	:	**SUPERIOR COURT OF NEW JERSEY**
	:	**LAW DIVISION – CRIMINAL**
STATE OF NEW JERSEY,	:	**GLOUCESTER COUNTY**
	:	
	:	
vs.	:	**MCA #36-09**
	:	
	:	
MICHAEL DEVINE,	:	**ORDER**
	:	
Defendant.	:	

THIS MATTER having come before the Court on January 28, 2011, on appeal from A conviction under National Park Ordinance § 97-7A, in Westville/National Park Municipal Court; and the State being represented by Kelly Conroy, Municipal Prosecutor and the defendant being represented by Jamie Epstein, Esq.; and the Court having reviewed this matter, as well as the submissions of counsel and the defendant; and having considered the matter *de novo* on the record pursuant to *R.* 3:23-8(a); and for other good cause shown;

IT IS, on this **28th day of January, 2011, ORDERED** as follows:

1. Based on reasons within the written decision, National Park Ordinance § 97-7A is unconstitutional as applied to the defendant.
2. Therefore, the defendant is NOT GUILTY of violating National Park Ordinance § 97-7A.
3. The penalties and sentence previously imposed below by the Municipal Court shall be vacated.
4. The State may appeal this order as the New Jersey Rules of Court permit.

Jean B. McMaster

Jean B. McMaster, J.S.C.

	:	**SUPERIOR COURT OF NEW JERSEY**
	:	**LAW DIVISION – CRIMINAL**
STATE OF NEW JERSEY,	:	**GLOUCESTER COUNTY**
	:	
	:	
vs.	:	**MCA #35-09**
	:	
	:	
ROBERT HUNSBERGER,	:	**ORDER**
	:	
Defendant.	:	

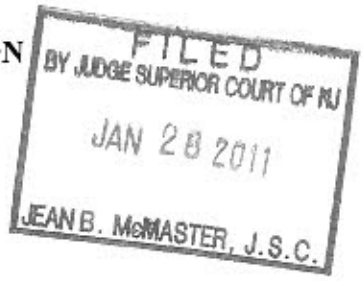
THIS MATTER having come before the Court on January 28, 2011, on appeal from two convictions under National Park Ordinance § 97-6D, in Westville/National Park Municipal Court; and the State being represented by Kelly Conroy, Municipal Prosecutor and the defendant being represented by Jamie Epstein, Esq.; and the Court having reviewed this matter, as well as the submissions of counsel and the defendant; and having considered the matter *de novo* on the record pursuant to *R.* 3:23-8(a); and for other good cause shown;

IT IS, on this **28th day of January, 2011, ORDERED** as follows:

1. Based on reasons within the written decision, the defendant is GUILTY of violating National Park Ordinance § 97-6D.
2. The penalties and sentence previously imposed below by the Municipal Court shall be enforced.
3. Within 10 days the defendant shall present himself to the Municipal Court Clerk for further processing.
4. The defendant may appeal this order within 45 days.

Jean B. McMaster, J.S.C.

	:	**SUPERIOR COURT OF NEW JERSEY**
	:	**LAW DIVISION – CRIMINAL**
STATE OF NEW JERSEY,	:	**GLOUCESTER COUNTY**
	:	
	:	
vs.	:	**Municipal Court Appeals #35-09; #36-09**
	:	
	:	
ROBERT HUNSBERGER,	:	
	:	
Defendant, #35-09.	:	**DECISION**
and	:	
	:	
MICHAEL DEVINE,	:	
	:	
Defendant, #36-09.	:	
	:	



RELIEF REQUESTED

Appellants Robert Hunsberger and Michael Devine represented by Jamie Epstein, appeal convictions for failure to permit entry under Municipal Ordinance.

State of New Jersey and Borough of National Park represented by Kelly Conroy, opposes the appeal.

PROCEDURAL HISTORY

1. On June 25, 2009, defendant Robert Hunsberger was charged with two separate violations of National Park Ordinance 97-6D (§ 97-6D), Failure to Allow Re-inspection, under Summonses SC-002789, and SC-002790 respectively.
2. On June 25, 2009, defendant Michael Devine was charged with a violation of National Park Ordinance 97-7A (§ 97-7A), Refusing Access for Inspection, under summons SC-002791.
3. On September 2, 2009, the defendants moved to suppress/dismiss the charges under the Municipal Ordinance in Westville/National Park Municipal Court before Judge North, P.J.M.C. Judge North denied the motion finding the Ordinances constitutional, and the case was continued at the conclusion of the hearing.
4. On September 16, 2009, the defendants conditionally pled guilty to the charges before Judge North in the municipal court.
5. The defendants were fined $150 and assessed $33 in court costs for each violation; however the sentences were stayed pending the present appeals.
6. On September 22, 2009, the defendants filed the present appeals.

7. On April 9, 2010, a hearing was held in Gloucester County Superior Court before Judge Allen-Jackson, J.S.C. on the present appeals. The court entered an order finding the defendants Not Guilty and declaring the Ordinance unconstitutional.
8. The State was represented by Gloucester County Assistant Prosecutor Margaret Cipparone at the hearing. The State consented to the order vacating the convictions and finding the ordinance unconstitutional.
9. On April 20, 2010, the State, represented by Gloucester County Assistant Prosecutor Mary Pyffer, filed a motion to vacate the April 9, 2010 order. The motion was accompanied by the certification of Kelly Conroy, Municipal Prosecutor for the Borough of National Park.
10. The certification by Ms. Conroy asserted that the prior April 9, 2010 order was improperly entered, as the County Prosecutor did not have authority to enter into the consent order. The Municipal Prosecutor must serve as prosecuting attorney in violations of municipal ordinances as required by *R.* 3:23-9, defining Prosecuting Attorney. Further, a court may not declare an ordinance unconstitutional by a consent order.
11. The defendants opposed the vacating of the April 9, 2010 order by way of brief filed on August 24, 2010.
12. On September 16, 2010, Judge Allen-Jackson, J.S.C. vacated the April 9, 2010 order and declaring that Kelly Conroy, the municipal prosecutor shall represent the State in subsequent proceedings.
13. On January 28, 2011, a hearing was held before this Court on the merits of the case.
14. This history brings these consolidated Municipal Court Appeals to this decision today.

