

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

KEVIN KELLER,	:	Case No. 1:14-CV-271
	:	
and	:	Judge _____
	:	
BRYAN KELLER,	:	
	:	
and	:	VERIFIED COMPLAINT FOR
	:	DECLARATORY JUDGMENT,
K & T HOMES, LTD,	:	PRELIMINARY AND PERMANENT
	:	INJUNCTIVE RELIEF, AND
and	:	NOMINAL DAMAGES
	:	
VINCENT EVERS,	:	
	:	
and	:	
	:	
MARILYN EVERS,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
CITY OF MT. HEALTHY, OHIO,	:	
	:	
Defendant.	:	

Plaintiffs KEVIN KELLER, K & T HOMES, LTD., BRYAN KELLER, VINCENT EVERS and MARILYN EVERS, for their Verified Complaint against Defendant CITY OF MT. HEALTHY, OHIO, hereby allege as follows:

INTRODUCTION

1. This is an action brought pursuant to 42 U.S.C. §1983 for declaratory judgment, temporary restraining order, preliminary and permanent injunction, and nominal damages arising from the unconstitutional policies, practices, and threats of Defendant City of Mt. Healthy, Ohio. Defendant’s policies, practices, and conduct threatens Plaintiffs with irreparable harm to their

rights under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution. The harm may only be remedied by a ruling from this Court.

2. The City of Mt. Healthy, Ohio, has impeded and threatens to unconstitutionally impede Plaintiffs in their right to be free from unlimited warrantless searches without probable cause by maintaining, implementing and enforcing a vague policy, practice or custom that (i) threaten Plaintiffs and certain other Ohioans with subjection to unduly broad warrantless searches of their homes and business property without probable cause; (ii) violates Plaintiffs' reasonable expectation of privacy; and (iii) retaliates against Plaintiffs for exercising their Fourth Amendment rights by either (a) pressing criminal charges against them, or (b) depriving them of their property rights, including but not limited to the right to use their rental property by renting it.

3. As a result of the policy, practice and custom of the City of Mt. Healthy of adopting and enforcement its Rental Permit Program, Plaintiffs will suffer irreparable harm unless the Defendants are immediately enjoined from restricting their Fourth Amendment rights in this manner.

4. Accordingly, Plaintiffs seek: (i) declaratory judgment determining that the offending provisions of the City's Rental Permit Program codified in Ordinance 14-1693 (the "Ordinance"), are unconstitutional on their face and as applied to them, and further, that the Ordinance is insufficient to support the issuance of an administrative warrant; (ii) injunctive relief against further actions enforcing or implementing the Ordinance; and (iii) nominal damages.

PARTIES

5. Plaintiff K & T HOMES, LTD. (hereinafter “K&T”) is a limited liability company duly organized and existing under the laws of the State of Ohio, with its principle place of business located at 9635 Timbermill Court, Cincinnati, Ohio 45231.

6. K&T is the sole owner of four single-family rental dwellings in the City of Mt. Healthy, each of which it leases to tenants.

7. The street addresses of the properties K&T currently owns in Mt. Healthy and which it leases are as follows: 1392 Compton Road; 7405 Elizabeth Street; 7416 Phoenix Avenue; and 7304 Park Avenue.

8. Plaintiff KEVIN KELLER is a resident of Cincinnati, Ohio. Plaintiff is the sole member and owner of K & T.

9. Plaintiff BRYAN KELLER currently leases a home, for use as his residence, located at 7304 Park Avenue in Mt. Healthy, Ohio. This property is a “single family dwelling.”

10. Plaintiffs VINCENT EVERS and MARILYN EVERS are residents of Cincinnati, Ohio.

11. The Evers are the owners of a single-family rental dwelling located at 7329 Elizabeth Street in the City of Mt. Healthy, which they currently lease to tenants.

12. Defendant CITY OF MT. HEALTHY, OHIO, is a municipal corporation located within Hamilton County, Ohio; it is created and existing under and by virtue of the laws of the State of Ohio.

