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CITY OF GUADALUPE
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February 14, 2023

The Honorable Mayor of
The City of Guadalupe Ariston Julian,
and Council Members
918 Obispo Street
Guadalupe, CA 93434

Re: Warning concerning unconstitutional aspects of proposed Ordinance No. 2023-507 to add Chapter 8.80 to the Municipal Code of the City of Guadalupe

Mayor Julian and Council Members:

A number of tax payers of the City of Guadalupe have asked me to review the referenced proposed ordinance. I need to bring to your attention the constitutional impairments implicit in the proposal lest the City subject itself to needless litigation and liabilities. If you have been advised otherwise, please understand that the advice is erroneous.

The illegal provisions of the proposed municipal code Chapter flout preemptive California statutes, impair rights guaranteed under California's Constitution, Article I and II; and impair rights set forth in U.S. Constitution Amendments One, Four, Five and Fourteen.

In summary, particularly when read together with other portions of the City's Municipal Code:

- 1) Punish the owners of commercial and industrial real property who decline to waive their right against search of their property and business records absent a search warrant issued by a judge upon probable cause, and by removing their right to keep their vacant until they locate a tenant whom the owner finds suitable.
- 2) By requiring registration of vacant properties, requiring listing with a

commercial real estate broker or equivalent, and by imposing warrantless inspection requirements the City is assuming essential ownership rights of control and access over industrial and commercial properties. The City is seizing a significant portion of the allodial ownership rights of the property owner, without compensation.¹

3) By reimposing mandatory warrantless searches of all vacant commercial properties after the voters repealed substantially similar provisions formerly in Title 5 in a 2014 ballot proposition, the Council will violate voters' reserved power to directly legislate on a subject contained in California Constitution, Article II.

The Constitutions of the United States and of the State of California are not legalistic. Each was adopted by the People directly in language for all to understand. I know that each of you took seriously your oath of office to support – to give effect to - the rights guaranteed by both Constitutions. Such was fully explained by a unanimous court, in *Ableman v. Booth* (1858) 62 U.S. 506, and later in *Cooper v. Aaron* (1958) 358 U.S. 1.

A sentence in the Municipal Code requiring an officer, employee or agent to obtain a warrant, if required by law, this is a meaningless sentence. It is well established that refusal to waive the Article I, § 13 and U.S. 4th Amendment privilege against unreasonable search does not constitute probable cause to support issuance of a warrant.

Analysis must begin with **Residential Search** provisions of Municipal Code, Title 8, that already violate U.S. law. The Fourth Amendment prohibition against unreasonable searches protects against warrantless intrusions during civil as well as criminal investigations. *Marshall v. Barlow's Inc.* (1978) 436 U.S. 307, 312. The Municipal Code contains no limitation of these warrantless searches (styled inspections) to the four limited industries that the U.S. Supreme Court has held have “such a history of government oversight that no reasonable expectation of privacy ... could exist for a proprietor over the stock of an enterprise.” Those industries? Liquor sales, firearms dealing, mining, and auto junkyards.

A similar scheme of ordinances by the City of Garland was struck down by the Federal Court as violating the Fourth Amendment rights of an owner of residential rental units.² Like Guadalupe, the City of Garland had required a permit (Guadalupe's business license) in

¹ The right to use an individual's property is separately guaranteed under California Constitution, Article I, § 1, which states that among the inalienable rights of Californians' “are enjoying and defending life and liberty, *acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.*” The right to use property includes the right to leave it vacant and fallow. The right to protect one's property includes the right to protect it from intrusion by local governmental officials.

² *Dearmore v. City of Garland* (2005) 400 F.S7upp.2d 894; see also *Dearmore v. City of Garland* (2008) 519 F.3d 517 [determining that protection of the commercial fourth amendment rights in the landlord's rental housing units justified an award of private attorney general fees to Dearmore after the City Council repealed by amendment offending parts of its ordinance].

order to rent out dwelling units, and *required* as a condition to receiving the permit an agreement to an annual inspection whether the rental was occupied or not. Similar to Guadalupe, Garland fined owners who rented without a license, and Garland's ordinance provided for a daily fine for refusing to allow a warrantless inspection. The Court issued an injunction against the City's enforcement of "the Ordinance that requires a person who rents or leases a single-family dwelling to allow an inspection of the rental property as a condition of issuing a permit, and that criminally penalizes a lessor for refusing to allow an inspection" to prevent violation of the Landlord's Fourth Amendment rights. The Court also enjoined the City from enforcing any part of the "Ordinance that requires a person who rents or leases a single-family dwelling to allow an inspection of the rental property as a condition of issuing a permit, or penalizes the lessor for refusing to allow an inspection." *Dearmore v. City of Garland* (2005) 400 F.Supp.2d 894, 906.

