Philadelphia's New Lead Paint Ordinance Is In Effect

In late December, the Lead Paint Disclosure and Certification Law came into effect for residential landlords owning rental properties located in the city of Philadelphia. Under the city ordinance, many residential landlords will now be obligated to substantially modify the way they do business.

First of all, the ordinance does not apply to all such residential landlords. It does not pertain to residential landlords who own and operate dwelling units that are: built after 1978; housing individuals over the age of 6; housing college students at educational institutions or leased entirely to college students; owned or subsidized by the Philadelphia Housing Authority (PHA); or under what is commonly referred to as Section 8 housing, which is regulated by the U.S. Department of Housing and Urban Development (HUD).

Under pre-existing federal law, residential landlords and tenants are obligated to sign a lead disclosure form that identifies the risks associated with lead poisoning to young children and pregnant women and requires landlords to disclose the presence of known lead-based paint in the dwelling unit. Furthermore, residential tenants must receive the pamphlet titled "Protect Your Family From Lead in Your Home." Besides the federal lead disclosure form and pamphlet, under the ordinance, all residential leases must now contain the following statement: "Every lessee of any interest in residential property on which a residential dwelling was built prior to 1978 is notified that such property may present exposure to lead from lead-based paint that may place young children at risk of developing lead poisoning. Lead poisoning in young children may produce permanent neurological damage, including learning disabilities, reduced intelligence quotient, behavior problems and impaired memory. Lead

poisoning also poses a particular risk to pregnant women. The lessor of any interest in residential real property is required to disclose to the lessee the presence or absence of any lead-based paint and/or lead-based paint hazards. A comprehensive lead inspection or risk assessment for possible lead-based paint and/or lead-based paint hazards is recommended prior to lease."

Under the ordinance, such a tenant must be provided with a copy of a certification prepared by a certified lead inspector demonstrating that the dwelling unit is either "lead free" or "lead safe."

A dwelling unit is deemed "lead safe" if it is "free of a condition that causes or may cause exposure to lead from lead-contaminated dust, lead-contaminated soil, deteriorated lead-based paint, deteriorated presumed lead-based paint, or other similar threat of lead exposure due to the condition of the property itself."

For the certification to be considered valid under the ordinance, the inspection for the dwelling unit must occur within 24 months from the commencement of the lease term.

To be deemed "lead free," the "interior and exterior surfaces of a property do not contain any lead-based paint and the property contains no lead-contaminated soil or lead-contaminated dust."

There is no termination date for certificates that demonstrate the dwelling unit is "lead free."

However, the definition of "lead free" was changed with the ordinance. Earlier inspections did not take into consideration lead-contaminated soil or lead-contaminated dust, which is now taken into account when determining if a property is "lead free." Therefore, "lead free" certifications obtained before the enactment of the ordinance are of no legal consequence.

A copy of a certificate demonstrating the dwelling is either “lead safe” or “lead free” must be signed by the tenant and returned to the city of Philadelphia’s Department of Public Health.

Additionally, tenants must receive written notification advising them to perform visual inspections of all painted surfaces during the lease term. If the landlord is informed of any deteriorating paint surfaces, the landlord must promptly inspect and correct any defective conditions.

Tenants have the right to conduct an independent inspection before moving into the dwelling unit. Upon signing a lease, the tenant is given a 10-day period, unless the landlord and tenant agree in writing to different terms where the tenant at his or her own expense may obtain an inspection from a certified lead inspector. If the inspection reveals lead-based paint or lead-based paint hazards, the tenant may terminate the lease within two business days of receiving the inspection report with written notification. If the tenant fails to obtain an inspection within the 10-day timeframe, or fails to terminate the lease within two business days after receipt of an inspection report, the tenant effectively waives his right to terminate the lease.

In the event a tenant is already residing in the dwelling unit and has the option to renew the lease, the tenant is afforded the opportunity to obtain an independent inspection. The tenant has 10 days upon receipt of the inspection report to notify the landlord in writing of his or her intention to terminate the lease. If the tenant decides to terminate the lease, the tenant must vacate the premises within 90 days of receiving the inspection report, but the lease will remain in effect until that time.