13. All acts herein of the Defendant, its officers, agents, servants, employees or persons acting at their behest or direction, were done and are continuing to be done under the color or pretense of state law.

14. Furthermore, the unconstitutional provisions of the Ordinance at issue herein constitute and represent the official public policy, practice or custom of the City of Mt. Healthy.

JURISDICTION AND VENUE

15. This Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331, as this action arises under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution; under 28 U.S.C. § 1343(a)(3), in that it is brought to prevent imminent deprivations, under color of state law, of rights, privileges and immunities secured by the United States Constitution; under 28 U.S.C. § 1343(a)(4), in that it seeks to recover damages and secure equitable relief under an Act of Congress, specifically, 42 U.S.C. § 1983, which provides a cause of action for the protection of civil and constitutional rights; under 28 U.S.C. § 2201(a), to secure declaratory relief; under 28 U.S.C. § 2202, to secure preliminary and injunctive relief and damages; and under 42 U.S.C. § 1988 to grant Plaintiffs' prayer for relief regarding the recovery of costs, including reasonable attorney fees.

16. Venue is proper within this judicial district and division pursuant to 28 U.S.C. § 1391(b) and Local Rule 82.1 as (i) Defendant is situated within this judicial district and division, (ii) the Defendant transacts business within this District, and (iii) the conduct complained of occurred within this District.

FACTUAL ALLEGATIONS

The Mt. Healthy Rental Permit Program

17. Plaintiffs incorporate by reference all of the foregoing paragraphs as if fully restated herein.

18. On January 21, 2014, the City of Mt. Healthy's City Council enacted Ordinance No. 14-1693 (hereinafter "the Rental Permit Program" or "the Program"). The Rental Permit Program became effective on February 21, 2014. *See Exhibit A: Ordinance No. 14-1693.*

19. The Rental Permit Program applies only to "single family dwellings".

20. Section 155.03 of the Mt. Healthy Codified Ordinances defines "'DWELLING, SINGLE FAMILY" as "[a] dwelling consisting of a single dwelling unit only, separated from other dwelling units by open space."

21. The Rental Permit Program does not apply to multi-family rental units or owner-occupied homes in Mt. Healthy.

22. Section 1 of the Rental Permit Program mandates that "owners of single family dwelling rental units will be required to obtain a permit . . . before [tenants] are permitted to occupy the dwelling units."

23. Section 1(B) of the Rental Permit Program mandates that "Owners of single family rental units shall apply for a rental permit."

24. Section 1(F) of the Rental Permit Program states "Permits will be issued only to properties that comply with the City of Mt. Healthy Property Maintenance Code."

25. To determine whether properties comply with the Mt. Healthy Property Maintenance Code and are thus eligible to serve as rental properties, Sections 1(E) and (F) of the Rental Permit Program mandate that owners of single family rental units shall subject such properties to inspections by officials with the City of Mt. Healthy.

26. Pursuant to Sections 1(E) and (F) of the Rental Permit Program, the inspection of single family rental units is applicable to both vacant and occupied properties.

27. Pursuant to Section 1(F) of the Rental Permit Program, any violation of the Mt. Healthy Property Maintenance Code is to be “noted” during any such inspection.

28. The Mt. Healthy Property Maintenance Code (“PMC”) is voluminous, requiring criminal prosecution and an array of civil penalties in response to violations.

29. Section 153.15-106.2 of the PMC provides for civil penalties as follows: **“Prosecution of violation.** Any person failing to comply with a notice of violation or order served in accordance with § 153.16 shall be deemed guilty of a misdemeanor, and the violation shall be deemed a strict liability offense. If the notice of violation is not complied with, the Code Official shall institute the appropriate proceeding at law or in equity to restrain, correct or abate such violation, or to require the removal or termination of the unlawful occupancy of the structure in violation of the provisions of this code or of the order or direction made pursuant thereto. Any action taken by the authority having jurisdiction on such premises shall be charged against the real estate upon which the structure is located and shall be a lien upon such real estate.”

