Report to Groundwork Denver: Policy and Legal Strategies to Combat Residential Sources of Lead Poisoning in Children

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Table of Contents

I. Executive Summary

This White Paper explores various legal avenues available to local government and/or private citizens to require property owners to abate lead-based paint ("LBP") hazards in residential units within Denver, Colorado. This paper provides Groundwork Denver with a comprehensive analysis of whether existing laws may be used to protect children from LBP hazards and additional legal strategies that may achieve Groundwork Denver's goal of eliminating LBP hazards in Denver. The paper examines three levels of governmental law: federal statutes and regulations; state statutes and regulations; and local (Denver) ordinances.

Some federal laws may be useful in forcing residential LBP abatements on a case-by-case basis. The Resource Conservation and Recovery Act ("RCRA") may be an effective tool for forcing abatement of LBP hazards where a child has been detected with an elevated blood level ("EBL") and/or there are obvious LBP hazards present in the residence. First, RCRA would allow local government to request that the U.S. Environmental Protection Agency ("EPA") bring an enforcement action against the building owner to abate the LBP hazard. Second, RCRA authorizes private enforcement on behalf of the tenant against the landlord. In many cases, the use of an enforcement notice (often called a 90-day letter of intent to sue) will work to prompt the landlord to remedy the situation.[1] However, if a landlord were to fight the enforcement action, use of RCRA to force lead abatement could generally be time consuming and resource intensive for EPA, Groundwork Denver, or individual citizens, particularly if the building owner were to take the action to court. Use of RCRA on behalf of the tenant can also risk the possibility of retaliation by the property owner (such as eviction).

With respect to state law, the Colorado legislature has intentionally limited the scope of many of its statutes that involve LBP hazards, lead, and abatement. As such, neither local government nor citizens could use these statutes to force abatement of LBP hazards in residential housing. The only two potentially usable provisions passed by the Colorado legislature are the City Housing Laws and Slum Clearance and the Rehabilitation Act of 1945. However, both provisions have drawbacks and require substantial amounts of discretional government spending. Each would cause hardships by forcing large groups of people out of their homes for an indeterminate period, and would require either the government or a private enterprise to initiate the redevelopment of sub-standard areas on their own accord.[2]

The Denver Municipal Code contains three chapters that may be relevant to enforce removal of LBP hazards: (1) Chapter 37 "Nuisances," prohibiting any health

[1] Similarly, the Lead Safe Housing Rule ("LSHR") may be used to force abatement in some specific government owned or financed properties.

[2] State law does provide requirements associated with lead hazard abatement during building renovations. These are discussed below.

nuisance to exist or remain within the city; (2) Chapter 10 "Buildings and Building Regulations," prohibiting buildings from becoming neglected or derelict; and (3) Chapter 27 "Housing Code," requiring that owners and operators maintain residences in a clean and sanitary manner. Though none of the relevant chapters within the Municipal Code specifically require the removal of LBP hazards from Denver residences, the language of each chapter is generally broad enough that local government officials could rely on any one of these chapters of the Municipal code to require residential LBP hazard abatement by a property owner. Of these, however, the Housing Code is a particularly persuasive means of enforcement, given its clear purpose to protect, preserve, and promote the physical and mental health of the people. Not only is the statutory language of Housing Code sufficient to support enforcement efforts by local government to abate LBP hazards, but it was specifically found by the City Council at a "Neighborhood, Community, & Business Revitalization" Committee meeting that lead and other non-visible problems were intended to be covered by the Housing Code's definition of "clean and sanitary" conditions.

Finally, this Paper also considers potential future legislative choices to address residential LBP hazards in Denver. Specifically, we have examined three possibilities: (1) additional state or local laws that would provide local officials with more specific authority to address LBP hazards; (2) state or local laws to require expedited adoption of the new federal LBP abatement requirements; and (3) adoption of a local law requiring registration of residential rental units to provide an avenue for enforcement against negligent landlords to abate LBP hazards. We have reviewed provisions of other state and local laws to determine if other jurisdictions have adopted any laws similar to those we propose. We have also suggested methods for bringing forward such legislative proposals in Colorado.

II. Questions Presented

Three general questions are presented and analyzed in this White Paper. First, do existing legal mechanisms exist in Colorado or Denver that would allow local government agencies to proactively enforce against residential property owners to require abatement of LBP hazards? Second, do existing federal, state, or local laws authorize private enforcement (such as by GWD on behalf of tenants) to require LBP hazards abatement in residential units? Third, what legislative options are available to improve LBP hazard abatement in Denver?

III. Research Methodology

For the Federal laws section, we reviewed RCRA and the Lead Safe Housing Rule. After reviewing the statutory provisions and annotations of those statutes, we reviewed the associated administrative regulations. In order to discern how each government agency interpreted its own authority to use these statutes, we looked in the

Federal Registrar for the preambles to the administrative rulemakings. In addition, we examined case law interpreting these statutes. Finally, we examined secondary sources written by experts in the field regarding their interpretations of how these statutes and rules may be used to force lead abatement. Not all documents that were reviewed are presented in this White Paper, as some of them did not contain any relevant information.

In researching Colorado statutes, we first began by reviewing all potentially relevant statutory language and resulting regulations to narrow down the potentially usable sections. After this fist "cull," the statutory notes that accompany some statutes were analyzed for further insight. The Session Laws that created the statute where then located, and were used to identify the legislative hearing tapes and the appropriate portion of the *Colorado Session Laws* text to search. For the statutes that were particularly on point, we went to the State Legislative archives to listen to the hearings that led up to the enactment of the statute. This information is only available in audio format but can be particularly helpful when trying to discern the intent of the bill or statute. When at the legislative archives, we also searched the *Digest of Bills* and the *House and Senate Journals*. Additional information on Colorado bill amendments can be found in the *Digest of Bills*, which summarizes the major provisions of each bill passed during the preceding session. Additionally, further details on the legislative actions affecting a bill may be found in the journals of the House and Senate. The journals are the official records of the proceedings of the legislature and contain highlights of what happened in the legislature. We also checked the secondary sources in order to be more thorough. For a few of the statutes, there were Legislative Council Research Publications on point. Dating back to 1954, these nonpartisan research publications "comprise Colorado's most authoritative written legislative history."[3] Lastly, we examined applicable case law.

At the local level, we examined the Denver Municipal Code in order to identify chapters that may be used for the enforcement of LBP hazard removal. Because the language of the Code is broad and vague and to gain better insight into what the sections specifically prohibit, including whether the sections prohibit LBP hazards to remain, we examined the legislative history of each of the relevant sections of the Code. To determine the legislative history of each of the relevant sections of the Code, we sought out the ordinances listed after each section.[4] After compiling a list of ordinances corresponding to the relevant sections of the three chapters, we located the ordinances on the Denver City Council website. For the most part, the ordinances contained language that was almost identical to the corresponding sections of the Code, and thus, the ordinances provided no further clarification of the meaning of the relevant sections. Accordingly we viewed videotapes at the Denver Public Library that covered City

[3] University of Denver Sturm College of Law, Westminster Law Library, "About CLC Research Publications," available at www.law.du.edu/index.php/library/digital-collections/colorado-legislative-process/aboutclc-research-pubs.

[4] The Denver City Council passes ordinances that ultimately comprise the different sections and chapters of the Denver Municipal Code.

Council meetings between 1991 to 2007, during which the Council may have discussed a given ordinance in greater detail. None of the City Council meetings provided further clarification of the meaning of the ordinances and their corresponding sections of the Code. Our final source of legislative history was then to view the City Council committee meetings. Council members with a particular interest or specialty serve on a given committee and debate bills that the head of the Council assigns to that committee. The bills are, thus, fleshed out before they appear before the full City Council for a vote. Most of the City Council committee meetings did not provide further insight into the meaning of the relevant sections of the Code. However, one such committee meeting gave greater meaning to a given section of the code, making it more plausible that the City Council meant to prohibit LBP hazards from remaining in Denver residences.

IV. Principles of Statutory Construction

Statutory interpretation is the process of interpreting and applying legislation. For the vast majority of legal problems, the primary source of law is statutory. This is particularly true when a statute is clearly written and unambiguous as to the legislative intent. Unfortunately, many statutes contain ambiguity or vagueness in the wording that must be resolved. When the law seems unclear or ambiguous, judges and lawyers step in and try to delineate interpretations of the general rule to the narrow particularities of the case at hand.[5]

To unearth the meanings of statutes, lawyers use various tools, including traditional canons of statutory interpretation. This interpretation always begins and ends with the language of the statute itself and is conducted in a manner that the resulting interpretation makes sense and is reasonable.[6] An essential rule of statutory construction is that "every part of a statute be presumed to have some effect, and not be treated as meaningless unless absolutely necessary."[7] Each and every word of a statute must be given meaning if possible.[8] In analyzing the specific words, there is an express preference for common, ordinary, natural, normal, or dictionary meanings.[9] Additionally, statutes must be read as a whole, and interpretation of word or phrase depends upon reading whole statutory text.[10] This includes not just the words, but the punctuation as well. [11]

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[5] *Lassner v. Civil Service Comm'n*, 493 P.2d 1087 (Colo. 1972); *see also* 2A Norman J. Singer, *Sutherland Statutory Construction* § 45.2 (6th ed. 2000).
[6] *City and County of Denver v. Holmes*, 400 P.2d 901 (Colo. 1965); *Lang v. Colorado Mental Health Institute in Pueblo*, 44 P.3d 262 (Colo. Ct. App. 2001); *see also* 2A Norman J. Singer, *Sutherland Statutory Construction* § 45.12 (6th ed. 2000).
[7] *Raven Coal Corp. v. Absher*, 153 Va. 332, 149 S.E. 541 (1929).
[8] *Thomas v. Grand Junction*, 13 Colo. App. 80 (1889).
[9] *Mid-Century Ins. Co. v. Travelers Indem. Co. of Illinois*, 982 P.2d 310 (Colo. 1999).
[10] *TRW Inc. v. Andrews,* 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (internal quotation and citation omitted)).
[11] *See Raven Coal Corp. v. Absher*, 153 Va. 332 (1929).

There is also an obligation to construe statutes so that they carry out the will of the legislature.[12] In accordance with this principle, courts normally comply with instructions in a statute indicating how its language should be defined and its provisions interpreted.[13] A legislative policy declaration at the outset of the legislation may serve as a guide to legislative intent.[14] When the intent is not explicitly stated, attorneys look at the language of a statute, the policy behind the statute, the legislative history, and concepts of reasonableness to determine the intent of the legislature.[15] This legislative intent must prevail if it is reasonably discoverable in the language used. A statute must be construed in the light of the intended purpose, as articulated in the legislative intent.[16]

Where a statute covers a general area but does not specifically address an issue within that general area, the legislative intent must also be discerned. The attorney first starts with the discernable legislative intent from the general area and then extrapolates fair and reasonable corollaries of that intent to the specific issue.[17] In such cases, courts may not avoid this problem by refusing to apply the statute on the ground that the legislature has not yet extended the statute to make it clearly apply, but courts must conduct the analysis to determine if the specific issue is within the statutory framework.[18]

If the meaning of the statute remains unclear after interpreting the language, the next step is to use binding judicial interpretations of the statute. In Colorado, the Colorado Supreme Court is the highest authority that can provide judicial interpretation of state and local legislation. Judges' interpretations of statutes are as important to understanding what the law is as are the words of the statutes themselves.

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[12] *Colo. State Bd. of Medical Examiners v. Jorgensen*, 599 P.2d 869 (Colo. 1979); 2A Norman J. Singer, *Sutherland Statutory Construction* § 45.5 (6th ed. 2000).
[13] *Vail Associates, Inc. v. Eagle Cty Bd. of Cty Comr's*, 983 P.2d 49 (Colo. Ct. App. 1998), judgment rev'd on other grounds, 19 P.3d 1263 (Colo. 2001), as modified on denial of reh'g, (Mar. 19, 2001); *see also* 2A Norman J. Singer, *Sutherland Statutory Construction* § 45.3 (6th ed. 2000).
[14] *People v. Grady*, 126 P.3d 218 (Colo. Ct. App. 2005), cert. denied, 2006 WL 349692 (Colo. 2006) ; *see also* 2A Norman J. Singer, *Sutherland Statutory Construction* § 45.9 (6th ed. 2000).
[15] *People v. Merrill*, 816 P.2d 958 (Colo. Ct. App. 1991); *see also* 2A Norman J. Singer, *Sutherland Statutory Construction* § 45.6 (6th ed. 2000).
[16] 2A Norman J. Singer, *Sutherland Statutory Construction* § 45.5 (6th ed. 2000).
[17] 2A Norman J. Singer, *Sutherland Statutory Construction* § 45.9 (6th ed. 2000); *see also People v. Valdez*, 56 P.3d 1148 (Colo. Ct. App. 2002).
[18] 2A Norman J. Singer, *Sutherland Statutory Construction* § 45.9 (6th ed. 2000).

V. Analysis of Potentially Relevant Laws

A. Federal Law

1. Summary

Some federal laws may be useful in forcing LBP abatements for individual properties on a case-by-case basis. However, using federal statutes to enforce lead abatement would generally be more time consuming and resource intensive for Groundwork Denver or individual citizens than a regulatory system like those in some east coast states and cities. RCRA may be an effective tool in forcing abatement of LBP hazards. In situations where a child has an EBL, there are obvious and significant LBP hazards present in the building, the property owner has failed to conduct proper maintenance, and the tenant has options for other places to go if the property owner retaliates or closes the building, then initiating a RCRA suit by filing a 90 day letter of intent may prove useful and effective tool. Similarly, the Lead Safe Housing Rule may be used to force abatement in some specific government owned or financed properties.

