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# Administrative Inspections: The Loophole in the Fourth Amendment

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**ADMINISTRATIVE INSPECTIONS:  
THE LOOPHOLE IN THE FOURTH AMENDMENT**

**SUPREME COURT OF NEW YORK  
APPELLATE DIVISION, SECOND DEPARTMENT**

Wisoff v. City of Schenectady<sup>1</sup>  
(decided April 2014)

**I. INTRODUCTION**

The enforcement of city rental ordinances has allowed for a distinct form of searches under the Fourth Amendment, known as administrative inspections. Building inspectors and governmental employees are able to search a home or building pursuant to these ordinances, which are often subject to constitutional scrutiny.<sup>2</sup> Administrative searches pursuant to the Fourth Amendment are much different from criminal searches because an administrative search safeguards the health and safety of prospective tenants, while criminal searches seek to uncover evidence of criminal activity. The parallel between a criminal and administrative search is the possibility of a violation of the fundamental right to privacy.

Although not expressly mentioned in the United States Constitution, the right to privacy stands as one of the basic, fundamental rights of our system.<sup>3</sup> The Fourth Amendment of the United States Constitution and article 1, section 12 of the New York Constitution both guarantee the right to privacy.<sup>4</sup> The right to privacy has expanded over time to increase protection and limit investigative techniques of law enforcement. The Fourth Amendment also governs the reasonableness of a civil search pursuant to a violation of a city or town ordinance.<sup>5</sup>

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<sup>1</sup> 984 N.Y.S.2d 207 (App. Div. 3d Dep't 2014).

<sup>2</sup> 12 N.Y. JUR.2D *Buildings* § 41 (2015).

<sup>3</sup> U.S. CONST. amend. IV.

<sup>4</sup> *Wisoff*, 984 N.Y.S.2d at 209.

<sup>5</sup> *Id.*

A search pursuant to a city or town ordinance is an administrative search and is the subject of this Case Note.<sup>6</sup> This Case Note addresses the various approaches to assessing the constitutionality of an administrative inspection pursuant to the Fourth Amendment's standard of reasonableness. Specifically, this Case Note explores the issue raised in *Wisoff v. City of Schenectady*—whether Article 10 of Chapter 167 of the Code of Ordinances of the City of Schenectady violated the plaintiff's right to be free from unreasonable searches under article 1, section 12 of the New York State Constitution<sup>7</sup> and the Fourth Amendment of the United States Constitution.<sup>8</sup>

Currently, there is no bright-line rule governing the constitutionality of an administrative search. When presented with this issue, federal courts broadly analyze the constitutionality of an administrative inspection by applying a flexible standard of reasonableness. To determine whether an administrative search is reasonable, federal courts conduct a balancing test, which weighs the governmental purpose of the inspection against the individual's privacy interest. Federal courts consider additional factors, such as the scope of the intrusion and the need for the search. As a result of this flexible standard, New York courts are confronted with determining the most appropriate approach in analyzing the constitutionality of a given search. New York courts have adopted a narrow analysis to ensure that the policy of an ordinance does not impede upon the right to be free from warrantless searches. Courts in New York have consistently ruled that ordinances requiring either consent or a warrant preserve an individual's privacy interests and, therefore, are constitutional.<sup>9</sup> By implementing such a narrow analysis, however, New York courts have failed to consider the constitutionality of the actual inspection. Ultimately, to determine if a specific inspection is constitutional, New York courts need not create a new test. Rather, the adoption of a broad approach, commonly applied by federal courts, will allow New York courts to analyze the constitutionality of the actual inspection.

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<sup>6</sup> *Id.*

<sup>7</sup> N.Y. CONST. art. I, § 12.

<sup>8</sup> U.S. CONST. amend. IV.

<sup>9</sup> *Wisoff*, 984 N.Y.S.2d at 209.

## II. DISCUSSION OF *WISOFF*

The plaintiff, Andrew Wisoff, a building owner and resident of Nikayuna, New York, received a fine and was imprisoned for violating Article 10 of Chapter 167 of the Code of Ordinances of the City of Schenectady (Ordinance No. 85-75) (Schenectady Rental Certificate Ordinance) (“RCO”).<sup>10</sup> The RCO provides specific guidelines detailing how to conduct an inspection, as well as the grounds for a violation.<sup>11</sup> Specifically, the RCO requires a search to occur “within five working days of receipt of [such] application, [and] the Building Inspector [must] inspect the rental unit to determine if [it] is in compliance with certain enumerated housing standards.”<sup>12</sup> The RCO also regulates when a search may be conducted<sup>13</sup> and has established guidelines for denying consent.<sup>14</sup> Finally, the RCO assigns criminal and monetary penalties to any owner violating the ordinance.<sup>15</sup>

Owners of residential rental properties must comply with the standards set forth within the ordinance. In requiring compliance, the RCO seeks “to promote the health and safety of tenants and to alleviate conditions of substandard housing . . . .”<sup>16</sup> The execution of the ordinance is likely to raise future constitutional claims because the ordinance allows building inspectors to inspect almost any area of the home.<sup>17</sup>

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<sup>10</sup> The RCO provided that:

[I]t shall be unlawful for any owner to permit the occupancy of any rental unit subject to [former article X of the Code of the City of Schenectady], unless such unit has a current and valid rental certificate or temporary rental certificate.

*Id.* at 208.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 208 (stating that if the building inspector fails to perform the inspection within five days, the owner of the property can obtain a rental certificate that “is valid for 30 days or until the unit is inspected”).

<sup>14</sup> The RCO provided that if the owner denied consent, “the Building Inspector shall apply for a search warrant or court order in an appropriate court and upon a showing that there [are] reasonable grounds to believe that a building or rental unit within [the] building is rented and occupied in violation of the RCO.” *Wisoff*, 984 N.Y.S.2d at 208.