Significant penalties attach when landlords fail to abide by the provisions of the ordinance. Fortunately, tenants who do not receive proper disclosure are required to notify the

landlord in writing. The landlord then has 10 days to come into compliance with the ordinance. If the landlord fails to become compliant in that time period, the tenant may bring a court action to seek appropriate relief. Some of the remedies made available to tenants in the ordinance include a court order requiring the landlord to obtain the certification, performance of necessary work to make the property safe, damages for any harm caused by the failure to provide certification, exemplary damages not to exceed $2,000, abatement and refund of rent for any periods in which the dwelling unit was occupied without proper certification. It is thus extremely important to provide tenants with all pertinent information regarding lead-based paint at the beginning of the lease.

Alan Nochumson

Vertical Position 100%

Commonwealth Court Holds Landlord Liable For Utilities

Separately metering utilities is an effective way of adding value to both multifamily and commercial properties. However, disputes often arise when properties are not metered properly.

The legal implications often lead to landlords becoming

responsible for the utilities and ultimately must have the utilities transferred into their name. Landlords must recognize their responsibilities as it pertains to metered utilities and have a good understanding of how properties are metered before acquiring them, confirm that properties already owned are metered correctly and make sure that when separately metering utilities in buildings already owned the work is done properly.

A recent decision handed down by the Commonwealth Court of Pennsylvania in *I-A Realty v. Pennsylvania Public Utility Commission* demonstrates why landlords must understand their rights and obligations associated with metered utilities. As this case illustrated, failure to abide by state regulations may result in additional expenses incurred by property owners.

1-A Realty owns and manages Red Maple Acres, a mobile home community located in Lower Macungie Township, Pa. At the time, the community streetlights were metered in conjunction with a maintenance garage located on the property and the wiring was run underground from the garage to the communal streetlights.

The electrician responsible for installing the lights failed to mark the location of the wires. Consequently, the wiring was cut by tenants as they moved their mobile homes to their respective lots. Although cutting the streetlight wiring was inadvertent, it became a reoccurring problem.

In July 2009, safety concerns along with the costs of continually repairing the wiring led 1-A Realty to rewire the lights to the electrical boxes of the mobile homes closest to the streetlights.

In total, 21 homes were outfitted with additional breakers responsible for providing the electricity to power the communal streetlights.

1-A Realty conducted an independent study based upon the metered usage measured at the maintenance garage previously

responsible for the street lighting and concluded the mobile homes responsible for the increased electrical load would incur additional costs ranging from $6.54 to $9.67 each month. 1-A Realty provided a monthly rent discount of $10 to the affected tenants to compensate them for the additional electric expense not agreed upon in their lease agreements.

A month after the breakers were installed, two residents of the Red Maple Acres community contacted PPL, their utility provider, to determine whether the $10 rent discount covered the cost of the streetlight usage. The residents were not interested in having their electrical account placed in 1-A Realty's name. They were merely determining whether they were being fairly compensated. Shortly after inquiring about the actual costs of the increased electrical usage, the residents learned their accounts along with their outstanding balances had been transferred to 1-A Realty due to the fact their homes were not "individually metered."

1-A Realty proceeded to turn off the breaker in each home responsible for supplying the electricity to the streetlights, and both 1-A Realty and the residents of the mobile homes responsible for bringing attention to the newly installed breakers instructed PPL to transfer the accounts back to the tenants' names. Despite the breakers being turned off and no evidence of usage coming from the mobile homes, PPL refused to transfer the accounts out of 1-A Realty's name.

1-A Realty filed a complaint with the Pennsylvania Public Utility Commission (PUC) against PPL pertaining to the accounts that remained in its name. Hearings were held before an administrative law judge who issued a ruling dismissing the complaints and directed PPL to transfer accounts for each of the residents of Red Maple Acres with streetlights attached to their residential electric boxes into the 1-A Realty's name. 1-A Realty then appealed that ruling to the Commonwealth Court.

