# ASSESSING THE IMPACTS OF NEW YORK CITY'S LEAD PAINT LEGISLATION (LOCAL LAW 1 OF 2004) ON THE HOUSING MARKET

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## I. INTRODUCTION

Lead paint in homes has long been recognized as a significant factor contributing to health hazards in many older urban communities. Poor housing quality conditions, including peeling lead-based paint and leaking surfaces, expose children to lead dust, putting them at risk for adverse developmental health effects. Lead hazards in the home are generally known to be the most important factor in early childhood elevated blood lead levels (EBLLs).[1] "The scientific and medical consensus is that a child's primary route of lead exposure is oral ingestion of lead-based paint and lead-contaminated dust and, to a lesser extent, lead-contaminated soil."[2] Nonetheless, many experts accept that the presence of lead hazards in the home is the most likely cause of lead poisoning.[3] This Article therefore proceeds under the assumption that targeting lead hazards in the home is the most crucial step toward eliminating lead poisoning in children.

With the recent enactment of Local Law 1 of 2004 (LL1 of 2004), previously known as Int. 101-A, New York City has taken an aggressive stance against lead poisoning. The law makes landlords responsible for inspecting and correcting lead hazards in multiple family dwellings throughout the city.[4] However, the new legislation has incited controversy within housing, health, and policy circles.[5] This controversy centers around whether LL1 of

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[1] Felicia A. Rabito et al., *Lead Levels Among Children Who Live in Public Housing*, 14 EPIDEMIOLOGY 263, 263 (2003).

[2] Daland R. Juberg et al., *Position Paper of the American Council on Science and Health: Lead and Human Health*, 38 ECOTOXICOLOGY & ENVTL. SAFETY 162, 164 (1997). In general, the authors' review of the scientific literature indicates that the effects of lead ingestion from soil are much less clear than ingestion from home lead hazards, as they depend upon soil type, location, and numerous other variables. *See, e.g.*, Michael D. Lewin et al., *A Multivariate Linear Regression Model for Predicting Children's Blood Lead Levels Based on Soil Lead Levels: A Study at Four Superfund Sites*, 81 ENVTL. RES. 52, 59-60 (1999). Overall, ingestion of soil by children is a minimal route of exposure and will rarely be the exclusive cause of EBLLs so high as to induce lead poisoning in children; it may, however, contribute to intervention-level EBLLs in some extremely limited circumstances. *See id.* Given the paucity of soil surrounding homes in New York City, ingestion of lead via soil seems far less likely to be a cause of lead poisoning than even Lewin's study might suggest.

[3] *See, e.g.*, Rabito et al., *supra* note 1, at 263.

[4] NEW YORK CITY ADMIN. CODE § 27-2056.3 (2004), *available at* http://www.nyc.gov/html/hpd/pdf/lead-local-local1-2004.pdf.

[5] For a brief overview of the controversy, see University Neighborhood Housing Project (UNHP), Lead Poisoning and Prevention [hereinafter UNHP],

2004 will improve housing conditions and the quality of children's health, or will ultimately lead to degradation of the quality of the city's affordable housing stock, resulting in disinvestment in areas already at risk for lead hazards. This Article seeks to examine this question in an effort to shed light on the controversy regarding LL1 of 2004.

As a result of the 1960 prohibition on the use of lead paint in residential housing, lead paint hazards in New York City are mostly located in older homes.[6] While older homes abound throughout New York City, children with EBLLs are primarily found in lower-income neighborhoods.[7] The "Lead Belt," an area stretching across the neighborhoods of Bushwick, Bedford-Stuyvesant, and Fort Greene, as well as parts of central Brooklyn and lower Queens,[8] has the highest incidence of EBLLs and lead poisoning in New York City. This area is characterized by a high number of children per household, older housing stock, and lower income levels.[9] Other areas not located within the Lead Belt have significantly lower proportions of children affected by lead paint hazards.[10]

LL1 of 2004, also known as the "New York City Childhood Lead Poisoning Prevention Act of 2003," took effect on August 2, 2004,[11] and replaces Local Law 38 of 1999, which was invalidated

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*at* http://www.unhp.org/lead.html (last visited Oct. 18, 2004).

[6] *See* Donald A. Lash, *Cost Allocation of Lead Paint Abatement in Distressed Buildings in New York City*, 6 J. AFFORDABLE HOUSING & CMTY. DEV. L. 299, 301 (1997).

[7] *See infra* text accompanying notes 47-52.

[8] For examples of the use of the term "Lead Belt" to describe this band of neighborhoods, see Diane Cardwell, *One-Third of Children in Part of Brooklyn Are Exposed to Lead Dangers, Study Finds*, N.Y. TIMES, June 9, 2003, at B3; Marjory Garrison, *Will the City Get the Lead Out?*, THE BROOKLYN RAIL, Oct. 2003, *at* http://www.thebrooklynrail.org/local/oct03/lead.html; *see also* AMY LAURA CAHN & GABRIEL THOMPSON, THE POLITICS OF POISON 7 (June 2003), *available at* http://www.nmic.org/nyccelp/documents/PACC-Report.pdf. For a brief discussion of the uneven distribution of lead poisoning cases across the city, see ANDREW GOLDBERG & DAVID PALMER, NYPIRG, THOUSANDS OF NEW YORK CITY CHILDREN STILL HAVE LEAD LEVELS ABOVE THE LEVEL SET BY THE FEDERAL CENTERS FOR DISEASE CONTROL AND PREVENTION (CDC) 1-3 (n.d.), *available at* http://www.nypirg.org/lead/whereslead/ReportText.pdf (last visited Feb. 25, 2005).

[9] *See infra* notes 47-52, 395-98 and accompanying text.

[10] *See infra* text accompanying notes 47-52.

[11] Local Law 1, Local Laws of the City of New York (2004) (codified at NEW YORK CITY ADMIN. CODE § 27-2056.1-.18 (2004)).

by the New York State Court of Appeals because of the New York City Council's failure to adequately address the law's environmental and social impacts.[12] LL1 of 2004 is primarily a preventive, building-based approach that requires the abatement of lead-based paint hazards in multiple dwelling units constructed prior to 1960, where children under the age of seven are present. Unlike Local Law 1 of 1982—New York City's first comprehensive regulation of lead paint in residential buildings and the predecessor to Local Law 38 of 1999—the new law does not require the complete removal of all lead-based paint in the home. Instead, it calls for the abatement of lead-based paint hazards such as peeling, cracking, or bubbling lead-based paint.[13] LL1 of 2004 was passed in recognition of the fact that complete removal of lead paint is often unnecessary to ensure the safety and well-being of tenants. The law focuses on correcting the hazards created by lead paint while minimizing the costs landlords face in doing so.

LL1 of 2004 reduces some costs to landlords while it increases others. For instance, it imposes additional remediation safety requirements that increase the per-hazard remediation cost in some instances.[14] LL1 of 2004's focus on prevention targets children most at risk for lead poisoning by decreasing the blood lead level threshold that must be passed before the Department of Health and Mental Hygiene (DOHMH) is required to intervene to prevent lead poisoning. By reducing the threshold EBLL for intervention, or "intervention level," LL1 of 2004 attempts to target children most at risk for lead poisoning because lead hazards in the home left unchecked can result in significant increases in EBLL in a short period of time.[15] The reduced threshold will

[12] N.Y.C. Coalition to End Lead Poisoning (NYCCELP) v. Vallone, 794 N.E.2d 672, 679 (N.Y. 2003).

[13] NEW YORK CITY ADMIN. CODE §§ 27-2056.2(6), (11), -2056.3 (2004).

[14] *See id.* § 27-2056.11. For a discussion of some of the additional remediation costs imposed by LL1 of 2004, see Part IV.B.4.g.

[15] *See, e.g.*, Peter B. Lord, *State to Intervene in More Cases of Lead Poisoning*, THE PROVIDENCE J., May 19, 2001 (quoting a leader of the Childhood Lead Action Project, who argued that a child's EBLL "could jump from fifteen to fifty" in a ninety-day period), http://www.projo.com/cgi-bin/include.pl/extra/lead/aftermath/20010519.htm; *see also* ENVTL. HEALTH DIV., MINN. DEP'T OF HEALTH, MINNESOTA'S LEAD POISONING PREVENTION PROGRAMS: BIENNIAL REPORT TO THE LEGISLATURE 15 (Feb. 2005) (discussing Minnesota's consideration of a lower threshold for mandatory state intervention), *available at* http://www.health.state.mn.us/divs/eh/lead/reports/legislative/2005legreport.pdf; Comm'r of Health, Minn. Dep't of Human Servs., 2004

inevitably increase the number of DOHMH interventions, which, according to the authors' analyses, will result in early identification of more lead paint hazards.[16] Early identification, in turn, will increase the remediation costs to landlords, who will be required to remediate the lead paint hazards that might have remained unidentified under the higher threshold existing prior to LL1 of 2004.

These changes and the uncertainty surrounding their potential impacts have caused a significant stir in New York City, pitting environmental justice advocates against affordable housing advocates. The controversy centers primarily on the financial impact the law will impose upon landlords and tenants. Because most lead paint is located in lower-income housing, affordable housing advocates fear the cost of complying with the new law may result in abandonment or rent increases so large that housing may become unaffordable for many current low-income residents.[17] Environmental justice advocates, on the other hand, fear that inaction will maintain a status quo characterized by non-enforcement by city officials and a consequent worsening of lead poisoning statistics in New York City.[18] This Article's analysis of LL1 of 2004 seeks to dispel some of the misconceptions surrounding the law, as well as to determine the existence and extent of any impacts on affordable housing in New York City. The scope of the analysis, however, is limited to LL1 of 2004's effects upon the provision of private housing; it does not include an analysis of the costs of LL1 of 2004 borne by city and state agencies.[19]

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Legislative Lead Study: Final Report to the Legislature 5-7 ("[L]owering the mandatory environmental intervention level to 10 ug/dL would be most consistent with current public health research. However, the associated costs of that change cannot be supported by current budgets and would seriously disrupt current efforts toward primary prevention."), *available at* http://www.health.state.mn.us/divs/eh/lead/ reports/legislative/2004legreport.pdf.

[16] *See infra* text accompanying notes 237-40.

[17] *See* UNHP, *supra* note 5.

[18] *See generally infra* notes 84-86 and accompanying text.

[19] Projections regarding potential costs to city and state agencies have been made by both New York City's Independent Budget Office (IBO) and the New York City Department of Housing Preservation and Development (HPD). *See* IBO, GETTING THE LEAD OUT: THE FISCAL IMPACT OF INTRO 101A, THE NEW YORK CITY CHILDHOOD LEAD POISONING PREVENTION ACT OF 2003, at i (2003) [hereinafter IBO-FISCAL IMPACT], *available at* http://www.ibo.nyc.ny.us/ iboreports/Intro101Afis.pdf; Letter from Ronnie Lowenstein, Director of the

This Article comprehensively examines lead paint poisoning in New York City from legal, economic, and spatial perspectives, culminating in an analysis of the potential impacts of LL1 of 2004 on private residential landlords, their tenants, and the city's affordable housing market as a whole. Information was gathered through key informant interviews, literature reviews, case studies, census data, and city reports. Spatial analyses were generated utilizing Geographic Information Systems (GIS) mapping of important economic, demographic, and housing features.

Part II begins with a discussion of the incidence of EBLLs and lead poisoning in New York City, noting the demographic and spatial impacts of lead paint hazards. Part III analyzes the impact of existing federal, state, and local lead-based paint legislation on the provision of affordable housing. This Part finds that housing projects under federal and state funding will likely not be impacted by LL1 of 2004, as federal lead-based paint abatement requirements for publicly funded housing already in existence tend to be more stringent than LL1 of 2004. Previous New York City

IBO, to Robert Jackson, Council Member, Council of the City of New York 1-2 (Sept. 10, 2003) (found within the first two pages of IBO-FISCAL IMPACT, *supra*); COMM. ON HOUSING & BLDGS., N.Y.C. COUNCIL, FISCAL IMPACT STATEMENT (1999). Many of the assumptions used throughout this Article to determine the private cost of implementing LL1 of 2004 are derived from these two studies, with heavier reliance on the IBO figures, due to the authors' belief that these figures are more reliable than the HPD numbers. This belief is based on a comparative analysis of the two studies, vacillations of HPD figures, and historically incorrect HPD projections for various assumptions and cost figures. *Compare* COMM. ON HOUSING & BLDGS., *supra*, *and* IBO, RESULTS OF REVIEW OF IBO AND ADMINISTRATION ANALYSES OF THE FISCAL IMPACT OF INTRO 101A (2003) [hereinafter IBO-ADMINISTRATION FISCAL ANALYSIS COMPARISON], *with* Letter from Ronnie Lowenstein to Robert Jackson, *supra*; IBO-FISCAL IMPACT, *supra*. Although the IBO analysis was limited to costs incurred by the city, some of its assumptions and analysis are relevant to predicting the costs borne by private actors and will be used throughout this Article's analysis.

In this Article, the authors estimate the financial impact on landlords and rents. In deriving their estimates, the authors conducted a number of analyses too complicated to describe in any great detail or with adequate coherence in this Article. Accordingly, the authors have singled out a few of their major analyses and assumptions, leaving the rest for review in a spreadsheet on file with the journal. All monetary calculations used in this Article are based upon the information provided in the Article or on calculations that may be found in this spreadsheet. The authors apologize for not including the spreadsheet with the Article, but both the staff of the *New York University Environmental Law Journal* and the authors agree that a printed version of the spreadsheet would have little value for readers without detailing each formula and assumption used—details that would overwhelm the substance of this Article.

lead-based paint laws are also discussed to illustrate important differences between LL1 of 2004 and earlier laws.

Part IV analyzes the potential impacts of LL1 of 2004 on the New York City housing market relative to the impacts of the previous lead bill, Local Law 38 of 1999. The issue of increased owner liability is examined, as well as the potential response of insurance companies to the uncertainty and misconceptions created by both the new law and the controversy surrounding the passage of the law. The authors also consider the private assessment and implementation costs borne by the building owner, finding that operating costs can be expected to rise for units in pre-1960 residential buildings. Part IV also investigates the impacts on mortgage lending, which the authors suggest may be hindered in the short term for pre-1960 rehabilitation projects due to exclusionary lead liability clauses and prohibitively high insurance rates. The Part concludes with an assessment of potential impacts on various city housing markets, examining communities at risk for quality degradation, disinvestment, and abandonment. The authors' findings suggest that the neighborhoods most at risk for lead poisoning may be the most adversely affected by the law.

## II. LEAD POISONING IN NEW YORK CITY

### A. *Historical Incidence and Trends*

Throughout the nation and New York City, the drop in the incidence of EBLLs in the past few decades has been nothing short of spectacular. Between 1976 and 1980, 77.8% of children (and all people age 1 to 74 years old) nationwide had an EBLL of 10 µg/dL or higher.[20] By 1991-94, that figure had dropped to 4.4%.[21] In New York City, child EBLLs have seen a similarly significant decline.[22]

[20] *See* Centers for Disease Control and Prevention (CDC), *Update: Blood Lead Levels—United States, 1991-1994*, MORBIDITY MORTALITY WEEKLY REP., Feb. 21, 1997, at 141 [hereinafter CDC U.S. BLOOD LEAD LEVELS], *at* http://www.cdc.gov/epo/mmwr/preview/mmwrhtml/00048339.htm.

[21] *Id.* Between 1976 and 1980, 24.7% of that age group had EBLLs over 20 µg/dL—the intervention level established by most government agencies—but, in 1994, only 0.4% had EBLLs over 20 µg/dL. *Id.*; Juberg et al., *supra* note 2, at 164-67 (detailing the progressive decline in EBLLs).

[22] NEW YORK CITY DEP'T OF HEALTH AND MENTAL HYGIENE (DOHMH), PREVENTING LEAD POISONING IN NEW YORK CITY: ANNUAL REPORT 2001, at 8 fig.1 [hereinafter DOHMH 2001 REPORT] (indicating that there were 21,575

Prior to LL1 of 2004, the Department of Health and Mental Hygiene (DOHMH) would intervene if a child's blood lead level was at or above 20 µg/dL on any single test or if a blood lead level of 15-19 µg/dL was found on two successive tests taken more than three months apart.[23] In 2001, twelve percent (653) of the newly reported cases had levels above the intervention level.[24] Of those 653 cases, a home visit was performed for ninety-five percent of the EBLL cases, resulting in 443 paint condition abatement orders.[25]

Abatement orders are issued because of the direct connection between undermaintained paint surfaces and EBLLs in older housing. While lead paint in the home remains the leading cause of lead paint poisoning, an increasing number of children with EBLL live in homes with no visible paint hazard.[26] From 1997 to 2001, the percentage of EBLL cases that were correlated with visible lead paint hazards at the home fell from eighty to seventy-one.[27] Therefore, while removal of lead hazards in the home is important to reduce significantly the health hazards of lead and

newly identified cases in 1995; 16,103 in 1996; 12,936 in 1997; 10,817 in 1998; 8146 in 1999; 7194 in 2000; and 5638 in 2001). In 1970, 2649 children had EBLLs greater than 60 µg/dL; by 2001, only six children suffered from levels that high. *Id.* at 5. In 2001, the number of children newly identified as having an EBLL above 45 µg/dL (29) was 90% lower than 1983 levels (284). *Id*. at 9. The annual incidence of new cases of children with EBLLs above 20 µg/dL was between 1400 and 2000 children each year from 1994 to 1996. Jessica Leighton et al., *The Effect of Lead-Based Paint Hazard Remediation on Blood Lead Levels of Lead Poisoned Children in New York City*, 92 ENVTL. RES. 182, 183 (2003). In 2000, only 0.16% of children between six months and six years of age who were tested (519) had blood lead levels above 20 µg/dL. Slightly under eleven percent (674) of newly reported cases of children between six months and six years of age having EBLLs were intervention-level cases. DOHMH lead testing data, obtained from Andrew Faciano, City Research Scientist, Lead Poisoning Prevention Program, DOHMH (on file with journal). The incidence of new cases of children under eighteen years of age with EBLLs above 10 µg/dL has dropped 74% between 1995 (21,575) and 2001 (5638). DOHMH 2001 REPORT, *supra*, at 8.

[23] DOHMH 2001 REPORT, *supra* note 22, at 6. LL1 of 2004 reduced the DOHMH intervention level to 15 µg/dL on any single test. NEW YORK CITY ADMIN. CODE § 27-2056.14 (2004). The implications of this change are discussed in Part IV.B.3.b(2).

[24] DOHMH 2001 REPORT, *supra* note 22, at 6.

[25] *Id*. at 19.

[26] *Id*. at 10.

[27] *Id*. The DOHMH report states that sixty-eight percent of primary and secondary residences of children with intervention blood lead levels contained visible lead paint hazards. *See id*. at 6, 10, 27 tbl.A-2.

will continue to remain important in the near term, such actions may not completely eliminate children's risk of EBLL in the long term.[28]

### B. *Demographic Analysis*

Of the EBLL cases newly identified in 2001, nearly ninety-five percent are Black, Hispanic, or Asian.[29] The effects of lead paint are therefore highly correlated with race. Studies have revealed that this correlation, however, is primarily due to low income, which contributes to lead poisoning not only through poor housing maintenance, but also through poor diet, which increases susceptibility to lead toxicity.[30] Therefore, it has been noted that "[t]he racial and ethnic distribution of lead poisoning probably reflects the fact that children of color in NYC are more likely than white children to be living in poverty."[31] Evidence shows that low-income families living in older housing exhibit EBLLs at a rate four times higher than children from middle-income families living in similarly aged housing.[32]

### C. *Spatial Analysis: Housing Age, Type, and Quality*

There are many different variables to consider when considering the overall level of lead risk for housing units. According to the Alliance to End Childhood Lead Poisoning (AECLP), the major determinants of risk are "housing age; type of construction; occupancy (rental versus homeowner); rental ownership patterns ('mom and pop' versus owners of large multi-family properties); physical condition; and scenarios of poisoning (dilapidation versus remodeling)."[33] The next sections illustrate the relationship between some of these variables and the impact of lead paint legislation, including the distributional effects of those

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[28] *See generally* Anita Weinberg, *Lead Poisoning Threatens Children's Health, Legal System Responds*, 7 PUB. INT. L. REP. 14, 19 (2002) (mentioning other sources of lead that may also contribute to lead poisoning).

[29] DOHMH 2001 REPORT, *supra* note 22, at 6, 14 fig.6.

[30] *See* Kathryn R. Mahaffey, *Nutrition and Lead: Strategies for Public Health*, 103 ENV'T HEALTH PERSP. 191 (1995).

[31] DOHMH 2001 REPORT, *supra* note 22, at 14.

[32] *Id*. at 13.

[33] ALLIANCE TO END CHILDHOOD LEAD POISONING, MAKING LEAD-SAFE HOUSING THE CENTRAL FOCUS OF STRATEGIC PLANS TO ELIMINATE CHILDHOOD LEAD POISONING 6 (2003) [hereinafter AECLP], *available at* http://www.aeclp.org/res/res_pubs/Strategic%20Planning%20Guidance%20Final.pdf.

impacts.

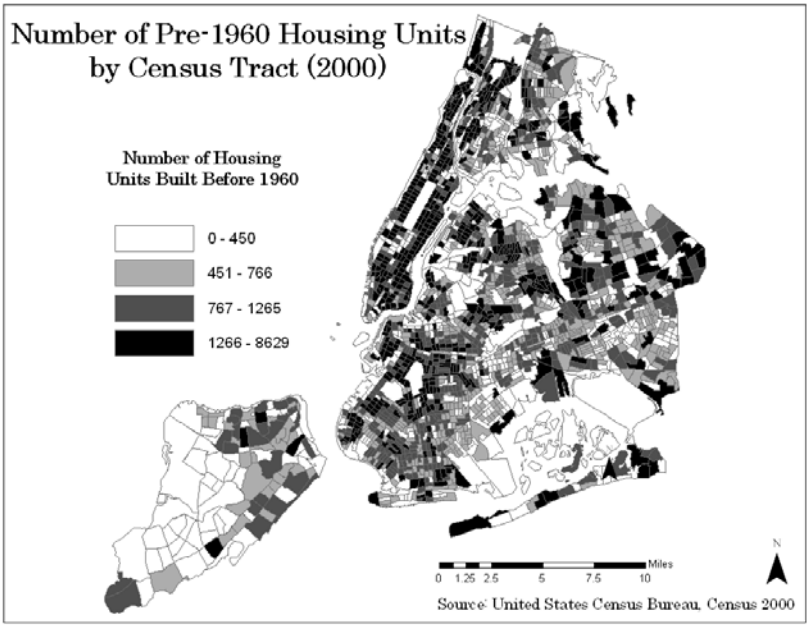
Housing age is the first and most important variable in determining the risk of EBLL in children. Much of New York City's housing stock was built before the ban on lead paint instituted in 1960;[34] the authors estimate that approximately sixty percent of the stock was built before 1960.[35] Because New York City is an older city, the presence of lead paint, and consequently lead paint hazards, in homes is more prevalent than in many newer cities. A Department of Health study demonstrated the heightened risk that a child living in an older building will suffer from an EBLL; the study revealed that eighty-two percent of newly identified cases of EBLL in New York City involved children living in buildings erected prior to 1950, with the majority of cases found in buildings erected prior to 1938.[36]

*Map 1, Number of Pre-1960 Housing Units by Census Tract (2000)*, illustrates that older buildings, though prevalent throughout New York City, are not evenly distributed throughout various neighborhoods. Nonetheless, each of the five boroughs contains concentrations of buildings built before 1960.

[34] Lash, *supra* note 6, at 301.

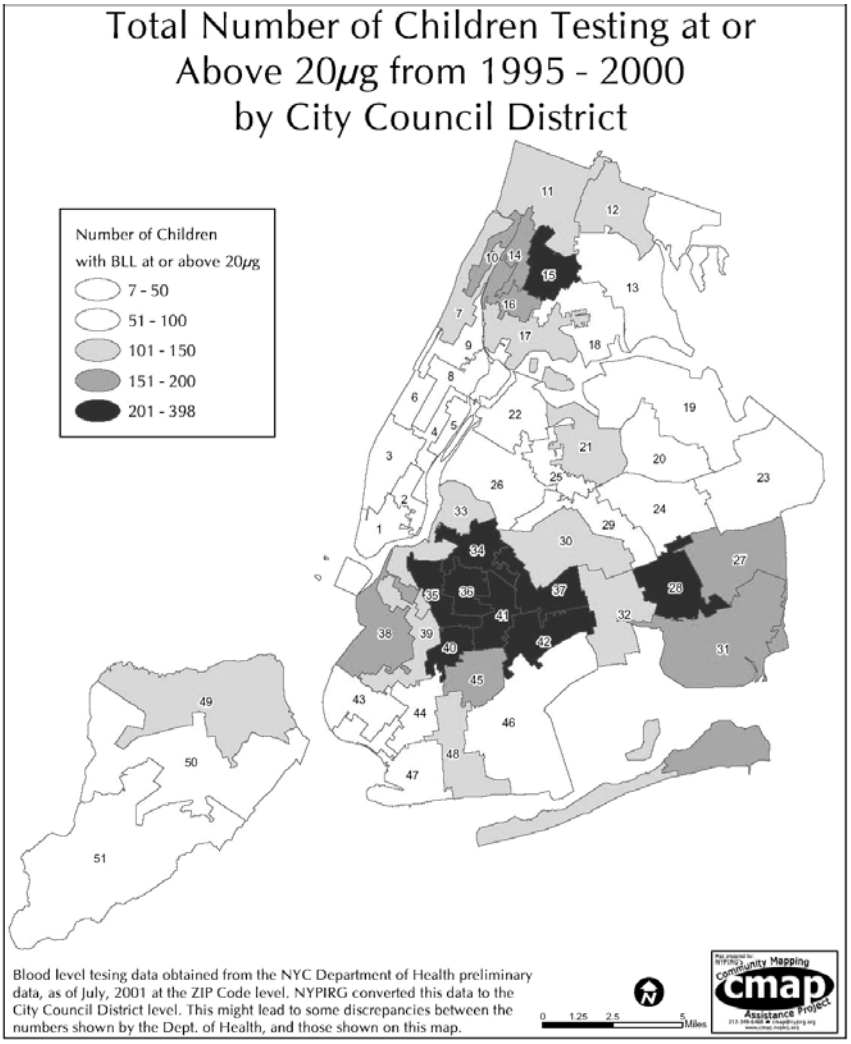
[35] *See* NEW YORK CITY RENT GUIDELINES BOARD, HOUSING NYC: RENT, MARKETS AND TRENDS 2002, 94 app. D, 121 app. G.2 (suggesting that, as of 1999, seventy-five percent of the housing stock was built before 1960) [hereinafter RGB 2002 HOUSING REPORT]; DOHMH 2001 REPORT, *supra* note 22, at 13 (indicating that fifty-five percent of the housing stock was built prior to 1950).

[36] DOHMH 2001 REPORT, *supra* note 22, at 13 (506 of 653 intervention-level cases were in buildings erected before 1938).




Map 1

Because older homes are not evenly distributed throughout the city, the risk that children will be exposed to lead paint hazards and suffer EBLLs is also not evenly distributed throughout the city. Indeed, *Map 2, Total Number of Children Testing at or Above 20 ug/dL from 1995-2000 by City Council District*, indicates that not all city council districts are equally affected by elevated blood lead levels in children.




Map 2

Housing type is also important in determining the spatial impact of lead paint legislation since lead was used more heavily in some construction projects than others. In addition, the turnover and vacancy rates, and number and age of children in residence vary by rental and housing type.[37] Similarly, the presence of peeling paint is correlated to the type of rental unit.[38] Different

[37] *Id.*

[38] *See* U.S. CENSUS BUREAU, 2002 NEW YORK CITY HOUSING AND VACANCY

housing and rental types are not evenly distributed geographically throughout different neighborhoods and boroughs, and therefore the spatial impacts of lead paint hazards and lead paint legislation are not evenly distributed throughout the city.