2. Analysis

a. Use of RCRA to Force Lead Abatement

Congress passed the Resource Conservation and Recovery Act ("RCRA") in 1976 to establish a system for solid waste collection, transportation, separation, recovery, and disposal practices.[19] RCRA regulates the generation, transportation, treatment, storage and disposal of *hazardous waste* under Subtitle C.[20] RCRA also provides a framework for the management of non-hazardous wastes under Subtitle D.[21] When contractors or do-it-yourselfers undertake abetments, renovations, or remodeling projects in residential dwellings with elevated lead paint hazards, they may generate debris that contains unsafe levels of lead. This debris is considered "household waste" by the Environmental Protection Agency ("EPA") and is ***therefore not subject*** to the strict regulations for disposing hazardous waste under Subsection C.[22] Practically this means that contractors or residents that generate lead based paint waste may dispose of such waste in regular municipal dumps instead of paying the high costs to dispose of them as RCRA hazardous waste.[23] However, such waste may be regulated by the state of Colorado under Regulation 19.[24]

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[19] 42 U.S.C. § 6902.
[20] 42 U.S.C. §§ 6921-6939.
[21] *Id*.
[22] EPA Memorandum, *Regulatory Status of Waste Generated by Contractors and Residents from Lead-Based Paint Activities Conducted in Households* (August, 2000), *available at* http://www.epa.gov/lead/pubs/fslbp.htm (last visited March 13, 2009).
[23] *See* 40 CFR 258.2 and 40 CFR 257.2 (also allowing for LBP debris to be dumped in Construction and Demolition landfills); EPA has officially taken the position that the household waste exclusion in RCRA does not apply to

i. EPA Has Used Its' Authority under RCRA to force LBP Abatement

Aside from RCRA's regulatory regime for hazardous wastes, RCRA also gives EPA the statutory authority to address imminent and substantial endangerments to public health or the environment from hazardous ***or*** solid wastes in section 7003.[25] The provision authorizes the administrator of the EPA to:

> bring suit on behalf of the United States in the appropriate district court against any person (including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility) who has contributed or who is contributing to such handling, storage, treatment, transportation or disposal to restrain such person from such handling, storage, treatment, transportation, or disposal, to order such person to take such other action as may be necessary, or both.[26]

The government must prove the following 5 elements in order to successfully bring a 7003 action:

1. the presence of a solid or hazardous waste;
2. that is being or has been handled, stored, treated, transported or disposed;
3. that is situated such that it may pose an "imminent and substantial endangerment to health or the environment;
4. that the person has contributed or is contributing to the handling storage, treatment, transportation or disposal; and
5. that relief is available.[27]

Section 7003 actions may be used to force action but do not provide for civil penalties or money damages.[28] EPA has applied sections 7003 to force abatement of LBP hazards in at least two enforcement orders at the request of local government officials.[29]

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debris resulting from the demolition of housing or other residences. Hazardous Waste Management System; Identification and Listing of Hazardous Waste, 49 Fed. Reg. 44,978 (1984); *see also* http://www.epa.gov/osw/inforesources/pubs/infocus/rif-c&d.pdf. Because wastes from these sources are dissimilar to those generated by a consumer in the home in the course of daily living, EPA determined that there is no basis for extending the household waste exclusion. *Id.* However, the household waste exclusion does apply to LBP waste that results from renovations, remodeling, and abatement. *See* 63 Fed. Reg. 70,233, 70,241 (1998); *see also* Jeffrey M. Gaba and Donald W. Stever, 1 L. of Solid Waste, Pollut. Prevent. and Recycl. § 4:4 Scope of the household waste exclusion (2008).

[24] *See* section V., B., 2., c., of this paper.

[25] 42 U.S.C. § 6973(a)

[26] *Id*.

[27] 1 RCRA and Superfund: A Practice Guide, 3d § 5:29.1, 2 (2008).

First, in 2000 EPA region 3 issued a Unilateral Administrative Order ("UAO") to 17th Street Revocable Trust and other owners of a 77-unit apartment building in Washington D.C. [30] The municipal government identified five lead poisoned children as residents of the building and there was a child-care facility on the ground floor.[31] City inspectors revealed the presence of extremely high levels of LBP and LBP waste.[32] Further the EPA determined that peeling paint chips and dust were refuse, contstituting 'discarded materials' and, therefore, meeting the definition of solid waste under RCRA.[33] Because the EPA determined that all of the Section 7003 factors were present, it ordered the owners within one year to permanently abate all LBP waste and deteriorating LBP in all 77 residential units and interior common and maintenance areas.[34] The EPA also reserved the right to perform testing and follow-up inspections to ensure compliance with its order.[35]

Second, in 2001 EPA issued a UAO to Group I Management and M275 LLC ("*Fall River UAO"),* owners of a commercial building.[36] Though no children resided at building, one of the tenants was a dance studio, set to begin classes for children.[37] EPA inspectors observed dust throughout the building and tested dust samples that showed lead concentrations well in excess of federal lead hazard standards.[38] Just as it had in 17th Street Trust, EPA ordered the owners to hire licensed abatement contractors to abate the lead paint hazards, conduct clearance testing, and report to EPA at key stages of abatement.[39]

In *17th Street Trust* and *Fall River UAO*, EPA became involved at the request of state or local authorities because lead-contaminated dust and debris from LBP was present in excess of federal lead hazard standards, and young children resided in or frequented the buildings.[40] These two orders set an administrative precedent: 1) that LBP hazards are a solid waste; 2) that the peeling and deterioration of LBP in residences and commercial buildings constitutes generation of a LBP hazard; 3) that such LBP hazards may pose an imminent and substantial endangerment to health or the environment; 4) that owners or operators contributed to the handling storage, treatment, transportation and/or

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[28] 42 U.S.C. § 6973(a); *See also* Shana R. Cappell, *Lead Paint Poisoning and The Resource Conservation and Recovery Act: A New Partnership for the Twenty-First Century*, 35 Colum. J.L. & Soc. Probs. 175, 186 (Spring 2002).
[29] *See* RCRA-3-2000-0001TH (2000) (*17th Street Trust UAO*); RCRA-01-2001-0072 (Sept. 4, 2001) (*Fall River UAO*).
[30] *17th Street Trust UAO*, *supra* note 9
[31] *Id*. at 10.
[32] *Id*. at 11.
[33] *Id*. at 17.
[34] *Id.* at Attachment II, Statement of Work, p.1
[35] *Id*. at 20.
[36] *Fall River UAO, supra* note 9.
[37] NCHH chapter 4, p. 68.
[38] *Fall River UAO, supra* note 9 at attachment I, Statement of Facts, p.1
[39] *Id*. at 3.
[40] NCHH, chapter 4, p. 66.

disposal by not properly maintaining the premises; and 5) that relief was available through abatement orders.[41]

EPA's interpretation of its own authority under Section 7003 to force lead abatements would be persuasive on a court of law. However, no case law currently exists for such an action under Section 7003.[42] It is possible for an owner or operator of a building who was forced to abate lead hazards by the EPA (or any other agency) to appeal that decision to a court. So long as the agency's order was not arbitrary or capricious, the court would likely affirm it.[43]

ii. Citizens Can Also Bring Suit Under RCRA

Section 7002 of RCRA enables ordinary citizens to:

> commence a civil action on his own behalf . . . against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment . . ..[44]

The language is almost identical to the language in Section 7003. Therefore it follows that citizens could initiate a civil action in situations similar to those in *17th Street Trust* and *Fall River*.[45] Indeed, such an approach has been advocated in several scholarly articles and law reviews.[46]

To initiate a citizen suit, all five of the Section 7003 factors discussed above must be present. In addition, a person may not commence a Section 7002 citizen suit if: (1) EPA or the state has commenced and is "diligently prosecuting" a RCRA action; or (2)

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[41] *See 17th Street Trust UAO* and *Fall River UAO, supra* note 9.
[42] However, there is one unbreported lower level court decision, which supports the notion that lead paint is a "solid waste" under RCRA, *see* Duckworth v. Barrios, 1995 WL 241841 (E.D. La. 1995., April 25, 1995).
[43] *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983).
[44] 42 U.S.C.A. § 6972(a)(1)(B).
[45] *Supra* note 6.
[46] *See* T. Neltner, *Lead Dust as Solid Waste: a New Legal Strategy for Achieving Lead Safety*, CLEARINGHOUSE REV. J.L. & POL'Y, Mar.-April 2006, 665-675; Shana R. Cappell, *Lead Paint Poisoning and The Resource Conservation and Recovery Act: A New Partnership for the Twenty-First Century*, 35 Colum. J.L. & Soc. Probs. 175 (Spring 2002). *See also*, Alliance For Healthy Homes, Using the Resource Conservation and Recovery Act to Control Lead Hazards In Housing, www.afhh.org/res/res_Operation_LEAP_toolkit.htm.

the person suing has provided a 90 days prior notice to EPA, the violator, and the state in which the alleged violation occurs.[47] This notice is provided in order to give the violator a chance to volunteer to correct the problem and/or to allow EPA and the state to pursue a civil enforcement action.

Thomas G. Neltner, the author of *Lead Dust as Solid Waste: a New Legal Strategy for Achieving Lead Safety*, argues that by issuing a 90-day letter of intent to sue, individuals can often force landlords and owners of properties to abate lead hazards without actually having to file suit.[48] Mr. Neltner describes a situation in which he worked with the mother of a lead poisoned child to send a 90-day letter of intent to sue the landlord under RCRA 7002.[49] In response, the landlord immediately agreed to clean up or demolish the building.[50] Since publishing *Lead Dust as Solid Waste*, Mr. Neltner has issued four (4) additional 90-day notice of intent letters to landlords on behalf of parents of children with EBLs.[51] Mr. Neltner attests that he usually targets landlords with less than 20 houses when sending RCRA notice letters .[52] In every instance, landlords immediately abated the action prior to any litigation.[53] Mr. Neltner argues that even where insurance companies do not cover LBP claims, insurance attorneys will often pressure landlords to abate the LBP hazard.[54] We fully agree with Mr. Neltner's analysis.

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[47] 42 U.S.C. § 6972(b)(2)(A).
[48] Neltner, *supra* note 25 at 673.
[49] *Id.*
[50] *Id*.
[51] Phone conversation between Jacob Schlesinger and Thomas Neltner, March 12, 2009, 2:20pm.
[52] *Id*.
[53] *Id.*
[54] *Id*.; *see also* Neltner, *supra* note 25 at 674.

iii. Advantages and Disadvantages to Using RCRA to Force LBP Abatements

Actor	Advantages	Disadvantages
To the Individual Citizen	• A citizen may file a notice letter without the aid of an attorney.[55] • RCRA may be an attractive tool for public interest lawyers because RCRA provides for costs of litigation and attorney's fees.[56] • May force abatement for the particular dwelling where the individual resides.	• Hard for individuals to step forward. • There is always a concern when suing a landlord that he or she could retaliate against the tenant. Most retaliation would be illegal, but without proper enforcement legality may be inconsequential to the tenant. • The property owner may legally choose to close the building and evict all of the tenants rather than pay to clean up the property. • Tenants may be considered persons responsible for endangerment under RCRA in situations where the tenant has somehow disturbed the paint him or herself.[57]
To Groundwork Denver	• A public interest organization may file a notice letter without the aid of an attorney.[58] • RCRA may be an attractive tool for public interest lawyers because RCRA provides for costs of litigation and attorney's fees.[59] • Because the notice letter must also be sent to EPA and the state where the violation occurs, it is possible that the letter will trigger government action • 90-day notice letter may also serve as an effective tool for raising awareness of this issue with local government officials who may be influential in reforming local laws and regulations to more directly address the issue of LBP hazards in Denver.	• Is not an effective general tool for broad enforcement and abatement of LBP hazards across the city. • Retaliation to tenant (see above).

[55] Neltner, *supra* note 25 at 674.
[56] *See* 42 U.S.C. § 6972(e).
[57] *Id*.
[58] Neltner, *supra* note 25 at 674.
[59] *See* 42 U.S.C. § 6972(e).

b. Using the Lead Safe Housing Rule to force lead abatement

The Lead Safe Housing ("LSH") Rule applies to federally owned and assisted target housing.[60] The LSH rule requires various forms of notification, paint evaluation, risk reduction, and in some cases abatement of LBP hazards.[61] The requirements applicable to each property depend on the type and level of federal assistance and ownership that the property receives.[62] The requirements also depend on the age of the property and whether it is managed through a rental company or homeownership.[63] In some situations the LSH rule may be used to force abatement. The attached chart (see Appendix A) explains the various requirements based on the type of federal involvement with each property.[64]

B. State Law

1. Summary

Because the Colorado legislature intentionally limited the scope of many of its statutes regarding LBP, lead, and abatement, these laws generally may not be used to force cleanup of LBP hazards. However, Groundwork Denver may choose to push greater use by local officials of two provisions in the Colorado statutes that pertain generally to residential hazards. Both the City Housing Laws and the Slum Clearance or the Rehabilitation Act of 1945 could theoretically be used to force abatement of LBP hazards. While usable, both would likely cause hardships by forcing large groups of people out of their homes for an indeterminate period and would require the unlikely scenario that either the government or a private enterprise to initiate the redevelopment of sub-standard areas on their own accord, using discretional government spending. Both the unlikeliness of government spending on redevelopment and the potential tenant scramble that redevelopment would cause makes the use of these two statutes less desirable than the options available in federal or local law.

2. Analysis

The Colorado Department of Public Health and Environment (CDPHE) has in-state authority to regulate lead under the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, RCRA, and the Colorado Solid Wastes Disposal Sites and Facilities

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[60] 24 C.F.R. § 35.100; *see also* Housing and Urban Development, *Summary of Lead-safe Housing Rule Requirements*, available at http://www.hud.gov/offices/lead/enforcement/lshr_summary.cfm.
[61] *Id*.
[62] Stephanie Brown, Federal Lead-Safe Paint Enforcement Benchbook 70 (National Center for Healthy Housing 2009) (2009), *available at* http://www.healthyhomestraining.org/Codes/index.htm.
[63] *Id*. at 71.
[64] http://www.hud.gov/offices/lead/enforcement/lshr_summary.cfm, *supra* note 42.

Act.[65] In regulating lead in the state, the Air Pollution Control Division, Water Quality Control Division, and the Hazardous Materials and Waste Management Division of the CDPHE share regulatory responsibility.[66] The Air Pollution Control Division regulates inspection and assessment activities for lead as well as the abatement of LBP materials. The Water Quality Control Division has authority to regulate lead in public drinking water supplies and state waters. The Hazardous Materials and Waste Management Division regulates the proper disposal of lead wastes in Colorado.[67]

Where legal authority exists under a state statute, the CDPHE Division of Administration has the power to administer and enforce the public health laws, standards, orders, rules, and regulations.[68] Similarly, the CDPHE Executive Director can request that a civil or criminal action be brought against a violator, which would trigger the district attorney's compliance with this request.[69] An action can be brought to abate conditions that are in violation, to restrain or enjoin any action that is in violation, or to prosecute the violation.[70] After being ordered to halt or fix the violation, violators have forty-eight hours to remove any nuisance, source of filth, or cause of sickness, whether such person, association, or corporation is the owner, tenant, or occupant of such private property.[71] It is a misdemeanor for anyone to willfully violate, disobey, or disregard these provisions.[72]

Unfortunately, as discussed below, no specific state authority exists that requires the CDPHE or its divisions to investigate or enforce LBP hazards in residential units in Colorado.

a. Lead Exposure Statutes

In 1997, the legislature in Colorado passed the Prevention, Intervention, and Reduction of Lead Exposure statutes.[73] In the legislative declaration, the state found that a "comprehensive lead hazard reduction program is needed to prevent elevated blood lead levels in children."[74] Because of this need, the general assembly established and funded a statewide lead hazard prevention, intervention, and reduction program within the CDPHE.[75] However, the scope was limited to:

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[65] http://www.cdphe.state.co.us/hm/leadcomp.pdf.
[66] http://www.cdphe.state.co.us/hm/leadcomp.pdf.
[67] http://www.cdphe.state.co.us/hm/leadcomp.pdf.
[68] COLO. REV. STAT. § 25-1-109.
[69] COLO. REV. STAT. § 25-1-112.
[70] *Id.*
[71] COLO. REV. STAT. § 25-1-114.
[72] *Id.*
[73] COLO. REV. STAT. § 25-5-1101.
[74] *Id.*
[75] *Id.*

(I) Compiling information concerning the prevalence, causes, and geographic occurrence of elevated levels of lead in children's blood;

(II) Identifying areas of the state where children's lead exposures are significant;

(III) Analyzing lead information and, where indicated, designing and implementing a program of medical monitoring and follow-up and environmental intervention that will reduce the incidence of excessive exposure of children to lead in residences and child-occupied facilities in Colorado; and

(IV) Providing comprehensive educational materials that are targeted to health care providers, childcare providers, schools, parents of young children, the real estate industry, and owners of rental properties.[76]

