

202002015



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Date: October 12, 2020

To: Members of the Law & Public Safety Committee

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From: Andrew W. Garth, Interim City Solicitor *AWG*
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Subject: **Legality of No Knock Search Warrant Ban Ordinance**

This opinion addresses legal issues concerning state law and the City Charter in connection with prohibition of no-knock search warrants by the Cincinnati Police Department ("CPD").

Summary

In order to prevent state preemption issues and comply with City Charter limitations, Council efforts to ban or limit the use of no-knock search warrants by CPD officers must be undertaken through the exercise of the City Manager's authority over the oversight and operation of the Police Department.

The Ohio Revised Code ("O.R.C.") generally provides that a law enforcement official must "give notice of his intention to execute the warrant and then be refused admittance" prior to nonconsensual entry to execute a search warrant.¹ But the O.R.C. also provides that a law enforcement officer, prosecutor, or other authorized individual may ask the court for a "no-knock" warrant for nonconsensual entry under limited circumstances. If City Council were to enact an ordinance to legislatively contradict or invalidate the O.R.C.'s warrant provisions in Cincinnati, such a law could be vulnerable to state preemption challenge and raise Charter issues, as described below.

Instead, modifications to the no-knock warrant policies and procedures of the Cincinnati Police Department can be pursued through the City Manager's authority to operate and administer the police department. The City Manager's

¹ O.R.C. § 2933.231.

administrative role over CPD falls within the City's power of local self-government.² The power of local self-government is not subject to state conflict and preemption limitations.

Accordingly, while City Council cannot legislate a change to CPD practices and procedures, City Council can express its position on the use of no-knock warrants via motion, request reports from the Administration regarding the use of no-knock search warrants, and ask questions about their use. The City Manager has the authority to direct the Police Chief and Police Department's work. The City Manager and Police Chief also have the authority to revise the Police Department policies to prohibit unannounced searches.

Legal Background

The Fourth Amendment to the United States Constitution governs how police officers may conduct searches of private property:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

As a result of these Fourth Amendment rights, officers must secure a warrant before searching someone's home or seizing their property. In 1958, the U.S. Supreme Court recognized that police must give notice before making a forced entry, which was extended to all states in 1963 (the "knock and announce" rule).³ In 1995, however, the Supreme Court held the "knock and announce" rule could be considered and dispensed with by a court issuing a search warrant.⁴

The Ohio Revised Code requires "a law enforcement officer or other authorized individual executing a search warrant to give notice of his intention to execute the warrant and then be refused admittance to a dwelling house or other building before he legally may break down a door or window to gain entry to execute the warrant."⁵ However, pursuant to O.R.C. § 2933.231, a law enforcement officer, prosecutor, or other authorized individual *may* include in the affidavit for the

² The Ohio Supreme Court has held that "the organization and regulation of [the City's] police force, as well as its civil service functions, are within a municipality's power of local self-government." *State ex rel. Lynch v. Cleveland* (1956), 164 Ohio St. 437, quoting *Harsney v. Allen*, 160 Ohio St. 36 (1953).

³ *Ker v. California*, 374 U.S. 23 (1963), citing *Miller v. United States*, 357 U.S. 301 (1958).

⁴ *Wilson v. Arkansas*, 514 U.S. 927 (1995).

⁵ O.R.C. § 2933.231 (A)(3) (defining "statutory precondition for nonconsensual entry" as defined in O.R.C. § 2935.12).

search warrant a request for a waiver of this statutory precondition for nonconsensual entry. The affidavit for the waiver must contain:

- (1) A statement that the affiant has good cause to believe that there is a risk of serious physical harm to the law enforcement officers or other authorized individuals who will execute the warrant if they are required to comply with "knocking and announcing" before nonconsensual entry;
- (2) A statement setting forth the facts upon which the affiant's belief is based, including, but not limited to, the names of all known persons who the affiant believes pose the risk of serious physical harm to the law enforcement officers or other authorized individuals who will execute the warrant at the particular residence or other building;
- (3) A statement verifying the address of the residence or other building proposed to be searched as the correct address in relation to the criminal offense or other violation of law underlying the request for the issuance of the search warrant;
- (4) A request, based on these statements, that the judge or magistrate waive the "knock and announce" requirement for nonconsensual entry.⁶

The city associated with a law enforcement officer making the request can be held liable for damages associated with the execution of the search warrant where the statutory precondition to "knock and announce" was waived.⁷ Ohio's legislature, through its enactment of O.R.C. § 2933.231, recognized that no-knock search warrants should be used in very limited circumstances and with multiple levels of scrutiny because there is a statewide interest in protecting the safety of persons within their homes.⁸

Analysis

The City has Home Rule authority to prohibit the Cincinnati Police Department from using no-knock search warrants as a matter of local self-government, but the Manager has sole authority under the City Charter to regulate the Police

⁶ *Id.* (The request must be recorded and the judge must find that the officer will be subjected to a risk of serious physical harm and that the address is correct.)

