Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

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DATE: February 22, 2008

TO: Councilmember Donna Frye

FROM: City Attorney

SUBJECT: Lead Hazard Prevention and Control Ordinance – Comments of Ms. Theresa Quiroz

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During the Council hearing of October 30, 2007, Councilmember Frye requested the City Attorney to provide an analysis of the proposed Lead Hazard Prevention and Control Ordinance [Ordinance] in response to comments made at that hearing by Ms. Theresa Quiroz. Essentially, Ms. Quiroz stated that, if adopted, the Ordinance would codify the presumption that 65% of homeowners in the City of San Diego are guilty of a misdemeanor because their homes were constructed prior to 1979; that their property will immediately be designated as a public nuisance; and that their 4th Amendment rights will be violated. Ms. Quiroz discussed these concerns in more detail in an email dated October 27, 2007, in which she also commented that the Ordinance punishes a property owner for past conduct, i.e., applying lead-based paint to housing, which was not an offense at the time it was committed. As explained below, these comments misinterpret the Ordinance.

DISCUSSION

I. BACKGROUND

The United States Congress has found that "[p]re-1980 American housing stock contains more than 3,000,000 tons of lead in the form of lead-based paint, with the vast majority of homes built before 1950 containing substantial amounts of lead-based paint." 42 U.S.C. § 4851(3). "[A]t low levels, lead poisoning in children causes intelligence quotient deficiencies, reading and learning disabilities, impaired hearing, reduced attention span, hyperactivity, and behavior problems." 42 U.S.C. § 4851(2). According to the Consumer Product Safety Commission: "[t]he seriousness of the lead poisoning problem is well documented." 42 FR 44198 (Sept. 1, 1977). "[T]he ingestion of household dust containing lead from deteriorating or abraded lead-based paint is the most common cause of lead poisoning in children." 42 U.S.C. § 4851(4).

Further, the California Legislature has declared that "childhood lead exposure represents the most significant childhood environmental health problem in the state today; . . . that at least 1 in every 25 children in the nation has an elevated blood lead level; and that the cost to society of neglecting this problem may be enormous." Cal. Health & Safety Code § 124125. "Levels of lead found in soil and paint around and on housing constitute a health hazard to children living in the housing." Cal. Health & Safety Code § 124150(e). "[T]he danger posed by lead-based paint hazards can be reduced by abating lead-based paint or by taking interim measures to prevent paint deterioration. . . ." 42 U.S.C. § 4851(6).

Hazardous levels of lead were commonly used in the manufacture of residential paint [lead-based paint] before being banned as of February 28, 1978. 16 CFR § 1303.1. Thus, "a home built before 1978 is likely to have surfaces painted with lead-based paint."[1] "Even if the lead-based paint has been covered with new paint or another covering, cracked or chipped painted surfaces can expose the lead-based paint . . . ." [2] To be sure the paint is not lead-based, it must be tested by a qualified professional.[3] The U.S. Department of Housing and Urban Development warns owners and residents of homes built before 1978 to treat peeling paint as a lead hazard unless proven otherwise.[4] According to a 2000 Census Profile compiled by the San Diego Association of Governments, approximately 14% of the housing units in the City of San Diego were built before 1950. Approximately 66% of the housing units in the City of San Diego were built before 1979.[5]

Given these alarming facts, a primary purpose of the Ordinance is to prevent lead poisoning in children by protecting them from exposure to lead hazards, primarily in the form of lead-contaminated dust or soil from deteriorated lead-based paint in or around housing and from activities that disturb lead-based paint without using proper containment. Ordinance § 54.1002(a). Deteriorated lead-based paint is paint that is cracking, flaking, chipping, peeling, or otherwise separating from the substrate of the dwelling. Ordinance § 54.1003. Lead hazards in the form of deteriorated paint may be corrected using lead safe work practices.

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[1]Reducing Lead Hazards When Remodeling Your Home, EPA 747-K-97-001, page 2 (Sept. 1997).

[2]*Id.*; U.S. Department of Housing and Urban Development, Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing pp.5-11 through 5-15 (June 1995).

[3]Reducing Lead Hazards When Remodeling Your Home, EPA 747-K-97-001, page 3 (Sept. 1997).

