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Court of Appeals

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CITY OF CLEVELAND

CA 25 114852

vs.

Judge:

SHAKER HEIGHTS APARTMENTS OWNER LLC

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IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT
CUYAHOGA COUNTY

CITY OF CLEVELAND Plaintiff-Appellee, v. **SHAKER HEIGHTS APARTMENTS OWNER LLC** Defendant-Appellant.	**CA-25-114852** Consolidated with: **CA-25-114853** **CA-25- 11854** Trial court number: 2023- CRB- 7888 (consolidated with 2023 CRB 7891 and 2023 CRB 7893)

BRIEF OF APPELLANT
Oral Argument requested

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STATEMENT OF THE ASSIGNMENTS OF ERROR

In accordance with App. R. 16(B), Appellant assigns the following errors:

I. The Trial Court Erred by Failing to Grant Defendant's Motion to Suppress.

II. The Trial Court Erred by Imposing Community Control Sanctions Upon a Limited Liability Company.

III. The Trial Court Erred by Imposing Conditions of Community Control that are Unwarranted by Law, Do Not Relate to Rehabilitation or the Underlying Offense, and are Not Narrowly Tailored and are Overbroad.

IV. The Trial Court Erred When it Fined Defendant in Excess of the Maximum Fine Allowable for First Degree Misdemeanors.

STATEMENT OF THE ISSUES TO BE PRESENTED FOR REVIEW

1. Did the Trial Court err when it failed to grant Defendant's Motion to Suppress? (Assignment of Error No. 1)

2. May a municipal Trial Court of limited jurisdiction impose community control conditions upon Defendant, a limited liability company, when the sentencing statute and relevant local ordinance governing liability upon organizations does not authorize imposition of community control conditions? (Assignment of Error No. 2)

3. Is the No-Sale Provision of the community control condition(s) an improper, excessive condition of community control unwarranted by law? (Assignment of Error No. 3 and Assignment of Error 4)

4. Are the community control conditions unrelated to the underlying crime, including conditions pertaining to building upkeep/ facility management, improper conditions of community control when they are unrelated to the underlying offense and serve no rehabilitative purpose? (Assignment of Error No. 3)

5. Is the Receivership Provision and Receivership Order an excessive condition of community control unwarranted by law? (Assignment of Error No. 3).

6. Did the Trial Court err when it fined Defendant $10,000 on one First Degree Misdemeanor for each Complaint when the maximum allowable fine was $5,000? (Assignment of Error No. 4).

STATEMENT OF THE CASE

This is yet another case that concerns the Trial Court's unbridled use of purported community control sanctions and examines their unwarranted nature and indiscriminate application. It further examines the failure to suppress evidence obtained by the City through warrantless searches. The questions can thus be boiled down to whether or not the Trial Court failed to exclude evidence obtained through an unlawful search and whether the Trial Court has gone too far in its sentence and accompanying restrictions upon Defendant.

On October 3, 2023, the City of Cleveland (hereinafter referred to as the "City") initiated 3 misdemeanor criminal housing code violation cases against Defendant-Appellant Shaker Heights Apartments Owner, LLC (hereinafter "Defendant"), citing violations of C.C.O 3103.25(e) "Failure to Comply with a Notice of Violations". Specifically, in 2023 CRB 7891, the Complaint charged Defendant with 3 counts of "fail[ing] to comply with a Notice of Violations ordering repairs at 12500, 12600, 12701 Shaker Blvd., Cleveland, Ohio" from September 9, 2023 through September 11, 2023. Complaint 2023- CRB- 7888 charged Defendant with 2 counts of the same violations for the same period of time, September 10, 2023 – September 11, 2023. Complaint 2023-CRB-7893 charged Defendant with 2 counts of the same violations for the same period of time. The essence of the allegations concerned the maintenance and decommissioning

procedures for certain elevators at Defendant's property. (See generally Notice of Violation attached to Complaints). It is unclear why the City filed 3 Complaints against Defendant on the same day for the same matters, that occurred during the same time. Regardless, the matters were consolidated for pre-trial purposes.

On October 31, 2023, Defendant plead not guilty to the charges. On April 19, 2024, Defendant filed a Motion to Suppress due to the City conducting warrantless searches of Defendant's property in violation of the United States and Ohio Constitution. The Motion to Suppress requested that all evidence obtained by the City of Cleveland be excluded. A hearing was held on August 8, 2024. The City called 1 witness, inspector Eaton. The Motion to Suppress was denied by the Trial Court on September 11, 2024. (9/11/2024 Entry/Order titled "Defendant's Motion to Suppress is hereby Denied due to Lack of Merit and Order Entry").

After the Trial Court denied Defendant's Motion to Suppress, on December 6, 2024, Defendant plead no contest and the Trial Court held a change of plea hearing. (2/20/25 Sentencing Entry). Following a no contest plea, Defendant was found guilty on all counts in all 3 Complaints. (2/20/25 Sentencing Entry)[1]. The Trial Court's sanctions/ community control conditions were reduced to writing in the 2/20/2025 Sentencing Entries, which were substantively identical. The Sentence was over 100 pages, incorporated dozens of documents, and contained community control sanctions that were wide ranging, ambiguous, and mostly unrelated to the underlying infraction. See, e.g. Sentencing Entry ¶ 8 (order to remove "any graffiti"); Sentencing Entry ¶ 11 (order to cut grass and "remove any shrubbery"); Sentencing Entry ¶ 10 (keep property clear from

[1] The date of Journalization is the date Appellant uses for its citations.

unspecified junk and debris); Sentencing Entry ¶ 23 (order to submit to "a Tier III (30-day) maintenance and repair plan to Chief Housing Court Specialist Carl Kannenberg on the 1st of each month", and an order to attend a landlord clinic held by the Housing Court. Sentencing Entry ¶ 22. The Court further issued a "do not sell, gift, or transfer the properties it owns within the City of Cleveland while on community control without approval of the Court. Prohibition Order to be issued [SEE ATTACHED PROPERTY LIST]("Attached Property List"]." Sentencing Entry ¶ 5 (hereinafter referred to as the "No Sale Provision").

Most shockingly, in addition to the above community control sanctions, the Court ordered Defendant to put all rental payments (i.e. its sole source of incoming cash flow) received from all its tenants into a "rent escrow account for any repairs needed to the property owned, beginning on March 1, 2025. To access these funds, Defendant will need to provide an invoice or receipt for repairs ***." Sentencing Entry ¶ 9 (hereinafter referred to as the "Receivership Provision"). The Court's Sentencing Entry attached/ referenced yet another document, titled "CLERK ORDERED TO CREATE A REPAIR ESCROW ACCOUNT JUDGMENT ENTRY AND ORDER." (Hereinafter the "Receivership Order").[2] Whereby the Trial Court directed accounts to be opened for the collection of all rental proceeds collected by Defendant, and maintained by the Trial Court "per the Court's Community Control order." The Receivership provision of the Sentence along with the Receivership Order made it clear that the Trial Court was responsible for determining when and how the money could be released, and that money would only be released to Defendant to make property repairs approved by the Trial Court.

[2] The Receivership Order, if being viewed in PDF format, is found on page 102-103 of the Sentence.

The Sentence and its restrictions require Defendant to abide by its terms for a three-year period of time, through January 23, 2028, subject to "increased community control for up to five years in total[.]" (Sentencing Entry, P. 5).