30. Violations of the PMC also result in criminal penalties (PMC 153.15-106.4): **“Violation penalties.** Any person, who shall violate a provision of this code, or fail to comply therewith, or with any of the requirements thereof, shall be prosecuted within the limits as provided herein. Each day that a violation continues after due notice has been served shall be deemed a separate offense. Whoever is convicted or pleads guilty to a Property Maintenance Code violation shall be charged with a minor misdemeanor. However: (a) Whoever is convicted or pleads guilty of a second offense not sooner than 20 days and not later than one year of the same section of the Property Maintenance Code shall be charged with a misdemeanor of the fourth degree. (b) Whoever is convicted or pleads guilty of the third offense not sooner than 20

days and not later than one year of the same section of the Property Maintenance Code shall be charged with misdemeanor of the third degree. (c) Whoever is convicted or pleads guilty of the fourth offense not sooner than 20 days and not later than one year of the same section of the Property Maintenance Code shall be charged with misdemeanor of the second degree. (d) Whoever is convicted or pleads guilty of the fifth offense not sooner than 20 days and not later than one year of the same section of the Property Maintenance Code shall be charged with misdemeanor of the first degree.”

31. Thus, Plaintiffs cannot rent their property unless they submit to warrantless criminal searches of their property in order to obtain a permit under the Rental Permit Program.

32. The breadth of the Rental Permit Program search is further confirmed by the “City of Mt. Healthy Rental Inspection Form,” which denotes several pages of criminal offenses that the City searches for when inspecting. *See Exhibit B: Mt. Healthy Rental Inspection Form.*

33. Pursuant to Section 3 of the Rental Permit Program, the City reserves the power to prosecute those who rent homes without a permit for an offense as high as first-degree misdemeanor, as well as to impose significant civil penalties.

34. Under state law, a first-degree misdemeanor offense carries a potential fine of up to \$1,000.00 and a maximum sentence of 180 days in jail.

35. A property owner who refuses to submit to warrantless and unconstitutional searches to his or her rental properties under the Rental Permit Program can be criminally charged with a minor misdemeanor per day for each rental property he or she owns.

36. Under state law, a minor misdemeanor offense carries a potential fine of up to \$150.00.

37. After twenty days of failing or refusing to comply with the warrantless and unconstitutional searches of one's rental properties under the Rental Permit Program, the criminal charge increases to being a fourth-degree misdemeanor per day for each rental property.

38. Under state law, a fourth-degree misdemeanor offense carries a potential fine of up to \$250.00 and a maximum sentence of 30 days in jail.

39. The Rental Permit Program contains no provision for the City to acquire a warrant to search any single-family rental dwellings that the owners thereof desires to rent, including the properties of the Plaintiffs herein.

40. Pursuant to Section 1(C) of the Rental Permit Program, the City imposes a \$100 monetary charge on the owners of single-family rental dwellings solely for the purpose of covering the costs of the warrantless searches specified in Sections 1(E) and (F) of the Rental Permit Program.

41. Upon first notice of the Ordinance, Plaintiff K & T paid the \$100.00 fee for each of its single-family rental dwellings.

Mt. Healthy's Application of the Rental Permit Program

42. On or about February 4, 2014, Plaintiffs received a notice from the City outlining the requirements of Ordinance 14-1693, including the potential for penalties should the Plaintiffs refuse to allow warrantless searches of their properties. *See Exhibit C: First Rental Permit Program Letter.*

43. Then, on or about February 21, 2014, the City communicated to Plaintiffs and others "we have not received your application and payment, which puts you in violation of

Ordinance 14-1693,” and “whoever violations any provision of this ordinance . . . shall be prosecuted.” *See Exhibit D: Second Rental Permit Program Letter.*

44. Submission of the aforementioned monetary extraction and application is the event that triggers the search of the houses of Plaintiffs and others.

45. The Rental Permit Program Letter specifies that the only method of avoiding prosecution is to (1) submit to the Program, which includes a warrantless search of homes; or (2) discontinue renting of one’s property.