PARTIES' POSITIONS & FACTUAL BASIS

Summary of Facts

1. In 2007, the Borough of National Park passed resolution 0-3-07, enacting Ordinance Chapter 97, Annual Registration and Inspection Required, under the Code of National Park Rental Units.
2. § 97-6A required rental units to be inspected at least once every twelve-month period. § 97-6D stated that following an unsatisfactory inspection of an occupied dwelling, landlords were required to grant inspection to the dwelling within 60 days or be subject to the penalty provisions of Chapter 97.
3. § 97-7A required that every owner or occupant shall give free access to an inspector at all reasonable times for the purpose of inspections, examinations and surveys.
4. § 97-17 defines the penalties for violations of the Ordinance, including fines up to $1,000 or imprisonment up to 30 days. Each day that a violation occurs is deemed a separate violation for the purpose of penalties.
5. Defendant Devine:
    a. On November 18, 2008, Ele Hagerty, Property Inspection Control Clerk, informed Devine that he must comply with the Rental Licensing Ordinance by completing an application listing the occupants of his property at 24 Riverview Ave., National Park, NJ.

b. On December 1, 2008, Devine completed the licensing application listing Walter Trump as the occupant of 24 Riverview Ave., paying the $75 registration fee, and including the required floor plan of the rental property.
c. An inspection of 24 Riverview Ave. was scheduled for February 20, 2009; however it was cancelled because the occupant refused to consent to the inspection because his girlfriend living there was seriously ill.
d. Another inspection was scheduled for May 1, 2009.
e. On April 8, 2009, the Borough sent a reminder of the scheduled inspection, setting forth the legal basis, and the potential penalties that Devine would incur if he did not grant access to the property of 24 Riverview Ave.
f. On April 24, 2009, Devine notified the Borough that he was not refusing to comply with the Ordinance, but his tenant would not consent to the inspection, and would require a warrant to grant a search of the premises.
g. On May 5, 2009, Devine followed up stating that his tenant would not consent to the search and had threatened to sue him.
h. On June 25, 2009, Devine was charged with a violation of National Park Ordinance 97-7A (§ 97-7A), Refusing Access for Inspection, under summons SC-002791.

6. Defendant Hunsberger
   a. On October 30, 2008, Hunsberger underwent an inspection of his rental properties at 522 and 524 Wesley Avenue, National Park, NJ, performed by inspector Joseph Conboy.
   b. On November 5, 2008, Hunsberger was notified that Conboy found several electrical violations which required work to comply with the building code.
   c. Between October 2008 and February 2009, Hunsberger made the required improvements and sought reinspection.
   d. On February 26, 2009, Conboy inspected the electrical work and passed it, however Hunsberger declined an offer to perform a reinspection for the Landlord License.
   e. On May 29, 2009, Conboy returned and Hunsberger informed him that the units were occupied at that time and a warrant would be required to enter them.
   f. On June 25, 2009, Hunsberger was charged with two separate violations of National Park Ordinance 97-6D (§ 97-6D), Failure to Allow Re-inspection, under Summonses SC-002789, and SC-002790 respectively.

Appellants' Argument

I. The Borough's Warrantless Inspection Violates the Defendants' Rights Under the 4th Amendment of the U.S. Constitution and Art. 1, Par. 7 of the N.J. Constitution

Under the Federal Constitution a search warrant is required to make routine inspections of residential structures unless consent is given by the occupant. *Camara v. Municipal Court of San Francisco*, 387 *U.S.* 523 (1967). In *Camara*, the defendant was charged with refusing to permit a warrantless inspection of his residence under § 503 of San Francisco's Code. The Court determined that administrative searches are still covered by the 4th amendment. The defendant was held to have a constitutional right to insist that the inspectors produce a warrant prior to

entering the premises, and could not be charged with refusal to give consent to the warrantless inspection.

The defendants in this case consented to the searches of their premises provided a warrant was obtained by the Borough. Like *Camara*, the Borough is criminally charging the defendants for refusing to consent to the warrantless searches of their premises.

A. This is not a Facial Challenge

A facial challenge requires the appellant to show that a law is not constitutional under any set of circumstances. This is not a facial challenge, but rather it is a challenge that the Ordinance is unconstitutional as applied to the defendants. *Berwick Area Landlord Ass'n. v. Borough of Berwick*, 2007 *U.S. Dist. LEXIS* 51207, was a facial challenge to a similar Ordinance in which the Ordinance was upheld because of the burden under a facial challenge. However, the court in *Berwick* hypothesized that should consent be obtained by threat of citations or if refusal to consent resulted in citations, such instances would violate the 4th Amendment.

In this case, those hypothetical circumstances have occurred. The defendants were required to consent to the searches of their premises without the Borough obtaining a warrant, and were ultimately issued citations. Under these circumstances, the Ordinance is unconstitutional as applied to the defendants.