[4]U.S. Department of Housing and Urban Development, Office of Healthy Homes, Lead Brochure. http://www.hud.gov/offices/lead/healthyhomes/lead.cfm.

[5]SANDAG Census 2000 Profile City of San Diego p.3. www.sandag.org (June 12, 2003).

II. PRESUMPTION OF GUILT

A. The Ordinance does not presume owners of pre-1979 homes are guilty of a misdemeanor.

With the above context in mind, we address the first comment, which is that the Ordinance presumes that all homeowners who own pre-1979 housing are guilty of a misdemeanor. This comment confuses "lead-based paint" with "lead hazard." The Ordinance contains the presumption that paint on housing built before January 1, 1979, is lead-based paint. Ordinance § 54.1007(a). However, the Ordinance does not prohibit lead-based paint on housing. It prohibits the creation or maintenance of a *lead hazard*. Ordinance § 54.1004. Lead-based paint alone is not a lead hazard. The lead-based paint must be deteriorated (cracking, flaking, chipping, peeling, or otherwise separating from the substrate of the dwelling) over a certain surface area or otherwise be a health hazard in order to constitute a lead hazard. Ordinance § 54.1003. Plus, the Ordinance provides a method for a homeowner to rebut the presumption by showing that the dwelling does not have lead-based paint. Ordinance § 54.1007(b). So, contrary to the comment, the Ordinance does not presume that all owners of pre-1979 housing are guilty of a misdemeanor.

B. The presumption does not relieve the City of its burden to prove guilt beyond a reasonable doubt in a criminal case.

In addition, the application of a presumption in a criminal case is governed by both federal and state constitutional law and the California Evidence Code. *Ulster County Court v. Allen*, 442 U.S. 140, 156 (1979); *People v. McCall,* 32 Cal. 4th 175, 182-83 (2004), *cert. denied,* 542 U.S. 923 (2004); *People v. Roder*, 33 Cal. 3d 491, 497 (1983). In a criminal case, the prosecution has the burden to prove each element of the offense beyond a reasonable doubt. Cal. Penal Code § 1096; Cal. Evid. Code § 501; *People v. Mower*, 28 Cal. 4th 457, 478-79 (2002). A presumption does not operate to relieve the prosecution of its burden of proof. *Ulster County Court,* 442 U.S. at 156-67; Cal. Evid. Code §§ 501, 600-607; *McCall*, 32 Cal. 4th at 183-84; *Roder*, 33 Cal. 3d 491, 497-507 (1983); *People v. Beltran*, 157 Cal. App. 4th 235, 245 (2007). Thus, the presumption in the Ordinance does not violate the presumption of innocence and would not relieve the City from proving defendant's guilt beyond a reasonable doubt in the event the City brings a misdemeanor criminal action for a violation of the Ordinance.

III. PUBLIC NUISANCE

Similarly, the second comment, which is that pre-1979 housing will immediately become a public nuisance under the Ordinance, also confuses "lead-based paint" with a "lead hazard." The Ordinance does not declare that a home with lead-based paint is a public nuisance, and the Ordinance does not declare that a home built prior to 1979 is a public nuisance. Rather, the Ordinance declares that a lead hazard, as defined in the Ordinance, is a public nuisance. Ordinance § 54.1001(f). So, under the Ordinance, housing does not become a public nuisance merely because it was built before 1979 and/or contains lead-based paint.

A. Council has authority to decide that a lead hazard constitutes a public nuisance.

A public nuisance is anything which is injurious to health and affects an entire community or neighborhood or any considerable number of people, even if not all persons are affected equally. Cal. Civ. Code §§ 3479, 3480; Cal. Penal Code § 370. A city legislative body has authority to declare by ordinance that certain conditions or activities constitute a public nuisance. Cal. Const. art. XI, § 7; Cal. Gov't Code § 38771; *City of Costa Mesa v. Soffer,* 11 Cal. App. 4th 378, 383 (1992). Once a legislative body makes such a declaration, a court will not substitute its independent judgment for that of the city council that a certain condition or activity is significant enough to constitute a nuisance. *City of Bakersfield v. Miller*, 64 Cal. 2d 93, 100 (1966), *cert. denied,* 384 U.S. 988 (1966). The court's role is limited to deciding whether a public nuisance exists, as defined by the ordinance, and whether the ordinance is constitutionally valid. *Id.* A legislative body has broad discretion to determine what the public interests are and the measures necessary to protect them, and that determination will not run afoul of due process principles unless it is "palpably unreasonable, arbitrary or capricious, having no tendency to promote the public welfare, safety, morals or general welfare." In other words, there must be some rational basis for the determination. *Thain v. City of Palo Alto,* 207 Cal. App. 2d 173, 186-87 (1962).

