A Program for Housing Maintenance and Emergency Repair

Department of Buildings of the City of New York
A PROGRAM FOR HOUSING MAINTENANCE AND EMERGENCY REPAIR

Proposed by THE DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK *

THE PROBLEM

MORE than a quarter of a century ago, former President Franklin D. Roosevelt, then Governor of New York, commented:

We have a definite goal—the seeking within our lifetime of the day when we can say to the world: 'New York is a city without slums, New York is a city where every one of its ten million people can have living conditions which guarantee to them air, light and sanitation.'

That dream is still unfulfilled. Indeed, even the casual observer will note that New York City has over the years permitted the slums to thrive while the habitable areas have seemingly continued to shrink.

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Thus, it seems clear that somewhere between 450,000 and 550,000 of New York City's households today cannot find housing of an appropriate size and rental to fit their needs. Furthermore, there are indications that there are more than 800,000 dwelling units in New York located in deteriorating areas where some form of governmental assistance is essential to restore a sound environment.

Stated otherwise, but to the same effect, between 1950 and 1960, the City's population increased by 2,802,876 persons but only 324,651 additional housing units were constructed.\(^1\) In 1960, of the City's 2,758,116 units, 84,246 were in dilapidated condition and 343,311 were deteriorating; 30,308 units were without heating, 19,468 lacked hot water; 198,395 units shared bathrooms or had none at all, and 172,259 lacked other plumbing facilities.\(^2\) In all, there are today some 41,185 old law tenements that were built in the nineteenth century in which one million people still reside. These condemned antiquities remain with us, in an ever advancing state of deterioration,\(^3\) while new housing has failed to keep up with the ever-increasing demands. The importance of decent housing cannot be adequately stressed. Thus, to quote Mayor John V. Lindsay in a statement made when he was a member of the Congress:

Adequate housing goes to the root of most urban problems. Education, safety, delinquency, narcotics and health are directly affected by the housing conditions of the neighborhoods in

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\(^1\) United States Dept. of Commerce, Census of Population and Housing—Census Tract 104, 752 (1960).

\(^2\) Id. at 6.

\(^3\) It might also be noted that some forty years ago the Temporary Commission replied to those who now protest that efforts to maintain some measure of decency in such structures is unfair because it imposes a substantial financial burden. Thus, the Commission observed:

Nevertheless some of the worst features [of old law tenements] can be remedied to a degree. And if objection be made that the remedy is confiscatory, let it be said that the houses affected have long since retired the investment they represent, with adequate returns to boot and are to be tolerated when they come within at least the lowest standards consistent with civilized habitation. Report of Temporary Commission to Examine and Revise the Tenement House Law 35 (Jan. 30, 1928) (emphasis added).
our cities and towns. The problems of adequate shelter in our great cities cannot be neglected, and no public officer can pretend that they do not exist.

Over the years, several solutions have been advanced to the problem here posed. The classic solution was colorfully stated by former Mayor Fiorello LaGuardia of New York:


New construction to replace indecent antiquities is a much desired objective. The horrible structures which abound in far too great numbers in our major urban centers are frequently incapable of salvage, either through code enforcement or through rehabilitation. The notorious tenements which were condemned more than a half century ago because they provided neither light, nor air, nor sanitation, much less hope, must at long last be consigned to a by-gone era and replaced with modern, utilitarian and aesthetic structures.

However, new construction and rehabilitation are not the only answer. Even newly constructed housing can and does fall into disrepair when effective code enforcement is not provided. Similarly, age, in and of itself, does not necessarily mandate the conclusion that such housing accommodations are inadequate. If soundly constructed in the first instance and if kept in good repair, many old homes are and remain the pride of the community. In other words, both in the case of new construction and of rehabilitation of existing structures, code enforcement is and will always be an essential tool for the attainment of the goal of decent housing.

Code enforcement can and must always be approached from a variety of viewpoints. The well maintained new or old structure generally requires less attention on the part of government than the decrepit hovel. The aging structure in a deteriorating neighborhood requires consid-
erable attention if the neighborhood and the building are to be preserved for the future. The hovel in a blighted area requires, at the very least, strict code enforcement to assure its inhabitants that the basic standards of decency will be maintained until such time as they are relocated and the structure is either rehabilitated or replaced. Thus, the character of the structure involved is one factor, albeit a varying factor, to be considered in a total program of code enforcement.

The character of ownership is another factor to be considered. The responsible landlord—and it is widely conceded that the overwhelming majority of landlords are responsible—generally requires only slight prodding in order to insure that he will comply with the basic housing ordinances. The speculator with the small equity position, the poorly financed investor, the untutored and the unskilled require more than just a gentle prodding. Of course, there are in every major urban center those who purchase buildings for the sole purpose of milking them, without any desire to maintain them, and with their sole objective to drain every cent of profit possible. Where one encounters these parasites, one frequently finds that punitive action in and of itself is not enough, for the punishment all too frequently fails to meet the crime and, even when it does, the degradation of hovels continues. In these cases, then, punitive action must also be coupled with effective efforts aimed at prompt repair or maintenance of the structure.4

Manifestly, effective code enforcement necessarily depends upon the totality of weapons available in the arsenal of those who would skillfully use them to preserve and maintain the housing inventory. Thus, New York today employs a range of code enforcement tools. They include

4 There are still other factors worthy of note in considering a total program of code enforcement. They include the total planning for the area; the needs of the tenants; the future of the community; landlord, tenant and janitorial education; repair loan programs; and the availability of insurance coverage, to name just a few.
criminal proceedings, receivership, rent reduction and—the "final weapon"—vacatur.\(^5\)

The effectiveness of rent reduction as a weapon for securing code compliance has, in the opinion of many, been exaggerated. True, the threat of rent reduction is awesome because no owner of property is in that business for reasons of altruism. It is equally true that when rent reductions are effectuated against owners who are otherwise reasonably responsible, or who have a substantial equity interest in the affected property, or who have independent means, code compliance is frequently secured. However, experience has demonstrated that the speculator, the landlord whose equity interest in the premises is minimal, and the owner, lacking in means other than the revenue produced by the affected premises, tend with increasing frequency either to abandon their active interest in the rent-reduced structure or become unable to cope with the financial burden. They are confronted with a multi-faceted attack of increased expenditures necessary to effect repairs, decreased income by virtue of rent reduction, and the refusal of institutional investors to provide loans. Thus, this weapon of code enforcement has declined in effectiveness as a broad-based weapon, although it still is used as a selective tool in appropriate cases.\(^6\)

For example, recent experimental programs pursued by the New York City Rent and Rehabilitation Administration and the Department of Buildings have indicated that successful use can be made of approaches under which rents

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\(^5\) The second report of the Legislative Research Drafting Fund of Columbia University—the so-called Grad Report—proposed addition of a further tool through the adoption of legislation creating a cumulative per diem civil penalty. Legislation incorporating the aforementioned proposal and providing for the creation of an Administrative Tribunal empowered to enforce and apply it was introduced at the 1966 Session of the State Legislature by the Lindsay Administration and enacted by the State Senate. The legislation died in the Assembly Rules Committee. It is anticipated that the legislation will be re-introduced at the 1967 Legislative Session.

\(^6\) In 1965, the Department of Buildings referred to the Rent and Rehabilitation Administration 1,809 cases for appropriate action. During the first eight months of 1966, 1,714 cases have been referred for like action.
are placed in escrow to be used solely for the making of repairs, or rent reductions are temporarily stayed to permit the making of repairs in accordance with a stated schedule. These new approaches make maximum use of the threat that rent reduction poses and minimize instances of abandonment which, in turn, only accelerates deterioration of the affected housing.

Receivership has been described by former Buildings Commissioner Judah Gribetz as "an essential and primary code enforcement weapon." Few will dispute the observation that where the owner of property has, as a practical matter, abandoned it, a responsibility exists either to provide new shelter for inhabitants of the structure or to provide for maintenance. With standard relocation facilities at a minimum, if they exist at all, maintenance is almost invariably the only practical course. The same alternatives are, as a practical matter, posed where the owner is either unwilling or unable to effect repair. Thus, as stated in the so-called Grad Report:

For the class of seriously deteriorated buildings brought under receivership this appears to be the most effective and direct remedy. For the slum dweller forced to occupy grossly substandard buildings—frequently with hundreds of violations—receivership alone provides certain removal of all serious hazards, and, at least, minimum legal habitability. Where a criminal prosecution is brought, the fine is paid, but the violations remain. While rent reductions, rent abatement or rent withholding may serve as powerful inducements for repair the result is sometimes uncertain. A minority of owners are not amenable even to these economic pressures. But in the case of receivership, the code enforcement agency carefully selects buildings appropriate for the program, designates the hazards to be eliminated, and a responsible municipal agency is appointed to remove the accumulated defects.

The remedy is effective because all of the parties involved or concerned with the deteriorated conditions of the building can be notified and brought together with comparative ease. The municipality is present on behalf of tenants and the public at large; if neither the owner of the equity nor the

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8 21 J. Housing 297, 300 (1964).
mortgage investor accepts responsibility, its official agent can assume the municipal obligation to bring the building into minimum legal condition. The owner, who may vanish like a ghost when personal service for criminal prosecution is attempted, will lose this advantage upon the initiation of receivership proceedings since he can be served by ordinary mail and posting of the building, if personal service is not feasible. The mortgagor who may be receiving a high interest rate on his loan without concern for the condition of his asset, may lose some of the benefits of his silent partnership in slum ownership unless he acts to protect his investment. Receivership has been a decisive influence on owner repair. Even after the referral of a building to the receivership unit, the Department gives every encouragement to the owner who evidences a clear intent to commence work immediately and wishes to enter into a compliance agreement.

According to the statistics of the receivership unit of the Division of Housing, in the approximately 600 cases handled by the unit as of May 1965, at least 20% were closed because the owner had undertaken substantial or total compliance before the court’s show cause hearing. In fact, the owner may even undertake the repairs after the Supreme Court hearing, if he posts security for his performance. Furthermore, because the remedy is effective, it has had strong deterrent effect on other owners. Criminal prosecution of the owner of a neighboring building leading to a fine of $25 hardly creates the impetus to repair; but receivership proceedings do, indeed, have a deterrent effect on neighboring owners who are stimulated to bring their own buildings into legal compliance. Thus, the accomplishments of receivership cannot be measured solely in terms of the direct ratio between municipal costs and dwelling units salvaged.9

Having thus referred to several of the favorable aspects of receivership, it should also be noted that the program as pursued to date has not been without shortcomings. First of all, by their very nature the structures taken into receivership are among the worst maintained in New York and require considerable work before they can be made to adhere to the minimum standards of decency. Thus, the expense involved frequently is quite considerable. An-

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9 Legislative Research Drafting Fund of Columbia University, Legal Remedies in Housing Code Enforcement in New York City, 115-18 (1967) [hereinafter cited as the Grad Report].
other limitation upon receivership is the time it generally takes between the commencement of proceedings and the completion of repairs. The passage of months is not unusual. Hence, for emergencies or repairs that fall short of massive repair, receivership is less than an ideal tool.

The principal code enforcement weapon employed has been punitive criminal proceedings. However, over the years the threat of criminal proceedings has rapidly decreased in effectiveness as a weapon. From 1961 through 1965, the constantly declining average fines per case were $23.00, $21.92, $16.86, and $13.73, respectively. These figures assume added significance when one notes that they reflect *per case* as contrasted with *per violation* fines. Having in mind that the usual case involves ten, twenty or more violations, it becomes apparent that the *per violation* figure frequently amounts to less than one dollar, although the statutes generally found to have been violated expressly authorize the imposition of fines running into the many hundreds of dollars. Additionally, almost invariably those same statutes authorize the imposition of jail sentences. However, only rarely are jail sentences imposed. In 1964, 17,724 cases were recorded involving arraignments for Multiple Dwelling Law misdemeanors and offenses. Only 271 of such cases resulted in discharge of the defendant for any reason, including acquittal. However, only eight convictions resulted in confinement of any sort. Also imposed most sparingly was the most effective form of sentence, i.e., confinement with execution suspended for a short period of time pending correction of the operative violations of law. In 1964, the judiciary exercised its most meaningful power on only seven reported occasions.