The median building size is also important in determining the spatial impact of lead paint legislation, since larger buildings can absorb greater cost impacts than smaller buildings, and since a large dilapidated building may have an impact on more children than a small dilapidated building. Knowing which housing or rental type is most associated with lead paint hazards is crucial to identifying appropriate targeted solutions. Since different rental types likely have varying levels of profitability (measured in the study of net operating income (NOI)) and ability to pass increased operating costs on to renters,[39] it is important to pass studies of the impact of bills such as LL1 of 2004 through housing and rental type filters to determine where abandonment and affordability impacts will be greatest. The Alliance To End Childhood Lead Poisoning study notes that "[c]ities frequently find that just a few problem landlords own multiple properties that disproportionately poison children."[40] Although no data is available to quantify the impact of individual landlords, such a result could occur where a single unit poisons multiple children or where a single dilapidated building poisons children living in multiple units. This scenario suggests that targeting solutions to landlords who poorly maintain their properties would yield significant positive results, especially if such landlords owned more than one dilapidated property. As will be discussed below, these "bad landlords" are the landlords most likely to abandon their properties due to cost increases created by LL1 of 2004.[41]

Another important determinant of EBLL is the physical condition of the building. Bad physical conditions are closely correlated with building age. According to 2002 New York City Housing and Vacancy Survey data, 38.2% of renters in pre-1947 stabilized units classified their building condition as "fair" or "poor," compared to 25.2% of renters of post-1947 stabilized units (85% of which were built between 1947 and 1969), 28.6% of

SURVEY, Series IA, tbl.50 [hereinafter 2002 HOUSING AND VACANCY SURVEY], http://www.census.gov/hhes/www/housing/nychvs/2002/s1at50.html.

[39] *See infra* notes 395, 407-08 and accompanying text.

[40] AECLP, *supra* note 33, at 8.

[41] *See infra* text accompanying note 221.

Mitchell-Lama unit residents, 22.6% of controlled rent units (100% of which were built prior to 1969), and 21.8% of all other rented units (82% of which were built before 1969).[42] Similarly, renters of pre-1947 stabilized units considered their units "dilapidated" more often than any other category of renters.[43]

A few poorly maintained properties, if sufficiently large, may contribute disproportionately to lead poisoning in a particular area. Approximately seven percent of the rent-stabilized units in New York City are "distressed" (formally defined as when monthly carrying costs exceed the building's cash flow),[44] ninety-five percent of which were built before 1947.[45] As noted above, approximately eighty percent of newly identified intervention-level cases were children living in pre-1947 structures. Pre-1947 distressed stabilized buildings, though generally containing fewer than 100 units,[46] have the highest rates of overcrowding,[47] and thus are more likely to have a higher number of children occupying them than either post-1946 stabilized units or unregulated units. Almost all of these pre-1946 buildings were built in the Bronx, Manhattan, and Brooklyn.[48] If the relationship between being "distressed" and children having EBLLs is significant, it would lend credence to the view that a few "bad landlords" contribute disproportionately to DOHMH lead interventions.

In addition to issues related to the type, age, and quality of housing, there are also spatial or geographic correlations with lead poisoning. Children with EBLL are disproportionately distributed throughout the city. Forty-three percent of the children with EBLL in New York City reside in Brooklyn, with a large portion of those children located in the three neighborhoods of Bushwick, Bedford-Stuyvesant, and Fort Greene.[49] This area, including other parts of

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[42] 2002 HOUSING AND VACANCY SURVEY, *supra* note 38, Series IA, tbl.57 http://www.census.gov/hhes/www/housing/nychvs/2002/s1at57.html.

[43] *Id*.

[44] NEW YORK CITY RENT GUIDELINES BOARD, 2003 INCOME AND EXPENSE STUDY 7 (2003) [hereinafter RGB 2003 INCOME AND EXPENSE STUDY], *available at* http://www.housingnyc.com/downloads/research/pdf_reports/ie03.pdf.

[45] *Id.*

[46] RGB 2003 HSR, *supra* note 38, at 2; *see also* 2002 HOUSING AND VACANCY SURVEY, *supra* note 38, Series IA, tbl.17, http://www.census.gov/hhes/www/housing/nychvs/2002/s1at17.html.

[47] RGB 2003 HSR, *supra* note 38, at 2.

[48] *Id.*

[49] *Id*. at 16 fig.8, 26 tbl.A-2; CAHN & THOMPSON, *supra* note 8, at 4.

central Brooklyn, is located in the Lead Belt.[50] The four neighborhoods of Bedford-Stuyvesant, East Flatbush, Williamsburg-Bushwick, and Fordham-Bronx Park were responsible for more than one-third of EBLL cases in the entire city in 2002.[51] *Figure 1* demonstrates the disproportionate spatial impact of EBLLs by illustrating that over half of all EBLL cases arose in less than one-quarter of the neighborhoods in New York City.[52]

Children with EBLLs are disproportionately distributed across spatial and demographic lines, with lower-income minority children living in older, distressed rental units throughout the Lead Belt suffering the worst effects of lead paint hazards. As will be discussed below, the high correlation of lead poisoning associated with lead paint hazards to geographic location and building age and type suggests that an approach based solely on identifying older buildings may not be the most efficient means of identifying children most at risk of lead poisoning. Although building age is certainly a very important factor, geographic location is also very significant. Efforts should therefore be targeted toward the Lead Belt. LL1 of 2004 utilizes an approach that is both building-based and place-based, though as discussed below, LL1 of 2004 may need to be modified to better target at-risk areas and distressed buildings run by "bad landlords."

[50] *See* Garrison, *supra* note 8.

[51] *Id.*

[52] DOHMH 2001 REPORT, *supra* note 22, at 6. Data for *Figure 1* comes from *id.* at 30-32 tbl.A-4.

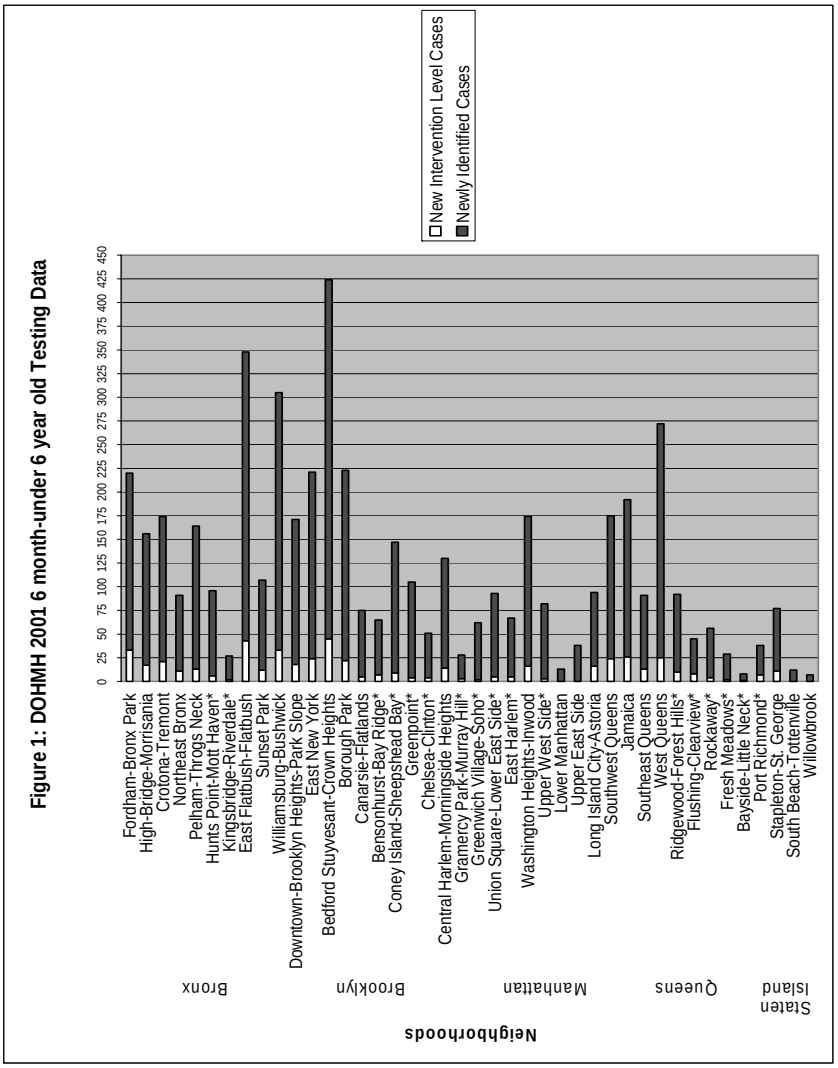
Figure 1: DOHMH 2001 6 month-under 6 year old Testing Data
New Intervention Level Cases
Newly Identified Cases
0 25 50 75 100 125 150 175 200 225 250 275 300 325 350 375 400 425 450
Fordham-Bronx Park
High-Bridge-Morrisania
Crotona-Tremont
Northeast Bronx
Pelham-Throgs Neck
Hunts Point-Mott Haven*
Kingsbridge-Riverdale*
East Flatbush-Flatbush
Sunset Park
Williamsburg-Bushwick
Downtown-Brooklyn Heights-Park Slope
East New York
Bedford Stuyvesant-Crown Heights
Borough Park
Canarsie-Flatlands
Bensonhurst-Bay Ridge*
Coney Island-Sheepshead Bay*
Greenpoint*
Chelsea-Clinton*
Central Harlem-Morningside Heights
Gramercy Park-Murray Hill*
Greenwich Village-Soho*
Union Square-Lower East Side*
East Harlem*
Washington Heights-Inwood
Upper West Side*
Lower Manhattan
Upper East Side
Long Island City-Astoria
Southwest Queens
Jamaica
Southeast Queens
West Queens
Ridgewood-Forest Hills*
Flushing-Clearview*
Rockaway*
Fresh Meadows*
Bayside-Little Neck*
Port Richmond*
Stapleton-St. George
South Beach-Tottenville
Willowbrook
Bronx
Brooklyn
Manhattan
Queens
Staten Island
Neighborhoods

## III. LEAD POISONING LEGISLATION AFFECTING NEW YORK CITY AFFORDABLE HOUSING DEVELOPERS, OWNERS, AND MANAGERS

Developers, owners, and managers of affordable housing must comply with a number of requirements in the provision of low-income housing, including city, state, and federal laws and regulations. These regulations often overlap—requiring general good maintenance or otherwise directly regulating the elimination of lead paint hazards. These baseline requirements already impose compliance costs on developers and landlords, and, as a result, some of the costs imposed by LL1 of 2004 in a zero-regulation environment are already absorbed by landlords who comply with these city, state, and federal requirements. Therefore, this Article seeks to analyze only those costs imposed by LL1 of 2004 that are new to landlords, as only those costs are directly attributable to the new law and may incrementally affect the provision of affordable housing.

### *A. Applicable Federal Legislation*

The federal government did not play an active role in controlling lead paint until the 1970s. Even though the potential dangers of lead were known as early as the 1920s,[53] it was another fifty years before the first federal legislation regulating lead paint was passed. That legislation, the Lead-Based Paint Poisoning Prevention Act (LPPPA),[54] prohibited lead-based paint in federally funded housing units.[55] It did not, however, affect private housing.[56] In 1988, the LPPPA was amended to include, among other provisions, inspection and abatement requirements for federally funded housing units built or substantially rehabilitated before 1978.[57] In 1992, with the passage of the Residential Lead-

[53] *See* Wendy Johnson, *The Legacy of Lead: Pervasive Poisoning, Suspect Science and the Industry Effort to Escape Liability*, MULTINAT'L MONITOR, Apr. 2003, at 14, 17 (referring to research and documents that indicate that the lead paint industry was aware by the 1920s of the dangers lead paint posed to children).

[54] Pub. L. No. 91-695, 84 Stat. 2078 (1971) (codified as amended at 42 U.S.C. §§ 4801-4846 (2000)).

[55] *See* § 401, 84 Stat. at 2079.

[56] *See id.* (applying the lead-based paint prohibition only to "residential structures constructed or rehabilitated . . . by the Federal government").

[57] *See* Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 566, 101 Stat. 1815, 1945-48 (1988) (codified at 42 U.S.C. § 4822

Based Paint Hazard Reduction Act (Title X of the Housing and Community Development Act of 1992),[58] the federal government took comprehensive action to address lead-based paint hazards in all federally funded housing units, regardless of whether the unit was public or private. Title X requires the use of lead-based paint hazard controls in federally funded housing units where children under six years of age are occupants.[59]

Title X places lead-based paint hazard controls into three categories: (1) interim controls, designed to temporarily reduce the likelihood of exposure to lead-based paint hazards (e.g., dust removal, paint film stabilization, and treatment of windowsill and other friction or impact surfaces); (2) abatement of lead-based paint hazards, including the removal or encapsulation of deteriorated lead-based paint or replacing lead-painted fixtures; and (3) complete abatement of lead-based paint.[60]

Title X also addresses private housing, but only urges abatement instead of mandating it. Title X does, however, require disclosure of known lead hazards at the time of sale or rental.[61] A knowing violation of the notice provisions could result in liability if subsequent owners or tenants sustain damage.[62]

As a result of this federal legislation, all federally funded housing projects must comply with the lead-safe work practices, abatement standards, and other requirements established by the federal government. Since many affordable housing projects are constructed or rehabilitated using federal funding, these projects are required to meet the federal standards regardless of any city or state legislation.[63]

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(2000)); *see also* Thomas F. Zimmerman, *The Regulation of Lead-Based Paint in Air Force Housing*, 44 A.F. L. REV. 169, 176-77 (1998).

[58] Residential Lead-Based Paint Hazard Reduction Act of 1992, Pub. L. No. 102-550, §§ 1001-1061, 106 Stat. 3672, 3897-3927 (codified at 42 U.S.C. §§ 4851 et seq. (2000)).

[59] *See* § 1017, 106 Stat. at 3909-10.

[60] *See* Juberg et al., *supra* note 2, at 176.

[61] *See* § 1018, 106 Stat. at 3910-11 (codified at 42 U.S.C. § 4852d (2000)). For a discussion of the disclosure rule, see John B. Shumway, *HUD Enforcement of Lead-Based Paint Rules and Other Lead-Based Paint Activities*, 12-SPG J. AFFORDABLE HOUSING & CMTY. DEV. L. 366, 368-72 (2003); Claude E. Walker, *The Lead-Based Paint Real Estate Notification and Disclosure Rule*, 8 BUFF. ENVTL. L.J. 65, 70 (2000).

[62] *See* § 1018(b)(3), 106 Stat. at 3911 (codified at 42 U.S.C. § 4851d(b)(3) (2000)).

[63] Interview with Matthew Chachère, Attorney, Northern Manhattan

### B. *Applicable State Legislation*

In addition to federal requirements, all New York City housing, regardless of the source of funding, must comply with New York State legislative and regulatory requirements. These state requirements, similar to the federal requirements for federally funded projects, are often duplicative of city requirements, as noted below. As a result, a proper analysis of the incremental costs imposed by LL1 of 2004 must differentiate between the unique costs imposed by LL1 of 2004 and those costs and obligations already imposed under state and other laws.

New York State has long provided for screening of children and pregnant women for EBLLs and authorized inspections of residential properties for lead-based paint hazards.[64] In 1992, the state required all pregnant women as well as children entering the public school system to be screened for EBLLs.[65] Doctors finding a patient with an EBLL are required to report such a finding to the New York State Department of Health (NYSDOH).[66] NYSDOH may then inspect the residence or workplace of the patient in an attempt to identify the cause of the EBLL.

The Multiple Dwelling Law also imposes obligations on owners. It requires owners of multiple dwellings to keep dwelling units in good repair, including repair of paint and wallpaper, to protect the sanitary conditions of the unit.[67]

### C. *Applicable City Legislation*

The first lead paint legislation passed in New York City was Local Law 1 of 1982.[68] Local Law 38 of 1999 was passed to avoid some of the unnecessary and potentially dangerous burdens of the complete remediation standard established under Local Law 1 of

Improvement Corporation (Mar. 1, 2004) [hereinafter Chachère Interview] (noting that many federal requirements are more stringent than any current or previous New York City lead-paint legislation).

[64] *See* Control of Lead Poisoning Act, ch. 338, 1970 N.Y. Laws 1715 (codified as amended at N.Y. PUB. HEALTH LAW §§ 1370, 1370-c, 1373 (McKinney 2002)).

[65] Lead Poisoning Prevention Act, ch. 485, 1992 N.Y. Laws 3245 (codified as N.Y. PUB. HEALTH LAW §§ 1370-a, 1370-c, 1370-d (McKinney 2002)).

[66] *Id*. § 1370-e.

[67] *See* N.Y. MULT. DWELL. LAW. §§ 78, 80(4) (McKinney 2001).

[68] Local Law 1 of 1982 (codified at NEW YORK CITY ADMIN. CODE § 27-2013 (1982)).

1982.[69] The New York Court of Appeals revived Local Law 1 of 1982 by striking down Local Law 38 of 1999 on July 1, 2003, for failing to conduct an adequate environmental impact assessment.[70]

1. *Local Law 1 of 1982*

Under Local Law 1 of 1982, owners of multiple dwelling buildings (in which three or more families reside independently of each other[71]) were required to remove or cover paint surfaces with lead readings of 0.7 mg/cm$^2$ or 0.5% lead by weight,[72] a more stringent standard than that established under federal law. Local Law 1 of 1982 imposed a rebuttable presumption that pre-1960 structures were painted using paint containing impermissibly high levels of lead.[73] Local Law 1 of 1982 placed upon landlords an affirmative duty to remove or cover such surfaces.[74] Where paint in such pre-1960 multiple dwelling units was peeling, city inspectors had the power to assess a fine against the owner and issue a peeling paint violation requiring remediation.[75]

The New York State Court of Appeals in *Juarez v. Wavercrest Management Team* provided the authoritative interpretation of Local Law 1 of 1982, finding that it imposed a statutory duty on owners of properties containing lead-based paint to completely remediate lead-based paint when such owners had actual or constructive notice that a child under the age of six

[69] NEW YORK CITY ADMIN. CODE §§ 17-179, -181, 27-2056.1-.10 (1999) (repealing NEW YORK CITY ADMIN. CODE § 27-2013(h)(1) (1982)); *see also* NEW YORK CITY COUNCIL, ATTACHMENT TO THE ENVIRONMENTAL ASSESSMENT STATEMENT FOR PROPOSED INT. NO. 101-A, at 9 (2003) [hereinafter ENVIRONMENTAL ASSESSMENT STATEMENT], *available at* http://www.nyccouncil.info/pdf_files/reports/int0101a-eas-att.pdf .

[70] N.Y.C. Coalition to End Lead Poisoning v. Vallone, 794 N.E.2d 672, 679 (N.Y. 2003).

[71] N.Y. MULT. DWELL. LAW § 4(7) (McKinney 2001).

[72] NEW YORK CITY ADMIN. CODE § 27-2013(h)(1) (1982).

[73] *Id*. § 27-2013(h)(2) (1982). This presumption helps to avoid the necessity of a finding of violation or an order of abatement from the Department of Health. *See* N.Y. PUB. HEALTH LAW § 1373 (McKinney 2002); N.Y. COMP. CODES R. & REGS. tit. 10, § 173.13(d)(1), (2) (2000). This issue is discussed in greater detail *infra* Part IV.B.3.f. While this presumption has helped plaintiffs overcome traditional notice defenses by property owners to negligence liability suits, it was also created for expediency and efficiency purposes.

[74] NEW YORK CITY ADMIN. CODE § 27-2013(h)(1) (1982).

[75] *See* NEW YORK CITY ADMIN. CODE § 27-2013(h) (1982); *see also* MARK GREEN, LEAD & KIDS: WHY ARE 30,000 NYC CHILDREN CONTAMINATED? 62, 70 (1998), *available at* http://www.nmic.org/nyccelp/Documents/Lead-and-Kids-30000-Children.pdf.

resided in the unit.[76] The court reasoned that since Local Law 1 of 1982 provided owners the authority to enter apartment units where children under the age of six reside to inspect for lead-based paint hazards, such right-of-entry authority provided owners with constructive notice of any lead-based paint hazards.[77]

To establish negligence liability under Local Law 1 of 1982, tenants needed only prove that the owner had constructive notice that a child under the age of six resided in the unit (assuming causation had been established).[78] Owners could then either raise the defense that the lead-based paint hazard existed despite reasonable efforts to control it or that the owner did not have a reasonable time within which to remedy the hazard.[79] It is not clear, however, how successful such a defense would or could be. Although *Juarez* established a potentially expansive liability rule, post-*Juarez* cases have circumscribed the decision's reach by requiring proof that the landlord had actual or constructive knowledge of the relationship between the age of the building and the presence of lead-based paint.[80]

Where a landlord had constructive or actual knowledge of the presence of a child in a unit built before 1960, the landlord was required under Local Law 1 of 1982 to abate all the lead-based paint in the unit, regardless of whether or not such paint constituted a hazard.[81] The complete remediation requirement established by Local Law 1 of 1982 had many drawbacks: it was prohibitively expensive, it was not necessarily correlated with lower EBLLs, and it might be dangerous to children residing in such units because certain remediation techniques actually created more lead dust than existed prior to the remediation.[82] One organization that works to reduce lead poisoning and other housing-related health hazards states that "[t]he mere presence of lead-based paint in a home is not a hazard, as about 40% of all U.S. housing contains some leaded paint, and the vast majority of children live safely in these homes and apartments."[83]

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[76] Juarez v. Wavercrest Mgmt. Team, 672 N.E.2d 135, 142-43 (N.Y. 1996).
[77] *See Juarez*, 672 N.E.2d at 143.
[78] *Id*. at 137.
[79] *Id*.
[80] *See, e.g.*, Chapman v. Silber, 760 N.E.2d 329, 335-36 (N.Y. 2001).
[81] *See* Juarez, 672 N.E.2d at 143.
[82] *See* ENVIRONMENTAL ASSESSMENT STATEMENT, *supra* note 69, at 9.
[83] Alliance for Healthy Homes, Lead, *at* http://www.afhh.org/hhe/

The City, recognizing the drawbacks of total remediation, chose a policy of underenforcement or nonenforcement of Local Law 1 of 1982 as written, prompting a lawsuit to force city enforcement.[84] An audit at the time of the lawsuit by the Office of the New York City Comptroller "identified a staggering 66,000 reports in the records of the City's Department of Housing Preservation and Development (HPD) of lead-based paint violations posing potential hazards to young children."[85] Despite the overwhelming potential costs of compliance, the plaintiffs were victorious. Nevertheless, the City's lax enforcement continued, and in 1997 the City was held in contempt (for a third time) and required to pay fines for its nonenforcement.[86]

2. *Local Law 38 of 1999*

Local Law 38 of 1999 was passed in light of the impossibility of achieving a lead-free housing environment, focusing on a more feasible lead-safe housing goal.[87] Local Law 38 of 1999 intended to establish an easier burden for landlords to meet—one which required the proper maintenance of interior surfaces rather than the complete abatement standard of Local Law 1 of 1982.[88]

Local Law 38 of 1999, like Local Law 1 of 1982, created the rebuttable presumption that pre-1960 dwellings contain lead-based paint.[89] Local Law 38 of 1999 required owners to conduct annual inspections of units in which children under six years of age resided[90] and to correct any defects identified through the visual

hhe_lead.htm (last visited Feb. 27, 2005).

[84] For a history of this litigation, see Leon Lazaroff, *Painted into a Corner*, CITY LIMITS MONTHLY, Mar. 1999, http://www.citylimits.org/content/articles/articleView.cfm?articlenumber=402.

[85] Clifford P. Case & Craig J.J. Snyder, *Developments in Lead Paint Liability*, N.Y. L.J., Sept. 25, 1995, at S1.

[86] *See* New York City Coalition to End Childhood Lead Poisoning v. Giuliani, 668 N.Y.S.2d 1, 2 (N.Y. App. Div. 1997); *see also* GREEN, *supra* note 75, at 19; Robert Vilensky, *New York City's New Lead Poisoning Act: Favors Landlords, Kills Plaintiff Cases*, N.Y. L.J., July 29, 1999, at 1.

[87] New York, N.Y., Local Law 38 of 1999, § 2 (uncodified statement of findings).

[88] *See id*. For a practical discussion of the major provisions of Local Law 38, see CMTY. HOUSING IMPROVEMENT PROG., SPECIAL LOCAL LAW 38 BULLETIN (1999).

[89] *Compare* NEW YORK CITY ADMIN. CODE § 27-2056.4 (1999), *with* NEW YORK CITY ADMIN. CODE § 27-2013(h)(1) (1982).

[90] NEW YORK CITY ADMIN. CODE § 27-2056.3(d) (1999).

inspection.[91] The law, however, did not require landlords to inspect units where tenants did not respond in the affirmative to a questionnaire asking if a child under six years of age was residing in the unit.[92]

Tenants gained the explicit right to report violations to the DOHMH.[93] Following a report, DOHMH would inspect dwelling units for lead safety and issue violations to the owners of units that failed the inspection.[94] If owners did not correct violations issued by DOHMH or HPD, HPD would correct the violation, charging the owner for HPD's labor and expense and placing a lien in the amount of those charges against the landlord's property.[95]

Owners, upon turnover, were required to repair any subsurface damage to prevent lead-based paint hazards and to repaint rooms containing lead-based paint[96] according to the interim controls.[97] Repair in accordance with the interim controls involved wet scraping to minimize dust, particle-air vacuums to remove dust, and adjustment of impact and friction surfaces to avoid binding of painted surfaces.[98] This turnover requirement applied not only to multiple dwelling units, but also to private homes that were rented or leased to persons other than immediate family members.[99] Peeling lead-based paint and deteriorated subsurfaces were required to be removed or permanently covered on turnover.[100]

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[91] *Id*. § 27-2056.3(e).

[92] *See* NEW YORK CITY ADMIN. CODE § 27-2056.3(b)(4) (1999).

[93] *See id*. § 27-2056.7.

[94] *Id*. § 27-2056.7(a).

[95] *See id.* §§ 27-2056.5(d), 27-2115(l)(3) (1999); IBO-ADMINISTRATION FISCAL ANALYSIS COMPARISON, *supra* note 19, at 10; *see also* N.Y. MULT. DWELL. LAW § 309(d)(11)(a) (McKinney 2001) (noting that the agency remediating lead hazards may waive its right to impose a lien).

[96] NEW YORK CITY ADMIN. CODE § 27-2056.6(a)(2), (4) (1999) ("When any dwelling unit becomes vacant in a multiple dwelling erected prior to [January 1, 1960], the owner of such multiple dwelling shall have the duty to . . . wet scrape all peeling paint using a scraper and water misting to reduce dust and other work-related debris and repair all deteriorated subsurfaces where such subsurfaces are covered with paint . . . [and] repaint all areas affected . . . .").

[97] *See id*. § 27-2056.2.

[98] *See id*. § 27-2056.2(a)(1)-(12).

[99] *See Report of the Infrastructure Division on Proposed Int. No. 101-A*, Comm. on Housing & Bldgs., N.Y.C. Council, at 40 (Dec. 10, 2003) [hereinafter *2003 Council Infrastructure Report*], *available at* http://www.nmic.org/nyccelp/Laws/Infrastructure-report-12-10-03.pdf.

[100] *Id*.

Local Law 38 of 1999 was nullified by the New York Court of Appeals on July 1, 2003, for failure to adequately address the environmental impacts of the law through the State Environmental Quality Review Act (SEQRA).[101] Specifically, the court found that Local Law 38 of 1999 ignored the harmful effects of lead dust in the scope of its coverage, and also exposed more children to potential harm by the reduction in coverage age.[102]

Local Law 38 of 1999, while attempting to achieve a lead-safe housing environment, may be criticized for a number of procedural and substantive failings. These failings stem from the process by which city inspections and remediations occur, the clarity of landlord responsibilities and penalties for non-compliance, the time frame within which landlords must remediate a unit (eight months after a tenant files a complaint), the failure to require trained professionals to conduct remediations and testing, and its failure to fully address repair of underlying defects or remediation of common areas, among other things.[103] The major provisions of Local Law 38 of 1999 are compared in detail with LL1 of 2004 in Part IV.

3. *Administrative and Housing Maintenance Codes*

The New York City Housing Maintenance Code and other provisions of the Administrative Code also impose restrictions on landlords that overlap with the requirements established by LL1 of 2004. Indirectly, these other provisions ameliorate unsafe lead conditions by requiring safe paint conditions and safe underlying conditions regardless of lead status. For instance, the New York City Administrative Code requires that all parts of buildings be maintained in a safe condition by the owner.[104] The Housing Maintenance Code requires that owners of multiple dwelling units

[101] N.Y.C. Coalition to End Lead Poisoning (NYCCELP) v. Vallone, 794 N.E.2d 672, 679 (N.Y. 2003). LL1 of 2004 was also challenged for failure to conduct an environmental impact review as required under the New York State Environmental Quality Review Act, but the suit was dismissed for lack of standing. The grounds for such a challenge were largely rejected in dicta by the New York Supreme Court in New York County. *See* Cmty. Preservation Corp. v. Miller, 781 N.Y.S.2d 603 (N.Y. Sup. Ct. 2004), *aff'd*, 788 N.Y.S.2d 609 (App. Div. 2005).

