

How to Comply with Westchester's New Well-Water Testing Law

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On May 23, 2007, the County of Westchester adopted Local Law No. 7 of the year 2007 which is entitled "The Private Well-Water Testing Law". The new Law becomes effective on November 19, 2007. Regulations contemplated by the new Law were published by the County of Westchester on Tuesday, September 18, 2007 and the Law and the Rules and Regulations are posted on the Health Department's website at <http://www.westchestergov.com/health/>.

Why Was the New Law Necessary?

The new Law, also referred to as "Laws of Westchester County §707.0 et seq." is intended to identify properties throughout Westchester County which are served by substandard water supplies so that purchasers of properties and tenants residing in properties served by wells with contaminants, are aware of the circumstances, can remediate and address the issues and so that the Health Department can make available to the public a "general compilation of water test results data arranged or identified by municipality or appropriate geographic area...". In addition, the Department of Health may establish a public information and education program to assist the public in identifying the potential health affects of consuming contaminated water as well as suggesting water treatment techniques, equipment strategies and identifying funding sources available for treating water from private wells which have failed a water test.

Who Must Comply With the New Law?

There are three aspects to the Private Well-Water Testing Law:

1. §707.03 relates to water testing when a property served by well-water is sold in Westchester County;
2. §707.04 relates to water testing requirements for properties served by well-water which are leased; and
3. §707.05 relates to water testing requirements for new wells.

The burden of compliance with these new sections falls upon a seller of real property upon the sale of the property, the landlord in connection with the leasing of property and the owner of property at the time that a new well is installed.

Requirements upon Sale of Real Property

When a contract of sale for any property served by well-water in Westchester County is signed, the seller must cause a water test to be conducted, which will identify contaminants, constituents, substances, metals, inorganic or organic chemicals (all referred to as "Parameters") which affect the drinking quality of the water. The seller is required to arrange and pay for the cost of the testing and within ten (10) days of the signing of the formal contract of sale, provide to the purchaser confirmation that the test has been ordered. Within five (5) days after the receipt of the water test results from a certified laboratory, the seller is required to deliver the well-water testing report to the purchaser. The purchaser and seller are required to certify in writing that they have received and reviewed the water-test results. The County Health Department must receive a copy of the test results directly from the certified laboratory.

If the test fails any of the primary parameters (bacteria/total coliform or e-coli, nitrates, arsenic, lead, primary organic contaminants, vinyl chloride or MTBE) the seller will have a choice to a) correct the condition to achieve safe levels of contaminants b) cancel the contract of sale and return the down payment or c) agree in writing to consummate the sale upon terms negotiated between the buyer and the seller.

In addition, the purchaser or seller can test for additional parameters which are not considered "Primary Parameters" and which are referred to in the Regulations as "Secondary Parameters" which affect taste and water quality. Such secondary parameters include pH, iron content, sodium content, chloride content, etc.

Water Testing for Leased Properties

Landlords will be required to test a private well on or before November 19, 2008 and once every five (5) years thereafter. Every new tenant of an apartment in Westchester which is provided with water from a private well is entitled to a copy of the test results whenever a new lease is entered into.

New Wells and Wells Not In Use

Prior to its first use, any new well must be tested and any well which is not in use for a period of five (5) years for drinking purposes must be tested if it is placed into use for a resident or owner.

Who Can Perform the Test?

The test can only be performed by a certified laboratory. The certified laboratory must designate an employee or authorized representative of the certified laboratory to collect the water sample. The water sample cannot be submitted by the homeowner, by a Realtor or by any other party.

There are highly technical requirements for how the sample is to be obtained including the designation of sampling locations and particular requirements for lead analysis. The format of the report to be provided by the certified laboratory is specified by the Westchester County Department of Health and will include the maximum contaminant levels, guidelines, optimum ranges and other data. The data is required to be reported by the laboratory directly to the Department of Health and to the person who requested the test. Results will not be made available to the public. A list of certified laboratories will be created by the Westchester County Health Department and can be found at the Department's website at www.westchestergov.com/health.

What is the Estimated Cost of the Testing?

The Questions and Answers promulgated by the Department of Health on September 18, 2007 indicate that the Department believes that the average cost of the well testing will be Four Hundred to Four Hundred Fifty (\$400 - \$450) Dollars. The seller is required to pay the cost and the Law specifically prohibits an agreement between buyer and seller that the test be waived (§707.09).

What About Contracts Entered Into Prior to November 19, 2007?

The Law provides that it is applicable only to contracts on or after Monday, November 19, 2007. It applies solely to properties which are served by private wells that are providing potable water for drinking purposes (not wells used strictly for watering lawns, etc.). If there was an accepted offer with respect to a property as of November 19, 2007 but formal contracts have not been entered into, the well testing Law will apply. The Law does not allow the seller to pass the costs onto the purchaser. If a test is completed by a seller and the sale is not consummated, the seller can use the test results for a period of one (1) year from the date of the original sample collection although the test for coliform is valid only for six (6) months from the date of the sample collection. In such cases in which a test was already obtained, the seller is required to provide a copy of the test results within ten (10) days of the execution of the subsequent contract.