⁷ *Id.* at (D).

⁸ See *Am. Fin. Servs. Ass'n v. City of Cleveland*, 112 Ohio St.3d 170 (2006) (finding that the Home Rule Amendment was "designed to give the "broadest possible powers of self-government in connection with all matters which are strictly local," but the framers of the amendment did not want to "impinge upon matters which are of a state-wide nature or interest." (quoting *State ex rel. Hackley v. Edmonds*, 150 Ohio St. 203 (1948)).

Department's policies.

I. The City could ban the use of no-knock search warrants under its Home Rule authority.

The Ohio Constitution grants municipalities the authority to engage in self-government and enact laws that do not conflict with the general, police-power laws of Ohio. Specifically, cities can exercise all powers of local self-government and adopt and enforce within their limits such local police, sanitary, and other similar regulations as are not in conflict with Ohio's general laws.

When an ordinance relates to local self-government, the ordinance is a valid exercise of the City's Home Rule authority.⁹ The City can exercise its power of local self-government relating to the regulation of its police department as long as the regulation is not an exercise of police power.¹⁰ The Ohio Supreme Court has held that "the organization and regulation of [the City's] police force, as well as its civil service functions, are within a municipality's power of local self-government."¹¹

A local ordinance "must relate 'solely to the government and administration of the internal affairs of the municipality.'"¹² The Ohio Supreme Court held that a municipality cannot "infringe on matters of statewide concern" even in the regulation of exclusively local matters.¹³ The Ohio Supreme Court provides some guidance regarding when a regulation of the City's Police Department may be preempted by state law:

[E]ven if there is a matter of local concern involved, if the regulation of the subject matter affects the general public of the state as a whole more than it does the local inhabitants the matter passes from what was a matter for local government to a matter of general state interest.¹⁴

A narrowly crafted City ordinance banning the use of no-knock warrants as a matter of CPD policy and procedure within the City limits by CPD officers who are not serving on state or federal task forces would regulate the administration of the Police Department and internal affairs of the City without impinging on other

⁹ *Id.*

¹⁰ *State ex rel. Canada v. Phillips*, 168 Ohio St. 191, 194 (1953).

¹¹ *State ex rel. Lynch v. Cleveland*, 164 Ohio St. 437 (1956) quoting *Harsney v. Allen*, 160 Ohio St. 36 (1953).

¹² *Marich v. Bob Bennett Constr. Co.*, 116 Ohio St.3d 553, 556 (2008) quoting *Beachwood v. Cuyahoga Cty. Bd. of Elections*, 167 Ohio St. 369 (1958).

¹³ *State ex rel. Evans v. Moore*, 69 Ohio St. 2d 88, 89-90 (1982) (holding that local regulations could not except the municipality from state prevailing wage laws).

¹⁴ *Id.* at 90 (quotation marks omitted).

jurisdictions.¹⁵ (In contrast, a broader City ordinance purporting to legislate on the issue of no-knock warrants independent of City Manager authority would raise state preemption issues.) Therefore, a City ordinance banning the use of no-knock warrants by the Cincinnati Police Department is likely permissible under Ohio law without any further Home Rule analysis.¹⁶ Such an ordinance, however, would conflict with the City Charter as set forth below.

II. Council does not have the authority under the City Charter to enact an ordinance banning the police department from requesting a no-knock search warrant.

While an ordinance banning CPD's use of no-knock warrants could be a valid exercise of the City's Home Rule authority under state law, such an ordinance is beyond Council's authority. The Charter delineates the powers and authority of the City Manager and Council. Pursuant to Article IV, Section 1, the City Manager is the chief executive and administrative officer of the City. The City Manager "supervises the administration of the affairs of the city, except as otherwise specifically provided in [the] charter; [sees] that the ordinances of the city and the laws of the state are enforced . . ." and exercises "all other executive and administrative powers conferred by the laws of the state upon any municipal official" except as otherwise provided in the Charter.¹⁷

The Charter vests City Council with "all legislative powers of the city" subject to the terms of the Charter and the Ohio Constitution.¹⁸ The Charter does not provide Council with administrative powers beyond its right to appoint its legislative assistants and clerk. Per the Charter, Council may exercise legislative authority; it may not exercise administrative authority.¹⁹ Council lacks the authority to legislate what is the administrative authority of the City Manager and the Chief of Police – the control and direction of police work.