[102] *See NYCCELP*, 794 N.E.2d at 679; *see also New York City's Lead Paint Law Invalidated for Failure to Comply with State Environmental Review Act*, 31 No. CD-14 HDR CURRENT DEVS. 39 (2003).

[103] *See infra* notes 147, 161-62, 169, 337-39 and accompanying text.

[104] NEW YORK CITY ADMIN. CODE §§ 27-127, -128 (2004).

repaint or re-cover walls every three years, or more often as necessary.[105] The Housing Maintenance Code provides the authority to HPD to require tenants to paint or cover their walls if they become unsanitary before three years have elapsed, but, if the unsanitary condition arises through no fault of the tenant, then the owner may be required to repaint or recover the surface.[106] While landlords may indicate in lease agreements that they will not repaint more often than every five years, such a deferral does not relieve landlords of their duty to repaint or recover surfaces that have become unsanitary through no fault of the tenant before the expiration of the five years.[107] The Housing Maintenance Code requires that landlords maintain records of painting and repainting[108] and also requires that units that have been vacant for more than sixty days be repaired at the time of turnover to the standards required by the Administrative Code and the Multiple Dwelling Law.[109] Additionally, DOHMH may order abatement and impose fines for noncompliance where the presence of lead may create a health hazard.[110] The implementation of these provisions is similar under Local Law 38 of 1999 and LL1 of 2004 since both laws declared lead-based paint health hazards.

## IV. ANALYSIS OF LL1 OF 2004

### *A. Introduction to the Analysis*

Lead legislation imposes significant costs and yields numerous benefits across a number of different areas and for both public and private actors. The desirability of such legislation can only be determined by a thorough analysis of the impacts of the legislation on these various areas. This Part will examine LL1 of 2004's impacts on such areas as housing, insurance, and public health as compared with requirements established by Local Law 38 of 1999. This review does not and cannot feasibly take into account the increase or decrease in government agencies'

[105] NEW YORK CITY ADMIN. CODE § 27-2013(b) (2004).

[106] *Id*. § 27-2013(c). This period of time may be extended by HPD regulation for specific types of paint proven to be durable and remain intact for longer periods of time. *See id*. § 27-2016(b).

[107] *See id*. § 27-2013(d).

[108] *Id*. § 27-2013(g).

[109] *Id*. § 27-2089(a)(2).

[110] NEW YORK CITY HEALTH CODE §§ 173.14, 3.12 (1996).

enforcement of LL1 of 2004 compared to their enforcement of previous lead paint laws. While most of the analysis of LL1 of 2004 is based on a comparison to the requirements of Local Law 38 of 1999, it should be recognized that Local Law 1 of 1982 was the law in effect prior to the passage of LL1 of 2004.[111] Therefore, comparisons between LL1 of 2004 and Local Law 1 of 1982 have been interlaced throughout this analysis for reference. This baseline analysis is important because much of the politicization of the bill does not take into account the obligations that the previous laws already placed upon owners, tenants, and city agencies.[112]

### *B. Analysis*

LL1 of 2004 was designed to address the overzealousness and deficiencies present in Local Laws 1 and 38.[113] LL1 of 2004 was approved over the veto of Mayor Bloomberg by forty-four of the fifty council members on February 4, 2004.

The mayoral veto focused on a number of major themes, which form the basis of this Article's analysis. These themes provide an overview of some of the concerns raised by opponents of LL1 of 2004, and include:[114]

*Insurance/Liability Impacts*

- "Increased demands on landlords (such as difficult and probably unachievable timeframes and unreasonable tort liability exposure) as well as the possible unavailability of insurance may result in the deterioration of the City's housing stock."[115]
- "[L]ead paint may be presumed in tort liability cases even

[111] The significant differences between LL1 of 2004 and Local Law 38 are discussed in greater detail in the following sections. *Appendices A* and *B* are flowcharts illustrating the LL1 of 2004 process and timing and the HPD complaint process and timing, respectively.

[112] For instance, these laws already put landlords on notice of various issues related to lead, including the possibility that buildings erected prior to 1960 contain lead paint. This notice, in turn, imposed obligations on landlords and therefore may have affected the negligence liability of landlords and, as a result, their insurance rates.

[113] *See generally* Comm. on Housing & Bldgs., N.Y.C. Council, Report on the Infrastructure Division (Jan. 26, 2004), http://webdocs.nyccouncil.info/attachments/59997.htm.

[114] Letter from Michael R. Bloomberg, Mayor, New York City, to Honorable Victor Robles, City Clerk and Clerk of the Council, New York City (Dec. 19, 2003) [hereinafter Bloomberg Letter] (on file with journal).

[115] *Id*. at 2.

when owners have complied with all aspects of the annual notice, investigation and remediation requirements and thereafter are not notified of a new lead paint hazard in a dwelling unit."[116]

*Implementation/Assessment Issues*

- "There is no policy reason to stop otherwise willing owners from performing lead hazard remediations if they seek reasonable extensions for good cause. And given the liability risk that owners will face, owners seeking to comply may be forced to pursue aggressive legal options when tenants are not able or unwilling to provide prompt access."[117]
- "Beyond the deterioration of the housing stock, the bill may also lead to an increase in discrimination against families with children who are seeking to rent apartments, similar to the experience in Massachusetts. That state, which has a very strict tort liability law relating to lead paint hazards, has experienced a pervasive problem with owners discriminating against families with children."[118]
- "Especially troubling is the bill's requirement that on its effective date owners will have to immediately abate (i.e. permanently remove or cover) the paint on every windowsill accessible to a young child. Up to 2.8 million windowsills will be included within this mandate. If such abatements are not performed properly—and it can, unfortunately, be assumed that will be the case in some situations, especially since there will likely not be a sufficient number of trained workers needed to do the work immediately—vast quantities of lead dust will be released, thereby *increasing* the risk of lead poisoning to children."[119]

*Housing Market Impacts*

- "[LL1 of 2004] may result in negative unintended consequences that will affect the affordable housing stock of the City."[120]
- "[LL1 of 2004] was passed . . . without the hard look

[116] *Id*. at 3.
[117] *Id*.
[118] *Id*. at 2.
[119] *Id*. at 3.
[120] *Id*. at 2.

required . . . [at] the threats to [New York City's] affordable housing stock."[121]

- "In addition, the bill may lead to an increase in attempts by owners to prohibit families from doubling up in apartments, a common occurrence in this time of tight housing availability."[122]
- "Ultimately, if owners cannot comply with the strict requirements in the bill and face unreasonable tort exposure, they may either abandon their property, seek to evict doubled up families, decline to rent to families or increase rents."[123]

1. *Liability*

LL1 of 2004 reads similarly to Local Law 38 of 1999 in relation to definitions, notice, and other inspection requirements.[124] One difference between the two bills, and a source of significant contention, is the potential application of the presumption of lead-based paint. Under Local Law 38 of 1999, the presumption of lead-based paint only applied to one article of the law and expressly indicated that it was not applicable to other articles of the law or other laws.[125] The limited scope of the presumption in Local Law 38 of 1999 was intended to rein in owner liability in civil personal injury actions.[126]

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[121] *Id*. *But see* ENVIRONMENTAL ASSESSMENT STATEMENT, *supra* note 69, at 2-4, 43-44 (2003) (discussing reasons why the law would not affect the availability of affordable housing. The EAS indicated that: (1) it was reasonable to assume that landlords would not behave illegally by, for example, discriminating against families with children or failing to maintain the premises in good condition; (2) insurance impacts, while plausible, were too speculative to be analyzed, in part because no insurance representative presented testimony; and (3) remediation costs might affect affordable housing, but J-51 tax benefits and HUD forgivable loans (available when the dwelling units are rented to low-income families for three years following remediation) should offset such costs).

[122] Bloomberg letter, *supra* note 114, at 2.

[123] *Id*.

[124] *See* NMIC, A Comparison between "The New York City Childhood Lead Poisoning Prevention Act of 2003 (Intro 101A)" and recently nullified Local Law 38, *at* http://www.nmic.org/nyccelp/documents/Comparison-between-Intro-101-and-LL38.htm (last visited Mar. 22, 2005). This comparison is to an older version of LL1 of 2004, but the basic contents remained unchanged from the earlier version identified by NMIC to the version that passed.

[125] NEW YORK CITY ADMIN. CODE § 27-2056.4 (1999).

[126] Verne A. Pedro, Note, *Still Hazy After All These Years: New York City's Local Law 38 and the Legislative Debate Over Landlord Liability in Lead Paint Poisoning Cases*, 24 SETON HALL LEGIS. J. 541, 573 (2000).

Interviews with individuals involved in lead paint issues throughout the city indicate a perception that LL1 of 2004 significantly changed the liability structure that landlords face. This perceived change in liability is important to examine because such a change could directly impact the affordability and availability of insurance, as well as indirectly affect lending and financing issues. These impacts could then lead to macro-level real estate market impacts. Therefore, this Article's analysis will focus on the potential changes in liability arising from the adoption of LL1 of 2004 as well as the hypothetical impact of the bill upon the insurance market.

Interviews with a number of individuals and organizations involved in the passage of or opposition to LL1 of 2004 indicate that both proponents and opponents of the bill misunderstood the liability impacts of LL1 of 2004, especially in comparison to the baseline liability structure of Local Law 38 of 1999.[127] One of the most hotly debated, and most misunderstood, provisions of LL1 of 2004 relates to the liability created by the "presumption" of the presence of lead-based paint in pre-1960 structures. These misconceptions range from fears of huge incremental liability increases to claims that LL1 of 2004 imposes no additional liability.[128] Both of these claims are incorrect: although LL1 of 2004 does not change the basic liability structure of Local Law 38 of 1999, other provisions do impose additional obligation upon landlords, thereby increasing the potential liability of landlords. The misperceptions surrounding the presumption of lead paint, however, while not affecting ultimate landlord liability, may affect insurance rates in the short term as insurance companies may raise rates based on misperceptions of liability risk.[129]

Under common law, if landlords or owners are found negligent in the maintenance of dwelling units in which children are lead poisoned, they may be found liable for the poisoning.[130]

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[127] Due to various requests for anonymity from interviewees and for purposes of ensuring continued good relationships between the authors and the interviewees, the authors decline to include the names of the specific interviewees to which the authors' findings and conclusions relate.

[128] This comparison is made more fully *infra* Part IV.B.3.f.

[129] *Cf. infra* text accompanying note 179.

[130] Liability is based on the reasonableness of the landlord's actions, and, since lead poisoning resulting from exposure in a dwelling unit almost exclusively affects children, landlords have not historically been required to protect adults from exposure to lead, or at least not to the same extent as they

To establish liability, however, the plaintiff must meet a high evidentiary burden. The plaintiff must prove by a preponderance of the evidence that the landlord or owner knew of the presence of a hazard that would likely cause exposure to lead, that someone was actually exposed to lead from that hazard and was demonstrably injured as a result, that the injury is attributable to lead exposure, that the individual was exposed to lead in sufficient quantities to cause the symptoms of lead poisoning to occur, and that the lead to which the individual was exposed due to the hazard was sufficient in quantity to cause the injury.[131]

This negligence liability standard exists independent of any city statutory or regulatory scheme, and city law cannot alter state common law negligence standards.[132] Therefore, LL1 of 2004 cannot affect the liability standard applied in negligence actions and should not impose any additional liability or insurance costs due to its presumption of lead paint since there is no difference for negligence purposes between the presumptions established by LL1 of 2004 and Local Law 38 of 1999.

Negligence suits pose significant causation difficulties for most plaintiffs. The use of expert testimony is crucial to lead paint poisoning cases and may give landlord defendants an advantage since they typically can afford better expert witnesses. Additionally, statistical data demonstrating the aggregate effects of lead poisoning are generally insufficient to prove that the plaintiff's injuries were directly attributable to her lead exposure or to justify an award where lead exposure occurred in quantities so small that no clinical symptoms arose, even where statistical data may illustrate that the average individual suffers diminished intellectual capacity at such levels of exposure.[133] New York State

have for children.

[131] *See, e.g.*, Miah v. N.Y.C. Housing Auth., 748 N.Y.S.2d 913, 916, 918 (N.Y. Sup. Ct. 2002) (denying plaintiff's motion for summary judgment because Housing Authority had raised triable issues as to whether children had suffered injury as a result of exposure to lead and as to whether the childrens' EBLLs were attributable to a seven-week trip to Bangladesh rather than to lead in the apartment).

[132] Elliott v. City of New York, 747 N.E.2d 760, 762-63 (N.Y. 2001). Only the state legislature may alter the common law negligence standard. *See id.* at 763.

[133] *See* Stephen E. Feinberg, *Expert Statistical Testimony and Epidemiological Evidence: The Toxic Effects of Lead Exposure on Children*, 113 J. ECONOMETRICS 33 (2003); Centers for Disease Control and Prevention (CDC), *Recommendations and Reports: Recommendations for Blood Lead Screening of*

has not adopted a frank effect level—a level assumed to cause actual injury—for determining damages in lead paint negligence liability cases.[134]

As a result, low-level exposure cases where no clinical symptoms exist are extraordinarily difficult to win in New York State.[135] Although lead poisoning cases have a high rate of success in New York, this success may be attributable to plaintiffs' self-selection of cases with demonstrated clinical injuries.[136]

Lead paint legislation might affect negligence liability through the notice requirement of negligence cases. That is, to prove liability, a plaintiff must prove that the landlord did nothing to remove a known hazardous condition that would likely result in

*Young Children Enrolled in Medicaid: Targeting a Group at High Risk*, MORBIDITY MORTALITY WEEKLY REP., Dec. 8, 2000, at 1-2, *available at* http://www.cdc.gov/mmwr/pdf/rr/rr4914.pdf.

[134] *Cf.* Huertero v. Blue Ridge Ins. Co., 787 N.Y.S.2d 89, 90 (N.Y. App. Div. 2004) (noting that injury must be demonstrated to assume liability) (citing Pub. Serv. Mut. Ins. Co. v. AYFAS Realty Corp., 651 N.Y.S.2d 513, 514 (N.Y. App. Div. 1996)).

[135] *See Miah*, 748 N.Y.S.2d at 916, 918 (denying plaintiff's motion for summary judgment in case where plaintiff's and defendant's experts had conflicting assessments of the plaintiffs' injuries and the causes of plaintiffs' EBLLs).

[136] *See* Lash, *supra* note 6, at 301 (noting few cases have arisen); *see also* Michael B. Sena, *Sorting out the Complexities of Lead Paint Poisoning Cases*, 4 J. AFFORDABLE HOUSING & CMTY. DEV. L. 169, 172 (1995); Michael B. Sena, *Lead Paint Litigation in New York*, N.Y. ST. B.J., Mar.-Apr. 1994, at 12 (discussing some early successful lead paint litigation cases). Despite the success of some lead poisoning cases, lost earning power and speculative damages are calculated using race-based, low-income, and family profiles that result in lower judgments for low-income lead poisoning victims than for high-income lead poisoning victims. Laura Greenberg, Comment, *Compensating the Lead Poisoned Child: Proposals for Mitigating Discriminatory Damage Awards*, 28 B.C. ENVTL. AFF. L. REV. 429, 429-30 (2001). This income disparity may have resulted in the belief, demonstrated by thirty-eight percent of New York civil litigators surveyed in 1991, that minority plaintiffs get smaller awards than white plaintiffs. *Id*. at 436. Given that the majority of children at risk of lead poisoning in New York City are low-income minority children, the per-lawsuit liability faced by New York City owners may be lower than the nationwide average (which, according to HUD, indicates that income levels are not statistically significant determinants of the presence of lead hazards). *See* WESTAT, REPORT ON THE NATIONAL SURVEY OF LEAD-BASED PAINT IN HOUSING: BASE REPORT 5-1 (1995) (This report was written under contracts from both HUD and EPA.), *available at* http://www.epa.gov/lead/r95-003.pdf. The report states that "[t]here are no significant differences in the prevalence of lead-based paint by type of housing, market value of the home, amount of rent payment, household income, or geographic region." *Id.*

lead exposure to a child.[137] Therefore, there are two pieces of knowledge that a landlord must possess to act negligently: (1) knowledge of the existence of a child and (2) knowledge of the existence of a lead hazard. Local Law 1 of 1982 and Local Law 38 of 1999 both included a presumption that pre-1960 buildings contain lead paint, thereby possibly putting landlords on notice that peeling paint in those buildings might constitute a lead hazard. While Local Law 38 of 1999 attempted to limit the application of that presumption to negligence suits, liability in such suits can only be modified by state law. Therefore Local Law 38 of 1999 did not affect the constructive notice that may be imposed upon landlords of pre-1960 units. And, as a result, LL1 of 2004 does not significantly affect the constructive notice of the presence of lead paint in pre-1960 homes for negligence liability purposes over Local Law 1 of 1982 or Local Law 38 of 1999.

Legislation could also affect negligence liability by prescribing remediation standards that, if met, are presumed to be sufficiently reasonable to avoid liability. *Figure 2* indicates how LL1 of 2004 changes the remediation standard for lead paint hazards of different sizes.

**Figure 2: Comparison of Remediation Requirements**

| | LL1 of 2004 | Local Law 38 of 1999 |
|---|---|---|
| Minimum Area Trigger | Areas of less than two square feet of peeling lead-based paint per room or ten percent of the total surface area of peeling paint on a type of component with a small surface area, such as a windowsill or door frame, do not have to comply with remediation standards.[138] | No minimum area trigger[139] |

[137] *See Miah*, 748 N.Y.S.2d at 915-16.

[138] NEW YORK CITY ADMIN. CODE § 27-2056.11(2)(iii) (2004).

[139] *See* NEW YORK CITY ADMIN. CODE § 27-2056.2(a) (1999) (requiring that "[a]n owner shall correct *all* lead-based paint hazards . . . using . . . exclusive interim controls" (emphasis added)).

| | | |
|---|---|---|
| Standard Remediation Conditions | Requires cleanup according to 173.14 of the New York City Health Code. A dust clearance test is required after remediation work is performed.[140] | All remediation work must comply with listed interim controls.[141] |
| Large Abatement Trigger | At surface area remediations of over 100 square feet, owners are required to comply with 173.14(d)-(e) of NYC Health Code, but also to provide lead dust clearance test after work completion, provide for temporary relocation when work can not be completed safely, use only firms and workers that are EPA certified, and provide written notice to DOHMH within ten days of beginning abatement work.[142] | N/A |

Failure of a landlord to remediate to the standard required by the law may be construed by a court as unreasonable under the circumstances and therefore negligent. The impact of this liability change, however, is deemed minimal by the authors given existing interim control requirements and other statutory requirements that in some cases are more demanding than the remediation standards of LL1 of 2004.

A large part of the misconceptions concerning liability created under LL1 of 2004 lies in the uncertainty created by early lead paint legislation. Under Local Law 1 of 1982, for instance, landlords took on a bit of "phantom" liability because they were unaware of what steps would be needed to relieve themselves of

[140] *Id*. § 27-2056.11(2)(i).

[141] NEW YORK CITY ADMIN. CODE § 27-2056.2(a) (1999); *see also Figure 3: Turnover Requirements* in Part IV.B.3(c). Use of the measures in section 173.14 of the New York City Health Code are an alternative to the interim controls in Local Law 38 of 1999. *See* NEW YORK CITY ADMIN. CODE § 27-2056.2(b) (1999).

[142] NEW YORK CITY ADMIN. CODE § 27-2056.11(2)(ii) (2004).

liability for lead paint-related damages.[143] As a result of this "phantom" liability, insurance rates rose significantly.[144] Local Law 38 of 1999 solidified the requirements by defining what was necessary to meet the Department of Housing and Urban Development (HUD) lead safety regulations, thereby protecting landlords from undefined liability standards.[145] LL1 of 2004 follows Local Law 38 of 1999 by prescribing clear remediation standards.[146] As discussed below, LL1 of 2004 provides greater clarity than Local Law 38 of 1999 because it provides clear notice to landlords regarding what remediation standard is required for which project and who must conduct the remediations and dust clearance tests, whereas Local Law 38 of 1999 left some ambiguity regarding what interim controls are and who should perform them.[147] The reduced ambiguity should result in greater landlord compliance and therefore less liability and lower insurance rates, at least over the long term.

The notice or knowledge requirement for negligence liability is where the "presumption" established by lead paint legislation comes into play. The presumption that paint in pre-1960 structures is lead paint imputes knowledge to landlords that peeling paint is peeling lead paint.[148] The reasonableness of the landlord's actions then depends upon the relationship between the peeling paint and the potential for lead exposure. Local Law 38 of 1999 and LL1 of 2004 both establish that peeling paint in pre-1960 structures is deemed to constitute a lead paint hazard that requires remediation.[149] Failure to take any action to remediate could be considered unreasonable when landlords possess knowledge of the peeling paint.[150] Although LL1 of 2004 and Local Law 38 of 1999

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[143] *Cf.* Don Ryan, *Turning the Corner on Lead-Based Paint*, J. HOUSING & CMTY. DEV., May/June 2001, at 20 (discussing uncertainties about the effect more stringent federal standards would have on landlords' legal liability).

[144] *See infra* text accompanying note 179.

[145] *See* Ryan, *supra* note 143, at 20.

[146] *See* NEW YORK CITY ADMIN. CODE § 27-2056.11 (2004).

[147] *See* NEW YORK CITY ADMIN. CODE §§ 27-2056.2(a) (1999); *Figure 2: Comparison of Remediation Requirements* in Part IV.B.1; *see also Figure 3: Turnover Requirements* in Part IV.B.3(c).

[148] *See* Chapman v. Silber, 760 N.E.2d 329, 335-36 (N.Y. 2001).

[149] *See* NEW YORK CITY ADMIN. CODE § 27-2056(a) (1999); NEW YORK CITY ADMIN. CODE §§ 27-2056.2(6), -2056.3 (2004) (defining "[l]ead-paint hazard" and establishing the owner's duty to remediate).

[150] *See Chapman*, 760 N.E.2d at 336; *see also* Molina v. Belasquez, 767 N.Y.S.2d 277, 278 (N.Y. App. Div. 2003).

regulate buildings erected between 1960 and 1978, the presumption of lead paint does not extend to properties erected after 1960.[151] As a result, LL1 of 2004 does not affect the notice prong of traditional negligence liability established under common law with respect to those properties.

Lead-based paint hazards under LL1 of 2004 include any condition in the house that may cause lead paint or lead dust exposure.[152] Poisoning from airborne dust and tracked-in soil[153] are of minimal concern, since these sources of lead do not arise from any condition within the dwelling unit. The concern expressed is that the "presumption" would make landlords liable for lead poisonings resulting from tracked-in dust or airborne dust.[154] However, it is not the case that landlords would be liable for lead poisonings traced to these sources. Returning to the causation issue, plaintiffs alleging lead paint poisoning must prove that the EBLL causing the poisoning was a direct result of and caused by lead hazards in the household, or, in other words, "[a]n owner is not responsible for remediating 'lead-contaminated dust' in a dwelling unit when DOHMH determines that the source of the dust was not a condition within the dwelling in which such dwelling unit is located."[155] Therefore, owners are not responsible for remediating airborne or dust-borne lead, only the lead that is directly from the paint surfaces inside the units.[156]

As noted above, there have been some misunderstandings about the applicability of the presumption that arose under Local Law 38 of 1999 to negligence liability actions.[157] However, a number of liability cases under Local Law 38 of 1999 found that the presumption imputed notice to the landlord of a lead-based paint hazard.[158] The Court of Appeals held that, absent controlling

[151] Jerilyn Perrine, Comm'r, HPD, Local Law 1 of 2004: A Summary 8 (2004) (unpublished PowerPoint document) (on file with journal).

[152] *See* NEW YORK CITY ADMIN. CODE § 27-2056.2 (2004).

[153] *See 2003 Council Infrastructure Report*, *supra* note 99, at 38. Provisions addressing these potential lead sources were removed via amendment before LL1 of 2004's passage.

[154] *See, e.g.*, Dan Margulies, Executive Director, Community Housing Improvement Program (CHIP), Testimony Regarding Int. No. 101-A (June 23, 2002). CHIP is an organization of property owners.

[155] *2003 Council Infrastructure Report*, *supra* note 99, at 39.

[156] *Id*.

[157] *See supra* notes 125-26 and accompanying text.

[158] *See, e.g.*, Crespo v. A.D.A. Mgmt., 739 N.Y.S.2d 49 (N.Y. App. Div.

legislation, "a landlord who actually knows of the existence of many conditions indicating a lead paint hazard to young children may, in the minds of the jury, also be charged constructively with notice of the hazard."[159] Therefore, even under Local Law 38 of 1999, landlords were already subject to presumptions of knowledge in liability suits.

Although LL1 of 2004 does not affect the standard applied to determine negligence liability, it does impose additional obligations upon landlords, and the failure to meet these obligations may impose additional liability upon landlords. For instance, LL1 of 2004 increases the number of units that must be inspected and for which knowledge of lead-based paint hazards is imputed by increasing the age of children triggering landlord duties to under seven from under six;[160] it increases the number of units that will be inspected by city agencies by decreasing the

2002). While Local Law 38 limited its impact to children under the age of six and LL1 of 2004 expanded that impact to children under the age of seven, Local Law 1 of 1982 has remained in effect in recent years. The number of lead paint lawsuits rose under Local Law 38, even though it created little additional liability over Local Law 1 of 1982. *See infra* note 178 and accompanying text. Although no analysis is available on the cause of this spike in lawsuits, the authors are of the opinion that the number of lawsuits may have risen as a result of increased education of potential claimants regarding lead paint or misperceptions that the bill changed the negligence liability standards landlords must meet.

[159] *See* Chapman v. Silber, 760 N.E.2d 329, 331, 335-36 (N.Y. 2001).

[160] *Compare* NEW YORK CITY ADMIN. CODE § 27-2056.1(a)(6) (1999), *with* NEW YORK CITY ADMIN. CODE § 27-2056.18 (2004). In comparison to Local Law 38, LL1 of 2004 will likely increase the potential liability exposure of landlords because LL1 of 2004 affects more children. Based on information provided by the IBO, 23,204 pre-1960 units contain six-year-olds, 6676 of which contain both a six-year-old and a "lead hazard." IBO-FISCAL IMPACT, *supra* note 19, at 16. The 23,204 figure represents an 8.1% increase in the number of units affected. *See* IBO-FISCAL IMPACT, *supra* note 19, at 16 (determining the child age based upon reference to the Housing Vacancy Survey). The IBO's definition of lead hazard, however, is more expansive than that of LL1 of 2004. Accordingly, IBO has found that twenty-four percent of those units containing a "lead hazard" under IBO's definition actually contain lead paint. IBO-FISCAL IMPACT, *supra* note 19, at 16. The seventy-six percent of units not containing a lead paint hazard under LL1 of 2004, although not requiring remedition under the law, nevertheless impose some costs on landlords due to the presumption of the existence of lead paint established under the law. These costs are discussed more fully *infra* Part IV.B.3.f.

Although increasing the applicable coverage age increases the units affected by the legislation, the liability imposed on landlords in potential negligence actions does not increase at a one-to-one ratio, since six-year-old children are less likely to suffer clinical symptoms of lead poisoning than younger children. *See infra* notes 203-04.

blood lead level that prompts intervention, which presumably will result in more findings of landlord breaches of duty;[161] it speeds up the time frame within which landlords must act, making it possible that more landlords might not act within a reasonable time frame to remediate lead-based paint hazards;[162] it establishes more detailed remediation requirements regarding impact, friction, and chewable surfaces, especially upon turnover;[163] and it requires that landlords attempt to inspect units even when tenants do not respond to questionnaires seeking to identify the presence of children of the trigger age.[164] Additionally, the authors speculate that increased tenant education as a result of the media coverage of the legislation may result in an increased number of cases in the short term, increasing risks faced by landlords in the short term.

