Inspecting the Castle: The Constitutionality of Municipal Housing Code Enforcement at Point of Sale

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Privacy of the home is a fundamental American value first developed in the writings of legal philosophers and later embodied in the United States Constitution. From its inception, however, the abso-
olute rule has been restricted by public health and safety considerations. The tension between these two competing policies continues today in the controversy surrounding inspections of private dwellings pursuant to the enforcement of municipal housing codes.

In the last ten years, a number of cities have attempted to deal with housing code enforcement problems by adopting a policy of


4. Even before these concepts were constitutionalized in the United States, the safety of society provided the justification for the forerunners of housing codes. Urban land use regulations specified construction with fireproof building materials in Boston and Philadelphia. Mass. Laws 269 (1672); 2 Pa. Stat. 311, ch. 59. In New York City, a colonial ordinance required any structure in specified areas to be constructed of "stone or brick, and roofed with tile or slate." cited in L. Friedman, Government and Slum Housing: A Century of Frustration 26-28 (1969); Abbott, Housing Policy, Housing Codes and Tenant Remedies: An Integration, 56 B.U.L. Rev. 1, 41 (1976) (hereinafter referred to as Abbott) In Baltimore health laws first authorized warrantless entries in 1801 to enforce protection of the public from disease under the increasingly crowded conditions of urban living. Baltimore, Md., Ordinance No. 23, 6 (1801-02) cited in Frank v. Maryland, 359 U.S. 360, 369-70 (1959). The New York Tenement House Law of 1867 represented an attempt to deal with the spread of disease which resulted from the overcrowded, unsanitary conditions of life of the immigrant population. Cholera epidemics were the immediate evil to be controlled, and not insignificantly, these epidemics endangered the lives of lawmakers and mansion-dwellers as well as the poor. Abbott, supra, at 41.

The use of housing codes as tools of state and local policy gradually became established in urban areas. Twelve states and forty cities had housing laws in effect by 1920. Id.

Nuisance laws also became an accepted form of permissible intrusion upon the citizen's inalienable right of property. The historical rule is best restated in the case of Booth v. Rome, W & O Ry., 140 N.Y. 267,274, 36 N.E. 592,594 (1893): "[N]o one has absolute freedom in the use of his property, but is restrained by the coexistence of equal rights in his neighbor to the use of his property." The application of nuisance law to abandoned or deteriorated housing is explored in Note, New Judicial Approaches to Maintaining Housing Quality in the Cities, 4 Fordham Urban L.J. 403-418 (1976).

Another early intrusion still recognized today is the concept of eminent domain. Eminent domain, according to natural law theorists, is an inherent power of sovereignty to take private land if it is needed for public purposes. Lenhoff, Development of the Concept of Eminent Domain, 42 Colum. L. Rev. 596-597 (1942). However, the overexercise of this sovereign right ultimately led to the English barons' efforts to destroy royal prerogative over the land. The limit of due process was guaranteed in the Magna Carta: "No freeman shall be arrested, or detained in prison, or deprived of his freehold, or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land." Magna Carta, ch. 39 (1215)(emphasis added); See Bosselman, Callie & Banta, The Taking Issue 53-104 (1973).

The fifth amendment provides almost the exact protection to American citizens today as the Magna Carta gave to English citizens. The fifth amendment reads in relevant part, "[N]or shall any person... be deprived of life, liberty, or property, without due process of law... nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

inspecting houses at the point of sale. By tying the inspection to a commercial transaction, municipal authorities believe they are diminishing the invasion of privacy involved in inspection of private homes, while maintaining or upgrading the quality of the community's housing stock by the requirement of subsequent code compliance.

This article examines the inherent conflict existing between the present need for housing code enforcement and traditional notions concerning personal privacy and freedom from unreasonable governmental searches of private residences. In addition, it discusses local ordinances enacted by various cities which implement the policy of inspection at point of sale, analyzing the constitutionality of the "administrative searches" used to enforce this policy in light of the existing standards for such searches promulgated by the Supreme Court in recent years. Finally, it will weigh the need for proper housing code enforcement, and the use of inspections at point of sale to attain this goal, against the claim that such inspections may infringe on privacy interests.

MODERN HOUSING PROBLEMS AND THE NEED FOR CODE ENFORCEMENT

During the depression and through the Second World War little housing was built in the United States. As a result, a great backlog of demand accumulated. After the Second World War, the "throwaway ethic" prevailed in housing policy as the federal government subsidized, through its mortgage practices and through highway construction, the migration of large segments of the urban population to the suburbs. The urban housing abandoned by the middle class was rapidly filled by migrants from the south and from neighboring rural areas. In 1949, to ease urban housing problems caused by this transition, Congress began providing federal grants and loans for slum clearance and urban redevelopment. Administra tors of these new federal programs were directed to stress "adoption, improvement and modernization of local [housing] codes and regulations relating to land use and adequate standards of health, sanitation, and safety for dwelling accommodations."

When the federal government modified its approach from

"renewal" to "redevelopment" in the Housing Act of 1954,9 cities were given incentives to develop housing codes that would be part of a "workable program for community improvement."10 In 1964, housing codes became a statutory condition for receiving federal subsidies for housing assistance.11 The adoption of housing codes proceeded apace under this stimulus; by 1968 most cities over 50,000 population and half of the cities under 50,000 population had adopted housing codes.12

Adopting a code is quite different from enforcing a code, however, and non-enforcement became the national norm.13 As early as 1956, an official of the Housing and Home Finance Agency identified local governments' failure to use their police power effectively as the "ultimate" cause of urban blight.14 Cleveland, for example, which had one of the earliest and "best" housing laws in the nation, succumbed quickly to inactivity, and permitted the housing in large areas of the central city to deteriorate beyond repair.15

While the conditions traced above are largely urban phenomena, urbanization of the close-in suburbs has enlarged the area of concern. The inner ring of older suburbs in the major metropolitan areas has experienced to a lesser degree the deterioration of housing stock and related problems, particularly in zones of racial transition.16

9. Housing Act of 1954, ch. 649, §303, 68 Stat. 623 (current version at 42 U.S.C. §1451(c)(1970)). This modification resulted from the perception that urban renewal was destroying the housing of low income groups without replacement. Whether this destruction was carried out by design or by the rule of unintended consequences has not yet been settled. NATIONAL COMMISSION ON URBAN PROBLEMS, supra note 6, at 67.