On appeal, 1-A Realty first argued that PUC erred by finding tenants are not permitted to accept utility service for common areas not part of their normal home usage.

Although tenants may only accept responsibility for utility services exclusive to their homes, this concept is based on the finding that their utilities are individually metered.

While the phrase “not individually metered” is not defined in the Public Utility Code or by PUC’s regulations, as the court pointed out, the phrase has repeatedly been interpreted by the PUC as having foreign wiring or registering use not exclusive to the dwelling or its occupants. In other words, as long as the dwelling in question contains foreign wiring, the dwelling cannot be treated as individually metered even if the foreign wiring is not registering any usage.

The court believed that 1-A Realty was responsible for maintaining the accounts in its name since the homes were not individually metered. In doing so, the court noted that electrical usage was interrupted by turning off the breakers in each of the homes outfitted with breakers connected to the public lighting and the breakers and the wiring remained in each of the homes.

1-A Realty next argued that the tenants never requested that their accounts be transferred into the owner’s name and 1-A Realty immediately turned off the breakers responsible for the streetlights, and a result thereof, the accounts should have been transferred back into the tenant’s names.

The Commonwealth Court stated that the Public Utility Code does not allow tenants to enter agreements with landlords to have utilities remain in their names when the utilities are not separately metered. As such, once PPL became aware foreign wiring was present, the court held that the utility provider was required to transfer the accounts to the property owner’s name.

1-A Realty's last argument was based upon the notion that PPL was not permitted to transfer the remaining 19 accounts, whose electrical boxes contained a breaker connected to the street lighting, into the property owner's name because those homes were not part of the dispute.

Under 66 Pa. C.S § 1529.1, "any owner of a residential building or mobile home park failing to notify affected public utilities as required by this section shall nonetheless be responsible for payment of the utility services as if the required notice had been given."

Since there was no dispute that foreign wiring remained in each of the 21 homes, the court ruled that PPL was required to automatically transfer the accounts at issue into the name of the property owner until 1-A Realty permanently removed the wiring from all of the homes.

LESSON LEARNED

While the Commonwealth Court's ruling does not change the law in any way, it offers a reminder to landlords to properly meter their units. Had 1-A Realty taken the time to understand its rights and obligations associated with metering utilities, and metered the communal lights correctly, it could have avoided the account transfers, the cost of removing the wiring from each of the affected homes, and the costs associated with rewiring the streetlights properly.

Alan Nochumson

Vertical Position 100%

Nochumson P.C. And Bear Abstract Services Relocate To South Broad Street

After almost 7 years in the same office building, Nochumson P.C. and Bear Abstract Services, its title insurance company, have relocated their offices to 123 South Broad Street, Suite 1600, Philadelphia, Pennsylvania 19109.

During these years in business, Nochumson P.C. has built a reputation for thinking fast, thinking ahead, and getting things done.

Vertical Position 8%

Superior Court Expands Builder’s Liability For Subsequent Purchasers

Purchasing a new construction home involves certain risks. Without normal wear and tear or the passage of time to uncover latent defects, discovering problems in a new home during the inspection is difficult.

The implied warranty of habitability is a protective measure that is available to buyers of new construction homes. In Pennsylvania, courts imply a warranty of fitness for the

purpose intended when a buyer has reason to rely upon and does rely upon the judgment of a builder who manufactures the product, believing such a warranty is necessary to equalize the disparate positions of the builder and the average homebuyer by safeguarding the reasonable expectations of the homebuyer who is compelled to depend upon the builder's greater manufacturing and marketing expertise. The warranty is further justified because the builder is in the best position to repair the defects and spread the costs of the repair to those responsible.

A decision recently handed down by the Superior Court of Pennsylvania in *Conway v. Cutler Group* addressed a question of first impression regarding the applicability of the implied warranty of habitability as to whether homebuyers, who were not the initial homebuyers, may maintain a cause of action for breach of the implied warranty of habitability against the builder.