The failure of criminal sanctions was foreseen by the draftsmen of the Multiple Dwelling Law, now our basic

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11 *Id.* at 26.
12 *Id.* at 13, 15.
13 *Id.* at 34. Under Section 2188 of the Penal Law and Section 470(a) of the Code of Criminal Procedure, the court may direct that repairs be effected within a specified time and if there were a failure to comply with the direction, execution could be had on the jail sentence.
codification of housing standards. Generally, the law restricted new construction and provided for alterations in existing structures to assure greater safety and improved sanitary conditions. In addition to these substantive provisions, the original Multiple Dwelling Law contained a number of code enforcement weapons, including the criminal sanctions heretofore discussed. However, primary among the weapons created, in the eyes of the draftsmen at least, was the power conferred upon government directly to perform emergency repairs.\footnote{Report to the Legislature of the \textit{Temporary Commission to Examine and Revise the Tenement House Law}, Leg. Doc. No. 54, 5-6 (1929).}

To accomplish an effective emergency repair program, the draftsmen granted an array of powers to the responsible governmental agency, including the power to fund a program on a revolving basis, replenishing itself out of civil and criminal penalties recovered; the power directly to repair dangerous and non-dangerous conditions; the power to make such repairs with or without a previous order to the owner; the power to recover the costs of repair; and the power to recover a $250 civil penalty for failure to comply with an order.

More specifically, the original law provided clearly that the department could order removal of a condition "dangerous to life or health"\footnote{First sentence of original section 309(1).} and, upon the owner's failure to remove the condition, could itself execute the order,\footnote{Fourth sentence of original section 309(1).} and recover the costs directly from the owner\footnote{The provisions of section 309(2) (now section 309(3)) were restated in section 304(2) by amendment in 1947. Apparently, the purpose of this amendment was to consolidate under one section the penalty provisions and thus provide a cost recovery section of general application. The 1947 restatement (in section 304(2)) confined itself to the "order" approach and provided that after an order, the department could repair any "violation"} or by a lien.
against the building and land \textsuperscript{18} or on the rents without a prior judgment.\textsuperscript{19} Present section 309 continues these powers substantially unchanged. In addition, section 304 continues the original §250 civil penalty for failure to comply with an order.\textsuperscript{20}

The original Multiple Dwelling Law also provided for department repair without any order being given and for the repair of a non-dangerous condition. The grant of power to perform both types of repair was in the second sentence of the original section 309(1) [present 309(1)(d)] which provided:

The said department may order or cause any multiple dwelling or part thereof, or any excavation, building, structure, sewer, plumbing, pipe, passage, premises, ground, matter or thing in or about a multiple dwelling or the lot on which it is situated, to be purified, cleansed, disinfected, removed, altered, repaired or improved.

This sentence does not limit itself, as does the remainder of section 309, to a nuisance or dangerous condition. Recovery for such repairs was covered by the original section 309(2) [present section 309(3)]. An

and recover costs. Prior to amendment, this section (then section 304(6)) read:

Any person who, having been served with a notice or order to remove any such nuisance or violation, shall fail to comply therewith within five days after such service, or shall continue to violate any provision or requirement of this chapter in the respect named in such notice or order, shall also be subject to a civil penalty of two hundred fifty dollars.

Following the 1947 amendment, the section (now 304(2)) provided (the new sentence added by amendment is italicized):

2. Any person who, having been served with a notice or order to remove any nuisance or violation, shall fail to comply therewith within five days after such service, or shall continue to violate any provision or requirement of this chapter in the respect named in such notice or order, shall also be subject to a civil penalty of two hundred dollars. Such persons shall also be liable for all costs expenses and disbursements incurred by any such department or its agents or contractor in the removal of any such nuisance or violation.

Thus, the 1947 amendment clearly granted the department an additional right to recover for the removal of any "violation" if the repair was preceded by an order to correct. N.Y. Sess. Laws 1947, ch. 502, §1 (emphasis added).

\textsuperscript{18} Original section 309(3).

\textsuperscript{19} Original section 309(4)(a).

\textsuperscript{20} Fourth sentence of original section 304(1), present section 304(2).
additional highly significant power was granted by the legislature in 1965 when it provided that the department receive a lien prior to existing mortgagees for the cost of repairs where an order has been given.\textsuperscript{21}

Certainly, it is puzzling that emergency repair, which the draftsmen of the Multiple Dwelling Law considered to be the paramount weapon granted to government, and which has been enhanced by subsequent legislatures, has not heretofore been widely used. Only to some extent is this explainable. During the early part of the 1930's, reliance upon criminal sanctions was avoided by the successful use of vacate orders.\textsuperscript{22} The vacate order, a summary power of the department, can, under certain conditions, be a highly effective code enforcement weapon. As stated by former Buildings Commissioner Judah Gribetz:

The ultimate and most effective code enforcement is the vacate order—simply the power to close up and remove tenants from dwellings which are unfit for human habitation. The vacate order is so simple to execute and so final in its accomplishment—no owner has to be found and served with legal powers, no court proceedings are involved, there is an absence of numerous reinspections, and the building is removed from the market place of human misery.\textsuperscript{23}

But, as Commissioner Gribetz also observed, the potency of the vacate order is dependent upon the existence of a reasonably high vacancy ratio. Thus, in 1934, when the city-wide vacancy ratio was twelve percent, the vacate order was more effective than criminal sanctions in bringing about compliance. In the 1960's, with a vacancy ratio under two percent and with some four thousand vacant and derelict structures dotting New York City, the vacate order is of little utility as a code enforcement weapon.\textsuperscript{24}

\textsuperscript{22} N.Y.C. ADMIN. CODE § 643(a)-1.0; N.Y. MULT. DWELL. LAW §§ 302, 309.
\textsuperscript{23} Address by Judah Gribetz, SNAG Club Meeting, 12-13, March 11, 1965 [hereinafter cited as SNAG Speech].
\textsuperscript{24} SNAG Speech 12-17. The Grad Report comments in detail upon the history of the vacate power as a code enforcement weapon:
One might wonder why a repair program has not been fully effectuated, although the power to do so has existed for years under the Multiple Dwelling Law. In 1937, the New York Court of Appeals held unconstitutional a repair program maintained under the authority of Section 309 of the Multiple Dwelling Law, a program which was not limited to emergencies. Thereafter, repairs were continued under a voluntary program based upon low-interest long-term loans. The program, surprisingly, was successful for some years. However, in the early 1940's, with the shortage of investment capital, the program was discontinued.

Early in 1940, Mayor LaGuardia announced that his Committee On Property Improvement [a voluntary group of governmental, banking and real estate officials] ... had worked out a basic financial arrangement for complete compliance loans, to enable owners to remove fire hazards endangering more than 500,000 residents of this city and to provide a sound economic plan for the removal of such hazards.

This plan was adopted, and, as a result, owners or mortgagors of property, desiring to save their property by removing major fire-hazard violations of the Multiple Dwelling Law, are enabled to obtain compliance loans upon recommendation by the Mayor's Committee. The loans are obtained from a

From the time of the First World War until the thirties, the low vacancy rate of low-cost housing made it impossible to use the remedy. By 1934, when Commissioner Langdon Post once again returned to the issuance of vacate orders, a combination of factors, primarily related to impact of the Great Depression, had again increased the vacancy rate in old-law tenements lacking private sanitary facilities or central heat. From 1935 to 1937, over 5,000 vacate proceedings were commenced, and about 1800 buildings were actually vacated. By 1937, with a general improvement in the economy, the decreasing vacancy rate of low-rent housing again rendered wholesale use of vacate orders impracticable. To some extent, the enactment of the Multiple Dwelling Law itself contributed to the tightening of the housing market. When the law's moratorium on the application of its requirements to existing buildings terminated in the mid-1930's, many owners, and particularly banking institutions, that had acquired buildings through foreclosure during the depression, chose to withdraw the buildings from the rental market rather than to make costly alterations or repairs required by the law. Grad Report 102-04.

HOUSING MAINTENANCE

savings bank at 4 per cent simple interest payable in ten years in equal annual or semi-annual installments. In some cases monthly payments are permitted at the same rate of interest. Other sources from which money for this purpose may be obtained require payment in three years, the usual interest charge being 5 per cent, compounded.

It may be well to note that when an owner removes violations on his property through the help of the Department and the Mayor's Committee On Property Improvement, the low rate of interest made possible under this plan does not warrant an increase in rent. On the other hand, when loans are secured from other sources, requiring the money to be repaid fully in a period of three years, the owner often has no alternative except to raise the tenants' rent.\(26\)

The Department of Buildings is now prepared and herein proposes to institute a complete repair program, implementing the original intent of the Multiple Dwelling Law and at long last employing the powers conferred in accordance with that intent.

Orders will be served upon owners directing that work be done within the time specified—not longer than twenty-one days. If the work is not done, or is improperly done, the City will do it. To the extent possible a copy of such notice will be served on mortgagees. The City, without judgment, will file a lien upon rents, the premises and the lot to satisfy the cost of repair. That lien can be a priority lien and, as such, take precedence over mortgages and other like security interests. In proper cases, the City will sue the owner for immediate satisfaction of expenses, through foreclosure or otherwise, and also for recovery of a \$250\ civil penalty for violation of the order to remove the violation. In the case of a corporate owner, the provisions of Chapter 619 of the Laws of 1966, the so-called "WMCA Law," will be invoked, thereby assuring that the large shareholders will be held personally liable.

In cases where time is of the essence and notice and order cannot be utilized, the department will effect the requisite repairs and bring suit against the owner for costs. In such cases, in particular, the Spiegel Act (Section

\(26\) 1940 DEPT OF HOUSING AND BLDGS. ANN. REP. 7-9.
143(b) of the Social Welfare Law) will also be employed to help effect recoupment for the emergency repairs.

Before proceeding to detail the program thus proposed, it should first be observed that it is not entirely correct to assume, as has thus far been the case, that the proposal for a program of emergency repair is entirely novel. A program involving one approach to the making of emergency repairs has been in effect in New York City for over a year. To better understand the departures therefrom which here are proposed, a brief discussion of the current program appears appropriate.

THE CURRENT EMERGENCY REPAIR PROGRAM

(a) The genesis of the program. On January 29, 1965, the Board of Health of the City of New York adopted a resolution designating as public nuisances dangerous to life and health certain dwellings within the City which, by virtue of neglect by the owner or repeated violations of laws relative to housing maintenance, lack certain essential services such as running water, sewage disposal facilities, electricity, or heat, or contain other conditions which present an immediate danger to the life and health of occupants. The Resolution ordered immediate abatement of such nuisances by those responsible under law for so doing, or, in the event they failed to do so, authorized the Board of Health to take such steps as might be required to effect abatement of the nuisances thus declared.

That Resolution, published as prescribed by Section 564-21.0(c) of the Administrative Code, served as notice to all those responsible to abate such nuisances and also empowered the Department of Health to effect such abatement forthwith through the employment of all necessary measures. On January 31, 1965, the Anti-Poverty Operations Board provided the means to effect such repairs by voting a grant of $1 million to establish a revolving fund

27 For convenience the above-cited Resolution will hereafter be referred to simply as the Resolution.
to finance repairs directed to be made pursuant to the Resolution.

On March 19, 1965, Mayor Robert F. Wagner promulgated Executive Order No. 134, empowering the Housing Executive Committee of the City of New York, acting in concert with the Anti-Poverty Operations Board, to undertake an emergency repair program designed “to eliminate conditions dangerous to life and health in residential housing [irrespective of whether privately or governmentally owned or operated] where it has been impossible to cause the owners or other responsible persons to do so. . . .”

All departmental heads and governmental agencies were directed to cooperate with the Housing Executive Committee, its Chairman, the Coordinator of Housing and Development, and the Anti-Poverty Operations Board and its Chairman.

Implementation of Executive Order No. 134 came several months after its issuance. An Emergency Repair Action Committee was established, consisting of representatives of the Departments of Health (whose representative was designated as Chairman), Buildings, Real Estate and Relocation. The Committee was to determine whether emergency repairs, as contrasted with other remedies such as receivership or vacatur, were called for, based upon information to be furnished by Committee members. The Committee could draw upon the staffs of the Departments of Real Estate, Relocation and Health, the Housing Authority and the Housing and Redevelopment Board “to assign staff to daily oversee the maintenance of each building for such period of time as the Committee shall determine.”