From a landlord perspective, the first issue to tackle to reduce liability risks is to find the units where a child under seven years of age resides. Under Local Law 1 of 1982, constructive notice of a lead-based paint hazard was imputed to the landowner if the landowner knew that the unit was occupied by a family with a child under seven years of age.[165] Local Law 38 of 1999 discharged the landlord's obligation to determine the presence of a child of applicable age through a questionnaire.[166] LL1 of 2004, however, requires the landlord to attempt to obtain access to inspect properties at reasonable times to determine the presence of children in units for which the tenants did not return the landlord's questionnaire if the landlord does not otherwise have actual knowledge as to whether a child of applicable age lives in the apartment.[167] Since prior lead paint laws presumed the presence of lead paint in pre-1960 buildings and landlords were made aware of that presumption, it is possible that courts may consider landlords to have notice of the possible presence of a lead paint hazard where peeling paint in pre-1960 buildings exists. LL1 of 2004 does not change this possible interpretation of notice under the

[161] *See* IBO-ADMINISTRATION FISCAL ANALYSIS COMPARISON, *supra* note 19, at 4-5; *see also supra* note 160.

[162] *See id*. at 15.

[163] *See* Part IV.B.3.c, g.

[164] *See* Part IV.B.3.d-e.

[165] *See* Juarez v. Wavecrest Mgmt. Team Ltd., 672 N.E.2d 135, 142-43 (N.Y. 1996).

[166] *See* NEW YORK CITY ADMIN. CODE § 27-2056.3(b)(1) (1999).

[167] NEW YORK CITY ADMIN. CODE § 27-2056.4(e)(3)(i) (2004).

negligence liability regime.

The next step for landlords is to note any peeling or deteriorating paint on an annual basis for the units where it is determined that a child under the age of seven resides. The annual inspection requirement has not changed between Local Law 38 of 1999 and LL1 of 2004, though now landlords have a duty to find out if a child of applicable age resides in a unit by sending a form to the tenants and inspecting nonresponsive units.[168]

Landlord exposure to liability under LL1 of 2004 may be slightly increased since landlords must not only repair peeling paint but also repair defects underlying lead-based paint hazards. Landlords are required to repair all "underlying defects" where it is "reasonably foreseeable" that failure to repair that defect would cause a lead-based paint hazard.[169] This repair requirement may not affect negligence liability, however, since such liability is already based on the reasonableness of landlord action,[170] and landlords have been held liable pre-LL1 of 2004 for failure to repair underlying defects, especially those causing moisture that might result in bubbling or peeling paint.[171] On the other hand, the requirement to repair underlying defects may affect liability, since the reasonableness of landlord action may be interpreted by statutory directives. Since Local Law 38 of 1999 did not require the repair of the underlying defect,[172] but only the deteriorated subsurface,[173] it is possible that LL1 of 2004 will increase the standard of repair required to be considered reasonable, and therefore the landlord liability. However, under the City's Housing Maintenance Code and the State's Multiple Dwelling Law, landlords are required to repair such underlying defects where such defects create unsanitary conditions[174]—as would be the case where those defects cause lead-based paint to peel—and therefore the cost implications of that provision of LL1 of 2004 are

[168] *See id*.

[169] *2003 Council Infrastructure Report*, *supra* note 99, at 38; *see also* NEW YORK CITY ADMIN. CODE § 27-2056.3 (2004).

[170] *See Juarez*, 672 N.E.2d at 137.

[171] *See* Queeney v. Willi, 122 N.E. 198, 199-200 (N.Y. 1919).

[172] N. Manhattan Improvement Corp. (NMIC), What's Wrong with the Current Law (Local Law #38)? [hereinafter What's Wrong with the Current Law?], *at* http://www.nmic.org/nyccelp/Documents/WRONG.htm (last visited Mar. 5, 2005).

[173] *See* NEW YORK CITY ADMIN. CODE § 27-2056.2 (1999).

[174] *See supra* text accompanying notes 67, 105-07.

not unique.

In a multiple dwelling unit, actual notice of lead paint hazards in one unit "may have imposed an obligation to examine other portions of the structure for defects arising from the same cause and to ascertain what was ascertainable with the exercise of reasonable care."[175] While this duty is not clear, this is not a unique obligation imposed upon landlords by LL1 of 2004.

To summarize, although LL1 of 2004 will not increase the liability of landlords by changing the standard of care required of them, it may increase slightly the liability of landlords over Local Law 38 of 1999 due to increases in volumes of units affected, expedited timelines of action, and the requirement that landlords (as opposed to tenants) identify units with children.[176]

2. *Insurance*

As noted in the previous section, property and general liability insurance rates are closely linked to and dependent on landlord liability. This relationship has been used to explain the rise of insurance costs in the mid-1990s: in the early 1990s, some landlords were found liable for lead paint poisoning, and these cases have been linked to the 5.2% rise in insurance rates between 1994 and 1995,[177] the fastest growing category of landlord operating expenses at the time.[178]

Based on the analysis of landlord liability in the previous section, the authors find that minimal increases in landlord liability should be expected in the long term. As such, insurance rates are not expected to be significantly altered or insurance made any less available through exclusion in the long term. In the short term, however, it is possible that insurance rates will spike upward due to uncertainty. Insurance trends indicate that significant legislation often causes insurance rates to rise in the short term until the impacts are more fully known, and then those rates settle down to a more appropriate level.[179] This was the case after the initial

[175] Rodriguez v. Amigo, 663 N.Y.S.2d 873, 875 (N.Y. App. Div. 1997).

[176] *See supra* text accompanying notes 160-62, 167.

[177] NEW YORK CITY RENT GUIDELINES BOARD, HOUSING NYC: RENTS, MARKETS AND TRENDS '95, at v, 25 (1995) [hereinafter NYC RGB 1995 HOUSING REPORT].

[178] Lash, *supra* note 6, at 301.

[179] Interview with John McCarthy, Executive Vice President and Chief Operating Officer, The Community Preservation Corporation (CPC) (Mar. 9,

spike of insurance rates in the mid-1990s attributable to the courts' willingness to find landlords liable for negligence in repairing lead paint hazards, after which time insurance premiums increased at a slower rate and even dropped.[180]

a. *Industry Overview*

Insurance costs have been a highly volatile cost component, subject to large increases that are never offset by commensurately large decreases.[181] Recent volatility may be a result of differential insurance cost measurements.[182] However, it is most likely that the decline in the stock market, coupled with post-9/11 fears, caused an increase in property and general liability insurance rates because financing buildings in New York City was perceived to be riskier than in previous years.[183] The Terrorism Risk Insurance Act of 2002 further complicated the availability of insurance by requiring buildings that pose a negligible terrorism risk to purchase terrorism insurance.[184] In all, after 9/11, insurance costs rose more than thirty percent due to these many converging factors.[185]

These different insurance cost increases began prior to the passage of LL1 of 2004 and were not evenly distributed by housing type or geographic location. Between 2001 and 2002, insurance rates increased 49.6% in Queens, 42.6% in Bronx, 40.4% in Manhattan, and 34.6% in Brooklyn.[186] Citywide, insurance rates for buildings with 100 or more units increased 80.7%, 20-99 unit buildings increased 45.2%, 11-19 unit buildings increased 34.2%, and 10 or fewer unit buildings increased 22.8%.[187] In total, 2002 insurance rates jumped 40.5%, which was on top of the 16.5% increase felt in 2001.[188] Insurance rate predictions for 2003,[189] however, showed an increase of

2004) [hereinafter McCarthy Interview].

[180] *See* NYC RGB 1995 HOUSING REPORT, *supra* note 177, at v.

[181] *See* NEW YORK CITY RENT GUIDELINES BOARD, 2003 PRICE INDEX OF OPERATING COSTS 6 (Apr. 25, 2003) [hereinafter RGB 2003 PIOC].

[182] RGB 2003 INCOME AND EXPENSE STUDY, *supra* note 44, at 14.

[183] RGB 2002 HOUSING REPORT, *supra* note 35, at 16.

[184] Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322 (2002); *see* RGB 2003 PIOC, *supra* note 181, at 7.

[185] RGB 2003 PIOC, *supra* note 181, at 6.

[186] *Id.*

[187] *Id.*

[188] *Id.* at 5-6.

[189] At the time of submission for publication, these figures were the most

approximately 19.7%, perhaps indicating a potential stabilization in rates.[190]

For pre-1947 buildings, insurance comprised 5.1% of total operating costs on average in 2001,[191] compared to 3.5% for post-1946 buildings.[192] This cost differential suggests that pre-1947 buildings, which tend to be smaller, are less able to absorb insurance rate increases. This difference is especially important to this Article's analysis since buildings built prior to 1947 constitute the bulk of buildings containing lead-based paint.

These figures do not suggest the significant insurance cost impact of Local Law 38 of 1999 that some have suggested, since these figures appear to indicate that external factors caused insurance rates to change. While insurance companies have begun to exclude lead coverage from policies, a number of major insurance companies continued to provide lead coverage under Local Law 38 of 1999 in 2001.[193] Because LL1 of 2004 creates similar though slightly increased risks for insurance companies, the authors believe it is unlikely that LL1 of 2004 will do much to affect the availability of lead coverage insurance.

According to the 2003 New York Rent Guidelines Board Income and Expense Study, which analyzed the insurance impacts of Local Law 38 of 1999, most of the buildings currently classified as "distressed" are in poor financial position due mainly to costs other than insurance costs.[194] Incremental cost increases may affect properties on the margins of sustainable net operating income, as discussed below,[195] but those costs are fairly minimal, so that most properties in danger of abandonment will not be placed at higher risk simply due to increased insurance costs attributable to LL1 of 2004. Since 1990, average landlord cost-to-income ratios have declined every year except 1996 and 2000,

recent insurance rate data for New York City of which the authors were aware.

[190] *Id*. at 10.

[191] RGB 2003 INCOME AND EXPENSE STUDY, *supra* note 44, at 21 app.5.

[192] *Id*.

[193] *See* National Center For Healthy Housing, Insurance Companies Offering Lead Liability Coverage for Lead Hazard Evaluation and Reduction Operations and Other Housing Rehabilitation and Maintenance Activities, *at* http://www.centerforhealthyhousing.org/html/lead_liability.html (last visited Mar. 1, 2005).

[194] RGB 2003 INCOME AND EXPENSE STUDY, *supra* note 44, at 7, 22 app.6.

[195] *See infra* text accompanying note 221 and Section IV.A.5(a).

when heating oil spikes caused an increase in costs.[196] Between 1999 and 2001, when Local Law 38 of 1999 was in effect, net operating income increased, despite insurance cost increases.[197]

Nevertheless, insurance companies are writing fewer and fewer policies for older multi-family structures, and prices are estimated to have doubled over the past two years.[198] In response to such trends, the University Neighborhood Housing Program (UNHP) raised several concerns regarding LL1 of 2004, most important of which was "whether insurance concerns had been investigated."[199] UNHP claimed that the past three years had created a market in which obtaining "affordable and adequate coverage has become increasingly difficult."[200] The following sections assess the unique impacts of LL1 of 2004 on insurance rates.

b. *LL1 of 2004 Impacts*

LL1 of 2004 may incrementally increase the cost of insurance based upon the increased liability discussed in the previous section. In the short term, there may be a spike in cost because of an increased number of lawsuits (resulting from increased exposure of tenants to the issue of lead paint hazards as well as from the misconception that landlords are automatically liable for lead paint poisonings) that may force insurance companies to expend greater resources to defend their policyholders. The authors expect a gradual decline in insurance premiums after the initial spike as insurance carriers realize that LL1 of 2004 does not significantly increase insurance risks and as media coverage of the lead paint issue subsides.

One specific provision of LL1 of 2004 should be mentioned here: LL1 of 2004 raises the age of children covered by its provisions—from Local Law 38 of 1999's under six years of age to LL1 of 2004's under seven years of age. However, this should not be a large liability concern because the incidence of lead

[196] RGB 2002 HOUSING REPORT, *supra* note 35, at 32-33.

[197] RGB 2003 INCOME AND EXPENSE STUDY, *supra* note 44, at 10.

[198] *Lead Poisoning Prevention Legislation Passes City Council; Override of Mayoral Veto Anticipated*, NOTES (Univ. Neighborhood Housing Program, Bronx, N.Y.), New Year's 2004, at 1, *available at* http://www.unhp.org/pdf/notes2003-2004.pdf.

[199] *Id*.

[200] *Id*.

poisoning decreases geometrically as children age. To illustrate the point: nearly half of the 5638 newly identified child EBLL cases and forty-five percent of the intervention-level cases in 2001 were for children under the age of three.[201] Children under six constituted 81.9% of the newly reported cases and 80.2% of all intervention-level cases.[202] Most poisoning occurs for children who are three years of age or younger, because children at that age have more direct hand-to-floor and then hand-to-mouth contact, and are also more likely to chew or "teeth" on wall and windowsill surfaces.[203] In fact, DOHMH Commissioner Frieden noted that "[e]xtending the age to children under 7 years of age from children under 6 years of age directs resources to an age group at lower risk," meaning that the extra levels of enforcement, activity, and liability should be smaller, due to the lower risk.[204]

c. *Lead Coverage*

Currently, many types of available insurance protect landlords from lead poisoning claims. These are comprehensive general, umbrella, excess, first-party property, and business interruption liability insurance policies.[205] Some policies provide allowances to assist with the cost of remediation related to lead paint hazards, though many do not provide any coverage for such mitigation work.[206] Whether an insurance company may legally deny coverage for such mitigation work is unclear and is currently being decided in the courts nationwide.[207]

Insurance carriers may choose to specifically exclude lead paint hazards in their policies.[208] Current standard general liability policies exclude damage caused by the "'actual, alleged or

[201] DOHMH 2001 REPORT, *supra* note 22, at 6, 13.

[202] *See supra* notes 24-26 and accompanying text.

[203] DOHMH 2001 REPORT, *supra* note 22, at 13.

[204] Thomas R. Frieden, Commissioner, DOHMH, testimony regarding Int. No. 101-A (June 23, 2002). *But see* N.Y.C. Coalition to End Lead Poisoning v. Giuliani, 245 A.D.2d 49 (1997) (holding that, under Local Law 1 of 1982, the city defendants had to provide for safety of children under seven years of age if lead-based paint is presumed to exist, whether or not a lead-based paint hazard exists).

[205] *See* Eugene R. Anderson & Joan L. Lewis, *Lead-Based Paint: Abate or Wait? Your Insurance Policy May Hold the Answer*, 182 N.J. LAW. 10, 10 (1997).

[206] *See id.*

[207] *See id*. (analogizing asbestos cases to lead paint cases).

[208] McCarthy Interview, *supra* note 179.

threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time.' 'Pollutants' are defined as 'any solid, liquid, gaseous or thermal irritant or contaminant including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."[209] In cases dealing with lead paint chips, the courts have consistently held that this language is ambiguous as to whether or not lead paint chips are considered a pollutant.[210] Such ambiguous insurance provisions are construed in favor of the policyholder.[211] An insurer may, however, exclude coverage where the exclusion "is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case."[212] Any ambiguity must be resolved in favor of the insured and against the insurer.[213] This rule applies particularly "when the ambiguity is in an exclusionary clause."[214] Under New York law, an exclusion clause receives "a strict and narrow interpretation."[215]

Therefore, in New York, for lead hazards to be excluded from coverage, an insurance company must use the term "lead, paint, or lead based paint" explicitly in the definition of a pollutant.[216] This

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[209] Belt Painting Corp. v. TIG Ins. Co., 795 N.E.2d 15, 16 (N.Y. 2003) (quoting a standard form "Total Pollution Exclusion Endorsement"); *see also* Calvert Ins. Co. v. S & L Realty Corp., 926 F. Supp. 44, 45 n.1 (S.D.N.Y. 1996) (quoting a similar exclusion).

[210] *See, e.g.*, Westview Assoc. v. Guaranty Nat'l Ins. Co., 740 N.E.2d 220, 223 (N.Y. 2000).

[211] *See, e.g.*, *Belt Painting*, 795 N.E.2d at 17 (N.Y. 2003).

[212] Stoney Run Co. v. Prudential-LMI Commercial Ins. Co., 47 F.3d 34, 36-37 (2d Cir. 1995) (quoting Cont'l Cas. Co. v. Rapid-Am. Corp., 609 N.E.2d 506, 512 (N.Y. 1993)); *Belt Painting*, 795 N.E.2d at 17 (internal quotation omitted); Westview Assoc. v. Guaranty Nat'l Ins. Co., 740 N.E.2d 220, 223 (N.Y. 2000) (same); Gen. Accident Ins. Co. of Am. v. Idbar Realty, 622 N.Y.S.2d 417 (N.Y. Sup. Ct. 1994).

[213] *Belt Painting*, 795 N.E.2d at 17; *Westview*, 740 N.E.2d at 223; Roofers' Joint Training, Apprentice and Educ. Comm. of Western N.Y. v. Gen. Accident Ins. Co. of Am., 713 N.Y.S.2d 615, 617 (N.Y. App. Div. 2000); *see also* Lefrak Org., Inc. v. Chubb Custom Ins. Co., 942 F. Supp. 949, 952 (S.D.N.Y. 1996).

[214] *Stoney Run*, 47 F.3d at 37 (citing Ace Wire & Cable Co. v. Aetna Casualty & Surety Co., 457 N.E.2d 761, 764 (N.Y. 1983)); *see also* Vigilant Ins. Co. v. V.I. Technologies, Inc., 676 N.Y.S.2d 596, 597, 598 (N.Y. App. Div. 1998).

[215] *Belt Painting*, 795 N.E.2d at 17 (internal citations omitted); *Roofers' Joint Training*, 713 N.Y.S.2d at 617 ("Any such exclusions or exceptions from policy coverage . . . are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction." (quoting Seaboard Sur. Co. v. Gillette Co., 476 N.E.2d 272, 275 (N.Y. 1984))); *see also* Calvert Ins. Co. v. S & L Realty Corp., 926 F. Supp. 44, 46 (S.D.N.Y. 1996).

[216] *See, e.g.*, Generali-U.S. Branch v. Caribe Realty Corp., 612 N.Y.S.2d 296, 299 (N.Y. Sup. Ct. 1994) (with respect to an insurance company's general

is consistent with most courts' interpretations of the pollution exclusion clause.[217] As a result, some insurance agencies have created a lead exclusion.[218] This language has been found legally unambiguous by at least one court in an unpublished opinion.[219] Though at this time many insurance companies have not yet created such exclusions, they are fully within their legal rights to do so.[220]

If losses due to lead paint claims increase significantly as a result of LL1 of 2004 (in part due to claimants' misunderstandings about the effects of LL1 of 2004 upon landlord duties of care), it is foreseeable that insurance companies will choose to exclude lead hazards from general coverage and offer other policies that charge a premium for lead coverage. In this case, "good landlords" and landlords of buildings in high rent or high NOI areas will likely obtain this insurance, whereas "bad landlords," smaller landlords, and landlords operating on the margins of sustainability may not.[221] The irony is that good landlords who properly maintain their premises do not have a significant risk of incurring liability resulting from lead paint hazards and therefore have less need for lead paint coverage than do landlords who fail to properly maintain their buildings.

Insurance policies often include a requirement that the insurance company defend the policyholder in the event of a lawsuit, so a landlord may use insurance to protect the property from potential bankruptcy (assuming a successful suit would

exclusion clause for pollutants, finding that there was a "reasonable interpretation of the exclusion other than that it applies to claims based on lead poisoning"). *But see* Oates v. State, 597 N.Y.S.2d 550, 554 (N.Y. Ct. Cl. 1993) (finding lead included in generic exclusion provision in insurance policies).

[217] *See* Kurt C. Schultheis, Sullins v. Allstate*: Lead Paint and the Growing Ambiguity of the Pollution Exclusion Clause*, 27 U. BALT. L. REV. 475, 503 (1998) (citing *Lefrak*, 942 F. Supp. at 956).

[218] *E.g.*, Allstate Insurance Company, Policy Endorsement, New York Amendment of Policy Provisions—AP1948 (Feb. 26, 2004) (excluding coverage for "bodily injury or property damage arising out of . . . lead paint") (on file with journal).

[219] Mt. Vernon Fire Ins. Co. v. Jones, No. CV 95 3295 (RJD), 1997 WL 37033 at *3 (E.D.N.Y. 1997) (mem.).

[220] McCarthy Interview, *supra* note 179.

[221] *See* NYC RGB 1995 HOUSING REPORT, *supra* note 177, at vii (discussing the inability of landlords or low-rent tenants in distressed buildings to accept higher costs).

bankrupt the property).[222] Whether a landlord decides to purchase an insurance policy to protect herself from lead paint liability will depend upon the building age, type, condition, location, and the risk-loving or risk-averse nature of the landlord or owner. The determination not to obtain lead coverage, however, may seriously jeopardize the ability to obtain financing or refinancing, as some lenders, such as the Community Preservation Corporation (CPC), require lead coverage while others may consider the absence of liability coverage a potential risk to the landlord's ability to service the loan debt in the event of a lawsuit finding the landlord negligent.[223]

Those companies that have excluded lead coverage could charge a premium to restore such lead coverage or could continue to deny lead coverage.[224] The authors' contention is that insurance implications specifically related to LL1 of 2004 should be small because the new legislation does not substantially increase owner liability and because owner liability levels govern insurance rates in the long term. As short-term uncertainty regarding liability and compliance issues subsides, long-term rates should fall back to stabilized Local Law 38 of 1999 levels.

### 3. *Operating Costs: Implementation and Assessment*

#### a. *Introduction*

In this section, an analysis of the differences in operating costs between LL1 of 2004 and Local Law 38 of 1999 will be performed. Under LL1 of 2004, operating costs will increase in two ways: (1) via the increase in volume of new units covered, and (2) through the per-unit increase in compliance costs for LL1 of 2004 relative to Local Law 38 of 1999. The authors will first present a brief overview of some large-scale issues regarding

[222] *See* Cont'l Cas. Co. v. Rapid-Am. Corp., 609 N.E.2d 506, 509 (N.Y. 1993) (describing broad scope of duty to defend obligations); *see also* Anthony E. Cascino, *Five Things Every Lawyer Should Know About Insurance Law*, 18 CBA Rec. 43, 44 (Apr. 2004) ("Many insurance policies require the insurer to defend the policyholder in lawsuits involving covered claims.").

[223] *See* Lash, *supra* note 6, at 302; Telephone Interview with Beth Malone, Insurance Services Program Manager, Neighborhood Housing Services (Feb. 20, 2004) [hereinafter Malone Interview].

[224] The ability to reject lead coverage is currently an issue of contention. *See* Mark E. Miller, *Lead-Based Paint Insurance Coverage: Courts Mandate Coverage Despite Insurance Industry Opposition*, 9 ENVTL. CLAIMS J. (1997), http://www.gtlaw.com/pub/articles/1997/millerm97.htm.

volume of units that will be covered by LL1 of 2004, and then analyze the actual cost differential comparisons for LL1 of 2004 and Local Law 38 of 1999.

b. *Leading Issues*

(1) *Coverage Age*

In a pre-1960 residential apartment, the landlord is responsible for determining whether a child under the age of seven resides in the apartment. It is estimated that sixteen percent of pre-1960 units are home to children under the age of seven.[225] Based upon data from the 2002 Independent Budget Office (IBO) study and the 2002 Housing and Vacancy Survey (HVS), the percentage of units with a six-year-old child in residence is estimated to be 8.1% of all units containing a lead hazard.[226]

In addition to adding to the overall volume of units covered, this increase in coverage age will also have an impact on the number of units affected by HPD violations. HPD assumes a twelve percent increase in complaints, resulting from the increased number of children covered.[227] Based on a historic trend of twenty-four percent of complaints resulting in remediation and inspection costs to the landlord, the authors estimate that the increased volume of remediations due to HPD complaints and the increased coverage age will be 2.74%.[228]

In analyzing the costs and benefits of changing the age range, it seems that the incremental costs associated with the age change may not be worth the additional benefits, since the risk of lead poisoning decreases geometrically with age.[229] The costs of this provision, however, as will be noted below, are significantly greater than the actual number of lead poisonings prevented in six-

[225] IBO-FISCAL IMPACT, *supra* note 19, at 16 (determining the child age based upon reference to the Housing Vacancy Survey).

[226] *Id.*; *see also supra* note 160.

[227] *See* IBO-ADMINISTRATION FISCAL ANALYSIS COMPARISON, *supra* note 19, at 7.

[228] This figure is based on the IBO's assumption of a 12% increase in complaints under LL1 of 2004 multiplied by DOHMH's 95% response rate to complaints multiplied by the 24% remediation rate of units inspected. DOHMH 2001 REPORT, *supra* note 22, at 19 (95% response rate); IBO-ADMINISTRATION FISCAL ANALYSIS COMPARISON, *supra* note 19, at 7 (12% complaint increase rate); IBO-FISCAL IMPACT, *supra* note 19, at 16 (24% remediation rate).

[229] *See supra* text accompanying notes 201-04.

year-olds, since landlords must incur costs for all such units through inspection, turnover remediations, and other administrative duties, whether or not there is a lead paint hazard in the unit or EBLL suffered by the six-year-old. Additionally, this provision goes beyond the prescriptions of Title X,[230] thereby increasing costs even to federally funded units where six-year-old children are present.

(2) *Elevated Blood Lead Level*

LL1 of 2004 lowers the threshold blood testing levels that mandate a home inspection from one test showing 20 µg/dL or two showing 15-19 µg/dL spaced more than three months apart to one test showing above 15 µg/dL.[231] Upon such a finding, DOHMH is required to inspect the household paint conditions for visible lead paint hazards and to pass any positive results to HPD.[232] HPD then issues a violation notice and a notice to correct to the owner.[233] The owners have up to thirty-four days to correct the violation.[234]

In 2001, 5638 children were newly identified as having EBLLs above 10 µg/dL and 653 were newly identified as having EBLLs above 20 µg/dL or between 15-19 µg/dL in two separate tests.[235] These figures illustrate that the "universe" of children with significant EBLL of over 15 µg/dL is rather small, given the total population of children in New York City. In part because of these findings, the IBO estimates the costs associated with reducing the intervention blood lead level at $667,000 annually, of which $107,600 is associated with inspections of an additional 500 units and $559,100 with remediation of an additional 188 units.[236]

This threshold-lowering provision, while costly, is expected to yield significant health benefits, both as a preventive measure and as a measure that serves to protect more children. A 1993 study indicates that mental effects, including reduced IQ, may be

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[230] *See supra* text accompanying notes 58-62.

[231] *Compare* NEW YORK CITY ADMIN. CODE § 27-2126 (1999), *with* NEW YORK CITY ADMIN. CODE § 27-2056.14 (2004).

[232] NEW YORK CITY ADMIN. CODE § 27-2056.14 (2004).

[233] *See* Appendix B.

[234] NEW YORK CITY ADMIN. CODE § 27-2056.14 (2004).

[235] DOHMH 2001 REPORT, *supra* note 22, at 5-6.

[236] IBO, *supra* note 19, at 8. Again, this figure assumes the more stringent lead paint definition under a previous version of LL1 of 2004. *See supra* note 161 and accompanying text.

associated with high blood lead levels.[237] This provision serves to protect children from those effects. While physical symptoms are generally not present at such low levels, intervention is a necessary means to protect children from continued exposure to lead paint hazards that could eventually result in lead poisoning. Although DOHMH does not have data available on EBLLs at or above a single test of 15 µg/dL, the authors expect a significant number of units to be affected by the change in the intervention level. Given the high correlation between the presence of lead paint hazards in the home and intervention-level EBLLs,[238] the authors believe the provision should both protect children currently living in units with lead-paint hazards from additional exposure by triggering remediation and reduce the potential exposure of future tenants. Given the lack of data, however, it is difficult for the authors to assert a conclusion on the worthiness of this provision. Nonetheless, the authors feel that the provision is reasonable, cost-effective, and valuable, especially in light of studies finding there to be negative mental effects suffered by children at relatively low EBLLs and as compared to other states that have intervention levels of 10 µg/dL.[239] The reduced intervention level is now more aligned with the intervention level recommended by the Centers for Disease Control and Prevention (CDC) and is a reasonable balance between protecting health and maintaining affordability, at least until further studies can be conducted regarding the effects of low-level lead exposure.[240]

c. *Requirements upon Unit Turnover*

The first direct cost area reviewed will be the requirements upon unit turnover for LL1 of 2004 in comparison with Local Law 38 of 1999. Provisions similar to those requiring paint remediation

[237] *See* COMM. ON MEASURING LEAD IN CRITICAL POPULATIONS, NAT'L RESEARCH COUNCIL, MEASURING LEAD EXPOSURE IN INFANTS, CHILDREN, AND OTHER SENSITIVE POPULATIONS (1993).