B. This is not a Pervasively Regulated Industry

Exceptions to the *Camara* rule are made for pervasively regulated industries. However no exception has ever been made for residential property as a pervasively regulated industry. The requirements to find a pervasively regulated industry exception are (1) a substantial government interest in the regulatory scheme under which the inspection is conducted, (2) the warrantless search must be necessary to further the regulatory scheme, and (3) in terms of certainty and regularity of its application, the inspection must provide a constitutionally adequate substitute for a warrant. *New York v. Burger*, 482 *U.S.* 691 (1987). A constitutionally adequate substitute for a warrant requires that a scheme must (a) advise the property owner that a search is made pursuant to law and properly defining the scope of that search and; (b) limit the discretion of the inspecting officer. *Id.* at 702-03.

Residential rental properties are not a pervasively regulated industry. Residential rental properties do not require warrantless searches to ensure compliance with building code. Such searches do not further the regulatory scheme. The Ordinance does not limit the discretion of the inspecting officer; it requires the owner or occupant to grant free access to the inspector.

C. The Defendants Cannot Consent for their Residential Tenants

The right to consent or not consent to residential searches belongs to the tenant, not the landlord. Consent of the landlord is insufficient to allow entry into a tenant's premises. *Chapman v. United States*, 365 *U.S.* 610 (1961). *Chapman* was a case where a landlord

consented to police entering a tenant's residence and the tenant was subsequently charged with operating a distillery.

While the 3rd Circuit has distinguished *Chapman* in *United States v. Jong Suk Lee*, 101 *F.3d* 693 (3d Cir. 1996), that reasoning is clearly different than the present circumstances. *Lee* allowed a landlord's wife to consent to a search of a private garage by the Philadelphia Department of Licenses and Inspections; however the context of that search was one of only a visual search to verify proper usage under zoning laws. *Lee* was a case of a search of commercial property, whereas here the defendants' property is residential, which the 4th amendment treats differently. *Chapman* is controlling, as that case dealt with residential property.

The defendants could not legally consent to the search of the tenants' premises in this case. § 97-7A requires owners and occupants to allow the inspector free access to the premises, however *Chapman* holds that a landlord is not in a legitimate position to give consent to search the residential premises of a tenant.

D. This Ordinance Lacks a Search Warrant Provision

Courts have regularly upheld similar ordinances for inspections where there is provision made that administrative search warrants must be obtained upon a tenant's refusal to consent. Courts have also regularly struck down similar ordinances where there is no provision for an administrative warrant in the face of a tenant's refusal to consent to a search.

Ordinance 97 makes no provision for obtaining a search warrant. § 97-6D states that it is a violation to not permit a reinspection after a failing inspection, and each day of failing to give consent is a separate violation under the Ordinance. § 97-7A similarly penalizes the failure to give access to the property, with no provision made for obtaining a warrant, administrative or otherwise.

2. The Municipal Court Committed Reversible Error in Holding that Landlords Have the Authority to Consent to Warrantless Entry into the Occupied Premises of Their Tenants

Judge North incorrectly rejected the cases in which courts have held that landlords lack authority to consent to searches of their tenants' apartments. Judge North reasoned that in those cases, it was the tenants who were charged for failing to give consent to search, whereas here it is landlords. The distinction is immaterial. A landlord should not be placed in a position of having to analyze the legal consequences of his tenant in order to determine whether to consent to a search.

Judge North incorrectly cites *Dome Realty, Inc. v. City of Paterson*, 83 *N.J.* 212 (1980) to distinguish *Camara*. *Dome Realty* only recognized an exception for a landlord's authority to consent to inspection of vacant properties, not occupied properties.

Judge North held that the defendants did not have a reasonable expectation of privacy in the residences, but also held that the defendants, as landlords, had the authority to consent to the

search of the premises. The Ordinance is unconstitutional because it compels the landlord to be the municipality's surrogate for a warrantless search.

Judge North's reliance on *Reedy v. Collingswood*, 04-CV-4079 (D.N.J. June 22, 2005) (J. Simandle) an unpublished District of New Jersey case, is misplaced. That case was not one in which landlords had been charged under an ordinance. It was a preliminary injunction rejected for lack of showing irreparable harm, not because the ordinance at issue was constitutional. The court in *Reedy* noted that the plaintiffs may renew their injunction request if they were charged for violating the ordinance.

The Ordinance 97 is unconstitutional as it is applied to the defendants. The defendants request that the judgment of the Municipal Court below be reversed and that the convictions be vacated.

State's Position

1. Fourth Amendment

An individual engaged in renting a property as a business does not have a reasonable expectation of privacy for the entirety of that property, and as such that individual cannot express a 4th Amendment protection to prevent a municipal inspection under a local ordinance. This matter is similar to *Reedy v. Collingswood*. *Reedy* was a case of an ordinance clearly delineating the purpose as inspection for building purposes, as opposed to *Camara* which was much broader in granting authority to enter dwellings. Ordinance 97 complies with the requirements of *Reedy*.

The defendants have asserted no basis to assert a Fourth Amendment claim to prevent the Borough from conducting the inspections. The judge in *Reedy* adopted the diminished expectation of privacy set forth in *Dome Realty v. City of Paterson*, 83 *N.J.* 212 (1980). The defendants are both non-resident landlords of the properties in question; therefore they do not have a 4th Amendment right to assert.

Defendant Devine cannot assert that it is the tenant who is refusing access to the property. Under Ordinance 97, it is the obligation of the landlord, not the tenant, to allow the Borough entry to complete inspections. The lease should be crafted in such a way that allows the Defendant landlord into the premises to comply with all inspections required by the Borough. Because neither defendant can assert a 4th amendment right, none of the defendants' other arguments regarding this will be addressed.

2. Public Policy

Public policy dictates that inspections of rental properties are in the interest of the residence of a municipality to ensure that rental units are kept up to code and in habitable condition. Of New Jersey's 566 municipalities, 258 require landlord registration, and 88 require annual inspections under those respective ordinances. Of Gloucester County's 17 municipalities, 11 require landlord registration, and 10 require annual inspection.

