

# **Memorandum**

## **City of Lawrence**

### **City Attorney's Office**

**TO:** David L. Corliss, City Manager  
Toni Ramirez Wheeler, City Attorney

**cc:** Scott McCullough, Director of Planning  
and Development Services

**FROM:** Randall F. Larkin, Senior Assistant City Attorney

**DATE:** December 12, 2013

**RE:** Ordinance No. 8840, Draft 2

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At the December 3, 2013, City Commission meeting, the City Commission considered proposed Ordinance No. 8840 (Draft 1), which, if passed, would have amended Chapter VI, Article 13 of the City Code, to include the comprehensive regulation of all residential rental property within the City. At that meeting, based on the fact that several Commissioners were reluctant because of the proposed scope of the program and because the administrative regulations and several of the forms necessary to implement the program had yet to be completed, the City Commission tabled the ordinance. Earlier this week, the City received a proposed revision of Ordinance No. 8840 (Draft 2), that would, among other things, essentially limit the scope of inspections under the ordinance to life, health, and fire safety issues, would heighten the transparency of the program, would clarify the rights of owners and tenants with respect to the program, and would provide a sunset provision for the ordinance.

The City Attorney's Office has completed an initial review of Draft 2 of the Ordinance and believes that, with some tweaking of language to protect the City's interests and to maintain consistency within the City Code, the City Commission could pass an Ordinance that would accomplish most of the goals of Draft 2 and would pass constitutional muster. Along those lines, deconstructing Draft 2, section by section, the City Attorney's Office would make the following comments:

- (1) Based on the evolving nature of the program, the City Attorney's Office would agree that the Recitals should be rewritten or modified to capture those changes to the program.

- (2) The City Attorney's Office would suggest that the City Commission leave Section 6-1301 as proposed in Draft 1. The regulation of residential rental property includes more than just licensing and inspection. Those are but two aspects of regulation. Regulation also involves the creation of standards, enforcement, administrative procedure, exemptions, and the like. Thus, it is more accurate to state that the City can protect the health, safety, and welfare of the community through the regulation of residential rental property, as opposed to only licensing and inspection, which are but components of said regulation.
- (3) Regarding the proposed Section 6-1302, Definitions:
- (a) The City Attorney's Office would recommend that the City Commission leave the definition of Code Official as it is because, as used in the Ordinance, it incorporates more than just inspectors and more than just inspection. However, the City Attorney's Office would suggest that the proposed training requirements for Code Officials charged with inspections be added as a subsection to the definition.
  - (b) The City Attorney's Office would recommend that the definition of Dwelling Unit remain as proposed in Draft 1 in order to be consistent with the definition of that term in the Land Development Code.
  - (c) The City Attorney's Office would recommend that the definition of Premises remain unchanged. Dwelling units, not Premises, are licensed. Premises is only used in the Code to indicate a single residential property that may include more than one Dwelling Unit.
  - (d) The City Attorney's Office would recommend that the definition of Re-inspection be modified as proposed in Draft 2.
  - (e) The City Attorney's Office would recommend that a definition of "Qualified Vacant Dwelling Unit" be added to the Ordinance, albeit slightly modified from the form presented.
  - (f) Finally, the City Attorney's Office would also recommend that the definitions of "New Construction" and "Major Reconstruction" be moved from the Administrative Regulations to the Definitions section for the purposes of finality and transparency.
- (4) The City Attorney's Office is fine with the proposed change to Section 6-1305. However, the City Attorney's Office would recommend that the proposed form be Appendix A to the Regulations, and that such Regulations be promulgated by the Governing Body by Resolution. That will get the form in front of the public, allow some ease of modification, and not litter the City Code with forms.

- (5) The City Attorney's Office would recommend that the City Commission adopt language similar to that proposed in Section 6-1306(c) of Draft 2.
- (6) With regard to the proposed addition to Section 6-1307(a), the City Attorney's Office would recommend that the form be identified in a separate subsection and that the form be attached as Appendix B to the Regulations to be adopted by the City Commission. The City Attorney's Office also recommends that the reference to the Consent Form be moved to Section 6-1313, Right of Entry, and that it be a subsection of that Ordinance.
- (7) With regard to the sentence appended to Section 6-1308, because, as the program is planned, there will be no short-term licenses, the City Attorney's Office believes that it should not be included. Moreover, if included it would mean that the program would lose an entire year's worth of License fees.
- (8) With respect to Section 6-1310(a), the City Attorney's Office recommends that the Inspection Checklist be attached as Appendix C to the Regulations as promulgated by the Governing Body, that the section include the language proposed in the middle of the paragraph, and that language substantially similar to that proposed at the end of the paragraph be included in a subsection to Section 6-1310(a). The City Attorney's Office would also recommend that the "approximately 3-year cycle" be returned to this Section.
- (9) The City Attorney would recommend that the City Commission adopt language substantially similar to that proposed in Section 6-1310(b).
- (10) The City Attorney would recommend that, if it includes the language proposed in Section 6-1310(c) the City Commission temper the language from the proposed "shall be the duty of" to "shall make reasonable efforts to" prioritize the inspection of Qualified Vacant Dwelling Units. While the City should make every reasonable effort to prioritize inspections, there may be situations where such prioritization is not possible. The City Attorney's Office would not recommend creating a situation where the City may be liable for something as nebulous as "prioritization," especially where prioritization may not always be possible. The City Attorney's Office would also recommend that, if it includes such language, that it omit the final clause because Licensees should not be unilaterally in control of which Dwelling Units and when such Dwelling Units should be inspected.
- (11) The City Attorney's Office would recommend that the City Commission adopt language substantially similar to that proposed in Section 6-1311.