[238] *See* DOHMH 2001 REPORT, *supra* note 22, at 10.

[239] *See* Juberg et al., *supra* note 2, at 174; *see, e.g.*, Comm'r of Health, *supra* note 15, at 5-7 (discussing consensus among Minnesota's health and housing agencies that resources should be sought to permit intervention in cases where children have EBLLs above 10 µg/dL).

[240] CENTERS FOR DISEASE CONTROL & PREVENTION (CDC), PREVENTING LEAD POISONING IN YOUNG CHILDREN: A STATEMENT BY THE CENTERS FOR DISEASE CONTROL 2 (1991); CDC, Why Not Change the Blood Lead Level of Concern at this Time?, http://www.cdc.gov/nceh/lead/spotLights/changeBLL.htm (last reviewed Oct. 7, 2004).

upon turnover in LL1 of 2004 were present in Local Law 38 of 1999.[241] Local Law 38 of 1999 required all visible paint hazards to be remediated under its interim controls,[242] while LL1 of 2004 requires remediation to specific standards.

*Figure 3* provides a comparison between the turnover rules between LL1 of 2004 and Local Law 38 of 1999.

| **Figure 3: Turnover Requirements** | |
|---|---|
| LL1 of 2004[243] | Local Law 38 of 1999 |
| For units in a multiple dwelling erected before January 1, 1960, or in a private dwelling occupied by persons other than the owners family, upon turnover the landlord is responsible for:<br>• Remediating all lead-based paint hazards and any underlying defects, when such underlying defects exist;[244]<br>• Making floors, windowsills, and window wells in the dwelling unit smooth and cleanable;[245]<br>• Removing or permanently covering lead-based paint on all friction surfaces on all doors and door frames, windows, and providing for the installation of replacement window channels or slides on all lead-based painted friction surfaces on all windows.[246] | For units in a multiple dwelling erected before January 1, 1960, upon turnover the landlord is responsible for:<br>• Performing remediation work as per the listed measures.[247]<br><br>These measures include:<br>• Making all bare floors in the dwelling unit smooth enough so that dust can be removed by normal cleaning without special equipment;[248]<br>• Adjusting all doors and windows to ensure that they are properly hung, so that no painted surfaces bind;[249]<br>• Disposing all work materials in a safe manner.[250] |

[241] *See supra* text accompanying notes 96-100; *see also Figure 2: Comparison of Remediation Requirements* in Part IV.B.1.
[242] NEW YORK CITY ADMIN. § 27-2056.2 (1999).
[243] NEW YORK CITY ADMIN. CODE § 27-2056.8(a)(1)-(4) (2004).
[244] *Id.* § 27-2056.8(a)(1).
[245] *Id.* § 27-2056.8(a)(2).
[246] *Id.* § 27-2056.8(a)(3)-(4).
[247] NEW YORK CITY ADMIN. CODE § 27-2056.6(a) (1999).
[248] *Id.* § 27-2056.6(a)(5).
[249] *Id.* § 27-2056.6(a)(6).
[250] *Id.* § 27-2056.6(a)(8).

Costs due to turnover that are unique to LL1 of 2004 include the requirement that remediation be performed according to certain work practices and the requirement that a dust clearance test be taken to prove the hazard's remediation.[251] Most costly is the requirement that the lead-based paint on the windows and doors (the existence of which is presumed) must either be removed or permanently covered, *or* that, for windows, the window channels and slides be covered or completely replaced upon the unit's turnover (or extended vacancy).[252] According to one environmental services company, following the new turnover requirements can be somewhat complicated because pre-1960 units may have older-style wood windows with weights and pulleys and other dated mechanical technologies that cannot be replaced.[253] Furthermore, because these windows are old and inefficient, owners may decide that it is more cost-effective in the long term to replace the windows, raising turnover costs substantially. Local Law 38 of 1999, on the other hand, only required that doors, windows, and cabinets be adjusted and rehung.[254]

Door and window frames and other friction surfaces are significant routes of exposure to lead dust for children, as these surfaces tend to be easily accessed by children.[255] Their effective remediation is therefore important to minimize access to lead paint chips and lead dust created by rubbing surfaces. Although such remediation is important, the authors feel that LL1 of 2004 lacks clarity regarding the means by which landlords are released from the turnover obligations. A one-time turnover remediation should be sufficient to eliminate the risk of lead paint exposure through friction surfaces, yet the bill does not demonstrate how a landlord might exempt herself from conducting further turnover

[251] *See* NEW YORK CITY ADMIN. CODE § 27-2056.11 (2004).

[252] *Id*. § 27-2056.8(4).

[253] Telephone Interview with Linear Environmental Corporation general staff. The costs related to stripping the paint clean and repainting windows in a lead-safe manner would cost roughly $200 per window. *Id*.

[254] *See* NEW YORK CITY ADMIN. CODE § 27-2056.6(a) (1999).

[255] Scott Clark et al., *Prevalence and Location of Teeth Marks Observed on Painted Surfaces in an Evaluation of the HUD Lead Hazard Control Grant Program*, 17 APPLIED OCCUPATIONAL & ENVTL. HYGIENE 628, 632 (2002); Helen J. Binns, *Lead Poisoning: Still a Common Problem in Chicago*, 18 THE CHILD'S DOCTOR: J. OF CHILDREN'S MEMORIAL HOSP. CHICAGO 15 (2001), *available at* http://www.childsdoc.org/spring2001/leadpoisoning.asp.

remediations.[256]

For purposes of this Article's analysis, the authors estimate that the standard New York City apartment has eight windows, based upon empirical analysis and discussions with various developers,[257] and that the costs of remediating the paint hazards upon turnover for those units based on that assumption are roughly $1600/unit. Replacement of the windows ranges from $1400 to $2800 per unit, with an average replacement cost of $2100. Because the cost differential between window remediation and replacement is great and the value to landlords only minimally different between remediation and replacement, the authors assume that landlords will choose to remediate their windows as as a result of LL1 of 2004, rather than replace them.[258] The authors assume that this is a one-time remediation cost, since once a window is replaced or has all lead paint removed, it can no longer be presumed to contain lead paint and be subject to the lead paint presumption.

Regarding doors, the costs are slightly different. A standard-size entryway door is six feet by three feet, for a total of eighteen

[256] A landlord may exempt herself from LL1 of 2004 by conducting an XRF test indicating that no lead paint exists in the unit (the exact methodology of the test still must be determined by HPD). However, this requirement seems excessive to exempt a landlord from the turnover provision once a turnover remediation has been conducted. HPD may promulgate rules that provide for a lesser means of landlord exemption, but, as the law currently stands, this provision is unclear and may be unnecessarily burdensome for landlords.

The authors feel that cost increases attributable to the work practices provision will be fairly small as LL1 of 2004 only stipulates that work practices relating to turnover must comply with section 27-2056.11(a)(3), which simply deals with dust clearance tests after completion of work. *See infra* Part IV.B.3.h. The section dealing with turnover does not seem to apply the more vigorous standards of section 27-2056.11, which governs general lead-safe work practices.

[257] The standard apartment is assumed to contain two bedrooms (two windows in each bedroom), one bathroom (one window), kitchen (one window), and living room (two windows).

[258] Although some of the older windows and door frames are inefficient, these inefficiencies are borne primarily by tenants and do not affect landlord operating costs. Accordingly, the presence of older windows is of little consequence to owners of distressed buildings in deciding whether to replace or remediate those windows. On the other hand, the authors' empirical study indicates that "good landlords" have almost entirely replaced such windows. Indeed, these older window technologies are present in very few buildings. The authors conclude that the remediation/replacement requirement of LL1 of 2004 will have no impact on any decision to replace windows when a landlord has previously not decided to replace the windows under the rehanging requirement of Local Law 38 of 1999.

square feet per side.[259] With both sides and the edges, the average door has roughly thirty-eight square feet of surface area. The friction surfaces of the door and doorframe are the only surfaces that must be remediated, and these surfaces are no more than ten percent of the surface area of the door. Since LL1 of 2004 does not require a certified abatement specialist to perform the remediation, the authors assume that the cost for lead-safe paint remediation is six dollars per square foot,[260] resulting in a total cost of $22.80 for the average front door.

The authors estimate that the number of owners who decide to replace front doors due to this requirement should be rather small due to the large cost differential between remediation and replacement. Based upon anectodal evidence, the authors estimate that seventy-five percent of exterior doors are metal, that twenty-five percent of exterior doors are wood, and that one hundred percent of interior doors are wood. The estimated front door replacement costs are $355.71 for metal and $685.71 for wood, resulting in an average front door replacement cost of $438.21.[261] Even at this cost, turnover abatement could be performed up to seven times before replacement of the door becomes cost-effective.

The installation of interior doors would be less costly than installation of exterior doors, as ready-painted interior doors can be purchased and installed for less than $40.[262] The authors' calculations indicate that the replacement price for interior doors, including installation costs, is approximately $52, while the remediation cost is approximately $23.[263] At this price point, an owner is nearly three times more likely to choose to remediate the

[259] Marjie O'Connor, Exterior Doors, *at* http://www.housingzone.com/topics/pr/cmaterials/pr02aa012.asp (last visited Jan. 29, 2005).

[260] *See infra* Part IV.B.3.g.

[261] *See* O'Connor, *supra* note 259.

[262] Danny Lipford, CBS, Upgrading Your Home's Doors, Aug. 21, 2003, *at* http://www.cbsnews.com/stories/2003/08/20/earlyshow/contributors/dannylipford/main569344.shtml.

[263] This replacement cost includes purchasing and installing the ready-painted doors (approximated at $40) and remediating the door frame (approximately $12, which comprises an estimated $6/square foot charge for lead-safe trained worker multiplied by the estimated 2 square feet of door frame). The remediation cost is this same $6/square foot charge multiplied by 3.8 square feet, or the amount of friction surface comprising the door and door frame (10% of 38 total square feet (the average door has 36 square feet of surface area, and the average door frame has 2 square feet of surface area)).

interior doors than to replace them. The doors represent another one-time cost since, once interior doors are replaced or remediated, they should not be subject to the lead paint presumption.

Paint remediation for deteriorating paint conditions and deteriorating subsurface conditions was previously required under Local Law 38 of 1999, so the only additional costs imposed by LL1 of 2004 are the costs of remediation of underlying conditions.[264] However, these underlying conditions already must be repaired under the Housing Maintenance Code when they pose a health threat (as would be the case where an underlying condition creates a lead paint hazard).[265] Due to this pre-existing statutory requirement, the authors assume that this provision will not increase costs to landlords implementing LL1 of 2004.

Unique to LL1 of 2004 is the application of turnover requirements to all non-owner-occupied units in private dwellings, whether or not a multiple dwelling.[266] The units not considered "multiple dwelling units" are estimated to add slightly over 26,000 units to the almost 174,000 pre-1960 multiple dwelling units that annually turn over.[267] Annual costs due to turnover for all pre-1960 units are estimated at $231.58 per turnover, the vast majority of the costs of LL1 of 2004 in the authors' analysis.[268] Although neither LL1 of 2004 nor Local Law 38 of 1999 has a direct impact on the frequency of tenant turnover, the authors assume a slightly increased rate of turnover due to slightly increased rents,[269] though this increased rate of tenant turnover is not expected to be a

[264] *See supra* text accompanying notes 96-100.

[265] *See supra* text accompanying notes 105-07.

[266] NEW YORK CITY ADMIN. CODE § 27-2056.8 (2004); *see also supra* notes 96-99 and accompanying text.

[267] Approximately 200,000 units turn over annually, approximately 87% of which are multiple dwelling units. *See* IBO-FISCAL IMPACT, *supra* note 19, at (stating that "[j]ust under 200,000 private, pre-1960 rental units turn over each year"); 2002 HOUSING AND VACANCY SURVEY, *supra* note 38, Series IIA, tbl.15 (showing that 87.3% of total vacant units for rent were in multiple dwelling buildings), http://www.census.gov/hhes/www/housing/nychvs/2002/s2at15.html.

[268] These costs are based on: (1) an average per-window remediation cost of $62.50, with the average New York City apartment having four windows; (2) an average per-outside door remediation cost of $22.80; and (3) an average per-interior door remediation cost of $31.70, with the average New York City apartment having three interior doors. These costs are averaged over all apartments and include a slight upward adjustment from existing turnover rates due to the assumed increased rents caused by LL1 of 2004.

[269] *See* Part IV.B.5 (discussing impact on rents).

significant cost factor.

d. *Notification/Determination of Coverage Age Child Tenancy*

LL1 of 2004 establishes specific notification requirements for a new lease or new tenant situation. Upon signing a new lease, renewal lease, or commencement of occupancy, the landlord is responsible for distributing a DOHMH approved form in both English and Spanish to the tenant, inquiring if a child under the age of seven is in residence.[270] Subsequently, the tenant is responsible for replying to an annual notice regarding whether a child of the coverage age lives in the dwelling unit, although, if the tenant fails to reply, a landlord must try to gain access to the unit to determine whether a child is in residence.[271] After responding to the notice, it is the tenant's responsibility to inform the landlord if a child of the coverage age begins residence.[272] If the landlord is not notified, has no actual knowledge that such a child is residing in the dwelling unit, and has made the called-for investigations, then the landlord is not deemed to have notice of the existence of a lead paint hazard requiring remediation under LL1 of 2004.[273] It should be noted, however, that while the landlord may not be deemed to have knowledge of the presence of a child of applicable age and therefore has no duties under LL1 of 2004, the landlord has a duty to inspect units or repair lead-based paint hazards under other statutes, and failure to remedy such defects may create landlord liability for injuries arising from the hazard.[274]

*Figure 4* provides a comparison of the timelines for notification purposes for a renewal/release situation under LL1 of 2004 and Local Law 38 of 1999.[275]

[270] NEW YORK CITY ADMIN. CODE § 27-2056.4(e)(1) (2004).
[271] *Id* § 27-2056.4(e)(3)(i).
[272] *Id* § 27-2056.4(e)(3)(ii).
[273] *See id*. § 27-2056.4(e)(3)(i).
[274] *See supra* Parts III, IV.B.
[275] NEW YORK CITY ADMIN. CODE § 27-2056.4 (2004).

| **Figure 4: Notification Timeline Comparison** | | |
|---|---|---|
| Date | LL1 of 2004 | Local Law 38 of 1999 |
| 1/1-1/15 | Landlord must present the tenant with a DOHMH-approved form in both English and Spanish inquiring about the residence of any children under the age of seven.[276]<br><br>This form can be either mailed first class, hand delivered, enclosed with the January rent bill (if the rent bill is delivered between 12/15 and 1/16), or distributed along with the DOHMH guidelines regarding windowguards.[277] | Landlord is responsible for providing tenants with an approved notice on a one-page form inquiring if a child under the age of six resides there. This form was to be given in "at least" English and Spanish.[278]<br><br>This form could be either mailed first class, hand delivered, enclosed with the January rent bill (if the rent bill is delivered between 12/15 and 1/16), or distributed along with the DOHMH guidelines regarding window guards.[279] |
| 2/15 | Tenant is responsible for a written response to the landlord regarding the tenancy status of any children of coverage age.[280] | |
| 3/1 | If no response has been received, the landlord must inspect the apartment by this date at "reasonable times and with reasonable notice" to determine if such a child is present.[281] | Tenant deadline to submit in writing a response to the landlord if a child under the age of six is in residence. [282]<br><br>The landlord fulfills his legal obligation to determine the tenancy of a child of the coverage age via this notice/response method.[283] |

[276] *Id*. § 27-2056.4(e)(1).
[277] *Id*. § 27-2056.4(e)(2)(iv).
[278] NEW YORK CITY ADMIN. CODE § 27-2056.3 (1999).
[279] *Id*. § 27-2056.3(b)(2).
[280] NEW YORK CITY ADMIN. CODE § 27-2056.4(e)(3)(i) (2004).
[281] *Id*.
[282] NEW YORK CITY ADMIN. CODE § 27-2056.3(b)(3)(1999).
[283] *Id*. § 27-2056.3(b)(4).

| | | |
|---|---|---|
| Post 3/1 | The landlord is to keep records of these inspections for ten years, transferable with the title of the property. The landlord then must provide a copy of written notice regarding the outcome of the inspection. The tenant is then responsible for correcting the results of the inspection, if necessary.[284]<br><br>If there is a determination either by inspection, by failure to correct the findings of inspection, or by written notice by the tenant that no child of coverage age is present, then the tenant is responsible for notifying the landlord if a child of coverage age becomes a tenant.[285]<br><br>If no such notification is given by the tenant, the presumption for purposes of liability due to exposure to lead paint or lead dust is not applicable.[286] | If a child under the age of six becomes a tenant in between the notification and the notice given the following year, it is the responsibility of the tenant to notify the landlord of such tenancy.[287] If no notice is given, the landlord must have "actual knowledge" of a child of coverage age in residence to be legally responsible to comply with the LL 38 rules.[288] |

The main differences in the two laws are the coverage age and the shift of responsibility to the landlord to investigate whether children of the coverage age are in residence, as discussed in the next section. LL1 of 2004's notification requirements are largely similar to Local Law 38 of 1999's, and these requirements should add only a negligible cost due to the extra administration. The authors assume that costs generated by the required changes in notification procedures will be borne almost exclusively by HPD

[284] NEW YORK CITY ADMIN. CODE § 27-2056.4(f) (2004).
[285] *Id.* § 27-2056.4(e)(3)(ii).
[286] *Id.*
[287] NEW YORK CITY ADMIN. CODE § 27-2056.3(c)(1)-(2) (1999).
[288] *Id.* § 27-2056.3(d).

and DOHMH, as they are responsible for producing and approving the language on the new forms required by LL1 of 2004.[289] Volume increases will not increase the costs of notification since owners were already required under Local Law 38 of 1999 to send notice to all non-owner-occupied multiple dwelling units.[290]

e. *Visual Inspection*

After the notification timeline is followed, there are two circumstances under which the owner must perform visual inspections. First, landlords must perform an annual visual inspection for lead paint hazards where, in a building built before 1960, the notification process has yielded knowledge of a child of applicable age in residence.[291] Second, in a building built between January 1, 1960, and January 1, 1978, if the landlord knows *both* of a child of applicable age in residence and that lead paint hazards exist in the unit, the landlord must comply with the inspection requirements of LL1 of 2004.[292] The existence of these factors resulting in an obligation imposed upon the landlord is incredibly unlikely, but, for purposes of estimating high-range costs, the factors are estimated to exist in five percent of the units built from 1960 to 1978.

The first area of difference between LL1 of 2004 and Local Law 38 of 1999 is that the burden of showing residency of a child of coverage age falls upon the landlord instead of the tenant. LL1 of 2004 requires landlords to inspect units when the tenants fail to respond to the DOHMH-approved questionnaire by February 15.[293] The landlord must inspect the unit during reasonable times and upon reasonable notice by March 1 to determine if a child under seven resides in the apartment.[294] The additional costs for the inspection process and the record keeping involved may increase current inspection costs by thirty-three percent to account

[289] *Id.* § 27-2056.10(c)(2).

[290] *See id*. § 27-2056.3 (1999).

[291] NEW YORK CITY ADMIN. CODE § 27-2056.4(a) (2004).

[292] *Id*.

[293] *Id*. § 27-2056.4(e). The questionnaire must be provided to tenants no later than January 16. *Id*. § 27-2056.4(e)(1).

[294] *Id*. § 27-2056.4(e)(3)(i). Under Local Law 38, if a tenant did not reply to the landlord notice (which only had to be given one time) and did not have other constructive knowledge of a child of coverage age in residence, then they were considered to have fulfilled their discovery obligations. NEW YORK CITY ADMIN. CODE § 27-2056.3(c)(2)-(d) (1999).

for a total yearly increase of approximately $407,000.[295] As a result of these inspections, the number of units where it is discovered that children under seven are in residence should rise by .05%, based upon previous response rates and coverage and children tenancy rates.[296]

The process of conducting an annual visual inspection is fairly similar in LL1 of 2004 and Local Law 38 of 1999. Both require inspection of paint conditions and underlying conditions.[297] LL1 of 2004 also requires that the following be inspected: chewable surfaces,[298] friction surfaces,[299] impact surfaces,[300] and common

[295] This figure is based on the authors' estimation that the two-week window provided to landlords to determine the presence of a child will impose some small administrative costs where tenants do not respond to the landlords' questionnaires. The authors assume that the nonresponse rate will be half that of the response rate to the Housing and Vacancy Survey (HVS), or approximately six percent. This rate is derived from the authors' analysis of response rates to the 1999 and 2002 HVSs. The authors compared that response data to the methodologies landlords would use (e.g., less rigorous follow up) and the qualitative differences in the questionnaires themselves (e.g., since the lead paint questionnaire is related to tenant safety, it is more likely to elicit a tenant response than the HVS). The authors conclude that, overall, tenants will be less likely to timely respond to the LL1 of 2004 landlord questionnaire than to the HVS, but, out of caution and a desire to obtain a conservative cost estimate, the authors approximate the response rate to be the response rate to the 1999 HVS, adjusted slightly downward. *See* U.S. Census Bureau, *New York City Housing and Vacancy Survey (NYCHVS): Overview*, *at* http://www.census.gov/hhes/www/housing/nychvs/1999/overview.html (last revised Nov. 19, 2004); Telephone Interview with Alan Friedman, Statistician, Housing and Household Economic Statistics Division, United States Census Bureau (May 9, 2005).

[296] This figure is based on the expected non-response rate, *see supra* note 295, multiplied by the number of units with a child under the age of seven (approximately sixteen percent of all units) triggering line-of-sight inspections by landlords, multiplied by the number of new violations found by those inspections. *See* IBO-ADMINISTRATION FISCAL ANALYSIS COMPARISON, *supra* note 19, at 8. The authors assume that tenants will respond at the same rate under Local Law 38 of 1999 and LL1 of 2004, so, where tenants responded to a landlord's questionnaire, any violations found would not be unique to LL1 of 2004.

[297] *Compare* NEW YORK CITY ADMIN. CODE §§ 27-2056.2(3), 27-2056.4(a) (2004), *with* NEW YORK CITY ADMIN. CODE § 27-2056.3(d) (1999).

[298] Chewable surfaces include windowsills or other types of interior edges or protrusions accessible to small children. NEW YORK CITY ADMIN. CODE, § 27-2056.2(1) (2004).

[299] Friction surfaces include painted surfaces in contact with another surface that are capable of relative motion. *Id*. § 27-2056.2(4).

[300] Impact surfaces include painted surfaces showing evidence of repeated damage. *Id*. § 27-2056.2(5).

areas.[301]

The purpose of these increased inspections is to discover more affected children and more lead paint hazards that require remediation. Presumably these additional inspections will increase the costs to landlords. However, the requirement to inspect additional surfaces should not significantly add to the costs of inspection since, once units are inspected for paint and subsurfaces, the additional marginal cost to landlords of visually inspecting the friction, impact, and chewable surfaces is negligible.[302] The additional costs of inspecting common areas should also be small because property managers do not have to schedule around tenants and can combine common area inspections with other on-site activities.

If the visual inspection indicates no lead paint hazards, then the landlord has fulfilled her duties. If the visual inspection reveals deteriorating paint conditions, however, any paint defects found are considered lead-based paint hazards.[303] In such a situation, the landlord has two options. First, the landlord can choose to rebut the lead presumption by having the paint tested using an x-ray fluorescent (XRF) analyzer—a test which determines the presence of lead—or by having samples tested in a lab if she believes the unit does not contain lead paint.[304] If the results of the XRF test show no lead-based paint, then the landlord is free to fix the paint hazards according to the Housing Maintenance Code, which requires repair of most cases of peeling paint, without using the more stringent standards promulgated by the DOHMH or found in section 173.14 of the Health Code.[305] Alternatively, the landlord may remediate the lead paint hazard according to the standards of LL1 of 2004.

f. *Presumption*

Both LL1 of 2004 and Local Law 38 of 1999 presume the

[301] Common areas include areas regularly used by occupants for access to and egress from individual dwelling units. *Id*. § 27-2056.2(2).

[302] There is no indication that landlords need to conduct an inspection of surface areas as detailed as those which may be required of HPD inspectors. *See* IBO-ADMINISTRATION FISCAL ANALYSIS COMPARISON, *supra* note 19, at 5.

[303] NEW YORK CITY ADMIN. CODE §§ 27-2056.2(6), (10) (2004).

[304] *Id*. §§ 27-2056.2(7), 27-2056.5(a) (specifying the testing methods and allowing the presumption to be rebutted, respectively).

[305] *See supra* text accompanying notes 105-07.

presence of lead paint in pre-1960 units.[306] The presumption in LL1 of 2004 only marginally increases the costs of compliance, if at all, because under LL1 of 2004 the presumption can only be rebutted by tests performed by certified employees. Local Law 38 of 1999 did not require that such tests be performed by certified employees.[307]

As exceptions to the remediation requirements require an XRF scan performed by a certified worker, it is quite likely that most landlords would use external contractors. The costs of XRF testing by private firms for lead paint purposes are estimated to be roughly $400.[308] HPD lists their cost of XRF inspections at approximately $215 per inspection, which is presumed to be lower than private contractors due to lower salary costs and no additional margin for profit.[309] The authors are therefore estimating average private-sector XRF testing to cost $400, which includes all XRF testing costs, including laboratory analysis.

Unless landlords are fairly positive that the paint in the unit is not lead paint, spending $400 on a rebuttal may be economically unfeasible since a positive read for lead paint would require remediation according to the LL1 of 2004 standards and a wasted $400. The authors, therefore, consider XRF testing costs to impose only negligible costs upon landlords likely to be able to afford such tests, as the authors believe they will be costs borne mostly by units not affected by lead liability or remediation requirements. Since most owners do not know whether the paint in a particular pre-1960 unit is leaded and because there is a high likelihood that units that contain no paperwork or history indicating that lead paint is no longer present actually contain lead paint, the authors assume that the vast majority of owners will choose to remediate lead paint hazards according to LL1 of 2004.

[306] *See* NEW YORK CITY ADMIN. CODE § 27-2056.5 (2004); NEW YORK CITY ADMIN. CODE § 27-2056.4 (1999).

[307] NEW YORK CITY ADMIN. CODE § 27-2056.4(a) (1999). United States Dep't of Housing & Urban Dev. (HUD), Fee Sheet, *available at* http://www.hud.gov/ utilities/intercept.cfm?/offices/lead/402404/feesheet.pdf (last visited Mar. 4, 2005). It should be noted that HPD does not necessarily require that workers be trained to EPA standards and that it offers many training courses at reduced cost or for free. *See* HPD, Housing Education Services Lead Paint Education Program, *at* http://www.ci.nyc.ny.us/html/hpd/html/for-owners/hep-lead-courses.html#305 (last updated Sept. 24, 2004).

[308] *See* HUD, *supra* note 307.

[309] IBO-FISCAL IMPACT, *supra* note 19, at 17.

It should be noted, however, that HPD has not issued guidelines to define the exact methods to rebut the lead paint presumption, and therefore the actual costs of rebutting the presumption may end up being significantly lower than $400 per unit.[310]

g. *Remediation*

Nationally, approximately nineteen percent of all pre-1980 private housing units contain non-intact lead paint that poses an immediate hazard; seventeen percent, or thirteen million private housing units, have interior dust lead levels above federal guidelines.[311] At the same time, there are fifty million pre-1980 housing units that have intact lead-based paint on exterior or interior surfaces.[312] For these units, "[t]he prescription . . . is good maintenance and regular repainting to keep paint intact, and lead-safe work practices to avoid lead dust hazards during remodeling."[313] HPD estimated that in New York City, between one and two million units require remediation of some form.[314] However, as noted below and in the authors' analysis, this number appears to be based on some unsupportable assumptions and incorrect computations. The authors estimate that a total of 581,588 dwelling units in New York City have peeling paint, 139,581 units of which actually contain a lead paint hazard.[315]

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[310] For instance, HPD may not require that every unit be XRF tested to rebut the presumption of lead paint in the building, thereby reducing the per-unit cost of rebutting the presumption.

[311] WESTAT, *supra* note 136, at 2-1.

[312] *See id.*

[313] Ryan, *supra* note 143, at 18.

[314] NYC RGB 1995 HOUSING REPORT, *supra* note 177, at v-vi.