This appeal emanates from the Trial Court's 2/20/25 Sentences and the interlocutory order denying Defendant's Motion to Suppress.

STATEMENT OF THE FACTS

Defendant owns the properties located at 12701 Shaker Blvd., Cleveland, OH, 12500 shaker Blvd., Cleveland, Ohio, and 12600 Shaker Blvd., Cleveland, OH (hereinafter the "Premises"). Defendant is engaged in the residential rental business and the Premises consist of residential multi-family rental units. On or around August 10, 2023 and September 8, 2023, City Inspector Eaton entered the Premises to inspect the Premises' elevators. (Motion to Suppress, ¶ 1, Tr. 10). Eaton entered the Premises without a warrant to conduct a search of the elevators at the Premises. (Tr. 6). It is undisputed that Inspector Eaton entered the property without a warrant. (Tr. 5). At no point during Inspector Eaton's testimony did he state that someone on behalf of Defendant gave him permission to enter and inspect the Premises. (Tr. 17). Inspector Easton testified that he had no specific recollection of obtaining consent. (Tr. 22). Inspector Eaton further testified he has never seen the City's Consent to Search Form, (Tr. 18) does not have any notes in the City's record keeping system for inspectors indicating he received consent to search the Premises (Tr. 19-20), and that he is unfamiliar with what limits would be placed upon him when inspecting properties. (Tr. 21). Inspector Eaton was at the Premises to conduct what he referred to as a routine inspection. (Tr. 60). The violations placed upon Defendant stem from Inspector Eaton's inspections. (See Violation Notices attached to Complaints).

The matter eventually resulted in the Defendant pleading no contest to the charged counts. The Trial Court found Defendant guilty on all counts of the Complaints, sentenced on Count I of each Complaint and imposed 3 separate $10,000 fines and probation through 2028. (2/20/2025 Sentencing Entries).

LAW AND ARGUMENT

I. ASSIGNMENT OF ERROR 1: THE TRIAL COURT ERRED BY FAILING TO GRANT DEFENDANT'S MOTION TO SUPPRESS.

A decision on Assignment of Error No. 1 in Appellant's favor (reversing the Trial Court's decision on the motion to suppress and remanding back to the Trial Court for proceedings consistent with this Opinion), moots the remaining issues. Accordingly, it is addressed first. When reviewing a ruling on a motion to suppress, the reviewing court accepts the trial court's findings of fact if the findings are supported by competent, credible evidence and decides whether the facts satisfy the applicable legal standard. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. With respect to the trial court's conclusions of law (and/or whether the facts support them), the reviewing court applies a de novo standard of review. *Id.*

The Fourth Amendment of the United States Constitution and Section 14, Article I of the Ohio Constitution protect against unreasonable searches and seizures. *City of Strongsville v. Patel*, 8th Dist. Cuyahoga Nos. 84736, 84749, 84750, 84751, 84752, 84753, 84754, 2005-Ohio-620, ¶ 8. **Warrantless searches are presumptively unconstitutional.** *Id.* citing *Marshall v. Barlow's Inc.* (1978), 436 US.307, 312; *Groh v. Ramirez*, 540 U.S. 551, 553, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004), Syllabus. "This general rule is applicable to commercial premises as well as homes" and the

expectation of privacy "exists with respect to administrative inspections designed to enforce regulatory statutes. *City of Strongsville v. Patel*, ¶ 8. ["T]he mandate of the Fourth Amendment requires adherence to judicial processes," *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), citing *United States v. Jeffers*, 342 U.S. 48, 51.

"[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment -- subject only to a few "*specifically* established and *well-delineated* exceptions." *Id.* (emphasis added). Thus, in order for a warrantless search to pass constitutional muster, it must first fit into one of the specifically established, narrowly defined exceptions to the warrant requirement. E.g., *Id.* **It is the state that bears the burden of establishing the validity of a search**. *State v. Price*, 134 Ohio App.3d 464, 467, 731 N.E.2d 280 (9th Dist.1999). When the state fails to meet its burden demonstrating that the warrantless search falls into a narrowly tailored exception, a motion to suppress should be granted and all evidence obtained as a result of search must be excluded. *State v. Price* (1999), 134 Ohio App.3d 464, 467, citing *Mapp v. Ohio* (1961), 367 U.S. 643, 654-655. Not only must evidence obtained from the search be excluded, but all evidence stemming therefrom must be excluded, as it is considered "fruits from a poisonous tree." *Northrop v. Trippett*, 265 F.3d 372 (6th Cir. 2001) ("The fruit of the poisonous tree doctrine provides that evidence discovered as the indirect result of a Fourth Amendment violation is inadmissible[.]").

The City argued, and the Trial Court found, that the search conducted by Inspector Eaton, was administrative in nature. (9/11/2024 Order denying Defendant's Motion to Suppress, p. 3-6). An exception to the warrant requirement exists for administrative

searches of "pervasively regulated businesses" and industries "long subject to close supervision and inspection." *United States v. Biswell* (1972), 406 U .S.311, 316; *State v. Price*, 134 Ohio App.3d 464, 467, 731 N.E.2d 280 (9th Dist.1999). This exception does not grant the government unrestricted authority or act as an all-access pass. In order to avail itself of the warrant requirement for administrative searches, the government must prove: 1) the regulatory scheme (i.e. statute/ordinance) involves a substantial governmental interest, 2) the search must be necessary to further the scheme, and 3) there must be a "constitutionally adequate substitute for the warrant". *City of Strongsville v. Patel*, 8th Dist. Cuyahoga Nos. 84736, 84749, 84750, 84751, 84752, 84753, 84754, 2005-Ohio-620, ¶ 11, quoting *United States v. Burger* (1987), 482 U.S. at 703. The regulatory statute must "advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers." *Id.* It must also limit the time, place, and scope of the inspection. *Id.* quoting *Burger*, at 703. If the regulatory scheme does not meet this test, **any consent to search is invalid and irrelevant.** *City of Strongsville v. Patel*, 2005-Ohio-620, ¶ 17.

The ordinance relied upon by the City to conduct the warrantless, purported administrative search -- C.C.O 3141.14 (hereinafter the "Ordinance") does not satisfy the *Burger* test. C.C.O 3141.14 states:

(a) All elevators, amusement devices and special equipment shall be tested by the owner in the presence of the Commissioner, or his or her authorized representative, at least once every six (6) months, and all such devices shall be inspected by the Commissioner or his or her authorized representative at the time of testing.

(b) All moving stairways, and the miscellaneous safety devices on dumbwaiters, shall be tested annually by the owner in the presence of the Commissioner or his or her authorized representative, and all such equipment shall be inspected by the Commissioner or his or her authorized representative at the time of testing.

(c) All tests shall be made in conformity with the rules therefor issued by the Cleveland Board of Building Standards and Building Appeals or any rules of the Ohio Board of Building Standards.

The Ordinance does not advise individuals of the nature of the search or its limitations; the time, scope, place, and discretion of the inspector is unlimited. Additionally, the City advanced no substantive testimony or reasoning to support that the statutory scheme purportedly allowing for a warrantless administrative search is necessary to advance a substantial governmental interest and that the warrantless search is necessary to further the regulatory scheme as opposed to securing a warrant.

i. Residential Housing is Not a Recognized Highly Regulated Industry.