This statutory scheme also created the Lead Hazard Reduction Program in the CDPHE "to perform prevention, intervention, and general hazard reduction activities needed to reduce exposure of children to LBP hazards."[77] This statute instructs the department to coordinate actions with other state level departments to produce a comprehensive plan and program based on the scope of the previous statute to prevent elevated blood lead levels in children and to control exposure to LBP hazards in residences and child-occupied facilities.[78]

The comprehensive plan was to be established on or before July 1, 1998, with the goal of preventing "elevated blood lead levels in children and to control exposure of children to lead-based paint hazards in residences and child-occupied facilities."[79] The plan was required to include the development of standards concerning the method and frequency of screening of young children for elevated blood lead levels, development of a comprehensive education program, case management and environmental follow-up services for all cases of EBL levels in children, recommendations concerning further legislative actions to address lead exposure, proposed regulations "governing the requirement, timing, and conduct of environmental investigations and interventions," and a detailed fiscal analysis of this program.[80]

In debating the bill to enact these statutes, senators agreed that the statute was enacted to find out if there is a lead problem, ***but only by voluntary means***.[81] This intent

[76] *Id.*
[77] COLO. REV. STAT. § 25-5-1103.
[78] *Id.*
[79] COLO. REV. STAT. § 25-5-1104(1).
[80] COLO. REV. STAT. § 25-5-1104.
[81] Legislative Hearing Tapes for S.B. 97-136.

was also expressed in the accompanying CDPHE fact sheet that was given to each senator. The fact sheet stated that:

> [t]he knowledge about where and to what extent harmful childhood lead exposures are occurring in Colorado is the first step in the prevention of these exposures and reducing childhood lead poisoning.[82]. . . CDPHE will implement a process to identify priority areas in which to conduct childhood lead screening programs and will conduct limited surveys to determine if a screening program would be beneficial.[83] . . . [And that] [t]he bill will allow CDPHE to establish a training and certification program that EPA would approve.[84]

In accordance with this limited scope, the legislature specifically omitted spot inspections of homes.[85] Senator Blickensderfer, the sponsor of the bill, stated that this was the same bill that was proposed the previous year that died in the House Appropriations Committee except that "it does not have the spot inspections of private residences that his had, that was the trip wire of his bill and we just kept that out of this one."[86] The Chairwoman and others were concerned that "we are going to have lead police," and that homeowners would be forced to repaint houses, and wanted to ensure that the bill was "narrowly tailored" and would only be for targeted screening and educational goals.[87]

As a result of these statutes, from June through September 1995, the CDPHE conducted a survey of blood lead levels among children living in north central Denver, a high-risk area.[88] Of the randomly selected sample of children from 12-35 months of age, 173 participated, and of those children the proportion with blood lead levels > 10 μg/dL was 16.2%, and five children had levels > 20 μg/dL.[89] The proportion with elevated levels was over five times greater than the overall rate (3.2%) for Denver County, and the CDPHE found that the findings are consistent with the idea that there exist "pockets" of childhood lead poisoning within the city.[90]

Additionally, the state formed a steering committee of some 20 individuals, representing a variety of federal, state and local entities, both public and private, to coordinate the development of a statewide lead poisoning elimination plan called the

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[82] CDPHE fact sheet, attached in to S.B. 97-136 hearing packet given to all Senators.
[83] *Id.*
[84] *Id.*
[85] Legislative Hearing Tapes for S.B. 97-136.
[86] *Id.*
[87] *Id.*
[88] http://www.cdphe.state.co.us/ap/leadstudies.html; http://www.cdphe.state.co.us/ap/down/leadstdy.pdf.
[89] *Id.*
[90] *Id.*

"2010 Strategic Plan; Eliminating Childhood Lead Poisoning in Colorado."[91] This plan focused on identifying at-risk children, testing those children, and initiating action for treating those children; educating parents and the public at large about lead poisoning and prevention; and identifying and controlling sources of lead in the environment.[92] Further, under this statutory scheme, the Air Pollution Control Division Regulation No. 19, LBP Abatement, was revised to include requirements for Pre-Renovation Education in Target Housing, modeled after the Environmental Protection Agency requirements.[93] Please see the detailed analysis of the new rules in section VIII., B., 3. of this White Paper.

Because of the extremely limited scope of these statutes in the plain text, the clear legislative intent that the statutes should not be read more broadly, and the deference that the government is given in promulgating its regulations, these statutes cannot be read to include enforcement provisions. However, this statute could be a very good model for new legislation to widen and improve the screening of at-risk children in Denver.

b. Lead Abatement Statute

The Colorado Air Pollution Control Division, established within the CDPHE, works with the Colorado Air Quality Control Commission to regulate potential airborne lead hazards in the state.[94] The Colorado Air Quality Control Commission operates under the Federal Clean Air Act, the Colorado Air Quality Control Statutes, and Air Quality Control Regulations passed by the Commission.

The Air Pollution Control Division is responsible for developing and implementing lead certification and abatement regulations for child-occupied facilities and target housing.[95] The relevant Colorado Air Quality Control Statutes, entitled Lead-based Paint Abatement, provide for abatement requirements in the state.[96] The legislative declaration in the statue specifies that:

> [t]he state seeks to adopt the concept of 'lead-safe' housing units and child-occupied facilities, rather than 'lead-free' housing and facilities. The goal of the state should not be the removal of all lead-based paint, but the creation of housing and facilities where no significant lead-based paint hazard is present.[97]

While this provision sounds promising, as discussed earlier, in debating the bill to enact these statutes, the consensus among the senators was that the statute was to be used to

[91] http://www.cdphe.state.co.us/ap/leadhome.html.
[92] *Id.*
[93] *Id.*
[94] COLO. REV. STAT. § 25-7-104; *Corcoran v. Sanner*, 854 P.2d 1376, 1380 (Colo. App. 1993).
[95] COLO. REV. STAT. § 25-5-1101, et seq.
[96] COLO. REV. STAT. §§ 25-7-1101 to 1107.
[97] COLO. REV. STAT. § 25-7-1101.

find out if there is a problem, ***but only by voluntary means***.[98] The goal of this legislation was to "implement a process to identify priority areas," and to "allow CDPHE to establish a training and certification program that EPA would approve."[99]

Further, one of the LBP Abatement statutes specifically enumerates the powers and duties of the Air Quality Control Commission.[100] These enumerated powers are limited to the promulgation of rules under the federal "Residential Lead-Based Paint Hazard Reduction Act of 1992," including procedures for a training and certification program, performance standards and practices for lead abatement, approval procedures for persons or companies who provide training or accreditation, notification procedures regarding LBP projects, the establishment of fees for certification, and requirements for the dispersal of lead hazard information pamphlets.[101] These specified powers limit the scope of the LBP Abatement statutes to the point that they are not usable to force abatement action.

It must also be noted that this provision may be used now to implement the EPA / HUD 2010 changes. These statutes repeatedly cite to the federal "Residential Lead-based Paint Hazard Reduction Act of 1992" for the requirements and scope of these statutes and promulgated regulations.[102] Because this Act has not been altered and only the regulations under the Act have been altered, the Colorado statute would not need to be amended before it could be used to implement the 2010 changes now. Because the Colorado legislature has already chosen once to take state control over LBP hazard reductions, it should be easy to persuade them to update their own regulations to come into compliance.

c. Lead Regulations

As noted, above, commensurate with the lead exposure and abatement statutes, the Air Quality Control Commission was directed to promulgate rules regarding LBP abatement and certification of persons and companies performing inspections and abatements. Regulation 19, entitled LBP Abatement, was revised to include requirements for pre-renovation education in target housing, and was modeled after the EPA requirements.[103] Regulation 19 governs LBP activities such as inspection, risk assessment, and abatement in housing and child occupied facilities and target housing constructed prior to 1978.[104] This regulation mandates that state-certified professionals, who have been certified by the Air Pollution Control Division under the procedures and

[98] Legislative Hearing Tapes for S.B. 97-136.
[99] CDPHE fact sheet, attached in to S.B. 97-136 hearing packet given to all Senators.
[100] COLO. REV. STAT. § 25-7-1103.
[101] *Id.*
[102] COLO. REV. STAT. §§ 25-7-1101, 1103.
[103] Regulation 19; Steve Fine ? – this is identical to EPA's program, the work practices section is a little different, bec the state wanted the lead abatement companies to know exactly what is required
[104] Regulation No. 19

requirements of this regulation, conduct the removal of LBP or lead-contaminated soil from these facilities.[105]

Regulation 19 applies to all LBP activities that are performed in target housing and child-occupied facilities and to buildings that will be converted to target housing or child-occupied facilities.[106] The term child-occupied facility in the regulation is broad; it includes all buildings built before 1978 that is visited two or more days a week, with each such visit totaling six or more hours regularly by the same child who is under 7 years of age.[107] Target housing means housing constructed prior to 1978, excluding those without bedrooms or dwellings for the elderly or disabled unless a child under 7 years of age resides or is expected to reside in the dwelling.[108]

Unfortunately, the scope of Regulation No. 19 is very limited: it does not apply to renovation, remodeling, landscaping, or other activities when such activities are *not **intended nor designed to permanently eliminate LBP hazards*** but instead are intended to repair, restore or remodel a given structure or dwelling.[109] This regulation may only be enforced when permanent abatement is being conducted. Further, the regulation explicitly states "nothing in this Regulation No. 19, Part A requires that the owner or occupant undertake any particular LBP activity."[110] So, an owner or occupant must intend to permanently eliminate the lead hazard in target housing or child-occupied facilities for this regulation to apply.

This Commission has also passed Regulation No. 8, entitled Control of Hazardous Air Pollutants, which in part, deals with airborne lead contamination.[111] This provision is explicitly limited to ***stationary sources*** of lead and provides that "[n]o person shall cause or permit emissions of lead into the ambient air that would result in an ambient lead concentration (expressed in terms of the element) exceeding 1.5 micrograms per standard cubic meter averaged over a one-month period."[112] While stationary source is not defined in this provision, the legislature has defined it as "any building, structure, facility, or installation[,] which emits or may emit any air pollutant."[113] This is the same definition given by Congress in the Clean Air Act ("CAA").[114] In our experience, the definition is limited to stacks, smelters, and other larger sources of lead. Specifically as to lead, the EPA has described stationary sources as smelters, waste incinerators, utilities,

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[105] *Id.*
[106] Regulation No. 19, Part A, I.C
[107] Regulation No. 19, Part A, II.B.12.
[108] Regulation No. 19, Part A, II.B.70.
[109] Regulation No. 19, Part A, I.D.
[110] Regulation No. 19, Part A, I.F.
[111] Regulation No. 8, Control of Hazardous Air Pollutants, Part C, I.A., B., 5 CCR 1001-10
[112] Regulation No. 8, Control of Hazardous Air Pollutants, Part C, 5 CCR 1001-10
[113] COLO. REV. STAT. § 25-7-103.
[114] Clean Air Act, 42 U.S.C. § 7401, § 112

and lead-acid battery manufacturers.[115] In addition, when the EPA charted lead emissions by source, LBP failed to make the list.[116]

Additionally, in the statutory provisions that allowed for the promulgation of Regulation 8, the Colorado legislature uses the term area source as a limiting factor.[117] While not defined by the Colorado legislature, under the CAA, an "'area source' means any stationary source of hazardous air pollutants that is not a major source."[118] Homes are more like area sources than stationary sources. In short, we do not believe that this provision could be used to require permitting or abatement of residential LBP hazards.

d. Other Colorado Statutes

i. State Hazardous Waste Management Program

Following EPA authorization, Colorado implemented its own hazardous waste program statutory scheme, entitled the State Hazardous Waste Management Program.[119] Pursuant to the statute, the Hazardous Materials and Waste Management Division was formed and, thereafter, promulgated regulations for the identification and management of hazardous waste.[120] One of the promulgated regulations provides the definitions of solid and hazardous wastes.[121] LBP chips or blasting wastes, because of their concentrated nature, and unlike the paint film on a wall, will often exhibit the toxicity characteristic for lead[122] and require management as a hazardous waste.[123] However, this definition of hazardous waste allows for exclusions from regulation for those solid wastes that fall under certain parameters.[124] This exclusion section provides that household solid wastes are not hazardous wastes.[125] Household waste is then defined as "any waste material (including garbage, trash and sanitary wastes in septic tanks) derived from households (including single and multiple residences, hotels and motels, bunkhouses, ranger stations, crew quarters, campground, picnic grounds and day-use recreation areas.)."[126] So, in Colorado, households are exempt completely from the hazardous waste regulations.[127]

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[115] http://www.epa.gov/air/lead.
[116] http://www.epa.gov/air/emissions/pb.htm.
[117] COLO. REV. STAT. 25-7-103.
[118] CAA, 42 U.S.C. § 111, 112
[119] COLO. REV. STAT. § 25-15-301, et seq. ; *Sierra Club v. Chemical Handling Corp.*, 824 F.Supp. 195, 197 (D.Colo. 1993).
[120] COLO. REV. STAT. § 25-15-302 ; 6 CCR 1007-3, parts 260, 261.
[121] 6 CCR 1007-3, part 261.
[122] 5.0 ppm or greater TCLP
[123] *Id.*
[124] 6 CCR 1007-3, part 261.3.
[125] 6 CCR 1007-3, part 261.4(b)(1).
[126] *Id.*
[127] *Id.*; *see also* http://www.cdphe.state.co.us/hm/hwid.pdf.

Because Colorado's regulations are substantially identical to the EPA's regulations,[128] analysis of the federal scheme can overlay and define that of Colorado.[129] See the Resource Conservation and Recovery Act section for further analysis.[130]

ii. Colorado Hazardous Substances Act of 1973

We examined the "Colorado Hazardous Substances Act of 1973" but found that it would not accommodate Groundwork Denver's goals.[131] The Act is located under the products control and safety provisions in the Colorado Statutes and deals with children's toys and misbranded products that contain hazardous substances. While lead would fall under the definition of hazardous substance in the statute,[132] lead does not rise to the level of a "banned hazardous substance" because it is not a "toy, or other article intended to use by children."[133] Further, the legislature narrowly tailored the prohibited act section of the Act to instances in commerce, which indoor and outdoor LBP hazards from peeling and chipping paint would not violate.[134]

iii. City Housing Laws and Slum Clearance

In 1935, the State passed an act entitled City Housing Laws and Slum Clearance.[135] In this statute, the legislature declared that unsanitary or unsafe dwelling accommodations exist in the various cities and cite, as one of many reasons, the obsolete and poor condition of the buildings.[136] The legislature then declared that "these conditions cause an increase in and spread of disease and crime and constitute a menace to the health, safety, morals, and welfare of the citizens of the state and impair economic values; that these conditions cannot be remedied by the ordinary operations of private enterprises."[137] This law allows the cities to use public money to acquire private property to clear, re-plan, and reconstruct areas in which unsanitary or unsafe housing conditions exist to provide safe and sanitary dwelling accommodations.[138] If this provision were to be used, it would require tenants to move and would have the city rebuild the low-income housing. This would cause a hardship for many of the people living in these areas because they would be required to move out and find new affordable housing for an indeterminate period. Additionally, this statute does not create an obligation for the city to come in and rebuild the housing; it merely provides them a means to do so.