<sup>15</sup> *Id.* at 209. *See also* Schenectady, N.Y., Code § 167-67 Penalties for Offenses. “Each violation of this article shall be a misdemeanor and shall be punishable by a fine of not less than \$200 and not exceeding \$500 or by imprisonment not exceeding 30 days, or by both such fine and imprisonment . . . .” *Id.*

<sup>16</sup> Schenectady, N.Y., Code § 167-67.

<sup>17</sup> *Id.* § 167-60 Application; standards; issuance; temporary certificate. The RCO specifi-

### A. Factual and Procedural History

Wisoff owns 12 two-family homes in the City of Schenectady.<sup>18</sup> Although Wisoff does not reside in the homes, he rents apartments within the homes to individuals and families.<sup>19</sup> The City criminally charged Wisoff with “violating Chapter 167, Article X of the Code of the City of Schenectady.”<sup>20</sup> The RCO requires all landlords to “submit a written application for a rental certificate [whenever a vacancy exists or whenever there is a change in occupancy].”<sup>21</sup> Upon receiving such written application, the RCO allows the City to reserve the right to enter and inspect the premises by stating the following:

During regular business hours or in an emergency, the Building Inspector[,] . . . upon the showing of proper credentials[,] . . . may enter any building or rental unit within a building. If access to such property is refused, the Building Inspector shall apply for a search warrant or court order in an appropriate court and upon a showing that there [are] reasonable grounds to believe that a building or rental unit within a building is rented and occupied in violation of this article.<sup>22</sup>

Specifically, Wisoff rented apartments within his two-family homes without a valid rental certificate in violation of the RCO.<sup>23</sup> Wisoff believed that requiring an inspection to obtain the rental certificate intruded on his Fourth Amendment rights.<sup>24</sup> He argued that the RCO “deprived him of the beneficial use of his properties,” thereby affect-

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cally allowed Building Inspectors to inspect a home to determine compliance with the following standards: light and ventilation, railings or parapet walls, exits, structural requirements, exterior protection, interior protection, plumbing, heating equipment, fire places, electrical wiring, cooking and refrigeration equipment, fire protection, maintenance requirements, exterior property areas, and prohibited storage areas. The areas to be searched are subject to the discretion of the Building Inspector and, therefore, are substantially broad.

<sup>18</sup> Mem. Decision and Order at 3, *Wisoff v. City of Schenectady*, 1:07-CV-34 (N.D.N.Y. Mar. 9, 2009).

<sup>19</sup> *Id.* at 3-4.

<sup>20</sup> *Id.* at 4 n.4.

<sup>21</sup> Complaint and Notice of Removal, *Wisoff v. Schenectady*, No. 07-CV-0034, 2007 WL 4653331 (N.D.N.Y. Jan. 9, 2007).

<sup>22</sup> Schenectady, N.Y., Code § 167-61.EN(3) Right to enter and inspect.

<sup>23</sup> *Wisoff*, 984 N.Y.S.2d at 208.

<sup>24</sup> *Id.*

ing its economic value and his income.<sup>25</sup> In an effort to have the RCO declared unconstitutional, Wisoff claimed that the RCO facilitates coercive consent and punishes those who reject inspection by imposing criminal penalties.<sup>26</sup>

Wisoff filed a complaint against the City in 2007, alleging that the Code violated his right to privacy guaranteed under the Fourth Amendment of the United States Constitution and article 1, section 12 of the New York State Constitution, respectively.<sup>27</sup> Wisoff sought injunctive relief to prevent the City from pursuing criminal prosecution against him and a declaratory judgment finding the Code unconstitutional for violating the Fourth Amendment of the United States Constitution and article 1, section 12 of the New York State Constitution.<sup>28</sup>

The City responded with a counterclaim and filed for removal of the action to the United States District Court for the Northern District of New York.<sup>29</sup> Following removal, Judge Mordue preserved Wisoff's Fourth Amendment claims in the Northern District and remanded the state claims to the supreme court.<sup>30</sup> Wisoff moved for summary judgment in the supreme court, and the City cross-moved for a dismissal of Wisoff's state law claims.<sup>31</sup> The supreme court granted the City's cross-motion, declaring the RCO as "facially valid," thereby prompting Wisoff's subsequent motion and later appeal.<sup>32</sup>

### B. A Critique of the Court's Analysis in *Wisoff v. City of Schenectady*

The court focused on the prerequisites of the inspection by noting that the RCO requires either consent or a search warrant to conduct an administrative inspection.<sup>33</sup> Ultimately, the court held that the RCO was constitutional and did not violate Wisoff's right to

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<sup>25</sup> *Id.* at 209.

<sup>26</sup> Complaint and Notice of Removal, *Wisoff v. Schenectady*, *supra* note 21.

<sup>27</sup> *Wisoff*, 984 N.Y.S.2d at 208.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Wisoff*, 984 N.Y.S.2d at 208.

<sup>33</sup> *Id.* at 209.

privacy.<sup>34</sup> The court found that the prerequisites of either consent or a warrant safeguarded a person's constitutional right to privacy.<sup>35</sup> The court held that the RCO safeguarded privacy interests because it did not permit a warrantless search, was not coercive, and was not purposeless.<sup>36</sup> To pass constitutional muster, an ordinance must either (1) require consent of the property owner to the inspection or (2) obtain the issuance of a valid judicial search warrant.<sup>37</sup> The court's holding implies that any ordinance that contains such prerequisites would consistently be found constitutional.