Thus, the Council has the authority to declare, by way of the Ordinance, that a lead hazard as defined in the Ordinance constitutes a public nuisance. In fact, Council has already made a similar declaration in the City's existing lead hazard abatement ordinance.[6] Given the abundance of evidence associating deteriorated lead-based paint in housing with lead poisoning in children, the devastating and irreversible health effects of lead poisoning in children, the likelihood that housing constructed prior to 1979 contains lead-based paint, and the prevalence of pre-1979 housing in the City, a determination that a lead hazard as defined in the Ordinance constitutes a public nuisance is not unreasonable, arbitrary, nor capricious.

B. The remedies for a public nuisance violation may include a civil action, criminal case, and abatement.

A public nuisance defined by ordinance is a nuisance *per se. Soffer,* 11 Cal. App. 4th at 382. Cities typically declare nuisances *per se* in the areas of zoning, building, environmental protection, noise, and similar fields. California Municipal Law Handbook § 9.2.50(D) (2006 ed.). Remedies for a nuisance violation may include a civil action, a criminal proceeding, and abatement of the nuisance at the expense of the person creating or maintaining it. Cal. Civil Code § 3491; Cal. Gov't Code § 38773; *Flahive v. City of Dana Point*, 72 Cal. App. 4th 241, 244 (1999).

Due process is required for the abatement of a public nuisance. Due process requirements are satisfied by providing adequate notice and a meaningful opportunity to be heard on the matter.

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[6]SDMC § 54.1001(e).

Mohilef v. Janovici, 51 Cal. App. 4th 267, 285 (1996). However, if an imminent life safety hazard exists that requires immediate correction or elimination, the City may take the minimum action necessary to eliminate the immediacy of the hazard, absent prior notice to the property owner, without violating due process principles. Cal. Gov't Code § 38773; *Thain*, 207 Cal. App. 2d at 189; *Leppo v. City of Petaluma*, 20 Cal. App. 3d 711, 718 (1971). The Ordinance provides for all of these potential remedies along with the requisite due process protections. Ordinance § 54.1013; SDMC Chapter 1, Article 2, Divisions 3-10

IV. 4TH AMENDMENT ISSUE

A. A homeowner is not required to hire a government agent to perform a lead inspection.

The third comment is based on the misperception that the Ordinance would require a homeowner to allow a government official into the home to conduct a search without a warrant and without probable cause. This misperception is based on a misreading of sections 54.1007(c) and 54.1013 of the Ordinance. Essentially, section 54.1007(c) provides that once a homeowner is on notice that a lead hazard exists on the property, the homeowner must expeditiously correct it and subsequently provide proof of compliance. Proof of compliance is shown by submitting a form showing that the identified lead hazards were corrected and passed a clearance inspection conducted by a state certified lead inspector. Ordinance § 54.1007(c)(2), (3). The inspection is not conducted by a government official, but by a professional, selected by the homeowner, who has been certified by the state as having the necessary training and expertise to safely and properly conduct lead clearance inspections. Ordinance § 54.1003.

B. A warrant is required to enter a home absent an emergency or consent.

Further, section 54.1013 authorizes the Director or designee to conduct a reasonable home inspection when a violation of the Ordinance is suspected. However, unless the homeowner consents or exigent circumstances exist, the Director would be required to obtain an administrative inspection warrant before entering the home. Ordinance § 54.1013(b)(1); *see Flahive,* 72 Cal. App. 4th at 246. Although specific to this Ordinance and more limited in scope, this section also is comparable to section 12.0104 of the Municipal Code which provides authority to inspect property when *any* Municipal Code or State law violation is suspected. Thus, the Ordinance does not run afoul of the 4th Amendment.