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[128] Board of Health Minutes, August 21, 1985, p.8, re: proposed revisions to the Colorado Hazardous Waste Regulations.
[129] *Sierra Club v. Chemical Handling Corp.*, 824 F.Supp. 195, 197 (D.Colo.,1993) (internal quotations omitted).
[130] *Supra*, Section V., A., 2., a.
[131] COLO. REV. STAT. § 25-5-501, et. seq.
[132] COLO. REV. STAT. § 25-5-502.
[133] *Id.*
[134] COLO. REV. STAT. § 25-5-503.
[135] COLO. REV. STAT. § 29-4-101, et seq.
[136] COLO. REV. STAT. § 29-4-102.
[137] *Id.*
[138] *Id.*

iv. Rehabilitation Act of 1945

The "Rehabilitation Act of 1945," the economic blight provision, states that there exists areas within the state that are substandard and unsanitary.[139] The legislature declared that "buildings [exist], which, by reason of age, obsolescence, or physical deterioration, have become economic and social liabilities; that such conditions are conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, and crime."[140] This Act then authorizes private enterprise to use public funds to redevelop these areas.[141] Additionally, a municipalities planning commission either on its own initiative or at the request of the city council may prepare a suggested plan for the rehabilitation of any area deemed substandard or unsanitary.[142] This provision has the same problem, that it would force people out of their homes and would require discretionary public spending.

C. Municipal Law

1. Summary

The Denver Municipal Code contains three chapters that may be relevant to enforce removal of LBP hazards: (1) Chapter 37 "Nuisances," prohibiting any health nuisance to exist or remain within the city; (2) Chapter 10 "Buildings and Building Regulations," prohibiting buildings from becoming neglected or derelict; and (3) Chapter 27 "Housing Code," requiring that owners and operators maintain residences in a clean and sanitary manner. In analyzing the relevant ordinances contained within Denver's Municipal Code, considering the ordinances in the context of traditional canons of statutory interpretation, considering the purpose of the ordinances, and considering the ordinances' legislative history, we determined that the Municipal Code *does* provide local government authority to require abatement LBP hazards in Denver residences.

Though none of the relevant chapters within the Municipal Code specifically require the removal of LBP hazards from Denver residences, the language of each chapter is generally broad enough that one could read such a LBP removal requirement into any one of the chapters of the Municipal Code we reviewed. Of these provisions, the Housing Code is a particularly persuasive means of enforcement, given its clear purpose to protect, preserve, and promote the physical and mental health of the people. Furthermore, the deliberations amongst City Council members who passed the relevant part of the Housing Code into law indicate a willingness to prohibit LBP hazards in Denver dwelling units. Specifically, the "Neighborhood, Community, & Business

[139] COLO. REV. STAT. § 29-4-301, et seq.
[140] COLO. REV. STAT. § 29-4-302.
[141] *Id.*
[142] COLO. REV. STAT. § 29-4-304.

Revitalization" Committee indicated that the Housing Code's definition of "clean and sanitary conditions" presumed the removal of lead and other non-visible problems in order to attain compliance.

The health nuisance provision and the prohibition against buildings that are 'neglected or derelict' (contained within the building regulations) are each broad enough to cover enforcing the removal of LBP hazards in at least some limited circumstances. The health nuisance provision requires that a LBP hazard occur on a public scale and, possibly, in a public setting. This provision may be usable, for instance, where an entire residential apartment building contains significant amount of exposed LBP and residue as to constitute a "public" health nuisance. However, this provision probably provides little avenue for enforcement of LBP hazards in a single apartment or private home.

Second, the prohibition against buildings that are 'neglected or derelict' is an extremely broad prohibition and we have discovered two concerns of its use in LBP hazard cases. First, the agency charged with enforcement is not Denver Environmental Health, but Community Planning and Development. We are unaware whether the manager of Community Planning and Development and his staff are properly trained in LBP hazard identification. Second, because the 'neglector or derelict' section is so broad – covering a wide range of conditions that make buildings unsafe or neglected – no single agency tasked with authority to enforce this prohibition could possibly catch every violation.

Of course, we believe that the City should utilize, to the maximum extent possible, both the nuisance and housing codes for LBP hazard abatement and enforcement. However, as elaborated upon below, the Housing Code seems to be the optimum avenue for enforcing the removal of LBP hazards, since the Housing Code gives the Department of Environmental Health the authority to require removal of LBP hazards and the class of violators is more manageable for enforcement purposes.

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MUNICIPAL CODE PROVISIONS THAT COVER REMOVAL OF LBP HAZARDS			
	Health Nuisance	**Building Regulations**	**Housing Code**
Prohibition/ Mandate	Sec. 37-2. It shall be unlawful for any person to maintain or allow any health nuisance; Sec. 37-15. No building . . . shall be . . . used, kept, maintained or operated [that occasions] any health nuisance [or that is] dangerous or detrimental to the public health.	Sec. 10-138 (d). No person shall allow or permit any building or property to be neglected or derelict.	Sec. 27-23. Every owner and every operator of a dwelling containing two or more dwelling units shall maintain the hared or public areas of the dwelling and premises thereof in clean and sanitary condition . . . Every occupant of a dwelling or dwelling unit shall keep in a clean and sanitary condition that part of the dwelling, dwelling unit, and premises thereof which he occupies and controls.
Enforcing Agency	Sec. 37-3. It shall be the duty of the manager of environmental health to ascertain and cause all health nuisances to be abated.	Sec. 10-138 (b) (4). Manager means the manager of community planning and development or anyone designated by the manager of community planning and development.	Sec. 27-18 (11.5). Manager means, unless the context otherwise requires, the manager of the department of environmental health of the manager's representative.
Inspections	Sec. 37-3. The manager shall have authority at any reasonable time to enter upon any premises, or any buildings, in order to make a thorough examination.	Sec. 10-141. Whenever the manager has reason to believe that a building or property is a neglected or derelict building or property . . . the manager shall cause an inspection to be done to determine if the building or property complies with this article and all other applicable laws and codes.	Sec. 27-26. [T]he manager or an authorized representative is hereby authorized and directed to make inspections . . . [and is] authorized to request entry to examine, inspect and survey all dwellings, dwelling units . . . at all reasonable times.
Class of Violators	Owner or occupant or persons in possession or in charge or in control of the building or premise where the health nuisance exists. *See* Sec. 37-5	Owner, mortgagee, lienholder, or other person or entity that possesses an interest of record or an interest otherwise provable in property that becomes subject to the provisions of this article, including the city and any applicant for appointment as receiver pursuant. *See* 10-138 (b) (3)	Owners, operators, occupants, or all of them. *See* Sec. 27-23; *see also* Sec. 27-18 (13)-(15).

2. Analysis

a. Analysis of Chapter 37. "Nuisances"

The Nuisance Chapter of Denver's Municipal Code prohibits any health nuisance to exist or remain within the city. Whether this chapter of the Code can be used to enforce the removal of LBP hazards depends on the definition of "health nuisance" as defined in Colorado common law.[143] In fact, enforcement of this entire chapter of the Code hinges on Colorado common law's definition of health nuisance. Interestingly, Colorado common law does not define the term "health nuisance" but, instead, defines "public nuisance" and "public health nuisance." It may be, then, that the City Council intended "public nuisance" or "public health nuisance" rather than "health nuisance." Such a substitution would at least give the term a workable definition.

A common law public nuisance is "[t]he doing of or failure to do something that injuriously affects the safety, health or morals of the public, or works some substantial annoyance, inconvenience, or injury to the public."[144] Accordingly, a public nuisance must be *public*. We can infer that a public health nuisance must be similarly public. We glean more about the definition of public health nuisance from other interpretations. In at least one instance, the City and County of Denver district attorney has equated a public health nuisance with a business being run for prostitution and lewdness.[145] Similarly, the state Court of Appeals in Ohio has said that public health nuisances include, but are not limited to, improper storing of car parts, fence posts, loose fencing, trash and debris, glass, brush, tarps, metal, and old appliances.[146] Each of these different interpretations of public health nuisance allows us to infer that pubic health nuisances must involve an *adverse effect* on the *public*.

LBP admittedly has an adverse effect on those children who ingest it, and the mere existence of LBP hazards pose a danger to children that constitutes an adverse effect. Whether or not the health nuisance provision of the Municipal Code covers LBP hazards, however, depends on where the LBP chipping occurs and on what scale of people the hazardous chipping could affect. For instance, LBP that chips in a single home where only a single child lives is not likely to cause an adverse effect *on the public*; rather, the child who could ingest the LBP would be privately affected. By contrast, chipping LBP in a childcare facility or an entire apartment complex could be considered public, especially if the chipping where to occur in more public areas, such as on the exterior of the facility in an alleyway or in the hallways and corridors of the interior. Similarly, the chipping of LBP in a facility owned or operated by the City or County of Denver would constitute an adverse effect on the public, occurring in a public place.

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[143] Denver's Municipal Code § 37-1 & 2.
[144] *Echave v. City of Grand Junction*, 193 P.2d 277, 280 (Colo. App. 1948).
[145] *See O'Connor v. City & County of Denver*, 894 F.2d 1210 (Colo. 1990).
[146] *See Senaca County Gen. Health Dist. V. Black*, 2007 WL 2350995).

Gene Hook, of the Denver Department of Environmental Health, has indicated that "in the past, [the City] would have primarily explored enforcement action of [of LBP hazards] under the health nuisance authority, Section 37-6." Section 37-6 states that "[w]henever any health nuisance shall be found on any premise within the city constituting an imminent hazard, the manager of environmental health is hereby empowered to cause the same to be summarily abated in such manner as the manager may direct." Given that this section uses the term "health nuisance," which does not have a workable Colorado common law definition, we would have to import the term "public nuisance" or "public health nuisance." Because a public nuisance or public health nuisance requires that the nuisance occur *publically*, the Department of Environmental Health would not be required to enforce abatement when the scope of the adverse effect was not large enough to be considered public, especially in dwelling areas that are considered private. The same is true using another section of the health nuisance provision: Section 37-15 prohibits keeping or maintaining a building in a manner that is dangerous or detrimental to the public health. Section 37-15 is broad enough to include LBP hazards, but because this section still prohibits buildings that are dangerous to the *public* health, the scope of any LBP hazards must be large enough in order to be considered public.

The legislative history of the Nuisance Chapter of the Municipal Code may provide some clarification of its meaning, however small. Chapter 37. "Nuisances" references a single ordinance that is relevant to the removal of LBP hazards. The preamble of this ordinance focuses on public nuisances, not health nuisances, stating: "public nuisances within the City and County of Denver are a threat to the public health, safety, and welfare." The remainder of the ordinance contains identical language to that found within the Health Nuisance section of the Code. No record exists of City Council deliberations on this bill, neither in the Officer of the Clerk & Recorder or in the Denver Public Library. According to the Office of the City Council, records may have been lost in a flood. Thus, we gain no view of the intent and scope of the ordinance beyond the ordinance's plain language. Furthermore, the meeting minutes from the relevant committee hearings did not reveal any specific discussion of LBP hazards.

Given the need to eliminate LBP hazards in the public *and* private spheres, the health nuisance provision of the Municipal Code will not provide the most time-effective, programmatic method. First, the health nuisance provision will not be usable for single-family homes, since they are not public. Second, it is unclear at what point a dwelling becomes public; a cluster of dwellings could become public possibly be at the level of a large apartment facility, but there is no indication in Colorado case law that large apartment facilities containing given hazards have ever constituted a public health nuisance. Accordingly, though the health nuisance provision could be used in some limited circumstances, as mentioned by Gene Hook, this provision would not completely meet the goal of large-scale removal of LBP hazards.

b. Analysis of Chapter 10 "Buildings and Building Regulations"

The Building Regulations prohibit buildings from becoming neglected or derelict. Presumably, a building that contains LBP hazards *could* be considered neglected or derelict, and thus warrant a violation and require administrative enforcement by the Manager of Community Planning and Development.[147] However, the Building Regulations can only be used for purpose of enforcing the removal of LBP hazards *if* LBP hazards render a building "neglected or derelict" as defined in Section 10-138(c). This section specifically sets forth six factors to determine what constitutes "neglected or derelict." Two of the six factors are relevant for LBP, and we must give Section 10-138(c) effect by exclusively considering the factors it lists and nothing more. In relevant part, Section 10-138(c) regards a building as neglected or derelict if the building is unsafe[148] or constitutes a neighborhood nuisance.[149]

Section 10-138(b)(12) explains that a property is determined to be "unsafe" by the definition contained in the Denver Building Code, located at Chapter 10, Section 16 of the Municipal Code. However, the Denver Building Code does not define "unsafe" but, rather, indicates that Denver's Municipal Code has adopted the 2006 International Building Code ("IBC").[150] The 2006 IBC,[151] accessed at the University of Denver Sturm College of Law Library, defines "unsafe" in the context of unsafe buildings or equipment. Accordingly, buildings that are "insanitary or deficient because of inadequate means of egress facilities, inadequate light and ventilation, or that constitutes a fire hazard, or that is otherwise *dangerous to human life or the public welfare or that involves inadequate maintenance* shall be deemed an unsafe condition."[152] The IBC definition of 'unsafe' fails to list examples of things that are dangerous to the public welfare.[153]

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[147] *See* Denver's Municipal Code § 10-138(b)(4) ("*Manager* means the manager of community planning and development or anyone designated by the manager of community planning and development to act in his behalf."); *see also* Denver's Municipal Code § 10-139(a) & (b) ("Whenever the manager determines that a violation of this article is an imminent hazard to life, health, property, or public welfare, the manager may order or cuase immediate emergency abatement of the condition causing the imminent hazard . . . [W]henever the manager finds that any owner has violated or is violating this article, or any rules and regulations established hereunder, the manager may cause to be served upon such person a written notice stating the nature of the violation, the possible penalties, [and] any required remedial action . . .").

[148] Denver's Municipal Code § 10-138(c)(1)

[149] Denver's Municipal Code § 10-138(c)(5)

[150] *See* Denver's Municipal Code §10-16 ("The International Building Code ("IBC"), International Energy Conservation Code ("IECC"), the International Fire Code ("IFC"), the International Fuel Gas Code ("IFGC"), the International Mechanical Code ("IMC"), the International Plumbing Code ("IPC"), and the International Residential Code ("IRC"), all series of 2006 and all amendments thereto and the administration of the Denver Building Code, all as filed March 13, 2008 in City Clerk File Number 08-256 are hereby adopted collectively as the Denver Building and Fire Code.").

[151] http://www.iccsafe.org/government/adoption.html.

[152] International Building Code § 115 (2006); International Existing Building Code § 202 (2006) (emphasis added).

[153] The community of groups that support enforcing removal of LBP hazards has discussed the need to approach the International Code Council that puts forth the IBC and push for inclusion of LBP hazards in provisions of the IBC.

However, that LBP hazards are dangerous to both human life and the public health is well documented, and it would be hard to argue that LBP hazards did not fit within this broad definition of "unsafe."

We can also examine whether LBP hazards can be deemed a "neighborhood nuisance," as defined in Section 10-138(b)(7). Similar to the IBC definition of "unsafe," a "neighborhood nuisance" is a building that poses risks to the public health, safety, and welfare. An important difference between these two provisions, however, is that while the "unsafe" authority would seem to allow enforcement to abate LBP in a private home, the "neighborhood nuisance" authority would require, as with a health nuisance discussed above, that the LBP hazard constitute a "public" nuisance.