However, the *Wisoff* court failed to consider the actual inspection in question.<sup>38</sup> By assessing the constitutionality of the ordinance, the court did not analyze whether the actual inspection impinged on *Wisoff's* privacy interest. To determine whether an administrative inspection pursuant to a housing code is constitutional, New York courts should consider factors such as whether the ordinance serves a substantial governmental interest, whether the inspection is necessary to further those interests, the intrusiveness of the inspection, and whether the governmental interest in the search outweighs the individual interest of privacy.<sup>39</sup> Analyzing those factors will implement the federal approach, and thus would provide an analysis of both the constitutionality of the ordinance and the reasonableness of the inspection.

### III. FEDERAL APPROACH TO FOURTH AMENDMENT ADMINISTRATIVE SEARCHES

The 1959 Supreme Court opinion in *Frank v. Maryland* initiated the development of an approach to administrative inspections under the Fourth Amendment.<sup>40</sup> In *Frank v. Maryland*, the Court noted that the factors used to assess a criminal search under the Fourth Amendment were not applicable to a housing inspection.<sup>41</sup> In

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* (holding that the RCO serves the purpose of "a legitimate governmental goal").

<sup>37</sup> *Wisoff*, 984 N.Y.S.2d at 209.

<sup>38</sup> *Id.*

<sup>39</sup> *See* *New York v. Burger*, 482 U.S. 691, 702-04 (1987). *See also* *Camara v. Municipal Court*, 387 U.S. 523, 533 (1967).

<sup>40</sup> *Frank v. Maryland*, 359 U.S. 360 (1959).

<sup>41</sup> *Id.* at 365-66 (holding that the defendant's assertion of a subjective and objective expectation of privacy was irrelevant because the search was not criminal in nature).

*Frank*, a city health inspector was trying to determine the source of rodent infestation within a neighborhood.<sup>42</sup> Noticing that the defendant's home was in an "extreme state of decay," the inspector requested permission to enter the home.<sup>43</sup> The defendant refused to grant the inspector entry, which prompted the defendant's arrest.<sup>44</sup>

The case resulted in a conviction based on the defendant's refusal to consent to a warrantless inspection pursuant to a city code, which permitted a search upon suspicion of an existing nuisance.<sup>45</sup> On appeal, the Criminal Court of Baltimore affirmed the defendant's conviction.<sup>46</sup> After the Maryland Court of Appeals denied certiorari, the Supreme Court of the United States granted certiorari to determine the validity of the city code.<sup>47</sup>

Noting the historical policy reasons for the city code, the Court ruled that the code was constitutional.<sup>48</sup> The search in *Frank* was an administrative inspection, not a criminal search, although the Court did not clearly identify the search as administrative. According to the Court, the code did not subject the defendant to criminal liability upon a finding of a violation.<sup>49</sup> Furthermore, the code furthered the interests of the community by maintaining minimum standards of hygiene and safety and, therefore, used careful delineation to ensure the defendant's rights were protected.<sup>50</sup> The strict limitations on the scope of the search fostered a privacy protection rather than a violation.<sup>51</sup> The Court reasoned that the code served the general welfare of the community and did not seek to investigate criminal activity.<sup>52</sup>

The *Frank* decision resulted in a very narrow and restrictive reading of the applicability of the Fourth Amendment. The holding implies that individuals have Fourth Amendment protections *only* when they are suspected of a crime. However, seven years later, the

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<sup>42</sup> *Id.* at 361.

<sup>43</sup> *Id.* The inspector observed a pile of "rodent feces mixed with straw and trash and debris . . ." *Id.*

<sup>44</sup> *Frank*, 359 U.S. at 381.

<sup>45</sup> *Id.* at 361-62.

<sup>46</sup> *Id.* at 362.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 368-71.

<sup>49</sup> *Frank*, 359 U.S. at 367.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 366-67. For an inspection to occur there must be valid grounds to suspect that a nuisance exists, the inspection must occur during the daytime, and the inspector cannot force entry. *Id.*

<sup>52</sup> *Id.* at 367.



Supreme Court provided some guidance.

### A. The Significance of *Camara v. Municipal Court*

In 1967, the Supreme Court, in *Camara v. Municipal Court*,<sup>53</sup> carved out the administrative inspection doctrine under the Fourth Amendment and, for the first time, ruled that administrative inspections infringe on the fundamental protection of privacy. The Court had to determine whether administrative inspection programs violated the Fourth Amendment.<sup>54</sup> The petitioner, Camara, faced criminal charges for violating the San Francisco Housing Code when he refused to consent to a warrantless inspection of his ground floor apartment.<sup>55</sup> The inspector entered the apartment building to conduct a routine annual inspection to ensure compliance with the city's Housing Code.<sup>56</sup> The building manager informed the inspector that Camara was a lessee of the ground floor.<sup>57</sup> The inspector claimed that the building permit prohibited residential use of the ground floor and demanded to inspect Camara's home.<sup>58</sup> After Camara refused to permit the inspector to enter, the District Attorney's office issued a subpoena.<sup>59</sup>

Camara refused to appear, prompting inspectors to return to his apartment. The inspectors advised Camara that the Housing Code required him to allow a warrantless search.<sup>60</sup> Exercising his right to privacy, Camara again refused to give the inspectors access.<sup>61</sup> His response resulted in his arrest for refusing to consent to an inspection in violation of the Housing Code.<sup>62</sup> While awaiting trial on his criminal case, Camara challenged the constitutionality of the Housing Code in California Superior Court.<sup>63</sup> The Superior Court denied Camara's motion, the District Court of Appeals affirmed, and the Supreme

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<sup>53</sup> 387 U.S. 523 (1967).

<sup>54</sup> *Id.* at 527.

<sup>55</sup> *Id.* at 525-27.

<sup>56</sup> *Id.* at 526.

