



## CITY OF SOMERVILLE, MASSACHUSETTS LAW DEPARTMENT

September 27, 2024

City Council  
City Hall  
Somerville, MA 02143

Response to Item #24-1275

Dear Honorable Members of the City Council

You have asked the following questions regarding the enforcement of Section 11-038, the Rodent Control Ordinance.

1) Whether City Inspectors may enter onto private property as prescribed in 11-038(f)?

On behalf of the Law Department, it is my opinion that City Inspectors may enter a property either 1) with the consent of the owner or occupant or 2) after securing a search or administrative inspection warrant.

Section 11-038(f) in relevant part states that inspectors “shall have authority to enter any land, building, structure, or premises at reasonable times to inspect the same, *provided such entry is consistent with the constitutions of the United States and the Commonwealth of Massachusetts.*” (emphasis added).

Both the United States and Massachusetts Supreme Courts have held, with limited exception, that an administrative inspector may only enter and conduct an unconsented search of a private premises after obtaining a search warrant.<sup>1</sup> Warrantless searches, even those authorized by ordinance or statute have been found to be significant intrusions upon the interests protected by the Fourth Amendment<sup>2</sup> that are permitted only in limited circumstances.

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<sup>1</sup> Commonwealth v. O'Donnell, 92 Mass.App.Ct. 262, 265 (2017); Boston v. Ditson, 4 Mass.App.Ct. 323, 327 (1976); Camara v. Municipal Court, 387 U.S. 523, 534 (1967).

<sup>2</sup> Camara at 534.



The relevant exceptions to the search warrant requirement include:

- when prior to the search, consent is given by someone with common authority or control over the premises;<sup>3</sup>
- when the search is limited to areas outside of the curtilage of one's home;<sup>4</sup>
- if necessary, by exigent circumstances;<sup>5</sup> and
- in limited circumstances, by statute for "closely regulated" industries where there is a "reduced expectation of privacy."<sup>6</sup>

2) How much time must elapse subsequent to the issuance of a citation for the city to "cause the work to be performed and charge the owner of the property and place a lien against the property for expenses incurred" as prescribed in 11-038 (j)?

The relevant section identifies two distinct but intrinsically linked remedies for the City, the ability for the City to cause the work to be performed, and the ability to charge the owner and lien the property for such expenses. Taken in order, in my opinion, under 11-038 (j) ("Ordinance") the City may "cause the work to be performed" on a case-by-case basis depending on the facts. Relevant facts may include the severity of the violation(s), and what, if any, response has been given by party served with the notice.

An unconsented entry onto private property, even where the City seeks to advance its public health interests, raises due process concerns. This concern is particularly acute where the Ordinance authorizes the City to file a lien<sup>7</sup> the against the property for the work being performed. A property owner must be given "some notice and an opportunity to be heard"<sup>8</sup> before causing any work to be done. To vitiate the due process concerns of an unresponsive or unwilling property owner, the

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<sup>3</sup> Hmura v. McCarthy, 1 Mass.L.Rptr. 323 (1993) citing Camara

<sup>4</sup> Curtilage generally includes a garage, fenced-in back yard, a front porch, a screened-in porch not accessible to visitors, the crawl space beneath a home, the private area of a basement of a home, and areas behind the walls of an apartment not accessible to other tenants or visitors. Curtilage does **not** include a driveway to a house that is visible from the street, a common hallway of an apartment building freely accessible to the public, a basement of an apartment building accessible to tenants and others, or a parking lot or alleyway next to an apartment building.

<sup>5</sup> Exigent circumstances are narrow in scope and are limited to situations where there is an imminent threat to the life or safety of the public or person in residence. It requires a showing that it was impractical to obtain a warrant. Courts have found exigent circumstances in the seizure of unwholesome food, compulsory smallpox vaccination, destruction of tubercular cattle, and where explosive levels of natural gas in a home were observed. In contrast Courts did not find exigency where a municipal inspector observed dead and dying dogs, significant accumulations of rubbish, or re-inspection of a fire damaged building.

<sup>6</sup> For example, see New York v. Burger, 482 U.S. 691 (1987), automobile junkyards.

<sup>7</sup> Even temporary or partial impairments to property rights that attachments, liens,, and similar encumbrances entail are sufficient to merit due process protection. Without doubt state procedures for creating and enforcing attachments, as with liens "are subject to the strictures of due process" Connecticut v. Doehr, 501 U.S. 1, 12 (1991)

<sup>8</sup> "However weighty the government's interest may be in a given case, the amount of process required can never be reduced to zero – that is, the government is never relieved of its duty to provide some notice and some opportunity to be heard prior to final deprivation of a property interest." Propert v. District of Columbia, 948 F.2d 1327, 1331 (1991)

City may seek an order of entry from court giving the City the express authority to enter onto the property for the purpose of remediating violations of the Ordinance.

If appropriate, based on the facts - the City may buttress any citation under the Ordinance by also citing to the related violations of the State Building and Sanitary Codes which separately have time frames for the correction of violations.<sup>9</sup>

With respect to the latter question regarding charging the owner of the property for work done by the City - in my opinion, Chapter 252 of the Acts of 1996 and the Ordinance authorizes the City to seek reimbursement within a reasonable time from the property owner, and to place a lien against the property for any municipal charge not paid by the due date.

3) What is the minimum amount of time that may be imposed pursuant to 11-038 (e)?

In my opinion, the minimum amount of time that may be imposed to issue a correction order may be determined on a case-by-case basis. Where appropriate, facts supporting a correction order under the Ordinance may serve as the basis for finding a condition deemed to endanger health under provisions of the State Sanitary Code, 105 CMR § 410.630(A)<sup>10</sup>. Where a condition deemed to endanger health is found, an owner is required to make a good faith effort to correct within 24 hours of notice.

Please feel free to contact me directly with any additional questions.

Sincerely,



Jason Piques  
Assistant City Solicitor

cc: Cynthia Amara, City Solicitor  
Mayor Katjana Ballantyne  
Nicholas Antanavica, Superintendent of Inspectional Services  
Colin Zeigler, Environmental Health Manager  
Kelly Como, Inspectional Services Division Liaison

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<sup>9</sup> For example, a condition deemed to endanger health requires an owner or occupant to make a good faith effort to correct within 24 hours. 105 CMR § 410.630(A). At the time of this opinion there did not appear to be any appellant Massachusetts authority holding a rodent infestation as the sole basis of a condition deemed to endanger health.

<sup>10</sup> Implicit in a trial court's conclusion, was a determination that a longstanding ant infestation [was] *significant*. (emphasis added) Jablonski v. Clemons, 60 Mass.App.Ct. 473, 475 (2004)