate adverse conditions instead of incurring the delay which the more traditional lien on the property involves.

Notice must be given of an intention to repair,[63] and the Ordinance, as drafted, provides the workmen who actually accomplish repair with a right of entry,[64] which may well be subject to challenge in light of the *Camara* and *See* decisions. Where a householder refuses entry to

62. *Cf.* City of Independence v. Purdy, 46 Iowa 202 (1877), in which the city filled in petitioner's stagnant pond, and was permitted to recover its costs in a civil action.

63. APHA-PHS CODE, § 16.01.02.

64. *Id.* at § 16.01.03.

a repairman, the indications point to the necessity of obtaining a warrant.

Rather than invoking a cumbersome process of placing a lien on the affected property, the Ordinance achieves financing for the needed repairs from the recalcitrant owner, himself, by means of a simple civil action for recovery of a debt. Section 16.01.04 states:

> **16.01.04 When repairs are made at the direction of the (Appropriate Authority) the cost of such repairs shall constitute a debt in favor of this [Jurisdiction] against the owner of the repaired structure. In the event such owner fails, neglects or refuses to pay this [Jurisdiction] the amount of this debt, it shall be recoverable in a civil action, against the owner or his successor, brought in a court of competent jurisdiction by this [Jurisdiction] which shall possess all rights of a private creditor.**

Some structures cannot economically be repaired or are so delapidated as to require destruction. The Ordinance therefore provides for demolition to be accomplished by the municipality if the owner neglects or refuses to accomplish it within a stated period of time. Recovery of the costs of the undertaking would be made in the same manner as has been provided for the recovery of sums expended for repair:[65]

> **16.02.01 Any dwelling, dwelling unit or rooming unit shall be declared unfit for human habitation when, in the judgment of the (Appropriate Authority) it is so damaged, decayed, delapidated, insanitary [sic], unsafe or vermin-infested as to create a hazard to the health, safety and welfare of the occupants or of the public, and where the structure is determined by the (Appropriate Authority) not to warrant repair under Section 16.01.01.**

Demolition is intended to extend beyond the removal of occupied unfit structures, also applying to vacant structures:

> **16.02.02 Any vacant building shall be declared unfit for human habitation, when its existence, in the judgment of the (Appropriate Authority), is detrimental to the public health, safety or welfare.**

In these cases, it may be necessary to act quickly to remove the structure so that the owner of the building determined to require demolition, once served with notice, would be given ninety days to remove

65. *Id.* at § 16.02.06.

the structure,[66] although he could effect a delay by seeking an informal conference or formal hearing in the matter.[67]

As in situations calling for repair, the municipality itself may undertake demolition where the circumstances warrant:

16.02.06 When the owner fails, neglects or refuses to remove the unfit structure within the requisite time, the (Appropriate Authority) may apply to a court of competent jurisdiction for a demolition order. The court may grant such order when no reconsideration or hearing on the matter is pending. The cost of such demolition shall create a debt in favor of this (Jurisdiction) against such owner, and shall be recoverable in a civil action brought by this (Jurisdiction), which shall possess all the rights of a private creditor.

As a safety precaution, the ordinance demands the "topping off" of any demolition site:

16.02.07 All demolition, whether carried out by the owner or by the (Appropriate Authority) shall include the filling in of the excavation remaining on the property on which the demolished structure was located, in such manner as to eliminate all potential danger to the public health, safety or welfare arising from such excavation.

Repair, demolition, and all other functions relating to the maintenance or rehabilitation of housing would be supported through a revolving fund maintained by each jurisdiction. This fund would contain all civil penalties collected, all fees collected in connection with the licensing of multiple dwellings and rooming houses, all judgments collected in civil actions founded on repair or demolition, any other available local funds, and grants from any public or private sources, the local enforcing agency having been authorized to apply for such grants on behalf of its parent jurisdiction.[68]

Conclusion

As is true of almost all human institutions, the law must remain responsive to changing social conditions and to the advancing state of man's ability to control his environment. New approaches must be applied to old problems, and where they are found wanting, methods

66. *Id.* at § 16.02.03. Note that a building, scheduled for demolition and vacated, may not be reoccupied under the terms of § 16.02.04.

67. *Id.* at § 16.02.05.

68. *Id.* at §§ 16.03.01(a)-(e).

must be reshaped and tried once more. The administrative and enforcement sections of the APHA-PHS Recommended Housing Maintenance and Occupancy Ordinance represent the first tentative effort to grapple with the present housing crisis with the assistance of the experience acquired by lawyers, judges, and public health officers in the past sixteen years. For the Code to be meaningful, it must never be allowed to become static, but must be subjected to periodic review, frequent revision, and constant improvement.