<sup>57</sup> *Id.*

<sup>58</sup> *Camara*, 387 U.S. at 526.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 527.

<sup>62</sup> *Id.*

<sup>63</sup> *Camara*, 387 U.S. at 525.

Court of California denied *Camara*'s petition for a hearing.<sup>64</sup> *Camara* then petitioned for certiorari to the Supreme Court.

Justice White, writing for the majority, began his analysis by noting that the historically governing principle of the Fourth Amendment is that "except in certain carefully defined classes of cases, a search of private property without consent is unreasonable unless it has been authorized by a valid search warrant."<sup>65</sup> The Court recognized that the *Frank* decision jeopardized the interests of homeowners because it limited Fourth Amendment protections to only those individuals who are subjected to criminal investigations.<sup>66</sup> Further, the Court reasoned that the ordinance, like a warrantless criminal search, subjected owners to warrantless inspections without knowledge of whether the inspector is acting pursuant to a housing code, the lawful limits of a search, and the authority under which the inspector is acting.<sup>67</sup>

However, Justice White also considered the public policy of administrative inspections. The Court found that the public interest demands administrative searches because they facilitate the health and safety of urban communities.<sup>68</sup> Determining whether administrative searches facilitate the public interest depends on whether the burden of obtaining a warrant would "frustrate the governmental purpose behind the search."<sup>69</sup> According to the majority, the burden of obtaining a warrant would not frustrate the governmental purpose because inspection programs could achieve the goals of safeguarding health and safety within the confines of a search warrant.<sup>70</sup>

To distinguish *Camara* from *Frank*, the Court differentiated between a criminal and an administrative search.<sup>71</sup> In criminal searches, to determine whether the search is reasonable, the Court inquired as to whether or not there is probable cause.<sup>72</sup> The Court measures the probable cause standard by balancing the governmental interest justifying intrusion against the constitutionally protected in-

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 528-29.

<sup>66</sup> *Id.* at 528.

<sup>67</sup> *Id.* at 532.

<sup>68</sup> *Camara*, 387 U.S. at 533.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 534-35.

<sup>72</sup> *Id.*

terests of the particular private citizen.<sup>73</sup> Unlike a criminal search, administrative inspections, by design, seek to maintain citywide compliance with an ordinance to facilitate the health and safety of the community.<sup>74</sup> To determine whether an administrative inspection is reasonable, probable cause must also exist.<sup>75</sup> In administrative searches, the probable cause standard is measured by balancing the need for the inspection in terms of the goals of the code enforcement against the intrusiveness of the search.<sup>76</sup>

In a six to three ruling, the *Camara* Court overruled the *Frank* decision, which had created an exceedingly broad exception to a warrantless search.<sup>77</sup> The District Court of Appeals found section 503 (the ordinance at issue in *Camara*) constitutional because the ordinance “is part of a regulatory scheme which is essentially civil rather than criminal in nature, inasmuch as that section creates a right of inspection which is limited in scope and may not be exercised under unreasonable conditions.”<sup>78</sup> The Supreme Court focused on whether the governmental interest justified a warrantless search.<sup>79</sup> Furthermore, the Court assessed whether the burden of obtaining a warrant would frustrate the governmental purpose behind the search.<sup>80</sup> Accordingly, the Court determined that a search could not be made without the owner’s consent unless the city first obtained a warrant.<sup>81</sup> Thus, the Court found the San Francisco ordinance unconstitutional because it permitted warrantless inspections to ensure compliance with the city’s housing code.<sup>82</sup>

### B. How the *Camara* Court Applied the New Standard

The majority reasoned that the strict standards attending the issuance of a warrant in criminal cases are not applicable to the issuance of a warrant authorizing an administrative inspection.<sup>83</sup> The

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<sup>73</sup> *Camara*, 387 U.S. at 535.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 536-37.

<sup>77</sup> *Id.* at 528.

<sup>78</sup> *Camara*, 387 U.S. at 528.

<sup>79</sup> *Id.* at 534-35.

<sup>80</sup> *Id.* at 533.

<sup>81</sup> *Id.* at 528-29.

<sup>82</sup> *Id.* at 540.

<sup>83</sup> *Camara*, 387 U.S. at 538.

Court considered the public's need for effective enforcement of the regulation under the standard of reasonableness.<sup>84</sup> Rather than requiring individualized suspicion to satisfy the standard for obtaining a warrant, the Court broadened the concept of reasonableness.<sup>85</sup> Finding that the reasonableness standard was identical to the probable cause test, the Court weighed the governmental interests against the intrusiveness of the search.<sup>86</sup>

To apply the new standard given by the *Camara* Court, the Court reasoned that reasonableness and probable cause are determined by the same test.<sup>87</sup> The Court balanced the need for the inspection against the reasonable goals of the specific code or ordinance in question.<sup>88</sup> The goals of the inspection and code are "aimed at securing citywide compliance . . . to prevent even the unintentional development of conditions which are hazardous to public health and safety."<sup>89</sup> The Court conceded that a balancing test is the only way to apply the reasonableness test.<sup>90</sup>

The holding in *Camara* fails to provide guidance to lower courts and, thus, will result in a lack of consistency in future application. The *Camara* decision implements a balancing test for administrative searches, but remains unclear in establishing which factors to consider. The *Camara* holding only applies to residential properties; however, on the same day that the Court decided *Camara*, the Court ruled on *See v. Seattle*.<sup>91</sup>

### C. *See v. Seattle*

In *See v. Seattle*, the Court applied the ruling in *Camara* to administrative searches of private commercial premises.<sup>92</sup> In *Seattle*, the City of Seattle convicted and fined the appellant for refusing to consent to an administrative search by a representative of the City of Seattle Fire Department.<sup>93</sup> The appellant was the owner of a com-

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<sup>84</sup> *Id.* at 539.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 535.