The Borough of National Park's Ordinance 97 requires annual inspection, which mirrors the requirements of two nearby municipalities' landlord registration ordinances. The Borough of Paulsboro has an ordinance which mirrors that of National Park's. The Borough of Westville similarly requires annual inspections. The purpose of allowing annual inspections by municipalities is to promote safe and decent housing for the benefit of all residents of the Borough and to abate harmful housing conditions.

3. Landlord Consent for Residential Tenants

Landlords may consent to searches for residential tenants in non-criminal situations, such as a building inspection in this case. The defendants are incorrect to cite *Chapman v. United States*, 365 *U.S.* 610 (1961) because that was a case of law enforcement entering a tenant's residence with consent of a landlord. In *Chapman* it was the tenant who was charged with criminal activity, not the landlord.

This situation is different from *Chapman* because the inspections are taking place in a civil context; inspectors are not searching for criminal activity. This Ordinance specifies that the landlord may be charged with code violations following the inspection, not the tenant. It is the landlord who is responsible for ensuring entry to allow inspections.

4. Municipal Court did not Commit Reversible Error

The defendants are incorrect in alleging that a landlord must evaluate the possible legal consequences for tenants resulting from code inspectors. Under the Ordinance, the only violations that can result would be filed against the landlord(s) and not the tenant. The inspectors are only allowed to inspect the premises for code violations; they are not in any way acting as a policing agent for criminal violations.

If a landlord cannot be forced to allow the Municipality's inspector access to the property for inspections, who else should be held responsible for allowing access? Appellants are choosing to operate the business of renting properties; as such they must comply with the Borough's requirements. There was no error at the municipal court pertaining to the Ordinance.

Defendants' Reply

1. The Borough's Failure to File Opposition in Municipal Court Constituted Waiver of Their Right to Oppose this Appeal

The Borough's failure to oppose the Defendants' Motion to Dismiss at the trial level in Municipal Court prevents it from doing so on appeal. New Jersey law is clear that appellate courts will not consider an issue not properly presented at trial when an opportunity was available, unless the questions are jurisdictional, plain error, or concern matters of great public interest. *Nieder v. Royal Indemnity Ins. Co.*, 62 *N.J.* 229, 234 (1973); *also Cavanaugh v. Skil Corp.*, 331 *N.J. Super.* 134, 179 (App. Div. 1999).

The Borough is prohibited from raising any arguments that could have been brought up while the matter was before the trial court. The Borough waived all arguments opposing said motion. None of the aforementioned exceptions permit the Borough to raise any arguments against on Defendants' appeal.

This is not a matter of great public concern. For this to be a matter of great public concern, public policy would need to permeate the proposition. This matter only affects landlords and tenants regarding rental properties in National Park, and therefore it is not a matter of great public concern. Even if this were a matter of great public concern, the Borough could protect tenant safety while still respecting the 4th amendment by getting a warrant.

2. All Arguments the Borough Failed to Respond to are Deemed Waived and Unopposed as a Matter of Law

The Borough should be deemed to have waived any response to the defendants' arguments which it failed to respond to in its brief. New Jersey law is clear that failing to respond to appellate brief arguments is deemed a waiver. *W.H. Industries, Inc. v. Fundiacao Balancins, Ltda.*, 397 *N.J. Super.* 455, 459 (App. Div. 2008)(citing *In re Freshwater Wetlands Permit*, 379 *N.J. Super.* 331, 334 n.1 (App. Div. 2005)).

In *Polk v. Nevada*, 233 *P.3d* 357, 358 (Nev. 2010), a court found the defendant had raised a significant constitutional issue, which compelled response. The State in *Polk* failed to respond to the argument, and instead waited until oral argument. The court stated that such appellate practice prejudices the defendant in preparing to respond to oral argument.

The Borough here has failed to respond to the following arguments by the defendants: (1) there is no reason for the Borough not to get a warrant, (2) this is not a pervasively-regulated industry, (3) landlord consent is insufficient to grant access to a rental property, (4) ordinances without a warrant provision have been struck down in the past, (5) the ordinance is not totally civil in nature, but has criminal aspects as well, (6) *Dome* and *Reedy* are distinguishable from the facts of this case, and (7) other jurisdictions have warrant requirements under similar circumstances.

The Borough's brief is simply a regurgitation of the decision by Judge North, and does nothing to respond to how the defendant distinguished *Dome* and *Reedy*. The Borough does not clarify how the Ordinance could be strictly civil in nature when it comes with penalties and potential jail time as a consequence.

The Borough argues that the defendants do not have an expectation of privacy, yet it fails to respond to the defendants' argument that it is not the defendants' 4th amendment rights at issue; it is the tenant's. It is for this reason that a landlord's consent is insufficient to allow a search of a tenant's dwelling. Like in *Polk*, the Borough has failed to respond to a significant constitutional claim, and therefore it should be waived.

3. *The Borough's Arguments are Without Merit*

The defendants did not repeat the arguments contained in the first brief submission, but adopted them and supplemented in response to the Borough's submission.

a. Reedy actually supports the defendants' appeal

Reedy is distinguishable because there, the landlords were not charged with a violation of the ordinance at issue. *Reedy* dealt with a preliminary injunction prior to enforcement of the ordinance. The landlords' case in *Reedy* was only lost because there was no showing of irreparable harm under the preliminary injunction standard.