46. On or about March 10, 2014, Plaintiff Kevin Keller emailed William Knight, the Building Inspector for the City of Mt. Healthy, in order to obtain clarification regarding the Rental Permit Program. *See Exhibit E.*

47. Mr. Knight responded in pertinent part as follows: “schedule the inspections for April or May, but they do have to be inspected. Without the inspection you can’t get a rental license which would put you in violation.”

The Threat to Plaintiffs

48. While Plaintiff K & T has paid the Rental Permit Program fee for each of its rental properties, none of the Plaintiffs have submitted Rental Permit Program applications or submitted to the inspection, because none of the Plaintiffs believe that the City of Mt. Healthy has the power to initiate warrantless general searches of their houses for code violations and/or other crimes.

49. As a consequence of their refusal to submit to the Rental Permit Program, each Plaintiff is in imminent risk of facing criminal charges and/or loss of their property rights in response to the assertion his or her Fourth Amendment rights.

50. Despite these risks, Plaintiffs refuse and continue to refuse to submit or consent to warrantless searches of their properties, and insist on asserting the protections afforded to them under the Fourth Amendment.

51. As owners of single-family rental dwellings in the City of Mt. Healthy, K & T Homes, Ltd., Kevin Keller, Vincent Evers and Marilyn Evers face the real and imminent threat of being subjected to (1) criminal charges and fines; and/or (2) loss of all rental income related to the Mt. Healthy properties, unless they submit to the warrantless search of their property.

52. As a tenant living in a single-family rental dwelling in the City of Mt. Healthy, Bryan Keller has a reasonable expectation of privacy in his personal residence and, thus, faces the real and imminent threat of having his constitutional protection against an unreasonable warrantless search of his property being conducted by officials with the City of Mt. Healthy.

COUNT I
DECLARATORY JUDGMENT AND INJUNCTION
(28 U.S.C. § 2201, *et seq.*)

53. Plaintiffs hereby incorporate by reference the allegations in the foregoing paragraphs as if set forth fully herein.

54. An actual controversy has arisen and now exists between Plaintiffs and the policy, practice and custom of the Defendant concerning Plaintiffs' rights under the United States Constitution. A judicial declaration is necessary and appropriate at this time.

55. In violation of the United States Constitution, it is the policy, practice and custom of the City of Mt. Healthy to condition the receipt of a benefit, *i.e.*, the rental of one's property, on an agreement to refrain from exercising one's constitutional rights, particularly one's right to be free from unlimited warrantless searches of private property without probable cause.

56. Plaintiffs desire a judicial determination of their rights as against the policy, practice and custom of the City of Mt. Healthy as it pertains to Plaintiffs' right to be free from unlawful searches, coerced surrender of property rights and/or privileges, and vague licensing requirements.

57. In order to prevent violation of Plaintiffs' constitutional rights by the policy, practice and custom of the City of Mt. Healthy, it is appropriate and proper that a declaratory judgment be issued, pursuant to 28 U.S.C. § 2201 and FED. R. CIV. P. 57, declaring unconstitutional, facially and as-applied here, all relevant portions of the Rental Permit Program of the City of Mt. Healthy (Ordinance 14-1693).

58. Furthermore, pursuant to 28 U.S.C. § 2202 and FED. R. CIV. P. 65, it is appropriate and hereby requested that this Court issue preliminary and permanent injunctions enjoining the City of Mt. Healthy from enforcing or implementing its policy, practice or custom of enforcing any search policies based upon or related to the Rental Permit Program, including but not limited to the imposition of search fees under the Rental Permit Program.

COUNT II
**VIOLATION OF RIGHT TO DUE PROCESS AND FREEDOM FROM
UNCONSTITUTIONAL SEARCHES PURSUANT TO THE FOURTH, FIFTH,
AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION
(42 U.S.C. § 1983)**

59. Plaintiffs incorporate by reference all of the foregoing paragraphs as if fully restated herein.

Violation of the Due Process Clause (Unconstitutional Conditions Doctrine)

60. Based upon the protections afforded by the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution, "government may not deny a benefit

to a person because he exercises a constitutional right.” *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1983)

61. The right to rent property in Ohio, like the right to exclude others from private property, is not a government benefit, but rather, is an extension of the fundamental right one has in the ownership of private property.