<sup>87</sup> *Id.*

<sup>88</sup> *Camara*, 387 U.S. at 536-37.

<sup>89</sup> *Id.* at 535.

<sup>90</sup> *Id.* at 540.

<sup>91</sup> 387 U.S. 541 (1967).

<sup>92</sup> *Id.* at 542.

<sup>93</sup> *Id.* at 541.

mercial warehouse.<sup>94</sup> The City conducted an inspection to maintain compliance pursuant to Seattle's Fire Code.<sup>95</sup> The inspector sought entry without a warrant and without any existing probable cause to believe that there was a violation of the code.<sup>96</sup> The appellant refused to permit the inspector inside to conduct a warrantless search of his locked commercial warehouse.<sup>97</sup> The City then arrested and charged the appellant with violating the Fire Code by refusing to consent to a warrantless search.<sup>98</sup> The issue presented was whether *Camara* applied to administrative inspections of commercial premises that were not used as private residences.<sup>99</sup>

To reach a decision, the Court compared the constitutional rights of a private homeowner to the rights of a business owner.<sup>100</sup> Like a private homeowner, the business owner had a constitutional right to be free from unreasonable searches of his private commercial property.<sup>101</sup> The business owner, like the private homeowner, would suffer a violation of his constitutional rights in the event of an inspection without a warrant.<sup>102</sup> The Court compared this commercial administrative inspection to administrative subpoenas for corporate books and records.<sup>103</sup> Because administrative subpoenas require a warrant, the Court reasoned that a warrant ought to be required for administrative inspections of commercial premises.<sup>104</sup> The Court held that inspections of commercial property, which are not open to the public, may only be executed under the authorization of a valid warrant.<sup>105</sup> However, the Court clarified that this is not a bright-line rule and that each factual situation requires a case-by-case analysis pursuant to a standard of reasonableness.<sup>106</sup>

Adhering to the rule in *Camara*, the Court reversed the appellant's conviction for refusing to permit the Fire Inspector to conduct a

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Seattle*, 387 U.S. at 541.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 542.

<sup>100</sup> *Id.* at 543.

<sup>101</sup> *Seattle*, 387 U.S. at 543.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 544.

<sup>104</sup> *Id.* at 545.

<sup>105</sup> *Id.*

<sup>106</sup> *Seattle*, 387 U.S. at 545-46.

warrantless search.<sup>107</sup> Justice White, again writing for the majority, concluded that non-consensual “administrative [inspections]. . . of commercial premises which are not open to the public may only be compelled through prosecution or . . . a warrant procedure.”<sup>108</sup>

#### D. Carving the Exception in Pervasively Regulated Business

Following the rulings in *Camara* and *Seattle*, the Supreme Court had many opportunities to determine the constitutionality of administrative inspections. The last administrative inspection case before the Supreme Court was *New York v. Burger*.<sup>109</sup> The *Burger* opinion clearly provides a historical analysis of the Fourth Amendment’s application to regulated industries.<sup>110</sup> In *Burger*, the respondent owned an automobile junkyard in Brooklyn, New York.<sup>111</sup> Five plainclothes police officers entered the respondent’s place of business to inspect pursuant to a statute.<sup>112</sup> The purpose of the inspection was to uncover any stolen vehicles or car parts and to ensure compliance with registration codes.<sup>113</sup> After obtaining consent to inspect, the officers determined that several vehicles and parts had been stolen.<sup>114</sup> They arrested the respondent and charged him with five counts of possession of stolen property and one count of unregistered operation as a vehicle dismantler.<sup>115</sup>

The respondent moved to suppress the evidence obtained, claiming that the search and statute were unconstitutional.<sup>116</sup> The trial court denied the respondent’s motion, finding that the junkyard business was a pervasively regulated business; therefore, warrantless administrative inspections were appropriate.<sup>117</sup> The Appellate Division affirmed the trial court’s decision.<sup>118</sup> The New York Court of

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<sup>107</sup> *Id.* at 546.

<sup>108</sup> *Id.* at 545.

<sup>109</sup> 482 U.S. 691 (1987).

<sup>110</sup> *Id.* at 699-703.

<sup>111</sup> *Id.* at 693.

<sup>112</sup> *Id.* at 693-94.

<sup>113</sup> *Id.* at 694-95.

<sup>114</sup> *Burger*, 482 U.S. at 695.

<sup>115</sup> *Id.* at 695-96.

<sup>116</sup> *Id.* at 696.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 696-97.

Appeals then reversed on the ground that the statute authorized warrantless searches solely to uncover evidence of criminality and not to enforce regulation.<sup>119</sup> The United States Supreme Court granted certiorari.<sup>120</sup>

The Court in *Burger* considered whether an otherwise proper administrative inspection was unconstitutional when the sole purpose of the statute is to deter criminal behavior.<sup>121</sup> The Court noted that the general rule is that a warrantless inspection in the context of a pervasively regulated business will be deemed reasonable so long as three criteria are met.<sup>122</sup> The Court incorporated the factors of prior business administrative inspection decisions into a three-part test<sup>123</sup>:

First, there must be a “substantial” government interest that informs the regulatory scheme pursuant to which the inspection is made. Second, the warrantless inspections must be “necessary to further the regulatory scheme.” Finally, the “statute’s inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant.”<sup>124</sup>

Acknowledging that the third step is flexible in its application, the Court clarified that, by requiring the statute to be “sufficiently comprehensive and defined[,] that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for a specific purpose.”<sup>125</sup> The *Burger* Court determined that the statute allowing warrantless administrative inspections fell within the pervasively regulated business exception.<sup>126</sup> To further consider whether the statute is reasonable, the Court focused on the duration of such regulation and its limitations.<sup>127</sup> Under that purview, the Court found that the warrantless administrative inspection was appropriate because it was limited in time, place, and

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<sup>119</sup> *Burger*, 482 U.S. at 697-98.