The initial homebuyers who purchased their home from the buyer sold it several years later. Two years after purchasing the home, the new homebuyers recognized water infiltration around the windows. The new homebuyers retained the services of an architectural firm to assess the situation. The architectural report revealed water infiltrating the home because of several defects in the construction of the home, and the report recommended "a complete stripping off of the entire home" to repair the mistakes, the opinion said.

The new homebuyers then filed a complaint against the builder solely upon the grounds of the alleged breach of the implied warranty of habitability.

The builder then filed preliminary objections to the complaint, arguing that the implied warranty of habitability only extends from the builder to the initial homebuyer. The trial court agreed and granted the preliminary objections.

On appeal, the Superior Court reversed the trial court's ruling.

The Superior Court relied on the notion that "privity of contract is not required to assert a breach of warranty claim against the builder of a new residential unit." In doing so, the Superior Court reviewed its previous ruling in *Spivack v. Berks Ridge*, where a condominium was purchased from a vendor shortly after the vendor acquired the condominium from the builder.

In *Spivack*, the Superior Court concluded that the new purchasers were permitted to sue the builder for a breach of the implied warranty of habitability because the builder should have recognized the vendor would not be the first to occupy the home, and privity of contract is not required to assert a breach of warranty against the builder.

Relying on a similar rationale, the Superior Court in *Conway* found "no logical reason to limit a builder's implied warranty to his immediate vendee."

Although the Pennsylvania appellate courts have not considered whether the implied warranty of habitability extends beyond initial purchasers, other trial courts that have confronted this issue have ruled that the builder's warranty is not limited to the initial homebuyers.

The Superior Court in *Conway* focused upon the policy considerations from these trial court rulings. According to the Superior Court, these cases assert that "the implied warranty of habitability is a creature of public policy. The warranty was created because a builder who exercises reasonable care should be capable of constructing a house that meets the warranty standards, because the price that the buyer is willing to pay is based on the assumption that the newly constructed house meets contemporary community standards for function and habitability, and because the contractor is the

only party that is in a position to know whether the house has been built in accordance with these standards. Even a knowledgeable buyer does not have access to the underlying structural work. Furthermore, defects attributable to negligent or deliberate failures to comply with building codes frequently do not manifest themselves until many years after the house was constructed."

In reaching its holding, the Superior Court emphasized that a homebuyer "justifiably relies on the skill of the builder that the house will be a suitable living unit" and that a subsequent homebuyer also relies upon the builder's skill that the home will be habitable. Before purchasing the home, the Superior Court noted that the subsequent homebuyer is in no better position than the initial homebuyer to discover hidden structural defects and should be afforded the same assurances as the original homebuyer that the home was properly constructed by the builder.

Furthermore, the Superior Court pointed out that the warranty arises to protect a homebuyer from defects that would not be apparent during a reasonable inspection, and if the law did not require a builder to be accountable under the warranty simply because the home was transferred before the defect was uncovered, the new homebuyer would have no recourse against the builder. Since, according to the Superior Court, many defects take years to materialize, the policy considerations behind the law should not be ignored simply because of a transfer in homeownership.

Although the Superior Court's ruling in *Conway* ruling expands the reach of the implied warranty of habitability beyond the initial homebuyers, the homebuyer ultimately has the burden of proving that the defect was latent, attributable to the builder's design and the defect made the home inhabitable. Furthermore, any such action must be commenced within the statute of limitations period of 12 years after completion of the construction of the home.

Alan Nochumson

Vertical Position 100%

Klyashtorny Elected To The Philadelphia Bar Association's Board Of Governors

Natalie Klyashtorny has been elected to a three-year term of the Board of Governors of the Philadelphia Bar Association.

As a member of the Board of Governors, Klyashtorny will be working with the Philadelphia Bar Association's Chancellor and fellow members of the Board of Governors to establish official policy for the Philadelphia Bar Association and provide guidance to the overall legal system.