The second step in the implementation process came on October 28, 1965 when procedures were established for designating buildings for repairs and the recoupment of moneys expended for repairs. Upon notification by the Buildings Department of which buildings were designated, the Health Department would make the requisite certification under that Department’s Resolution and would

28 Simultaneously, the Secretary of the Committee would be notified so that recoupment efforts might be initiated.
direct the Department of Real Estate to take appropriate action.

The task of coordinating recoupment efforts was vested in the Secretary of the Emergency Repair Action Committee. The Connorton-Edelstein Memorandum directed that Rent and Rehabilitation District Offices provide the Secretary with pertinent ownership and rent information, that the Real Estate Inspector secure and furnish to the Secretary information concerning the identity of tenants and, where repairs exceeded fifty dollars, the Corporation Counsel would secure and furnish a title search. Three weeks after repair work commenced, a demand letter was to be sent by the Secretary to all responsible ownership or management parties. Where this means of effecting recompense failed, the Secretary was then directed to seek recompense from tenants, employing the facilities of the Department of Real Estate in posting a copy of the demand letter on the building, in effecting mailing to tenants where appropriate and in maintaining financial records. The Corporation Counsel was directed to appear for tenants subjected to suit for making such direct payment and to maintain suit against owners to enforce collection where all other means failed.

(b) Project Rescu. Some months after the program went into effect, a secondary means for detection and verification of emergencies came into being. Funded initially by a grant of some $662,424, allocated by the Economic Opportunity Committee, Project Rescu was authorized to establish a community-oriented program of detection, verification and coordination of emergency conditions in five localities.

Trailers were placed on the public streets in Bedford-Stuyvesant, Central Harlem, East Harlem, the Lower East Side of Manhattan and the South East Bronx. Upon the receipt of complaints, either at the trailers or at the Central Complaint Bureau of the Buildings Department, the practice, in theory at least, was that verifiers (who were indigenous to the community) would determine whether there was basis to the complaint and, if so, a Buildings Department Inspector and Real Estate Department Estimator
assigned to the trailer would investigate, place violations where appropriate, estimate the cost of repair and then notify the Health Department. At that point, the processes for repair and recoupment outlined briefly above would be followed, except that local contractors were to be employed to effect repairs to the extent possible and the Real Estate Estimator would also have the responsibility for checking whether the work had been done properly.

Thus, in at least five of the areas having the greatest need for emergency repair action, field forces were provided sixteen hours a day, seven days a week, to make the initial findings which were a condition precedent to repair.\(^{(29)}\)

(c) The results of the program. From January 29, 1965—the date of adoption of the Health Department Resolution—through July 31, 1966, the Department of Real Estate has incurred liability in excess of $1 million under the emergency repair program. At the same time, recoupment aggregated slightly in excess of $21,500. More importantly, 3,561 buildings were the subject of some form of emergency repair action. Disbursements made during the above-stated period totalled some $897,000, while some $153,000 remained unpaid as of July 31, 1966. Receipts for the same period aggregated $20,585.17, with $10,956.50 received from landlords and $9,628.67 from tenants.

(d) Appraisal of the program. Most objective observers agree that, despite shortcomings, the program has been a success in terms of the most meaningful standard of measurement—people. Thousands of New Yorkers residing in some three thousand tenements were provided heat, sewerage, running water, relief from leaking roofs, removal of accumulated refuse, janitorial services, and other like assistance which would otherwise have been denied them. Government thus tangibly demonstrated that it cared for the plight of people. In countless other cases, landlords were moved to act promptly to correct illegal conditions

\(^{(29)}\) Though originally contemplated as a brief crash program commencing on or about December 1, 1965, the life of Project Rescu has periodically been extended and continues in effect.
in the face of the possibility that government would otherwise intervene. In the latter achievement, the program provided an added—and most effective—instrument of code enforcement.

Certainly, such governmental action served to prevent untold misery. Similarly, in a City which at times gives the impression of an ever-enlarging sea of slums dotted with ever-shrinking islands of habitable housing, such relief was essential. Clearly, the relief offered, albeit sometimes delayed, was far more speedy than would have been the case if the normal punitive route had been pursued, if only because of the fact that, in many cases, the landlords involved were either runaways or hardcore slumlords who view fines as part of the cost of doing business.

The principal objections to the program as effectuated to date have been that it has not gone far enough and has not been as effective as it might be and recoupment has not been effected to the extent possible. The first objection can simply be restated as “too little and too slow.” Few will dispute the observation that ready availability of inspectional and other personnel authorized to direct the making of emergency repairs is much to be desired. However, a more fundamental objection has turned upon the operable Health Department Resolution. By its terms, the Resolution defines correctable nuisances in deteriorated buildings as those:

(1) (a) which have been seriously neglected by the owner
   (b) against which there are repeated violations of the
       Health Code or Multiple Dwelling Law or other pro-
       visions of the housing maintenance laws

       and

(2) which have one or more of the following conditions:
   (a) no running water

30 True, other objections have been raised concerning selection of personnel, their conduct, their effectiveness and the like. However, in terms of overall program planning, such objections pose, primarily, problems of administration and can readily be dealt with if there is the will and the means to effect such reform. Hence, such objections are of little moment in so far as the overall program is concerned and they will not be dealt with herein.
(b) no effective sewage disposal facilities  
(c) no electricity  
(d) no heat after repeated violations  
(e) no heat because of inoperative boiler, furnace or distribution facilities  
(f) such other conditions that in the Department of Health's opinion they present immediate danger to life and health of occupants or those living in adjacent buildings.

As thus limited, the Resolution arguably excludes such conditions as lack of hot water, gas or sanitary facilities.

Perhaps the most persistent criticism in this area is the time it often takes to effect minor repairs. At present, even minor repairs, such as leaking pipes, broken windows, lack of operable hall light fixtures and minor boiler defects, must be serviced by outside contractors. The argument most often heard is that the City should maintain its own repair crews for minor repairs. By so doing, another objection would be met—what happens to the men now employed under Project Rescu when it terminates? The program clearly could incorporate training and experience activity while, at the same time, providing repair facilities.

The criticism of the recoupment activity to date finds dramatic support in the fact that less than $25,000 has to date been recouped though some $1 million has been expended.

Obviously, it would be foolhardy to think of this program as self-liquidating. Literally thousands of New Yorkers today inhabit housing which, by modern standards, ought not be permitted to be inhabited. However, the lack of adequate new construction over the years, plus the deterioration of the existing housing inventory, have combined with other circumstances to dictate that government withhold its ultimate weapon—vacatur—in many cases where conscience might otherwise dictate such action. Almost invariably such structures are not economically viable. Hence, the cost of even minimum repair and maintenance cannot be fully liquidated out of existing rentals. Where the owner fails to do so, government has the choice in those instances to effect the repairs required to provide
at least minimum standards of decency or to vacate the structures and find new shelter for the inhabitants. Because of the deplorable condition of the housing inventory, the choice is merely theoretical since there is no place to relocate in dignity those many thousands of persons who would then be affected by vacatur. Thus, government must be prepared to shoulder for some time to come some part of the cost of housing maintenance, at least until the housing inventory is substantially improved.

However, some criticism of the recoupment effort made to date does seem pertinent. There has seemingly been a virtually complete failure to secure a security lien—much less a priority lien—to protect the City's interest and investment. This has been the fault, in part at least, of the means used to provide a legal basis for the program. It has also been the fault of the program and those administering it. Thus, if thousands of dollars have been poured into the repair or maintenance of a structure and recoupment in cash cannot be secured, because, for example, of abandonment by the owner, then the City should at least have title to the structure and lot by foreclosure. Such an approach assumes added significance when one notes that not infrequently the City must pay substantial sums for acquisition of title to these same hovels when it seeks to effect improvement through urban renewal, the construction of public housing or the like. At least these costs would be sharply diminished if the City had a clear priority lien pending against the premises.

Similarly, inadequate use has been made of such devices as the Spiegel Act to secure some measure of recompense. Thus, when emergency repairs have been made, the Department of Welfare might withhold all rental payments for the affected premises and pay them into an escrow fund from which they could be withdrawn only after discharge of the repair lien. Furthermore, it seems

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31 See N.Y.C. ADMIN. CODE § 564-24.0.
32 In theory, the moneys would be withheld under Section 143(b)(2) of the Social Welfare Law and paid into the escrow fund under Section 143(b)(1) and (6). When the landlord has discharged the repair lien,
clear that until recently, at least, the effort to secure collection was at best half-hearted. Clearly, improvement is possible.

THE LEGAL BASES FOR THE PROPOSED PROGRAM

To permit comprehension of the foundation and nature of the program herein proposed, there is set forth below a brief discussion of the legal bases for the proposal. It should be noted, however, that no attempt is here made to discuss various legal problems in depth because the law in this area is, to say the least, untested and poorly drafted and, hence, somewhat less than crystal clear.

(A) Creation of the housing maintenance and emergency repair funds. A relatively substantial amount of capital or "seed" money obviously is essential to the operation of the program. Dual approaches to solution of that problem are urged.

(1) The capital budget allocation. It is urged that a capital budget allocation of $1 million be made. It is unrealistic to assume that the proposed program will be wholly self-liquidating. There are a number of antiquated structures in New York City which simply are not viable economic entities in light of the ravages of time and the historic lack of adequate maintenance. Hence, provision must be made to cover such exigencies and recognition in advance of the event must be given to the fact that there will be a certain and, hopefully, minimal amount of "slippage."

It is urged that the basic fund be provided out of capital budget funds as contrasted with expense budget

he would be entitled to his money under Section 143(b)(1) and (6). In practice, the payment might, perhaps, be made directly to the emergency repair fund. When the landlord sues to recover for illegal withholding of rent, he would be faced with a counterclaim based upon the cost of repair plus the $250 civil penalty authorized under Section 304(2) of the Multiple Dwelling Law, thus making the possibility of such litigation most unlikely because it would prove too costly to the plaintiff-landlord who might find the end result to be a "wash" except for the $250 civil penalty which he would have to pay.
funds. The power to proceed in that fashion seems clear. Section 211(1)(a) of the City Charter provides: "The term 'capital project' shall mean: (a) any physical public betterment or improvement or any preliminary studies and surveys relative thereto." 33

The only aspect of the Charter provision which may give occasion for pause stems from usage of the term "public" in connection with a proposed program of emergency repair and maintenance of privately-owned structures. In that regard, the following observations may be made in the absence of germane decisional law. Although the word "public" is undefined in either the Charter or the Administrative Code, as used in section 211(1)(a), the term seems to have three possible meanings:

(1) that the "betterment or improvement" be in the public interest regardless of who owns or has an interest in the improvement. Emergency repair would obviously qualify under this definition;

(2) that the public (or the City) have some rights with respect to the improvement. Emergency repair would qualify under this definition since the City may recover costs (a) where an order is served, under sections 309 and 304(5) (removal of any violation) and (b) where no order is served, under section 309(3);

(3) that the public (or the City) hold legal title to the improvement. This meaning is probably incorrect. Since subsections (b) and (c) of section 211(1) cover the "acquisition" of real and other types of property, it is apparent that subsection (a) does not confine itself to title ownership by the City. Thus, only the last meaning would argue for preclusion of an emergency repair program from the capital budget.

It should also be pointed out that the program established in section 230 with relation to the City's installation of sidewalks or fencing or filling vacant lots is substantially the same type of program as the emergency repair program. Since the funds for this program are defined in the City Charter under subsection (d) of section 211(1) as a

33 See also N.Y.C. ADMIN. CODE §211-1.0(a) (emphasis added).
capital project and a public improvement, it is consistent that funds for the emergency repair program are properly within the capital budget.

Further support for the proposition that capital budget funds may be utilized by the proposed program can be found by reference to Section 11.00 of the Local Finance Law. That statute deals with the powers of municipalities to contract indebtedness and fixes the time limits relating to the duration of such indebtedness. It logically follows that improvements for which periods of probable usefulness are expressed are, indeed, capital improvements within the ambit of the capital budget.

In 1960, the legislature amended paragraph (a) of section 11.00 by adding subdivision sixty-three:

Abatement of nuisances. The repairing or demolishing of a multiple dwelling, or part thereof, pursuant to section three hundred five of the multiple residence law, ten years.

In 1962, when the legislature amended Section 309 of the Multiple Dwelling Law, it again amended paragraph (a) of section 11.00 by adding the following, immediately prior to the words “ten years”: “or section three hundred nine of the Multiple Dwelling Law.” Thus, the legislature fixed a period of probable usefulness for repairs or demolition pursuant to section 305 by the 1960 amendments, and section 309 by the 1962 amendment. Certainly, the latter amendment indicates clearly that the legislature views repairs made pursuant to section 309 as capital improvements.