<sup>120</sup> *Id.* at 698.

<sup>121</sup> *Id.* at 693.

<sup>122</sup> *Id.* at 702.

<sup>123</sup> *Id.* at 702.

<sup>124</sup> *Burger*, 482 U.S. at 702-03.

<sup>125</sup> *Id.* at 703.

<sup>126</sup> *Id.* at 712.

<sup>127</sup> *Id.* at 711.

scope.<sup>128</sup>

Finally, to reconcile the analysis with past precedent, Justice Blackmun traced the history of pervasively regulated business inspections that have been upheld as constitutional.<sup>129</sup> In doing so, the *Burger* decision provides a framework to assess the breadth of the Fourth Amendment with respect to warrantless inspections of pervasively regulated businesses.

### E. Implication of the Supreme Court Decisions

Over time, the Supreme Court's decisions have expanded the applicability of the Fourth Amendment to administrative inspections and have provided some guidance in determining the applicability of the Fourth Amendment to civil searches. However, these decisions lack consistency, which is attributed to the lack of clarity in determining which approach is the most appropriate in assessing the constitutionality of an inspection.

The Court stressed the importance of balancing the interests, reasonableness, level of intrusiveness, and traditional probable cause. However, it has provided little guidance to the lower courts as to whether they must weigh all of these factors when determining the constitutionality of an inspection. Unlike the United States Supreme Court, New York state courts implement a narrow approach when considering the constitutionality of a city or town ordinance.

## IV. NEW YORK STATE APPROACHES TO ADMINISTRATIVE INSPECTIONS

In *People v. Northrop*,<sup>130</sup> the City Court of Long Beach declared that an administrative search is an inspection by administrative

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<sup>128</sup> *Id.*

<sup>129</sup> *Burger*, 482 U.S. at 699-703. *See also* *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 75, 77 (1970) (holding that a warrantless search of a catering business pursuant to a federal statute enforced the long standing history of regulation within the liquor industry); *United States v. Biswell*, 406 U.S. 311, 316-17 (1972) (holding that warrantless inspection of licensed firearm dealers was appropriately within the "licensing program" inspection exception); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 324 (1978) (holding that a warrantless inspection, pursuant to the Occupational Safety and Health Act, was unconstitutional); *Donovan v. Dewey*, 452 U.S. 594, 606 (1981) (holding that the Federal Mine Safety and Health Act of 1977 that authorized warrantless inspections of underground and surface mines was constitutional).

<sup>130</sup> 410 N.Y.S.2d 32 (City Ct. 1978).



officials to determine whether a property owner is complying with building regulations.<sup>131</sup> Thus, when faced with the issue of administrative searches, New York courts determine the constitutionality of the search by evaluating the implications of the statute.<sup>132</sup>

### A. The Foundation of *Sokolov v. Freeport*

In 1981, the Court of Appeals ruled on the constitutionality of a municipal ordinance,<sup>133</sup> which required a landlord to consent to a warrantless inspection of his property in order to obtain a rental permit.<sup>134</sup> The purpose of the ordinance was to ensure that the property was “safe, clean, sanitary, in good repair, and free from rodents and vermin.”<sup>135</sup>

The appellants owned rental property in Freeport, New York.<sup>136</sup> The state prosecuted the appellants for violating a rental ordinance that makes failure to obtain rental permits illegal.<sup>137</sup> The trial court held the ordinance was unconstitutional because it permitted warrantless administrative searches and, therefore, infringed upon the owners’ Fourth Amendment rights.<sup>138</sup> The Appellate Division, relying on precedent where a similar ordinance was held constitutional, reversed.<sup>139</sup> The Court of Appeals reversed the Appellate Division’s decision.<sup>140</sup>

The Court of Appeals evaluated the constitutionality of the ordinance by focusing on the Supreme Court cases of *Camara v. Municipal Court* and *See v. Seattle*.<sup>141</sup> The court distinguished *Sokolov* from the federal cases, noting that the Freeport ordinance was coercive.<sup>142</sup> Although the ordinance did not directly authorize warrantless

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<sup>131</sup> *Id.* at 34.

<sup>132</sup> *Id.* at 35.

<sup>133</sup> *Sokolov v. Freeport*, 420 N.E.2d 55 (N.Y. 1981).

<sup>134</sup> *Id.* at 56.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Sokolov*, 420 N.E.2d at 56.

<sup>139</sup> *Id.* The Appellate Division relied on *Loventhal v. City of Mount Vernon*, 379 N.Y.S.2d 130 (App. Div. 2d Dep’t 1976) (holding that the ordinance was a valid exercise of the City’s Police Power, and the ordinance did not have the effect of coercing consent to warrantless searches in violation of the Constitution).

<sup>140</sup> *Sokolov*, 420 N.E.2d at 59.

<sup>141</sup> *Id.* at 56.

