

THE URBAN PROSPECT

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Lead Problem Stymies Legislators

Uncertainty regarding lead paint liability has been a dark cloud hanging over the housing industry for several years. While the City Council and state legislature ponder the difficult issues involved, the legal and financial consequences for the city and for low-income housing are mounting inexorably.

Interior house surfaces covered with lead-based paints have long been recognized as a principal source of lead poisoning in young children, with potentially devastating and irreversible neurological effects. Children are most likely to suffer acute lead poisoning when they eat flaked paint chips or chew on window ledges or other painted surfaces, but recent research suggests that lead dust cast from friction or impact surfaces in the home is a more common contributor to high blood lead levels. Moreover, it is now recognized that rudimentary methods of lead-based paint removal can generate significant health risks by releasing dust, and so remediation must be carefully performed.

New York banned the use of lead-based paint in 1960, but it was not until 1978 that the federal government did so. Consequently, housing built before 1960 is presumed to contain lead-based paint and dwellings built between 1960 and 1978 may also. There are about 1.9 million pre-1960 apartments in New York City, of which an estimated 225,000 are occupied by families with children under seven years old. Although New York has lead poisoning rates below those of many other cities, an estimated 6,000 to 10,000 city children absorb enough lead to produce blood lead levels above the 20 micrograms per deciliter identified by the Center for Disease Control as the threshold for medical intervention.

The difficulty in formulating a lead paint strategy stems from the gravity of the health risks and the costs associated with various remediation strategies. Complete elimination of lead paint in housing can involve replacing all windows and trim, encapsulating walls with new sheet rock, and replacing cabinets, doors and molding — measures that can easily exceed \$15,000 per dwelling unit. Housing experts argue that complete remediation is thus financially impossible for much of the economically marginal low-income housing stock and would cause the abandonment of thousands of housing units. Less costly strategies involve elimination of

the most immediately dangerous conditions, such as peeling or flaking paint or binding doors. Also at issue is the degree of responsibility government should assume for ensuring that remediation is done.

During the past several years there has been a flood of litigation, against both private landlords and the city, to recover damages in cases of lead poisoning. The largest judgment against the city involved a child who was poisoned while living in a city-owned apartment and was awarded \$10 million (a judge later reduced the award). To date, there have been no judgments against the city for failing to perform its regulatory functions, although officials are clearly concerned that if such a precedent were set, the city could be exposed to enormous monetary liabilities.

Aside from raising the costs of maintaining housing (whether publicly or privately owned), the uncertainty regarding lead poisoning liabilities has created an insurance crisis for housing providers. Thus far, some 30 property and casualty insurers have been given waivers by the State Insurance Department allowing them to exclude lead liabilities from their coverage. As liability insurance becomes nearly impossible to find for many housing providers, the flow of capital to low-income housing is jeopardized.

City Council Deadlock

New York City's lead remediation policy has been frozen for some time by stringent standards that housing advocates say are impossible to fulfill. Section 27-2013(h) of the city's Housing Maintenance Code (HMC), adopted in 1982, declares the existence of any lead-based paint or similar surface coating material (0.7 milligrams of lead per square centimeter or 0.5 percent of metallic lead content) in a multiple dwelling unit in which a child six years of age or under resides to be an "immediately hazardous" Class C violation. It requires the owner to remove or cover the paint in a manner approved by HPD, and establishes a rebuttable presumption that any peeling paint in a dwelling erected prior to 1960 is lead-based. As with other Class C violations, the agency is authorized under the HMC to undertake remediation work itself and place a lien on the premises in order to recover the cost.

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PUBLIC HOUSING WATCH

Federal Funds to Aid City and State Projects

An agreement between the New York City Housing Authority and the Department of Housing and Urban Development has given city- and state-owned public housing projects new access to federal public housing funds at the same time that budget cuts endanger the future of those programs.

The agreement, brokered by Senator Alfonse D'Amato and announced in July, will permit the Housing Authority (NYCHA) to divert \$230.8 million in unused public housing development funds toward the modernization of city- and state-owned projects. The deal will also shift 2,481 units from the city and state to the federal inventory, while permitting the remaining city- and state-owned projects to utilize federal modernization and operating funds.