Reedy actually helps the defendants' case here because the court left open the ability of the landlords to renew their request for an injunction in the event that a landlord faced fine or incarceration. In this case the defendants have actually been charged and fined under the Ordinance in National Park.

b. Dome actually supports the defendants

The Borough failed to respond to the way the defendants distinguished *Dome* from this case. At no point does the Borough address the fact that the diminished expectation of privacy in *Dome* was due to the properties being vacant at the time of the search. Here, the defendants' properties are occupied, which leads to a higher expectation of privacy for the tenants, and does not allow the defendants to consent to the searches.

c. The Borough's argument that the charges are civil is without merit

A violation of the Ordinance can lead to a criminal complaint, as occurred here, and can carry fines up to $1,000 and/or up to 30 days imprisonment for each day a violation continues. The penalties involved carry criminal components, and cannot be civil in nature. It is not believable that an inspector would enter a tenant's apartment and completely ignore any evidence of a criminal violation, even if the primary purpose is code inspection.

d. The Borough's attempt to distinguish Camara *is without merit*

Camara stands for the proposition that (1) warrantless administrative inspections of a dwelling are covered by the 4th amendment where it can lead to criminal complaints, fines and jail time; (2) inspectors can be forced to produce a warrant prior to entering the premises; and (3) a person cannot be constitutionally charged for refusing to consent to a warrantless inspection. The Borough attempts to distinguish *Camara* by arguing that it dealt with a dwelling, whereas here the units are rentals. That is exactly what this case involves—rental *dwellings*.

e. The Borough's public policy argument is invalid

The Borough's argument that other municipalities have required annual inspections does not support the validity of this Ordinance. There is no indication that any of the other ordinances

cited have ever been subjected to and survived 4th amendment scrutiny. Requiring warrantless inspection into rental facilities is not supported by public policy because this is not a pervasively regulated industry. The Borough offered no argument to the contrary.

The Borough's argument that it is the landlord's responsibility to craft a lease to guarantee access for inspections is in conflict with Department of Community Affairs Guidelines. The Guidelines state that where voluntary consent is not given for an inspection, a warrant must be obtained. *N.J.A.C.* 5:10-1.10(d). The inspections are still performed by a government agent, and all government actors must comply with the 4th amendment. The Ordinance does not clearly limit the scope of the inspector's search, as "free access" must be provided to all premises. § 97-7(a).

The Borough cannot coerce, through criminal sanctions, the defendants to act as surrogates in violating the tenant's privacy rights. National Park is arguing that the defendants have authority to consent to a search of the tenant's units, but do not have standing to object to being coerced into assisting with warrantless searches.

4. *National Park's Ordinance is illegal under New Jersey Regulations and Guidelines*

Under the New Jersey Uniform Construction Code (NJUCC), *N.J.S.A.* 52:27D-120, from which the Ordinance is drawn, the DCA Commissioner is able to establish standardization of enforcement practices to preempt conflicting municipal policies for construction in municipalities. *Builders League of South Jersey, Inc. v. Pine Hill*, 286 *N.J. Super.* 348, 352 (App. Div. 1996). Under the NJUCC, during construction of buildings, inspectors are generally permitted to inspect the interior of a building, but there are 4th amendment limitations.

Under the NJUCC, an inspector must obtain permission from the owner or occupant to inspect the interior of a property. However, if a request is denied, the Construction Official has the administrative authority to seek a court order to conduct an inspection. The NJUCC deals with inspections during construction, and the Borough's Ordinance deals with inspections of already built structures; however the same requirement of a warrant should be applied. There is no reason that the Borough's Ordinance should be exempt from the same requirement outside of the construction context.

ANALYSIS

Standard of Review

A municipal court appeal is reviewed *de novo*. *R.* 3:23-8(a). On a *de novo* review of the record, the reviewing court must make independent findings of fact and conclusions of law. *See State v. States*, 44 *N.J.* 285, 293 (1965), *State v. Ross*, 189 *N.J. Super.* 67, 75 (App. Div.1983). Although, the Law Division is required to make its own findings and rulings on the evidence, it is generally bound by the evidentiary record of the municipal court. *State v. Loce*, 267 *N.J. Super.* 102, 104 (Law Div. 1991). This Court must give due, but not controlling, deference to the municipal court judge's findings on credibility of the witnesses. *State v. Locurto,* 157 *N.J.*

463, 474 (1999). This Court can arrive at its own conclusions where justice demands intervention and correction. *Id.* at 473.

The defendants initially argue in reply to the State's brief that the failure of the Borough of National Park to oppose the initial brief precludes the Borough's objection to the appeal at this time. This is incorrect. This issue was resolved through the procedural history, and it is clear that *R.* 3:23-9 requires that on an appeal of a municipal ordinance, the municipal prosecutor must represent the State. In the prior hearing of this case the County Prosecutor represented the State, and this was impermissible. The municipal prosecutor must be the party to represent the State, as is properly being done at this time pursuant to the September 16, 2010 order of Judge Allen-Jackson, J.S.C.

The defendants' argument that the Borough of National Park has waived opposition or specific arguments on the legal issue of constitutionality of National Park Ordinance 97-1, *et. al.* is incorrect. This Court is making a *de novo* review of the proceedings from September 2, 2009 and September 16, 2009 in Westville/National Park Municipal Court before Judge North, J.M.C. As part of the *de novo* review, this Court will make independent findings of fact and conclusions of law. Because this is a trial *de novo*, the rules of waiver of argument drawn from appellate jurisdictional law do not apply here. This Court will consider the issue presented in this Municipal Court Appeal on the merits.

Validity in Passing the Ordinance

The facts of these consolidated cases were stipulated to by the parties below at the Municipal Court and are described above. The defendants' entry of conditional guilty pleas on September 16, 2009 led to the present appeal in which the defendants make multiple claims alleging that Chapter 97 is unconstitutional as applied to the defendants' facts.