<sup>142</sup> *Id.* at 56-58.

inspections, the court found that it facilitated coercive consent to a warrantless inspection, making it unconstitutional.<sup>143</sup> The coercive effect of the ordinance penalized owners who refused to consent to a warrantless search.<sup>144</sup> To further consider the constitutionality of the ordinance, the court then shifted its focus to the timing of the inspection.<sup>145</sup> The inspection occurred two business days after the property owners notified the Department of Buildings of a vacancy, thus, making the owners aware that the inspection was imminent.<sup>146</sup> The court concluded that the differences between the ordinance in question and those in the Supreme Court cases were inconsequential.<sup>147</sup>

The *Sokolov* court also considered the degree of intrusion.<sup>148</sup> The attorneys for the Village of Freeport argued that the intrusion was minimal because the inspection occurred while the premises were vacant.<sup>149</sup> The court did not find this argument compelling because the search took place within two days after notification of vacancy; therefore, there was a risk that the tenant's belongings would be present in the residential space.<sup>150</sup>

Although the court held the rental permit ordinance unconstitutional, it observed that the ruling did not disturb the goals of the ordinance.<sup>151</sup> Such a ruling upholds the public interest value in having such an ordinance. Ultimately, the court held that the ordinance was unconstitutional because landlords in the rental business are entitled to Fourth Amendment protections just as homeowners, and ordinances that penalized landlords who failed to consent to a warrantless search violated those protections.<sup>152</sup>

### **B. The Expansion of *Sokolov v. Freeport* and Its Influence on New York Cases**

The Court of Appeals, in *Pashcow v. Babylon*,<sup>153</sup> held that an

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 57.

<sup>145</sup> *Sokolov*, 420 N.E.2d at 58.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 57.

<sup>148</sup> *Id.* at 58.

<sup>149</sup> *Id.*

<sup>150</sup> *Sokolov*, 420 N.E.2d at 58.

<sup>151</sup> *Id.* at 58-59.

<sup>152</sup> *Id.* at 55.

<sup>153</sup> 421 N.E.2d 498 (1981).

ordinance requiring an owner to consent to a warrantless search was unconstitutional.<sup>154</sup> In *Pashcow*, the ordinance in question required either consent or a warrant, except in an emergency situation, in order for a landlord to rent the premises.<sup>155</sup> The court held that the ordinance was unconstitutional because an owner's ability to rent his or her premises cannot be conditioned upon consent to a warrantless inspection.<sup>156</sup>

Just as the Supreme Court made *Camara* applicable to commercial premises, so too did the New York courts.<sup>157</sup> In *Brookhaven v. Ronkonkoma Realty Corp.*,<sup>158</sup> the defendant owned a multiple residence facility in a town that required owners of facilities to obtain a permit in order to operate the facility.<sup>159</sup> To obtain a permit, the owner must submit to a warrantless physical inspection.<sup>160</sup> Failure to obtain a permit would subject the owner to high fines and imprisonment.<sup>161</sup> Applying the ruling in *Sokolov*, the court held that the ordinance in Brookhaven violated an owner's right to be free from unreasonable searches.<sup>162</sup>

In 1992, the Third Department's decision in *Stender v. Albany*<sup>163</sup> created a domino effect on future New York cases. In *Stender*, the plaintiff owned several rental properties in a city that required owners to obtain permits prior to renting the units within a dwelling.<sup>164</sup> The plaintiff consented to an inspection to obtain the permit.<sup>165</sup> The housing code in question precluded a non-compliant landlord from collecting rent within the dwelling unit until the landlord obtained a permit.<sup>166</sup> The court held that such a penalty precluding a landlord from collecting rent after refusing an unconstitutional

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<sup>154</sup> *Id.* at 498.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> Compare *See v. Seattle*, 387 U.S. 541 (1967), with *Brookhaven v. Ronkonkoma Realty Corp.*, 547 N.Y.S.2d 68 (App. Div. 2d Dep't 1989).

<sup>158</sup> 547 N.Y.S.2d 68 (App. Div. 2d Dep't 1989).

<sup>159</sup> *Id.* at 69.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* (stating that a violator will be subjected to fines up to \$500 and imprisonment up to six months for every day the facility operates without a permit).

<sup>162</sup> *Id.*

<sup>163</sup> 592 N.Y.S.2d 70 (App. Div. 3d Dep't 1992).

<sup>164</sup> *Id.* at 71.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

search violated the Fourth Amendment.<sup>167</sup>

### C. A Deviation from the New York Norm

As time progressed, New York courts started to analyze administrative searches under more heightened scrutiny to determine the constitutionality of an ordinance. The heightened scrutiny resulted in a new burden upon the petitioner to require a showing that the owner faced a penalty as a result of the ordinance. To require a showing that an owner suffered a penalty implies that a violation of the right to privacy does not rise to the level of a penalty; rather, this heightened scrutiny meant that owners should endure more damages. A number of later cases demonstrates how this additional burden requires a homeowner to suffer not only a constitutional violation, but also a monetary, criminal, civil, or personal penalty.

In *McLean v. City of Kingston*,<sup>168</sup> the plaintiff complied with the housing ordinances in obtaining permits to schedule an inspection date. However, the plaintiff failed to appear for the scheduled inspection, resulting in re-inspection fees of \$150 for each missed appointment.<sup>169</sup> The plaintiff sought to have the ordinance declared unconstitutional because the ordinance lacked the requirement of a search warrant and, thus, only required consent from the owner to enter the premises.<sup>170</sup> The court held that the ordinance was constitutional because a non-compliant owner did not face criminal penalties, but instead faced only monetary penalties as a result of the owner's carelessness.<sup>171</sup> Further, the court based its decision on the lack of a penalty suffered by the plaintiff.<sup>172</sup> Then, in a 2013 opinion, the Fourth Department expressly required a petitioner to demonstrate that

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<sup>167</sup> *Id.* at 72.

<sup>168</sup> 869 N.Y.S.2d 685, 686 (App. Div. 3d Dep't 2008). The City of Kingston required owners to schedule appointments for inspection of the rental properties. A letter stating the date and time of the inspection was sent to the owner, and if the owner was unable to make the appointment, the owner was directed to call to cancel or face a \$150 re-inspection fee. *Id.* at 686.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 687.