In order to justify any statutory scheme allowing for a warrantless administrative search, the City must first demonstrate that the business searched is a pervasively regulated industry. *Baker v. City of Portsmouth*, S.D.Ohio No. 1:14cv512, 2015 U.S. Dist. LEXIS 132759, at *16 (Sep. 30, 2015), citing *Barlow's Inc.*, 436 U.S. at 313; e.g., *Biswell,* 316. For the last 50 years, the Supreme Court has recognized only **4** industries as belonging to this group: 1) liquor sales ; 2) firearms; 3) dealing (gambling); 4) mining; 5) automobile junkyards. *Baker v. City of Portsmouth*, at *16 (i.e., the regulations were necessary due to "meet the evils at hand" and the businesses possess some inherently dangerous quality or "significant risk to public welfare"). See, *Biswell*, at 314, 315 and *Portsmouth* at *16.

Case law on administrative searches has **routinely rejected** a municipality's right to conduct warrantless administrative searches of multifamily residential housing and similar businesses. *Baker v. Portsmouth*, 2015 U.S. Dist. LEXIS, US Dist. Court, ND

Ohio. **The "rental of residential properties is not a closely regulated industry."** *Id* at *16. The *Baker* court went on to state that "[a]s the Supreme Court has warned, to classify the rental business as closely regulated 'would permit what was always the exception to swallow the rule.'" *Id.* citing *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978). The United States Supreme Court has specifically rejected the idea that enforcement of regulatory matters upon businesses provide a valid basis for a warrantless search. *See v. Seattle*, 387 U.S. 541, 543, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967):

> The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws **can be made and enforced by the inspector in the field without official authority evidenced by a warrant.**

Id. (Emphasis added). The *See* court concluded "warrants are a necessary and a tolerable limitation on the right to enter upon and inspect commercial premises." *Id.* "[A]dministrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure." *Id.* at 545. See also, *Camara v. Mun. Court*, 387 U.S. 523, 527, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967) (ordinance that permitted warrantless search to enforce city's housing code unconstitutional).

Further, the Fourth Amendments protections extend to all components of the within protected business, including its elevators. E.g., *Baker*. The fact that residential housing contains elevators does not transform the rental industry, or a multi-family housing property, into an elevator industry. A decision finding that parts of an industry govern the whole, would practically eviscerate Fourth Amendment protections. By way of example, tenants may carry firearms or store them at their property, firearms are a

pervasively regulated industry. Just because a tenant may be suspected of unlawfully carrying a firearm in his home, does not mean that police get to search his home without a warrant because "firearms are pervasively regulated."

Elevators are not a pervasively regulated industry and the fact that they exist within a business or property does not transform the property into a pervasively regulated industry; no case law exists to the contrary.

ii. C.C.O 3141.14 Grants Unbridled Authority and Discretion to Inspectors and Does Not Place Any limitation upon their searches.

Even if this Court found that elevators are a pervasively regulated industry, the City of Cleveland's Ordinance fails to limit the time, place, and scope of the inspection or to limit the discretion of the inspecting officers as required by *Burger* and its progeny (e.g. the ordinance contains no constitutionally adequate substitute for a warrant. See, *Burger*, at 703. **An administrative regulatory scheme must be sufficiently limited in time, place and scope to satisfy the Burger test**. *City of Strongsville v. Patel*, 8th Dist. Cuyahoga Nos. 84736, 84749, 84750, 84751, 84752, 84753, 84754, 2005-Ohio-620, ¶ 11, citing *United States v. Burger* (1987), 482 U.S. 691, 699, 96 L. Ed. 2d 601, 107 S. Ct. 2636; *Amvest Post #711 v. Rutter*, 863 F. Supp.2d 270 (N.D. Ohio 2012). An ordinance allowing a search to be conducted "at any time it is occupied or open for business" is not sufficiently limited in time, place and manner. *J.L. Spoons, Inc. v. City of Brunswick*, 49 F.Supp.2d 1032, 1039 (N.D.Ohio 1999); *Patel,* supra (ordinance allowing a search at any time that the hotel is open not sufficiently limited in time). The fact that a search takes place during business hours does not render an unconstitutional ordinance constitutional. E.g. *Patel*, at 4.

As can be seen from a plain reading of C.C.O 3141.14, no restraints upon the search exist. The relied upon language in the Ordinance to support the City's right to conduct a warrantless search is in Section a, which simply states : "All elevators, amusement devices and special equipment shall be tested by the owner in the presence of the Commissioner, or his or her authorized representative, **at least once every six (6) months**, and all such devices shall be inspected by the Commissioner or his or her authorized representative at the time of testing." C.C.O 3141.14(a). This language ('at least') is *unlimited* rather than limited. "At least once every six months", means everything from twice a year to an unlimited, discretionless number of times a year (365 searches or more should the City decide to conduct more than one search a day). There is nothing in C.C.O 3141.14 that places a time restriction on the searches or anything that limits its scope.

Further, C.C.O 367.03 granting an (undefined) inspector or agent of the City a right to enter property at "reasonable times", "upon presentation of proper credentials", is just as unlimited in time, scope, and manner. "Reasonable times" is undefined and contains no specificity. The use of the term "reasonable times" is more illusive and discretionless than that declared unreasonable in *Patel* and *J.L. Spoons*, wherein a statute limited searches to "hours of operation". The failure to provide any limitations as to time, place, manner and scope, cause the City's statutory scheme to fail the *Burger* test. In fact, the United States Supreme Court specifically struck down a nearly identical city ordinance in *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 526, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), finding the City's reliance upon it to conduct a warrantless search to be unconstitutional for Fourth Amendment purposes.

Lastly, the City advances zero testimony or reasoning to support that the statutory scheme allowing for a warrantless administrative search is necessary to advance a

substantial governmental interest and that the warrantless search is necessary to further the regulatory scheme as opposed to securing a warrant. The City does not advance any argument for the necessity of a warrantless search, (e.g. that the scheme is necessary due the ability for the businesses to hide and dispose of illegal contraband upon being made aware of the intent to conduct a search as may occur with firearms or alcohol). The ability to dispose of illegal material or matters upon being presented with a warrant does not exist in the context of elevators – they are not capable of being hidden or destroyed and contain no underlying illegal nature. An Inspector's presence won't make the elevator's suddenly work when they are out of order or in need of repair.

iii. C.C.O 3141.14 unconstitutionally mandates warrantless searches.

Nevertheless, neither consent or satisfying various elements of *Burger* can save an invalid statutory scheme. Regardless of whether the City's Ordinance satisfies various elements of the *Berger* test or consent was given, it is unconstitutional on its face because it forces property owners to choose between consent or penalties for failing to consent to a search. A statutory scheme is unconstitutional when a property owner is subject to penalties for failing to allow a search or when the statute effectively requires a warrantless inspection. *Baker v. City of Portsmouth,* S.D.Ohio No. 1:14cv512, 2015 U.S. Dist. LEXIS 132759, at *12 (Sep. 30, 2015), citing *Sokolov v. Village of Freeport*, 52 N.Y.2d 341, 420 N.E.2d 55, 438 N.Y.S.2d 257 (N.Y. 1981) (ordinance requiring landlord's to obtain a certification that required an inspection of its premises unconstitutional "as it effectively authorizes and, indeed, requires a warrantless inspection of residential rental property." Here, like the ordinance in *Freeport*, a property owner is punished for failing to secure an elevator certification from the City (which requires at least bi-annual inspection by the

City); the fact that the property owner is punished for failing to secure a certification as opposed to being punished for failure to allow the search makes no difference. *Baker v. City of Portsmouth*, at *12, citing *Sokolov v. Village of Freeport* at 346.

