

1 COMMITTEE ON HOUSING AND BUILDINGS

2 COUNCIL MEMBER EISLAND: Thank you,
3 Mr. Chairman.

4 COUNCIL MEMBER QUINN: Thank you.
5 What provisions does this bill
6 provide as it relates to friction spaces?

7 COMMISSIONER ROBERTS: The bill -- I
8 am not so sure that friction spaces are dealt with
9 specifically other than the definition of
10 deteriorated conditions would cover friction spaces
11 if those specific conditions do exist.

12 COUNCIL MEMBER QUINN: Although those
13 spaces like a windowsill, for example, are ones
14 which young children may come frequently in contact
15 with, in fact their mouth may frequently come in
16 contact with, there is no additional precautions or
17 restriction or requirement or anything as it relates
18 to friction spaces; is that correct?

19 COMMISSIONER ROBERTS: Well, friction
20 spaces don't pose a problem because the child is
21 more likely to come in contact with them, because
22 quite frankly, a friction space, like a window, is
23 not necessarily going to be more like an area of
24 contact than the floor would be for a small child.
25 That is not so much the issue, as much as the kind.

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2 of back and forth would create the condition.

3 What I am saying is that to the
4 extent that those conditions are created and you are
5 seeing peeling, chipping, they would then be pulled
6 into the definitions that are outlined in the bill.

7 COUNCIL MEMBER QUINN: Okay, let's you
8 say you go into an apartment and you don't see that
9 chipping or peeling at that window, but you do see
10 it in other places, it is likely to assume that it
11 would eventually develop at that window given the up
12 and down, up and down that you were just talking
13 about. So, I just want to be clear, there is no
14 additional precautions that we are taking as it
15 relates to those spaces in this bill?

16 COMMISSIONER ROBERTS: Well, there are
17 precautions that are outlined in the controls that
18 are required for the performance of the work, and
19 their reference is combined and uncombined of doors
20 and windows and so forth.

21 But let me also point out that the --

22 COUNCIL MEMBER QUINN: Can I just ask
23 one more question.

24 COMMISSIONER ROBERTS: Sure.

25 COUNCIL MEMBER QUINN: In the thing

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2 about friction spaces and other parts of the bill, I
3 haven't really heard you use the word lead dust,
4 aren't friction spaces a place where lead dust is
5 often more of an issue?

6 COMMISSIONER ROBERTS: Could be, yes.

7 COUNCIL MEMBER QUINN: Could be.

8 COMMISSIONER ROBERTS: But, again,
9 what I am trying to get to is that the definitions
10 that are outlined in the legislation would encompass
11 those areas of the unit that you are addressing
12 here.

13 COUNCIL MEMBER QUINN: I just want to
14 go back a little bit to the point that Council
15 Member Eisland was raising about notification and
16 things of that nature.

17 In the bill there is a number of
18 different, four different ways where a tenant can be
19 notified that they have to tell their landlord if
20 there is a child of six years or under living in the
21 house, and a number of those ways are obviously by
22 mail.

23 COMMISSIONER ROBERTS: Excuse me. I
24 didn't hear what you said.

25 COUNCIL MEMBER QUINN: A number of

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2 those ways are by mail.

3 COMMISSIONER ROBERTS: Mail.

4 COUNCIL MEMBER QUINN: Which is a
5 federal issue, so I am not going to ask any
6 questions about the problems with the mail, we will
7 bring in our congress people for that.

8 Often, though, unfortunately in my
9 district and I am sure in other people's districts,
10 buildings which have a lot of violations which may
11 be more prone to have lead paint violations
12 frequently have violations as it relates to the
13 mailboxes, and frequently tenants in my district who
14 are living in buildings which are owned by bad
15 landlords or unscrupulous landlords have a
16 tremendous amount of difficulty getting their mail,
17 and that is something we work with them frequently
18 on, sometimes there is just no mailboxes, sometimes
19 the mail is believed to be stolen, et cetera, et
20 cetera.

21 It seems then, since a number of the
22 ways we are going to notify people about this very
23 important provision are by mail seems somewhat
24 reckless, given that the Department must recognize
25 the relationship between violations, bad landlords

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2 and the failure to receive mail.

3 So, based on that I want to get your
4 sense of whether you actually think this is going to
5 work or what provisions instead you would put in as
6 it relates to the six-year-old notification, et
7 cetera.

8 COMMISSIONER ROBERTS: I think there
9 are three responses.

10 I think there are provisions for hand
11 delivery in the bill as it is currently drafted.

12 COUNCIL MEMBER QUINN: By the
13 landlord, right?

14 COMMISSIONER ROBERTS: Yes.

15 Secondly, we do write violations and
16 require corrections on mailboxes, open vestibules,
17 so on and so forth, in the context of the current
18 Housing Maintenance Code.

