

LISTERS' RIGHT TO INSPECT PROPERTY WITHOUT PERMISSION UNDER APPEAL

Another case, which is currently on appeal to the Vermont Supreme Court, has implications for how listers conduct their work. *State v. Tripp*, Nos. 581-6-99 Cacr and 575-6-99 Cacr (Caledonia District Court, Oct. 22, 1999). In May of 1999, two listers for the Town of Walden were appraising a residential property. They noticed a new addition on the house next door, and went there to get information about it. They knocked on the door, no one answered, and they then walked around the outside of the house and took measurements of the addition. On the side of the house, they saw a number of marijuana plants in buckets about 15 feet from a basement door. Later in the day, one of the listers went to the police and gave a sworn statement about the plants. The police used this information to get a search warrant, and then conducted a search and seized the plants and other drug paraphernalia. The two residents of the house were charged with cultivation and possession of marijuana.

At a pre-trial hearing, the defendants, Mr. Tripp and Ms. Schofner, moved to suppress the seized evidence on the grounds that listers are government agents for purposes of the Fourth Amendment to the U.S. Constitution. The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . ." Simply stated, if listers fall into the category of government agents, they cannot conduct a search without the consent of the home's resident or a search warrant. The question at the pre-trial hearing focused on whether non-law enforcement government activity, such as what listers do, is a "search" or "seizure" under the Fourth Amendment. Judge Cook of the Caledonia District Court agreed with the defendants that the listers are government agents and that they had conducted an unreasonable search. It is clear, from rulings by the United States Supreme Court, that the Fourth Amendment's warrant requirement covers regulatory searches such as OSHA inspections and searches by municipal health and safety inspectors. Relying on these cases and a case from the federal Ninth Circuit Court of Appeals, Judge Cook reasoned that because listers appraise property to ensure compliance with the tax laws, they "elicit a benefit for the government in either its investigative or administrative capacities." *United States v. Atton*, 900 F.2d 1427, 1430 (9th Cir. 1990). Under that standard, he decided that they are limited by the requirements of the Fourth Amendment.

Judge Cook further ruled that the particular search in this case was unreasonable. The reasonableness of a particular search requires the court to balance the type of intrusion to the individual against the governmental interests in conducting the search. Here, Judge Cook reasoned, the listers had no immediate need to conduct the measurements that day, and the home's residents had a strong interest in protecting the privacy of the area immediately surrounding the house. He concluded that the evidence seized by the police, based on the lister's information, should be suppressed.

The State has appealed the case to the Vermont Supreme Court. Until the Court issues its decision (which will take a few months at a minimum), we offer the following advice to listers. Listers should always get consent to examine property for appraisal purposes. This may be done either by knocking on the door and getting permission from the occupant, or calling ahead and telling them when you plan to view the property.

If the occupant gives you verbal permission to go on the outside of the property when he or she is not home, that is fine. Be sure to make a written note of this consent, and the date it was given, in your file. If the occupant refuses you entry to the property after you have explained why you need to go there, you should list the property as accurately as you can from the information you do have. If the taxpayer grieves his or her assessment, there will need to be a viewing of the property during the grievance process.

This is an important case, and we will report the Supreme Court's decision to you as soon as we have it. In the meantime, getting consent from the property owner to do an appraisal is the course you should take.

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