In 2007, the Borough of National Park adopted Chapter 97 of ordinances, "Rental Units Annual Registration and Inspection Required." A copy of Chapter 97 was provided to this Court as Exhibit A in the Borough's brief. The relevant provisions are described below.

§ 97-6A requires that "[e]ach rental unit shall be inspected at least once every twelve-month period." § 97-6B requires that:

> Such inspections shall be performed by such person, persons, or agency duly authorized and appointed by the Borough of National Park and inspections made by persons or an agency other than the duly authorized and appointed person, persons, or agency of the Borough of National Park shall not be used as a valid substitute.

§ 97-6D requires that in the event of an unsatisfactory inspection, a rental property shall not be leased or rented until the necessary corrections are made. If a property is occupied at the time, the corrections must be made within sixty (60) days. *Id.* Each day a violation continues is a separate violation of the Ordinance. *Id.*

§ 97-7A states that:

> The inspection officers are hereby authorized to make inspections to determine the condition of rental facilities, rental units, and rooming/boarding houses in order that they may promote the purposes of this ordinance to safeguard the health, safety, welfare of the occupants of rental facilities, rental units, and rooming/boarding houses and of the general public. For the purposes of making such inspections, the inspecting officers are hereby authorized to enter, examine and survey rental facilities, rental units, and rooming/boarding houses at all reasonable times. The owner or occupant of every rental facility, rental unit, and rooming/boarding house shall give the inspecting officer free access to the rental facility, rental unit, and rooming/boarding house at all reasonable times for the purpose of such inspections, examinations and surveys.

§ 97-17 provides the penalty provisions for any violation under the Chapter 97 Ordinance:

> Any person who violates any provision of this ordinance shall, upon conviction in the Municipal Court of the Borough of National Park or such other court having jurisdiction, be liable to a fine not exceeding $1,000.00 or imprisonment for a term not exceeding 30 days, or both. Each day that a violation occurs shall be deemed a separate and distinct violations (sic) subject to the penalty provisions of this ordinance.

"It is established beyond question that municipalities, being created by the State, have no powers save those delegated to them by the Legislature and the State Constitution." *Dome Realty v. City of Paterson*, 83 *N.J.* 212, 225 (1980). "Ordinarily legislative enactments are presumed to be valid and the burden to prove invalidity is a heavy one." *Planned Parenthood of Central New Jersey v. Farmer*, 165 *N.J.* 609, 619 (2000)(citing *Bell v. Twp. of Stafford*, 110 N.J. 384, 394 (1988)).

As noted by Judge North, J.M.C., the Ordinance was validly enacted pursuant to *N.J.S.A.* 40:48-2.12a.[1] While the Legislature did separately authorize municipalities to require certificates of inspection prior to any new occupancy under *N.J.S.A.* 40:48-2.12m, the requirement of annual inspections exceeds that authorization because the Ordinance at issue requires annual inspections regardless of any new occupancy in a rental unit. Such authority must be found under the umbrella of the general police power, *N.J.S.A.* 40:48-2.12a.

[1] The governing body of any municipality may make, amend, repeal and enforce ordinances to regulate buildings and structures and their use and occupation to prevent and abate conditions therein harmful to the health and safety of the occupants of said buildings and structures and the general public in the municipality. *N.J.S.A.* 40:48-2.12a.

This Court will note that the Ordinance at issue is not purely civil, as has been suggested. The possibility of incarceration for any violation under Chapter 97 makes clear that the Ordinance is at least quasi-criminal.[2] The penalties were clearly intended to be steep as evidenced by the provision that each day constitutes a separate and independent violation. § 97-17.

Standing

Fourth Amendment

The Fourth Amendment of the United States Constitution states 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 the persons or things to be seized.

U.S. CONST. amend. IV. The Fourth Amendment is applied to State conduct through the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *Mapp v. Ohio*, 367 *U.S.* 643 (1961).

"[E]xcept in certain carefully defined cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara v. Municipal Court of San Francisco*, 387 *U.S.* 523, 528 (1967). "[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States Dist. Court*, 407 *U.S.* 297, 313 (1972).

The Borough is correct in this case that the defendants do not have standing to assert a Fourth Amendment right when challenging the Ordinance. In order to assert a Fourth Amendment right, "a person [must] have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Katz v. United States*, 389 *N.J.* 347, 361 (1967) (Harlan, J. concurring).

The Supreme Court recognized in *Camara*, 387 *U.S.* 523 (1967) that administrative inspections of dwellings are significant enough an intrusion to implicate the Fourth Amendment. *Camara*, however, dealt with the expectation of privacy of a residential occupant of a dwelling, not the privacy interest of a landlord in an occupied rental dwelling.

Here, the defendants are landlords in this case, and both defendants are charged with refusing access to occupied rental properties. As such, the landlords do not have a reasonable

[2] At oral argument the Borough acknowledged that an inspector's observation of criminal activity by a tenant during an inspection would be reported to the police. This is a clear recognition that the scope of these searches is not, and cannot, be purely limited to building code inspection only.

expectation of privacy because once a landlord has leased a residential property to another for the purpose of use as a dwelling, a landlord cannot expect that space to remain within their private domain.

The tenants of the defendant-landlords would have standing to assert a Fourth Amendment claim because the holding in *Camara* squarely acknowledged that a tenant has the right to require a warrant for administrative searches of a dwelling. In this case, however, the properties are not occupied by the defendants, and therefore the holding in *Camara* does not provide the defendants with the same standing to assert a strong Fourth Amendment claim, nor a claim on the behalf of the tenants.