Section 10-138(b)(7) lists factors to consider when determining whether a property constitutes a neighborhood nuisance: the existence of past or present code violations; whether or not the structure is vacant; whether or not the grounds are maintained; whether or not a structure's interior is sound; the extent of vandalism or other destruction on the property; whether rents have been collected from the tenants by the owner; the length of time any of these conditions mentioned above have existed; and whether the owner has failed to provide services, or make repairs.

No single factor is determinative; rather, we must consider each factor in order to establish that LBP hazards constitute a neighborhood nuisance. Whether rents have been collected, whether the grounds have been maintained, and whether vandalism has occurred on the property has nothing to do with LBP hazards. This may indicate that LBP hazards would not constitute a neighborhood nuisance. On the other hand, an owner's failure to make repairs and how long the dilapidated condition has existed could be interpreted as accounting for chipping paint that leads to LBP hazards. Similarly, the factor that mentions whether or not a building or interior structure is sound could arguably refer to chipping of LBP on a building's exterior or whether water has penetrated the exterior, thereby comprising the structural integrity, including, perhaps, walls and paint. Therefore, one could argue that LBP hazards fit within the definition of "neighborhood nuisance," also asserting that the list of factors to determine if something is a neighborhood nuisance is meant to be illustrative and not exclusive.

We can also turn to Colorado case law to see if courts have explained the terms "unsafe" and "neighborhood nuisance" or Denver's Building Regulations as a whole. Though no Colorado case law provides a clarification of the meaning of the term "unsafe" in the building code context, one court provides small clarification for the meaning of "neighborhood nuisance." In a recent case before the Colorado Court of Appeals, *Silver v. Colorado Cas. Ins. Co.*,[154] the Court noted that the City and County of

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This effort occurs at a higher organizational level than the City & County of Denver or GroundWork Denver's operations. However, GroundWork Denver supports this effort to include LBP hazards in the provisions of the IBC.

[154] 2009 WL 540653 (Colo. App., 2009).

Denver cited an individual for a property that constituted a neighborhood nuisance. The house was vacant and uninhabitable, and the City determined that because the property was unsafe, was boarded up, and had not been occupied for at least three consecutive months, it was a neighborhood nuisance. The Court neither upheld nor denied the validity of the City's determination, as the Court instead dealt with other points of law in the case. While the Court accepted the City's interpretation of a neighborhood nuisance in this one case, the decision in this case only explains that neighborhood nuisance occurs at least when a property is unsafe, boarded up, and unoccupied for a series of months. We can also glean from the Court's opinion that a neighborhood nuisance exists even when the problem occurs in an individual property, not only on a large scale of an entire apartment complex. Though this case does not provide any elaboration on whether LBP hazards fit within the definition of 'neighborhood nuisance,' LBP hazards in no way are precluded from constituting a neighborhood nuisance.

We also examined City Council meeting records for legislative history, to determine the scope of Chapter 10 of the Municipal Code as a mechanism to enforce removal of LBP hazards. The Building Regulations reference the following ordinances: Ord. No. 90 from 1995, Ord. No. 464 from 1998, Ord. No. 807 from 2003, and Ord. No. 775 from 2007. Before each of these ordinances was adopted and published by the City Council at its weekly meetings, the ordinances were introduced as council bills.[155] None of the City Council meetings in which the above listed ordinances were adopted included a discussion of LBP hazards.[156] More often than not, the Council passed ordinances in a block vote without any deliberation, thus providing no view of the intent and scope of the ordinance beyond the ordinance's plain language. Furthermore, the meeting minutes from the relevant committee hearings did not reveal any specifiable discussion of LBP hazards.

Despite finding any clarification of Chapter 10 in the legislative history, the definition of 'unsafe' and the factors for finding a 'neighborhood nuisance' are broad enough to include LBP hazards in the prohibition against neglected and derelict buildings. If Groundwork Denver seeks to use this section of the Municipal Code to require the relevant agency to enforce violations, Groundwork Denver should indicate that the enforcing agency may inspect a building if the agency has reason to believe that a building or property is a neglected or derelict. However, because so many other hazards exist within Denver that could also easily fall within the definition of 'unsafe' and

[155] At the first reading of a council bill at the weekly City Council meetings, the President of the City Council designates a given council bill to a given committee in order for that committee to discuss the bill and bring its expertise to deliberating over the content of the bill. The council committees cover several areas of expertise, such as economic development, finance, public works, and safety. Not all bills are discussed at the committee meetings, and not all bills are discussed at Council meetings. During each Council meeting, Council members tell the President which bills they want to call out for a vote and which bills require more time with a given committee for further deliberation. Only those bills that are called out are voted on individually, while all other unmentioned bills pass in a block vote. When a bill is passed, it becomes an ordinance to be added to the Municipal Code.

[156] *See* attached Appendix with research and analysis of City Council meetings, ordinance by ordinance.

factors for finding a 'neighborhood nuisance,' thus warranting enforcement under the 'neglected and derelict' prohibition, the enforcing agency may have an extremely large class of violators to enforce against. If this is the case, the enforcing agency may indicate that, though it has the authority to enforce against violators, it will only use such authority selectively, perhaps choosing to omit enforcing the removal of LBP hazards.

c. Analysis of Chapter 27. "Housing Code"

The Housing Code requires that owners and operators maintain residences in a clean and sanitary manner. The "Declaration of Policy," Section 27-16, at the beginning of the Housing Code states that "the purpose of this article is to protect, preserve, and promote the physical and mental health of the people, investigate and control communicable diseases, regulate privately and publically owned dwellings for the purpose of sanitation and public health, and protect the safety of the people and promote the general welfare . . .."[157] Taking into consideration principles of statutory construction, we must assume that this stated purpose must be given meaning to determine when to enforce the Housing Code. Since the removal of LBP hazards would "regulate public health," "protect physical and mental health," and "protect the safety of the people," Denver's Housing Code would seem to cover the removal of LBP hazards.

Beyond the purpose statement, the Housing Code contains the definition of "clean and sanitary" which is also advantageous for enforcing the Housing Code against the existence of LBP hazards. "Clean and sanitary" means a condition free of visible dirt, debris, clutter, rubbish, trash, waste, and free from other substances, contaminants, material, or environmental conditions harmful to human health. LBP hazards fits within this list of materials that a dwelling must be free from, as LBP constitutes environmental conditions, debris, *and* material, each of which is harmful to public health, the physical and mental health of the people, and the safety of the people.[158]

To further bolster the position that LBP hazards are covered under the Housing Code, judicial interpretations of the Housing Code support enforcing the Code against LBP hazards. Though the following opinion from 1964 predates the amendment of the Housing Code to include the definition of "clean and sanitary", the holding from this case illustrates that even almost half a century ago, the Colorado Supreme Court viewed the Housing Code as an expansive set of rules that prohibited *any unsafe conditions*. In *Apple v. City and County of Denver, et. al.*, an apartment owner appealed a determination of the Board of Health and Hospitals that the apartment owner violated Denver's Housing

[157] Denver's Municipal Code § 27-16

[158] Note, the Housing Code does not specify how inspections are to be conducted or how a violation is found. It is not clear if testing a child for lead poisoning would be sufficient for finding a violation of the Housing Code 'clean and sanitary' provision. Furthermore, the City Council did not elaborate on how inspections were to be conducted or violations were to be found when passing this provision into law.

Code in several respects.[159] The Court agreed with the Board's determination that the apartment owner violated the Housing Code. Though the Court did not enumerate a list of factors for what constitutes a safe and sanitary dwelling place, the court noted the importance that dwellings conform to this "safe and sanitary" standard.[160] The Court stated:

> Dwellings which are unsafe or unsanitary or which fail to provide the amenities essential to decent living may work injury not only to those who live there, but to the general welfare. At the point where economic self-interest ceases to be a sufficiently potent force for the promotion of the general welfare, the legislature may intervene and require that buildings intended for use as tenement houses or multiple dwellings shall conform to minimum standards which may reasonably be regarded as essential for safe, decent, and sanitary dwelling places.[161]

Similarly, in an opinion issued in 1963 in the case *Jesse Douglas, et. al., v. City and County of Denver, et. al.*, the Court concluded that the:

> Housing Code . . . is designed and intended to protect, preserve and promote the physical and mental health of the inhabitants of the city; . . . to regulate privately and publicly owned dwellings for the purpose of sanitation and public health; and to protect the safety and general welfare by legislation applicable to all dwellings now in existence or hereafter constructed. *The said article covers a wide range of related subjects* . . . ".[162]

Given the expansive interpretation of the Housing Code by the Supreme Court of Colorado, and given the language of the Housing Code itself, lending an easy interpretation to include enforcement against LBP hazards as unclean and unsanitary, Groundwork Denver should focus on this chapter of the Municipal Code to achieve its goal to expand municipal enforcement to abate LBP hazards in Denver residences.

An analysis of the legislative history of the Housing Code also supports this conclusion. The Housing Code references three ordinances that are relevant to the removal of LBP hazards: Ord. No. 997 from 1995, Ord. No. 1110 from 1996, and Ord. No. 500 from 2007. Though the City Council did not mention LBP hazards when passing each of these ordinances, the summary of one committee hearing yielded favorable results for enforcing LBP removal. The committee "Neighborhood, Community, & Business Revitalization" announced revisions to the Housing Code and

[159] *See* 390 P.2d 91 (Colo. 1964).
[160] *Apple*, 390 P.2d at 94.
[161] Id.
[162] 377 P.2d 738, 279 (Colo. 1963).

moved for committee action that defined 'clean and sanitary' to ***"include any environmental concerns (e.g. mold, lead, and other non-visible problems)*** . . .." (Emphasis added). The purpose of this definition, as stated by a member of Denver Environmental Health in attendance at the committee meeting, was to allow inspectors to give a shorter compliance period based on a public health risk or hazard.[163] The committee specifically approved such a change to the definition of 'clean and sanitary' along with other changes to the Housing Code in order to provide more flexibility to the Department of Environmental Health in handling complaints and addressing violations more promptly. These revisions correlate to Ord. No. 500, which was later passed by the City Council (without any further deliberation) on September 17, 2007.

The elaborations by the committee of the expansiveness of the definition of "clean and sanitary" indicates clearly and persuasively that the City Council intended for the Department of Environmental Health to enforce removal of LBP hazards. Admittedly, the Department of Environmental Health, like any enforcement agency, will approach enforcement with an eye towards staffing, funding, and the scale of any given violation, but Department of Environmental Health's authority to enforce is unequivocal. Consequently, Groundwork Denver should initiate discussions with the Department of Environmental Health and any other enforcement body to gauge the level of interest in using this authority to remove LBP hazards either programmatically or on a case-by-case basis.

d. When is Enforcement of LBP Hazard's Triggered under the Municipal Code?

While all three provisions – (1) Chapter 37 "Nuisances;" (2) Chapter 10 "Buildings and Building Regulations;" and (3) Chapter 27 "Housing Code" – provide the City authority to enforce and abate LBP hazards in residential units under circumstances discussed above, it still must be asked "what information must the City have before it has the right to inspect the property in question?"

Clearly, a complaint lodged with the City by a resident would constitute some grounds for inspecting a unit for potential LBP hazards. Similarly, with respect to Chapter 37 and the "neighborhood nuisance" provisions of Chapter 10, it is likely that in some salutations in which the LBP hazard has become significant enough to meet the definition of a common law public nuisance (such as an entire apartment building in dilapidated condition and exposed LBP hazards), the City would have ample reason to begin an investigation, inspection and/or enforcement. Indeed, section 37-3(a) of Chapter 37 clearly states that "[i]t shall be the duty of the manager of environmental health to ascertain and cause all health nuisances to be abated."

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[163] Testimony from Robert McDonald of the Department of Environmental Health; *see* Neighborhood, Community & Business Revitalization Committee Summary, August 28, 2007

However, this leaves numerous potential situations in which no complaint may have been made, and the condition is not so clearly obvious to constitute a public nuisance. In such cases, we believe that the existing law would authorize inspections, and necessary enforcement, where the City has information regarding the detection of increased EBLs in children residing in the unit or home that is indicative of an existing LBP hazard.

Indeed, section 10-141(a) of Chapter 10 provides that "[w]henever the manager has ***reason to believe*** that a building or property is a neglected or derelict building or property as defined in this article . . . the manager ***shall*** cause an inspection to be done to determine if the building or property complies with this article and all other applicable laws and codes." (Emphasis added). Section 27-26(1) of Chapter 26 provides for even broader authority: "[f]or the purpose of determining compliance with the provisions of this article, the manager or an authorized representative ***is hereby authorized and directed*** to make inspections to determine the condition, use, and occupancy of dwellings, dwelling units, rooming units, and the premises upon which the same are located. . . . For the purpose of making such inspections the manager or an authorized representative ***is hereby authorized to request entry to examine, inspect and survey all dwellings, dwelling units, rooming units and premises upon which the same are located, at all reasonable times***." (Emphasis added).

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e. Conclusion of Statutory Construction of Denver's Municipal Code

	Problems	Benefits
Health Nuisance	• not usable for single-family homes, since they are not public • could be used in some limited circumstances • would not completely meet Groundwork Denver's goals of large scale removal of LBP hazards.	• could be used in some limited circumstances, such as emergency abatement or when the health nuisance affects a large number of people
Building Regulations	• many hazards exist that easily fall within the definition of 'unsafe' and factors for finding a 'neighborhood nuisance', enforcement under the 'neglected and derelict' prohibition, • the enforcing agency may have an extremely large class of violators to enforce against and may lawfully choose not to enforce, in keeping with principles of selective enforcement and prosecutorial discretion	• definition of 'unsafe' and the factors for finding a 'neighborhood nuisance' are broad enough to include LBP hazards in the prohibition against neglected and derelict buildings
Housing Code	• the agency with the authority to enforce against LBP hazards may lawfully choose not to enforce, in keeping with principles of selective enforcement and prosecutorial discretion	• clear purpose to protect, preserve, and promote the physical and mental health of the people • the statutory language supports enforcing the removal of LBP hazards • the "Neighborhood, Community, & Business Revitalization" Committee meeting indicates that lead and other non-visible problems were intended to be covered by the Housing Code's definition of "clean and sanitary."

Groundwork Denver could seek greater municipal enforcement of the "neglected or derelict" provision of the "Buildings and Building Regulations" chapter of the Municipal Code or the Health Nuisance section of the Code. Both provisions provide local government authority to force residential abatement of LPB hazards, at least in limited circumstances. However, the Housing Code is the best tool for Groundwork Denver because its provisions make the strongest case for greater government enforcement of LBP hazard removal. The Housing Code is a particularly persuasive means of enforcement given its clear purpose to protect, preserve, and promote the physical and mental health of the people, of which removal of LBP hazards is in integral component. Furthermore, the statutory language of Housing Code supports enforcement of removing LBP hazards. Finally, the summary of the "Neighborhood, Community, & Business Revitalization" Committee meeting indicates that lead and other non-visible problems were intended to be covered by the Housing Code's definition of "clean and sanitary."

VI. Enforcement Discretion and Strategy

Governmental agencies, whether at the local, state, or federal levels, which engage in enforcement activities, are allowed wide discretion in initiating enforcement activities and prosecuting violations. Agencies have nearly absolute discretion in initiating an investigation, as well as broad discretion to decide whom to initiate the investigation against. Additionally, the agency is entitled to a presumption that a decision not to institute enforcement proceedings is reasonable, and such decision is not generally reviewable by a court.