[315] This figure is based on an adjustment to the IBO's figures, but uses some of the IBO's other assumptions and calculations. *See* IBO-FISCAL IMPACT, *supra* note 19, at 16 (noting that sampling error is likely to occur with IBO's base figures). The authors adjusted the IBO's base housing figures upward to 1,925,152 pre-1960 units, or approximately sixty percent of the existing housing stock, a figure more in line with the figures provided by the DOHMH and HPD. *See* DOHMH 2001 REPORT, *supra* note 22, at 13 (noing that fifty-five percent of New York City's housing stock was built prior to 1950); HPD, Press Release, City Housing Agency Launches Lead Education Program to Help Residential Building Owners, Managers and Workers Comply with Lead Paint Hazard Reduction Law (Aug. 16, 2004) (stating that sixty percent of New York City housing stock was built before 1960), *at* http://www.nyc.gov/html/hpd/html/for-researchers/release-16-2004-pr.html. The authors used IBO's approximate thirty percent rate of lead paint hazards for pre-1960 units, *see* IBO-FISCAL IMPACT, *supra* note 19, at 16, as well as IBO's assumption that twenty-four percent of units defined as having a "lead hazard" actually have lead present and require

Significantly, the authors' estimates indicate that only 10,247 units have a six-year-old child and peeling paint.[316] Therefore, only 2459 units will be added to the total number of units requiring remediation under Local Law 38 of 1999 due to the increased child age of LL1 of 2004.

To eliminate completely the possibility of all future lead paint hazards in units containing lead paint, the landlords of those units would have to undertake a tedious process in which *all* painted surfaces including walls, ceilings, doors, and other impact and friction surfaces would be cleaned in a zero-pressure state to capture the paint and the paint dust so that all existing paint would be removed. Then surfaces would be completely primed to the drywall and painted.[317] According to LVI Services, Inc., a large environmental services firm that performs lead paint remediations in New York City, complete lead removal in a standard 1200-1500-square-foot two-bedroom unit would cost roughly $50,000-60,000.[318] LVI estimates that a complete wet-scrape remediation and "encapsulation" of all accessible paint to conform with EPA standards would cost $15,000 per unit.[319]

As a baseline comparison, HPD spent an average of $4835 in 2002 remediating all of the various lead paint hazards and associated underlying defects in city-owned units.[320] For private units, HPD estimates that landlords spent an average of $6285 for the remediation and repair of underlying defects conducted at the request of DOHMH.[321] Similarly, according to Mary Jean Brown at the CDC, it costs approximately $16,000 to remove lead paint hazards from a three-unit residence, or approximately $5000 per

remediation under LL1 of 2004. *See id.*; *supra* notes 160, 228 and accompanying text.

[316] The authors use the IBO's estimate that approximately twenty-nine percent of units with six-year-olds have lead hazards, including peeling paint. *See* IBO-FISCAL IMPACT, *supra* note 19, at 16. The authors have no knowledge of how the IBO arrived at different rates of such lead hazards found in all pre-1960 units and found in pre-1960 units with children aged six. *See id.* The authors, however, have no reason to doubt the IBO's analysis on this point and find the difference too marginal to alter the authors' main conclusions. *See supra* note 315.

[317] Telephone Interview with Peter Demopolis, Associate, LVI Services, Inc. (Mar. 22, 2004).

[318] *Id.*

[319] *Id.*

[320] IBO-FISCAL IMPACT, *supra* note 19, at 12.

[321] *Id.* It is not clear why the higher cost is assumed, since HPD has historically been significantly under budget.

unit.[322]

All of the previously discussed remediation work, however, deals with the complete or fairly complete lead paint abatement of a unit. Fortunately, very few situations exist where units would have to undergo complete remediation work. Most lead paint hazards arise from paint defects located in smaller concentrated areas, such as the area surrounding a paint bubble.[323] LL1 of 2004 does not appear to require complete remediation when a lead paint hazard exists, but only a "spot remediation" to correct the hazard.[324]

Local Law 38 of 1999 did not impose different standards depending upon the size of remediation. Although Local Law 38 of 1999 allowed for less stringent interim controls—essentially work practices—to be used in the remediation of lead paint hazards, landlords could only utilize the interim controls if remediation occurred within twenty-one days of notice of the violation.[325] Failure to meet these conditions triggered the Health Code remediation requirements.[326] The Health Code requirements are more stringent than the LL1 of 2004 requirements for small and medium remediations, but not more stringent than the large hazard remediation requirements under LL1 of 2004.[327] Forty-three and a half percent of owners under Local Law 38 of 1999 remediated lead paint hazards under the Health Code requirements.[328] Unfortunately, no data is available indicating

[322] Cassi Feldman & Debbie Nathan, *The Politic*, CITY LIMITS, Sept./Oct. 2003, at 21.

[323] *See infra* note 329 and accompanying text.

[324] NEW YORK CITY ADMIN. CODE § 27-2056.2(11) (2004).

[325] NEW YORK CITY ADMIN. CODE § 27-2115.l (1) (1999).

[326] *See id.*

[327] LL1 of 2004 specifies three separate remediation conditions based upon the square footage of contiguous hazardous paint conditions: small (less than 2 square feet), medium (2 square feet to 100 square feet), and large (more than 100 square feet). *See* NEW YORK CITY ADMIN. CODE § 27-2056.11, .11(a)(2(ii), (iii) (2004).

[328] These remediations were done according to the Health Code whenever HPD performed an emergency repair (37.5% of all remediation orders issued) or when the landlords performed remediations but improperly certified the remediation, requiring a second remediation. *See* IBO-FISCAL IMPACT, *supra* note 19, at 18 (noting 37.5% HPD remediation rate). The figure for the improper certification is based on the number of landlords estimated to properly certify that they have done the work properly within the time frame allotted. Under Local Law 38 of 1999, that figure was twenty-three percent; under LL1 of 2004, seventeen percent of landlords are expected to properly certify that remediation

what size hazards were remediated.

It is difficult to estimate the number of violations that will occur for each size category of hazard from the data available, but the Housing Vacancy Survey estimates that 52.09% (47,375) of all remediations are smaller than an 8½ x 11 inch sheet of paper.[329] While imperfect,[330] the authors will use this estimate as the percentage of remediations in the small category. Because LL1 of 2004 imposed only minimally different obligations for small remediations, the overall cost differential is estimated at zero.[331]

Medium abatement jobs are between two square feet and 100 square feet of continuous paint area. In this category, similar abatement techniques are specified for LL1 of 2004 and Local Law 38 of 1999 interim controls, which were used in nearly forty-four percent of remediations under Local Law 38 of 1999.[332] The authors assume that forty percent of all remediations fall into this medium category.[333]

The costs due to actual remediation for a medium-size job will change due to the cost incurred to comply with LL1 of 2004's requirement that workers be sent to an EPA-approved course, which imposes a one-time course fee cost and possibly cost increases related to work practices.[334] Once the workers have attended this class, they are not required to undergo additional

was done within the required time frame, a difference of six percent. IBO-ADMINISTRATION FISCAL ANALYSIS COMPARISON, *supra* note 19, at 15.

[329] RGB 2003 HSR, *supra* note 38, at 2.

[330] Since a sheet of paper is less than one square foot, it can be expected that the actual number of small remediations will be greater than the number estimated by the authors. For the sake of estimating on the high side of costs, and, because there is a dearth of available data, the authors do not adjust the Housing Vacancy Survey figure.

[331] *See* IBO-FISCAL IMPACT, *supra* note 19, at 10. The authors assume that the costs of remediating these hazards are subsumed by the Housing Maintenance Code and Multiple Dwelling Law. *See supra* Part III.B, .C.3.

[332] *See* IBO-FISCAL IMPACT, *supra* note 19, at 10-11; *supra* note 328; *see also* NEW YORK CITY ADMIN. CODE § 27-2056.11 (2004); NEW YORK CITY ADMIN. CODE § 27-2056.2 (1999).

[333] This assumption is based largely on the fact that most New York apartments do not have walls with enough surface area to make possible large remediations. Considering also the rarity of large remediations, *see infra* note 335, the authors expect only approximately eight percent of remediations to be greater than 100 square feet.

[334] NEW YORK CITY ADMIN. CODE § 27-2056.10(a) (2004). EPA course information and materials can be found at http://www.epa.gov/lead/traincert.htm (last updated Feb. 10, 2005).

training for medium-size abatements. The authors assume that seventy-five percent of owners will opt to train workers to perform medium-size remediations in-house, because their internal labor costs will undoubtedly be much cheaper than the estimated cost for third-party abatement.[335] The remaining twenty-five percent will hire third-party firms to perform the work. The authors estimate that the average weighted cost differential resulting from LL1 of 2004, compared to Local Law 38 of 1999, is a $82.07 increase per average medium-size abatement.[336]

The authors estimate that the remaining 7.91% of remediations will fall into the large remediation category. This small percentage is due to the fact that, in general, New York City apartments do not lend themselves to many walls that are larger than 100 square feet. Also, it is assumed that many lead paint hazards are noticed before they reach such large proportions. For large remediations, the only difference between LL1 of 2004 and Local Law 38 of 1999 is that LL1 of 2004 limits who is qualified to conduct the remediation.[337] LL1 of 2004's qualification requirements, as well as the third-party requirement (the requirement that the certification be done by an individual or entity other than the owner and remediator), will, according to the authors' analysis, increase the cost of performing in-house large

[335] The authors assume that small and medium remediations will be distributed fairly evenly across rental units. Large remediations occur only in the rare instance where an underlying defect creates significant damage or when a medium remediation site goes unrepaired for such a period of time as to become a large remediation site. Accordingly, the authors assume that most remediations are small or medium and that most landlords will save money by training their maintenance workers. Not all landlords have in-house maintenance staff or contract with larger maintenance organizations that are likely to train their workers, however. Accordingly, the authors believe that owners of distressed buildings, "bad landlords," and landlords who know that their buildings possess no lead paint will not send their maintenance staffs, should they have them, to be certified for small and medium remediation jobs.

[336] These costs include: (1) the costs of dust clearance tests performed when not otherwise required by federal law or pursuant to the Health Code under Local Law 38 of 1999; (2) the incremental cost difference of remediations of units with children under six years of age performed under the interim controls and the requirements of LL1 of 2004; and (3) the cost of the additional remediations of units where a six-year-old resides. The authors conclude that the differential cost between the remediations under the interim controls and LL1 of 2004 are minimal, at one dollar per square foot, with an average-size medium remediation of fifty square feet.

[337] *Compare* NEW YORK CITY ADMIN. CODE § 27-2056.11(a)(1) (2004), *with* NEW YORK CITY ADMIN. CODE § 27-2056.4(a) (1999).

remediations because most remediations will have to be performed by professional environmental services firms.

Regarding the capacity for owners to correct violations, building owners have historically not corrected 37.5% of violations issued by HPD or DOHMH, even under Local Law 38 of 1999.[338] LL1 of 2004 allows a maximum of 114 days, whereas Local Law 38 of 1999 allowed a maximum of 220 days, before HPD assumes responsibility for the remediation work.[339] HPD has traditionally spent $2982 per unit to complete these timeline-based remediations;[340] the authors assume that the shortened time frame will increase costs to HPD by twenty-five percent, resulting in an HPD cost of $3728 which would then be liened against the property after completion.[341] Since this shortened time frame will increase the costs of compliance and possibly the inability of landlords to correct violations within the time frame (though the authors are doubtful that 114 days is insufficient time), larger remediations under LL1 of 2004 will more likely result in HPD remediation (rather than landlord-conducted private remediation) than smaller, lower-cost remediations.[342]

According to Airtek, a certified abatement provider in New York City, abatement costs are very hard to measure because they are done on a case-by-case basis and cost depends on the type of subsurface in each unit as well as many other factors.[343] For example, with drywall and other soft subsurfaces, it might be most cost-effective to demolish the portion of wall with paint defects and replace it with new drywall or alternatively to place a layer of sheetrock over the affected wall and repaint. In lieu of generating

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[338] IBO-FISCAL IMPACT, *supra* note 19, at 6.

[339] *Compare* NMIC, Enforcement Scheme for Local Law 1 of 2004 Lead Violations, Aug. 2, 2004, *at* http://www.nmic.org/nyccelp/laws/intro-101/intro_101.htm, *with* NMIC, Enforcement Scheme for Local Law 38 Lead Violations, Sept. 11, 2002, *at* http://www.nmic.org/nyccelp/Laws/ LocalLaw38Chart/Local_Law_38.htm; *see also* What's Wrong with the Current Law?, *supra* note 172.

[340] IBO-FISCAL IMPACT, *supra* note 19, app. 1 at 18.

[341] IBO-ADMINISTRATION FISCAL ANALYSIS COMPARISON, *supra* note 19, at 9-10.

[342] This is partly due to a lack of financing to conduct the remediation and partly due to the lower remediation costs of HPD-conducted remediations versus privately-conducted remediations. This cost differential provides an incentive for landlords to wait until HPD conducts the remediation and imposes a lien on the property, at which time the landlord can decide whether to clear the lien.

[343] Telephone Interview with Airtek Project Manager (Mar. 9, 2004).

a "baseline" quote, Airtek instead estimates a minimum of fifteen dollars per square foot to encapsulate, prime, and paint to satisfy the requirements of LL1 of 2004 and Local Law 38 of 1999.[344] The authors estimate that the qualification requirements, expedited time frame within which to repair large hazards, and the dust clearance testing requirements will impose an additional $205.71 in costs for large remediations beyond the costs imposed by the requirements of Local Law 38 of 1999.

h. *Dust Clearance*

Dust clearance testing, which involves taking numerous dust samples from each room containing a lead hazard, can be performed three separate ways: (1) on-site via an XRF dust scan test, (2) off-site by a certified provider, or (3) manually.[345] The only specific requirement regarding lead dust clearance tests is that they must be performed by a "third party, who is independent of the owner and any individual or firm that performs the work."[346] The third party must complete a EPA dust sampling technician course, which costs up to $150.[347] HPD, however, offers a variety of free courses that the authors assume will be acceptable for testing after abatement.[348]

On-site XRF tests are the least likely option, except for the largest of owners/management companies, as XRF machines typically cost between $12,000 and $20,000.[349] Because the price of XRF machines is so high, only those owners who expect to take hundreds of dust samples would be able to recoup the costs of purchasing a machine. On the other hand, contracted off-site testing involves hiring a certified firm, with costs estimated at $150 per room for five samples taken from a small- or medium-size remediation.[350]

Manual testing costs include having a certified dust-sampling technician take the samples at a materials cost of roughly four

[344] *Id*.

[345] Peter Meyers, *Cranky Consumer*, WALL ST. J., Mar. 30, 2004, at D2.

[346] HPD, Guide to Local Law #1 of 2004 Work Practices 3 (July 20, 2004), *available at* http://www.nyc.gov/html/hpd/pdf/lead-ll1-guide-workpamphlet.pdf.

[347] *See* The Asbestos Inst., Inc., HUD Courses, *at* http://www.taiinfo.com/Class%20Info/Pbcourses.htm (last modified Dec. 14, 2004).

[348] *See* HPD, *supra* note 307.

[349] Telephone Interview with Niton NY Sales Staffperson (Mar. 9. 2004).

[350] Telephone Interview with ATC Associates Staffperson (Mar. 9, 2004).

dollars per sample, and an analysis cost of roughly fifteen dollars per sample.[351] A medium-size abatement would require that at least four samples be taken—one from the abatement spot, one from the floor, one from the windowsill, and one from a room external to the abatement room.[352] For large abatement projects, multiple dust samples may need to be collected from all sills, floors, and abatement spots. Costs would rise accordingly.[353]

The authors' cost analysis of dust sampling for medium-size jobs indicates that many landlords should opt for the cheapest option—manual dust clearance testing with free testing of in-house staff. However, some landlords may opt for the private off-site testing option to simplify the process. The authors estimate that seventy-five percent of owners will self-test and that twenty-five percent will contract out the work.[354] Also, the authors are building in a six percent reserve amount for problems associated with false positives and other situations requiring retesting.[355] These dust clearance requirements are expected to increase the cost of the average medium-size abatement by $105.87.[356]

For large projects, dust clearance testing is expected to incur additional testing costs for both private contractor and manual tests, as well as costs associated with additional samples and materials. Because of the significant additional costs and time incurred by a manual test for a large remediation, the authors assume that owners will be ambivalent towards the choice between manual tests and contracted third-party tests. The additional dust clearance testing requirements for large remediations and the greater proportion of landlords expected to use third-party testers should increase the cost of the average large remediation by $230.[357]

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[351] *Id*.

[352] *Id*.

[353] *Id*.

[354] See *supra* note 335 for a simplified discussion of the authors' analysis.

[355] The authors are unaware of any other analysis including such a reserve, but the authors believe it is more realistic to build in the reserve, and errs on the conservative side of cost figures. The authors base this estimate on the rate of improper certification under Local Law 38 of 1999. *See* IBO-ADMINISTRATION FISCAL ANALYSIS COMPARISON, *supra* note 19, at 15; *see supra* note 328.

[356] This is based on a weighted average of seventy-five percent in-house dust clearance testing, costing slightly over ninety dollars, and twenty-five percent contracted testing, costing $150. *See* text accompanying *supra* note 350.

[357] These larger remediations require more surfaces to be tested, requiring

i. *Relocation and Other Costs*

Another incremental cost of LL1 of 2004 over Local Law 38 of 1999 is that of relocation. Under LL1 of 2004, occupants must be temporarily relocated from units with lead paint hazards whenever the lead paint remediation cannot be performed safely.[358] Local Law 38 of 1999 did not require relocation, and any relocation was done voluntarily by landlords.[359] The increase in costs due to relocation will be directly proportional to the amount of remediation work that consists of more than 100 square feet performed, which is estimated to be quite small.[360] The actual unique financial impact of this provision will likely be limited to the "bad landlord" situation, since, even under Local Law 38 of 1999, most good landlords would have relocated tenants to avoid potential liability when work could not be performed safely.

The main relocation expense for owners is the cost of housing tenants during the period of remediation. The average remediation process requiring relocation is expected to require relocation for three days. The authors estimate that the average relocation costs approximately $300 for a three-day remediation.[361] The IBO assumes that there will be 141 instances where relocation is necessary and caused directly by the provisions of LL1 of 2004, resulting in an annual cost of $42,438.50. This figure is based on assumptions that relatively few units require large remediation, that some of these units can be remediated safely with the owner in residence, and that some landlords would have relocated their residents under previous lead paint laws when the work performed was not safe. This figure is used by the authors in determining the private impact of the provision on private remediations.

In addition, a final aspect of remediation that LL1 of 2004 affects is the lead hazard safety of common areas. LL1 of 2004 requires annual investigations of common areas for peeling paint, chewable surfaces, deteriorated subsurfaces, friction surfaces, and

more lab work and more labor, costing, in the authors' estimation, eighty dollars more per remediation for both in-house and contracted testing.

[358] NEW YORK CITY ADMIN. CODE § 27-2056.11(a)(i) (2004).

[359] Chachère Interview, *supra* note 63.

[360] *See supra* notes 333, 337 and accompanying text.

[361] This estimate is derived from an IBO estimate, and the authors assume that private remediations can be performed as least as quickly as HPD-conducted remediations. *See* IBO-FISCAL IMPACT, *supra* note 19, at 11.

impact surfaces.[362] This common area inspection and remediation was not required under Local Law 38 of 1999.[363] In addition to the investigation, landlords are responsible for remediating paint hazards in a similar manner to that required of units. The authors estimate that these common area inspection requirements will increase the total number of common area lead hazards identified, and, consequently, the number of remediations required by two percent. Although the authors estimate that the cost of remediating common spaces is significantly more expensive than the cost of remediating apartment units, the impact of the provisions affecting common space are minimal.

j. *Potential Cost Offsets/Savings*

There exist a few different types of cost savings available to owners who need to remediate. J-51 property tax benefits are one area where potential costs can be saved from abatement work. According to the IBO, J-51 abatements are given for "[a]lterations to eliminate unhealthy or dangerous conditions, generally including any repair included on the Department of Housing Preservation and Development's (HPD) list of Major Capital Improvements."[364] That list includes the remediation of lead paint hazards.

The provisions of J-51 allow a reduction of 8⅓% of reasonable costs from property taxes on a yearly basis, up to ninety percent of the total costs, and up to a maximum of twenty years on a forward basis.[365] The J-51 program has a few restrictions, however. Units are only eligible if the assessed value per each unit before abatement is below $40,000, which tends to limit the availability of J-51 benefits.[366] Also, owners must fund the full costs of remediation up front and wait to be reimbursed over a span of at least eleven years, which is the smallest time frame within which the ninety percent threshold can be met while

[362] NEW YORK CITY ADMIN. CODE § 27-2056.4(a).

[363] What's Wrong with the Current Law?, *supra* note 172.

[364] IBO, J-51 PROPERTY TAX EXEMPTIONS AND ABATEMENTS 2 (June 4, 2003) [hereinafter IBO-TAX EXEMPTIONS], *available at* http://www.ibo.nyc.ny.us/iboreports/J51overview.pdf. The New York State Division of Housing and Community Renewal is the government division that authorizes Major Capital Improvements.

[365] IBO-TAX EXEMPTIONS, *supra* note 364, at 2.

[366] *Id.* at 4.

claiming 8⅓% per annum.[367]

The IBO estimates the total amount of these expanded [J-51] benefits for the additional requirements of LL1 of 2004 at $1,001,000, while HPD calculates these benefits at $2.5 million.[368] Using the IBO figure, it is estimated that twelve million dollars in additional rehabilitation work will be performed under LL1 of 2004 and claimed under the J-51 program. The IBO assumes such a low amount of work to be claimed in part because of the assessed value restrictions placed on eligible J-51 benefits.[369] The IBO estimate is also based on estimates using public costs of remediation, and assumes no cost differential between remediation undertaken by private and public entities, which often is the case.[370]

Another source of funds is the HUD Lead-Paint Hazard Control Grant Program.[371] HUD gives these subsidized grants directly to states and municipalities. New York City distributes its grant money via a joint-sponsored HPD and DOHMH program: the Primary Prevention Program (PPP).[372] The PPP specifically targets friction surfaces—door jams, window slides/sills/wells, and cabinets.[373] Owners are eligible for six to eight thousand dollars worth of forgivable loans when all of the following conditions are met:[374]

- Over eighty percent of the tenants must be at low-income thresholds for three years post-completion.
- A pregnant mother or child under six months must be present in the units requiring work.
- Federal funds must support the targeted areas in West Queens and Astoria, Queens, Bedford-Stuyvesant, Crown Heights,

[367] *Id*. at 1, 3.

[368] IBO-ADMINISTRATION FISCAL ANALYSIS COMPARISON, *supra* note 19, at 4.

[369] *See generally* IBO-TAX EXEMPTIONS, *supra* note 364; *see also supra* text accompanying note 366.

[370] *See* IBO-ADMINISTRATION FISCAL ANALYSIS COMPARISON, *supra* note 19, at 4.

[371] HPD, Lead-Based Paint Hazard Reduction: Future Plans, *at* http://www.nyc.gov/html/hpd/html/for-owners/lead-future.html (last updated Nov. 10, 2003).

[372] HPD, Lead-Based Paint Treatment: Primary Prevention Programs, *at* http://www.ci.nyc.ny.us/html/hpd/html/for-owners/ppp.html (last updated Mar. 31, 2004).

[373] *Id*.

[374] *Id*.

East New York, East Flatbush-Flatbush, Williamsburg, and Bushwick in Brooklyn, and City funds support buildings citywide;

- The owner(s) must be current on all City taxes at the time of identification.
- According to the IBO:

> New York City has received three grants [to fund these loans]: $6.75 million in 1994, $1.6 million in 1996, and most recently $3 million in October of 2000. The grant period spans four city fiscal years. HPD spent $86,000 in lead grant funds in 2001, and $263,000 in 2002. The 2003 budget calls for spending $1.2 million, but again, budgeted amounts have consistently exceeded expenditures.[375]

Explanations for the relatively low usage of this grant by HPD may be due to the various restrictions of eligible neighborhoods, the lack of the presence of a pregnant mother or six-month-old child, owners who are not current with their taxes, and lack of information. These requirements taken together indicate that a very small portion of units that require remediation work will both qualify and have owners who are aware of the PPP loan.

The overall funding levels of these loans are not very significant in relation to the amount of work that LL1 of 2004 requires. Additionally, the low utilization rates as quoted by the IBO may illustrate the difficulties faced by owners involved in actually obtaining the grant. In summary, this grant may aid certain owners in the abatement of lead hazards, but it is not currently a viable and dependable source of remediation funding for the majority of owners. It will remain an uncertain offset until the grant requirements are more closely aligned with landlord and property needs and the purposes of LL1 of 2004.

k. *Conclusions*

In light of all the various volume and cost increases, the authors estimate that the average cost for all pre-1960 units to comply with the additional requirements of LL1 of 2004 is $51.09 per unit.[376] This number takes into account potential cost offsets

[375] IBO, CURRENT CITY SPENDING ON LEAD HAZARD REDUCTION 2 (2002), *available at* http://www.ibo.nyc.ny.us/iboreports/currentSpendingSummary.pdf.

[376] The vast majority of costs uniquely imposed by LL1 of 2004 that are borne by pre-1960 building owners are turnover costs. This per-unit average, however, includes units undergoing turnover, as well as units without children under seven

and grants and is limited to the impact that LL1 of 2004 will have above and beyond the financial impact of requirements imposed by Local Law 38 of 1999 and other pertinent federal, state, and local laws. The authors have calculated the average increased cost borne by housing structures designed for low-income tenants, given the impact of federal grant schemes, to be $55.50 per unit/year.[377] This figure is an average of both properties with minimal or no lead paint hazard and those with significant hazards requiring large remediations. As discussed elsewhere, this average does not reflect the disproportionate burden some buildings and areas will likely bear in implementing LL1 of 2004.[378] It is expected that buildings of poorer quality will suffer increases well beyond the average cost of compliance calculated by the authors. The following sections examine a range of implications for these lead-distressed properties, and predicts potential distributional consequences of compliance cost increases across New York City.

4. *Operating Costs: Impacts on Financing and Property Values*

The ability to obtain financing will also be affected by LL1 of 2004. Growing insurance rates for lead coverage and increasing operating expenses may have adverse impacts for existing and potential owners of pre-1960 buildings seeking financing from mortgage lenders for rehabilitation projects. These trends present a double-edged sword: capital may not be available without an insurance policy for lead, while increasing insurance and operating costs decrease the profitability of a pre-1960 residential investment and strain an owner's ability to meet debt payments.[379]

According to Beth Malone of Neighborhood Housing Services, many mortgage lenders will not provide capital without an insurance policy for lead,[380] so where owners avoid insurance, the ability to obtain financing may be limited.[381] Lenders require

years of age and units not requiring remediation.

[377] These offsets include J-51 and PPP benefits targeted specifically for low-income units. Additional offsets may be available that are not included in this analysis, including offsets for turnovers, window replacement for weatherization purposes, and additional grant monies that may be made available by the NewYork State legislature. *See infra* note 465.

[378] *See supra* text accompanying notes 47-52; *see also infra* text accompanying note 383.

[379] Malone Interview, *supra* note 223.

[380] *Id*.

[381] *See* Lash, *supra* note 6, at 302.

that an owner have liability coverage in the event of a lawsuit alleging lead poisoning and that she be able to repay the mortgage debt over the life of the loan. For instance, Community Preservation Corporation, a mortgage lender for low- and moderate-income housing, requires lead insurance,[382] which will have a significant impact on the financing of affordable housing units built before 1960 since "if such coverage is unavailable or un-affordable, owners with existing mortgages could default due to nonpayment or failure to meet the requirement of the mortgage, and applications for new financing would be rejected."[383]

The availability of financing may also be affected by the increasing costs of lead insurance and overall operating costs since such costs may cause lending institutions to encourage abandonment by deeming certain rehabilitation projects unworthy of credit. Lending institutions that require a particular debt service ratio may see some projects fail to meet the necessary ratio due to increasing costs attributable to lead. These increasing operating costs may therefore limit the ability of owners to repay the mortgage and make some projects too risky for lenders to finance.[384] This is especially true in markets that, due to low demand or rent stablilization, cannot raise rents to pass the growing operating expenses on to the tenants. As a result, net operating income for such buildings will decrease, creating a project that is deemed less financially attractive to mortgage lenders. Recent trends do not paint an optimistic picture either. The debt service ratio has remained constant over the past few years, indicating that "most lenders have not changed the amount of money they are willing to lend in relation to the net operating income of buildings."[385]

In cases where operating costs need to be diverted from other vital maintenance activities for expenses such as testing and hazard remediation, lenders may feel owners will be less likely to

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[382] *Lead Poisoning Prevention Legislation Passes City Council; Override of Mayoral Veto Anticipated*, 13 NOTES 1 (University Neighborhood Housing Program, New York, N.Y.) [hereinafter UNHP 2004 NOTES].

