Community and Economic Development in North Carolina and Beyond Blog: Ensuring Local Policy Complies with New Residential Inspections Law

By Tyler Mulligan

Article: https://ced.sog.unc.edu/ensuring-local-policy-complies-with-new-residential-inspections-law/

This entry was posted on December 20, 2011 and is filed under Built Assets & Housing, Community Development

Tyler Mulligan is a School of Government faculty member.

The city manager of Tooltime, North Carolina, picks up the phone and calls Tim Taylor, the city's minimum housing public officer and lead housing inspector. "Tim, I understand why you suspended all periodic inspections in Tooltime that did not comply with the new periodic inspections law. I know we have much less flexibility now than we had before. But residential buildings still need to be inspected, and new complaints about neglected dwellings come in every week. I need a plan for moving forward that I can explain to the council. Can we modify our inspections program to comply with the law?"

Tim had already been working on it. Earlier that week, he and city attorney Heidi Keppert had reviewed and discussed a School of Government (SOG) bulletin on the new law. Although the law now requires inspectors first to find "reasonable cause" prior to inspecting a residential building, there was no other guidance on the procedural aspects of an inspection program. Heidi explained that the lack of guidance offers some flexibility to the city, but there are pitfalls as well. In the absence of clear procedures, inspections might be conducted inconsistently, or similarly-situated owners and landlords might be treated differently, leaving the city vulnerable to equal protection or due process complaints. A written inspections policy would help in that regard.

As Heidi and Tim work to revise their local policy, what aspects of the policy should they evaluate and modify? As a start, I recommend that their new policy address the following issues:

1. Set forth the number of inspections to be imposed depending on which reasonable cause condition is established.

The periodic inspections law states that "reasonable cause" is established by the presence of any one of four conditions. Once reasonable cause is established, the inspections department is authorized to "make periodic inspections" (plural) of a residential building. The four conditions are listed below:

- The landlord or owner has a history of more than two verified violations of the housing ordinances or codes within a twelve-month period.

- There has been a complaint that substandard conditions exist within the building or there has been a request that the building be inspected.

- The inspection department has actual knowledge of an unsafe condition within the building.

- Violations of the local ordinances or codes are visible from the outside of the property.

Copyright © 2009 to present School of Government at the University of North Carolina. All rights reserved.

Although the four reasonable cause conditions are fairly clear (nuances are discussed in the SOG Bulletin here), there is no further policy guidance. The law offers no suggestion as to how many inspections can or should be conducted upon establishment of reasonable cause. It is therefore up to local governments to develop their own guidelines for how long a building is to be enrolled in a program of periodic inspections and the frequency of such inspections.

Different inspection parameters can be imposed depending on the type of reasonable cause that is established. For example, a local policy could call for only two inspections following a complaint: one to verify the complaint and a subsequent inspection to confirm that the violation (if any) has been corrected. A more substantial program of inspections, say once a year for several years, could be required for buildings that become eligible for periodic inspections as a result of having a history of violations.

Distinctions based on tenancy

A local policy could also presumably make a distinction based on tenancy—that is, between rental properties and owner-occupied dwellings. For example, a local government could impose more inspections on residential rental properties than on owner-occupied dwellings, provided the local government has a rational basis for the difference in treatment. Interestingly, language that would have prohibited discrimination "between owner-occupied and tenant-occupied buildings or structures" was removed from the inspection law prior to enactment. Although the prohibition was removed, a note of caution should be sounded because attempts to regulate the manner of tenancy through zoning have been disfavored in case law. This isn't necessarily a concern—there is no reason to believe that a tenancy-based distinction in an inspection policy would be similarly disfavored. After all, state law has long subjected landlord and tenant relationships to a special and separate set of regulations.