19 Third --

20 COUNCIL MEMBER QUINN: That can take
21 years sometimes to fix.

22 COMMISSIONER ROBERTS: And third, we,
23 as it relates, and one of the things I wanted to say
24 in response to Council Member Eisland's question,
25 was that we do in the context of this notion or the

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2 problem of the bad landlord, we do bring a number of
3 building-wide comprehensive cases that deal not only
4 with a combination of lead paint abatement problem,
5 heat and hot water, a variety of other circumstances
6 that are going to occur in the context of a landlord
7 that has failed to meet their obligations just
8 generally and across the board.

9 And so those issues are more likely
10 than not to be picked up in the context of a variety
11 of other enforcement activities that the Department
12 would be pursuing.

13 CHAIRPERSON SPIGNER: Thank you.

14 COUNCIL MEMBER QUINN: Can I just be
15 put down for a second round?

16 CHAIRPERSON SPIGNER: Yes.

17 Council Member Freed.

18 COUNCIL MEMBER FREED: Thank you, Mr.
19 Chair.

20 Mr. Commissioner.

21 COMMISSIONER ROBERTS: Hi.

22 COUNCIL MEMBER FREED: Like a lot of
23 my colleagues, I am concerned about the times that
24 seem to be added, the length of times that seem to
25 be added in this bill.

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2 I think it was HPD's recommendation
3 when you testified here in December that you current
4 respond to complaints of lead paint within 48 hours?
5 How does this comply with the law that is now being
6 put before us?

7 COMMISSIONER ROBERTS: C violations,
8 we generally respond to all C violations within a 24
9 to 72 hour period, although we are not mandated to
10 do so.

11 I guess my concerns, the articulated
12 concerns that I am expressing go to the issue of
13 mandating particular, you know, what the mandates
14 should be as it relates to particular response time.
15 Those response times I think are more accurately
16 reflected in the codification of the Housing
17 Maintenance Code, and so that is the response there.
18 Although, as I mentioned, those are outer time
19 frames, we would expect to try to do or would make
20 every attempt to do better than what is outlined in
21 the statute.

22 COUNCIL MEMBER FREED: But given the
23 fact that the longer the violation exists and the
24 longer the dust lays there and the longer children
25 are subjected to that every day makes a difference

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2 and may contribute to lead poisoning that child,
3 doesn't it make more sense, instead of having the
4 outside limits, to have tighter limits so that you
5 can move quicker and require quicker action on it?

6 COMMISSIONER ROBERTS: Council Member,
7 the analysis you use I think would be applicable to
8 most, if not every emergency condition that we are
9 talking about.

10 The longer you go without heat or hot
11 water you create the same concerns.

12 So, our concern would actually be in
13 trying to respond, as an operational standpoint,
14 respond as quickly as possible, and that is what we
15 do. And I think that this becomes a separate
16 question as to the articulated time frames in the
17 statute.

18 COUNCIL MEMBER FREED: Well, last fall
19 when the rules that you proposed would have required
20 violations to be issued within 20 days after
21 inspections, this law allows up to 60 days. I don't
22 see how that helps.

23 COMMISSIONER ROBERTS: I think our
24 particular concern was with articulating rules that
25 were going to be consistent with the law as it is

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2 currently being interpreted by the court. Our goal
3 was to articulate regulations that comply.

4 COUNCIL MEMBER FREED: Yes, but
5 shouldn't your goal be not to poison children? There
6 is a reason they call it poisoning, it is because
7 children that are subjected to this are immediately
8 at risk. And don't you think that we should be
9 concerned enough to do away with that risk as soon
10 as possible? I mean, the concern shouldn't be
11 complying with the law, particularly when we are in
12 the process of amending that law to make it more and
13 more time to do this compliance.

14 COMMISSIONER ROBERTS: Our experience
15 in government and life would surely indicate that
16 just because it is written does not make it so. And
17 the notion that specific regulations were
18 articulated consistent with the way the legislation
19 was interpreted by the court in the litigation is
20 not what we are talking about here, and no one is
21 talking about being an advocate or in favor of
22 poisoning children, and that is not what we are
23 talking about here. What we are talking about here
24 is the framework of the legislation being consistent
25 with what elements of the Housing Maintenance Code,

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2 which also deal with health and safety violations.