[383] *Id*.

[384] *See* Ann Meyerson, *Housing Abandonment: The Role of Institutional Mortgage Lenders*, *in* CRITICAL PERSPECTIVES ON HOUSING (1986).

[385] NEW YORK CITY RENT GUIDELINES BOARD, 2003 MORTGAGE SURVEY 4 (2003) [hereinafter 2003 MORTGAGE STUDY], *available at* http://www.housingnyc.com/ downloads/research/pdf_reports/03ms.pdf.

adequately maintain acceptable housing quality standards that may have been feasible before the passage of LL1 of 2004. In other words, increased expenditures for lead paint assessment and remediation may decrease the funds available for other building maintenance items, resulting in lower overall building quality. The 2003 Rent Guidelines Board Mortgage Survey estimates that "[s]ixty-four percent of lenders stipulate that overall building maintenance is an important standard when assessing loan applications."[386]

It is not enough to discuss these increasing operating costs without noting that the market value of buildings may already account for lead hazards and expected remediation measures. Ford and Gilligan find that costs for lead removal in contaminated buildings in Baltimore, Maryland, were already discounted by the market at about $15,250 per building or $3813 per unit.[387] The presence of lead in a building likely makes the property relatively less desirable to a potential buyer, as reflected in lower property values.[388] These findings suggest that property values of New York City buildings considered at risk for lead contamination may already reflect some of the aforementioned operating costs and liabilities imposed under other federal, state, and city laws. As the authors' analysis illustrates, LL1 of 2004 should, on average, result in increased operating costs to owners, resulting in slightly lower property values.[389] The actual extent of the unique impact of LL1 of 2004 on both lending and property values will vary widely, based on the extent of lead hazards in each building.

5. *Distributional Consequences*

As noted above, the effects of LL1 of 2004 will vary across different rental housing markets in the city.[390] This section

[386] *Id*. at 4. While building maintenance may be affected in some situations, the authors assume for the purposes of this analysis that landlords will make all repairs required by the Housing Maintenance Code and other statutes and regulations. Those unable to afford such repairs, for the purposes of this analysis, are assumed to sell the property or abandon the property if a sale exit strategy is unavailing. Therefore, the authors do not consider the effects of possible decreased maintenance offsets, but rather simply analyze increased costs as decreased net operating income.

[387] Deborah Ann Ford & Michelle Gilligan, *The Effect of Lead Paint Abatement Laws on Rental Property*, 16 REAL ESTATE ECON. 84, 92 (1988).

[388] *Id*.

[389] *See supra* text accompanying notes 376-77.

[390] *See, e.g.*, *supra* text accompanying notes 47-52, 383.

assesses potential real estate impacts on privately owned rental housing buildings in low-rent residential neighborhoods. This analysis indicates that low-rent residential communities will be the most adversely impacted, while high-rent housing markets can be expected to be disturbed to a much lesser degree. With regard to rent-stabilized housing, increases in operating costs will likely be taken into account by the New York City Rent Guidelines Board, which could change its guidelines to allow higher rents that reflect the increased costs imposed by LL1 of 2004.[391] Thus, rent-stabilized units are not included in the analysis below.

It is important to note that many pre-1960 units exist throughout the city in a number of housing markets. The census tracts of the Upper East and West Sides lead the city in the number of housing units built before 1960 and therefore should be most heavily impacted by the presumption of lead paint established by LL1 of 2004 (and previous lead paint laws of New York City). *Map 1* illustrates this fact. Nonetheless, these communities have very low numbers of children with EBLLs and even fewer cases of lead poisoning. This is likely attributable to good building maintenance, including paint maintenance, as well as other factors.[392]

*Figure 5* represents the authors' analysis that LL1 of 2004's change of applicable age will increase the number of pre-1960 units affected by the presumption by 35,615 units, representing an 8.1% increase over Local Law 38 of 1999.[393]

[391] The Rent Guidelines Board establishes lease renewal guidelines annually for rent-stabilized apartments and hotels. New York City Rent Guidelines Board, Explanation of the Rent Guidelines, *at* http://www.housingnyc.com/html/guidelines/guidelines.html (last visited Mar. 9, 2004).

[392] New York Public Interest Research Group, *Do You Know Where the Lead Is?: City Council Districts with the Most Children Testing at or Above 10 µg/dL from 1995-2000 Combined*, *at* http://www.nypirg.org/lead/whereslead/ (last visited Nov. 26, 2004).

[393] *See supra* note 160. According to the IBO's analysis, 23,204 of all pre-1960 units (1,443,395 total) have a six-year-old in residence. *See* IBO-FISCAL IMPACT, *supra* note 19, at 16. The authors use this assumption as applied to the adjusted IBO figures. *See supra* note 315.

| Figure 5: Impact of Increasing Age to Under Seven | |
|---|---|
| All Units in privately owned multifamily dwellings (pre-1960) | 1,925,152 |
| Units with peeling paint | 581,588 |
| Units with a lead hazard | 139,581 |
| Units with a child under 7 | 309,757 |
| Units with a child under 7 and peeling paint | 121,258 |
| Units with a 6-year-old | 35,615 |
| Units with a 6-year-old and peeling paint | 10,247 |
| Units with a 6-year-old and lead hazard | 2459 |

The citywide average rent increase of $51.09 expected by the authors is only an average; some pre-1960 units may see little cost increases, while others may witness extensive operating expenditure increases. In reality, this average-based analysis likely *understates* the inequity of such disparate outcomes, as many of these low NOI neighborhoods are marked by lower-quality housing conditions and thus suffer a relatively greater burden from the potential increases in operating expenses. Owners in high NOI neighborhoods, on the other hand, often have sufficient tangible income to properly maintain the building and therefore are often able to avoid lead paint hazards and consequent remediation costs. Also, as noted elsewhere, "bad landlords," who typically own properties in low-demand areas, may account for a significant number of units in one building with lead hazards. Countervailing these concerns is the fact that grant monies and tax benefits will be available to low-income housing units faced with large operating costs.[394] Whether such grants and offsets will be sufficient to meet the financial needs of some buildings, however, is difficult to assess in the aggregate.

The authors' analysis indicates that the real estate impacts of LL1 of 2004 will fall hardest on the communities most at risk for lead hazards and most in need of quality affordable housing: low-rent residential markets. A number of factors explain this disjoint in policy and outcome. The primary reason low-rent housing markets will be hit most heavily is that they typically have lower net operating income, limiting owners' ability to absorb the costs

[394] *See supra* Part IV.B.3.j.

associated with implementing LL1 of 2004. As *Figure 6* illustrates, NOI differs for residential units across New York City.

**Figure 6: Percentage Decrease in Rental Housing Owner Profits from Operating Cost Increases by Community District**

*Source: Calculated against NOI data from NYC Dept. of Finance, 2002 RPIE filings for year 2001 prepared by NYC Rent Guidelines Board*

| Community District | Per Unit Average Annual NOI | Per Unit Average Annual Owner Profit * | Increase in Operating Costs Due to LL1 of 2004 ** | New Per Unit Average Annual Owner Profits | Change in Profits |
|---|---|---|---|---|---|
| Bedford-Stuyvesant | $1,189 | $238 | $51.09 | $187 | 21% |
| Mott Haven | $1,270 | $254 | $51.09 | $203 | 20% |
| Hunts Point/Longwood | $1,441 | $288 | $51.09 | $237 | 18% |
| Morrisiania | $1,450 | $290 | $51.09 | $239 | 18% |
| Brownsville/Ocean Hill | $1,517 | $303 | $51.09 | $252 | 17% |
| Williamsburg/Greenpoint | $1,582 | $316 | $51.09 | $265 | 16% |
| E. Tremont | $1,751 | $350 | $51.09 | $299 | 15% |
| Soundview/Parkchester | $1,950 | $390 | $51.09 | $339 | 13% |
| University Heights/Fordham | $1,991 | $398 | $51.09 | $347 | 13% |
| Highbridge/S. Concourse | $2,000 | $400 | $51.09 | $349 | 13% |
| Throgs Neck/Co-op City | $2,071 | $414 | $51.09 | $363 | 12% |
| Baychester/Williamsbridge | $2,077 | $415 | $51.09 | $364 | 12% |
| Flatlands Canarsie | $2,143 | $429 | $51.09 | $378 | 12% |
| East Flatbush | $2,171 | $434 | $51.09 | $383 | 12% |
| N. Crown Hgts./Prospect Hgts. | $2,200 | $440 | $51.09 | $389 | 12% |
| Kingsbridge Hgts./Moshulu | $2,208 | $442 | $51.09 | $391 | 12% |
| South Crown Hgts. | $2,216 | $443 | $51.09 | $392 | 12% |
| Jamaica | $2,341 | $468 | $51.09 | $417 | 11% |
| Central Harlem | $2,418 | $484 | $51.09 | $433 | 11% |
| Bensonhurst | $2,504 | $501 | $51.09 | $450 | 10% |
| Flatbush | $2,551 | $510 | $51.09 | $459 | 10% |
| Pelham Parkway | $2,555 | $511 | $51.09 | $460 | 10% |
| Bay Ridge | $2,581 | $516 | $51.09 | $465 | 10% |
| Borough Park | $2,582 | $516 | $51.09 | $465 | 10% |
| Middle Village/Ridgewood | $2,600 | $520 | $51.09 | $469 | 10% |
| Sunset Park | $2,655 | $531 | $51.09 | $480 | 10% |

| | | | | | |
|---|---|---|---|---|---|
| Wash. Hgts./Inwood. | $2,716 | $543 | $51.09 | $492 | 9% |
| Sheepshead Bay/Gravesend | $2,815 | $563 | $51.09 | $512 | 9% |
| Astoria | $2,854 | $571 | $51.09 | $520 | 9% |
| Elmhurst/Corona | $2,930 | $586 | $51.09 | $535 | 9% |
| Sunnyside/Woodside | $2,953 | $591 | $51.09 | $540 | 9% |
| Coney Island | $2,967 | $593 | $51.09 | $542 | 9% |
| Kew Gardens/Woodhaven | $3,097 | $619 | $51.09 | $568 | 8% |
| Morningside Hgts./Hamilton | $3,099 | $620 | $51.09 | $569 | 8% |
| Hillcrest/Fresh Meadows | $3,108 | $622 | $51.09 | $571 | 8% |
| Park Slope/Carroll Gardens | $3,254 | $651 | $51.09 | $600 | 8% |
| North Shore | $3,272 | $654 | $51.09 | $603 | 8% |
| Jackson Hgts. | $3,318 | $664 | $51.09 | $613 | 8% |
| Riverdale/Kingsbridge | $3,424 | $685 | $51.09 | $634 | 7% |
| Flushing/Whitestone | $3,748 | $750 | $51.09 | $699 | 7% |
| Forest Hills/Rego Park | $3,941 | $788 | $51.09 | $737 | 6% |
| East Harlem | $4,603 | $921 | $51.09 | $870 | 6% |
| Lower E. Side/Chinatown | $4,877 | $975 | $51.09 | $924 | 5% |
| Brooklyn Hgts./Fort Greene | $4,958 | $992 | $51.09 | $941 | 5% |
| Chelsea/Clinton | $7,030 | $1,406 | $51.09 | $1,355 | 4% |
| Greenwich Village | $7,479 | $1,496 | $51.09 | $1,445 | 3% |
| Upper West Side | $7,935 | $1,587 | $51.09 | $1,536 | 3% |
| Stuyvesant Town/Turtle Bay | $8,403 | $1,681 | $51.09 | $1,630 | 3% |
| Upper East Side | $10,757 | $2,151 | $51.09 | $2,100 | 2% |
| Midtown | $12,190 | $2,438 | $51.09 | $2,387 | 2% |
| * Owner profit assumed to be 20% of NOI. | | ** Increase calculated as average across all pre-1960 New York City units. | | | |
| Note: No data is available for the community districts: Financial District, Bushwick, East New York/Starett City, Howard Beach/S. Ozone Park, Bayside/Little Neck, Bellerose/Rosedale, Rockaways, Mid-Island, or South Shore. | | | | | |

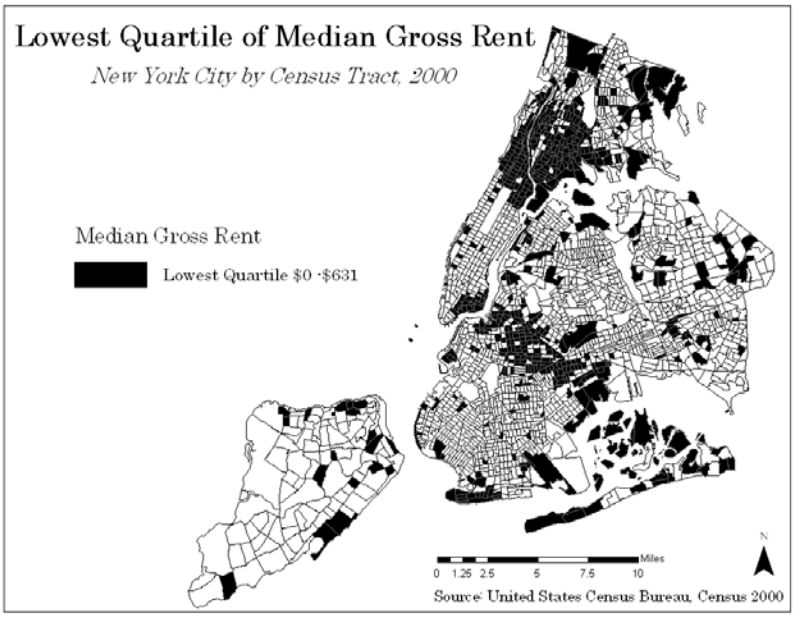
The lowest NOI averages exist in lower-income community districts such as Bedford-Stuyvesant, Mott Haven, Hunts Point, Morrisania, Brownsville, and Greenpoint.[395] Similarly, the highest NOI occurs for units in Midtown Manhattan, the Upper East and West Sides, Greenwich Village, and Chelsea.[396] Unfortunately, data gaps exist in key Lead Belt community districts such as

[395] New York City Rent Guidelines Board, 2002 RPIE (Real Property Income and Expense) Filings for 2001, prepared for New York City Department of Finance (cross-sectional sample) (on file with journal).

[396] *Id.*

Bushwick and East New York in Brooklyn.[397]

Low-rent neighborhoods have initially lower levels of housing quality when compared with the greater New York City housing market, as reflected by their lower gross rents. Since buildings in these neighborhoods may be poorly maintained and more prone to damage by tenants and vandals, requiring more in-depth assessments and more stringent remediations may disproportionately affect buildings in these neighborhoods. Thus, in order to comply with LL1 of 2004, landlords in low-rent neighborhoods will likely need to increase their operating expenses proportionally more than owners of properties in medium- and high-rent markets. Examples of such low-rent housing markets include Bedford-Stuyvesant, East New York, South Bronx, and, to a lesser extent, some sections of Harlem. In *Map 3*, *Lowest Quartile of Median Gross Rent*, these markets are indicated by those census tracts in the lowest quartile for median gross rent in New York City.




Map 3

[397] Telephone Interview with Brian Hoberman, Research Associate, NYC RGB (Apr. 1, 2004) (noting that the lack of data is due to sample sizes too small to be significant).

Consequently, NOI will decline to a proportionally larger degree in low-gross rent markets than high-gross rent markets, as indicated by the analysis in *Figure 6*. Profit levels are defined by the positive income after debt service is paid from net operating income; for the sake of analysis, debt service is estimated at eighty percent of net operating income.[398] Unique grant offsets for low-income housing are not taken into account in this figure, as low-income housing is not present equally across all community districts. *Figure 6* serves to demonstrate that impacts of LL1 of 2004 will be felt disproportionately, as a similar increase in operating costs for all pre-1960 units across the city represents a greater percentage decrease in profits for neighborhoods with lower net operating income. Owners of pre-1960 rental housing units in Greenpoint/Williamsburg, Bedford-Stuyvesant, Brownsville, and the Bronx may face the highest percentage decreases in owner profits. In these areas, landlords may face up to twenty-one percent decreases in profits due to compliance with LL1 of 2004, based on the authors' average cost of compliance alone.

Unfortunately, EBLLs are significantly correlated with paint surfaces in poor condition.[399] As discussed in previous sections, low-income minority children living in older housing are at a disproportionate risk of becoming lead poisoned.[400] Children in low-income families (earning incomes below 130% of poverty line) are eight times more likely to become poisoned by lead than children in high-income families (earning incomes above 350% of poverty line).[401]

Significantly, studies show that operating expenditures in declining neighborhoods may increase despite falling rents, unlike

[398] The debt service ratio (DSR) has remained stable at approximately 1.25. 2003 MORTGAGE SURVEY, *supra* note 385, at 4. The debt service ratio is calculated by dividing NOI by the debt service, or, expressed as a formula: DSR = NOI / DS. *Id*. Given the data in the mortgage survey, 1.25 = NOI /DS. Expressing the formula another way, DS = NOI /1.25. Substituting 1 for NOI, the debt service used by mortgage lenders in New York City currently approximates 80% of NOI.

[399] Bruce P. Lanphear et al., *Environmental Exposures to Lead and Urban Children's Blood Lead Levels*, 76 ENVTL. RES. 120, 123, 124 tbl.3 (1998).

[400] *See supra* notes 29-32, 34 and accompanying text; *see also* NAT'L CTR. FOR HEALTH STATISTICS, DEP'T OF HEALTH AND HUMAN SERVICES, HEALTHY PEOPLE 2000: FINAL REVIEW 176 (2001), *available at* http://www.cdc.gov/nchs/data/hp2000/hp2k01-acc.pdf.

[401] CAHN & THOMPSON, *supra* note 8, at 7.

typical housing markets.[402] In a typical market, maintenance will occur to a point where marginal costs equal marginal benefits so that expenditures to improve building conditions will be returned with increases in rental value.[403] This is not the case for neighborhoods experiencing declining housing demand.[404] Rather, in these neighborhoods, increases in expenditures are made to compensate for vandalism and damage, in an effort to maintain positive cash flows, sometimes in the face of declining rents.[405] In other words, as properties are damaged, increased funds are needed for maintenance, despite a lack of increased housing demand in the neighborhood or income increases to meet those needs. Increased maintenance will deplete profits, until a point when owners can no longer meet maintenance needs. Eventually, such a distressed property may become a candidate for abandonment. Furthermore, the ratio of property taxes to gross income may be higher in low-rent areas than the citywide average due to the lag between reassessment and a drop in market value.[406] Thus, the increased expenditures for lead assessment and remediation in low-income, low-rent neighborhoods may not be fully absorbable by increased rents. Instead, such increased expenditures may mean reduced profit margins for the building owner.

In distressed or low-demand neighborhoods,[407] rent levels may remain at previous levels due to the fact that the market demand is not there to meet a potential increase in rents.[408] Frank

[402] Of course, in such units, failure to make necessary repairs may result in violations of the Housing Maintenance Code or city or state regulations, whereas, in other markets, the needed repairs may be less significant to tenant welfare.

[403] Ford & Gilligan, *supra* note 387, at 86.

[404] *Id*. at 87.

[405] *Id.*

[406] *Id*.

[407] Gross rent is a good indicator of current demand for real estate properties in specific markets. The present value of gross rental price serves as an indicator for the value of residential real property, determined primarily by physical characteristics of the building, including condition, age, dimensions, and type, and the overall condition of the neighborhood, such as crime, race, income, parks, amenities, and access to transportation. *See* Ford & Gilligan, *supra* note 387, at 86. Furthermore, because residential leases are often short term, rental values are generally a timely indicator of value.

[408] Telephone Interview with Frank Ricci, Director, Governmental Affairs, Rent Stabilization Association of New York City, in New York, N.Y. (Mar. 2004) [hereinafter Ricci Interview]. Similarly, buildings with few units will also be less able to absorb the cost of implementing LL1 of 2004 when remediations

Ricci of the Rent Stabilization Association of New York City argues that in the face of increasing costs for lead inspection and abatement despite static rental levels, landlords will be forced to either neglect other maintenance activities or not comply with LL1 of 2004 requirements.[409] Landlords may also not be able to meet the possible short-term increase in lead insurance premiums and may choose as a result to exclude themselves from coverage. Not only will this leave landlords open to greater legal risk, but it will likely prevent them from obtaining any future loans necessary to improve building conditions.[410] Overall, housing conditions may suffer because costs associated with lead inspections and remediation may steer funds away from other important maintenance activities, potentially even causing the development of future lead hazards. For these reasons, Ricci argues that LL1 of 2004 may have adverse housing quality impacts on some units in low-income neighborhoods.[411]

Tenants in these low-income neighborhoods may already pay rents in excess of what they can afford. Markets in Brooklyn and the Bronx have some of the highest percentages of residents facing severe rent burdens, with numerous census tracts where tenants spend more than twenty-five percent of their income on rent.[412]

This is especially true for neighborhoods in the Lead Belt such as Bedford-Stuyvesant, Bushwick, and East New York.[413] Caroline Bhalla and others show that neighborhoods in the Bronx such as Kingsbridge Heights, University Heights/Fordham, Highbridge/South Concourse, and neighborhoods in Brooklyn such as Bensonhurst and Flatbush have the highest percentage of households with rent greater than fifty percent of income.[414] Thus,

are required than will larger buildings where there are more units that do not require remediation that can help owners to absorb some of the costs associated with remediating the hazardous unit.

[409] *Id*.

[410] UNHP 2004 NOTES, *supra* note 382.

[411] Ricci Interview, *supra* note 408. This is mentioned for the readers' understanding only, however, and is not included in the authors' analysis of potential costs of LL1 of 2004.

[412] U.S. Census Bureau, Summary File 3, Median Gross Rent as a Percentage of Household Income in 1999 (2000), *at* http://www.census.gov/Press-Release/www/2002/sumfile3.html.

[413] *Id*.

[414] CAROLINE K. BHALLA ET AL., STATE OF NEW YORK CITY'S HOUSING AND NEIGHBORHOODS 2004, at 116 exh. 4-2, 124 map 4-2 (2004), *available at* http://www.law.nyu.edu/realestatecenter/SOC_intro.htm.

it may be difficult for owners to pass increased operating expenses on to their tenants, who are already facing severe affordability gaps.

For the reasons discussed above, the continued operation of and new investments in pre-1960 housing stock in low-rent, low-income neighborhoods will become less attractive to owners, developers, and mortgage lenders. Due to decreased levels of profitability, private developers may choose not to pursue many rehabilitation projects, and mortgage lenders may consider such investments too risky. Overall, the result may be a decline of investment in the communities that most need improved affordable housing conditions. Tenants would simply have no place to relocate since they would face increasing competition for a decreasing number of affordable housing units. Since insurance rates are expected to settle in the long term, this adverse effect is expected to weaken considerably over time,[415] but the short-term impacts of disinvestment and abandonment may have long-term consequences that are not easily reversed.

6. *Assessment of Risk for Quality Degradation, Disinvestment, and Abandonment*

Increased operating costs resulting from LL1 of 2004 will strain some owners' ability to maintain their properties or continue operations, necessitating an analysis of quality degradation, disinvestment, and abandonment. In cases where operating costs exceed gross revenues, a building owner may be forced to sell her property, and in extreme cases, abandon her property if no buyer exists. In cases of sale, owners must sell at a price discounted for known lead contamination or risks thereof.[416] While disinvestment and abandonment do represent extreme cases and may be made less likely by available grants, abandonment may be a potential adverse consequence of the legislation.[417] Abandonment has been a key issue addressed by other studies in various cities. The authors will begin by describing in some detail the factors that affect disinvestment and abandonment decisions.

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[415] *See supra* Part IV.B.2.

[416] *See* Ford & Gilligan, *supra* note 387, at 92 (indicating that properties in "risky neighborhoods," i.e., neighborhoods where at least one child had been hospitalized for lead poisoning, sold for less than properties in "non-risky neighborhoods").

[417] *See, e.g.*, Ann Meyerson, *supra* note 384.

a. *Disinvestment and Abandonment Decisions*

Over the course of a decade, lead abatement costs could substantially increase abandonment and the loss of housing units, exhibiting an effect similar to increased taxes.[418] Based on a 1993 study on disinvestment and abandonment by the Community Service Society of New York,[419] Donald Lash concludes that

> [t]he single most important factor in disinvestments and abandonment appears to be the inability of tenants' incomes to support rental payments at a level sufficient to maintain housing at an acceptable standard of quality. Although the landlord lobby tends to identify rent regulation as the primary cause of abandonment, the determinant of rents in the neighborhoods of New York City most vulnerable to abandonment is tenant income rather than the regulation scheme. In other words, tenants cannot afford to pay the rents allowed by law.[420]

The Rent Guidelines Board 2003 Income and Expenses Study estimates that 897 (7%) of a cross-sectional sample of buildings are "distressed," having operations and maintenance costs in excess of gross income. Only 41 (4.6% of 897) of these buildings were built after 1946, and most are located in the Bronx, Manhattan, and Brooklyn.[421]

It is likely that the actual number of units requiring lead abatement under LL1 of 2004 is much lower, as only units with children under seven and units upon turnover require lead remediation measures at any given time.[422] While units with lead hazards may become occupied by children under seven at some point in the future, abatement costs will be postponed until a child of applicable age resides in the unit. The questions remain whether private owners can be expected to meet these abatement needs, how much of the burden will be deferred to the city, and

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[418] *See* Arthur Fraas & Randall Lutter, *Abandonment of Residential Housing and the Abatement of Lead-Based Paint Hazards*, 15 J. POL'Y ANALYSIS & MGMT. 424, 425 (1996).

[419] *See* VICTOR BACH & SHERECE Y. WEST, CMTY. SERV. SOC'Y OF N.Y., HOUSING ON THE BLOCK: DISINVESTMENT AND ABANDONMENT RISKS IN NEW YORK CITY NEIGHBORHOODS 11-33 (1993).

[420] Lash, *supra* note 6, at 301.

[421] RGB 2003 INCOME AND EXPENSE STUDY, *supra* note 44, at 7. Unfortunately, the sample from this study only covers buildings with eleven or more units. *Id*.

[422] *See supra* Part IV.B.3.g.

how often abandonment will occur in extreme cases. As the following discussion illustrates, the literature provides mixed findings on whether lead legislation has influenced abandonment rates and loss of affordable housing in Maryland and Minnesota.

(1) *Baltimore, Maryland*

Ford and Gilligan discuss abandonment as a direct result of expected lead remediation expenses, concluding that abandonment will occur only if the "cost of abatement is greater than the discounted value of the rent stream."[423] In their study of the impacts of lead abatement on housing rents in Baltimore, they find that each lead-contaminated unit has already been discounted by $3813 by prior legislation and other factors affecting the risk of lead paint hazards.[424] They claim that in most cases this discount value is less than the total value of the rental property, so, since residual value exists, abandonment should not occur. A study by the Subcommittee on Lead Paint Abatement Methodologies of the Baltimore City Task Force on Lead Paint Prevention found similar results.[425]

Baltimore began implementing stricter lead paint remediation standards in 1984, requiring abatement of hazards within three days of notification when an ill child was present in the apartment.[426] In the legislation's first year, a reported ninety-eight percent of landlords found in violation of the standards undertook abatement procedures as instructed, with no case of abandonment reported.[427] Ford and Gilligan note that such short-term data (one year following implementation of the legislation) does not adequately prove that abandonment will not occur, but does provide some interim supporting evidence that abandonment is unlikely.[428]

Although the short-term data implies that abandonment will not occur, it is not statistically valuable data for long-term predictions. Significantly, Ford and Gilligan's findings only analyze rental prices and neighborhood characteristics *before* the new legislation was implemented. Thus, their findings are only a

[423] Ford & Gilligan, *supra* note 387, at 92.
[424] *Id*.
[425] *Id*.
[426] *See id.* at 93.
[427] *Id.* at 93.
[428] *Id*.

prediction of the potential outcomes of Baltimore's legislation. Data is not available regarding the long-term impacts of Baltimore's 1984 lead abatement legislation, but critics claim that the legislation still needs to be altered to counter adverse impacts on housing and abandonment.[429] However, the Ford and Gilligan study does support the conclusion that owners must discount properties' values by the costs of repairing lead hazards if they opt to sell properties because they are unable to ensure a positive NOI after the enactment of lead paint legislation.