Because enforcement decisions have traditionally been committed to agency discretion, the decision is not reviewable by a court unless the relevant legislative body has indicated intent to restrict this discretion and provided standards for defining the discretionary limits. This discretion is so pervasive that it is very rarely challenged. In support of this unquestionable discretion, the Supreme Court in *Heckler v. Chaney* determined that a decision not to initiate was within an agency's unreviewable discretion.[164]

One important distinction to note is that compelling enforcement does not depend on whether the legislative body used the words "shall" or "may" in the legislation at issue. Despite the use of mandatory language, the agency has incontrovertible discretion to refuse to commence an enforcement action.

It is not Groundwork Denver's position that agencies within the City and County of Denver, or other relevant governmental bodies, must act to enforce all relevant legislative provisions, just that these agencies ultimately do have the authority to enforce

[164] *Heckler v. Chaney*, 470 U.S. 821 (1985).

their relevant provisions to clean-up LBP hazards. In this regard, our strategy is to work with Groundwork Denver to ensure that the city is aware that it does, in fact, have the authority to abate these hazards.

VII. Private Causes of Action

In order to bring a private cause of action against a landlord for negligently maintaining a housing unit, the child-plaintiff must demonstrate several factors. First, it must be proved that the landlord had a duty to keep the paint in the rental unit in good repair. If the landlord is unaware of the existing LBP problem in the unit (such as where tenant has caused damage to the wall or the landlord has been denied access to the unit), it will be hard to prove that he had a duty to maintain the paint.

Second, the landlord must have somehow failed to satisfy his duty to maintain the premises. To prove this, a plaintiff will usually have to show that the landlord knew (or should have known) that there was an LBP hazard and that they failed to manage it in a reasonable way.

Third, the landlord's failure to manage the LBP hazard must have caused the injury to the child. Practically this means that all other possible source of contamination must be ruled out. Also, the parents must have taken reasonable steps to prevent the child from ingesting LBP or they may be found to have contributed to the child's lead poisoning, thus relieving the landlord of some responsibility.

Finally, the child must have sustained some injury. This means that the child must be displaying characteristics of lead poisoning, such as behavioral or learning disorders that can be linked to the lead ingestion.

Because pursuing a private action (toxic tort) against a landlord usually requires the child and his parent to carry the burden of persuasion (often requiring use of expert witnesses), it is not overall an effective way to force abatements of LBP hazards. However, if a child is injured because of a landlord's negligence in maintaining LBP hazards in his building, a private cause of action is available to compensate the injured child. A successful lawsuit on behalf of the child will most likely lead to a money damage award and may result in some abatement. If a child has been injured because of LBP hazards, the family should consult an attorney that specializes in toxic tort law. Many attorneys that specialize in such lawsuits will meet with the family for a free consultation and many will also take the case on a contingency, only taking a fee if the suit is successful. The University of Denver Environmental Law Clinic can provide referrals for these types of cases.

VIII. Legislative Solutions

A. Summary

As an alternative to pursuing enforcement of the Housing Code for removing lead-based paint hazards, Groundwork Denver may also lobby for new local or state laws that explicitly targets lead-based paint hazards in Denver or Colorado residences. Creating an independent regulatory structure will increase the visibility of LBP hazards, educate the public, city officials, and even and judges about the need to eliminate lead-based paint hazards. Further, having a regulatory structure in place is more comprehensive and solution to the issue of LBP hazards than any of the existing laws or regulations that apply in Denver. Groundwork Denver could lobby for new laws or amendments to existing laws that simply prohibit deteriorated paint, sandblasting, or other abrasive paint removal techniques, or Groundwork Denver could model its ordinance after ordinances or statutes from other cities or states with successful lead programs.

B. Review of other Jurisdictions

1. Municipal Ordinances

The City of Chicago has a comprehensive Lead Poisoning Prevention Program.[165] In fact, a chapter within Chicago's Municipal Code lists several proactive and reactive measures for reducing lead-based paint hazards, including provisions for: the maintenance of residential buildings, child care facilities, and schools; the sale, transfer, or distribution of items containing lead-baring substances; a warning statement for lead-bearing substances; notice required stating the means of removal of old paint and contact information where consumer can obtain more information; child care facilities being required to conduct a blood lead level screening for admission; and a manner of abatement of lead hazards.

Other municipal codes reference lead poisoning prevention programs that already were adopted by the legislature in that state. In Minneapolis, the City has the authority to enforce such a state statute, and thereby achieves a degree of lead poisoning prevention and control.[166]

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[165] *See* http://egov.cityofchicago.org:80/city/webportal/portalContentItemAction.do?BV_SessionID=@@@@1171744204.1237145954@@@@&BV_EngineID=cccfadegkeeiilhcefecelldffhdfif.0&contentOID=536920859&contenTypeName=COC_EDITORIAL&topChannelName=Dept&blockName=Health%2FChildhood+Lead+Poisoning+Prevention%2FI+Want+To&context=dept&channelId=0&programId=0&entityName=Health&deptMainCategoryOID=-536891845.

[166] *See* Title 12 Housing, Chapter 24. Lead Poisoning Prevention and Control, at http://www.municode.com/Resources/gateway.asp?pid=11490&sid=23.

2. State Statutes

States other than Colorado have promulgated statutes, rules, and regulations to address LBP hazards and lead poisoned children. The following is a summary of several of the types of legal solutions that have been used in other states, which may be pursued as legislative policies here in Colorado. The following list is not comprehensive, but is intended to give the reader an idea of some of the legislative solutions already being utilized in other jurisdictions.

- Delegation to an existing administrative agency to promulgate rules and regulations regarding abatement of LBP hazards.[167]
    - Authorizing the agency to conduct inspections of properties[168], and suspending warrant requirements if the agent reasonably believes that there is a clear threat to a person's health.[169]
        - Requiring inspection of a building where an occupant requests an inspection.[170]
        - Requires the department to conduct an inspection of all units within a dwelling if one unit is identified with lead-based paint hazards.[171]
    - Authorizing the agency to require abatement of the lead hazard within a certain time limit.[172]
    - Authorizes the use of civil penalties against any property owner who fails to abate a lead hazard upon order of an agency.[173]
    - Directs the enforcement agency to focus their priorities on targeted geographical areas identified with children with elevated blood lead levels.[174]
    - Authorizes the agency to use community resources to effect relocation of any family that is found living in a dwelling requiring abatement for LBP hazards.[175]
    - Requires agency to post on the main entrance to a dwelling found to have an LBP hazard, a notice that the dwelling contains dangerous amounts of lead paint or other lead materials and that children under the age of six

[167] ARK. CODE ANN., §20-27-605; Cal, Health and Safety Code, §§105250; LA. REV. STAT. ANN. § 40:1299.2; MASS. GEN. LAWS ANN. ch. 111, § 190; ME. REV. STAT. ANN. 22, § 1315-a; N.H. REV. STAT. ANN. § 130-A:2; N.J. STAT. ANN. § 26:2-132.
[168] ARK. CODE ANN., §20-27-606; LA. REV. STAT. ANN. § 40:1299.24; MASS. GEN. LAWS ANN. ch. 111, § 194; N.H. REV. STAT. ANN. § 130-A:6; N.Y. PUBLIC HEALTH LAW § 1370-a; R.I. GEN. LAWS § 23-24.6-5.
[169] ARK. CODE ANN., §20-27-606
[170] MASS. GEN. LAWS ANN. ch. 111, § 194; R.I. GEN. LAWS § 23-24.6-15.
[171] N.H. REV. STAT. ANN. § 130-A:6
[172] ARK. CODE ANN., §20-27-605(5), 607; N.Y. PUBLIC HEALTH LAW § 1373
[173] Cal. Health and Safety Code, §§105256(c);
[174] Iowa Code § 135.102; LA. REV. STAT. ANN. § 40:1299.24(A)(2), 40:1299.25; MASS. GEN. LAWS ANN. ch. 111, § 193; N.Y. PUBLIC HEALTH LAW § 1370-a; R.I. GEN. LAWS § 23-24.6-23.
[175] CONN. GEN. STAT. § 19a-111.

years and persons deemed at risk should not be allowed to reside in said dwelling.[176]

- Formation of screening programs to identify children with lead poisoning or potential lead poisoning[177] (screening includes pregnant women).[178]
    - Poisoned children must be tested within 3 months and for those identified with EBL, establishes a case management program, which allows the state to investigate the sources of the lead hazards.[179]
    - Requirement that when a child is found lead poisoned, the parent be notified.[180]
    - Requires health professionals to report EBLs to appropriate agency.[181]
    - Requires that any medical laboratory that finds a child with an EBL above a certain amount to report such findings to the appropriate Agency.[182]
    - Requires that children receive a blood lead test by age six or prior to enrollment in an elementary school.[183]
    - Requires any physician in the jurisdiction to perform lead testing on all children under 6 years of age[184] at certain specified intervals.[185]
    - Requires that when an agency discovers a child with an EBL, that they test all other children residing at the property, and those who have recently resided there.[186]

- Prohibits retaliatory action against occupants of affected dwellings by landlords/property owners.[187]
    - Authorizes a tenant of a dwelling, in which the lessor has failed to remove lead-based paint within 20 day of notice to deposit rent with the District Court where it will be held until the lessor has remedied the situation. The tenant may not be evicted or be subject to an increase in rent for exercising this remedy.[188]

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[176] LA. REV. STAT. ANN. § 40:1299.24 (C).
[177] ARK. CODE ANN., §20-27-605(c); MASS. GEN. LAWS ANN. ch. 111, § 193; N.J. STAT. ANN. § 26:2-137.1; N.Y. PUBLIC HEALTH LAW § 1370-a; VT. STAT. ANN. 18, § 1755.
[178] N.Y. PUBLIC HEALTH LAW § 1370-c.
[179] ARK. CODE ANN., §20-27-605 (c).
[180] ARK. CODE ANN., §20-27-605(c)(3); CONN. GEN. STAT. § 19a-110(d)
[181] LA. REV. STAT. ANN. § 40:1299.23; MASS. GEN. LAWS ANN. ch. 111, § 191; N.Y. PUBLIC HEALTH LAW § 1370-e.
[182] CONN. GEN. STAT. § 19a-110(a); N.H. REV. STAT. ANN. § 130-A:3; N.J. STAT. ANN. § 26:2-137.5.
[183] Iowa Code § 135.105D; R.I. GEN. LAWS § 23-24.6-8.
[184] N.J. STAT. ANN. § 26:2-137.4.
[185] R.I. GEN. LAWS § 23-24.6-7.
[186] MASS. GEN. LAWS ANN. ch. 111, § 193.
[187] ARK. CODE ANN., §20-27-608.
[188] MD. CODE ANN., Real Property § 8-211.1

- Requiring that owners of dwellings containing toxic levels of lead and in which children reside, to abate or manage such dangerous materials.[189] Therefore property owners can be held liable for violating the statute without a specific order or notice from the agency.

- Establishes an educational and publicity program, in order to inform the general public, and particularly parents of children residing in areas of significant exposure to sources of lead poisoning of the dangers, frequency, and sources of lead poisoning, and the methods of preventing such poisoning.[190]

- Establishes a state sponsored loan and/or grant program for lead abatements.[191]

- Establishes a registration program for LBP contaminated properties.[192]

- Establishes a registration program for housing units and day-care facilities that can demonstrate that they are lead free or have undergone lead abatement.[193]

- Requires owners and managers of rental properties and child care centers to have essential maintenance practices performed by certified contractors in target properties.[194]

- Requires insurers to provide liability coverage of lead-based paint hazards.[195]

3. Environmental Protection Agency ("EPA") / Department of Housing and Urban Development ("HUD")

The Lead: Renovation, Repair and Painting Program rule, which will take effect in April 2010, prohibits work practices that create lead hazards. EPA issued a final rule to address LBP hazards created by renovation, repair, and painting activities that disturb LBP in target housing and child-occupied facilities.[196] The rule establishes requirements for "training renovators, other renovation workers, and dust sampling technicians; for certifying renovators, dust sampling technicians, and renovation firms; for accrediting providers of renovation and dust sampling technician training; for renovation work

[189] CONN. GEN. STAT. § 19a-111c; LA. REV. STAT. ANN. § 40:1299.27; MASS. GEN. LAWS ANN. ch. 111, § 197
[190] MASS. GEN. LAWS ANN. ch. 111, § 192; ME. REV. STAT. ANN. 22, § 1317-B
[191] MASS. GEN. LAWS ANN. ch. 111, § 197E; MINN. STAT. § 462A.21; N.J. STAT. ANN. § 26:2-136.
[192] MD. CODE ANN., Reduction of Lead Risk in Housing § 6-811
[193] VT. STAT. ANN. 18, § 1758.
[194] VT. STAT. ANN. 18, § 1759.
[195] VT. STAT. ANN. 18, § 1765.
[196] 40 CFR § 745.21692 (2008). The definition for "target housing" is the same as the Colorado definition. The definition for "child-occupied facility" is the same except that the child must be present only 3 hours a day. *See* 40 CFR § 745.21692 (2008).

practices; and for recordkeeping."[197] EPA amended the existing regulations to add training and certification requirements, as well as work practice standards, for specific renovation, repair, and painting projects performed for compensation in target housing and in child-occupied facilities.[198] The renovation activities covered by this rule are "virtually identical to the renovation activities already regulated under the Pre-Renovation Education Rule--essentially, activities that modify an existing structure and that result in the disturbance of painted surfaces."[199] Basically, "[a]ll types of repair, remodeling, modernization, and weatherization projects are covered, including projects performed as part of another Federal, State, or local program, if the projects meet the definition of ''renovation'' already codified in 40 CFR 745.83."[200]

In addition to the ''Protect Your Family From Lead in Your Home'' educational pamphlet, now a new renovation specific pamphlet entitled "Renovate Right: Important Lead Hazard Information for Families, Child Care Providers and Schools" will also be distributed.[201] This new pamphlet's goal is to better inform families about the risks of LBP exposure created during renovations and promote the use of healthy and safe work practices and measures during these renovation activities.[202]

This final rule requires that all renovations subject to this rule must be performed by a certified firm and that all persons performing the renovation work either be EPA certified renovators or receive on-the-job training from and perform key tasks under the direction of a certified renovator.[203] Additionally, it requires that all renovations subject to this rule be conducted in accordance with a defined set of work practice standards that are designed to minimize exposure to LBP hazards both during and after the renovation.[204]

This rule *only* applies to persons who perform renovations for compensation.[205] Additionally, this rule does not apply to minor maintenance or repair activities where less than six square feet of LBP is disturbed in a room or where less then 20 square feet of LBP is disturbed on the exterior.[206] This rule narrowed the exception for owner-occupied target housing that is neither the residence of a child under age 6 nor a child-occupied facility to include the requirement that a pregnant woman does not reside there.[207] This final rule exempts renovations in which a certified inspector or risk assessor has

[197] 40 CFR § 745.21692 (2008).
[198] *Id.* at 21705
[199] *Id.* at 21708
[200] *Id.* at 21708
[201] *Id.* at 21715.
[202] *Id.* at 21715.
[203] *Id.* at 21718.
[204] *Id.* at 21728.
[205] *Id.* at 21707.
[206] *Id.* at 21713-14.
[207] *Id.* at 21709.

determined are free of paint or other surface coatings that contain lead equal to or in excess of 1.0 mg/cm^2 or 0.5% by weight.[208]

If the State of Colorado is interested, it now may apply to administer and enforce all or part of the elements of these new renovation requirements.[209] The process for obtaining state authorization to operate these programs in lieu of the Federal program is the same process used in the Pre-Renovation Education programs, which the state has already done once.[210] Colorado may choose to administer and enforce just the existing requirements of subpart E, the pre-renovation education elements, or all of the requirements of the proposed subpart E, as amended.[211] If the State fails to create a new implementation plan for these new changes, the EPA will regulate LPB abatement procedures and requirements in the state of Colorado under this rule.