In 2015, the Federal District Court of the Southern District of Ohio struck down an ordinance of the City of Portsmouth, similar to that in Guadalupe, which required issuance of a license to rent dwelling units after a required inspection, and an annual inspection thereafter. The Court in *Baker v. City of Portsmouth* did such a good job of summarizing the law concerning warrantless inspections without probable cause that I provide you with several quotations from the case.

'The basic purpose of this Amendment ... is to safeguard the privacy and security of individuals against arbitrary invasions by government officials.' *Camara v. Mun. Court*, 387 U.S. 523, 527 (1967). The Supreme Court has repeatedly held that 'searches conducted outside the judicial process, without prior approval by a judge or a magistrate judge, are *per se* unreasonable subject only to a few specifically established and well-delineated exceptions.' *City of Los Angeles v. Patel*, U.S. ___, 135 S.Ct. 2443, 2452 (2015). See also *Camara*, 387 U.S. at 528-29 (1967) (noting that 'except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant'). This rule, which applies to the states via the Fourteenth Amendment, is applicable to both commercial premises as well as private homes. See *Marshall v. Barlow's, Inc.*, 436 U.S. 311, 312 (1978). *City of Portsmouth*, 2015, WL5822659, pg 3.

"In *Sokolov v. Village of Freeport*, 420 N.E.2d 55 (N.Y. 1981), the Court of Appeals of New York applied the principles of *Camara* to a rental ordinance substantially similar to the Portsmouth ROC in this case. **As here, the challenged ordinance required that landlords obtain a rental permit prior to leasing their property, which required an inspection of the rental property and a penalty for failure to comply—a fine of \$250 was levied for each day a rental property was occupied without a permit. *Id.* at 343-44.** The court held that the rental permit ordinance was unconstitutional 'as it effectively authorizes and, indeed, requires a warrantless inspection of

residential rental property. ‘ *Id.* at 346. In reaching its holding, the court rejected the argument that because the ordinance punished renting without a permit, as opposed to the failure to consent to a search, any inspections under the ordinance was conducted with the consent of the owner. The court noted, ‘[a] property owner cannot be regarded as having voluntarily given his consent to a search where the price he must pay to enjoy his rights under the Constitution is the effective deprivation of any economic benefit from his rental property.’ *Id.*”

City of Portsmouth, 2015, WL5822659, pg 4. (**Emphasis added**)

“In this case, the Court is satisfied that the warrantless inspections impact a substantial privacy interest, as ‘*the sanctity of private dwellings [is] ordinarily afforded the most stringent Fourth Amendment protection.*’ *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976). Cf. *California v. Ciraolo*, 476 U.S. 207, 226 (1986) (Powell, dissent) (describing the home as ‘an area where privacy interests are most cherished in our society’);....”

City of Portsmouth, 2015, WL5822659, pg 6 (*emphasis added*).

The U.S. Supreme Court also has weighed in on city ordinances mandating inspections in a number of other contexts. In *Camara v. Municipal Court for the City and County of San Francisco* (above), the court held that no forced inspection could occur absent an issuance of an administrative warrant, based on probable cause, for a particular establishment. Probable cause to justify the warrant may be based on specific evidence of an existing violation, or on a showing that reasonable legislative or administrative standards exist for conducting the inspection of that particular establishment. *Camara*, 387 U.S. 523, 534. Examples of the kinds of standards the high court was looking for were “the passage of time, the nature of the building (e.g. a multifamily apartment house), or the condition of the entire area.” When considering what an “entire area” is, the Court clearly intended to mean a particularly run down part of a city; and any city that seeks to extend the meaning of “entire area” to cover an entire city seriously would misread the *Camara* decision.