10. Housing Act of 1954, ch. 649, §303, 68 Stat. 623, 624 (current version at 42 U.S.C. §1451(c)(1970)). The "workable program" requirement signaled the large-scale entry of physical planning into the urban redevelopment process. CAPUTO, supra note 6, at 125. In many cities, planning was "a tool used by those with power against those without it." Id. at 127. For example, the destruction of a viable low income community in the West End of Boston is documented in H. GANS, THE URBAN VILLAGERS 305-335 (1962). See also Rubinowitz, A Question of Choice: Access of the Poor and the Black to Suburban Housing, THE URBANIZATION OF THE SUBURBS 354-355. (L. Masotti & J. Hadden eds. 1973) (hereinafter referred to as Rubinowitz).


12. Abbott, supra note 4, at 44.

13. Poor enforcement of housing codes is documented by the National Advisory Commission on Civil Disorders in thirteen American cities, all of which have experienced urban violence in recent years. U.S. NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT 146 (1968).


Economists and sociologists propose alternative explanations for this phenomenon. Certain economists argue that as housing ages, a natural process of "filtering down" through income groups occurs, exhibiting a market mechanism which provides housing for low-income families.\(^7\) Some sociologists, on the other hand, suggest a group struggle for control of neighborhoods, with "succession" by those less able to maintain the property.\(^8\)

These models ignore both public and private investment decisions which shape if not control the development of human communities. Deterioration is not an inevitable trend over which policymakers lack control. The federal government has not only subsidized the middle class exodus from the cities since the 1950's through its mortgage policies and highway building, but also continues to encourage abandonment of older housing by tax rebates for purchasers of new homes.\(^9\) While these policies may have been adopted to aid the construction industry, their inevitable if unintended effect is to harm the older suburbs and the remaining urban housing stock.

Government encouragement of population mobility to fringe suburbs has been accompanied by private disinvestment, as mortgage bankers and realtors have redlined older neighborhoods. Savings and loan associations have often terminated lending in the private home market in older neighborhoods, while insurance companies tend to follow similar patterns of disinvestment in multi-family buildings.\(^0\) Aging neighborhoods are considered unstable or unrewarding investments, a judgment which becomes a self-fulfilling prophecy when disinvestment occurs.\(^2\)

**Racial Change and Code Enforcement**

As noted earlier, areas undergoing racial integration, or in some instances resegregation, have been especially vulnerable to this combination of public policy and private decision-making.\(^2\) Be-
between 1960 and 1970, the rate of suburbanization of black urban families was slightly higher than that of white urban families, but the number of blacks involved remained extremely small. For blacks, the housing market remains artificially restricted by discriminatory practices in spite of federal and state laws prohibiting such discrimination. The distortions caused by racial discrimination in the housing market result in the clustering of the outwardly mobile black population in a few suburbs. These suburbs then experience a repetition of the urban pattern of public and private disinvestment. Residential segregation moves outward not only because of disparity in income between blacks and whites but also because of exclusionary zoning, government and private lending policies, discrimination by individual homeowners and landlords, and real estate industry practices.

While some analysts view rigorous enforcement of housing codes as a weapon of exclusion of potential black residents in transitional areas, other observers perceive non-enforcement of standards in integrating communities as another manifestation of racism by deliberate neglect. The variety of patterns of racial transition in older suburbs may explain these conflicting interpretations. Blockbusting practices in the real estate industry accelerate white flight as homeowners seek to maximize their gain before the realtors' predicted decline in property values sets in. If housing codes were not previously enforced, but are now enforced by the municipality against the new black homeowner, the effect is clearly punitive and repairs may be prohibitively costly for a family which has extended its financial capability for the purchase. However, if housing codes are

23. Moves from city to suburb were made by 29.2% of blacks and 27.5% of whites between 1960 and 1970; by 1970, 4.8% of the suburban population was black. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 17 (1974).


26. Taeuber, Racial Segregation: The Persisting Dilemma, THE SUBURBAN SEVENTIES 87 (L. Masotti ed. 1975). Taeuber identifies six relevant practices of the real estate industry: "a) limiting the access of black brokers to realty associations and multiple listing services; b) refusals by white realtors to cobroke on transactions that would foster racial integration; c) blockbusting, panic selling and racial steering; d) racially identifying vacancies, either overtly or by nominally benign codes (advertising housing according to racially identifiable schools or other neighborhood identifiers); e) refusing to show houses or apartments or refusing to encourage blacks to consider housing in white neighborhoods; [and] f) reprimanding or penalizing brokers and salesmen who act to facilitate racial integration." Id. at 92.

27. DANIELSON, supra note 24, at 6, 14.

not enforced in transition areas, whether or not previously enforced, the new locus of black homeownership may deteriorate rapidly, and the homeowner will be caught again in the spiral of the social decline which he or she sought to escape by leaving the central city.

Traditional Code Enforcement

Hence municipal officials seeking to maintain property values in particular and the quality of life in general in viable urban neighborhoods and older suburbs have tried to develop new approaches to housing code enforcement. The traditional mode of seeking homeowner compliance in those cities where housing codes have been enforced is area-wide inspection. City officials conduct a house to house inspection in a sector of the city chosen on the basis of some reasonable priority, such as age of houses or condition of repair. Citations are issued where code violations are found, and compliance is sought through periodic re-inspections, with criminal penalties as a last-resort enforcement action. Typically, such inspections include structural features, plumbing and electrical connections, and are limited to ground floor, basement and exterior portions of the residence for minimal invasion of privacy.

Due to changing family and work patterns of the population, such inspections have been increasingly difficult to make. The decline in the birthrate and the rise in the number of both single-parent families and families in which both spouses work mean that fewer homes are occupied during the day when inspections can be made. Inspections and re-inspections for compliance become more difficult, if not impossible to achieve. The cost of inspection programs rises while the number of dwellings brought into compliance declines. The growing value placed on privacy, and increasing resentment of bureaucratic intrusions reinforce the social patterns which have made regular inspection programs less practical.

Inspection at Point of Sale

Inspection at point of sale provides an alternative method of housing code enforcement which responds to several of these concerns. Since the homeowner makes an appointment for the required inspection, the intrusion occurs at least partially at his or her convenience. Since the property is prepared for showing to prospective purchasers anyway, the inspection is viewed as a lesser invasion of privacy than would otherwise be the case. Finally, the entire house can feasibly be inspected.