34 Section 11.00 provides:

A municipality, school district or district corporation may not contract indebtedness for any object or purpose for a period longer than the period of probable usefulness set forth below for such object or purpose. . . . Where a municipality is authorized by law to pay to the state or a county all or part of the cost of a capital improvement, the period of probable usefulness determined in this paragraph for a like capital improvement shall be the period of probable usefulness for the municipality's share of the cost of such capital improvement.


(2) The section 304(5) "revolving fund." A second avenue for funding—and one which we believe ought to be pursued simultaneously with that urged above—is provided under Section 304(5) of the Multiple Dwelling Law. Section 304(5) empowers New York City to create a separate fund of $25,000 to be constantly replenished by the proceeds of criminal and civil penalties collected pursuant to the Multiple Dwelling Law.\(^{37}\) Since the special fund contemplated by this section has never been created, all penalties now being collected are deposited in the general fund of the City treasury in accordance with Section 126 of the City Charter.\(^{38}\) When the City acts to create the special fund, such penalties will become available for the making of repairs. This frames the question as to who shall so act for the City.

No reference is made in section 304(5) to the "local legislative body." Therefore, the apparent intent of the section is to give the Mayor power to act by executive order. In contrast, Section 3 of the Multiple Dwelling Law as originally enacted\(^{39}\) provided that the "local legislative body of any other city . . . may adopt the provisions of this chapter. . . ." It would seem that if it had been intended that the City act by legislative mandate to create the special fund, similar language would have been employed in section 304(5). Moreover, since the Mayor is the chief executive of the City and is given the right to "exercise all the powers vested in the city,"\(^{40}\) it would seem

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\(^{37}\) Prior section 304(2), the precursor of section 304(5), was without precedent when enacted in 1929.

All penalties collected under this chapter shall be paid into the treasury of the city, but no provision of this chapter shall be construed to prohibit such city from creating and maintaining out of such penalties a separate fund not in excess of twenty-five thousand dollars, out of which payment may be made for repairs made by the department charged with the enforcement of this chapter, its agents or contractors, as provided in section three hundred nine.

\(^{38}\) Section 126 of the City Charter requires all revenues of the city "from whatsoever source except taxes or real estate, not required by law to be paid into any other fund or account . . . [to] be paid into . . . the general fund" (emphasis added).

\(^{39}\) N.Y. Sess. Laws 1929, ch. 713, § 3.

\(^{40}\) Charter of the City of New York § 8.
that he can act in its name where action by local law is not specifically required.

In order to create and maintain this fund, section 304(5) is specific in requiring the City to segregate penalties as they are paid into the City treasury. The section provides that the fund may not exceed $25,000. But it does not say that the fund may not exceed $25,000 per annum, per month or per day. The obvious intent of the section is that the limitation is to be fixed as currently as practicable in accordance with the accounting practices of the City. Since section 304(5) provides that the fund shall be maintained out of “all penalties collected,” it might be argued from the absence of the word “fines” that criminal recoveries are not included within the section. It would appear, however, that this argument will not withstand examination.

The caption of section 304 (the enforcement section of the Multiple Dwelling Law) reads “Penalties for violations.” Since the section speaks both of civil and criminal sanctions, the use of the term “penalties” in the caption obviously refers to both. Again, section 304(1)(a) refers to a “criminal penalty,” thus recognizing that criminal recoveries are a type of “penalty.” Further, sections 304(6) and 304(6)(a) refer to a “criminal liability or penalty” and section 304(7) refers to “the civil or criminal penalties provided in this section.” Since criminal recoveries are considered by section 304 to be “penalties,” they are clearly included within the language of section 304(5): “all penalties collected.” Finally, section 304(2), the predecessor to section 304(5), provided that “all penalties collected under this chapter” could be applied to the establishment and maintenance of a special repair fund.41 Since the Multiple Dwelling Law at that time imposed both civil and criminal penalties, it is apparent that it was intended

41 N.Y. Sess. Laws 1929, ch. 713, § 304(2) (emphasis added). The removal of the language “under this chapter” was not intended to result in a substantive change. It was removed in 1946 as part of a general “simplification” of the law. N.Y. Sess. Laws 1946, ch. 950, § 304(9).
that fines as well as civil recoveries were intended as sources of the fund.

(3) Summary. It is urged that a dual approach be taken. A capital budget allocation of not less than $1 million ought to be provided, thereby to insure adequate funding without delay. Additionally, the revolving fund authorized by section 304(5) ought to be established (a) to cover the cost of such items as fuel, which arguably are not within the ambit of capital budget expenditure and (b) to provide an unmistakably clear indication that the program will be self-liquidating and where it is not, that penalties will take up the burden. However, it seems clear that before this approach can fully be effective, a broader funding statute must be enacted. Thus, it is urged that section 304(5) be amended to eliminate the $25,000 restriction and to make clear that all recoveries under the housing ordinance—criminal penalties, civil penalties, civil recoveries (including those obtained after the Health Resolution has been utilized to warrant repairs in respect to one and two family homes and those obtained under the authorities hereinafter discussed), rent reductions, Spiegel Act diminutions of rents, Multiple Dwelling Law Section 302(a) rent abatements and the like—would be payable into the fund and could then be used to finance the repairs here proposed. If an experimental program under section 304(5), coupled with capital budget funding, proves successful, there is a substantial possibility that the legislature will approve an amendment along the lines outlined above. At that time, the need for continued capital budget or other City funding might well cease to be necessary.

(B) The power to act and recovery. Two distinct legal bases exist for the program here proposed. The Resolution, coupled with Section 564-24.0 of the New York City Administrative Code provides one such basis. The other is founded upon Section 309 of the Multiple Dwelling Law.42

42 A third basis for action exists under Section 78 of the Multiple Dwelling Law, which permits the department to repair or to order repaired broad areas of bad housing conditions. However, no independent
The power to act under section 309. Under Section 309 of the Multiple Dwelling Law, the department has two alternative procedures available for the making of repairs: the "cause" procedure and the "order" procedure. The "cause" procedure is based on section 309(1)(d), and the "order" procedure, in part, on section 309(1)(c):

The department may order or cause such nuisance [defined in subdivision (a) and (b)] to be removed, abated, suspended, purified, altered, repaired or otherwise improved as the order shall specify.43

Despite the fact that section 309(1)(c) states at first that the "cause" as contrasted with the "order" route is available thereunder, reference to the closing phrase of the subsection makes clear that an "order" is necessary since the legislation mandates that the corrective action to be taken shall be such "as the order shall specify."

(a) The "cause" procedure. The "or cause" language in section 309(1)(d) goes back to the Charter of 1901.44

right is created thereunder for securing recovery for the cost of such repairs. Instead, section 78 seemingly relies upon section 309 to accomplish that result. Hence, section 78 adds little to the powers afforded under section 309 and related provisions.

43 Emphasis added. The term "nuisance" as defined by and used in section 309 is quite broad. Thus, section 309(1)(a) states:
The term "nuisance" shall be held to embrace public nuisance as known at common law or in equity jurisprudence. Whatever is dangerous to human life or detrimental to health, and whatever dwelling is overcrowded with occupants or is not provided with adequate ingress and egress or is not sufficiently supported, ventilated, sewered, drained, cleaned, or lighted in reference to its intended or actual use, and whatever renders the air or human food or drink unwholesome, are also severally, in contemplation of this law, nuisances. All such nuisances are unlawful.

It is difficult to conceive of any condition which might come within the purview of the program here proposed which would not fall within the ambit of the above-cited definition.

44 This subsection is based on the second sentence of Section 1176 of the Charter of 1901 which provided in part:
Said board (Board of Health) may order or cause any excavation, erection, vehicle, vessel, water craft, room, building, place, sewer, pipe, passage, premises, ground, matter or thing in said city or adjacent waters, regarded by said board as in condition dangerous or detrimental to life or health, to be purified, cleaned, disinfected, altered or improved. . . .
The first sentence of section 1176 did not provide for a "cause" route.
(in a more limited form) and was continued in the second sentence of the original section 309(1). However, the "or cause" language of section 309(1) (c) was added by amendment in 1946. It was at this time that the section was changed from paragraph form to its present subdivision form. The apparent intent of the addition of the "or cause" language in section 309(1) (c) was to avoid the possible argument that the department could not act directly once the "order" route had been initiated in a nuisance situation.

The separate grant of power in what is now section 309(1) (d) does not seem restricted to a declared nuisance situation. Section 1176 of the Charter of 1901 provided for direct departmental action to remove a "condition dangerous or detrimental to life or health." In 1929, the Multiple Dwelling Law dropped the "dangerous or detrimental" requirement and endowed the department with broad summary powers in the form of what is now section 309(1) (d). The "cause" procedure, then, provides for departmental action, without notice to the owner, to remove any violation.

(b) The "order" route. The "order" procedure is based upon section 309(1) (c), (e) and (f) and section

That sentence dealt with nuisances and was the basis for what are now subsections 309(1)(b), (c). It provided in part:

Whenever any building, erection, excavation, premises, business pursuit, matter or thing, or the sewerage, drainage or ventilation thereof, in said city, shall, in the opinion of said board, whether as a whole or in any particular, be in a condition or in effect dangerous to life or health, said board may take and file among its records what it shall regard as sufficient proof to authorize its declaration that the same, to the extent it may specify, is a public nuisance, or dangerous to life or health; and said board may thereupon enter in its records the same as a nuisance, and order the same to be removed, abated, suspended, altered, or otherwise improved or purified, as said order shall specify.


46 It is, of course, not surprising that power was granted to make repairs without prior service of an order. Frequently, emergencies arise requiring immediate attention and the department simply does not, and cannot reasonably be expected to, have the time to proceed by the "order" route.

47 Section 309(1) provides:

(c) The department may order or cause such nuisance to be removed, abated, suspended, purified, altered, repaired or otherwise improved as the order shall specify.
which deal with service and time requirements when the "order" procedure is followed. The significance of the "order" procedure does not lie in the powers conferred (since the "cause" powers are complete), but in the right of the City to establish a lien on rents and a prior lien without a judgment. Additionally, where the "order" route is employed, a §250 civil penalty can be recovered if suit is brought.

Section 309(1)(e) provides for two possible intervals between service and compliance: The usual period is to be "not less than 21 days"; or, if a 21 day delay might "cause irreparable harm . . . or constitute an imminent danger" to anyone the order may set forth any lesser time period for compliance.

(e) Whenever the department shall certify that a nuisance exists in a multiple dwelling, or any part of its premises, which constitutes a serious fire hazard or is a serious threat to life, health or safety, the department may issue a written order to the owner directing the removal or remedying of such nuisance in the manner and, within the time specified in such order which shall be not less than twenty-one days after the service thereof on the owner in the manner specified in subdivision one of section three hundred twenty-six of this chapter except that if the department shall determine that the condition is such that a delay of twenty-one days in remedying or removing the same may cause irreparable harm to the building or constitute an imminent danger to its occupants, or the occupants of adjoining property or the general public, then the time specified for such remedy or removal may be less than twenty-one days.

(f) If any order of the department is not complied with or not so far complied with as the department may regard as reasonable, within the time therein designated, then such order may be executed by the department, its agents or contractors.

Section 326(1) provides:
Every notice, order or summons relative to a dwelling shall be served five days before the time for compliance therewith. The posting of a copy of such notice, order or summons in a conspicuous place in such dwelling, together with the mailing of a copy thereof, on the same day it is posted, to each person whose name has been filed with the department of health or the department charged with the enforcement of this chapter, in accordance with the provisions of section three hundred twenty-five, at his address as therewith filed, shall be sufficient service thereof. . . . (Emphasis added.)

N.Y. MULT. DWELL. LAW § 309(5)(c).

This position is taken despite the first sentence of section 326 which seems to require a time period of at least five days. Section 309(1)(e) clearly provides that any time period "less than 21 days" is permissible
Recovery under section 309.

(a) Personal liability. The owner's personal liability for repairs made to his property is governed by sections 309(3) and 304(2). If the provisions of the "WMCA" Law are utilized, officers, directors and certain controlling shareholders of a corporation owning a multiple dwelling will be subject to personal liability for all expenses thereafter sustained.