The City Manager is vested with the authority to appoint the Police Chief, Executive Assistant Chief, and Assistant Police Chiefs.²⁰ The chief of police

¹⁵ *Beachwood*, 167 Ohio St. at 371 (holding that a local regulation that affects only the [City] itself, with no extraterritorial effects, is clearly within the power of local self-government and is a matter for the determination of the municipality.)

¹⁶ It is important to note that the recent trend in the Ohio Supreme Court has been to invalidate local laws, even those appearing to be a power of local self-government, under a theory that the subject matter affects the general public. Therefore, even if a policy banning the use of "no knock" warrants were implemented, there is a chance that a court could invalidate it as conflicting with state law. Such a ruling could then be used to attack the City's ability to regulate its police department in other areas, risking that important decisions about how the department operates would lie in the hands of the Ohio General Assembly.

¹⁷ Art. IV, Sec. 3.

¹⁸ Charter, Art. II, Sec. 1.

¹⁹ Charter, Art. II, Sec. 1 and Art. IV, Sec. 1.

²⁰ Charter, Art. V, Sec. 5.

falls under the control, direction, and supervision of the City Manager and, subject to the approval of the City Manager, is the commanding officer²¹ of the department with control of the direction of the police work.²² CPD officers perform their duties at the direction of the Chief of Police, who is subject to the “control, direction, and supervision of the City Manager.”²³ The Chief of Police is a principal appointive executive officer.²⁴ CPD officers are executive branch officers carrying out administrative duties.

The Police Chief may prescribe rules and regulations for the police department, which must be approved by the City Manager.²⁵ These rules and regulations must comply with policies imposed by the Chief of Police under the direction of the City Manager,²⁶ as well as state laws that establish duties for law enforcement officers across the state when executing search warrants or requesting a waiver for the same.²⁷

The Cincinnati Police Department implemented CPD Procedure §12.700, “Search Warrants/Consent to Search.” This section provides additional requirements CPD officers must meet before requesting a no-knock search warrant.²⁸ The additional requirements balance the preference to “knock and announce” with the safety of the officers. The affidavit supporting the request for the no-knock warrant must be reviewed and approved by a commanding officer (captain or above). Moreover, after the commanding officer reviews the affidavit, that officer contacts the City Prosecutor who also reviews it. The affiant officer meets with a judge or magistrate only after the City Prosecutor reviews the affidavit, where there is another layer of review imposed by O.R.C. § 2933.231. Ultimately, if a no-knock search warrant is issued in the City, it must meet the requirements under the Police Department policies and procedures, the requirements under state law, and go through a judicial review.

III. Well-established exceptions to the “Knock and Announce” could have implications on a local ordinance or policy banning no-knock search warrants.

The law provides police officers significant discretion in the execution of their work as the occupation poses inherent safety risks and dangerous situations for both the officers and the community. As a result, despite any attempt to create local

²¹ The Mayor can take command of the police to maintain order and enforce the law in time of public danger or emergency with the consent of Council. Admin. Code, Art. III, Sec. 2,

²² Admin Code, Art. IV, Sec. 2.

²³ Admin. Code, Art. IV, Sec. 2.

²⁴ Admin. Code, Art. I, Sec. 1.

²⁵ Admin. Code, Art. I, Sec. 7.

²⁶ *Id.*

²⁷ O.R.C. Ann. §737.11.

²⁸ CPD Procedure 12.700.

legislation or CPD rules and regulations banning no-knock search warrants, there may be instances where circumstances not known to officers when they apply for and receive a search warrant dictate officers execute an unannounced, nonconsensual entry instead. It is well-established that law enforcement officers may dispense with the "knock and announce" requirement when they have reasonable suspicion of exigent circumstances regardless of whether the warrant authorizes no-knock entry. When officers do not have a no-knock warrant and enter without knocking due to exigent circumstances, the justification for bypassing "knock and announce" requirements may arise as late as when the officers are at the door. Having a law that completely bans the use of no-knock search warrants under all circumstances could put officers and citizens in danger for truly emergent circumstances. It is also possible that such a policy could lead to lawsuits from the public alleging damages due to the City's policy making a situation, like a hostage recovery, more dangerous or harmful.

Conclusion

The ultimate authority to direct the Police Department and the Police Chief lies with the City Manager. Ohio law does not preempt the City's authority to enact an ordinance banning the use of no-knock search warrants by CPD officers within the City limits. However, Council does not have the authority under the Charter to legislate an ordinance that involves the administration of the Police Department. Council can ask the City Manager to provide a report from the Police Department regarding the use of no-knock search warrants and make recommendations. Administrative changes made to police operations by the Manager and the Police Chief regarding no-knock search warrants should take into account the current holdings of the Supreme Court of the United States and implications of officers' work within other agencies and jurisdictions.

If you have questions, please feel free to contact me or Assistant Solicitor Kate Burroughs at 513-352-4893.