CRIMINAL ACTION
NO. 96-10/3/7/8/81

INSPECTIONAL SERVICES DEPARTMENT

VS.

DAVID C. PARKER

ORDER

This case commenced by way of a Criminal Complaint. The case, by agreement of the parties, was transferred to the civil docket. The government asks for a preliminary injunction.

In reading the briefs of the parties, it is doubtful whether the defendant would have been held criminally responsible as the Complaint alleged and therefore had to prove that the defendant had willfully, intentionally, recklessly or repeatedly failed to comply with the order of the inspector. The Court has no doubt that the defendant has acted in good faith, and that he has not in anyway affected the tenant's occupancy. Furthermore, in the contaxt of a criminal case, a law is too vague. On the civil side of the Court, giving due respect to the agency, the law is enforceable. Clearly, the sub-metering system violates 105 C.M.R. 410.354. Thus, the defendant has to obey the order of the inspector to correct.

The Legislature has delegated to the Department of Public Health (hereinafter, the "Department") the authority to adopt and amend the State Sanitary Code, 105 CMR 400.00 and 410.000. This

authority is broad in scope, as the code shall "deal with matters affecting the health and well-being of the public", M.G.L.c. 111, §127A. Because of this broad scope of authority, the Department's interpretation of terms used in the Code should be persuasive. An agency's construction of its own regulation is due considerable deference. Therrien v. Labor Relations Comm'n, 390 Mass. 644, 650 (1983); Greenleaf Fin. Co. v. Small Loans Regulatory Bd., 377 Mass. 282, 293 (1979); Amherst-Pelham Regional School Comm. v. Department of Education, 376 Mass. 480, 491 (1978). There is a "formidable burden" in attempting to overcome an agency's determinations. Northbridge v. Natick Department of Social Services, 394 Mass. 70, 74 (1985).

The Department of Public Health has determined that the word "meter" means:

> "a meter installed, inspected, maintained, and read by a utility company subject to the jurisdiction of the Massachusetts Department of Public Utilities."

In addition, the Department states that the "plain language of the Sanitary Code also supports this interpretation".

Although the Department's determination is articulated in an Opinion Letter as opposed to a more formal decree, this determination should be given its due deference as a rational interpretation of a term used in the regulation the Department is authorized to promulgate and enforce. Regardless of any merits to an owner-installed sub-metering system, such as promoting energy

conservation by occupants, or that the specific system in question is accurate and fair, the Legislature and the Department of Public Utilities have both spoken; absent new legislation or provisions amended to the Code, sub-metering of this kind is not acceptable, no matter how well such a system is maintained and operated.

Because the sub-meters installed by the defendant do not fall within the Department's definition, the landlord must provide (and pay for) gas service for heat unless the provisions of the Sanitary Code are met.

The Code's stated purpose is to "protect health, safety and well being of the occupants of housing and the general public ..." 105 CMR 410.001 (emphasis added). The term "well-being" is included to address not only issued related directly to health and safety, such as asbestos, lead paint and egress, but also to issues related to the general well-being of occupants. The Code promotes the well-being of occupants by including certain consumer-protection provisions intended to address the economic interests of occupants as they relate to their contractual relationship with their landlord. Such provisions include:

> . owner must maintain free from defects any owner-installed optional equipment such as refrigerators, dishwashers, clothes washing machines and dryers, and garbage grinders, 105 CMR 410.351(B);
>
> . where applicable, a rental agreement shall state that occupant pays for common area lights, 105 CMR 410.254(B)(1);

. owner shall provide oil unless such oil is provided through a tank serving only that dwelling unit, 410.355;

. a written letting agreement is required when the occupant is responsible for paying for heat, electricity or gas, 105 CMR 410.201 and 3.44.

These provisions protect occupants from paying for equipment or services which are either defective (e.g., an inoperative owner installed dishwasher), or not under the exclusive control or use of the occupant (e.g., gas which is metered through a meter which does not serve only that occupant's unit). Written letting agreements showing that the tenant pays for certain services insures that the tenant understands that he or she is responsible for utility bills. All these provisions help protect the occupant's economic well being, as opposed to purely health or safety interests.

Where a landlord owns the meter, maintains and reads them, then issues bills to tenants, he acts as an unregulated utility company. There is no neutral entity testing this equipment. The possibility for error is enormous, causing economic harm to occupants. While meters provided by utility companies must be sample-tested to ensure accuracy pursuant to M.G.L.c. 164, sub-metering systems are not increasing the probability that such systems are inaccurate. In addition, mistakes in the landlord's reading of sub-meters or his billing procedures may cause a tenant to pay more than their actual share of the entire building's gas

bill.

Finally, where the landlord controls the metering system, the chance for intentional abuse is ever present. All tenants may be overcharged, providing a windfall for the landlord, or one tenant may be overcharged for utility use, in effect subsidizing other tenants' bills. The occupancy has no means to challenge these bills. On the other hand, if Boston Edison customers dispute their bills or service termination, they have a means of redress pursuant to 220 CMR 25.00. (See Boston Real Estate Board v. Dept. of Public Utilities, 334 Mass. 477 (1956).

While at the present time the tenants are not being irreparably harmed, since the State Sanitary Code allows the government to seek equitable relief, the government need not show irreparable harm. The government has a right to require compliance with the State Sanitary Code to preserve the public good, even if there is no showing of irreparable harm. The State Sanitary Code prohibits a landlord from charging occupants for utilities where the meters used are not installed, maintained and read by a duly authorized utility company regulated by the Department of Public Utilities. While the defendants have not yet charged the tenants for the heat provided, clearly he desires to do so. Until and unless he gets a waiver, this cannot be done. The Court will issue a preliminary injunction against David C. Parker, from charging the occupants at 34 East Concord Street, Boston for utilities where the

meters used are not installed, maintained and read by a duly authorized utility company regulated by the Department of Public Utilities.

The Court will deny the defendant's Motion to Consolidate. The Court perceives no reason to allow the motion.

It does not seem that the Department of Public Health should re-write 105 CMR 410.354. The Court does take notice of the defendant's argument that in rural Massachusetts, refillable propane gas tanks without calibrated meters are utilized, and the cost are passed off to the tenant. It does seem that this system does not allow lower heating costs, and is conducive to conservation. In the case at bar, the Court finds the defendant had acted in good faith, and would not have overcharged his tenants for utility use. But this Court is not the Department of Public Utilities, and cannot grant a waiver. It does seem that in these days of deregulation, the Department of Public Utilities should make some accommodation to these set of circumstances, and set up mechanisms to insure that tenants will not be overcharged.

E. GEORGE DAHER
CHIEF JUSTICE

Date: March 14, 1997

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