The Philadelphia Bar Association, the oldest association of attorneys in the United States, provides guidance and professional support for attorneys, judges law students, and public officials on legal issues, and facilitates legal assistance and education to residents of the City of Philadelphia.

Vertical Position 14%

Nochumson Teaches How To Litigate A Landlord-Tenant Dispute In Philadelphia

For the second year in a row, Alan Nochumson taught a Continuing Legal Education (CLE) program entitled *Litigating Landlord-Tenant Disputes In Philadelphia County* which took place at Jenkins Law Library in Philadelphia, Pennsylvania.

During the program, Nochumson discussed the "nuts and bolts" of litigating a landlord-tenant dispute in Philadelphia County.

Vertical Position 35%

Klyashtorny Lectures On Considerations Before Starting A Law Firm

Natalie Klyashtorny served as a panelist at the *YLD Bootcamp: Tactics, Tips and Tricks for Law Students and New Lawyers* which was sponsored by the Young Lawyers' Division of the Philadelphia Bar Association.

During this panel discussion, Klyashtorny provided law

students and young lawyers with her insights into what it takes to start a law firm.

Vertical Position 14%

City Of Philadelphia Oversteps Its Bounds In Pursuit Of Blight

In 2007, I wrote an article titled “Fighting Blight,” explaining the consequences of a ruling handed down by the U.S. District Court for the Eastern District of Pennsylvania in *Gariffo Real Estate Holdings v. City of Philadelphia* and how the city of Philadelphia may, in the exercise of its inherent power of protecting residents from unsafe property conditions, demolish properties that are in danger of imminent collapse.

In *Gariffo*, the federal district court decided that the city is entitled to charge the property owner for the cost of demolition. At the conclusion of my 2007 article, I warned that the city is walking a fine line between a citizen’s constitutional rights and the city’s interest in the health and safety of its citizens. In *Bullard v. City of Philadelphia*, that same federal district court dealt with a situation where the city overstepped its bounds in pursuit of blight.

In Philadelphia, the Emergency Service and Abatement Unit, a subdivision of the city’s Department of Licenses and Inspections (L&I), is responsible for both a visual inspection and demolition of building structures it determines are

“unsafe” or “imminently dangerous.” The difference between an “unsafe” versus “imminently dangerous” classification is whether the structural components are deteriorating, or have failed and are in danger of collapse. In addition,

L&I is required to provide a property owner with 30 days to comply with an “unsafe” determination, and 10 days for an “imminently dangerous” one. If the property owner fails to comply within the time allowed, the city may demolish or repair the building structure at the property owner’s expense.

In *Bullard*, the property owner, Shawn Bullard, had recently purchased a property from the estate of the individual who was the record owner of the property. Bullard intended to renovate the property.

Prior to his purchase, Bullard applied for a building permit with the city, but that application was denied because, several days earlier, the property was cited by the city by way of a violation notice. At the time, Bullard was not advised that the city had classified the property as being “imminently dangerous.” Instead, the city had mailed the violation notice to the record owner of the property at the time, Frankie Thompson, who, unbeknownst to the city at the time of mailing, was deceased.

Several days later, but prior to Bullard’s purchase of the property, the city’s inspector visited the property after receiving a complaint about the condition of the property. At the time of his inspection, the city’s inspector was unaware that a violation notice had previously been issued against the property, classifying the property as being “imminently dangerous.” The city’s inspector independently determined that the property was “unsafe” and immediately affixed a violation notice to the property, which boldly stated that the property owner had 30 days to demolish or repair the property because the city had deemed the property as being “unsafe.”

Bullard was at the property when the violation notice was affixed to the property.

The next day, the city mailed another copy of the violation notice to the late but still record owner of the property, Thompson. That same day, the soon-to-be property owner, Bullard, retained the services of an engineer to inspect the property.

After purchasing the property, Bullard met with the city's inspector and others on several occasions to determine how to remediate the issues with the property. Bullard was advised that he had to follow his engineer's recommendations to repair the property and to complete the repair work before he could obtain the permits to renovate the property.