What are the Penalties for Non-Compliance?

The Department of Health has the ability under the Law to impose heavy fines upon a non-compliant landlord or a seller of real property. Under §707.12, a seller, purchaser or lessor who violates the new Law is subject to a civil penalty not to exceed One Thousand (\$1,000) Dollars. In addition, when a contaminated well is not remediated or a test is not provided by a seller to a purchaser or by a landlord to a tenant as required by the new Law, the County can impose a fine of One Thousand (\$1,000) Dollars per day for failure to provide potable water until the condition is corrected or remediated. In addition, any violation resulting from the failure of an owner or landlord to remediate a known condition within one (1) month of the initial violation date is subject to a penalty not to exceed Ten Thousand (\$10,000) Dollars for each violation.

What Rights Do Tenants Have?

In the event that a landlord fails to provide potable water to a rented property, the tenant is granted the right under §707.06 to remediate the condition and obtain subsequent tests of the water and to offset the cost of any remediation and subsequent water tests against the rent payable under the lease.

What is the Role of the Attorney?

Attorneys who represent buyers and sellers in residential real property transactions must not only be cognizant of the new Law but of necessity, will be required to educate buyers and sellers about the Law and the limitations which arise from Chapter 707 of the Laws of Westchester County. In particular, to ensure that the transactions entered into are consummated, sellers and buyers must be provided with information about the new Law and about what the role of each party will be in the transaction.

It is recommended that attorneys access the website of the Westchester County Department of Health and download a copy of the new Private Well-Water Testing Law, the Regulations issued by the Commissioner of Health which are effective on the effective date of the Law (November 19, 2007), as well as the Frequently Asked Questions ("FAQs") and Answers which are also available on the website. The FAQs are broken into fifteen (15) questions under "Applicability and General Requirements", nine (9) questions under "Collection and Analysis of Samples" and eleven (11) questions under "Interpreting Test Results & Subsequent Actions".

A review of these FAQs, the Law and the Regulations reveals that this Law is not simple and will no doubt cause compliance difficulties for some sellers and landlords as well as some unanticipated costs. The Department of Health has also issued a "Summary of Private Well-Water Testing Law" which includes a contact E-mail address for Ms. Nancy Birnbaum (neb1@westchestergov.com) to answer technical questions regarding the electronic transmission of data to the County and a phone number for the public to access for additional questions (914-813-5000).

Contract Clauses

Attorneys for sellers will no doubt prepare new contract provisions. A sample might be as follows:

- "1. Seller represents that the premises to be conveyed pursuant to this Contract of Sale are served by a private well within the meaning of Section 707.01-707.14 of Chapter 707 of the Laws of Westchester County. Seller agrees that seller will, pursuant to Section 707.03 of said Law "arrange and pay for" the cost of a water test in compliance with said Law and provide to the County of Westchester and to purchaser within five (5) days of**

the receipt of the water test results from a certified laboratory, the water testing report. Purchaser agrees to certify in writing upon the receipt of said report that purchaser has received and reviewed the water test results and a written certification by each of the seller and purchaser will be exchanged."

"In the event that the water test discloses a "primary parameter water test failure" the parties acknowledge that pursuant to Section 707.03 that the rights of the parties with respect to same shall be as follows:

1. Seller may elect to correct the condition to achieve safe levels of contaminants and consummate the within transaction; or
2. the Seller may cancel the Contract of Sale and return the down payment in which case neither the seller nor the Purchaser shall be liable to the other thereafter; or
3. the Seller and Purchaser may agree in writing, to consummate the transfer upon such terms as may be negotiated by the parties including the correction of the condition by the Purchaser."

A purchaser's attorney may wish to add to the purchaser's rider a clause such as the following:

"1. Notwithstanding the provisions of Section 707.03 under Chapter 707 of the Laws of Westchester County and specifically the rights of the Seller pursuant to subsection c thereof, the parties agree that in the event that the well-water test results provided pursuant to said Law discloses a primary parameter water test failure, the Purchaser shall have the right to refuse to consummate the transaction even if the seller agrees to correct the condition to achieve safe levels of contaminants. Upon written notice by Purchaser to Seller regarding same within ten (10) days of the receipt of the water test results, Seller agrees to refund in full the down payment and thereafter this Contract shall be deemed to be null and void and neither party shall have any rights or obligations against or to the other. In no event shall Purchaser be responsible for any costs or expenses incurred by Seller in connection with the testing, remediation of a primary parameter water test failure or any other costs and expenses incurred in connection with this Contract of Sale as same relates to a failed primary parameter water test failure."