Forerunners of contemporary point of sale inspection ordinances provided voluntary inspection services for a fee upon request at the
time a residential property is being sold.\textsuperscript{29} Certificates of Compliance and Certificates of Occupancy have been used in some cities for almost two decades as means of maintaining property values and preventing deterioration in residential buildings.\textsuperscript{30} The certificate might indicate compliance with city zoning and housing codes, or list actual records of inspection and violation. Where such certificates have been made available, their use has been encouraged by lenders, who value the information as a protection against risk that subsequent code enforcement may diminish the profitability of an investment.\textsuperscript{31} Such programs provide incentives for maintenance or improvement of the housing stock, but depend for their effectiveness on voluntary compliance and norms of community support. Their effectiveness is also limited by inadequate inspection personnel and difficulties in securing access for inspections.\textsuperscript{32}

Supportive state and federal laws may encourage housing inspection and code compliance, but do not mandate local action.\textsuperscript{33}

In the early 1970's, communities began to require that an inspection of property be made at the point of sale, and that an inspection certificate or certificate of compliance be provided by the seller to the buyer. Disclosure of code violations would presumably influence the sale price, and the money would be available to make corrections, which are mandatory within a specified period of time. Such ordinances were passed in 1973 by Pasadena, California\textsuperscript{34} and Cincinnati, Ohio,\textsuperscript{35} in 1974 by Charlottesville, Virginia,\textsuperscript{36} and in 1976 by Shaker Heights, Ohio.\textsuperscript{37}

\textsuperscript{29} R. Counts, Jr., \\textit{Certificates of Compliance}, AMERICAN SOCIETY OF PLANNING OFFICIALS, REPORT No. 220 at 4 (1967) (hereinafter referred to as R. Counts, Jr.).

\textsuperscript{30} A Certificate of Compliance is an official record, supplied for a fee to building owners, documenting the building's use and indicating conformance with applicable codes of the city. A Certificate of Occupancy is a similar record but may permit occupancy of a building pending specified code corrections. R. Counts, Jr., supra note 29, at 4.

\textsuperscript{31} Id. at 3. A situation in which such a certificate would have been useful occurred in Illinois when the buyer of a multi-family building was required to deconvert from seven to three apartments to conform to the zoning code. The Illinois Supreme Court rejected his claim of a non-conforming use, even though he was not aware of the illegal conversion by the seller. Eggert v. Board of Appeals of City of Chicago, 29 Ill. 2d 591, 195 N.E.2d 164 (1963).

\textsuperscript{32} Id. at 3.


\textsuperscript{34} PASADENA, CAL. ORDINANCE 5121 (July 31, 1973), as amended PASADENA, CAL., ORDINANCES 5231, 5254, 5280.

\textsuperscript{35} CINCINNATI, OHIO, ORDINANCE 556-1973, §CC-3-47.03 (1973).

\textsuperscript{36} CHARLOTTESVILLE, VA., CODE ch. 15, §15.1-7.2 (1974).

\textsuperscript{37} SHAKER HEIGHTS, OHIO ORDINANCE No. 76-93, ch. 1415 (1976), amended by ORDINANCES 77-67 and 77-107 (1977).
The Pasadena Ordinance

Pasadena's "Occupancy Ordinance" requires an inspection of all dwelling units in single-family, two-family or multi-family residential buildings, whenever new occupants move into a unit, or a unit is sold. In addition, it prohibits any residence from being reoccupied until a Certificate of Occupancy is issued. This certificate is issued if the unit complies with all housing and zoning codes and ordinances. If a building is not in compliance, deficiencies must be corrected within six months. A Temporary Certificate of Occupancy is available, prior to the completion of any necessary corrective maintenance, "upon a showing of a good cause." Under the ordinance, a person wishing to contest an adverse determination of a city inspection may appeal to the Housing Advisory and Appeals Board, and from there to the City Board of Directors. Water and Power departments aid in the administration of the compliance program by providing their residential records to the inspection agency. Similarly, effective enforcement is made possible, in part, by the fact that these departments will withhold services until they receive approval from the City's Occupancy Inspection Section.

The Pasadena Ordinance was challenged on constitutional grounds in Currier v. City of Pasadena. The trial court found that the warrantless search of residences mandated by the city's inspection ordinance violated both the fourth amendment of the United States Constitution and article one, section thirteen of the California Constitution. On appeal, the California Appellate Court reversed the trial court's decision and upheld the ordinance.

The appellate court agreed with the trial court that on the surface

38 Pasadena, Cal., Ordinance No. 5121, §3.
39 Id. at §3.
40 Id. at § 7.
41 Id. at §6.
42 Id. at §8.
43 Pasadena Housing Code, Ordinance 3729.
44 Pasadena Housing and Community Development Department, Occupancy Inspection Program 3-4 (1975).
45 Id.
47 See note 3 supra.
48 Article I, section thirteen, states:
The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.
the ordinance was unconstitutional. The public need was not of sufficient gravity to sustain the use of warrantless searches, nor was the use of search warrants impossible. Additionally, the court found the city's argument that these searches were "consensual" specious: "To compel a property owner to let his property lie vacant and to prohibit him from selling it, unless he 'consents' to a warrantless search is to require an involuntary consent." The ordinance was saved, however, by the city's concession that the ordinance was subject to the provisions of the California Code of Civil Procedure. Those provisions set forth a statutory scheme for accomplishing the purposes of the Pasadena ordinance, requiring the issuance of a warrant by a judge upon submission of an affidavit showing cause for the inspection. "Cause", as defined by the legislature, existed "if reasonable standards for conducting a routine or area inspection are satisfied... or there is reason to believe that a condition of non-conformity exists." Since Pasadena's ordinance provided for routine inspections on change of ownership or occupancy, warrants could validly issue. The court noted that:

[The Pasadena Ordinance] provides an on-going check on the observance of the City's zoning, health and housing ordinances, in a manner involving a minimal invasion of privacy. It also permits any corrective action found necessary by the inspection to be performed with minor [and usually no] interference with an occupant.

The city's interest in the inspections outweighed the minimal invasion of privacy caused by an inspection under the warrant standards.