The Other Public Housing

During the 1930s, New York launched the nation's first state-assisted and the first municipally-assisted housing programs. Today, NYCHA's inventory of public housing includes 13,904 state-assisted units in 18 projects and another 8,720 city-assisted units in eight projects, which together account for 12.5 percent of NYCHA's total public housing stock. An additional 42 projects financed by the city or state were federalized during the Carter administration.

Prior to last July's agreement, New York's city- and state-assisted housing projects were prohibited from sharing in federal operating and modernization funds, leaving them restricted to the more modest funding streams provided by City Hall and Albany. This has had a substantial impact on the comparative resources of federal and non-federal housing projects. Between 1983 and 1995, the Housing Authority received an average of \$951 per unit per year for the modernization of federal public housing. During that same period, the comparative figures for city and state projects were \$548 and \$284, respectively. Similar disparities exist in the operating subsidies received by the different programs.

Years of underfunding have left city and state housing projects facing NYCHA-estimated critical modernization needs exceeding \$392 million. That figure includes only those conditions rated as poor or requiring replacement — in other words, the repairs necessary to bring city and state projects up to federal standards. Deferred maintenance has compounded the financial difficulties of non-federal projects as uncorrected problems require more frequent maintenance and drive up operating costs. One result: both the city and state public housing programs have completely depleted their reserve funds. This has led to some difficult situations. For example, when an electrical storm blew out an aircraft warning light in a city-assisted project near the end of fiscal year

1993, NYCHA was forced to borrow money to make the repairs in order to avoid being fined by federal aviation officials.

Neighborhood Standards and Unspent Dollars

Between 1991 and 1994, NYCHA received \$230.8 million to build 2,481 new federal public housing units. The money was not used, however, as federal regulations barring public housing construction in areas of high minority or poverty concentration excluded most city-owned sites. Meanwhile, federal cost limitations precluded purchasing new sites that would meet HUD's neighborhood standards. When President Clinton signed a Fiscal Year 1995 rescission bill last July that included \$1.5 billion in cuts to public housing development and modernization, New York's unused and seemingly unusable \$230.8 million was considered a prime target for elimination.

Under the July agreement, all 26 city- and state-assisted projects will share in the \$230.8 million in redirected federal funds. Under federal regulations, activities necessary to address emergency conditions, and meeting the requirements of handicapped access, lead paint testing and other legal mandates will be given priority in the use of these funds. Following rehabilitation, five of the projects with a combined total of 2,481 units will be permanently transferred to the federal inventory. The five projects were chosen both because of their needs and because they provided the same number of units that originally would have been developed using the federal funds.

The remaining 21 city and state projects will be permitted, upon HUD's annual approval, to receive federal modernization and operating subsidies. These projects will not, however, be included in the formula used to determine NYCHA's annual funding levels. As such, their addition will not increase the total amount of funding received from HUD. Furthermore, to remain eligible for these funds the city and state will be expected to continue to meet their financial obligations toward their projects, which would include maintaining funding for modernization and operating subsidies and for servicing bonds.

Budget Pressures Remain

Holding on to the unused federal funds has given NYCHA officials a rare cause for celebration in the midst of an otherwise depressing legislative session. On July 31, the House of Representatives passed an FY96 appropriations bill that provides HUD with \$5.1 billion less than in FY95 (not including FY95 rescissions). Although the bill maintains CDBG and HOME program funding at their FY95 levels, it reduces public housing operating subsidies by \$400 million and cuts public housing modernization by \$1.2 billion, while completely withdrawing funding for public housing development and drug elimination. Compounding the impact of these cuts will be the more than \$6.4 billion in rescissions to HUD's FY95 budget that were approved by President Clinton in July. With much of HUD's FY95 funding already committed, local officials believe the agency will apply the rescissions when it distributes its funds for FY96. ■

Lead

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Litigation initiated by anti-lead activists challenged the agency's performance of its duties under the HMC. In *New York City Coalition to End Lead Poisoning v. Koch* the State Supreme Court found, in a decision issued in 1989, that HPD's regulations failed to conform to the mandate of the HMC. In particular, the court found that HPD's practice of citing Class C violations only in pre-1960 buildings and only on those specific areas where paint is peeling is a direct violation of the agency's statutory duties, and ordered it to comport its regulations to the requirements of the Code. The city's subsequent failure to do so has resulted in contempt citations against it.

