

Department of Legislative Services  
Maryland General Assembly  
2013 Session

**FISCAL AND POLICY NOTE**

House Bill 1048

(Delegate Niemann, *et al.*)

Environmental Matters

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**Real Property - Sale of Property - Lead-Contaminated Dust Test Required**

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This bill requires a vendor in a sale of real property to deliver to each purchaser the results of a lead-contaminated dust test performed for the property in accordance with the procedures and standards approved by the Maryland Department of the Environment (MDE). The results must be provided at least seven days before settlement of the contract for the sale of the property. The bill authorizes a purchaser to waive, in writing, the right to receive the results of a lead-contaminated dust test.

The bill applies only to the sale of property on which a dwelling built before 1978 is located.

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**Fiscal Summary**

**State Effect:** Special fund expenditures increase in FY 2014 and subsequent years for the Department of Housing and Community Development (DHCD) and the Maryland Department of Transportation (MDOT) to account for the cost of performing a dust test and any remediation measures on applicable residential property sold. Expenditures also increase for other State agencies to the extent that the agency owns and sells properties on which a dwelling was built before 1978. MDE can revise existing regulations within existing resources. No impact on revenues.

**Local Effect:** Local government expenditures increase in FY 2014 and subsequent years to perform lead dust tests required by the bill for jurisdictions that own and sell property on which a dwelling was built before 1978. No impact on local government revenues.  
**This bill imposes a mandate on a unit of local government.**

**Small Business Effect:** Meaningful.

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## Analysis

### **Current Law/Background:**

#### *The Federal Lead Disclosure Rule*

In 1992, the U.S. Congress passed the Residential Lead-Based Paint Hazard Reduction Act. The Act directed the U.S. Department of Housing and Urban Development and the Environmental Protection Agency (EPA) to require (1) the disclosure of known information on lead-based paint and lead-based paint hazards before the sale or lease of most housing built before 1978; (2) the inclusion of an attachment to a contract or lease which includes a Lead Warning Statement and a confirmation that the seller or landlord has complied with all notification requirements; and (3) a 10-day period for homebuyers to conduct a paint inspection or risk assessment for lead-based paint or lead-based paint hazards. Parties may agree, in writing, to alter this time period, and a homebuyer may completely waive the 10-day period.

#### *Reduction of Lead Risk in Housing Law*

According to MDE, lead paint dust from deteriorated lead paint or home renovation is the major source of exposure for children in Maryland. Chapter 114 of 1994 established the Lead Poisoning Prevention Program within MDE. Chapter 114 established a comprehensive plan to regulate compensation for children who are poisoned by lead paint, treat affected residential rental properties to reduce risks, and limit liability of landlords who act to reduce lead hazards in accordance with various regulatory requirements.

#### *Qualified Offer and Recent Court of Appeals Case*

Previously, if a landlord complied with the program's regulatory provisions, Chapter 114 provided liability protection, through a qualified offer, by limiting compensation to children who resided in the rental unit to not more than \$7,500 for all medically necessary treatments and to not more than \$9,500 for relocation benefits, for a total of \$17,000. However, in a decision filed October 24, 2011, the Court of Appeals ruled that the limits on landlord liability in Chapter 114 are unconstitutional because the provisions violate Article 19 of the Maryland Declaration of Rights. (Article 19 protects a right to a remedy for an injury and a right of access to the courts.)

The court stated that the test to be applied under an Article 19 challenge is whether the restriction on a judicial remedy was reasonable. The court found that the \$17,000 remedy available under Chapter 114 was "miniscule" and, thus, not reasonable compensation for a child permanently damaged by lead poisoning. Therefore, the court held the limited

liability provisions under Chapter 114 to be invalid under Article 19 because a qualified offer does not provide a reasonable remedy.

Owners of pre-1950 rental units that are in compliance with Chapter 114 and owners of rental units built between 1950 and 1978 that voluntarily opted to comply may be impacted by the court's decision, as they no longer have the liability protection previously afforded to them.

### *Recent Study and Changes to the Reduction of Lead Risk in Housing Law*

Unrelated to the Court of Appeals decision, Chapter 610 of 2011 (HB 1033) required MDE to conduct a study in consultation with members of the General Assembly and representatives of several State and local agencies and organizations reflecting the interests of landlords, housing owners, lead poisoning prevention advocates, and others. The study was required to evaluate processes that reduce the incidence of lead poisoning in residential properties not currently regulated by MDE, including rental properties built from 1950 through 1978 and owner-occupied properties.

The study group met seven times between July and December of 2011 and made recommendations regarding six different issues, including, among other things, expanding the scope of regulation to include rental properties built before 1978 and owner-occupied properties; increasing the program's property registration fee to address the program's declining revenue sources; and evaluating whether to require MDE to seek delegation of the federal renovation, repair, and repainting (RRP) rule, which requires renovation companies to be registered and follow lead-safe work practices while doing renovation in pre-1978 constructed homes.