<sup>171</sup> *Id.* at 688.

<sup>172</sup> *McLean*, 869 N.Y.S.2d at 688. The court stated that the plaintiff failed to make a showing of how the ordinance was unconstitutional as applied to him; therefore, there was no violation. The court now places a burden on the plaintiff to make a showing that not only was the ordinance unconstitutional, but in exercising his constitutional rights, the owner was penalized. *Id.*

the ordinance imposed an actual penalty to render it unconstitutional.<sup>173</sup>

In *Cappon v. Carballada*,<sup>174</sup> the petitioner was charged with violating a city code for failing to renew a certificate of occupancy for his rental property. The ordinance required that, upon renewal of the certificate of occupancy, the inspection could occur either upon consent or upon the issuance of a warrant.<sup>175</sup> The court held that the petitioner made no showing that he was actually penalized for failing to consent to a warrantless search.<sup>176</sup> The court reasoned that the ordinance triggers the administrative inspection when the owner applies for a renewal certificate; thus, in this case, the ordinance never triggered the administrative inspection because the owner never applied for a renewal.<sup>177</sup> Therefore, the ordinance did not unconstitutionally penalize the plaintiff. In light of the various approaches of the federal and state courts, the *Wisoff* decision requires a stricter analysis.

## V. THE THIRD DEPARTMENT'S DECISION IN *WISOFF*

The City of Rochester argued that the RCO was constitutional because the consent and warrant requirements of the RCO complied with constitutional interests.<sup>178</sup> However, under the federal approach, a more detailed analysis must drive the determination of whether the RCO comports with Fourth Amendment protections. Under the *Camara* approach, to determine whether the RCO is constitutional, the court must first assess whether the burden of obtaining a warrant would frustrate the governmental purpose behind the search.<sup>179</sup> Similar to other ordinances, the governmental purpose of the RCO is to ensure the health and safety of the tenants. The burden of obtaining a warrant would not frustrate the governmental purpose because the ordinance clearly states that the city will procure a warrant if the owner does not consent to the search. Thus, obtaining a warrant does

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<sup>173</sup> *Cappon v. Carballada*, 971 N.Y.S.2d 615 (App. Div. 4th Dep't 2013).

<sup>174</sup> 971 N.Y.S.2d 615, 617 (App. Div. 4th Dep't 2013).

<sup>175</sup> *Id.* at 616-17. The City code required owners to obtain a certificate of occupancy within 90 days prior to the expiration of the current certificate. Upon application for a renewal of the certificate of occupancy, the owner's premises are subjected to an inspection. *Id.*

<sup>176</sup> *Id.* at 617-18.

<sup>177</sup> *Id.* at 617.

<sup>178</sup> *Wisoff*, 984 N.Y.S.2d at 209.

<sup>179</sup> *Camara*, 387 U.S. at 533.

not frustrate the governmental goal.<sup>180</sup>

Further, the New York courts should adopt the *Camara* balancing test and weigh the interests of the government against the privacy interests of Wisoff to determine whether there is a Fourth Amendment violation. In order to balance the interests, the New York courts should determine the public need for effective enforcement of the particular ordinance. In *Wisoff*, a strong public need existed that called for effective enforcement of the RCO because of the potential of twenty-four families living in unsafe, unhealthy, and uninhabitable conditions. The governmental purpose of facilitating the health and safety of these twenty-four families outweighed Wisoff's interests because poor housing standards and conditions can debilitate the economic value of the City of Schenectady.

Finally, the last consideration is whether the search in *Wisoff* falls under the pervasively regulated business exception to *Camara* and *Seattle*, which requires the application of *Burger*. First, a substantial governmental interest exists because conducting inspections under the RCO ensures the health and safety of tenants and preserves the economic value of housing in Schenectady. These interests facilitate the regulatory scheme of the RCO which does not allow for arbitrary and unexpected inspections; rather, the RCO permits inspections upon notification of the owner. Second, warrantless inspections are necessary to further the regulatory scheme, because if a high number of owners refused consent, then the population of prospective homeless tenants would increase. Lastly, the RCO's inspection program provides for a constitutionally adequate substitute for a warrant by requesting consent from the owner.

## VI. CONCLUSION

The leading New York case, *Sokolov v. Freeport*, determined the constitutionality of the ordinance by assessing the "degree of intrusion" of the administrative search. The *Wisoff* opinion, however, lacked this treatment in its analysis. To determine the constitutionality of the ordinance, the *Wisoff* court examined the plain meaning of the statute. By focusing on the express language of the statute, the *Wisoff* court determined that the methodology that triggers a search is inherently constitutional; therefore, the ordinance itself is constitu-

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<sup>180</sup> *Wisoff*, 984 N.Y.S.2d at 208.

tional.

When examined together, the New York decisions illustrate that courts are following a trend of analyzing warrantless inspection claims by assessing whether the respective ordinance requires either consent or a warrant. This is where New York courts are mistaken. The inquiry is not only to determine the constitutionality of the ordinance. Instead, the challenge stems from the intrusion of the government by executing a search pursuant to the ordinance. Therefore, New York courts should analyze the constitutionality of the inspection in question as well as the ordinance. Such an inquiry will prevent arbitrary and capricious governmental invasions of the interests of residents and building owners.

By adopting the broad, federal approach, New York courts would effectively determine the constitutionality of a statute and search. To date, New York courts are not clear as to what makes an ordinance unconstitutional. *Wisoff* is illustrative of a valid administrative search because it demonstrated what makes an ordinance constitutional. *Wisoff* sends a message to the public that ordinances are presumptively constitutional, and furthermore, if the ordinance requires consent or a warrant for entry, then it upholds constitutional rights to be free from warrantless searches.

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