The Cincinnati Ordinances

In Cincinnati, two ordinances were adopted to "preserve quality in [the city's] housing stock... protect its citizens from housing which is a threat to their health and safety; and... provide more effective information to prospective housing purchasers..." The first of the two ordinances required an owner of residential property to have the residence inspected by the city prior to enter-

50. Id. at 814, 121 Cal. Rptr. at 916.
51. Id.
52. Id.
53. Id. at 814, 121 Cal. Rptr. at 915.
54. Id. at 817, 121 Cal. Rptr. at 917.
55. Id. at 817, 121 Cal. Rptr. at 917-18; CAL. CIV. PROC. CODE § 1822.52 (West 1972).
ing into a contract for sale. Subsequent to this inspection, the owner must obtain a certificate of housing inspection and present it to the prospective purchaser of the property. The seller must then obtain a signed acknowledgment from the buyer indicating his receipt of a copy of the inspection. If the seller fails to follow this procedure, then, by operation of law, he warrants to the buyer that the structure is in “substantial compliance” with the city’s housing and zoning codes. The second ordinance provides penalties for violation of the first, making it a misdemeanor for an owner or agent to fail to tender the certificate to the prospective buyer.

The Cincinnati ordinances were upheld, in part, by the Ohio Supreme Court in Wilson v. Cincinnati. The ordinance had been challenged by two Cincinnati residents, initially joined by the Cincinnati Board of Realtors. The trial court invalidated the ordinances, and enjoined the city from enforcing them. The Ohio Appellate Court found that although the inspection program was a valid exercise of the city’s police power, the warrantless inspections which the ordinance authorized violated the fourth amendment. Both parties appealed this decision to the Ohio Supreme Court.

The Ohio Supreme Court found that the inspection program was a valid exercise of the city’s police power:

[The ordinance] encourages inspection of residential housing prior to sale and, thus, supplements enforcement of the city’s housing code. The ordinance bears witness to the city’s attempt to preserve the quality of its existing housing stock and, in that respect, possesses a real and substantial relation to the public health, safety, morals or general welfare of the public, and is neither arbitrary nor unreasonable.

The court rejected plaintiff’s argument that the provision which gave the buyer an implied warranty if the seller failed to comply

58. CINCINNATI, OHIO ORDINANCE 556-1973, §CC-3-47.03 (A).
59. Id.
60. CINCINNATI, OHIO ORDINANCE 556-1973, §CC-3-47.03 (D).
61. CINCINNATI, OHIO ORDINANCE 557-1973, §CC-3-64.
63. Id. at 140, 346 N.E.2d at 668. The Cincinnati Board of Realtors and Chester J. Wilson were later dismissed as plaintiffs for lack of standing.
64. Id. at 140, 346 N.E.2d at 668.
65. Id. at 142, 346 N.E.2d at 669. Under Ohio law, a police regulation is not invalid “unless it clearly appears that such regulation bears no real and substantial relation to the public health, safety, morals or general welfare of the public, or is unreasonable or arbitrary.” West Jefferson v. Robinson, 1 Ohio St. 2d 113, 119, 205 N.E.2d 382, 387. The court applied the West Jefferson test in finding that the Cincinnati inspection program was a valid exercise of police power.
67. Id. at 142, 346 N.E.2d at 669.
with the ordinance was too vague and indefinite to withstand a fourteenth amendment due process test.\textsuperscript{68}

However, the Ohio court balked at approving that aspect of the inspection program which provided for enforcement through the use of criminal penalties.\textsuperscript{69} The city argued that because the seller arranges for the inspection, including the proper time, he consents to the search, thereby waiving his fourth amendment rights.\textsuperscript{70} The court reasoned, however, that "the coercion represented by the sole alternative of possible criminal prosecution clearly negates any 'consent' which may be inferred."\textsuperscript{71} The ordinance could not be constitutionally enforced while the criminal penalties remained.\textsuperscript{72}

In a concurring opinion in Wilson, Justice Celebrezze suggested specific means by which the city could save its criminal penalties under the rule of Camara.\textsuperscript{73} By inserting a clause requiring inspectors to advise homeowners of their right to refuse entry without a warrant, and to obtain a warrant if permission is refused, the rejected penalties would be rescued.\textsuperscript{74} However, the City of Cincinnati apparently preferred to delete the invalid penalty sections, depending on the warranty provision for compliance.\textsuperscript{75}

\textbf{The Shaker Heights Ordinance}

In 1976, the City of Shaker Heights, Ohio authorized housing inspections at point of sale as a means of "preserv[ing] quality in its residential structures, . . . protect[ing] its citizens from housing which may be a threat to the public health, safety, or welfare, and . . . provid[ing] more effective information to the purchasers of residential properties."\textsuperscript{76} Under the Shaker Heights program, a

\textsuperscript{68} Id. at 142-43, 346 N.E.2d at 669-70. Cf. Columbus v. Rogers, 41 Ohio St. 2d 161, 324 N.E.2d 563 (1973); Columbus v. Thompson, 25 Ohio St. 2d 26, 266 N.E.2d 571 (1971).

\textsuperscript{69} Wilson v. Cincinnati, 46 Ohio St. 2d 138, 144, 346 N.E.2d 668, 671 (1976).

\textsuperscript{70} Id.

\textsuperscript{71} Id.

\textsuperscript{72} Id.

\textsuperscript{73} Id. at 147-49, 346 N.E.2d at 672-73, citing Camara v. Municipal Court, 387 U.S. 523 (1967). It has been held that under the fourth amendment a person may waive his fourth amendment rights by consenting to a search. Katz v. United States, 389 U.S. 347, 358 (1967). However, for the consent to be valid it must be "voluntary and uncoerced, either physically or psychologically." United States v. Fike, 449 F.2d 191, 193 (5th Cir. 1972); see also Phelper v. Decker, 401 F.2d 232 (5th Cir. 1968); Cipres v. United States, 343 F.2d 95 (9th Cir. 1965).


\textsuperscript{76} SHAKER HEIGHTS, OHIO., ORDINANCE 76-93 (1976), preamble.
seller of single-family, two-family or duplex residences is required to obtain a signed acknowledgment which indicates that the buyer has received a Certificate of Housing Inspection or Compliance. For the acknowledgment to be valid, the certificate which the buyer receives must have been obtained by the seller within one year prior to the execution of the contract of sale. The acknowledgment must be deposited in escrow before title transfers or funds are distributed. Either the buyer or the seller must correct code violations within ninety days. In case of imminent danger to public health or safety, immediate corrections may be required. However, upon a showing of good cause, extensions may be allowed.