- (12) The City Attorney's Office would recommend that the City Commission adopt language substantially similar to that proposed in Section 6-1312.
- (13) The City Attorney's Office would recommend that, if the City Commission agrees to the changes proposed in Section 6-1313, that it be amended to insure that the 72-hour notice provision, whether or not the Dwelling Unit is occupied or unoccupied, would only apply absent exigent or emergency circumstances. The City cannot legislate away its authority to act in exigent circumstances.

The City Attorney's Office would also recommend that the City Commission add a subsection to Section 6-1313 that would state something along these lines: "If the Code Official obtains from the Tenant written consent to perform any inspection or re-inspection, it shall be on a form substantially similar to that attached as Appendix D to the Regulations, as promulgated by the Governing Body in accordance with Section 6-1323(a)."

- (14) With respect to proposed Section 6-1314, the City Attorney's Office would recommend the following:
  - (a) That it list the Major violations in the first subsection and the Minor Violations in the second subsection;
  - (b) That each of the violations be numbered so that, for ease of reference, they can be specifically identified.
  - (c) That the listed violations be redrafted to make complete sentences, or at least clauses.
  - (d) That the City Commission add a subsection that would identify the standards set forth in the Property Maintenance Code, as adopted by the City at Chapter IX, Article 6, to be the standards governing each of the violations noted in the Section. Either that, or the ordinance itself should establish the standard for each proposed violation. Without the adoption or incorporation of any standards for the proposed violations, the ordinance is unenforceable.
  - (e) That the City Commission add a subsection that would permit the Code Official (or the Director of the Department) the authority, where strict compliance with the standards is impossible or highly impractical, alternate compliance, assuming of course that said alternate compliance would not endanger the life, health, or fire safety of the Tenant. Such a provision would grant some flexibility to the City in difficult cases, to the benefit of both the Licensee/Owner and the Tenant.

- (15) The City Attorney's Office would recommend that the City Commission append language substantially similar to that proposed at the end of Section 6-1316(b).
- (16) The City Attorney's Office would recommend that the City Commission add language substantially similar to that proposed in Section 6-1317 which would permit a Licensee or Tenant to appeal not only a Notice of Violation, but the proposed penalty, be it Remediation, Probation, or Revocation.
- (17) The City Attorney's Office would recommend that the City Commission leave Section 6-1319, Revocation, as proposed in Draft 1. The purpose of revocation mainly is to serve as an impetus to a recalcitrant Licensee/Owner who fails to remediate violations after repeated efforts. If it is limited only to those situations posed by Draft 2, then the recalcitrant Licensee/Owner really has nothing to fear. Additionally, the final sentence as proposed basically repeats what appears in the sentence preceding it.
- (18) If the City Commission so desires, it can make the violation of Occupancy Limits a specific intent crime. That would mean that, during any municipal prosecution, the City would not only have to prove that the Owner/Licensee knew that the Dwelling Unit exceeded Occupancy Limits but that the Owner/Licensee intended that the Dwelling Unit exceed Occupancy Limits.
- (19) If the City Commission so desires, it can grant to the municipal judge the authority to suspend all or any portion of the minimum fine. The City Attorney's Office would note that the City Commission, by its own motion, added the language removing said authority by Ordinance passed in January, 2012.
- (20) The City Attorney's Office would recommend, in light of Draft 2, that it amend Section 6-1323 of Draft 1 (or Draft 2) to make the Regulations subject to adoption and amendment only by Resolution of the Governing Body. In that way, if any substantive changes are made to the Regulations, they will be made at an open meeting and will be public. The City Attorney's Office also recommends removing all substantive items from the Regulations, leaving only policy statements, implementation plans, and in Appendices (the forms).

The City Attorney's Office would recommend language substantially similar to that proposed in Section 6-1323(c).

- (21) The City Attorney's Office recommends that the City Commission add language substantially similar to proposed in Section 6-1324 of Draft 2.
- (22) The City Attorney's Office would recommend that the City Commission add to the Exemptions of Section 6-1325 an exemption for Religious Assembly Use, which is presently included only in the Regulations.

- (23) Finally, the City Attorney's Office would suggest that the City Commission not include a sunset provision in the Ordinance. However, if it does decide to include a sunset provision, the City Attorney's Office would recommend that the sunset provision be extended at least through one inspection cycle, which would be December 31, 2019, and that the language provided in Draft 2 be reworked.

## **CONCLUSION**

In sum, if the City Commission decides to pursue the regulation of residential rental property on a more limited scale, as proposed at the December 3, 2013, City Commission meeting and as reflected in Draft 2 of Ordinance 8840, the City Attorney's Office would request the City Commission to direct staff, consistent with this Memo, to craft a Draft 3 of Ordinance 8840, which would incorporate the change of scale proposed by Draft 2, alter some of the language to lessen the City's exposure to liability, continue Draft 2's clarification of the rights of the City, Landlords, and Tenants, and to add necessary changes proposed herein.