In addition, the defendants do not have third-party standing to assert the rights of their tenants because in order to assert the rights of another, the person must stand in a confidential relationship with those whose rights they are asserting. *Griswold v. Connecticut*, 381 *U.S.* 479, 481 (1965). Here, the defendants stand in a landlord-tenant relationship, there is no legal basis to find that these relationships could be deemed confidential as the term is used in *Griswold*.

New Jersey Constitution Art. I, para. 7

Article I, Paragraph 7 of the New Jersey Constitution, states similarly:

> 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 warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.

N.J. Const. Art. I, para. 7.

The New Jersey Constitution affords standing to a wider group of individuals under Art. I, para. 7. A "defendant has automatic standing to move to suppress evidence from a claimed unreasonable search or seizure if he has a proprietary, possessory or participatory interest in either the place searched or the property seized." *State v. Carvajal*, 202 *N.J.* 214, 222 (2010) (internal quotations omitted). However, the New Jersey Supreme Court has made clear that a landlord's privacy interest in an apartment he is making available for rent is diminished. *Dome Realty*, 83 *N.J.* at 240.

The defendants also do not have standing to assert a challenge under Art. I, para. 7 due to the holding in *Dome Realty*. The defendants' properties at issue are held for rental by others, and therefore fall within the scope of the holding in *Dome Realty* that the defendants have a diminished expectation of privacy.

General Standing to Challenge Constitutionality

While the defendants may not have standing to challenge the constitutionality of the Ordinance under the Fourth Amendment or Article I, paragraph 7, the defendants do have standing to challenge the Ordinance under general principals of constitutional law. Standing requires (1) injury-in-fact, (2) causation, and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 *U.S.* 555, 560-61 (1992); *see also cf. In re D'Aconti*, 316 *N.J. Super.* 1, 12-13 (App. Div. 1998)(acknowledging the same criteria for standing in New Jersey).

The defendants have standing to assert a constitutional claim here under the *Lujan* test. The defendants have injury-in-fact - both landlords were charged and convicted under the Ordinance and fined $150 for each charge. The cause of the injury to the defendants was the Ordinance. The defendants' injury is redressable by a favorable court ruling in this case. Because the defendants have standing, the merits of the case will be addressed.

Constitutionality of the Ordinance

Substantive Due Process

While not raised explicitly, the defendants have raised a substantive due process challenge to the Ordinance. The defendants argue that the landlords cannot consent on behalf of the tenants to the searches under the Ordinance. The Borough acknowledges the existence of this argument by responding to it, asserting that landlords do have the authority to consent on behalf of the tenants, and that the penalties for a refusal to consent lie solely with the landlords. This argument, in effect, is that the Ordinance violates substantive due process by holding the landlords liable for not consenting to a search where they have no capacity to consent.

> The principle of substantive due process, founded in the federal Constitution, U.S. CONST. amend XIV, § 1, and our State Constitution, N.J. CONST. art. I, § 1, protects individuals from the arbitrary exercise of the powers of government and governmental power being used for the purposes of oppression. However, the constitutional guarantee does not protect individuals from all governmental actions that infringe liberty or injure property in violation of some law. Rather, substantive due process is reserved for the most egregious governmental abuses against liberty or property rights, abuses that shock the conscience or otherwise offend...judicial notions of fairness...[and that are] offensive to human dignity.
>
> Correspondingly, if the challenged governmental restriction is seen to have a relation to a proper legislative purpose, and is "neither arbitrary nor discriminatory, the requirements of substantive due process are satisfied.

Felicioni v. Administrative Office of Courts, 404 *N.J. Super.* 382, 392 (App. Div. 2008)(internal citations omitted).

The defendants are correct to note that this is not a facial challenge to the Ordinance. A facial challenge would require proof that an Ordinance is unconstitutional under every possible set of facts. Rather, this challenge is a test of the Ordinance's constitutionality, as applied. It is within this context, that the defendants' individual facts diverge and lead this Court to a conclusion that Defendant Hunsberger is guilty of violating the Ordinance, and Defendant Devine is not guilty.

Consent to Search and Fundamental Fairness

There is considerable interplay between the Due Process argument and the Fourth Amendment. The Borough's Ordinance requires access be granted to rental premises for administrative searches to perform inspections for building code compliance. As *Camara* determined, these cases do implicate the Fourth Amendment, which gives rise to a tenant's ability to request a warrant.

"The Fourth Amendment proscription of unreasonable searches and seizures prohibits warrantless searches, but is subject to exception when, among other times, a search is conducted pursuant to valid consent, or when there are so-called exigent circumstances." *State v. Miller*, 159 *N.J. Super.* 552, 556 (App. Div. 1978). "[T]he Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force." *Schneckloth v. Bustamonte*, 412 *U.S.* 218, 228 (1973).

A person consenting to a search must have authority to give such consent. Authority to consent is not derived from property law, but "on mutual use of the property by person generally having joint access or control for most purposes." *United States v. Matlock*, 415 *U.S.* 164, 172 n. 7 (1974). In *Chapman v. United States*, 365 *U.S.* 610 (1961) it was determined that a landlord could not validly consent to the search of a house he rented to another. 365 *U.S.* at 617.[3]

Courts have addressed the two ends of the spectrum regarding administrative searches but have not addressed the middle area which this case occupies. In *Camara*, the Supreme Court determined that a tenant has the right to request a warrant when permitting entry by municipal agents for building inspections in an occupied dwelling. 387 *U.S.* at 540. In *Dome Realty*, the New Jersey Supreme Court held that a landlord can be required to provide access to vacant rental properties for building inspections prior to allowing new occupancy without a warrant. 83 *N.J.* at 241.