Likewise, the United States Supreme Court and the Ohio Supreme Court have held that administrative schemes which require a search and punish for failure to consent to the search to be facially unconstitutional under the Fourth Amendment. *City of Los Angelos v. Patel*, 135 S. Ct. 2443 (2015); *Wilson v. City of Cincinnati*, 46 Ohio St. 2d 138, 346 N.E.2d 666 (Ohio 1976) (ordinance requiring that a property owner obtain a Certificate of Housing Inspection which required a search of the property unconstitutional). The United States Supreme Court has also held that statutes that fail to offer any form of pre-compliance review in lieu of a search are facially unconstitutional. *City of Los Angeles v. Patel,* 576 U.S. 409, 410 ("[t]o be constitutional, the subject of an administrative search must, among other things, be afforded an opportunity to obtain precompliance review before a neutral decisionmaker".). Like the case *in City of Los Angeles v. Patel*, the City here does not even attempt to argue that the ordinance affords property owners any opportunity to obtain review before a neutral arbiter whatsoever.

The case law is clear – an ordinance cannot force a property or business owner to either consent to a search to obtain an economic benefit/ enjoy full use of its premises or charge a property owner criminally for failing to allow or engage in the search. E.g., *Sokolov v. village* of Freeport, 52 N.Y. 3d 341 (N.Y. 1981). "[T]he import of *Camara* is that the Fourth Amendment prohibits placing appellant in a position where she must agree to a warrantless inspection of her property or face a criminal penalty." *Baker*, at *12 quoting *Wilson v. City of Cincinnati*, 46 Ohio St. 2d 138, 346 N.E.2d 666 (Ohio 1976). Forcing an individual or business owner to choose between allowing a search or facing

penalties warrants the statutory scheme facially unconstitutional. E.g. *Id.* This type of statutory scheme requiring elevators to be inspected coupled with the City's ability to prosecute, make the statutory scheme unconstitutional. C.C.O 3103.04 states:

C.C.O. 3103.04 Right of Entry and Inspection states:

> (a) The Director and the Fire Chief or any of their assistants may, at any reasonable hour, enter any dwelling, multifamily dwelling, building, structure or premises within the City to perform any duty imposed on them by OBBC or this Building Code, or the City Housing or Fire Prevention Codes subject to the requirements and authority of Section 367.03.
>
> (b) **No person shall refuse to permit** such emergency entry or **inspection**, nor shall any person hinder, obstruct, resist or abuse any person making or attempting to make such entry or inspection.

Id. (Emphasis added). C.C.O 367.03, in relevant part, states:

§ 367.03 Right of Entry

> (a) Upon presentation of proper credentials, the Director of Building and Housing and his or her duly authorized agents or inspectors *** may enter at reasonable times, or at such other times as may be necessary in an emergency, any dwelling, building, structure or premises in the City to perform any duty imposed on him or her by this Housing Code, the Fire Code, or the Health Code.
>
> ***
>
> (f) **No person shall in any way obstruct, hinder, delay or otherwise** interfere with such entrance under this section.

Id. (Emphasis added).

"Whoever violates any provision of this Building Code for which no other penalty is provided or any rule or regulation or order promulgated thereunder, or any code adopted herein, or fails to comply with the lawful order issued pursuant thereto **is guilty of a misdemeanor of the first degree.** Each day during which noncompliance or a

violation continues shall constitute a separate offense." C.C.O. 3103.99(a) Penalty (emphasis added).

C.C.O 367.03 is nearly identical to the Ordinance struck down in *Camara*, as being unconstitutional. The *Camara* ordinance stated:

> Authorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code."

Camara v. Mun. Court of San Francisco, 387 U.S. 523, 526, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). The Camara Court declared the statutory scheme unconstitutional, stating:

> Under the present system, when the inspector demands entry, the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization. These are questions which may be reviewed by a neutral magistrate without any reassessment of the basic agency decision to canvass an area. Yet, only by refusing entry and risking a criminal conviction can the occupant at present challenge the inspector's decision to search. And even if the occupant possesses sufficient fortitude to take this risk, as appellant did here, he may never learn any more about the reason for the inspection than that the law generally allows housing inspectors to gain entry. The practical effect of this system is to leave the occupant subject to the discretion of the official in the field.

Camara v. Mun. Court of San Francisco, 387 U.S. 523, 532, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967).

Like *Camara*, C.C.O 3141.14 and 367.03 force a property or business owner to be subjected to searches to avoid prosecution. And, like *Wilson v. City of Cincinnati*, (ordinance requiring that a property owner obtain a Certificate of Housing Inspection which required a search of the property declared unconstitutional), C.C.O 3141.16 and 3441.14 additionally place a duty upon a property owner to allow a search in order to

obtain a required City issued 'certificate of inspection', necessarily forcing a property owner to a warrantless search in order to enjoy full use of its property.

The City's actions in conducting warrantless searches was unconstitutional and its reliance upon its statutory scheme (C.C.O 3141.14, 3414.16 and 367.03) fails - the statutory scheme is flawed and does not conform to *Burger* or its progeny and subjecting a property owner to choose between adherence to a defective statute or prosecution is unconstitutional under the Fourth Amendment.

iv. The Trial Court did not Have Competent, Credible Evidence to Determine that the search of the Premises was Consensual.

A Trial court may only consider "competent, credible evidence" when considering facts pertaining to a motion to suppress. The Trial Court's finding that Defendant consented to a search of its elevators at the Premises was not supported by competent, credible evidence. When an appellate court is tasked with analyzing whether evidence is competent and credible to support a trial court finding, it engages in the process of "examining the evidence for its value to the question at hand, without resolving inferences in favor of one side or the other; if the trial court's decision falls short, such as by entirely disregarding certain evidence or the lack thereof, when measured by this standard, there is cause to reverse the decision." *State v. Azeen*, 163 Ohio St.3d 447, 2021-Ohio-1735, 170 N.E.3d 864, ¶ 60.

In this matter, the Trial Court entirely disregarded certain evidence when finding Defendant consented to a search of the Premises. The Trial Court specifically found:

> "He [Inspector Eaton] testified that a maintenance person let him into the building and that the machine room was already open and unlocked. While Inspector Eaton was not able to testify to the name of the person who provided him access to the premises, he did testify that the individual was moving trash and mopping the floors while Inspector Eaton was on the premises, clearly indicating he was an employee of the property."

This finding completely ignored aspects of Inspector Eaton's testimony. (Tr. 15-17, 22,30, 31-32). Inspector Eaton testified that his normal procedure for apartment buildings is:

> [I]f they have an electronic intercom, we usually just the office, whatever number that may be, and then they buzz us in or we gain access, whether they come to the door or send a maintenance person to let us in. And then we with the property manager or maintenance person and tell them what they're – what we're there for, who we are. And they either direct us to the elevator machine rooms or in the elevators, or they will escort us.