On April 22, 2009, the training programs for renovators or dust sampling technicians may begin applying for accreditation and EPA will begin accrediting training programs as soon as complete applications are submitted.[212] Then, on October 22, 2009, renovation firms may begin applying for certification and EPA will begin certifying renovation firms upon receipt of complete applications.[213] On April 22, 2010, this rule will be fully implemented.[214] Based on this timeframe, early implementation would be difficult. However, this would be a good time to act to pressure the state to implement these new rules themselves. The state has done nothing yet to comply with these upcoming changes.[215]

VIX. Conclusion

The Denver Municipal Code, RCRA, and the Lead Safe Housing Rule statute provide Groundwork Denver with options for enforcement of LBP removal. RCRA or the Lead Safe Housing Rule has been used in specific instances to abate LBP hazards; however, such abatement occurred on a case-by-case basis and required participation by individual tenants to force landlords to abate LBP hazards. Groundwork Denver may assist members of the community who are exposed to LBP hazards by assisting them in finding legal counsel and sending notice of intent to sue letters. While such an approach or the use of the Lead Safe Housing Rule may force individual abatements, both approaches will not increase awareness of LBP issues and are not as effective as a comprehensive LBP regulatory scheme, such as those that exist in other jurisdictions. Whereas, using RCRA to abate LBP hazards on a case-by-case basis may be less

[208] *Id.* at 21711.
[209] *Id.* at 21692, 21748.
[210] *Id.* at 21746.
[211] *Id.* at 21746.
[212] *Id.* at 21748.
[213] *Id.* at 21748.
[214] *Id.* at 21748.
[215] *See* http://www.leg.state.co.us/.

efficient, using the Housing Code within Denver's Municipal Code would invoke a more comprehensive regulatory scheme. Violations of the Housing Code would be enforced by Denver's Department of Environmental Health, and would programmatically require violators to take corrective action. Groundwork Denver should present this White Paper to the Department of Environmental Health to explain that it can use the Housing Code as an enforcement mechanism, and to clarify that Department of Environmental Health's inspection protocol to ensure that violations would be uncovered.

As an alternative to using a federal statute or Denver's Housing Code, Groundwork Denver may choose to lobby for a new local or state law that specifically targets the removal of LBP hazards. If such efforts were to be successful, it would result in a more comprehensive enforcement mechanism and would raise awareness of LBP hazards, thus, better achieving Groundwork Denver's long-term goal.

Appendix A – Federal Lead-safe Housing Rule Requirements

Lead-safe Housing Rule Requirements

Information by State
Print version

The Lead Safe Housing Rule (LSHR) applies to all federally-assisted housing. Depending on the nature of work and the dollar amount of federal investment in the property, certain requirements must be complied with in handling lead-based paint. It is important to note that the combination of work-type and funding amount dictates the specific requirements. For example, even though the property is receiving less than $5,000 in CDBG funding, the fact that the CDBG funding is being used to replace lead-painted windows (an activity that is abatement), a certified lead abatement contractor must conduct the replacement. Refer to the LSHR Overview for additional information.

Note: Clearance is always required after abatement, interim controls, paint stabilization, or standard treatments.

Subpart of Rule	Type of Assistance	Construction Period	Requirements
C	Disposition by Federal Agency Other Than HUD	Pre-1960	• LBP inspection and risk assessment • Abatement of LBP hazards • Notice to occupants of inspection/abatement results
		1960-1977	• LBP inspection and risk assessment • Notice to occupants of results
D	Project-Based Assistance by Federal Agency Other Than HUD	Pre-1978	• Provision of pamphlet • Risk assessment • Interim controls • Notice to occupants of results • Response to EBL child
F	HUD-Owned Single Family Sold With a HUD-Insured Mortgage	Pre-1978	• Visual assessment • Paint stabilization • Notice to occupants of clearance
G	Multifamily Mortgage Insurance	1. For properties that are currently residential — Pre-1960	• Provision of pamphlet • Risk assessment • Interim controls • Notice to occupants • Ongoing LBP maintenance
		1. For properties that are currently residential — 1960-1977	• Provision of pamphlet • Ongoing LBP maintenance
		2. For conversions and major renovations — Pre-1978	• Provision of pamphlet • LBP inspection • Abatement of LBP • Notice to occupants
H	Project-Based Assistance (HUD Program)	1. Multifamily property receiving more than $5,000 per unit per year — Pre-1978	• Provision of pamphlet • Risk assessment • Interim controls • Notice to occupants • Ongoing LBP maintenance and reevaluation • Response to EBL child
		2. Multifamily property receiving less than or equal to $5,000 per unit per year, and single family properties — Pre-1978	• Provision of pamphlet • Visual assessment • Paint stabilization • Notice to occupants • Ongoing LBP maintenance • Response to EBL child
I	HUD-Owned Multifamily Property	Pre-1978	• Provision of pamphlet • LBP inspection and risk assessment • Interim controls • Notice to occupants • Ongoing LBP maintenance • Response to EBL child
		1. Unit receiving less than or equal to $5,000 per unit — Pre-1978	• Provision of pamphlet • Paint testing of surfaces to be disturbed, or presume LBP • Safe work practices in rehab • Repair disturbed paint • Notice to occupants

J	**Rehabilitation Assistance**	2. Unit receiving more than $5,000 and up to $25,000	Pre-1978	▸ Provision of pamphlet ▸ Paint testing of surfaces to be disturbed, or presume LBP ▸ Risk assessment ▸ Interim controls ▸ Notice to occupants ▸ Ongoing LBP maintenance if HOME or CILP
		3. Unit receiving more than $25,000 per unit	Pre-1978	▸ Provision of pamphlet ▸ Paint testing of surfaces to be disturbed, or presume LBP ▸ Risk assessment ▸ Abatement of LBP hazards ▸ Notice to occupants ▸ Ongoing LBP maintenance
K	**Acquisition, Leasing, Support Services, or Operation**	Pre-1978	▸ Provision of pamphlet ▸ Visual assessment ▸ Paint stabilization ▸ Notice to occupants ▸ Ongoing LBP maintenance	
L	**Public Housing**	Pre-1978	▸ Provision of pamphlet ▸ LBP inspection ▸ Abatement of LBP ▸ Risk assessment if LBP not yet abated ▸ Interim controls if LBP not yet abated ▸ Notice to occupants ▸ Response to EBL child	
M	**Tenant-Based Rental Assistance**	Pre-1978	▸ Provision of pamphlet ▸ Visual assessment ▸ Paint stabilization ▸ Notice to occupants ▸ Ongoing LBP maintenance ▸ Response to EBL child	

Content current as of 20 March 2009

U.S. Department of Housing and Urban Development
451 7th Street, S.W., Washington, DC 20410
Telephone: (202) 708-1112 Find the address of a HUD office near you

Appendix B – Municipal Code Provisions

Chapter 37 "Nuisance." Included below are the sections from Chapter 37 that are relevant to the enforcement of LBP removal and a summary of the contents of the ordinances that are cited at the end of each section:

Sec. 37-1. Definition.
In all cases where no provision is made in article I of this chapter defining what are health nuisances, those offenses which are known to the common law as it exists in this state shall, in case the same exist within the city, be treated as such, and proceeded against as provided in this article.
(Ord. No. 41-97, § 3, 1-13-97)

Sec. 37-2. Prohibition.
It shall be unlawful for any person to maintain or allow any health nuisance to exist or remain within the city.
(Ord. No. 41-97, § 3, 1-13-97)

Sec. 37-3. Enforcement by health authorities.
(a) It shall be the duty of the manager of environmental health to ascertain and cause all health nuisances to be abated.
(b) The manager shall have authority at any reasonable time to enter upon any premises, or any building, in order to make a thorough examination of cellars, vaults, sinks or drains; to enter upon all lots or grounds; to cause all stagnant water to be drained off, and pools, sinks, vaults, holes or low grounds to be cleansed, filled up or otherwise purified, and so cause all harmful substances or conditions which may be detrimental to health, to be abated or removed as provided by article I of this chapter . . .
(Ord. No. 41-97, § 3, 1-13-97)

. . .

Sec. 37-5. Notice to abate; failure to comply.
(a) Except as provided in section 37-6, whenever a health nuisance shall be found in any building, or upon any ground or other premises within the jurisdiction of the city, a twenty-four (24) hours' notice shall be given in writing, or other reasonable amounts of time not to exceed five (5) days, signed by the manager of environmental health, to the owner or occupant or persons in possession or in charge or in control of any vehicle, or of such building or other premises to remove and abate such health nuisance . . .
(Ord. No. 41-97, § 3, 1-13-97)

Sec. 37-6. Summary abatement of imminent hazards.
Whenever any health nuisance shall be found on any premises within the city constituting an imminent hazard, the manager of environmental health is hereby empowered to cause the same to be summarily abated in such manner as the manager may direct.

. . .

Sec. 37-15. Building, vehicle or anything else in condition detrimental to health.
No building, vehicle, structure, receptacle or thing used, or to be used, for any purpose whatever, shall be made, used, kept, maintained or operated in or retained within the city if the use, keeping, maintaining or operation of the same shall be the occasion of any health nuisance, or dangerous or detrimental to the public health.
(Ord. No. 41-97, § 3, 1-13-97)

Ord. No. 41 from 1997. This ordinance came before the City Council as Council Bill 41, amending the Nuisance Code and providing for civil and criminal abatement of public nuisances. This preamble of the bill does not discuss 'health nuisances' but, instead, focuses on public nuisances, stating "public nuisances within the City and County of Denver are a threat to the public health, safety, and welfare." The remainder of the bill contains the identical language found within the Health Nuisance provision of the Municipal Code, with a definition section, a prohibition section, and so on. No record exists of City Council deliberations on this bill, neither in the Officer of the Clerk & Recorder or in the Denver Public Library. According to the Office of the City Council, records may have been lost in a flood.

Chapter 10 "Buildings and Building Regulations". Included below are the sections from Chapter 10 that are relevant to the enforcement of LBP removal and a summary of the contents of the ordinances that are cited at the end of each section:

Sec. 10-138. Neglected or derelict buildings or property prohibited.
(a) *Purpose.* The purpose of this article is to prevent any building or property in the City of Denver from becoming or remaining neglected or derelict, as that term is defined in this article; to mitigate the blighting impacts of such buildings; to provide for the regular inspection of structures and buildings that are or are likely to become neglected or derelict; and to impose fees for the costs of this program on those properties and owners who have and maintain such buildings and property.

(b) *Definitions.* As used in this article, unless the context requires otherwise:

. . .

(2) *Building* means any building or structure, as defined in the Denver Building Code, located in the city.

(3) *Interested person* means an owner, mortgagee, lienholder, or other person or entity that possesses an interest of record or an interest otherwise provable in property that becomes subject to the provisions of this article. Interested person shall include the city and any applicant for appointment as receiver pursuant to this article.

(4) *Manager* means the manager of community planning and development or anyone designated by the manager of community planning and development to act in his behalf.

(5) *Neglected or derelict building or property* means any building, structure, utility or property determined to be neglected or derelict pursuant to subsection (c) of this section.

. . .

(7) *Neighborhood nuisance* means a building or property that, by reason of inadequate maintenance, dilapidation, obsolescence or other similar reason, is a danger to the public health, safety or welfare; is structurally unsafe or unsanitary; is not provided with adequate safe egress; constitutes a fire hazard; is otherwise dangerous to human life; or in relation to the existing use constitutes a danger to the public health, safety or welfare. The following factors, where applicable, shall be among those considered when determining whether a property constitutes a neighborhood nuisance:

a. Existence of past or present code or other ordinance or statutory violations;
b. Whether or not the structure is vacant;
c. Whether or not the grounds are maintained;
d. Whether or not a building's or structure's interior is sound;
e. Vandalism or other destruction of the property;
f. Whether or not rents have been collected from the tenants by the owner;
g. The length of time any of the above conditions have existed; and

h. In the case of an occupied building or structure, the failure of the owner, when so obligated by law or lease, to provide services, make repairs, purchase fuel or other needed supplies, or pay utility bills.

. . .

(12) *Unsafe* means any property defined as unsafe in the Denver Building Code as currently enacted or subsequently re-enacted.

(c) *Neglected or derelict buildings or property.* A building or property shall be considered to be neglected or derelict when there exists on the property any one (1) or more of the following circumstances:

(1) The property is unsafe;

(2) The property is, for any three (3) consecutive months, not lawfully occupied, wholly or partially boarded up, and does not show evidence of substantial and ongoing construction activity conducted pursuant to a valid building permit;

(3) The property is not lawfully occupied and has been in violation of any provision of city or state law on three (3) separate occasions within a one-year period;

(4) The property is not lawfully occupied and the tax on such premises has been due and unpaid for a period of at least one (1) year; or

(5) The property is a neighborhood nuisance as that term is defined in subsection (b)(7) of this section.

(6) Historic property that is not being preserved in accordance with Chapter 30 of the Revised Municipal Code.

(d) *Prohibition.* No person shall allow or permit any building or property to be neglected or derelict.

Sec. 10-139. Administrative actions for enforcement and abatement.

(a) *Emergency abatement.* Whenever the manager determines that a violation of this article is an imminent hazard to life, health, property or public welfare, the manager may order or cause immediate emergency abatement of the condition causing the imminent hazard . . .

(b) *Notice of violation.* Except as provided in subsection (a) of this section, whenever the manager finds that any owner has violated or is violating this article, or any rules and regulations established hereunder, the manager may cause to be served upon such person a written notice stating the nature of the violation, the possible penalties, any required remedial action and the appeal process under section 12-19 . . .

. . .

(e) *Notice of show cause hearing.* Notice of show cause hearing shall be served on the owner specifying: (1) the time and place of a hearing regarding the violation, (2) the reasons why the action is to be taken, and (3) the proposed enforcement action. The notice shall direct the owner to show cause why the proposed enforcement action should not be taken. If a consolidated hearing is to be held to include an appeal hearing, the notice shall so indicate.

. . .

(j) *Determination; civil penalties.* The manager shall:
(1) Make a written determination within thirty (30) days of the hearing . . .
(2) Include in the written determination a finding of whether any violation has occurred, any mitigating or aggravating circumstances, the amount of any civil penalty to be imposed . . . and
(3) Set a deadline for any required abatement action to be performed.

. . .