V. PUNISHMENT FOR PAST CONDUCT

Finally, the fourth comment contends that the Ordinance impermissibly punishes a homeowner for the past application and maintenance of lead-based paint. That comment also misinterprets the Ordinance. First, as stated above, the Ordinance does not make the use of lead-based paint a crime. The Ordinance makes it unlawful to create or maintain a lead hazard. Ordinance § 54.1004.

A. The Ordinance is not an ex post facto law

Second, the Ordinance is prospective only, not retroactive. A criminal statute which punishes an act that was innocent when committed is an ex post facto law in violation of both the federal and state constitutions. *Collins v. Youngblood*, 497 U.S. 37, 41 (1990); *People v. Snook*, 16 Cal. 4th 1210, 1220-21 (1997). The question in determining whether a penal statute is an ex post facto law is whether the legislative aim was to punish an individual for past activity or to regulate a present situation. *De Veau v. Braisted*, 363 U.S. 144, 160 (1960).

It is abundantly clear that the purpose of the Ordinance is to eliminate existing lead hazards, particularly in housing, so as to limit children's exposure to lead. In other words, its intent is to regulate a present, dangerous condition posed by lead in housing. To that end, the Ordinance requires that once a homeowner is on notice that a lead hazard exists on the property, the homeowner must expeditiously correct it and subsequently provide proof of compliance. Ordinance § 54.1007(c)(2), (3). The prohibition on creating or maintaining a lead hazard becomes effective only when the Ordinance becomes effective. So, the Ordinance does not punish a homeowner for the application of lead-based paint to the home before the Ordinance effective date, nor for merely having lead-based paint on housing. Moreover, it does not punish a property owner for the creation or maintenance of a lead hazard before the Ordinance is passed. The conduct subject to punishment is the creation or maintenance of a lead hazard *after* the Ordinance becomes effective. Thus, the Ordinance is not an ex post fact law. *See Chicago & Alton Railroad Co. v. Tranbarger*, 238 U.S. 67, 73 (1915) (no ex post facto violation where railroad was subject to punishment not for original construction of embankment but for maintenance of embankment in manner prohibited by later enacted law).

B. A property owner has no constitutional right to maintain property as a public nuisance

Finally, the fact that a building was built in compliance with the law when it was constructed does not immunize it from later becoming a public nuisance if a later enacted ordinance makes its condition a public nuisance and the condition continues uncorrected after the ordinance becomes law. *Miller*, 64 Cal. 2d at 101. A property owner has no constitutional right to maintain property as a public nuisance. *Leppo*, 20 Cal. App. 3d at 717. In this case, the City is not imposing punitive sanctions for the use of paint in past decades, but eliminating a presently existing danger to the public. *See Knapp v. City of Newport Beach,* 186 Cal. App. 2d 669, 681 (1960) (date of construction of building or enactment of law under which it was declared a public nuisance is irrelevant; present dangerous condition of building is real criterion for determining violation). Constitutional principles do not require the public to tolerate a public nuisance ad infinitum simply because the property was not in violation of the law when originally constructed. *Miller*, 64 Cal. 2d at 102. Thus, the Ordinance does not improperly subject past conduct to sanctions.

CONCLUSION

The Ordinance does not presume that owners of housing built prior to 1979 are guilty of a misdemeanor. The Ordinance does presume that paint on pre-1979 housing is lead-based paint. That presumption does not violate the presumption of innocence. In a criminal case alleging a violation of the Ordinance, the City maintains the burden to prove a property owner guilty beyond a reasonable doubt.

The Ordinance does not declare that pre-1979 housing and/or housing with lead-based paint is a public nuisance. The ordinance declares that a *lead hazard* is a public nuisance. Paint on pre-1979 housing alone is not a lead hazard. The paint must be deteriorated (cracking, flaking, chipping, peeling, or otherwise separating from the substrate of the dwelling) over a certain surface area or otherwise be a health hazard.

The Ordinance does not provide for procedures in violation of the 4th Amendment. Absent exigent circumstances or the property owner's consent, the City must obtain a warrant prior to entering the home.

Finally, the Ordinance does not punish property owners for a lead hazard on the property before the Ordinance becomes effective, but for creating or maintaining a lead hazard on the property after that time. Thus, it is prospective in effect and does not improperly punish past conduct.

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