(Tr. 16). No testimony that this occurred at the Premises for this case exists. Inspector Eaton testified that he did not recall the September 11th, inspection (the inspection that forms the basis of the Complaints since Defendant had 30 days from the initial violation notice to cure the purported defects). When the City asked if he recalled this inspection, Inspector Eaton stated, **"Not specifically,** but I was probably there for reinspection." (Tr. 17). After stating he did not recall this inspection, his direct examination ended. *Id.* Inspector Eaton never testified that he buzzed the front office to be let in, spoke with a property manager, or spoke to *anyone* about why he was there or what he sought permission to search.

On cross-examination (Tr. 18- 22), when Inspector Eaton was asked if he could "recall in any detail these inspections" Inspector Eaton indicated he could not. (Tr. 22). Inspector Eaton was specifically asked:

> **Q So you have no specific recollection of obtaining consent from the property manager, correct?**
>
> **A Correct.**

(Tr. 22).

Inspector Eaton did not know that the City had a consent to search form, did not use a consent to search form, nor has he ever seen a consent to search form. (Tr. 18). Inspector Eaton testified that in the City's electronic note keeping database, no contemporaneous notes exist indicating he obtained consent to search the Premises. (Tr. 19). Insector Eaton testified that advance notice is not given as to when the City will be conducting an inspection and no advance notice was given to defendants for any of the searches at the Premises. (Tr. 20).

Inspector Eaton was not familiar with the statutory scheme that the City alleged allowed him to conduct the inspections. (Tr. 21). He therefore, was unable to testify as to what limits he is constrained by or must engage in when conducting City inspections. (Tr. 21). Only upon re-cross examination did Inspector Eaton suddenly state that someone whom he speculated to be a maintenance person let him into the Premises. (Tr. 30-31). Inspector Eaton stated that this person was not a property manager or property owner, not in a uniform, and was "moving the trash and mopping the floors." (Tr. 32).

Therefore, the sole evidence the Trial Court had before it when deciding if consent was given by Defendant was the Inspector's initial and repeated testimony that he did not recall any specific detail of the searches, that he had **no specific recollection of obtaining consent**, and that someone whom he speculated to be a maintenance person because he was mopping and moving trash let the Inspector into the Premises. **Nothing in the record states that the Inspector identified himself to this person, that the Inspector indicated why he was there and what he was requesting to search, or that this person gave consent to search the Premises.** Nothing in the record indicates that that this person was employed in a managerial capacity or an even an employee of Defendant.

In essence, the Trial Court's best construction of Inspector Eaton's testimony was that he was let into the Premises by a maintenance technician. However, being let into a property does not equate to consent to search a property, especially when it is vast in size. Consent to search must be specific and given by someone with authority to grant it. E.g., *Mullane v. Kassinger*, 107 F.Supp.2d 877, 880 (N.D.Ohio 2000)(consent to search must be "unequivocal, specific and an intelligent decision.") "[A]s a general rule an affirmative response is required to a specific request to enter or search." *Id* at 881. "[F]ree and voluntary consent cannot be found by a showing of mere acquiescence to a claim of lawful authority." *Id,* citing *U.S. v. McCaleb,* 552 F.2d 717 (6th Cir. 1977). Like the facts of the case in *Kassinger*, the fact that the alleged speculated maintenance person did not object to the Inspector's uninvited and warrantless entry does not establish consent. Nothing in the record indicates that the maintenance person's statements (if any) were unequivocal or specific to indicate an intelligently made decision of consent to enter as required under the Fourth Amendment and is a violation of clearly established law. E.g. *Id* at 882.

At best, Inspector Eaton essentially assumed consent from perceived authority of the maintenance person to let him into the building. Aside from the record being completely devoid of any consent to search the Premises by this unknown individual, nothing in the record indicates that that the Inspector had permission or authority to grant him permission to search the Premises. When analyzing whether an employee's consent to search a business is valid under the Fourth Amendment, "[i]n general, the cases have engaged in a fact-specific analysis of the level of responsibility given to the employee. *United States v. Jones*, 335 F.3d 527, 531 (6th Cir.2003). In Jones, the court found that a handyman lacked authority to permit a search of the Premises. *Id.*

Further, there are no facts in the record to support a finding of apparent authority. "[I]f the facts available to the officer at the moment . . . warrant a man of reasonable caution in the belief that the consenting party had authority over the premises [] there is no violation of the Fourth Amendment if, under the totality of the circumstances, the officer performing the search has relied in good faith on a person's apparent authority." *Id.* at 532. Like the case in Jones, Inspector Eaton testified that the individual who allowed him access into the Premises was a maintenance person (i.e. a handyman). The individual was not in a uniform and Inspector Eaton testified that his general protocol is to speak with property managers. The record is devoid of any statements from this purported maintenance person or reasons why Inspector Eaton believed this individual had permission to allow a search, and no reasons were given by the Inspector. It was the City's burden to prove consent and the City clearly failed to meet this burden; the City did not even articulate which property the maintenance person was allegedly working at and the Complaints concerned 3 separate properties.

In summary to Assignment of Error No. 1, warrantless searches are presumptively unconstitutional and must fit into a narrowly tailored exception to the warrant requirement. The City failed to meet its burden demonstrating that its search was a lawful administrative search. Because the City cannot demonstrate a lawful administrative search occurred, all evidence obtained from the searches and any evidence obtained therefrom was required to be suppressed.

II. <u>ASSIGNMENT OF ERROR NO. 2:</u> A MUNICIPAL COURT MAY NOT IMPOSE PROBATION UPON A LIMITED LIABILITY COMPANY.

Although the decision of the Trial Court to grant community control is often reviewed under an abuse of discretion standard (*State v. Talty*, 103 Ohio St.3d 177, 2004-

Ohio-4888, 814 N.E.2d 1201, ¶ 10), questions of law are reviewed de novo. *State v. Burgette*, 4th Dist. Athens No. 13CA50, 2014-Ohio-3483, ¶ 10 (when claims involve violations of constitutional rights, a de novo standard of review applies). De novo review involves a full review of the relevant law to analyze whether the Trial Court exceeded its authority. E.g. *Cuyahoga Cty. v. Ohio Patrolmen's Benevolent, Assn.*, 2024-Ohio-1055, 240 N.E.3d 885, ¶ 17 -19 (8th Dist.).

"Criminal procedure in this state is regulated entirely by statute, and the state has thus created its system of criminal law covering questions of crime and penalties, and has provided its own definitions and procedure." *Mun. Court of Toledo v. State*, 126 Ohio St. 103, 103, 184 N.E. 1 (1933), Syllabus. Trial Courts have no authority to impose sentences not authorized by statute. *State v. Hitchcock*, 157 Ohio St.3d 215, 2019-Ohio-3246, 134 N.E.3d 164, ¶ 18. "**Ohio judges have no inherent power to create sentences, and the only sentence that a trial judge may impose is that provided for by statute.**" *Id.* A judge's sentencing authority is not unlimited but must be constrained by the relevant sentencing statute. *Id.* In *Hitchcock*, the Ohio Supreme Court clarified that after the 2019 passage of S.B. 2, the question is not whether the sentence is "*not prohibited* by statute", but rather, is the sentence "*authorized* by statute." *Id.* ¶ *State ex rel. Yost v. Crossridge, Inc.*, 2022-Ohio-1455, 188 N.E.3d 629, ¶ 35 (7th Dist.), citing *In Matter of Lands* (1946), 146 Ohio St. 589, 595, 67 N.E.2d 433 [33 O.O. 80] (where a procedure has been prescribed for the exercise of the power to punish, it is the duty of the court to follow such procedure).