HPD claims that it would be prohibitively expensive to remediate all lead-based paint according to current HMC standards — it estimates that the full cost to private owners and the city would total nearly \$30 billion. It also maintains that it is unnecessary from a health standpoint, and many health experts agree.

Most observers believe that formulation of a workable city strategy to minimize lead-based paint hazards in the city's housing stock will require relaxation of the remediation standards now mandated by Section 27-2013(h), but until the past year there was virtually no movement toward compromise.

Stanley Michaels has been the leading advocate of stringent lead-abatement standards within the City Council. Michaels has moved slightly from his previous insistence on a strict adherence to 27-2013(h), but there is still a huge gap between his position and that of more moderate members of the Council. Pursuant to a bill Michaels introduced in June 1994, abatement standards would be temporarily eased, but would eventually return to something approaching those currently in the law.

Under the Michaels bill, prior to January 1, 1998 Class C violations would be served only when lead-based paint in a dwelling unit in which a child six years of age or under or a pregnant woman resides is peeling or is on or covering a deteriorated subsurface. The owner would have ten days to cure the violation by repairing the peeling or deteriorating surface, unless the condition exceeds two square feet or is present in two or more rooms of the dwelling, in which case the owner would be responsible for abating all lead-based paint that is on windows, friction or chewable surfaces, or radiators, baseboards or floors. After December 31, 1997, any peeling lead-based paint in an apartment occupied by a child six years or younger or a pregnant woman would trigger the full abatement requirements.

While easing slightly the abatement standards, the Michaels bill would vastly increase the city's remediation responsibilities. The courts have held that HPD has the right to correct lead violations itself, but is not compelled to do so except in cases where the Department of Health has

identified lead-poisoned children and the owners have refused to comply with orders to abate the hazards. (HPD performs about 800 DOH-referred emergency abatements per year.) The Michaels bill would require HPD to correct all lead violations if the private owner fails to do so within the time provided.

Archie Spigner, who is chair of the Council's Housing and Buildings Committee and is considered to be more sympathetic to the concerns of housing providers, has also drafted a bill to amend 27-2013(h). Abatement standards in the Spigner bill are somewhat less demanding, but it would also require HPD to correct, within fourteen days, violations not corrected by the owner.

In March 1995 the Giuliani administration weighed in with its own bill. In apartments occupied by a child six years of age or under or by a pregnant woman, it would make it the duty of the owner to maintain intact all surfaces containing lead-based paint, to maintain doors so that surfaces do not bind, and to comply with the dust cleanup procedures of the Department when repainting surfaces. The bill would also require owners to encapsulate, enclose, remove or replace all windows containing lead-based paint upon a change in tenancy or pursuant to rules to be promulgated by HPD, regardless of the condition of other painted surfaces in the dwelling. Some housing experts regard the window provisions of the Giuliani bill to be economically unrealistic.

In incorporating a turnover trigger for abatement actions, the administration's bill goes further than either the Michaels or Spigner bills. Turnover provisions can expedite the removal of lead hazards from the housing stock and eliminate the incentive for landlords to discriminate against families with children, but would also result in substantial resources being spent to eliminate lead paint in apartments where there are no vulnerable residents.

The administration's bill would not require HPD to effect corrections of lead-paint violations when the private owner fails to do so. In fact, its preamble contains a finding that Sections 27-2013(h) and 27-2126 of the HMC "were never intended to create a cause of action in damages against the City for alleged failure to enforce the provisions of these sections and to perform cleanup of lead-based paint conditions."

Although a break in the City Council deadlock may still be a long way off, observers hope that the need to find a realistic way to protect children, coupled with growing legal

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pressure on the city and housing providers, will soon force more serious attempts at compromise.

State Houses Disagree

Several pieces of the lead puzzle await action in Albany. Although a significant piece of lead legislation was passed in 1992, the legislature failed to act during the past session on other important matters.