In the Shaker Heights ordinance, as in Cincinnati, if the seller fails to follow the inspection procedure, an implied warranty is given to the buyer, by operation of law, that the structure is in compliance with the Building, Housing and Zoning Codes, and all other applicable ordinances. This implied warranty can serve as the basis for a civil cause of action by the buyer against the seller for the costs the buyer incurs in complying with the housing code. In addition, penalties are provided for non-compliance with correction orders by the owner, and for violation of requirements by the escrow agent. No penalty, however, is imposed for refusal to permit an inspection. Furthermore, the ordinance is enforced in conjunction with the regular search warrant requirement of the city's Housing Code. That is, if permission to enter is not freely granted by the occupant, the inspector must apply to a judicial authority for a search warrant.

The point of sale ordinances enacted in these cities offer a viable means to attack deterioration in the housing stock of a city before blight actually occurs. The constitutionality of this approach will be explored below.

77. Codified Ordinance of the City of Shaker Heights, §1415.01.
78. Id., §1415.04.
79. Id., §1415.03.
80. Id.
81. Id.
82. Id., §1415.05.
83. Id., §1415.99.
84. Id.
85. City of Shaker Heights, Housing Code, §1409.02.
86. Consent must be obtained from the owner or his agent if the property is unoccupied.
87. City of Shaker Heights, Housing Code, 1409.02.
THE CONSTITUTIONALITY OF INSPECTIONS AT POINT OF SALE

Constitutional Standards for Administrative Searches

Standards for searches conducted by federal administrative agencies were defined by the Supreme Court in United States v. Morton Salt Co. The Morton Court stated that a search is reasonable "if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." Since the application of the fourth amendment to the states, the Supreme Court has promulgated standards as to the constitutionality of state administrative searches. In Frank v. Maryland, the Court upheld a warrantless inspection conducted by state health authorities. The state authorities initiated a search of a dwelling in the belief that the building was infested with rats. The Court concluded that the search was reasonable for two reasons. First, it was not a search for criminal evidence, and therefore a lesser constitutional standard applied. Secondly, justification for the search clearly existed: the house was in decayed condition and rodent feces were found in the backyard of the building.

On the privacy issue, the Court relied on the civil nature of the search, and found that administrative inspections, such as these, were at most of peripheral importance to the privacy concerns protected by the fourth amendment. The decision in Frank was far from unanimous. Four justices vigorously dissented on the ground that the decision severely diluted the constitutional right to privacy.

In Ohio ex rel Eaton v. Price, the Court, in a plurality opinion,

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89. Id. at 652. In the same year the Supreme Court bypassed an opportunity to decide the constitutionality of warrantless federal health inspections. See District of Columbia v. Little, 178 F.2d 13 (D.C. Cir. 1949), aff'd on other grounds, 339 U.S. 1 (1950). In that case, the District of Columbia Court of Appeals invalidated a warrantless inspection on the grounds that it was "a fantastic absurdity" to extend fourth amendment protection to a criminal suspect, but not to a citizen not suspected of any crime. Id. at 17.
92. Id. at 361.
93. Id. at 366.
94. Id. at 381, 366.
95. The civil/criminal distinction which the Court relied on in Frank was first promulgated in Flint v. Stone Tracy Co., 220 U.S. 107 (1911).
97. The dissenting opinion was written by Justice Douglas and joined by Justices Black and Brennan and Chief Justice Warren. Id. at 374.
98. Id. (Douglas, J., dissenting).
broadened the possible application of Frank. The Court upheld a warrantless housing inspection, where the warrantless entry was part of an area inspection program, and where there was no reason to believe that conditions existed which threatened the health or safety of the community.\textsuperscript{100} Once again, four justices strongly dissented, arguing that Frank was invalid, and that even applying the rule of Frank, the Eaton search was invalid since it was made without probable cause.\textsuperscript{101}

However, in Camara v. Municipal Court,\textsuperscript{102} the Court reversed its earlier trend, overruling Frank v. Maryland, and reversing its original rule that administrative inspections were not "searches" within the meaning of the fourth amendment.\textsuperscript{103} In a 5-4 decision, the Court found that the privacy interests of a homeowner confronted by a local housing inspector at his front door are entitled to constitutional protection.\textsuperscript{104} In the face of a refusal to admit, the housing inspector must justify to a judicial officer the need to enter, and must obtain a warrant to inspect.\textsuperscript{105}

In Camara's companion case, See v. City of Seattle,\textsuperscript{106} the Court extended fourth amendment protection to business establishments undergoing routine inspections.\textsuperscript{107} In See, the city was conducting routine, area-based fire inspections of all commercial businesses.\textsuperscript{108} The Court held that such inspections could not be made without either the consent of the owner, or some type of judicial warrant.\textsuperscript{109} However, the Court did not give businesses the identical protection extended to private dwellings in Camara. The Court specifically stated that businesses, due to their commercial nature, might have to submit to some warrantless searches, even if made without their consent.\textsuperscript{110}

\textsuperscript{100} Id. at 269.
\textsuperscript{101} Id. at 269-71. (Brennan, J., dissenting).
\textsuperscript{102} 387 U.S. 523 (1967).
\textsuperscript{103} Id. at 534, overruling Frank v. Maryland, 359 U.S. 360(1959).
\textsuperscript{104} 387 U.S. 523, 534 (1967).
\textsuperscript{105} Id. at 540.
\textsuperscript{106} 387 U.S. 541 (1967).
\textsuperscript{107} Id. at 542.
\textsuperscript{108} Id. at 541.
\textsuperscript{109} Id. at 545.
\textsuperscript{110} Id. at 545-46. Thus, even after See, warrantless inspections of private businesses, conducted as part of a licensing scheme, were upheld in lower federal and state courts. See, e.g., Harkey v. DeWetters, 443 F.2d 828 (5th Cir. 1971), cert. denied, 404 U.S. 858 (1971), in which a local regulation providing a permit system for animal owners was found to be a justifiable basis upon which to conduct a warrantless inspection of the nonresidential portions of the animal owner's home. The court distinguished See on the grounds that there, unlike this case, no licensing program was invoked. Id. at 829; United States v. Sessions, 283 F.Supp. 746 (N.D. Ga. 1968) (holding that a warrantless search of a nightclub conducted by the
The rules of *Camara* and *See*, although promulgated over ten years ago, remain the controlling standards for administrative searches.\(^{111}\)

Since the plaintiffs in neither *Camara* nor *See* consented to the inspections they challenged, the Court had no opportunity to deal with the issue concerning valid consent to an administrative inspection. Thus, to fully understand the constitutional standard applied to administrative searches, one must look beyond *Camara* and *See* to general principles of consent, as articulated in criminal cases and in analogous administrative settings. The warrant requirements of *Camara* and *See* must also be examined.