Pursuant to Ohio law, courts cannot sentence organizations to jail time or probation. *State v. Nite Clubs of Ohio, Inc.*, 7th Dist. Mahoning No., 2004-Ohio-4989 (vacating portion of sentence calling for jail time and probation; "organizations should be

sentenced under R.C. 2929.31 by receiving higher fines and no jail time if they are convicted"). R.C. 2929.31 provides the sole sentencing schemata for organizations. Nowhere in R.C. 2929.31 does the statute allow a judge to impose probation. R.C. 2929.31 specifically constrains a judge's authority in sentencing an organization to issuing higher fines. A trial court lacks authority to impose any sentence not expressly stated in the relevant sentencing statute. The relevant sentencing statute does not authorize the issuance of community control sanctions upon organizations; as such the Trial Court was limited in imposing higher fines upon the organization.

Further, Municipal Courts are courts of limited jurisdiction and may only exercise that authority which is *specifically* given to them by statute. *Ford v. Ohio Dept. of Rehab. & Correction, 10th Dist. Franklin* No. 05AP-357, 2006-Ohio-2531, ¶ 40 ("courts of limited jurisdiction have no such inherent power and have only such power to punish for contempt as conferred by statute."). The Ohio Supreme Court has repeatedly reiterated that Municipal Courts are statutorily created courts of limited jurisdiction. *State ex rel. Talaba v. Moreland,* 132 Ohio St. 71, 71, 5 N.E.2d 159 (1936) (in Ohio, municipal courts are created by statute); *State ex rel. Peterson v. Miday*, 175 Ohio St.3d 290, 2024-Ohio-2693, 242 N.E.3d 17, ¶ 19 **("[i]t is well established that municipal courts are courts of limited jurisdiction, and their jurisdictional limitations are set by statute").** Specifically, R.C. 1901.011 created the Cleveland Municipal Court's Housing Division. *Cleveland Hous. Renewal Project, Inc. v. Wells Fargo Bank, N.A.*, 188 Ohio App.3d 36, 2010-Ohio-2351, 934 N.E.2d 372, ¶ 25 (8th Dist.). R.C. 1901.181 is the specific statute detailing the limited jurisdiction of the Housing Court.

Pursuant to R.C. 1901.181, with regard to criminal actions:

> [T]he housing or environmental division of a municipal court has exclusive jurisdiction within the territory of the court in any criminal action for a violation of **any local building, housing**, air pollution, sanitation, health, fire, zoning, or safety code, **ordinance, or regulation applicable to premises used** or intended for use as a place of human habitation, buildings, structures, or any other real property subject to any such code, ordinance, or regulation.

The territory of the Housing Division is Cleveland, the Housing Division is thus limited to "any criminal action for a violation of any **local building [or] housing *** ordinance"**. Pursuant to C.C.O. 3103.99(c) – "[o]rganizations convicted of an offense **shall be fined** as provided by R.C. 2901.23 and 2929.31." *Id.* (emphasis added). C.C.O 3103.99(c)- the authority for which the Housing Division is limited to, specifically and unambiguously provides that the punishment for an organization found guilty of any its ordinances **shall be a fine**. Therefore, the Housing Division is limited both by statute *and* local ordinance to imposing higher fines in accordance with R.C. 2929.31.

The trial Court (Housing Division) must impose the penalty mandated by the legislature and has no authority to impose a punishment less than or greater than what is provided by ordinance. See, *State v. Purdy,* 1st Dist. Hamilton APPEAL NO. C-010206, 2001 Ohio App. LEXIS 5036, at *6 (Nov. 9, 2001) ("Crimes are statutory, as are the penalties therefor, and **the only sentence which a trial court may impose is that provided for by statute. A court has no power to substitute a different sentence for that provided for by statute or one that is either greater or lesser than that provided for by law.")** *Id.* (emphasis added). Any deviation from statute is impermissible and renders the sentence void as a trial court imposing the sentence has no subject matter jurisdiction to impose the sentence. *Id.*

The Trial Court (Housing Division) - which is a municipal court of very limited jurisdiction as opposed to a county court –greatly exceeded its authority when it went beyond the bounds of R.C. 2929.31 and C.C.O. 3103.99(c) in issuing its sentence/ probation violation restrictions upon Defendant. Ohio law dictates that all courts must follow the relevant sentencing statute when issuing their sentences and municipal court's do not possess any authority beyond that which is statutorily conferred upon them to punish. C.C.O. 3103.99 is the sole authority the Housing Division is governed by when imposing it sentences. Pursuant to C.C.O 3103.99(c), "organizations convicted of an offense **shall be fined** as provided by R.C. 2901.23 and 2929.31." Thus, the Trial Court is specifically limited to sentencing organizations to the fine schedule in R.C. 2929.31. Moreover, even under R.C. 2929.31, when sentencing organizations, community control sanctions are not authorized.

"Regardless of any court's personal view of the wisdom of a specific sentencing system, 'arguments for and against particular sentencing schemes are for legislatures to resolve'." *State v. Eaton*, 2022-Ohio-1340, 188 N.E.3d 658, ¶ 17 (2d Dist.). For the foregoing reasons, Defendant requests that its Assignment of Error No. 2 be sustained. If Defendant's Assignment of Error No. 2 is sustained, the Assignments of Error relating to the community control/ probation restrictions are mooted.

III. <u>ASSIGNMENT OF ERROR 3:</u> THE TRIAL COURT'S CONDITIONS OF COMMUNITY CONTROL ARE UNWARRANTED BY LAW, DO NOT RELATE TO REHABILITATION OR THE UNDERLYING OFFENSE AND ARE NOT NARROWLY TAILORED/ ARE OVERBROAD.

The Trial Court's decision to impose its community control restrictions are unwarranted by law. A Trial Court's authority to impose community control conditions are not limitless and must be warranted under existing law. *City of Cleveland v. City*

Redevelopment LLC, 8th Dist. Cuyahoga No. 113651, 2024-Ohio-5213, ¶ 7; *State v. Jones,* 49 Ohio St. 3d 51, 53, 550 N.E. 2d 469 (1990). A community control restriction may be warranted when it satisfies *all* of the following conditions:

> (1) [it] is reasonably related to rehabilitating the offender;
> (2) has some relationship to the crime of which the offender was convicted, and
> (3) relates to conduct which is criminal or reasonably related to future criminality and
> [4] serves the statutory ends of probation.

Id.; State v. Braxton, 8th Dist. Cuyahoga No. 91881, 2009-Ohio-2724, ¶ 40*; State v. Chapman,* 163 Ohio St.3d 290, 2020-Ohio-6730, 170 N.E.3d 6, ¶ 8. **A condition of community control must additionally be narrowly tailored to achieve rehabilitative purposes without imposing unnecessary restrictions on the defendant's liberty.** *State v. Chapman*, 163 Ohio St.3d 290, 2020-Ohio-6730, 170 N.E.3d 6, ¶ 17; *State v. Wagener*, 6th Dist. Lucas Nos., 2022-Ohio-724, ¶ 18 . In *City of Cleveland v. Southwest Invests. LLC*, 8th Dist. Cuyahoga Nos. 112485, 112486, 112683, 2024-Ohio-1271, (concurring opinion), this Court recently reviewed similar community control violations, including a no sale provision and stated it had "significant concerns with the pattern employed in the housing court, including its use and implementation of overly punitive conditions of community-control sanctions in cases involving corporations or limited liability companies"). *Id.* ¶ 35. The instant case herein presents the same overly punitive conditions of community control that have no relationship to the underlying crime and impose unnecessary restrictions on Defendant's liberty.