This case occupies a middle area between *Camara* and *Dome Realty*: can a landlord be required to provide access to a tenant's occupied dwelling without a warrant? A landlord cannot be required to provide access to a tenant's occupied dwelling for administrative searches over a

[3] The Borough's attempt to distinguish *Chapman* by limiting the landlord consent prohibition to solely criminal investigations is ineffective. *Camara* clearly states that such administrative searches are still within the purview of the Fourth Amendment. It is simply not believable that a an inspection officer would turn a blind eye to plain view evidence of criminal activity within a tenant's dwelling without reporting it to law enforcement.

tenant's objection. This holding simply synthesizes the holdings of *Camara*, *Chapman*, and *Dome Realty*.

To hold a landlord liable under possible fines and incarceration for a tenant's assertion of his Fourth Amendment rights as defined under *Camara* violates the fundamental principals of fairness embodied in substantive due process. Fairness under substantive due process affords the protection that a defendant can only be held liable for refusing an action which he has the capacity to perform. A landlord does not have the capacity to consent to a search for a tenant, thus he cannot be held liable where the tenant refuses to consent. The Borough cannot circumvent the holding of *Camara* by holding the landlord liable rather than the tenant.

The Borough argues that, while a landlord lacks standing to assert a Fourth Amendment right, landlords still retain the capacity to consent to the search of a tenant's occupied dwelling.[4] This position cannot be reconciled. When a landlord leases a dwelling, joint access to the property is signed away to a reasonable extent. The onus cannot be pushed on the landlord to compel a tenant to forfeit his Fourth Amendment rights.

There was considerable discussion given to the case of *Reedy v. Collingswood*, 04-cv-4079 (D.N.J. June 22, 2005)(J. Simandle) an unpublished decision from District Court of New Jersey, and the Third Circuit's decision affirming the decision, *Reedy v. Collingswood*, 204 *Fed. Appx.* 110 (3d Cir. 2006).[5] A review of those cases which were attached in the briefs submitted does not lend support to the Borough's position.

Reedy was not construing an ordinance as it was applied; it was construing the ordinance in the abstract vacuum of a preliminary injunction. The defendants correctly note that the Third Circuit, in affirming the dismissal of the case, held open the possibility "[i]n the event that any plaintiff is faced with fines or incarceration in the future, he or she may renew a request for preliminary injunction at that time." *Reedy*, 204 *Fed. Appx.* at 114. The defendant's challenge to the Ordinance here is being challenged as applied, with fines imposed on the landlords. Despite Judge Simandle's lengths to distinguish the ordinance at issue in *Camara*, it is this Court's view that a tenant has the right to object to a search of an occupied dwelling, and a landlord is not in a position to override that objection under threat of fines and incarceration.

This holding still acknowledges and validates the public policy concerns that the Borough raises, and does not defeat the general purpose of the Ordinance. The Borough states that the purpose of the Ordinance is to protect the health, safety and welfare of the residents. The Borough may still require access to vacant rental properties as provided in *Dome Realty*. The only limitation occurs where a tenant is occupying the property when an annual inspection occurs, and the tenant then objects.[6]

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[4] In briefing and oral argument the Borough argued that landlords must include provisions in each lease to allow for access over tenant refusal for inspections. There is no authority for a municipality to require, in advance, that a rental resident must waive their Fourth Amendment rights in order to reside in that municipality.

[5] It should be noted that *Reedy* is an unpublished decision which hold no mandatory authority. *See R.* 1:36-3.

[6] The Ordinance, in fact, does provide for shifting the burden to the tenant when a property is occupied. § 97-7A states: "The owner *or occupant* of every rental facility, rental unit, and rooming/boarding house shall give the

Inspections often occur in response to tenant complaints. To be sure, most tenants would not object to a landlord being held to building code standards. In the cases where a tenant does object, the Ordinance should provide for the implementation of a warrant procedure. Annual inspections may clearly be desirable based on the legislative intent of the Ordinance.

The legal holding here requires this Court to reach different results as applied to the facts of each defendant in this case. Defendant Devine's facts demonstrate that he consented to the search, but his tenant refused consent. In Defendant Devine's case, this legal holding requires that he be found Not Guilty of violating the Ordinance because his tenant did, in fact, assert his individual Fourth Amendment right. In Defendant Hunsberger's case, no facts were presented to demonstrate his tenant's assertion of a Fourth Amendment right; therefore, Defendant Hunsberger must be found Guilty of violating the Ordinance because his facts do not implicate the same fundamental unfairness issue as presented by Defendant Devine's facts.

NJUCC

The defendants also argue that the Ordinance is illegal under the New Jersey Uniform Construction Code (NJUCC), *N.J.S.A.* 52:27D-120. Under the NJUCC, an inspector is required to obtain a warrant where objections are given to searches. The NJUCC applies to new construction, not existing buildings and occupied rental units. As this is a challenge to the Ordinance as applied to these facts, the NJUCC is merely persuasive and not controlling over the application of the Ordinance. The NJUCC's authorization of a warrant provision where consent to inspect is not given should be persuasive to the Borough in possibly adopting a warrant provision to be added to the Ordinance.

DECISION

Based on the foregoing, Defendant Devine is found **NOT GUILTY** of violating § 97-7A and Defendant Hunsberger is found **GUILTY** of violating § 97-6D.

National Park Ordinance Chapter 97 is unconstitutional to the extent that it allows for the imposition of penalties against landlords when tenants refuse access for inspections and does not include a warrant provision. So Ordered.

Dated: January 28, 2011

Jean B. McMaster, JSC

inspecting officer free access to the rental facility, rental unit, and rooming/boarding house at all reasonable times for the purpose of such inspections, examinations and surveys." (emphasis added).