The study group discussed two means to address lead issues in owner-occupied houses, in addition to the RRP rule. First, local health departments could be given explicit authority to issue abatement orders in owner-occupied houses where children with elevated blood lead levels reside. Second, a dust test, or some other quantitative clearance procedure, could be required along with disclosure of the results to a prospective homebuyer at the time a property is sold. The study group expressed concern over the additional costs this would impose on the home-buying process at a time when the housing market is already depressed. The study group recommended that legislation be proposed to grant authority for local health departments to order lead abatements, but it decided that further discussion may be warranted before recommending that a lead dust test or other procedure be required at the time of sale.

Chapter 387 of 2012 (HB 644) makes various changes to the Reduction of Lead Risk in Housing Law to address the recent Court of Appeals decision and some of the issues examined by the study group. Changes under Chapter 387 include (1) expanding the

application of the law to owners of residential rental property built between 1950 and 1978 beginning January 1, 2015; (2) increasing the annual registration fee from \$15 to \$30; (3) altering the definition of “abatement” to include renovation, repair, and painting in specified properties built before 1978; (4) authorizing MDE to adopt regulations related to abatements involving renovation, repair, and painting; (5) repealing a rebuttable presumption that an owner of property that is not in compliance with the lead law is presumed to have failed to exercise reasonable care; (6) providing that evidence that a property owner was or was not in compliance with the lead law is admissible to prove that the owner exercised or failed to exercise reasonable care; and (7) requiring a party who makes certain allegations or denials without a good faith basis to pay reasonable costs, including

### *Dust Wipe Inspections*

Maryland has established dust sampling procedures for meeting the risk reduction and lead safe standard for an affected property. All lead dust wipe inspections must include field blank samples collected using the following procedures:

- before the sample is collected, the inspector must wipe his or her hands with a disposable towelette moistened with a specified wetting agent and discard the wipe;
- the inspector must also use the same type of wipe and insert into a labeled centrifuge tube as the beginning field blank to be analyzed by the laboratory;
- at the conclusion of the wipe sampling, the inspector must collect an ending field blank in the same manner as the beginning field blank; and
- field blank centrifuge tubes must be labeled with a unique identifier according to laboratory specifications.

The actual collection of dust wipe samples must be collected in accordance with standards promulgated by ASTM International, formerly known as the American Society for Testing and Materials. MDE regulations also prescribe an appropriate laboratory analytical procedure.

**State Fiscal Effect:** Special fund expenditures increase in fiscal 2014 and subsequent years for DHCD due to the cost of performing a dust test and any remediation measures before selling any residential property built before 1978. DHCD sells approximately 150 houses a year that were built before 1978.

Lead dust tests typically cost around \$300. Additionally, in order to sell the property, the agency may need to perform remediation measures. The President’s Task Force on Environmental Health Risks and Safety Risks to Children, completed in 2000, outlined

the costs for testing and lead-based paint remediation to be approximately \$1,200 to \$10,000 per property. If these estimates are accurate, any increase in special fund expenditures for DHCD may be significant.

Minimal increase in Transportation Trust Fund (TTF) expenditures for MDOT's Office of Real Estate (ORE) in fiscal 2014 and subsequent years. ORE occasionally disposes of State-owned improved properties originally bought by the State Highway Administration. ORE's current policy is to sell "as is," and the office does not test for lead-contaminated dust. Under the bill, ORE must test for lead-contaminated dust and provide any purchaser with a report of test findings.

Currently, ORE has five improved properties; however, ORE can go extended periods of time without owning an improved property as much of its inventory is unimproved property. Additionally, a further limit on the impact of the bill is that only properties built prior to 1978 are affected. The process to sell an improved property can take place over a year or more. Therefore, any increase in TTF expenditures is unpredictable and may not occur for several fiscal years.

To the extent that other agencies own and sell residential property built before 1978, general fund and special fund expenditures also increase to perform lead dust tests and any necessary remediation.

**Local Expenditures:** Local government expenditures increase in fiscal 2014 and subsequent years to perform lead dust tests required by the bill for jurisdictions that own residential property built before 1978. For example, Baltimore City advises that its current inventory of abandoned property is 2,531. According to recent trends, the city takes title to an additional 200 to 300 properties a year. Virtually all of dwellings on these properties were built before 1978. To the extent that the city is able to sell these properties, expenditures increase by approximately \$300 for each dust test and from \$1,200 to \$10,000 for any remediation measures performed on each property sold.

**Small Business Effect:** The bill may have a meaningful detrimental impact on vendors in a sale of real property, some of which may be small businesses. As noted above, lead dust tests typically cost around \$300, and lead-based paint remediation may cost approximately \$1,200 to \$10,000 per property. A vendor may either pay for the remediation or reduce the selling price of a home.

Additionally, small business contractors engaged in the inspection, abatement, or renovation of properties with lead paint, as well as businesses that administer lead dust tests, may realize a meaningful increase in the demand for their services.

## **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** Baltimore City, Maryland Department of the Environment, Judiciary (Administrative Office of the Courts), Maryland Department of Transportation, Department of Housing and Community Development, U.S. Department of Housing and Urban Development, Department of Legislative Services

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