A. The Trial Court Abused its Discretion by Implementing the No Sale Provision.

i. The No Sale Provision Does Not Relate to Rehabilitation

In this matter, the No Sale Provision does not satisfy any of the necessary conditions warranting its imposition. A restriction on the "selling, gifting, or transferring of any property it owns within the City of Cleveland" (referred to as the "No-Sale Provision"), is an improper condition of community control. *City of Cleveland v. City Redevelopment LLC*, 8th Dist. Cuyahoga No. 113651, 2024-Ohio-5213, ¶ 10. With regard to condition one, nothing in the record suggests that the No Sale Provision will have any effect on 'rehabilitating' Defendant. Rehabilitation has been defined as "[t]he process of seeking to improve a criminal's character and outlook so that he or she can function in a society without committing other crimes." *City of Cleveland v. Southwest Invs. LLC*, 2024-Ohio-1271. One way for a property to remediate repair issues at a property is to sell or transfer it to company who can afford the repairs; a provision barring the sale or transfer of property does more to hinder a properties' rehabilitation than to aid it.

ii. The No Sale Provision Does Not Have Any Relationship to the Underlying Infractions and Does Not Relate to Criminal Conduct

The Complaints specifically charged Defendant with failing to comply with a Notice of Violations pertaining to elevator operation/decommissioning and the requirement to have a city inspection to certify the elevators. (C.C.O 3141.15, 3141.16 and C.C.O 3141.05). (Complaints, Notice of Violations). Thus, the charges relate to elevators. The failure to adhere to building code violations is not inherently criminal but rather a matter of regulatory enforcement. (See, C.C.O. 361.02, Purpose [of Housing Code], "the purpose of this Code is to establish minimum standards necessary to make all dwelling structures safe ; *** fix responsibilities for owners ***; establish enforcement procedures[.]" (i.e., the purpose of the Housing Code is not punitive).

Additionally, the relationship between Defendant's conduct and the No Sale provision are unrelated and nothing in the record supports their relationship. This Court has previously dealt with this exact proposition of law and specifically held that the trial court (Cleveland Municipal Court Housing Division) abused its discretion when it prohibited an LLC's ability to sell or transfer its property due to violations of the Housing and Building Code. *City of Cleveland v. City Redevelopment LLC*, 8th Dist. Cuyahoga No. 113651, 2024-Ohio-5213, ¶ 9. In *City Redevelopment LLC*, this Court specifically held:

> [T]he prohibition of the sale of the subject Property in this case does not share some relationship to the failure-to-comply convictions because the Property was in full compliance at the time of sentencing. *** There is no correlative connection between the facts supporting the Company's convictions in this case and the ban placed on the Company's ability to sell its other properties in the city. Thus, we cannot conclude that the lawful sale or transfer of the subject Property or the Company's other properties is reasonably related to the risk of future criminality.

Id. ¶ 10.

Further, community control sanctions must be narrowly tailored to achieve rehabilitative purposes **without imposing unnecessary restrictions on the defendant's liberty.** The right to acquire, possess, and dispose of property is a fundamental right recognized and protected by the Ohio Constitution. *Norwood v. Horney*, 110 Ohio St.3d 353, 853 N.E.2d 1115, 2006 Ohio 3799, ¶ 38:

> **The rights related to property, i.e., to acquire, use, enjoy, and dispose of property, are among the most revered in our law and traditions. Indeed, property rights are integral aspects of our theory of democracy and notions of liberty**. ***
>
> Believed to be derived from a higher authority and natural law, **property rights were so sacred that they could not be entrusted lightly to 'the uncertain virtue of those who govern.'** ***. As such, property rights were believed to supersede constitutional principles. To be *** protected and *** secure in the possession of [one's] property is a right inalienable, a right which a written constitution may recognize or declare,

> but which existed independently of and before such recognition, **and which no government can destroy.**

Id. ¶ 34- 35 (internal citation omitted, emphasis added). It is clear that the right to acquire, use, enjoy, and dispose of property are fundamental, sacrosanct liberties deserving the highest protections.

For a community control sanction to be appropriately "narrowly tailored", aside from being reasonably related to rehabilitation and the offense, it "must target and eliminate no more than the exact source of the issue it seeks to remedy" (See, *State v. Wood,* 4th Dist. Scioto No. 03CA2901, 2004-Ohio-3879, ¶ 17, analyzing whether a criminal statute was 'narrowly tailored'), and consider the legitimate state's interests in implanting the condition against the defendants protected interests. *State v. Emery*, 12th Dist. Clermont No. CA2014-09-062, 2015-Ohio-1487, ¶ 15. See also, *State v. Chapman*, 163 Ohio St.3d 290, 2020-Ohio-6730, 170 N.E.3d 6, ¶ 19 (a community control condition that implicates a fundamental right imposes a more severe punishment than one that does not and therefore requires that "the justification must be more exacting so as to ensure that the condition does not limit the probationer's liberty more than is necessary to achieve the goals of community control").

In *Emery*, in analyzing whether a no-uninvited-contact condition of community control was narrowly tailored, the court considered the state's strong and compelling interest in protecting children of domestic violence against the parent's "constitutionally protected interest in their family integrity." *State v. Emery*, 12th Dist. Clermont No. CA2014-09-062, 2015-Ohio-1487, ¶ 15. The *Emery* court "counterbalanced" the competing legitimate interests and ultimately held that a "no-uninvited-contact condition, in conjunction with the trial court's directive that contact may be authorized

by CPS or the juvenile court, was narrowly tailored to promote the compelling governmental interest of protecting the safety and welfare of ***a child-victim of domestic violence." *Id.* The Emery Court reiterated that the sanction was narrowly tailored as it "targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Id.* ¶ 16, citing *State v. Burnett*, 93 Ohio St.3d 419, 429, 2001 Ohio 1581, 755 N.E.2d 857 (2001). The 'evil' sought to be remedied was child abuse and the no uninvited contact condition was necessary to protect the child victim from further abuse.

In contrast, in this matter, the Trial Court did not consider Defendant's fundamental rights. The Trial Court did not even identify (and the record does not reflect) any ascertainable legitimate interest the City has in prohibiting defendants from exercising their fundamental property rights. Put another way, there is no clear "evil" sought to be remedied ascertainable from the record; as such, the Trial Court did not narrowly tailor its sanctions. No circumstances exist in the record that warrant the taking of Defendant's fundamental rights to acquire and dispose of its property.

The Trial Court's No Sale Provision severely encroached on Defendant's liberties and was not narrowly tailored. The No Sale Provision serves no rehabilitative purpose, is unrelated to the underlying infraction, and placed an unnecessary restraint on Defendant's liberty.

B. The "Rent Escrow Provision" and Receivership Order are Unwarranted by Law, Do Not Relate to Rehabilitation or the Underlying Offense, and Are Not Narrowly Tailored/ Overbroad, and are a Complete Abuse of Judicial Discretion.