Where an order to repair is served, it seems clear that the department may recapture expenses incurred in correcting a violation, whether dangerous or not. The broadest power to collect expenses is found in section 304(4), empowering the department to maintain a suit for "all costs, expenses, disbursements incurred" in the removal of any

and this specific provision would seem to preclude operations of a general statute such as section 326.

It is interesting to note that the City Council appears to have reached a similar construction of these statutes. Thus, N.Y.C. ADMIN. CODE § 643a-8.0 contemplates that the Commissioner of Buildings may order that work be completed within less than five days after service thereof and that he may enter the premises and perform such repairs if such an order is not complied with.

Section 643a-8.0 provides:

Orders; failure to comply with; execution of work by department.—
Upon the failure to comply with any order of the commissioner, or upon the failure to comply so far as the commissioner may regard as reasonable, within five days after the service thereof, or within such shorter time as he may designate, then such order may be executed by him through the officers, agents, employees or contractors of the department.

Section 309(3) provides in pertinent part:

Whenever the department has incurred any expense for which payment is due under the provisions of this section, the department may institute and maintain a suit against the owner of the dwelling in respect to which such expense shall have been incurred and may recover the amount of such expense as in this section provided.

Section 304(2) provides:

Any person who, having been served with a notice or order to remove any nuisance or violation, shall fail to comply therewith within five days after such service, or shall continue to violate any provision or requirement of this chapter in the respect named in such notice or order, shall also be subject to a civil penalty of two hundred fifty dollars. Such persons shall also be liable for all costs, expenses and disbursements incurred by any such department or its agent or contractor in the removal of any such nuisance or violation.

N.Y. Sess. Laws 1966, ch. 619,
“violation.” Section 309(3) may also be used for the recovery of any expenses incurred.

In those cases where the violations must be corrected without service of an order, section 309(3) still affords the department a basis for the recovery of expenses incurred in remedying the conditions. However, the recovery thus obtained does not carry with it any preferential rights such as a rent lien or a priority lien. Pursuant to section 309(3), the department may recover for "any expense for which payment is due under the provisions of this section," and, thus, it follows that a right of recovery exists in every case where the procedures of section 309 have been followed.

In summary, therefore, the only significant difference, as far as personal liability is concerned, between "order" and "cause" procedures is that the $250 civil penalty under section 304(2) will be recoverable only if an order is given.

(b) The rent lien. An additional method of recovery available to the department is the lien on rents conferred by section 309(7) (a) and (b). This lien, which is recoverable only if the "order" procedure is used, is on rents due or to become due and does not require a judgment. This rent lien is another of the original powers granted by the draftsmen of the Multiple Dwelling Law. Original section 309(4) (a) was substantially identical to Section 1279(1) of the 1901 Charter. The provisions of former section 309(4) (a) were continued unchanged until the simplification of 1946. In 1946, the legislature amended the Multiple Dwelling Law "in relation to the recodification, clarification and simplification thereof." The amendment did not purport to make any substantive changes. It is clear from the legislative history that the reference in the present section 309(7) (b) to service of "an order" means the order of the department directing that work be done.

Section 304(2) requires a five day interval between the order and compliance before an action may be maintained. In the case where the department acts to repair in less than five days, reliance for recovery must be placed on § 309(3). An advantage of the 304(2) action is the $250 civil penalty for which the defendant is liable.
Thus, the lien on rents may be placed for recovery of the “expense of execution” of such an order. As previously noted, the availability of this effective procedure is another reason for using the “order” approach.

(c) The in rem priority lien. Still another advantage of the “order” approach is that when it is used, the department receives a lien for “expenses” necessarily incurred in the execution of an order, which lien is prior to existing mortgages. Section 309(4)(a) states in pertinent part:

The department ... shall have a lien, for the expenses necessarily incurred in the execution of an order, upon the premises upon or in respect of which the work required by said order has been done or expenses incurred, which lien shall have priority over all other mortgages, liens and encumbrances of record, except taxes and assessments levied pursuant to law. 56

Section 309(4)(b) provides that the department shall file the notice of a lien, containing the same particulars as a mechanic’s lien, where mechanics’ liens are required to be filed. Notice to mortgagees is not required by the statute.

The statute, which was amended in 1965 to give the department priority without notice to mortgagees, 57 is highly provocative, but the following conclusions seem clear:

(1) The statute is unambiguous in providing that the department shall have a lien prior to mortgagees whether or not notice is served. The only necessary precondition to the department’s lien is that the expenses be incurred in executing an order previously served upon the owner.

56 Emphasis added. Section 309(4), on its face, applies to mortgages recorded prior to its effective date.
57 Prior to the 1965 amendment, the Department of Buildings could not get priority over a previously recorded mortgage even if notice was given. Following a 1962 amendment, a receiver, after giving notice to mortgagees, could get a certain priority (to the extent of rents) but this lien was in favor of the Department of Real Estate. In 1965, the receiver’s lien was broadened so as to attach to the property itself. The same amendment granted the Department of Buildings its prior lien. The available legislative history of the 1965 amendment does not discuss the lien given to the Department of Buildings. Memorandum of Legislative Representative of City of N.Y., 1965 McKinney’s Session Laws at 2044.
There will be no such lien where the department makes the repairs without first ordering the owner to do so.

(2) When notice has been served on the mortgagee there are no constitutional questions as to the validity of the department's prior lien.

(3) When the department proceeds without serving notice, a constitutional attack upon the validity of the department's lien may be expected, if only on a "test case" basis. The authorities indicate that the department will prevail.

To facilitate comprehension of the latter two points, some reference to decisional law appears appropriate. In 1938, the Court of Appeals, in *Central Savings Bank v. City of New York*, found unconstitutional an amendment to section 309 (the Murray Prior Lien Law) which provided, after twenty-one days notice to the mortgagee, for a prior lien to supplement a fund to improve old law tenements. The law was held unconstitutional as an impairment of contract and a taking of property without due process of law. The Court's view of due process was a now disregarded concept of "substantive" due process, the Court stating that even notice to the mortgagee and an opportunity to be heard could not save the law.

The rights of the mortgagee, however, go much further than to require the mere service of notice and an opportunity to be heard. No lien under this law can be placed which supersedes the lien of the mortgagee.

In 1964, the Court unanimously upheld the validity of the 1962 Receivership Law in *In re Dept of Blgs.* That law provided that a receiver, after notice to the mortgagee, would be entitled to the rents of the property to recoup his expenses. The statute was attacked primarily on the authority of *Central Savings*. The Court rejected the impairment of contract argument holding the law to

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69 279 N.Y. at 278, 18 N.E.2d at 155.
be a valid exercise of the state's police power. In discussing the due process argument, the Court attempted to ration-
alize Central Savings to conform with modern constitutional thought and procedural due process:

The court [in Central Savings] found the statute procedurally defective in that the mortgagee was given no opportunity to be heard and could not even question the amount of the lien placed ahead of his mortgage.⁶¹

Of course, as noted above, this was not the Court's position in Central Savings at all. The Court there believed that a mortgagee's rights could not be altered by law. Central Savings has not been treated deferentially by subsequent courts. There are no cases following it, and two distinguish it, upholding priority liens where no personal notice to mortgagees was given.⁶²

In any event, it is submitted that, since the State has created the lien in favor of the mortgagee, it can reduce such a grant, at least to the extent of giving the City priority without service of notice for an emergency repair program.⁶³

The view expressed above—that Central Savings no longer represents the law of New York and that an emergency repair program under which recoupment can be aided by reference to a priority lien—finds support in the Grad Report:⁶⁴

The recent Matter of the Department of Buildings decision . . . contains every indication that a contemporary view would be different [from that expressed in Central Savings]. In upholding the receivership law, the court was able to avoid outright reversal of Central Savings, but its arguments clearly undermine the con-

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⁶¹ Id. at 299, 200 N.E.2d at 438, 251 N.Y.S.2d at 448.
⁶³ When read in conjunction with the present 309(4)(a), the legislative history shows a full cycle, returning to the prior lien originally granted the City by the charter.
stitutional basis of the previous decision. In fact, even contemporaneous opinion in the 1930's viewed *Central Savings Bank* as an anachronistic construction of the State's capacity to exercise the police power in the regulation of substandard buildings at a time of housing crisis.

In the previous year, 1937, the Court of Appeals had sustained the validity of the Multiple Dwelling Law, in the case of *Adamec v. Post* [273 N.Y. 250, 7 N.E.2d 120 (1937)], against the owner's claim that it was a deprivation of property without due process of law to require him to expend money to alter an old-law tenement in conformity with the law's retroactive requirements, or, alternatively, discontinue operation. The court found that the ownership and obligations of property were subject to the paramount power of the State; the legislature was free to adopt whatever reasonable remedial measures it found necessary to deal with unfit dwellings, if such measures were reasonably related to the promotion of the general welfare. This followed in the tradition of earlier decisions such as those concerning tenement house regulations of the nineteenth century, drastic dictum from the Department of Health. It was granted the power to inspect, to vacate or repair summarily, or to apply to the Supreme Court for an order restraining, abating or correcting a violation or nuisance [Cf. M.D.L. § 306]. All of these powers were incorporated in the Multiple Dwelling Law when it was enacted in 1929 [L. 1929, c. 713]. Together with the authority for abatement and repair, there were transferred to the Tenement House Department—and eventually to the Department of Buildings—the procedural devices to compel reimbursement for expenses incurred. These include a personal charge against the responsible owner, lessee or occupant; a lien on the fee, which, if recorded in the manner of a mechanic's lien, precedes all encumbrances except taxes and assessments; a lien on rents due or to become due; and a judgment lien on both the fee and rents when the amount of expenses has been reduced to judgment. All of these remedies

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65 As noted in the Grad Report:
In its 1961 memorandum on the 1962 receivership law, the New York City Bar Association's Special Committee on Housing and Urban Development states (p. 10): '... it is extremely doubtful whether the *Central Savings Bank* case is in fact good law today.' Id. at 124.

66 As noted in the Grad Report:
In the event that the owner took neither course, the Department was empowered under § 309 to perform the repairs, obtaining a lien junior only to taxes, assessments and mortgages previously recorded so that the non-complying owner of heavily mortgaged property would almost certainly lose his equity investment. Ibid.

67 Citing Health Dep't v. Rector of Trinity Church, 145 N.Y. 32, 39 N.E. 833 (1895).
have been incorporated in § 309 of the Multiple Dwelling Law, except that originally, in 1929, the lien on the fee was subordinated to mortgages previously recorded.

Thus, today the Administrative Code provisions pertaining to the Health Department virtually parallel various of the previously discussed sections of the Multiple Dwelling Law in the definition of a “nuisance” in empowering the direction that such condition be abated and, if not abated, in permitting the department to effect correction, in effecting personal liability and in creating a rent lien in favor of the department for the cost of repair, in providing for a priority lien and even in specifying the manner of filing of the lien.

Indeed, except for the language used, there are relatively few distinctions between the powers thus afforded the Health and Buildings Departments. There are, however, two areas of difference which should be noted. First, the Health Department is expressly authorized to issue and file among its records a “declaration” where such nuisances are found by the Board of Health to be “widespread throughout the city or in any area thereof” and such declaration, following publication, shall, if so specified, be sufficient notice to effect service in lieu of either personal or substantial service. Second, the outer limits of a Health Department order to correct are eight rather than the twenty-one days specified in respect to the Buildings Department. On the other hand, the Health Department

68 Compare N.Y.C. ADMIN. CODE § 564-15.0 with N.Y. MULT. DWELL. LAW § 309(1)(a).
69 Compare N.Y.C. ADMIN. CODE §§ 564-18.0, 564-20.0 with N.Y. MULT. DWELL. LAW § 309(1)(e),(f).
70 Compare N.Y.C. ADMIN. CODE §§ 564-22.0, 564-23.0 with N.Y. MULT. DWELL. LAW § 309(3),(4),(6).
71 Compare N.Y.C. ADMIN. CODE § 564-24.0(a) with N.Y. MULT. DWELL. LAW § 309(4)(a).
72 Compare N.Y.C. ADMIN. CODE § 564-24.0(b) with N.Y. MULT. DWELL. LAW § 309(4)(b).
73 N.Y.C. ADMIN. CODE § 564-21.0(c).
74 Compare N.Y.C. ADMIN. CODE §§ 564-19.0, 564-20.0 with N.Y. MULT. DWELL. LAW § 309(1)(e).
HOUSING MAINTENANCE

is not afforded the right to seek collection of a §250 civil penalty.