Internal Revenue Service was not unconstitutional); Portnoy v. McNamara, 8 Or. App. 15, 493 P.2d 63 (1972)(upholding a warrantless inspection of the books of a bailbondsman); State Real Estate Commission v. Roberts, 441 Pa. 159, 271 A.2d 246 (1970), *cert. denied* 402 U.S. 905 (1971)(holding that a real estate broker waives his right to object to a warrantless search of his office by the state, upon receiving his license to practice); cf. United States v. Kramer Grocery Co., 418 F.2d 987 (8th Cir. 1969)(holding that inspectors from the Food and Drug Administration must get consent to search a business, but finding that the search had been conducted pursuant to such consent).

Subsequent to *See*, the Supreme Court expanded the licensing exception until the rule which they had promulgated in *See*, protecting the privacy of business establishments, was virtually swallowed. In Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970), the Court condemned a forcible warrantless entry by federal agents into a locked storeroom, but implied that Congress had power to authorize such actions. *Id.* at 77. Rozzo, the President of Colonnade, held both a New York liquor license and a federal retail dealer's occupational stamp. When Rozzo denied the federal agents permission to enter his locked storage area, they broke in forcibly. The Court, although holding that the search was unconstitutional, specifically stated that Congress could, pursuant to the power given to it by the Commerce Clause of the Constitution, provide for warrantless searches of heavily regulated industries such as the liquor business. *Id.* at 76-77.

United States v. Biswell, 406 U.S. 311 (1972), the next case in this area to face the Court after Colonnade, defined standards for administrative searches exempted from the warrant requirement under the licensing exception of *See*. Biswell was a pawnbroker who had a federal license to sell firearms. Although he claimed not to know that his license would subject his business to unannounced warrantless inspections, the Court held that his acceptance of the license constituted implied consent. *Id.* at 316. The exception to *See*'s warrant requirement was justified by the following factors: the historical regulation of the firearms industry, like liquor in Colonnade; the “urgent federal interest” which could be protected only by “unannounced, even frequent, inspections,” *id.* at 316-317; the existence of a statute which carefully limited the inspections in “time, place and scope,” *id.* at 315; and the presumptive knowledge of the licensee.

When, with passage of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§651 et seq., Congress extended the authority of federal inspectors to conduct warrantless searches of businesses which were not “heavily regulated,” the Supreme Court halted the trend it had begun in Colonnade and Biswell. In Marshall v. Barlow's Inc., _U.S._, 98 S.Ct. 1816 (1978), the Court invalidated OSHA's provision for warrantless inspections. The vitality of *Camara* and *See* was reaffirmed, and the Colonnade-Biswell line of cases was placed in a carefully limited category of situations in which there had been a history of pervasive federal regulation. *Id.* at 1820.

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1. Consent

Consent to a search in effect constitutes a waiver of constitutional rights and, in criminal cases, will be accepted by the courts only if voluntarily made. If a prosecutor relies on consent to sustain the validity of a search, he bears the burden of proving that the consent was voluntarily given: "This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. . . . Where there is coercion there cannot be consent." However, the standard the Court has set for a valid waiver of fourth amendment rights is less stringent than that applied to waiver of other constitutional rights. In Schneckloth v. Bustamonte, the Court held that, unlike a case involving waiver of the fifth amendment protection against self incrimination, the state need not prove that a person who acquiesces to a search knew of the right to withhold consent.

Generally, lower federal courts, in evaluating whether a person has voluntarily relinquished his fourth amendment rights, have adopted the concept of "casual" consent. For example, in a case where warehouse owners told Food and Drug Administration inspectors to "go ahead" and inspect, the ensuing warrantless search was upheld. Although "casual consent" is accepted, it must not result


[W]hen the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.

Id. at 248-49. The dissenters in Schneckloth objected to the double standard of constitutional rights defined by the majority. Justice Marshall argued that the local police could follow the FBI practice of advising suspects of their right to refuse a search. The police should not, he admonished, "capitalize on the ignorance of citizens so as to accomplish by subterfuge what they could not achieve by relying only on the knowing relinquishment of constitutional rights." Id. at 288 (Marshall, J., dissenting).
118. Id. at 1008.
from intimidation or it will be found to be involuntary and the ensuing search will be invalidated.\textsuperscript{119}

2. The Warrant Requirement

An administrative search may not be conducted in the absence of consent unless a warrant, as defined in \textit{Camara} and \textit{See}, is obtained. Unlike the criminal search warrant, an administrative warrant to inspect a particular dwelling may be based on a variety of justifications: the existence of a reasonable inspection policy, conditions of housing in an area generally, the age of houses, or the type of building to be inspected.\textsuperscript{120} Thus, administrative warrants may issue upon a minimal showing of probable cause, and may be extremely general in nature.\textsuperscript{121} Since the state of a particular house will not be known until the inspection occurs, and in fact (as in the case of faulty wiring), may not even be known to the householder, requiring more specificity would defeat the purpose of the program.\textsuperscript{122} Since in most instances involving regulatory inspections no crime is suspected and no criminal penalties are threatened, the \textit{Camara} Court found a reduced standard of probable cause for administrative inspections justified.

This diminished standard of probable cause inevitably raises the question of why there should be any warrant requirement for administrative searches at all. When there is no reason to believe that a particular defect exists in a particular house, issuance of such warrants may be merely an empty formality.\textsuperscript{123} However, the Court in \textit{Camara} believed that an administrative search warrant was a necessary safeguard. First, it would serve to assure residents that an independent third party, in the form of a magistrate, would review the inspection program and determine whether it was reasonable and supportive of the public interests before allowing inspections to proceed.\textsuperscript{124} In addition, it assured the individual whose residence was the subject of a search that his home had not been arbitrarily


\textsuperscript{120} \textit{Camara} v. Municipal Court, 387 U.S. 523, 538 (1967).

\textsuperscript{121} \textit{Id.} at 535-36.

\textsuperscript{122} \textit{Id.} at 537.