There is no statute, case law, or authority that allows a Judge (especially a judge of limited jurisdiction) to effectively rid a business of access to its incoming cash flow, stop the cash flow, divert the funds to a Court account, and then appoint itself in charge of the

funds, including how and when (or if) the funds can be distributed. The Trial Court effectively – and unlawfully - ordered Defendant into receivership and appointed itself the receiver. When a court orders a non-party to take control of property at issue (or a portion thereof) and to engage in powers reserved for a duly appointed receiver, a court effectively appoints a receiver and must follow the rules applicable to receivership, regardless of what it labels its actions. E.g., *F.T.C. v. World Wide Factors, Ltd.*, 882 F.2d 344, 348 (9th Cir. 1989).

The appointment of a receiver is an extraordinary, drastic and harsh remedy that can only be exercised in specific situations **in accordance with the law**. E.g. *Parker v. Elsass*, 10th Dist. Franklin Nos. 01AP-1306, 02AP-15, and 02AP-144, 2002-Ohio-3340, ¶ 48. R.C. 2735.01 governs the circumstances under which a business may be legally divested of access to its business and a receiver appointed. R.C. 2735.01 states:

> (A) A receiver may be appointed **by the supreme court** or a judge thereof, **the court of appeals** or a judge thereof in the judge's district, **the court of common pleas or a judge thereof** in the judge's county, **or the probate court**, in causes pending in such courts respectively, in the following cases[.]

Thus, **municipal court judges do not have authority to appoint or direct property into receivership**.

Further, the law does not provide that receiverships may be created sue sponte or in criminal matters. R.C. 2735.01(A). Although it should go without saying, the Court cannot appoint itself receiver or put itself in charge of a defendant's income or business cash flow. Receivers are required to be neutral (not involved in or have an interest in the litigation), qualified (capable of executing its duties), and to take an oath and post a bond (R.C. 2735.03). The point of receivership is to be a *pre-trial* remedy to preserve funds in

dispute pursuant to law (i.e. not a punishment). E.g. *Pusey & Jones Co. v. Hanssen*, 261 U.S. 491, 497 (1923). Outside of bankruptcy and probate matters, receiverships do not exist in Ohio.

The Trial Court Judge abused its authority when it created and directed tenant rental payments at the Premises into a Court escrow account, thereby diverting Defendant's incoming cash flow into the hands of the Court, appointing itself in charge of the account, and appointing itself in charge of how those funds can be managed and utilized. The Trial court created a receivership in contravention to law and acted without any statutory authority to do so.

C. The Building Upkeep/ Facilities Management Sanctions Do Not Relate to Rehabilitation and Do not Relate to the Underlying Crime.

Except for Provision No. 20, "Defendant is ordered to submit a contract for a certified and bonded elevator company to make repairs to the elevators at the cited property, including costs and when elevator repairs will begin", the remaining Trial Court sanctions were unwarranted and do not relate to the underlying charges. The Trial Court's sanctions imposed an unbridled profusion of overboard sanctions wholly unrelated to the underlying infraction. The underlying infraction concerned elevators. The underlying violation did not concern issues with property maintenance or financing. It is abundantly clear that the remaining community control sanctions are not reasonably related to rehabilitating the offender and do not bear any relationship to the underlying violation.

Further, the conditions are overly broad and sweeping as opposed to narrowly tailored. The basic dictionary definition of "Narrow means "limited in size or scope." (Merriam's Webster Dictionary). Similarly, a trial court may impose community control sanctions only so long as the sanctions are not "overbroad". *N. Olmsted v. Rock*, 2018-

Ohio-1084 ¶ 32 (8th Dist.). The definition of "overbroad" is "too widely applicable or applied". There is nothing "narrow" about the Trial Court's Sentence – it is all encompassing and unlimited in its demands. The Sentence fits the verbatim definition of "overbroad", as the Sentence could be applied to any defendant charged in the Housing Court since it lacks any specificity and no relationship to the underlying violation. It is evident from recent cases before this Court, cited above, that the Trial Court applies the same boilerplate restrictions indiscriminately in nearly every case. (E.g., *City of Cleveland v. Sorjack*, 8th Dist. Cuyahoga No. 113697, 2024-Ohio-6018).

For the foregoing reasons, the Sentence's community control violations do not satisfy the test in *State v. Jones,* 49 Ohio St. 3d 51, 53, 550 N.E. 2d 469 (1990) warranting their imposition and are overly broad.

IV. ASSIGNMENT OF ERROR 4: THE TRIAL COURT ERRED IN IMPOSING A FINE IN EXCESS OF THE MAXIMUM ALLOWABLE FINE FOR FIRST DEGREE MISDEMEANOR CHARGES.

The Trial Court did not issue a sentence on Counts 2-3 in any of its sentences; it issued sentences on **Count 1** only in the amount of $10,000. (Sentence, P. 2, Section II). However, the maximum fine allowable on Count 1, a first-degree misdemeanor brought against an organization, is $5,000. R.C. 2929.31. The Trial Court's imposition of a $10,000 fine was blatantly excessive.

Assuming, arguendo, that the Judge had meant to separately sentence on each Count, this is not what the Sentence reflects. If the Trial Court had issued a separate maximum punishment on each count ($5,000 on each Count), the Court would have erred in failing to merge the sentences. When a defendant is found guilty of allied offenses of similar import, R.C. 2941.25 *requires* that the counts merge for purposes of sentencing. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 26. ("R.C.

2941.25(A) clearly provides that **there may be only one conviction for allied offenses of similar import**.") *Id.* The purpose of merger is to protect individuals from receiving multiple punishments for the same criminal act in violation of the double jeopardy protections afforded by the U.S. and Ohio Constitution. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 23. As stated by the Ohio Supreme Court in *Underwood*, "a trial court is prohibited from imposing individual sentences for counts that constitute allied offenses of similar import. A defendant's plea to multiple counts does not affect the court's duty to merge those allied counts at sentencing. **This duty is mandatory, not discretionary**." *Id.* ¶ 26.

In this matter, the offenses were allied offense of similar import under R.C. 2941.25 and the relevant test set for determining whether offenses are allied. See, *State v. Earley*, 145 Ohio St.3d 281, 2015-Ohio-4615, 49 N.E.3d 266, ¶ 12. The offenses were identical in significance, committed at the same time, and not committed with separate motivations. The underlying infraction was related to elevator repairs and their decommissioning from the period of September 9 -11 at the Premises. (See, Complaints). Regardless of the duty to merge, the Sentencing Entry reflects that the Judge did only Sentence on Count 1 of each of the Complaints, and was thus limited in its punishment to assess the maximum fine for one count - $5,000. The Trial Court erred in issuing a sentence above the maximum allowable penalty; Appellant respectfully requests that this Assignment of Error be sustained.

V. CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the Trial Court's finding on the suppression motion and grant Defendant's Motion to Suppress. If this Honorable Court does not reverse the finding on the Motion to Suppress,

Appellant respectfully requests that this Court vacate the probation/ community control portions of Defendant's sentence and limit the financial penalty to the maximum fine allowable under Ohio law for a first degree misdemeanors against an organization, which is $5,000; the Trial Court only sentenced Defendant on Count I and merger requires that it be limited to sentencing on one Count.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Appellant was sent by email to the City of Cleveland c/o David Robers, Esq. via this court's electronic filing system on 7/1/2025 to **droberts3@clevelandohio.gov**

/s/ Rachel Cohen
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