On balance, however, the powers in respect to repair and recoupment vested in the Health Department are as great as those vested in the Buildings Department. However, it seems clear that the areas of deficiency concerning the availability of priority liens discussed above would seemingly apply with equal force.

THE PROPOSED PROGRAM

The foregoing discussion has given clear indication of the proposed program. The provisions of the Health Resolution will continue to be employed in connection with repairs made in respect to dwellings and structures other than multiple dwellings. Section 309 will be employed in respect to multiple dwellings. The program will not be limited to the narrow categories of emergencies as now prescribed, but will, instead, include such items as hot water, lack of sanitary facilities and the like.

Two avenues for action will be employed under section 309: the “cause” procedure for effecting immediate repair without formal order to the owner that he effect such repair, and the “order” route, the form of which can vary according to the nature of the mandated repair work, i.e., a telephonic or telegrammed order for emergencies, followed by posting and mailing of a copy of the order; a written order of some five days—more or less—and the formal twenty-one day order for conditions not constituting emergencies and not likely to result in irreparable harm or imminent danger to anyone. Although it seems clear that no mandate exists in “order” cases for the giving of notice to mortgagees and other security interest holders, where time allows, such notice will be given out of an over-abundance of caution.\footnote{Ultimately, it is hoped legislation will be enacted requiring mortgagees, lienors, and other security interest holders to register with the department. This would obviously facilitate handling of “notice.” Legislation to that effect was introduced at the request of the department at the 1965 Legislative Session, but failed of passage. As an interim measure, the department can}
The actual repair work would be performed by two methods—mobile repair crews and private contractors. Determination of which of the two repair avenues will be pursued will vary depending upon the facts of each case. In essence, however, emergencies requiring the relatively minor work of palliative attention would be handled by the mobile crews, while the more serious protracted or detailed work would be handled by the private contractors. Obviously, there will be instances where both avenues will be employed in a given case with the mobile repair crews effecting temporary repairs and the private contractor the more extensive or permanent work. It should again be pointed out that the program must, of necessity, be viewed from at least three different approaches: those repairs, generally minor in nature, which require immediate attention; repairs that require prompt attention, but which can await the passage of five days; and those repairs which should be handled with a measure of promptness, but which can be withheld for a period of some twenty-one days. The distinctions among the three categories are based, primarily, upon the provisions of law previously discussed, as well as upon differing methods of handling differing problems. For example, the inhabitants of a chilled hovel should not on a cold winter’s night be required to await the passage of time, particularly where a delivery of fuel can easily and promptly be provided. On the other hand, the installation of a new boiler or major repairs in respect to an existing boiler generally take some five days or more. Where a major plumbing or roofing repair is called for, it is not at all unusual that three weeks pass before completion of that task. Hence, the program here proposed should be viewed with those distinctions in mind.

permit (and widely publicize the opportunity for) mortgagees and security interest holders to register, and thereby permit them to receive, upon payment of a fee, notice of violations pending against the structure, as well as of any repair liens. Additionally, the services of title companies would be employed on a contract basis in appropriate cases to help in identifying recorded mortgagees and other lienholders upon whom service could then be made. The cost thereof, which would ultimately be borne by the owner, would be de minimis,
(1) Instant repair. It is proposed that a fleet of trucks be secured and maintained under the jurisdiction and control of the Department of Buildings. The bulk of these mobile repair units and their complement of mechanics should be devoted to plumbing and heating repairs, at least in the opening stages of the program. As previously noted, some 38 per cent of the repairs effected to date under the current emergency repair program involved heating and plumbing repair work. One or more units should be devoted to electrical work and another to carpentry and plastering work. If possible, one unit should be reserved to handle the “tinning-up” of vacant buildings and roofing repairs, which amounted to 14.46 per cent of the total repair effort made to date.

Procedurally, the program would operate in essentially the following fashion. Where an inspector notes the existence of a condition warranting “instant repair,” either as the result of an inspection triggered by a complaint to one of the Code Enforcement Centers or to the Central Complaint Bureau, or as the result of an inspection triggered by the cyclical inspection or other method of routing, he immediately notifies the dispatcher in one of the two workshops, specifying the nature and kind of work required and, to the extent possible, the materials necessary to complete the job either on a temporary or permanent basis. Having in mind that all inspectors now are required under the provisions of the City Charter to have at least five years’ experience in one of the construction trades, there is some likelihood that they will be able to perform that task and the further task of determining whether the repair work can be done by one of the mobile crews or whether it can and should be delayed and handled by an outside contractor. If necessary, further training or briefing can be furnished through the Departmental Academy.

Based upon the information thus received, the dispatcher will route the appropriate truck where either temporary or permanent “instant repairs” are called for. Simultaneously, the dispatcher will prepare appropriate routing forms which can then be used in connection with
recoupment efforts. The mobile repair unit will note the time that it leaves the workshop or other stop and the time it completes its assigned repair activity. This information, coupled with a description of the work performed, will then be noted on appropriate forms thereby facilitating recoupment on the basis of time and materials charges.

Upon arriving at the scene of the assigned repair work, the crew will report that fact promptly to the dispatcher so that appropriate follow-up action can be taken. To illustrate, where the crew detects a leak and is able to effect temporary repairs but deems it necessary to have more comprehensive work done, it will note that fact and the nature and estimated cost of repair and so advise the dispatcher who can then pass along the total fund of information to the central office, which, in turn, can then take the requisite steps to notify the owner and give him an opportunity to correct voluntarily.

Since the mobile repair crews will, hopefully, be radio dispatched, they can, upon the completion of their assigned task, be directed to their next stop.

One further observation appears appropriate. The above outlined program contemplates emergency service sixteen hours a day, seven days a week. It is, however, important that one crew capable of performing all-round repair services be maintained at the beck and call of the Emergency Desk at the Central Complaint Bureau to service complaints received between the hours of midnight and 8 a.m.

One further aspect of "instant repair" requires commentary. The statistics indicate that the current Emergency Repair Program devoted 14.22 percent of its activity to providing fuel, 10.43 percent to janitorial and like activities and 9.16 percent to rubbish and sewerage work. These activities cannot and should not be handled by the mobile crews.77

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76 Use can be made of the facilities of the radio network of the Housing Authority.
77 It should also be observed that they account, in the aggregate, for some thirty-five percent of the total activity conducted to date under the current Emergency Repair Program.
With respect to provision of fuel, it should preliminarily be noted that this problem has to date been approached in a somewhat unusual fashion. New York City now has a contract under which fuel dealers undertake to provide fuel oil at approximately eleven cents a gallon and coal at approximately eighteen dollars a ton. When purchased in the open market, the same fuel oil costs approximately sixteen cents a gallon and the coal approximately twenty-one dollars a ton. Thus, it has been ascertained that several owners of property deliberately permit emergencies to occur in order to save themselves a few dollars. To guard against such abuses and at the same time to make clear the fact that it is the owner's responsibility in the first instance to provide for adequate maintenance of his property, it is proposed that an administrative cost-surcharge be levied to discourage such practices. Additionally, it should be noted that New York City has this purchasing advantage, in part at least, because deliveries made pursuant to the favorable contract terms just mentioned generally are made at the dealer's convenience and as his last order of business. Thus, it may well be necessary to renegotiate this aspect of the City's contract because the added cost would be borne by the owner, and time in these instances is of the essence.

The janitorial services now are provided through an independent contracting entity which merely secures the janitor and for that function receives a fee from the City. It is proposed that a training program be created, one employing the facilities of B.E.S.T. and under which janitorial personnel thus provided would either be graduates of the B.E.S.T. program or graduates of the mobile repair service program. A number of these individuals would thus be placed in a pool and paid on a per annum basis by the City. They would be sent out on calls as and when needed. This approach would have a two-fold advantage. First, it would put to real use the skills obtained under either the B.E.S.T. program or the repair program discussed above and thus provide encouragement and employment for graduates of those programs. Second, and in a sense
most important, these custodial employees would have a distinct set of skills which would then be used to help maintain and upgrade the building involved. Almost invariably buildings to which janitorial services must be furnished by government are those where other maintenance items require attention, such as filthy hallways and broken windows. In most instances, the owners have abandoned such structures. These custodial employees would, therefore, have at least some of the skills required to provide some measure of decency for the inhabitants involved.\(^\text{78}\)

The removal of rubble and sewage is an area in respect to which prompt governmental intervention frequently is necessary for health reasons. However, it is difficult to justify an expenditure in excess of $82,000 when one has in mind that New York City has one of the largest Sanitation Departments in the United States and that the Department of Public Works can make available skilled personnel to deal with sewerage problems. Accordingly, it seems clear that, for the present at least, this area of activity ought to be borne by one or more special crews of the Departments of Sanitation and Public Works which then will be dispatched either centrally or by the workshops. If, as a bookkeeping device, it seems preferable to permit those agencies to charge the programs for the cost of such services, then so be it. However, that would, in most cases, be merely a bookkeeping device.

In terms of long-range programming, it has been suggested that a unit can be devised which can provide for removal of refuse from courtyards, areaways and the like and that this unit could be woven into a training program. Certainly, that is a much to be desired event. Until that occurs, it seems clear that the City of New York should direct its Department of Sanitation to undertake this area of activity both in respect to outside refuse collection and

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\(^{78}\) It seems reasonably clear that in the majority of cases involving provision of janitorial and like services the full twenty-one-day route can be employed, thus assuring the giving of adequate notice to secure a priority lien under Section 309 of the Multiple Dwelling Law, as well as a rent lien.
that involving refuse in hallways, courtyards, areaways, doorways and roofs.

Two additional observations seem called for. First, as previously pointed out, it is proposed that, if possible, one of the mobile repair trucks be equipped to handle roofing and tinning work. The record discloses that literally thousands of dollars have been spent to date under the current Emergency Repair Program for the tinning of vacant buildings. Experience has indicated that this kind of work can be performed quite economically and efficiently by crews of indigenous trainees employed and trained for the task. Again, two functions would be accomplished. First, a training program could be devised and some usage could be made of the skills thus acquired. Second, economies of repair could be effected. Clearly, tinning will be a major area of activity until such time as demolition finally is secured of the thousands of vacant derelict structures which dot New York and which present an alluring invitation to the inquisitive, the mischievous and the criminal—an invitation to death.79

Second, at the present time the Department of Buildings has the responsibility for detecting vermin and the Department of Health has the task of exterminating them. This division of responsibility has long been condemned.80 The Department of Health now employs several mobile pest control units. It is urged that those units be made part of the program here proposed.

(2) The "five-day emergenies." As previously pointed out, Section 309(4)(a) of the Multiple Dwelling Law affords a priority lien "for the expenses necessarily incurred in the execution of an order [to repair] . . . which lien shall have priority over all other mortgages, liens and encumbrances

79 The records of the Fire Department disclose that in 1965 more than 1,500 fires arose out of or involved vacant buildings of the kind referred to above. The shame lies not in the destruction in whole or in part of the vacant structures but in the fact that in many instances the fires spread and engulf sound adjoining structures, thus spreading blight and deterioration.

80 See, e.g., Legislative Drafting Research Fund of Columbia University, Administrative Consolidation of Housing Enforcement Agencies of the City of New York 22 (1964).
of record except taxes and assessments levied pursuant to law.” Section 309(7)(b) of the Multiple Dwelling Law provides that such expenses shall be a lien and charge upon rents due or to become due from any tenant or occupant of the dwelling to which any such order relates. Section 304(2) of the Multiple Dwelling Law declares that “[a]ny person who, having been served with a notice or order to remove any nuisance or violation, shall fail to comply therewith within five days after such service . . . shall also be subject to a civil penalty of two hundred fifty dollars.” Thus, where repairs are made pursuant to an order, the Department shall have not only the right to recoup its expenses, but also a rent lien, a priority lien and the right to recover a $250 penalty.

Section 309(1)(e) provides, however, that the order may be issued “to the owner directing the removal or remedying of such nuisance . . . within the time specified in such order which shall be not less than twenty-one days after the service thereof on the owner . . . except that if the department shall determine that the condition is such that a delay of twenty-one days in remedying or removing the same may cause irreparable harm to the building or constitutes an imminent danger to its occupants, or the occupants of adjoining property or the general public, then the time specified for such remedy or removal may be less than twenty-one days.”