How might a tenancy distinction be put into practice? A local government might reason that an owner is in a better position than a tenant to ensure that code violations are corrected and prevented; so, for the protection of tenants, it might enroll eligible tenant-occupied dwellings into a program of inspections that is more rigorous than the program for owner-occupied dwellings in terms of the number of inspections or the number of years over which a dwelling is subject to those inspections. To complement such a policy, a local government may wish to institute a rental property registration program—in which landlords are required to inform the local government when a residential building is used as rental property—so inspectors know which dwellings are occupied by tenants. If such a registration program is instituted, it must comply with the new law as discussed in the SOG Bulletin here.

More than one type of reasonable cause found at a single dwelling

It may occasionally happen that more than one type of reasonable cause is present at a single dwelling. In such cases, it might be helpful for a local policy to clarify that the inspections department will proceed by applying the type of reasonable cause that results in the most intensive and lengthiest program of periodic inspections.

Scale and scope of properties eligible for inspection

Additionally, pay attention to the scope of eligibility for periodic inspections. As discussed in the aforementioned SOG bulletin and a previous blog post, each type of reasonable cause refers to a specific scale of property—two refer to a building, another refers to property, and yet another implicates all buildings owned or managed by a landlord or owner. Drafters of a local policy should ensure that the policy is crafted in such a way to remain consistent with the distinctions found in the statute.

2. Clarify that establishment of reasonable cause does not exempt an inspector from complying with the Fourth Amendment.

Once reasonable cause has been established, the inspections department possesses statutory authority to conduct an inspection. However, the ensuing inspection remains subject to the Fourth Amendment of the U.S. Constitution, which protects citizens from unreasonable searches of all kinds—including administrative inspections. Under Fourth Amendment case law, prior to inspecting a dwelling, an inspector must obtain the consent of the occupant or an administrative inspection warrant, unless there are exigent circumstances. *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 539–40 (1967).

Copyright © 2009 to present School of Government at the University of North Carolina. All rights reserved.

In North Carolina, administrative inspection warrants are issued pursuant to G.S. § 15-27.2 for two types of inspections:

(1) The inspection of property "to be searched or inspected as part of a legally authorized program of inspection which naturally includes that property." Once a jurisdiction adopts an inspections policy that outlines how many inspections are required for each type of reasonable cause, then that policy can serve as the basis for obtaining warrants for those inspections.

(2) The inspection of property when "there is probable cause for believing that there is a condition, object, activity or circumstance which legally justifies such a search or inspection of that property." This type of warrant is appropriate for an initial inspection following receipt of a complaint or when an inspector can see violations from outside the property.

The Administrative Office of the Courts provides affidavit forms, here and here, for each type of inspection.

3. Establish sanctions to be imposed upon landlords and owners who fail to submit to inspections even after being presented with a warrant.

Sanctions can be imposed on owners and landlords who fail to submit to an authorized program of inspections. An inspections policy, if enacted as an ordinance, could be enforced through sanctions such as fines or civil penalties pursuant to G.S. § 153A-123 (counties) and G.S. § 160A-175 (municipalities).

Penalties for failure to submit to lawful *inspections* must be distinguished from consequences for failing to comply with *minimum housing orders* that may be issued in the wake of an inspection. Fines and civil penalties generally are not permitted for enforcement of minimum housing orders, as the allowable enforcement mechanisms for such orders are set forth by statute (here) and case law has established that minimum housing powers may be exercised only in the manner provided in those statutes. For further discussion of this point, see the SOG publication entitled Housing Codes for Repair and Maintenance.

This blog post is published and posted online by the School of Government to address issues of interest to government officials. This blog post is for educational and informational use and may be used for those purposes without permission by providing acknowledgment of its source. Use of this blog post for commercial purposes is prohibited.

To browse a complete catalog of School of Government publications, please visit the School's website at www.sog.unc.edu or contact the Bookstore, School of Government, CB# 3330 Knapp-Sanders Building, UNC Chapel Hill, Chapel Hill, NC 27599-3330; e-mail sales@sog.unc.edu; telephone 919.966.4119; or fax 919.962.2707.