In 1992 the legislature enacted the Lead Poisoning Prevention Act, which vastly expanded the mandatory screening of children in New York State for elevated blood lead levels. This is expected to create a surge in demand for lead abatement services in coming years (the State Department of Health has had the authority to order the remediation of lead hazards in high risk housing units since 1976). Since careless abatement work can increase the health risks to resident children, there is a need to establish some standards of training and certification for lead abatement contractors. Further impetus to establish standards is provided by federal law, which requires a state certification program in order for its localities to receive federal lead-abatement grants. The law permits grantees to utilize the certification programs of other states on an interim basis; HPD has been sending its lead remediation contractors to Massachusetts for certification.

During the past session the Assembly passed a bill creating a mechanism for contractor training, licensing and record keeping under the Department of Health, and prohibiting any contractor or employee without such license from performing lead testing or abatement projects. Sponsored by Arthur O. Eve of Buffalo, it was passed with little expectation that it would be acceptable to the Senate. Real estate interests believe there are some pitfalls in its language and are unhappy that it does not address the standard of maintenance issue.

In order to make lead risks insurable, many believe that the law must specify appropriate standards of maintenance which, if observed by a property owner, would create a presumption that no malfeasance occurred. "Safe-harbor" provisions have been adopted by Maryland, Massachusetts, Minnesota and Rhode Island and are considered by many to be a key to solving the liability insurance problem.

A Senate bill to establish statewide training and certification requirements, which did contain a standard of care provision, languished in committee. That bill, sponsored by Senator Dale Volker, reportedly lost its prime advocate when John Daly left the Senate to join the Pataki administration.

Federal Actions and Inactions

The most significant legislation in the past several years has come at the federal level, but the regulatory follow-up has proven more difficult.

Title X of the Housing and Community Development Act of 1992 constituted the Residential Lead-based Paint Hazard Reduction Act of 1992, considered to be the most significant legislation regarding lead poisoning prevention in two decades. The primary focus of the legislation is on the identification and reduction of lead poisoning hazards in federally-assisted "target" housing, which encompasses all pre-1978 housing (except that for the elderly or the disabled) which is sold by any federal agency, subsidized with federal project-based assistance, or rehabilitated with federal funds. Toward that end, HUD, in consultation with the EPA, the Labor Department, and the Center for Disease Control, was instructed to issue guidelines for the conduct of federally supported risk assessment, interim control and abatement.

Title X also expanded the federal effort to abate lead hazards in private, unassisted housing. The law authorized appropriations of \$375 million over two fiscal years (HPD has received a \$6 million grant). Ironically, \$85 million of the \$140 million appropriated for the current fiscal year was rescinded by the current Congress.

The law also mandated a number of regulatory actions by federal agencies. As required, the Occupational Safety and Health Administration issued regulations in 1993 governing worker exposure to lead in construction activities. Local contractors report, however, that these rules have not had a dramatic effect because exposure levels in most remodeling and remediation activities do not exceed OSHA's thresholds, and the basic and less costly safeguards were already in common use.

The EPA was also mandated to devise standards defining hazardous levels of lead in lead-based paint, household dust, and soil. Because they will pertain to all housing in the nation (not just federally-assisted housing), these standards are considered extremely important and will set the baseline for legislation at other levels of government. However, the agency did not meet its statutory deadline and is reportedly still far from completing its research, especially with regard to dust and soil standards. Even after EPA releases its proposed standards, their importance and scientific complexity promises to make for a protracted regulatory review process.

One regulatory mandate that will soon become familiar to real estate professionals is the Title X disclosure requirement. Prior to the sale or lease of all housing built before 1978, the seller or lessor will be required to provide a lead hazard information pamphlet, disclose any known lead-based paint or any known lead-based paint hazard, and permit the purchaser a 10-day permit to conduct a risk assessment or inspection. HUD and EPA jointly issued proposed rules in November 1994 and the final rules are expected this fall.

Another important outcome of Title X was the formation of the national Lead-Based Paint Hazard Reduction and Financing Task Force, which issued its report in June. The report has been well received within housing circles as a realistic blueprint for accommodating the various interests. ■