As previously pointed out, an abundance of caution dictates that the lesser time period should, if possible, be not less than five days, in the first instance at least. It should, however, be noted that in true emergencies a lesser period of notice probably would suffice. The five-day notice would be necessary if invocation were sought of the right to impose the $250 civil penalty and the provisions of the “WMCA Law” in order to pierce the corporate veil.

Against that background, the second category of cases becomes clear. Where either the inspector first detecting the emergency condition, or the mobile repair crew effecting the palliative action, indicates that a time span of approximately five days would be in order, but that a greater time
span might cause "irreparable harm" to the building or constitute an imminent danger to its occupants or the occupants of adjoining property or the general public, then the five-day notice route could be employed. In other words, where it is concluded that work can be held in abeyance for approximately five days, a second course of action could be used. By thus proceeding, a priority lien, a rent lien, a §250 civil penalty and use of the "WMCA" measure may be effectuated.

In these cases it seems likely that reference will generally be made to outside contractors to make the requisite repairs. Thus, in such cases, the inspector reporting the condition or the mobile repair crew would notify the dispatcher of the conditions found, the type of work required, the estimated cost of repair and the fact that approximately five days could be allowed to elapse before further work was initiated. The dispatcher, in turn, would notify a central unit which would accomplish two tasks. First, a notice would issue to the owner forthwith and service would be effected. Second, preliminary arrangements would be made to secure a contractor. Additionally, arrangements would be made for a reinspection on the sixth day following service for the purpose of ascertaining whether or not the repair work has been done by the owner or others. If that inspection discloses that the work has not been performed, either in whole or in substantial part, then the contractor would be notified and work promptly commenced. Prompt commencement of the work by the contractor would be possible since he will have had an opportunity during the five-day interval to inspect and plan.

Obviously, the foregoing discussion raises the question as to how the contractor would be selected. Obviously, the contractor must be a capable and responsible individual. It is equally obvious that he should be a local contractor. Similarly, he should be someone who is an equal opportunity employer, not only one who also affords employment opportunities to graduates of the training program here discussed, B.E.S.T. or other programs. Those determina-
tions can, of course, be made in the first instance by the affected community or community group which could prepare and submit to the department a list of contractors fulfilling these qualifications. Manifestly, that listing would be subject: (1) to verification as to whether there has been compliance with the foregoing criteria and other similar criteria, and (2) to the right of any other local contractor to become a part of the local pool upon a showing that he has the means, capacity, integrity and intent to comply with those same criteria. Thus, there would be afforded to the community the right to make the initial determination and at the same time there would be guarantees that those determinations would not be arbitrary, capricious or discriminatory. Furthermore, the listing and determinations thus made would be subject to constant evaluation and reappraisal both by the community and by the department.

From the pool of local contractors thus designated, the department would select on a rotating basis the contractors to perform the requisite repair work. Safeguards would have to be secured to insure that the work performed by the contractors is workmanlike, promptly initiated and completed, and that the charges rendered are fair. Both areas of activity could and quite clearly should be actively and continually policed by the department and the community.81

It is, of course, true that just as the problem of selection of contractors is an important one, the speeding of

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81 This is an area of great opportunity for abuse and thus the policing effort must be most carefully and effectively conducted. It has been suggested that from time to time various contractors participating in the current emergency repair and other like programs have turned down job opportunities which they viewed to be minor, hoping thereby to reach the more lucrative work. Similarly, it has been suggested that some contractors have received the "lion's share" of the work while others have not been as fortunate. It is equally true that some contractors will not respond to emergencies on an around-the-clock basis and that others do not perform a workmanlike job, or they are exorbitant in their prices or do not act with the promptness that seems called for. These and a host of other like avenues must be the subject of continuing supervision and investigation. Obviously, this program must be beyond the pale of just criticism on grounds of inadequacies or improprieties. Hence, government must have the power and the final responsibility to perform that kind of critical task.
payment to the contractors for work performed and the securing of prompt and accurate billing from them is a problem which requires attention. There are, we are told, numerous responsible contractors who fulfill all of the criteria previously discussed but who will not participate in any of the programs now in effect for the simple reason that they must wait too long for payment of their bills. This is particularly true of relative newcomers to the field who lack the capital resources to be a long term creditor of the City. Similarly, it is clear that in order to permit a meaningful recoupment effort, the bills must be submitted promptly and in good order, thereby facilitating the timely and effective filing of the lien. It is hoped that these activities can be programed to permit the computer equipment utilized by the Department of Buildings to record the information, prepare the bill to the owner and the demand letter that accompanies it, and to prepare the requisite lien. Having in mind that there is a time limitation upon the filing of a lien, these factors assume critical significance.

One final observation appears appropriate. Section 309(4)(d) provides that unless parties in interest initiate proceedings for discharge of the priority lien within six months of actual notice of the filing of the lien, said lien will be deemed conclusive. Section 309(8) allows the owner of the property and, presumably, the mortgagee, to proceed within a period of twelve days after the department has proof that the owner has received notice of receipt of rentals by the department from tenants collected under the rent lien to recover such moneys. Presumably, in both proceedings the owner or mortgagee could challenge the cost of the repairs. Hence, steps must be taken to insure that bills are adequately and promptly documented and that the contractors are available to support their bills by testimony in these proceedings. 82

82 The above-mentioned rights of challenge are important in respect to the question of validity of the priority lien. Under the authorities, the right thus to effect a challenge to the amount of the bill is another distinguishing factor between this program and that which was found unconstitutional in the Central Savings Bank case.
The twenty-one day notice. There are many repairs which could or should be made in respect to "nuisance" conditions but which can be delayed for a period of approximately twenty-one days. These include the major plumbing repairs, some major roofing repairs, some categories of electrical work and the like. For the reasons and under the authority cited above, the cost of these categories of repair would be the subject of recoupment through the rent lien, the priority lien, the $250 civil penalty and the "WMCA Law." Thus, this category of repair, which almost invariably would be effected by outside contractors and involve relatively major work, would have attendant to it the greatest security factor and chances for recoupment would be enhanced.

If the program outlined herein proves successful, this category of repair work would also be extended to include two other areas of activity. First, there is now in effect on an experimental basis in the Department of Buildings a program called the Landlord Repair Schedule. Under that program, owners of property are afforded an opportunity to schedule the making of repairs to correct violations. Generally, the repairs must be made within a period of ninety days. The owners undertake personal liability for the cost of the repairs and bind themselves to various other remedies which can be availed of should they default on their obligation. From time to time there are owners who appear to be responsible individuals but who, for one reason or another, lack the means to effect repair. Because of the "tight money market" this becomes an increasingly pressing problem. Perhaps the twenty-one day program can be intertwined with the Landlord Repair Schedule and, in appropriate cases, government can undertake the initial repairs as part of the schedule, with security provided upon consent for the cost of the work to be performed. On the other hand, the Landlord Repair Schedule can also be used in those instances where repairs have already been made under this program. Thus, where an emergency repair has been made the owner would be given an opportunity to sign the Landlord Repair Schedule covering
other violations to be corrected in the premises and consenting, as part of the repair schedule, to prompt payment of the costs previously incurred by government in making repairs to the affected structure, plus interest where appropriate. In other words, the repair schedule would be a device to insure not only correction of all other illegal conditions in the premises, but also to effect prompt payment without suit for the work done.

Second, in time it may become appropriate to utilize this repair activity as an affirmative code enforcement tool. Thus, violations which fall into the "nuisance" category—and, as previously pointed out, the term nuisance is most broadly construed by section 309—could, when notice is first sent out to the owner, be appropriately indicated as being subject to such repair unless corrected by the owner within twenty-one days. In other words, all violations within the ambit of section 309 would automatically carry a notice that unless corrected by the owner within twenty-one days they could become the subject of repair under this program. This kind of activity would have particular impact on blighting (as contrasted with blighted) and standard structures, where the owner generally has a reasonable equity interest in the property which he would not wish to have jeopardized by any repair lien. Because of the threat thus posed, the owner might well move promptly to correct the condition. In those instances, the program would be utilized as a means of insuring compliance with the order to correct within the twenty-one day period.

(4) *Recoupment.* Preliminarily, it must be stressed that it is neither realistic nor reasonable to assume that any program can be completely self-liquidating at any point in the immediate future. As previously noted, a substantial segment of New York City's housing inventory is made up of dilapidated tenements of the kind condemned shortly after the turn of the century, but which still house over a million people. Until such time as these deteriorated antiquities are replaced, we must expect that government will have to bear a portion of the cost of maintenance of
these accommodations, thereby insuring that their inhabitants are afforded something approaching the minimum standards of decency.

Two funding devices have been proposed: a $1 million capital grant and a $25,000 revolving fund. As previously noted, it is urged that section 304(2) be amended to remove the ceiling on the revolving fund and to permit deposit into the fund of moneys received by virtue of civil recoveries and payments made under this program, rent reductions (including Spiegel Act and section 302(a) rent abatements), and other like receipts. If such legislation were enacted, the fund would then be sufficiently large to make it fully workable, having in mind that there would also be receipts based upon the work performed by the mobile crews.

It is specifically proposed that where emergency repairs are made by the mobile crews, the department promptly bill the owner of the repaired property based upon predetermined charges for time and materials, plus over-all administrative costs. Every effort will be made to make repairs under the "order," as contrasted with the "cause," route in order to give rise to a priority lien, a rent lien and the $250 civil penalty in addition to the right to maintain suit for recovery of the costs of repair and incidental expenses.

Rent collections will be made in cooperation with the New York City Rent and Rehabilitation Administration where the amount involved is minimal. In cases involving relatively large sums of money, foreclosure on the priority liens will be attempted. It may be that New York City may, at the end of the road, find that it is the owner of a substantial number of properties. However, it should be noted that in several instances the properties thus acquired become acquisition sites either under urban renewal programs or for other forms of government-aided construction. In those instances, government all too frequently must pay a substantial sum for the property. Where, however, clear title is secured through foreclosure of the prior lien, government may be enabled to spend a larger share of its
limited funds for construction as contrasted with site acquisition. Furthermore, in other instances, the buildings are or become so deteriorated that vacancy follows and then the city is faced with the complex problem of trying to compel demolition of the dangerous eyesore that remains. However, where the city has title to the property, the problem is appreciably diminished. Thus, even though the foreclosure route may from time to time not produce dollar revenues, it will facilitate the ultimate creation of a "land bank" and the demolition of derelict structures.

In addition, the department will prepare civil actions for collection which are joined with a claim for recovery of the §250 civil penalty. Thus, the owner would find himself subject not only to a judgment for the costs incurred but also with a §250 penalty, and that possibility would clearly encourage settlements.

Where the personal liability route is used, and where the repairs have been made pursuant to an order, the provisions of the "WMCA Law" can on occasion be utilized. Thus, where it becomes clear that a major repair will have to be made and that a brief period of time to effect such repair is in order, the department can simultaneously with the service of the order commence and complete proceedings under the "WMCA Law" and, if the appropriate filing is made, the corporate veil will be pierced and certain officers, directors and stockholders of the proprietary corporation will become personally liable.

Additionally, the Civil Court can be, and we think should be, prevailed upon to set aside one or more days every week or every several weeks in which these kinds of collection cases can be processed in a separate part of the court, thereby assuring their expeditious handling. The Legislature had before it at its 1965 Session a proposal authorizing municipal corporations to maintain suit in the small claims part of the court. That measure failed to pass. While that proposal could be reintroduced, the question does occur as to whether it is necessary to resort to this device if, as suggested, the court were periodically
to set aside specific days for the hearing of these cases in a special part.

Under Section 143(b)(2) of the Social Welfare Law (the Spiegel Act), the Department of Welfare now has the right to withhold payment of rent for its clients where appropriate certification is made to it by the Buildings Department. Under sections 143(b)(1) and (6), the Department of Welfare would have the right to pay those moneys, both for current or prior rentals, to the landlord (as contrasted with the client) and, perhaps, even to an escrow fund. Under Section 309(7) of the Multiple Dwelling Law, the Buildings Department is afforded a rent lien. Thus, a combination of Sections 143(b)(1), (2) and (6) of the Social Welfare Law might authorize the Department of Welfare to withhold rental payments to the landlord and pay them directly to the Buildings Department in discharge of its rent lien under section 309(7). This would be a most significant avenue for recoupment since in many instances the buildings which are the subject of emergency repair house a substantial number of welfare recipients.