62. In violation of the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution, the policy, practice or custom of the City of Mt. Healthy imminently threatens to pressure Plaintiffs into forfeiting their Fourth Amendment rights by, in response to the exercise of those rights, (1) withholding newly-required rental permits needed to rent homes in Mt. Healthy and/or (2) prosecuting Plaintiffs for criminal violations, should they rent their homes without newly-required rental permits.

Violation of the Prohibition Against Unreasonable Warrantless Searches

63. The Fourth Amendment provides in relevant part 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.”

64. Warrantless searches are “*per se* unreasonable.” *Mincey v. Arizona*, 437 U.S. 385, 390 (1978)

65. The protections of the Fourth Amendment also apply and extend to searches conducted by governmental officials pursuant to a regulatory scheme.

66. Accordingly, administrative inspections are significant intrusions on Fourth Amendment rights for which warrants generally are required. *Camara v. Municipal Court of City & Cty. of San Francisco*, 387 U.S. 523 (1967).

67. Warrantless searches of residential rental property by municipal inspectors violated the Fourth Amendment protection against unreasonable searches and seizures. *Camara v. Municipal Court of City & Cty. of San Francisco*, 387 U.S. 523, 528 (1967).

68. By allowing and providing for the warrantless searches of single-family rental dwellings in the City of Mt. Healthy, the Rental Permit Program violates the Fourth Amendment.

69. The Rental Permit Program violates Plaintiffs' right under the Fourth Amendment to be free from unreasonable searches by (1) coercing property owners' consent to such searches, and (2) violating tenants' reasonable expectation of privacy while (3) maintaining no warrant requirement.

Violation of the Fourth Amendment's Warrant Clause

70. The second clause of the Fourth Amendment provides that “no Warrants shall issue, but upon probably cause, supported by Oath or affirmation,, and particularly describing the place to be searched, and the persons or things to be seized.”

71. The Fourth Amendment guarantees Plaintiffs the right to refuse warrantless government inspections of their home unless the government first secures a valid administrative search warrant issued by a neutral party authorized to issue an administrative search warrant, or unless an emergency exists.

72. The Rental Permit Program does not permit Defendant to obtain a warrant to search Plaintiffs' houses because, *inter alia*, that regulatory scheme (1) does not make provision for a warrant to be obtained; (2) is not predicated on neutral principles; and (3) is tantamount to a general warrant inviting an open search.

73. The Rental Permit Program is not predicated on neutral principles because it arbitrarily discriminates against single family rental homes, while refusing to inspect either (1) multi-family rental properties; or (2) owner-occupied properties of any kind.

74. The City of Mt. Healthy is not otherwise entitled, by virtue of its Rental Permit Program or otherwise, to seek or obtain a search warrant to search Plaintiffs' properties.

CONCLUSION

75. Criminal punishment is an irreparable harm.

76. Loss of constitutionally-protected Fourth, Fifth, and Fourteenth Amendment rights and constitutionally-protected property rights causes irreparable harm.

77. Enforcement of the constitutional rights specified herein is in the public interest.

78. The policy, practice and custom of the City of Mt. Healthy of adopting and enforcing the Rental Permit Program violates the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution by imposing an unconstitutional condition upon Plaintiffs' lawful exercise of their property rights.

79. The Rental Permit Program is unconstitutional as applied to Plaintiffs – tenants with reasonable expectations of privacy and property owners who have not created any dangerous conditions or other emergencies on their property.

80. The search requirement of the Rental Permit Program is unconstitutional on its face.

81. The search requirement of the Rental Permit Program cannot be severed from the Program's "inspection fee" and "permitting" requirements.

82. The unconstitutional portions of the Rental Permit Program cannot be severed from the Program's lawful portions.

83. The Rental Permit Program fails to meet the requirements necessary to obtain a search warrant.

84. As a proximate result of Defendant's policies, practices and/or customs described above, Plaintiffs face imminent threat of irreparable injury and will continue to suffer irreparable injury, in that they will be deprived of their rights under the Fourth, Fifth, and Fourteenth Amendment of the Constitution.

