

Warrant Requirement for Building and Fire Code Inspections

A. Warrant Generally Required

An inspection by administrative officials to determine whether a property owner is complying with building or fire code regulations is an administrative search. See People v. Northrop, 96 Misc.2d 858, 861, 410 N.Y.S.2d 32, 33 rev'd on other grounds 90 Misc.2d 1083, 420 N.Y.S.2d 846 (N.Y. City Ct. 1978). The United States Supreme Court has held that administrative searches of homes and of commercial spaces that are not open to the public fall within the purview of the Fourth Amendment.¹ See Camara v. Municipal Court, 387 U.S. 523, 528 (1967) (holding unconstitutional an ordinance which allowed a building inspector "the right to enter, at reasonable times, any building" in order to determine compliance with the city's housing code and which imposed criminal sanctions on any person who prohibited such access); See v. Seattle, 387 U.S. 541, 545 (1967) (holding that "administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled" by obtaining a warrant). See also Michigan v. Clifford, 464 U.S. 287, 291 (1984) (reaffirming view that administrative searches generally require warrants). Thus, under ordinary circumstances, the City of New York may not make interior inspections to determine the occupants' compliance with the building, fire or health code without first obtaining either uncoerced consent or a warrant.

At present, there is no express statutory provision for the issuance of administrative warrants under New York law. Courts have therefore held that local criminal courts should issue administrative search warrants under the procedure outlined in Article 690 of New York State's Criminal Procedure Law, which provides for the issuance of criminal search warrants. See Property Under the Control of John Kun, 190 Misc.2d 470, 471-72, 738 N.Y.S.2d 549, 550-51 (Co. Ct. Green Co. 2002). Significantly, however, administrative search warrants are not subject to the same "probable cause" standard as criminal search warrants. Rather, "[t]he [administrative] agency's particular demand for access will . . . be measured . . . against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved." Sokolov v. Village of Freeport, 52 N.Y.2d 341, 348, 438 N.Y.S.2d 257, 261 (1981) (quoting See, 387 U.S. at 545). Generally administrative searches may only be permitted where: (1) the privacy interests are de minimus; (2) the government's interest is substantial and (3) safeguards are provided to insure that a person's right of privacy is not violated by unlimited discretion of the inspection agency. See People v. Ventura, 3 Misc.3d 1107(A), ---, 2004 WL 1236952, at *22 (N.Y. Just. Ct. May 6, 2004).

B. Exceptions to Warrant Requirement

¹ The Fourth Amendment prohibits "unreasonable search and seizure." U.S. Const., Amend. IV. Searches made pursuant to a warrant, consent or as an incident of a lawful arrest are reasonable and therefore not illegal. See People v. Cook, 85 N.Y.2d 928, 931, 626 N.Y.S.2d 1000, 1002 (1995).

There are two important exceptions to the general warrant requirement for administrative searches. The first is where the occupants of the space being inspected have no reasonable expectation of privacy. The second is where the space being inspected houses a heavily regulated business.

1. No Reasonable Expectation of Privacy

The Fourth Amendment's protection against unreasonable searches and seizures applies only where there is a reasonable expectation of privacy. See Rakas v. Illinois, 439 U.S. 128, 143 (1978) (stating that the "capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy *in the invaded place.*") (original emphasis); United States v. Haqq, 278 F.3d 44, 50 (2d Cir. 2002) (same); Moore v. Constantine, 151 Misc.2d 1048, 1049, 574 N.Y.S.2d 507, 508 (N.Y. Sup. Ct. 1991) ("The analysis of any search and seizure claim, and corresponding application of the Fourth Amendment's warrant clause, must begin with the threshold determination of whether the subject of the search possesses a reasonable expectation of privacy in the area and items to be searched."). The privacy test essentially is an objective one: whether "the expectation [is] one that society is prepared to recognize as 'reasonable.'" Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). See United States v. Vega, 309 F. Supp.2d 609, 612 (S.D.N.Y. 2004) (stating that where a defendant invokes the Fourth Amendment's protections with respect to a particular location, the defendant must demonstrate that he personally had an expectation of privacy in the place searched, and that his expectation was reasonable). Courts, however, have held that no expectation of privacy exists in the areas of commercial spaces where the public is invited to enter. See, e.g., Marilyn v. Macon, 472 U.S. 463, 469 (1985) (holding that detective's action in entering bookstore and examining wares that were intentionally exposed to all who frequented place of business did not infringe legitimate expectation of privacy); United States v. Castillo-Bautista, 1990 WL 151126, at *3 (S.D.N.Y. Oct. 2, 1990) (holding that employee of grocery store had no expectation of privacy in area behind the counter).

Applying the above case law, city officials need a warrant to inspect for code violations only where the occupants of the space in question have an objectively reasonable expectation of privacy. See, e.g., Clifford, 464 U.S. at 292 (stating that the constitutionality of warrantless and nonconsensual entries onto fire-damaged premises to determine cause of fire, turns on, *inter alia*, whether there are legitimate privacy interests in the damaged property). It remains an open question whether such a legitimate privacy expectation exists in spaces that are open to all protestors, such as a general convergence space. However, city officials do need a warrant to inspect residences and private, commercial (*i.e.*, non-residential) spaces that are accessible only to certain authorized individuals, such as members of a specific activist group.

2. Heavily Regulated Business

The second exception to the general warrant requirement for administrative searches involves heavily regulated businesses. The United States Supreme Court has held that warrantless inspections of businesses subject to extensive government regulation are constitutional. See, e.g., Donovan v. Dewey, 452 U.S. 594, 602-06 (1981) (allowing warrantless inspection of underground and surface mines and stone quarries to insure compliance with the Federal Mine Safety and Health Act of 1977 because inspection program, in terms of certainty and regularity of its application, provided constitutionally adequate substitute for warrant); United States v. Biswell, 406 U.S. 311, 317 (1972) (holding that warrantless search of gun dealer's locked storeroom during business hours as part of inspection procedure authorized by Gun Control Act of 1968 did not violate the Fourth Amendment); Colonnade v. United States, 397 U.S. 72, 76-77 (1970) (upholding warrantless search of retail liquor dealer's business).

Thus, if you use your space to sell alcohol, weapons or other heavily regulated commodities, a warrantless search by administrative officials will likely be upheld by the courts.

3. Consenting to a Search

A warrantless search, be it criminal or administrative, is automatically legal if the person(s) having control over the space consent(s) to the search. See Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); Anobile v. Pelligrino, 303 F.3d 107, 124 (2d Cir. 2002); Cook, 85 N.Y.2d at 931, 626 N.Y.S.2d at 1002. In other words, even if city officials were legally required to procure a warrant before entering your space, their failure to do so is cured if you consent to the search. Thus, in order to preserve your ability to challenge a warrantless search after the fact, state clearly and politely at the time of the search that you are not consenting.

C. Summary of General Warrant Requirement and Exceptions

If you are occupying a residence or a commercial (*i.e.*, non-residential) space that is not open to the general public, you may legally refuse to admit law enforcement or other city officials who are seeking to conduct an administrative search of the premises to determine compliance with applicable building and fire code regulations unless they have a warrant. If, however, you are occupying a commercial space that is open to the general public or in which heavily regulated commodities, such as alcohol or weapons, are being sold, city officials do not need a warrant to inspect for violations. If you are unsure whether your space falls into the latter category where no warrant is required and if city officials enter without a warrant, be sure to state clearly and politely that you are not consenting to the administrative search. This will preserve your right to challenge the search in court after the fact.