The foregoing specific illustration of recoupment proposals indicates that it is possible to achieve results in this area, provided a determined effort is made. As previously noted, it is planned to organize the program with that goal in mind. Indeed, it is hoped that much of this program can be expedited through utilization of computer equipment currently employed by the Buildings Department.

Based upon experience in service of papers in demolition cases, it is clear that the department lacks the means economically to effect "posting" or service. An outside entity paid a reasonable fee could perform that task far more economically and efficiently.

The next question which occurs is service of the order and the giving of notice. Additionally, as previously noted, the inspector detecting the condition warranting invocation of the program, or the mobile crew indicating that further repair work is necessary thereunder, would be required to notify either the repair workshop or the central unit of
all of the details so that an order could issue to the owner. Hopefully, that order could be effected by computer and, if not, through the use of forms. Where preliminary work has been done at that point by the mobile repair crews, a bill for the service thus performed would accompany the order. The order once prepared would, under Section 326 of the Multiple Dwelling Law, be served by “nailing and mailing.”

If time allows, it is urged, out of over-abundance of caution, that in all possible cases similar service should be effected upon all recorded mortgagees or even lienors. The identity of such lienor could readily and at relatively slight expense (approximately fifteen dollars a case or less) be ascertained through a title company. Such costs, parenthetically, similarly are chargeable against the owner and become part of the lien. Furthermore, as previously observed, the department has urged that legislation be enacted requiring mortgagees and other lienors to register. That measure, when enacted, would as a practical matter solve the problem by reason of the fact that such lienors can then be readily served, or, if they fail to register, such failure would act against any lack of notice argument.

Many of the conditions which would require repair under this program are now the subject of pending violations. Thus, if the department were now to re-mail to owners a notice of all pending violations together with a twenty-one-day notice as to certain of those violations (e.g., excluding the so-called housekeeping variety), then, in many cases where the department is forced to act by way of the instant repair route, it can nonetheless still demonstrate that the twenty-one-day notice was given and that a right to a priority lien, the rent lien and the $250 civil penalty exists. A by-product of such a proposal would, of course, be to stimulate repair work and thus a code enforcement function would be materially advanced.

(5) Personnel. In order adequately to perform the various tasks proposed herein, it is urged that the above-described programs and activities, and the personnel performing them, be consolidated. For example, the following
agencies now perform functions directly related to the current Emergency Repair Program: the Departments of Buildings, Health and Real Estate; the City Rent and Rehabilitation Administration; the Housing and Redevelopment Board (Neighborhood Conservation and Area Services programs); and the Office of the Housing Coordinator (Project Rescu).

The largest personnel grouping exists under the jurisdiction of the Office of the Coordinator of Housing and Development—Project Rescu. As previously noted, that program, as originally conceived and executed, contemplated a six-month activity with expenditures aggregating $662,424. The program has continued well beyond the point of original contemplation. It involves employment of inspectors, Real Estate Department estimators, executive personnel, local coordinators and verifiers, and clerical personnel. Additionally, provision thereunder has been made for expenditures other than personal service—supplies, equipment and the like.

An application now is pending aimed at securing funding through the Office of Economic Opportunity of a program of between one and one half million and two million dollars for some nine months. That program contemplates a combined work training function, including provision for ten mobile repair trucks and the requisite work crews to maintain them some sixteen hours a day, seven days a week, together with the required administrative, training and dispatch personnel. In addition, there is proposed the creation of ten emergency repair and local code enforcement centers, together with the needed personnel (inspection, executive, clerical and others) to maintain those centers on a sixteen hours a day, seven days a week basis.

The Department of Real Estate now employs, on an either full or part time basis, some seventy-two persons, some of them independent contractors and others paid out of poverty funds, in connection with that agency's activities under the Emergency Repair Program. They include accounting, inspectional, managerial, estimating and clerical personnel. The Department of Health employs some five
sanitarians and several clerical and other personnel in connection with the discharge of its function—certification for repair under the Health Resolution. At least one ranking official of the City Rent and Rehabilitation Administration plus several clerical personnel recently assigned to work under his jurisdiction perform the coordinating function as well as give direction to the recoupment efforts under the current program. In the Department of Buildings, three Senior Housing Inspectors and two regular housing inspectors provide supervision and coordination for that agency's efforts under the current program. Additionally, a substantial number of the complaints resulting in emergency repairs originate by telephone calls placed to and processed by the Central Complaint Bureau of the Department of Buildings. Furthermore, all of the field inspectional personnel in the department now make determinations, where appropriate, and recommendations for emergency repair.

Certainly, all of the foregoing activities should be integrated and thus serve as the backbone for the proposed program. Although the program here proposed would go far beyond that which now exists, not all of the personnel would have to be transferred. Through reorganization, coordination and central direction, it may well be that several of the persons referred to above could be released from participation in the program and assigned other tasks. That kind of judgment can only be made when a determination is made to go forward with this kind of reorganization. On the other hand, it may well be that the Corporation Counsel will either have to divert additional personnel to attend to the recoupment program herein proposed or that under the program additional personnel will have to be provided to aid in at least the initial aspects of that effort. Again, resolution of that question will have to await the specific determination as to whether, conceptually, the program here proposed should go forward.

As previously noted, there is now in existence Executive Order No. 134, which fixes the responsibility for, and the direction of, the current program of emergency
repair. The program here proposed is entirely inconsistent with that Executive Order. Accordingly, it will be necessary in order to effectuate this program that the order be revoked and a new Executive Order promulgated.

To give cohesion to the program as well as to effectuate reorganization, it is urged that by a new Executive Order the Mayor create the position of Commissioner of Housing Maintenance in the Office of the Mayor, and empower that person to draw upon and consolidate all of the scattered personnel and activities heretofore mentioned. By so doing, it will also be possible to argue that the segment of the proposed program relating to housing code enforcement is reimbursable to the extent of fifty percent through the medium of the state aid authorized under Section 608 of the Public Health Law.

Section 608 provides that the State of New York will reimburse the City of New York for fifty percent of the money expended through the Division of Housing of the Department of Buildings in its enforcement of the provisions of the Multiple Dwelling Law or other related laws pertaining to the management, housing, occupancy, safety, sanitary conditions and inspection of multiple dwellings. The regulations thus far promulgated by the New York State Commissioner of Health, pursuant to section 608, expressly exclude the actual cost of repairs. However, many of the activities herein proposed would nonetheless clearly fall within the ambit of the regulations since they are not limited to actual repair. Moreover, the statute clearly is sufficiently broad to permit the New York State Commissioner of Health to revoke that limitation at any time. In that event, virtually the entire program would be funded half by the City and half by the State.

Section 608 would become directly applicable if the program here proposed were conducted under the auspices of the Department of Buildings. Since the reorganization here urged might, in part at least, require local legislative action—in terms of shifting budget lines from one agency to another—it is urged that in the first instance the same goal can be accomplished by creating the separate position
of Commissioner of Housing Maintenance and appointing the Commissioner of Buildings to that position. Thereafter, local legislative action can be taken to effectuate the proposed reorganization.

It seems clear that this would be a most opportune occasion and indeed, in several instances, it would be necessary in order to fully effectuate this program, to incorporate several long overdue reforms. Thus, it has long been urged that the Pest Control Unit in the Department of Health be shifted to this area.\(^{33}\) Additionally, until such time as a comprehensive mechanism and training program can be devised to deal with the program, it seems foolhardy to continue to spend thousands upon thousands of dollars for the services of private contractors in removing accumulated refuse. Accordingly, the proposed Executive Order should empower and direct the Department of Sanitation to perform that function at the request of the reorganized Housing Maintenance entity. Obviously, removal of accumulated refuse would become the subject of such cartage proceedings only where it seems clearly necessary.

One final observation appears appropriate. There are now scattered throughout New York a substantial number of storefront and similar operations conducted under the Neighborhood Conservation and Area Services Program. Few will seriously dispute that the primary function now performed by those entities is a code enforcement activity. Discussion with local Neighborhood Conservation directors discloses that almost invariably their activities are directed primarily to the task of improving housing maintenance, landlord and tenant relations, and sanitation. To quote each of the Neighborhood Conservation directors, their activities could not possibly be conducted efficiently in the absence of the housing inspector because he is an integral part of their activities, as is, on occasion, the Department

of Sanitation representative. Stated otherwise, to the extent that this entity performs a code enforcement function it quite clearly overlaps with and duplicates the activities of the Department of Buildings.

The budget for the Neighborhood Conservation Program currently is approximately $1.2 million a year, paid entirely out of City funds. To the extent that those funds are devoted to code enforcement, the City of New York now is deprived of hundreds of thousands of dollars each year in State-aid reimbursement under Section 608 of the Public Health Law. If those code enforcement activities were transferred to the code enforcement entity, fifty percent of the cost thereof would be borne by the State of New York under section 608. Additionally, the City of New York would save slightly under $200,000 each year for the cost of housing inspectors assigned exclusively to the various Neighborhood Conservation centers, but whose work is almost invariably duplicated. Indeed, preliminary investigation discloses that many of the code enforcement activities conducted by the Neighborhood Conservation centers are, because of this lack of coordination and integration, duplicated on a relatively massive scale.

As previously noted, it has long been proposed by the Department of Buildings that it decentralize its activities. A ninety-day experiment conducted by the department as part of its Bronx Pilot Project demonstrated that local Code Enforcement Centers vastly increased the output of work performed by the department and at the same time guaranteed far more prompt response to emergency and other like complaints. At the same time, the Project demonstrated that effective supervision could be maintained without any loss of community contact or the facility to respond promptly to all kinds of emergencies, where field operations were locally supervised by departmental personnel but centrally directed to guard against opportunities for abuses.

In the event that it were determined that the code enforcement activities now conducted by the Neighborhood Conservation Program and, perhaps, the Area Services Program, were at long last to be effectively integrated into
the City's overall program for code enforcement and housing maintenance, substantial economies could be effected and, at the same time, the program herein proposed could be materially advanced. Instead of having to finance additional storefronts or similar centers, the existing facilities and personnel of the Neighborhood Conservation Program could be employed for that purpose as part of the overall program herein proposed. Decentralized code enforcement and emergency repair centers could be established throughout New York City and at the same time substantial economies could be effectuated through this reorganization.

Obviously, there are those who would wish to preserve their fiefdoms. However, the fact remains that to the extent that code enforcement activities are now performed by the Neighborhood Conservation Program, they clearly are duplicative both of current code enforcement activities performed by the Department of Buildings and the program here proposed. That code enforcement is the very backbone of the Neighborhood Conservation Program is readily demonstrable. Some thirty housing inspectors now are assigned exclusively away from the Buildings Department in the Neighborhood Conservation and Area Services Program, at a cost of almost $200,000. Additionally, not a day goes by without a cry for still further inspectional personnel. If their services were not the backbone of this more than $1 1/2 million enterprise, then how can their continued usage be justified? Moreover, over and above those crutches, the Department of Buildings is required each day to handle one or more requests for additional assistance on local housing problems forwarded by either a Neighborhood Conservation or Area Services Center. The cost to the City of this duplicative effort unnecessarily runs into many hundreds of thousands of dollars each year.
CONCLUSION

This report proposes a program of repair and of code enforcement which can at long last translate instantly into a reality the City's quest for better housing. The family huddled against winter's cold, the child unable to sleep for fear of attack by vermin, and the workman unable to rest from his labors for fear that the ceiling will collapse are not at all comforted by the fact that a housing inspector responds promptly and places a violation. He knows that weeks, if not months, must pass before court action is taken on such violations. He also knows that judicial proceedings have, in all too many instances, proven to be less than compelling.

This program would insure that, in appropriate cases, where the owner fails or refuses to act promptly to correct a condition which manifestly should promptly be corrected, government will intervene to perform that function and then charge the owner for the cost of doing so, plus a penalty. Government will thus demonstrate not only that it cares about the plight of people, but it will also help to stem the tide of deterioration in housing. Certainly, those with any inclination to preserve and maintain their property will do so voluntarily, rather than risk such governmental intervention.

At the same time, this program would at last offer a meaningful opportunity for the training of New York's youth in useful trades and occupations. Of equal importance, it will provide employment for them after their period of training has been completed.

The recent Logue Report correctly frames both the problem and the solution with respect to housing conditions in New York City by urging that at long last "Let There Be Commitment." Certainly, tangible, meaningful and immediate redemption of such a commitment could and would be had under this program.