The importance of having a neutral magistrate review the administrative probable cause before issuing a warrant was highlighted by *Camara*, and the reasoning applies to the web set forth in Guadalupe’s municipal code, culminating in the overreach in §8.50.100. Here’s what the Supreme Court said about the harmful effect of this kind of ordinance on tenants:

Under the present system, when the inspector demands entry, the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector’s power to search, and no way of knowing whether the inspector himself is acting under proper authorization. These are questions which may be reviewed by a neutral magistrate without any reassessment of the basic agency decision to canvass an area. Yet, only by refusing entry and risking a criminal

conviction can the occupant at present challenge the inspector's decision to search. The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search. We simply cannot say that the protections provided by the warrant procedure are not needed in this context; broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may only be invoked at the risk of a criminal penalty. *Camara*, 387 U.S. 523, 532-33 (emphasis added).

Commercial & Industrial Properties

On the same day that *Camara* was decided, in a companion opinion, the U.S. Supreme Court interpreted the safeguards of the Fourth Amendment as applying to commercial property. In *See v. The City of Seattle*³ the court considered a conviction of Norman See, who had refused a warrantless inspection by the Fire Department of his locked commercial warehouse *required* by a municipal ordinance. Similar to the Guadalupe Municipal Code, Seattle's ordinance made it "the duty of the Fire Chief to inspect and he may enter all buildings and premises, except the interiors of dwellings, as often as may be necessary for the purpose of ascertaining and causing to be corrected any conditions liable to cause fire," Notably, Seattle's ordinance did not go so far as to make the Police/Fire Chief the inspector for building code violations. Nor did the Court limit its decision to fire inspections.

The Supreme Court held, in *See*, that:

"..., we see no justification for so relaxing Fourth Amendment safeguards where the *official inspection* is intended to aid enforcement of laws prescribing *minimum physical standards for commercial premises*. As we explained in *Camara*, a search of private houses is presumptively unreasonable if conducted without a warrant. The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by warrant." *See*, 387 U.S. 541, 543.

"...the decision to enter and inspect will not be the product of the *unreviewed discretion* of the enforcement officer in the field." *See*, 387 U.S. 541, 545 (*emphasis added*)

³ (1967) 387 U.S. 541
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“We therefore conclude that administrative entry, without consent, upon the portions of commercial premises which are *not open to the public* may only be compelled through prosecution or physical force within the framework of a warrant procedure.” *See, 387 U.S. 541, 545 (emphasis added).*

It should be obvious that a vacant commercial or industrial building is not open to the public.

California’s own Courts have confirmed that depriving a person of the right to conduct business as a penalty for asserting Fourth Amendment protections by refusing an inspection will not be tolerated. *See California Restaurant Association v Henning* (1985) 173 Cal.App.3d 1069.

California adopted Preemptive Administrative Warrant Statutes in 1968

Code of Civil Procedure §§ 1822.50 – 1822.60 set forth all the conditions within which an administrative inspection warrant must issue. GMC § 8.50.100 contains no standards on which to issue the warrant (unless it be the constitutionally protected right to refuse entry) and conflicts with the limitations set forth in these state statutes.

To sum up: Guadalupe Municipal Code §8.50.100 was adopted in violation of the voters reserved rights when they adopted Measure W repealing inspections; those inspections violate owners, tenants, and business owners’ right to be free of mandatory official inspections without issuance of a judicial warrant, based on probable cause; constitute a taking without probable cause; and are unlawful under preemptive California statutes.

Taxpayer and Citizen standing to Correct Unlawful City Actions

California law provides standing to challenge unconstitutional ordinances, actions and policies of municipalities. Code of Civil Procedure, § 526a, provides that *any* citizen resident or property owner who has been assessed or paid a tax may bring an action to obtain a judgment, restraining and preventing any *illegal* expenditure or injury to property against a county or city, and that the action may be maintained against any officer, agent or other person acting in its behalf.⁴

You will immediately understand that the term *illegal* in the statute refers actions by a city that violate preemptive state or federal statutes, or the state or federal constitution(s). A long line of California cases also has recognized the standing of any citizen to challenge unconstitutional acts, or acts by cities which violate preemptive federal or state statute.

⁴ **The artful drafting of Guadalupe Municipal Code 5.04.590, when compared to the superseding effect of C.C.P. § 526a empowering city tax payers, serves as a relevant example of the Municipal Code’s ineffective attempt to impair the individual rights of City residents and property owners. It might well serve to evidence specific intent to impair those rights.**

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I urge you to reject adoption of Ordinance No. 2033-507, and respectfully suggest that by voting to reject the ordinance you will serve to protect the residents and taxpayers of Guadalupe.

Sincerely,

A handwritten signature in black ink, appearing to read "Stew Jenkins". The signature is written in a cursive style with a large, sweeping initial "S".

Stew Jenkins