(2) *Minneapolis and St. Paul, Minnesota*

Hartje, Yust, Goetz, and Franklin compared impacts of the differential implementation by Minneapolis and St. Paul of a 1995 statewide lead paint policy.[430] The state statute allowed for differential implementation procedures, chosen at the discretion of local municipal authorities.[431] Minneapolis mandates more costly and complex work, reflecting an abatement (lead-free) model (similar to LL1 of 1982), whereas St. Paul only required lead hazard reduction (lead-safe) practices (similar to LL1 of 2004).[432] Most of the housing stock in the two cities consisted of one- or two-unit buildings. As expected, Hartje et al. found that Minneapolis suffered a greater loss of affordable housing units due to abandonment by the owner, city condemnation, increased vacancies, and affordability level changes.[433]

There was a significant difference in the number and scope of work orders required by the cities for lead control. In Minneapolis, owners were more likely to face requests for removal and replacement of parts of windows and were eight times more likely to be required to fully replace windows. In implementing the statute, Minneapolis's average lead maintenance cost was $5913, compared to an average cost of $1932 in St. Paul.[434]

More properties were abandoned or condemned in Minneapolis than in St. Paul, and the relatively greater loss of units

[429] Ricci Interview, *supra* note 408.

[430] Sandra C. Hartje et al., *Twin Tragedies in the Twin Cities: Childhood Lead Poisoning and the Loss of Affordable Rental Housing*, 29 FAMILY & CONSUMER SCI. RES. J. 230, 235 (2001).

[431] *Id*. at 234.

[432] *Id*. at 241.

[433] *Id*. at 241-44.

[434] *Id*. at 241.

was more likely a result of the lead order than other external factors. In Minneapolis, thirty-one percent of owners divesting from their properties reported that the lead order served as the "last straw," compared to 12.5% in St. Paul.[435] Research also reported lengthier vacancy periods in Minneapolis.[436] In both cities, a significant number of affordable housing units were lost in "low-income" and "very low-income" communities, with low-income residents absorbing some of the lost units once occupied by the very low-income.[437]

The findings of the Hartje et al. study suggest a number of implications for the potential impacts of LL1 of 2004 on housing in New York City. First, under both the lead-safe and lead-free implementation models in Minnesota, the new legislation decreased the number of affordable housing units available.[438] While LL1 of 2004 is more akin to the St. Paul lead-safe model, legislative differences between the statutes may make difficult any comparisons between LL1 of 2004 and either the St. Paul or Minneapolis statutes. Second, Hartje et al. identify a correlation between the level of remediation work required and the number of building abandonments.[439] If this correlation proves causative, LL1 of 2004, by increasing the requirements for ensuring a lead-safe environment, will increase the rate of abandonment at least marginally over the levels of abandonment under Local Law 38 of 1999.

b. *A Spatial Analysis of New York City Housing Markets at Risk for Disinvestment and Abandonment*

Based on the above assessments of real estate impacts on residential rental markets and the literature on disinvestment and abandonment resulting from lead paint regulations, a spatial analysis examining household income, gross rents, pre-1960 housing stock, and EBLLs in children makes it possible to estimate which areas of New York City are most likely to suffer from disinvestment and abandonment.[440] These spatial analyses for

[435] *Id*. at 244.
[436] *Id*. at 246-47.
[437] *Id*. at 247 tbl.10.
[438] *Id*. at 242-43, 244, 246.
[439] Hartje et al., *supra* note 430, at 246.
[440] As previous analyses in this Article utilized net operating income as a means to determine economic impacts of LL1 of 2004, it would be ideal to use

disinvestment and abandonment were conducted using median gross rent levels and percentages of pre-1960 units by census tract.

As discussed above in Part II, Brooklyn is heavily impacted by lead-based paint hazards,[441] with thirty-four percent of the total city's child population and forty-three percent of new intervention-level cases.[442] The Bronx and Queens follow with twenty and twenty-three percent of the intervention-level cases, respectively.[443] The majority of the forty-three percent of lead poisoning cases in Brooklyn are located in the Lead Belt.[444] Williamsburg-Bushwick, Bedford-Stuyvesant, East Flatbush, and Fordham-Bronx Park accounted for more than a third of poisoning cases in 2002.[445]

The lowest median gross rents (median gross rents under $630 per month) and median household incomes are located in substantially the same communities: Greenpoint/Williamsburg, Bushwick, Bedford-Stuyvesant, and East New York in Brooklyn; Harlem, East Harlem, Morningside Heights, and Washington Heights in Manhattan; and Crotona, Tremont, Morrisania, Port

such data for a spatial analysis across New York City. However, significant data gaps exist; net operating income data was not available for a considerable number of community districts, including Bushwick and East New York, which constitute large portions of the Lead Belt. Net operating income was only available at the community district level, while data regarding the percentage of pre-1960 units from total area units was only available at the census tract level. The two data streams were not readily convertible. Nonetheless, the census tract level offers a much more targeted spatial analysis than do community district boundaries. *Figure 6: Percent Decrease in Rental Housing Owner Profits from Operating Cost Increases* in Part IV.B.5 provides complementary data.

It is assumed that disinvestment and abandonment are merely degrees of the same trouble: insufficient net operating income to support the costs imposed by LL1 of 2004. As a result, it is assumed that such impacts will be felt in substantially the same census tracts. Additionally, because the authors' analysis indicates a relatively minor cost increase, the authors project that most impacts will be felt in terms of quality degradation, rather than disinvestment or abandonment, which are viewed as largely unlikely except in extreme cases. This view is supported by New York City's policy to avoid abandonment and likely provision of necessary grant monies to buildings severely impacted by LL1 of 2004. This need-based distribution of grant monies and offsets, while reducing abandonment impacts, may serve to disperse quality degradation impacts more widely than would a more equal per-building distribution.

[441] DOHMH 2001 REPORT, *supra* note 22, at 15 fig.7.

[442] *Id.*

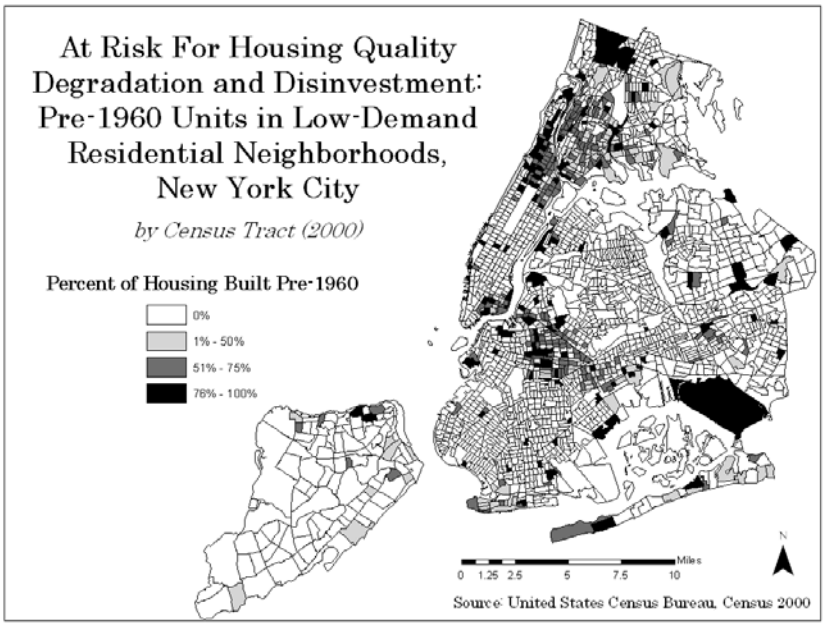
[443] *Id.*

[444] CAHN & THOMPSON, *supra* note 401, at 7.

[445] Garrison, *supra* note 50.

Morris, and Hunts Point in the Bronx.[446] As discussed, median gross rent reflects the demand for rental housing in a given area, suggesting the value that the market places on housing and neighborhood quality. In doing so, this analysis assumes that areas with the lowest median gross rent are areas where (1) housing quality is poorest, (2) rent rolls are lowest per unit, and (3) increased operating costs are likely to have the greatest proportional impact. *Map 3*, *Lowest Quartile of Median Gross Rent*, illustrates three distinct concentrations of such census tracts in Northern Brooklyn, Upper Manhattan, and the South and Central portions of the Bronx.[447]

*Map 4*, *At Risk for Housing Quality Degradation and Disinvestment: Pre-1960 Units in Low-Demand Residential Neighborhoods*, *New York City*, maps the high rent burden areas to the areas most likely to be affected by lead paint hazards, indicating the areas most likely to suffer quality degradation and disinvestment resulting from the obligations imposed by LL1 of 2004.




Map 4

[446] *See Map 3* in Part IV.B.5.
[447] *See* Part IV.B.5.

This map highlights the areas most at risk for abandonment due to lead hazard assessment and remediation cost increases required by LL1 of 2004. In most of the highlighted census tracts, at least fifty percent of the housing stock was built before 1960, and a number of the tracts have over seventy-five percent pre-1960 stock. These tracts comprise the areas most at risk for abandonment and include Williamsburg, Bedford-Stuyvesant, Eastern Parkway, Brownsville, and East New York in Brooklyn; Harlem, East Harlem, Morningside Heights, and Washington Heights in Manhattan; and Crotona, Tremont, Morrisania, Port Morris, and Hunts Point in the Bronx.[448]

These spatial projections correlate very closely with the areas defined within the Lead Belt.[449] *Map 2* illustrates the areas throughout the city where children suffer most from lead exposure.[450] The spatial arrangement of these concentrations is highly correlated to the geographic layout the authors have predicted will be most harshly affected by LL1. The authors' spatial analysis demonstrates that the areas suffering most from the lead public health threat are also the areas that may experience the most adverse economic impacts of LL1 of 2004, which seeks to cure it.

### 7. *Implications for New York City Communities*

#### a. *Implications for At-Risk Communities*

As the above spatial analysis indicates, LL1 of 2004 has the potential to hurt the very communities it is seeking to protect with its more stringent lead safety procedures for building owners.[451] However, one must weigh this potential for abandonment and disinvestment against the potential for overall improvement of housing quality and better health outcomes for children—not a simple task. Furthermore, the extent of the predicted quality degradation, disinvestment, and abandonment is extraordinarily difficult to estimate, and will vary greatly by individual building.

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[448] Of note, a number of tracts along the west side of Upper Manhattan and in Bedford-Stuyvesant have over three-quarters of their housing stock built before 1960.

[449] *Id*.

[450] The level of analysis on this map is City Council District rather than census tract, so some differences may exist due to the differences in areas covered between the maps.

[451] *See supra* Part IV.B.6.b.

It is crucial to distinguish the short-term impacts of LL1 of 2004 from its longer-term market outcomes. With insurance rates expected to constitute a large portion of increased operating expenses for pre-1960 rental housing owners in the short term, the impact of LL1 of 2004 will be far greater in the short term.[452] The authors' legal review of the legislation predicts that LL1 of 2004 should do very little to change liability outcomes in the long term. Therefore, insurance rates should settle in time, removing a heavy burden on property owners. Over time, the market will adjust to the new legislation, and insurance rates will drop, freeing up more landlord profits to put toward improving housing quality in the long term. In the short term, lead hazards will decline and housing quality will improve, though noncritical repairs may suffer as funds used to ensure their proper maintenance may be diverted to fund lead hazard remediation. Nonetheless, higher assessment and remediation costs will remain. Gradual repair of lead paint hazards as children under seven move into units with lead hazards should cause the number of units to decline over time. The additional investment in housing units should, in any event, produce the improved health outcomes that the drafters and proponents of LL1 of 2004 intended. Unfortunately, the data on the social benefit to be gained from the legislation is largely based on extrapolation.[453] However, a recent federal study indicates that the health benefits and reduced societal costs related to illness and lost productivity should significantly outweigh the actual cost of implementing the legislation.[454] Since only relatively minor secondary costs to affordable housing are predicted, LL1 of 2004 appears to be a net positive. This conclusion, however, depends

[452] While the rate of plaintiff awards will likely not increase to any important degree over the rate of awards under Local Law 38—hence the expected gradual decline of insurance rates to near pre-LL1 of 2004 rates—the misunderstandings creating fear and uncertainty surrounding the standards "established" by LL1 of 2004 have seemingly caused insurance companies to react by increasing rates to protect themselves until more data on risk is available.

[453] PRES. TASK FORCE ON ENVTL. HEALTH RISKS & SAFETY RISKS TO CHILDREN, ELIMINATING CHILDHOOD LEAD POISONING: A FEDERAL STRATEGY TARGETING LEAD PAINT HAZARDS, at A-28 tbl.26 (2000) [hereinafter PRES. TASK FORCE STRATEGY], *available at* http://www.epa.gov/lead/fedstrategy2000.pdf; *see* Rick Nevin, *How Lead Exposure Relates to Temporal Changes in IQ, Violent Crime, and Unwed Pregnancy*, 83 ENVTL. RES. 1 (2000); *see also* H.L. Needleman et al., *Bone Lead Levels and Delinquent Behavior*, 275 J. AM. MED. ASS'N 363 (1996).

[454] PRES. TASK FORCE STRATEGY, *supra* note 453, at A-28 tbl. 26.

heavily upon the extent of the insurance industry's evaluations of increased portfolio risk. If the industry opts to raise premiums significantly while it formulates its estimates of the risk, the short-term impacts on affordable housing quality and availability could be devastating for New York City's housing stock.

Because of the spatial concentrations of lead hazards, quality degradation and disinvestment will likely occur in clusters. If degradation, deterioration, and abandonment do occur, neighborhood blight could have adverse impacts on the values of surrounding properties and could impose even greater societal costs, as the adverse impacts of vacancy and deterioration would multiply throughout the neighborhood.[455] Such impacts would likely have additional negative impacts on future investment in these areas.[456] Therefore, ensuring the availability of quality affordable housing in lower-income neighborhoods is incredibly important for ensuring community stability.[457] The costs imposed on such affordable housing must be diluted by grants and offsets so that such costs do not overwhelm building owners and low-income communities.[458]

b. *Implications for Families*

One issue that has been raised by many groups is the potential for increased discrimination against families as a result of LL1 of 2004.[459] Though discrimination against families is illegal under the Fair Housing Act,[460] opponents of LL1 of 2004 feel that such discrimination may nevertheless result from LL1 of 2004 as

[455] This is known as the broken windows theory. Henry G. Cisneros, *Defensible Space: Deterring Crime and Building Community,* CITYSCAPE (Office of Policy Dev. & Research, HUD, Washington, D.C.) Dec. 1996, at 23, *available at* http://www.huduser.org/intercept.asp?loc=/Periodicals/CITYSCPE/SPISSUE/ch2.pdf.

[456] *See id*.

[457] *See id*. at 28.

[458] The process of abandonment is not always swift, and a heavy burden may fall upon the governmental agencies of New York City. The city may have to respond to remediate lead hazards if building owners are unable to allocate funds. In those cases, buildings will incur liens for the remediation work done by the city, which may lead to repossession by the primary lien holders. Where the city conducts the remediation, the city will need to provide remediation services that owners can afford to repay over time. Technical and financial assistance is important to assist owners in at-risk neighborhoods with the implementation of LL1 of 2004.

[459] ENVIRONMENTAL ASSESSMENT STATEMENT, *supra* note 69, at 2.

[460] *See* 42 U.S.C. § 3604(b) (2000).

landlords seek to avoid the additional inspection and remediation expenses imposed upon landlords when a child under the age of seven resides in a unit. As noted earlier in this Article, Mayor Bloomberg expressed this concern, supporting his case by analogizing LL1 of 2004 to Massachusetts's strict tort liability law for lead paint, which has led to alleged instances of discrimination against families.[461]

LL1 of 2004's environmental assessment statement noted that, while the possibility of discrimination exists, the lack of testimony on the issue "suggests that the probability of these circumstances arising is small, although not impossible to occur."[462] Since data is not available to quantify the number of units that might be affected by discrimination and since "it is illegal to decline to rent to families with children," the EAS concludes that "it is reasonable to assume for the purposes of [the environmental impact] analysis that owners will not intentionally violate the law."[463] The authors have decided to do the same, as any detailed analysis would be speculative at best.

## V. CONCLUSIONS

After conducting a thorough review of LL1 of 2004 and previous lead paint laws in New York City, the authors conclude that the impacts upon privately supplied affordable housing units are not expected to be significant on an aggregate level. The primary costs associated with LL1 of 2004 are a result of changes in the DOHMH blood lead intervention level, the annual inspection requirement, the dust clearance test requirement for abatements, the expedited time frame within which abatements must occur, turnover and common area requirements, and the increased age of children whose presence in a unit triggers the law's requirements.[464]

The authors conclude that the costs associated with landlord liability and insurance should not be the primary concerns regarding LL1 of 2004, though the misunderstandings surrounding the lead paint presumption's relationship to common law

[461] Bloomberg Letter, *supra* note 114, at 2.

[462] ENVIRONMENTAL ASSESSMENT STATEMENT, *supra* note 69, at 2.

[463] *Id*. A similar conclusion was reached regarding the impact that increased costs might have upon the repair of defects not related to lead-based paint hazards. *Id*. at 2-3.

[464] *See supra* Part IV.B.3.

negligence liability may result in significant short-term costs. LL1 of 2004 does not, and cannot, change the negligence liability structure present under Local Law 38 of 1999. It also, therefore, should not significantly affect long-term insurance rates. Due to a lack of awareness and the resulting insurance industry uncertainty regarding the effect of LL1 of 2004 in the courts, insurance rates for lead liability are expected to rise in the short term, but are predicted to settle over the long run. Exclusionary lead liability clauses and prohibitively high insurance rates may hinder lending on pre-1960 rehabilitation projects in the short term, but these effects should similarly decrease over a longer time horizon. As a result, the authors believe the true extent of LL1 of 2004 will be determined by the extensiveness of adverse short-term impacts and whether or not these impacts can be overcome in the long run. It is hoped that this analysis will help the insurance industry and the affordable housing and environmental justice advocates better understand the issues and thereby prevent or limit a significant spike in insurance rates or exclusions of lead coverage.

The authors' findings indicate that operating costs can be expected to rise for units in pre-1960 residential buildings, representing a proportionally larger decrease in net operating income for areas with low initial levels of capital and low net operating incomes. Low median rents, lower-income residents, older housing stock, and significant portions of the city's lead poisoning cases characterize these areas. Unfortunately, the areas with children most at risk for lead poisoning appear to be the neighborhoods that will bear the largest costs of the new legislation. Affordability in these communities may suffer, and will depend both on an individual owner's ability to absorb the cost increases and on the rental market dynamics of the particular area. Increased operating expenses may make buildings in these areas prone to degradation in quality, disinvestment, and, in extreme cases, abandonment.

Increased costs may be offset by a number of grants, loans, and tax benefit programs. However, the extent to which these costs may be offset is largely undetermined, as the offsets depend on the availability of such funds and owners' awareness of and ability to take advantage of such offsets. The authors speculate that, should affordability and abandonment occur at an unacceptable rate, additional funds currently proposed in the New York State Senate will likely be made available to achieve the

goals of LL1 of 2004.[465] In either case, the grant and offset application process should be better advertised, and any requirements for these applications processes that are not necessary to effect the main purposes of LL1 of 2004 should be removed. Most importantly, grants and offsets should be targeted toward buildings and areas most at risk for disinvestment and abandonment since these buildings and areas are most likely to incur disproportionate costs in implementing LL1 of 2004 and are least likely to be able to pass the costs on to tenants. Currently, the authors believe that New York City and the State are seeking to make available more targeted funding.[466] However, existing funding mechanisms are still unnecessarily difficult to obtain; if any new funds are channeled through these existing funding mechanisms, those funds would end up being largely inaccessible to many qualified landlords.

Lead paint legislation must direct resources to areas most at risk, while imposing itself as little as possible upon low risk properties. "Inevitably, a one-size-fits-all approach will squander resources on properties that pose little or no risk [of creating hazards likely to cause EBLLs], providing insufficient protection to high-risk properties or delaying their identification and slowing cleanup."[467] Lawmakers must therefore be cautious in crafting a policy approach that focuses on the properties where lead poisoning is at the highest level of risk. LL1 of 2004 may not be the most effective solution for New York City's lead paint problem because of the impacts it will have on properties beyond what is required to make the properties safe for children. A more targeted solution might do more to prevent children from suffering adverse EBLL effects, delivering positive health outcomes by limiting the scope while also lowering the costs for private owners and public agencies. To effectuate this more targeted approach, the authors advocate an approach that (1) allocates more resources to at-risk areas rather than distributing them across a large population and

[465] *See* NMIC, Pending New York State Legislative Proposals on Lead Paint and Lead (listing proposed bills that would provide loan funds to assist property owners in complying with lead-safe requirements), *at* http://www.nmic.org/nyccelp/New%20York%20State%20Bills.htm (last updated Sept. 15, 2004).

[466] *See* HPD, Lead-Based Paint Hazard Reduction: Future Plans, *at* http://www.nyc.gov/html/hpd/html/for-owners/lead-future.html (last updated Nov. 10, 2003); NMIC, *supra* note 465.

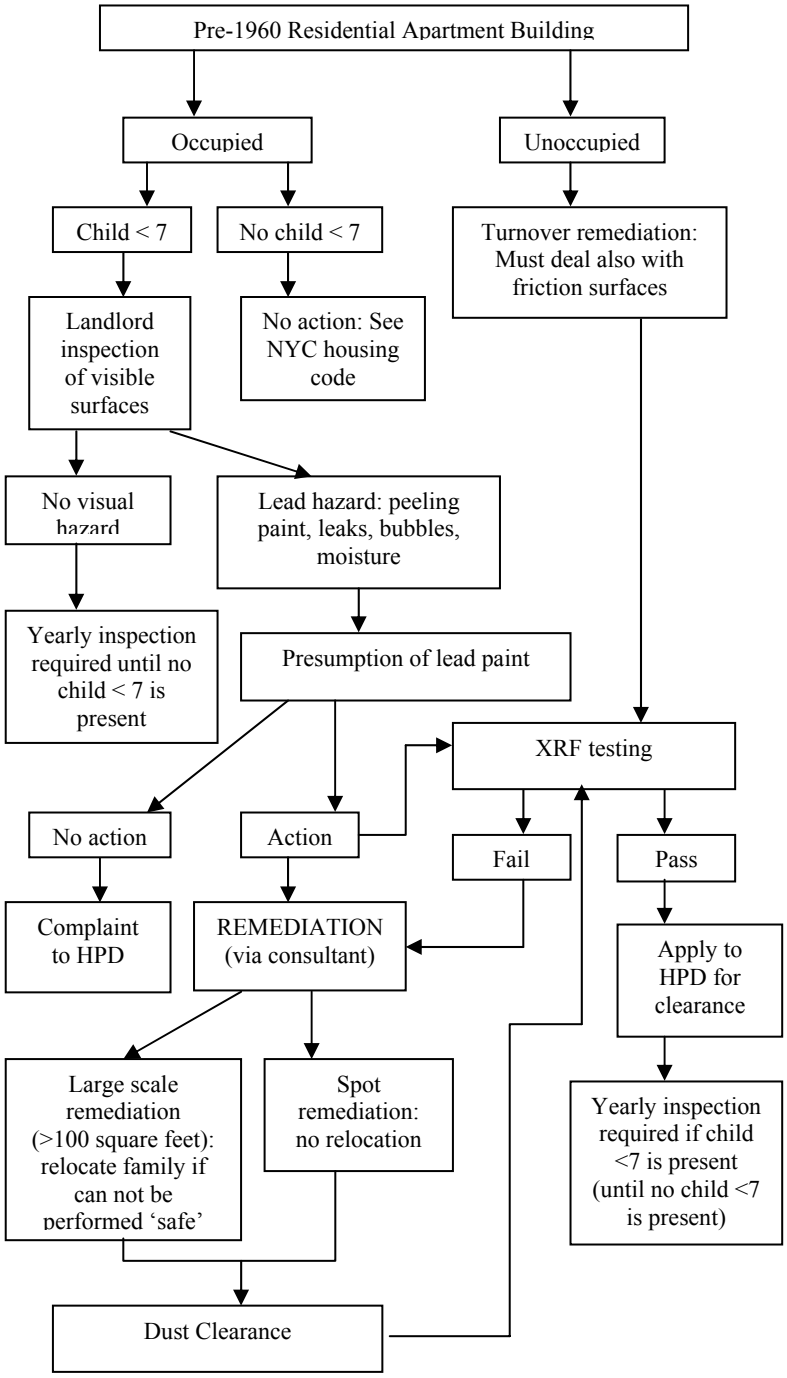
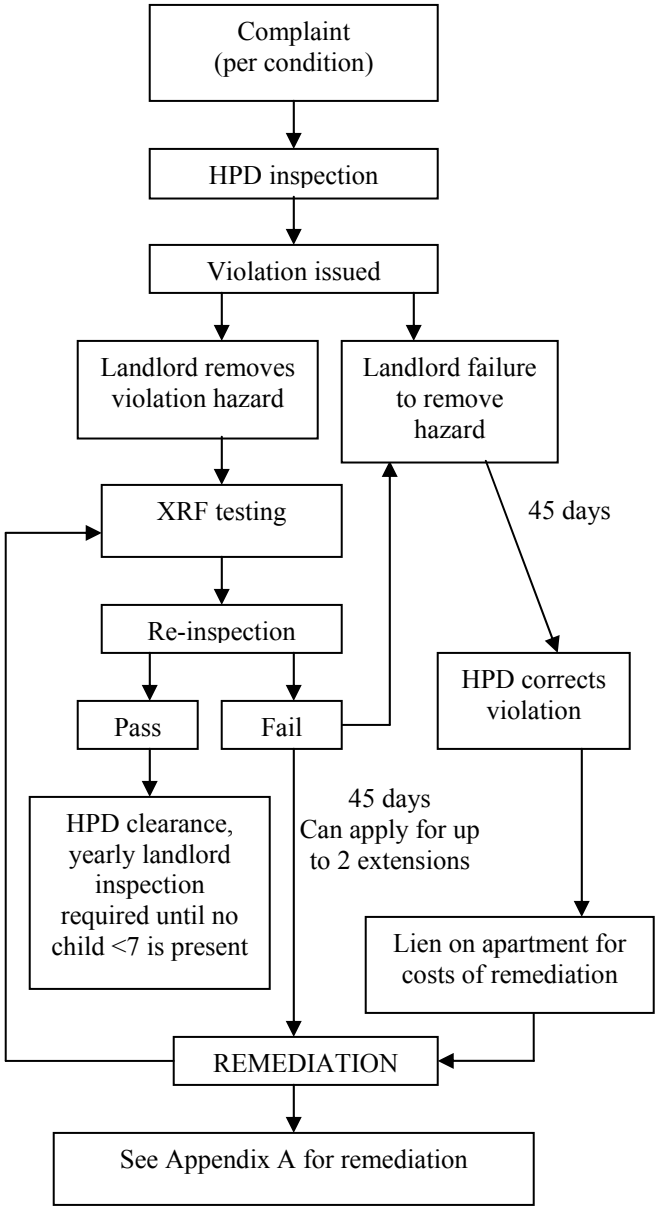
[467] Ryan, *supra* note 143, at 18.

(2) seeks to identify buildings with "bad landlords" or in which a large percentage of units have lead hazards. The extension of DOHMH's intervention in cases of EBLL to other units or common areas in the building could serve as a middle ground between LL1 of 2004's call for DOHMH to conduct random investigations of buildings in at-risk neighborhoods for lead paint hazards and a purely at-risk neighborhood targeted approach. Such an approach might serve to identify "bad landlords" before children suffer the ill effects of EBLLs.

LL1 of 2004 has generated controversy between affordable housing and environmental justice advocates because it forces a perceived tradeoff between the safety of children and the provision of affordable housing for families. It is clear that both issues are central to the welfare of families in New York City. Ultimately, the success or failure of LL1 of 2004 will be measured by its ability to address lead poisoning problems without reducing the availability of vital amounts of affordable housing units in the city. The authors' preliminary analysis indicates that, in the aggregate, society should benefit by its passage. Whether LL1 of 2004 proves to be successful, however, will depend on the ability of New York City to cushion the law's impacts on low-income neighborhoods in both the short and long term.

## APPENDIX A: LL1 OF 2004 FLOWCHART

Note: inspections & remediation required of frequently accessed common areas as well as living space



## APPENDIX B: HPD COMPLAINT PROCESS FLOWCHART