85. In order to prevent further violation of Plaintiffs' constitutional rights by Defendant, it is appropriate and proper that a declaratory judgment be issued, pursuant to 28 U.S.C. 2201 and Fed. Rule of Civil Procedure 57, declaring the City of Mt. Healthy's enforcement of the Ordinance against Plaintiffs to be unconstitutional.

86. Pursuant to 28 U.S.C. 2202 and Fed Rule of Civil Procedure 65, it is appropriate and hereby requested that this Court issue a Temporary Restraining Order and preliminary and permanent injunction enjoining the City of Mt. Healthy from enforcing the Rental Permit Program against Plaintiffs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against Defendant, and that the Court:

- (1) Declare that the search provision in the Rental Permit Program authorizing warrantless searches without probable cause is unconstitutional, both facially and as applied to Plaintiffs;
- (2) Declare that the provisions of the Rental Permit Programs wholly reliant upon the unconstitutional search, including but not limited to the monetary extraction for inspections and the permit requirement, violate Plaintiffs' Fourth Amendment rights;

- (3) Declare that the Rental Permit Program is insufficient, without more, to serve as a basis for the City to obtain an administrative warrant;
- (4) Enjoin Defendant from directly enforcing the Rental Permit Program's warrantless search requirement.
- (5) Enjoin Defendant from indirectly enforcing the Rental Permit Program's warrantless search requirement by criminally prosecuting Plaintiffs, stripping them of the right to rent their property, or otherwise.
- (6) Enjoin Defendant from attempting to seek and obtain a warrant, predicated on the Rental Permit Program, to search Plaintiffs' properties;
- (7) Nominal damages;
- (8) Pursuant to 42 U.S.C. §1988 and other applicable law, award Plaintiffs their costs and expenses incurred in bringing this action, including their reasonable attorneys' fees; and
- (9) Grant such other and further relief as the Court deems equitable, just, and proper.

Respectfully submitted,

Christopher Finney
Justin C. Walker (0080001)
Finney Law Firm, LLC
4270 Ivy Pointe Boulevard, Suite 225
Cincinnati, Ohio 45245
(513) 943-6660
(513) 943-6669 (fax)
chris @finneylawfirm.com
justin@finneylawfirm.com

/s/ Curt Hartman
Curt Hartman (0064242)
The Law Firm of Curt C. Hartman
3749 Fox Point Court
Amelia, Ohio 45102
(513) 752-2878
hartmanlawfirm@fuse.net

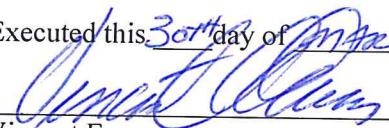
Maurice A. Thompson (0078548)
1851 Center for Constitutional Law
208 E. State Street
Columbus, Ohio 43215
(614) 340-9817
(614) 365-9564
MThompson@OhioConstitution.org

VERIFICATION

Vincent Evers, pursuant to 28 U.S.C. § 1746, declares as follows:

I declare under penalty of perjury under the laws of the United States of America that the factual statements in the foregoing Complaint concerning myself, my activities, and my intentions are true and correct.

Executed this 30th day of MARCH 2014.



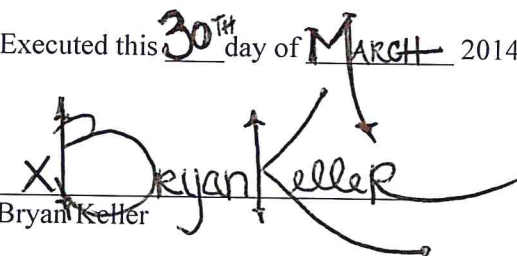
Vincent Evers

VERIFICATION

Bryan Keller, pursuant to 28 U.S.C. § 1746, declares as follows:

I declare under penalty of perjury under the laws of the United States of America that the factual statements in the foregoing Complaint concerning myself, my activities, and my intentions are true and correct.

Executed this 30th day of MARCH 2014.



Bryan Keller