\textsuperscript{123} \textit{See} \textit{Camara} v. Municipal Court, 387 U.S. 523, 535 (1967) (Clark, J. dissenting); Rothstein & Rothstein, \textit{supra} note 119, at 349.

\textsuperscript{124} \textit{Camara} v. Municipal Court, 387 U.S. 523, 532 (1967).
selected, but chosen pursuant to the guidelines of that particular inspection program.\textsuperscript{125}

Although the lower standard of probable cause for administrative warrants has been sharply criticized,\textsuperscript{126} the Supreme Court recently reaffirmed the vitality of these regulatory tools in \textit{Marshall v. Barlow's Inc.}\textsuperscript{127} In \textit{Barlow}, the Court held that the Occupational Safety and Health Administration, (OSHA), must, in the absence of consent, obtain a warrant to conduct a safety and health inspection of a business.\textsuperscript{128} The Court stated that such a warrant was required to "provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria."\textsuperscript{129}

\textit{The Constitutional Standards Applied}

Housing inspection at point of sale differs in significant policy respects from inspections on grounds of reasonable suspicion of code violations, as in \textit{Camara}, and regular area-based fire inspections, as in \textit{See}. Yet, the Court's decisions in these two landmark cases support the constitutionality of the procedures used in a point of sale inspection policy.

The \textit{Camara} Court weighed the householder's right to privacy against the public interest in health and safety. There is little doubt expressed in the Court's opinion that a public interest in housing code enforcement exists, not only to abate dangerous conditions, but also to maintain property values by correcting physical deterioration:

Unlike the search pursuant to a criminal investigation, the inspection programs at issue here are aimed at securing city-wide compliance with minimum physical standards for private property. The primary governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous to public

\textsuperscript{125} Id.
\textsuperscript{126} Rothstein & Rothstein, supra note 119, at 349, 382-84.
\textsuperscript{127} \textit{Id.} U.S. \textit{---}, 98 S.Ct. 1816 (1978). The \textit{Barlow} decision was also significant in that it ended a trend of lower federal and state court decisions, as well as two Supreme Court decisions, that had broadly interpreted the licensing exception of \textit{See}, and thus had significantly increased the number and type of businesses of which the government could conduct warrantless searches. \textit{See} note 110, supra. The \textit{Barlow} view of the warrant clause is reaffirmed in \textit{Michigan v. Tyler}, \textit{---} U.S. \textit{---}, 98 S.Ct. 1942 (1978), where the court ruled that while firefighters may remain in a building for a reasonable time to investigate the cause of a blaze they have extinguished, an administrative warrant is necessary for a later re-entry for further investigation.
\textsuperscript{129} \textit{Id.} at 1826.
health and safety. Because fires and epidemics may ravage large urban areas, because unsightly conditions adversely affect the economic values of neighboring structures, numerous courts have upheld the police power of municipalities to impose and enforce such minimum standards even upon existing structures.\footnote{110}

Furthermore, point of sale inspections appear to be a reasonable exercise of a municipality’s police power to achieve these goals. Although point of sale inspections will not reach all homes in a city within a limited period of time, they will bring an estimated 5 to 10 per cent of the homes into compliance annually. This increment in compliance should prevent the decline in physical standards which often accompanies rapid turnover in home ownership. Point of sale inspections are unlikely to provide the sole means of code enforcement, but will typically be supplemented by such means as regular exterior inspections of all properties and inspections upon complaint of adjoining property owners.

Occasionally the same house will be sold twice within a year. In such instances the point of sale policy could be unduly burdensome. However, in such a case, the certificate of compliance, which the city may make valid for a year, covers both transactions, and therefore no additional inspections would be required.\footnote{131}

The constitutionality of point of sale code enforcement is also strengthened by the Supreme Court’s opinion in \textit{See}. The Supreme Court found that business premises could reasonably be inspected “in many more situations than private homes.”\footnote{132} Thus, a business which is already regulated by a licensing process might be subjected to warrantless inspections.\footnote{133} The Court explicitly refused to question “such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product.”\footnote{134} Thus, under \textit{See}, when a business operator takes out a license, he or she theoretically agrees to whatever inspections may be necessary to assure compliance with the conditions of the license.

The sale of a home is not necessarily analogous to marketing a product, but it is a transaction which occurs in a commercial setting. Inspections at point of sale intrude upon the sanctity of the home at a time when the owners have already opened up the house to the public for the purpose of completing a sale. Of course, the

\footnotetext{130}{Camara v. Municipal Court, 387 U.S. 523, 535 (1967).} \footnotetext{131}{See, e.g., Shaker Heights Ordinance § 1415.01. However, Cincinnati Ordinance 556-1973 provides only 180 days.} \footnotetext{132}{See v. City of Seattle, 387 U.S. 541, 546 (1967).} \footnotetext{133}{Id. For a discussion of the licensing exception of See, see note 110 supra.} \footnotetext{134}{See v. City of Seattle, 387 U.S. 541, 546 (1967).}
owners have not, as have licensed businesses, completely opened up their home by merely putting it into a commercial milieu. However, under the rationale of See, they have at least significantly diminished their privacy expectations under the Constitution.

It seems clear, therefore, that an inspection at point of sale policy is not inherently unconstitutional, though the program still must conform to the strictures of the fourth amendment. Inspection cannot be made absent a valid consent, or the issuance of a proper warrant.

Under the constitutional standards for obtaining valid consent to a search promulgated by the Supreme Court and lower federal courts, it seems reasonable to infer consent to a point of sale inspection from the seller's request for an appointment for the inspection. As noted earlier, in Wilson v. Cincinnati, the Ohio Supreme Court invalidated the criminal penalties in the Cincinnati point of sale ordinance because, in effect, they coerced consent to the inspection. However, the typical enforcement mechanism is not a criminal penalty, but the existence of an implied warranty to the buyer if the seller fails to follow code procedures. Although this warranty provides grounds for a civil suit, it has not been found coercive in effect.

Of course, it may not be possible to always obtain the owner's consent. In that instance, it may be assumed that pursuant to the standards set for regulatory searches under the Supreme Court's decisions in Camara and See, administrative warrants may issue. However, if large numbers of homesellers object and warrants must be sought, the cost of enforcement would rise, and city authorities might seek a more generalized warrant. The concept of an area warrant may not be adaptable to point of sale inspections since houses are sold simultaneously at scattered locations in a single municipality. In a sense, the policy particularizes the warrant by creating a class of houses—those on the market for sale—which the warrant could cover. The present Supreme Court's attitude toward such a warrant is speculative, but a majority of the justices now sitting have indicated their support for area search warrants.