Sec. 10-140. Court actions for abatement.
If, after notice and hearing pursuant to this article and a finding of a violation of this article, the owner has failed to abate the violation or comply with abatement deadlines provided in the manager's written determination or in an approved plan of abatement, an action for abatement under this article may be commenced in the district court pursuant to Rule 65 or 66 of the Colorado Rules of Civil Procedure by the city, an affected neighboring landowner or any other person who can establish damages resulting from the condition of the property. Such actions may request:
(1) An injunction ordering the owner of property to take whatever action the court considers necessary or appropriate to correct the condition or to eliminate the violations; and/or
(2) The appointment of a receiver to take possession and control of the property, and to perform work and to furnish material that reasonably may be required to abate the violation. All interested persons shall be made parties to the action.

. . .

Sec. 10-141. Inspection and fees.
(a) *Inspection.* Whenever the manager has reason to believe that a building or property is a neglected or derelict building or property as

defined in this article or when requested by the landmark preservation commission to inspect a historic property, the manager shall cause an inspection to be done to determine if the building or property complies with this article and all other applicable laws and codes. In the event the manager finds after inspection that a building or property is a neglected or derelict building or property, the manager shall cause a written notice to issue and shall otherwise proceed pursuant to section 10-139 of this article.

(b) *Neglected and derelict building list.* If the manager makes a written determination pursuant to subsection (c) of section 10-139 that a violation of this article has occurred, the property will be placed on the neglected and derelict building (NADB) list maintained by the manager. The manager shall cause a notice to be sent to the owner that the building or property has been placed on the NADB list. The notice shall include:

(1) The property's address and a legal description of the property;

(2) Concise statement as to the basis of the manager's determination;

(3) A statement that the fee required by this section must be paid; and

(4) A statement that this determination may be appealed under section 12-19.

(c) *Quarterly inspection.* The manager shall conduct, at a minimum, quarterly inspections of neglected or derelict buildings or properties to ensure compliance with applicable codes.

(d) *Compliance.* When all violations have been corrected and a neglected or derelict building or property has been legally reoccupied, or when the building has been demolished and the lot cleared in accordance with provisions of this Code, the property shall be removed from the NADB list.

(e) *Assessment of fees.* The owner of any neglected or derelict building or property shall be assessed a nonrefundable yearly fee of one thousand dollars ($1,000.00) payable on each neglected or derelict building or property under his or her ownership or control that appears on the NADB list. The fee is due thirty (30) days from the date of the notice that the building or property is on the NADB list, and will be assessed for each twelve-month period or part thereof that his property appears on the NADB list. The assessment may be paid in quarterly installments of two hundred fifty dollars ($250.00), the first payment coming due when the annual payment would have been due. If a quarterly or annual payment of the assessment is more than thirty (30) days past due, a penalty of fifty dollars ($50.00) shall be assessed. Amounts past due may be collected as provided by law.

(f) *Waiver of assessments.* The manager may waive the assessments imposed under this section, if the following conditions are met:

(1) Arrangements have been made to pay all delinquent fees and penalties not waived;

(2) A plan and timetable for the repair and maintenance or demolition of the building or property has been submitted by the owner and approved by the manager; and
(3) The property is being maintained so that it does not violate any applicable law or the owner is acting in a timely fashion in adherence to the approved plan.
(g) *Appeals.* An owner who has been affected by a determination made pursuant to the provisions of this section may appeal that determination to the manager as provided in section 12-19.

(Ord. No. 90-95, § 3, 2-6-95; Ord. No. 638-98, §§ 1(c)--(f), 9-14-98; Ord. No. 807-03, §§ 4—7)

Ord. No. 90 from 1995. This ordinance came before the City Council as Council Bill 58 "For an Ordinance Relating to Neglected and Derelict Buildings and Nonresident Owners of Buildings." The bill states that the presence of neglected or derelict buildings or properties lowers property values and reduces the livability of Denver neighborhoods. Despite this broad language, the Council did not clarify the terms of the bill, placing it on a block vote and ordering it published and adopted, with no mention of LBP hazards.

Ord. No. 464 from 1998. This ordinance came before the City Council as Council Bill 455 providing for the collection of moneys owed for services and improvements. The Bill discussed fees for improper accumulation or storage of rubbish, ashes, garbage, or other waste, but never included any mention of LBP. At the City Council meeting, this bill was never discussed and, presumably, passed in a block vote.

Ord. No. 807 from 2003. This ordinance came before the City Council as Council Bill 800 modifying the "Neglected and Derelict Buildings" article of Chapter 10 "Buildings and Building Regulations." The bill provides for emergency abatement—whenever the manager determines that a violation of this article is an imminent hazard to life, health, property, or public welfare, the manager may order or cause immediate emergency abatement of the condition causing the imminent hazard. The City Council did not discuss this bill in passing it, and it remains unclear whether LBP hazards constitute grounds for an emergency abatement. However, in the Blueprint Denver Committee Meeting from Wednesday October 8, 2003, the committee indicated that the Neighborhood Inspection Services determines that emergency abatement action is required based on a building's proximity to schools and childcare facilities; whether the building is an attractive nuisance for children or others; and if the police determine that

illegal activity is occurring on the premises. There is no mention of lead as a factor prompting the Neighborhood Inspection Service from initializing an emergency abatement action.

Ord. No. 775 from 2007. This ordinance came before the City Council as Council Bill 768 for an ordinance to amend the Revised Municipal Code relating to the manager of finance, auditor, and audit committee. This bill only contained provisions that discussed finance and auditing. No provisions discussed LBP hazards.

Chapter 27 "Housing Code". Included below are the sections from Chapter 27 that are relevant to the enforcement of LBP removal and a summary of the contents of the ordinances that are cited at the end of each section:

Sec. 27-16. Declaration of policy.
The council declares the purpose of this article is to protect, preserve and promote the physical and mental health of the people, investigate and control communicable diseases, regulate privately and publicly owned dwellings for the purpose of sanitation and public health, and protect the safety of the people and promote the general welfare by legislation which shall be applicable to all dwellings now in existence or hereafter constructed which:

. . .

(2) Determines the responsibilities of owners, operators and occupants of dwellings; and
(3) Provides for the administration and enforcement thereof.
(Ord. No. 997-95[216], § 1, 12-4-95; Ord. No. 500[217], § 1, 9-17-07)

. . .

Sec. 27-18. Definitions.
The following words and phrases, when used in this article, have the meanings respectively ascribed to them:

. . .

[216] Ordinance No. 997 Series of 1995 reestablished the functions and programs in the Department of Health and Hospitals of the Housing Code, Article II of Chapter 27.
[217] Ordinance No. 500 Series of 2007 indicates that the administration of Chapter 27, Article II, Housing Code, was transferred from the Department of Public Works to the Department of Environmental Health in 2005.

(3.5) *Clean and sanitary* means a condition free of visible dirt, debris, clutter, rubbish, trash, waste and free from other substances, contaminants, materials, or environmental conditions harmful to human health.

(4) *Dwelling* means any building that contains one or more dwelling units or rooming units used, intended, or designed to be built, used, rented, leased, let, sublet, or hired out to be occupied, or that is occupied for living purposes, and includes rooming houses but excludes temporary housing.

(5) *Dwelling unit* means a single unit providing complete independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking, and sanitation and includes single rooming units.

. . .

(11.5) *Manager* means, unless the context otherwise requires, the manager of the department of environmental health or the manager's representative

. . .

(13) *Occupant* means any natural person living, sleeping, cooking or eating in, or having actual possession of, a dwelling unit or rooming unit.

(14) *Operator* means any person, whether the owner or not, who manages or controls any dwelling, or part thereof, in which a person or persons other than an owner occupy a dwelling unit or rooming unit.

(15) *Owner* , as used in this article, means any person who alone or with others:
(a) Has record legal or equitable title to any dwelling or dwelling unit, with or without accompanying actual possession thereof;
(b) Acts as the agent or manager for the person who holds the record legal or equitable title to any dwelling, dwelling unit in a multiple dwelling structure, or common area or utilities servicing a single unit dwelling or dwelling unit in multiple dwelling structure, or acts as an agent or manager for any group of such owners;
(c) Is the personal representative, trustee, or fiduciary of an estate, trust, other entity which holds record legal or equitable title to any single unit dwelling or dwelling unit in a multiple unit structure, or common area or utilities servicing a single unit dwelling or dwelling unit in multiple dwelling structure; or

(d) Controls access to any service, facility, equipment, or utility that is required under this article and which is servicing any single unit dwelling or dwelling unit in multiple dwelling structure.

. . .

Sec. 27-23. Responsibilities of owners and occupants.

(1) Every owner and every operator of a dwelling containing two (2) or more dwelling units shall maintain the shared or public areas of the dwelling and premises thereof in a clean and sanitary condition. If, however, the manager determines that the unclean or unsanitary condition was caused in whole or part by an act or omission of an occupant, the manager may issue a notice of violation to the owner, operator, occupant, or all of them.

(2) Every occupant of a dwelling or dwelling unit shall keep in a clean and sanitary condition that part of the dwelling, dwelling unit and premises thereof which he occupies and controls. If, however, the, manager determines that the unclean or unsanitary condition was caused in whole or part by the act or omission of an owner or operator, the manager may issue a notice of violation to the owner, operator, occupant or all of them.

. . .

Sec. 27-26. Inspections.

(1) For the purpose of determining compliance with the provisions of this article, the manager or an authorized representative is hereby authorized and directed to make inspections to determine the condition, use, and occupancy of dwellings, dwelling units, rooming units, and the premises upon which the same are located. For the purpose of making such inspections the manager or an authorized representative is hereby authorized to request entry to examine, inspect and survey all dwellings, dwelling units, rooming units and premises upon which the same are located, at all reasonable times.

(2) If the owner, occupant or operator in charge of a dwelling, dwelling unit, rooming unit and premises upon which the same are located subject to the provisions of this article and the rules and regulations adopted and promulgated in connection herewith, refuses or restricts entry and free access to every part of the structure or premises wherein inspection is sought, the manager or an authorized representative may seek from the county court a warrant for inspection and order that such owner, occupant or operator be required to permit an inspection at a reasonable time without interference, restriction or obstruction. The county court shall have jurisdiction and authority to issue warrants for inspection and order the

owner, occupant or operator to allow entry and free access into all buildings, dwellings, dwelling units, rooming units and the premises upon which the same are located. The court shall have full power, jurisdiction and authority to enforce all orders issued under the provisions of this article.

(3) It is unlawful for any person to violate the provisions of any warrant for inspection and order issued under the provisions of this article.

(4) It is unlawful for any person, owner, operator or occupant to refuse to allow or permit the manager or an authorized representative free access to any building, dwelling, dwelling unit, rooming unit and premises upon which the same are located when the manager or an authorized representative is acting in compliance with a warrant for inspection and order issued by the county court and where the manager or an authorized representative is conducting an inspection, examination and survey in accordance with the provisions of this article or any rule and regulation adopted and promulgated in accordance with the provisions of this article.

. . .

Sec. 27-27. Enforcement.

(1) *Notice of violations* . . . [W]henever the manager determines that there has been a violation of any provision of this article or any rule or regulation adopted and promulgated pursuant thereto, the manager shall give notice of the alleged violation to the person or persons the manager determines to be responsible for the alleged violation and may order such person or persons to take corrective action for the alleged violation. The notice must:

(a) Be in writing;

(b) Particularize the violations alleged to exist . . .

(c) Provide a reasonable time, based on the nature of the violation and threat to the human health, to correct the violations

. . .

Sec. 27-30. Emergency proceedings in court of record.

(1) If any owner or operator does not comply with an order of the manager, or if an emergency to public health exists, the manager may take whatever action as necessary to alleviate or eliminate the imminent hazard to public health . . .

(Ord. No. 997-95, § 1, 12-4-95; Ord. No. 1110-96, § 1, 12-16-96; Ord. No. 464-98, § 2, 7-6-98; Ord. No. 500, § 17, 9-17-07; Ord. No. 775-07, § 71, 12-26-07)

Ord. No. 997 from 1995. This ordinance came before the City Council as Council Bill Number 1002 under the title "Reestablishing the Functions and Programs in the Department of Health and Hospitals of the Housing Code, Article II of Chapter 27". The bill contains the same language that appears in the Municipal Code, with the following sections: declaration of policy; legislative finding; definitions; minimum standards for light, ventilation and heating; supplied facilities; requirements for maintenance of safe and sanitary dwelling and dwelling units; minimum space, use and location requirements; responsibilities of owners and occupants; rooming houses; rules and regulations; inspections; enforcement; designation of unfit dwellings and order requiring vacation; recording of notice with clerk; emergency proceedings in court of record; and notice of vacating buildings.

The Council referred this bill to the Health, Housing, and Human Services Committee. The Health, Housing, and Human Services Committee meeting minutes for the year preceding the Council vote did not discuss using the provisions in the Housing Code to reduce or eliminate LBP hazards. In fact, the Committee never enumerated a specific list of hazards or unsafe and unclean living conditions to target. Rather, the Committee, and later the Council, outlined the goal to "protect, preserve and promote the physical and mental health of the people, investigate and control communicable diseases, regulate privately and publicly owned dwellings for the purpose of sanitation and public health, and protect the safety of the people and promote the general welfare resulted in no meeting minutes made any reference to LBP hazards."

Before the Bill was signed into law as Ordinance 997 on December 4, 1995, the Council called this Bill out for a for a block vote with three other bills: Council Bill 1001 regarding restaurant licensing, Council Bill 1002 regarding licensing of child care facilities, and Council Bill 1003 regarding pet licensing. Council Member Ted Hackworth had concerns about the content of the four bills and urged the Council to wait for the Department of Health and Hospitals to come out with better rules. The only discussion specifically concerning the Housing Code and not the Council Bills up for vote revealed the general sentiment that several agencies enforce the housing code, which requires massive coordination. The Council voted that the bills be adopted and published without any mention of lead.

Ord. No. 1110 from 1996. This ordinance came before the City Council as Council Bill Number 1096 under the title "Amending the revised Municipal Code to Conform its Provisions to Those of the Charter Amendment Adopted November 5, 1996 to Become Effective January 1, 1997, Regarding the Department of Environmental Health". This bill modifies

the powers, duties, and functions of the Department of Health and Hospitals by creating a Department of Environmental Health and within that Department the board of environmental health, which is authorized to adopt rules and regulations deemed necessary for the proper and effective enforcement of, among other things, portions of the Housing Code.

The bill makes no reference to lead or LBP. The City Council took the Bill from the Human Services Committee for a vote. At neither the first nor the second reading of the bill, the Council voted to adopt the Bill as Ordinance 1110 on December 13, 1996, never mentioning lead or LBP.

Ord. No. 500 from 2007. This ordinance came before the City Council as Council Bill Number 494. Essentially, this Bill sought to decrease operating costs of the Housing Code, facilitate compliance, and improve customer service.[218] Notably, these revisions included the addition of the definition "clean and sanitary" to the housing code. "Clean and sanitary" means a condition free of visible dirt, debris, clutter, rubbish, trash, waste and free from other substances, contaminants, materials, or environmental conditions harmful to human health. Though the City Council never discussed the bill as being used to reduce LBP hazards, the committee "Neighborhood, Community, & Business Revitalization" announced briefly mentioned that the definition of 'clean and sanitary' "will include any environmental concerns (e.g. mold, lead, and other non-visible problems) . . . allowing inspectors to give a shorter compliance period based on a public health risk or hazard." The committee specifically approved such a change to the definition of 'clean and sanitary' along with other changes to the Housing Code in order to provide more flexibility to the Department of Environmental Health in handling complaints and addressing violations more promptly.

[218] Ordinance No. 500 Series of 2007