Less than two weeks after the city had affixed the violation notice to the property deeming the property as being "unsafe," and less than 30 days after the city initially classified the property as being "imminently dangerous," the city informed Bullard that it intended to demolish the property the following day. According to the city, Bullard was undermining the integrity of the building structure by renovating the property at the same time as making the recommended repairs to the property.

The following day, Bullard attempted to demolish the property himself, since he did not wish to incur the city's demolition costs. Bullard, however, was prevented from doing so. Instead, to Bullard's chagrin, the property was demolished by the city.

Bullard then filed a lawsuit against the city under Section 1983 based, upon other things, the city violating Bullard's procedural due process rights under the 14th Amendment to the U.S. Constitution.

The federal court subsequently granted summary judgment in favor of Bullard and against the city on the grounds that the city had, indeed, violated Bullard's procedural due process

rights under the 14th Amendment.

Procedural due process does not require the recipient to receive actual notice, just one reasonably calculated to apprise the recipient of the pending governmental action.

The federal district court found that Bullard was not provided with adequate notice.

As the federal district court pointed out, L&I requires its inspectors to confirm if the property owner received the violation notice. Moreover, the federal district court noted that L&I is obligated to determine whether the property has been sold and, if so, to not only provide the new property owner with the violation notice, but the city also had to update the new owner's information into the city's database as to that property.

According to the federal district court, Bullard had only known that the property was "unsafe" and no representative from the city had informed him that the property was actually categorized as being "imminently dangerous" or that he had a right to appeal the city's determination, even though he met with representatives from the city on several occasions.

The federal district court stated that, under Pennsylvania law, when a property owner is notified that the property is a nuisance to the public, the city is obligated to specify the repairs necessary to abate the nuisance and require completion of such repairs "within a reasonable time not less than 30 days from date of service.

As indicated by the federal district court, the city provided the former and present property owners with less than 30 days to so repair the property before the property demolition occurred.

In a footnote, the federal district court chastised the city's attempted service of the violation notice which had classified

the property as being “imminently dangerous.” The federal district court indicated that the city should have forwarded that violation notice to the present property owner when the city realized that the former property owner of record was deceased (and, thus, could not receive the violation notice), and the property had been sold to the present property owner.

The federal district court hypothesized that, even if the city had forwarded the violation notice to Bullard (which it did not), the city ran afoul of its obligation under Pennsylvania law by failing to give the requisite 30 days from the date the violation notice was issued, let alone served.

LESSONS LEARNED

The federal district court’s ruling in *Bullard* clearly indicates that the city must tread lightly before demolishing a property within the city limits. If the city does, the result will be similar to *Gariffo*. If the city does not, the city will find itself on the losing end of a lawsuit, as illustrated by the federal district court’s ruling in *Bullard*.

Alan Nochumson

Vertical Position 100%

Klyashtorny Is A Rising Star In Litigating Business Disputes

For 2012, Natalie Klyashtorny has been included in the list of Rising Stars – the top-up-and-coming attorneys in the Commonwealth of Pennsylvania – in litigating business disputes.

Each year, only 2.5% of attorneys practicing law in the Commonwealth of Pennsylvania receive the Rising Star honor.

The selections for this list are made by the research team at Super Lawyers, which is a service of the Thomson Reuters, Legal. Each year, the research team at Super Lawyers undertakes a selection process that includes a statewide survey of lawyers, independent evaluation of candidates by the attorney-led research staff, a peer review of candidates by practice area, and a good-standing and disciplinary check.

Vertical Position 14%

Nochumson Speaks About New Developments In Landlord-Tenant Law

Alan Nochumson, Esquire served as a faculty speaker at a Continuing Legal Education (CLE) seminar entitled *Landlord-Tenant Law: Surviving In A Difficult Economy* which was sponsored by Sterling Education Services, Inc.

During the seminar, Nochumson spoke about the legal and practical aspects of leasing real estate in Pennsylvania.

Vertical Position 100%