In Almeida-Sanchez v. United States, which invalidated a war-

135. *See* notes 112-116 and accompanying text, *supra*.
137. 46 Ohio St. 2d 138, 346 N.E.2d 666 (1976).
138. *Id.* at 145, 346 N.E.2d at 670.
139. *See* notes 38-86 and accompanying text, *supra*.
141. 413 U.S. 266 (1973).
rantless search of an automobile by a roving patrol north of the Mexican border, Justice Powell wrote a concurring opinion suggesting development of an area warrant system for conducting border searches for illegal aliens. All four dissenters noted their agreement with Powell on this point, and a footnote in the majority opinion indicated that at least some of the others accepted the area warrant concept. Although Powell conceded that the standards for probable cause would be “relatively unstructured,” he argued that relevant factors could be identified in the factual setting of any problem area. Housing inspection, as in _Camara_, would provide an analogue, in that age of housing, reasonable goals of a code enforcement program, and condition of the entire area were found to be relevant factors.

In _Almeida-Sanchez_, Powell pointed out that “the judicial function envisioned in _Camara_ did not extend to reconsideration of ‘the basic agency decision to canvass an area.’” In other words, the policy decision justified the issuance of the warrant. Here Powell came close to asserting that the _Camara-_See administrative warrant is an area warrant. However, the _Camara-_See Court clearly envisioned a warrant for a particular entry following refusal at a particular door, even though probable cause was not required. Since area search warrants would represent a further dilution of fourth amendment protection of privacy, they do not provide a satisfactory legal resolution of the issues inherent in administrative inspections.

Assuming that an inspection at point of sale policy is valid under the federal constitution, such a policy could be blocked under the provisions of state constitutions. While a state is prohibited from waiving the warrant requirement provided by the fourth and fourteenth amendments, it could move in the opposite direction and provide a stronger shelter for the privacy interests of the home. Thus, a state supreme court could construe the search and seizure

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142. _Id._ at 283.
143. _Id._ at 288.
144. _Id._ at 270 n.3.
145. _Id._ at 283-84.
146. Border searches for illegal aliens, like housing inspections, are civil matters, since the “penalty” is “mere” deportation. There the similarity would seem to end.
149. _Ohio Constitutional Revision Commission, Bill of Rights Committee, Research Study No. 44F_ (Dec. 23, 1974) p. 11. In addition, some state constitutions go beyond the fourth amendment by specifically protecting “communications”, _Hawaii Const._ art. 7, § 5, and guaranteeing privacy against “eavesdropping devices”, _Ill. Const._ art. 1, § 6. The Model State Constitution additionally incorporates the exclusionary rule of _Mapp_. _Model State Const._, art. 1.03 (c).
clause of its state constitution, although identical to the fourth amendment, to require probable cause and particularity for administrative warrants.

Such a trend is already visible in criminal cases as some state supreme courts, reacting negatively to recent Supreme Court decisions, have begun to find new protections for individual rights in their own constitutions. For example, in *State v. Opperman*, the South Dakota Supreme Court upset the conviction of a defendant on the ground that a warrantless search of his car, impounded by the police for parking offenses, violated his fourth and fourteenth amendment rights. The United States Supreme Court reversed, finding the search reasonable. On remand, the state supreme court invited oral arguments on the state constitution’s identical search and seizure clause, and again upset Opperman’s conviction. The South Dakota court stated:

> [W]e have the right to construe our state constitutional provision in accordance with what we conceive to be its plain meaning. We find that logic and sound regard for the purposes of the protection afforded by S.D. Const., Art. VI, §11 warrant a higher standard of protection for the individual in this instance than the United States Supreme Court found necessary under the Fourth Amendment.

At present there is no indication that this trend in state interpretation of criminal search law will affect judicial perceptions of state and local authority to conduct administrative inspections. As noted earlier, the only case law on point of sale inspections, in both instances from state courts, has found point of sale housing inspection to be a reasonable policy. Furthermore, the generally rising consensus in favor of rehabilitation and conservation of cities can reasonably be expected to sustain at the state level the concept of point of sale inspections as currently implemented.

**CONCLUSION**

The use of inspections at point of sale, as a means of effective housing code enforcement, can serve as the first step towards at-
tackling housing deterioration, an initial stage of urban decay. The point of sale inspection enforces the housing code at the time when money should be available to make corrections, since new homeowners in the community, protected by their knowledge that specific code corrections must be made, can negotiate the sale price to allow for the cost of making necessary repairs. Alternatively, buyers who receive certificates of compliance know that their residence meets code standards. The negative aspect of a point of sale program, official intrusion into the home, is minimized by the fact that sellers make an appointment for the inspection during normal working hours of the city. Thus, inspection occurs at a time chosen, within limits, by the seller. Anticipatory corrections may be made, but unlike searches for criminal evidence, action in anticipation of the “search” furthers the goals of the program. The purpose of the inspections is not discovery of violations, but maintenance and improvement of the quality of the local housing stock.

Although questions have been raised concerning the constitutionality of requiring homeowners to submit to governmental searches, a properly structured point of sale program violates neither an individual’s fourth and fourteenth amendment rights, nor his constitutional right of privacy. First, as long as the municipality does not impose criminal penalties for failure to submit to an inspection, an owner’s consent to the inspection serves as a valid waiver of his rights. Second, administrative warrants, similar to those prescribed by the Supreme Court in a series of regulatory search cases, may be issued to authorize inspection in the absence of consent. Finally, in view of the recent state court decisions in this area, it is doubtful that this type of inspection program will be found to violate the provisions of various state constitutions.

As homeowners become aware of the availability of warrant protection, more may refuse to permit inspection. While this would increase the cost of the program, it would not defeat the ultimate goal. In the absence of an escrow agent, the homeowner can sell without compliance, in which case the traditional rule of caveat emptor is overcome by a presumptive warranty that the house meets code requirements. The buyer’s remedy is a civil action to recover the costs of code repairs.

While a municipal point of sale housing inspection program is not a panacea for an aging community, it may serve as a useful component of a total program of code enforcement. The adoption of such a program works counter to the “throwaway ethic” as applied to cities, promotes rehabilitation and property maintenance, protects the buyers of older houses, and supports the human commitment to urban living patterns.