3 And so, that is the response to that
4 particular question.

5 COUNCIL MEMBER FREED: Okay, I guess
6 we will have to differ on that, because I don't
7 think the way to get compliance, if you can't get
8 compliance is to weaken the law. I think the way to
9 get compliance or solve a problem is to strengthen
10 it.

11 Commissioner, I have to say, from
12 personal knowledge and observation, I have seen that
13 many clean-ups, even under the current law are done
14 without real supervision or real oversight. Many of
15 the people who are hired to do the lead abatement
16 are not people who are strictly trained in doing
17 lead abatement, in many cases they don't even know
18 they are doing what they are doing, they just know
19 they are cleaning something up. If we are allowing
20 the landlords a certain amount of time to do this,
21 which certainly makes time, who is going to do the
22 oversight to guarantee that this clean-up is done
23 under proper supervision and in compliance with the
24 bill that we are now proposing?

25 COMMISSIONER ROBERTS: Yes, I think

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2 that that question again goes to the question of the
3 dust wipe test as an example of something that can
4 be done to ensure that the work was performed in a
5 manner that was consistent with the controls that
6 are outlined in the statute.

7 Again, that is an issue for the
8 Department of Health and I know that Commissioner
9 Cohen is going to speak to that.

10 COUNCIL MEMBER FREED: All right,
11 because I do have a problem with that, and I know
12 that there are current tests that can really check
13 that are very inexpensive that would do a better
14 job.

15 CHAIRPERSON SPIGNER: All right,
16 Council member.

17 COUNCIL MEMBER FREED: Could I just
18 get clarification on something?

19 CHAIRPERSON SPIGNER: Yes.

20 COUNCIL MEMBER FREED: I am wondering,
21 this bill as it is written, does it cover City-owned
22 buildings?

23 COMMISSIONER ROBERTS: Yes, it will
24 cover City-owned buildings.

25 COUNCIL MEMBER FREED: Okay.

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2 CHAIRPERSON SPIGNER: Council Member
3 Malave-Dilan.

4 COUNCIL MEMBER MALAVE-DILAN: Thank
5 you, Mr. Chairman.

6 Good morning, Commissioner.

7 COMMISSIONER ROBERTS: How are you?

8 COUNCIL MEMBER MALAVE-DILAN: My
9 concern is in regards to the timetable for HPD
10 enforcement. Basically I want to know why does it
11 take 25 days to even respond to the initial
12 complaint and then going to the end results when
13 allegedly the owner would correct a violation, why
14 would it take HPD another 90 days to ensure that it
15 is corrected?

16 COMMISSIONER ROBERTS: Yes.

17 COUNCIL MEMBER MALAVE-DILAN: Can you
18 explain that to me, and why does it take so long?

19 COMMISSIONER ROBERTS: Yes, there are
20 two. The first issue is the inspection upon the
21 complaint. What is contemplated is actually a
22 bifurcated system of the difference in time between
23 heat season and non-heat season. Heat season being
24 that period of time beginning in October, ending in
25 May, where it would be 25 days, and non-heat season

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2 would be 15 days.

3 COUNCIL MEMBER MALAVE-DILAN: So if we
4 are talking where there is a child six years, and
5 there is a violation, so it is an emergency
6 condition all year around, I mean if there is
7 additional money required for enforcement wouldn't
8 that be the way to go then?

9 COMMISSIONER ROBERTS: No, I think
10 that our particular focus will be on operationally
11 responding much faster than that. But, again, we are
12 talking about mandated compliance and enforcement
13 for which we have some concerns with the time frames
14 being shorter than what is contemplated by the
15 statute.

16 In terms of our operational ability
17 to respond, we do believe that these violations will
18 be treated like other emergency conditions. And we
19 do believe we will be in a position to respond, you
20 know, within 72 hours to the complaint being
21 initiated.

22 Again, the initial response time will
23 also involve under the current complaint system a
24 lot of back and forth and information being provided
25 between the tenant, HPD, and the landlord, calls

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2 into central complaint, follow-up calls to try to
3 ensure or to try to trigger compliance prior to the
4 initial inspection actually occurring. So there will
5 be a variety of different things that will be
6 ongoing in that time period, even within the shorter
7 72-hour time period.

8 But that is a particular concern that
9 we have about the mandated timeframes being shorter
10 than what is articulated in the code.

11 Secondly, on the 90 days, that is the
12 correction period. That would be the amount of time
13 it would take us to go out and actually perform the
14 work and to ensure that the work had actually been
15 completed. And again, these are buildings that we
16 don't own. We will have to go out and secure
17 contractors, initiate the work, gain access, perform
18 the work, so on and so forth.

19 Some of these jobs may actually be
20 more extensive than others, and so you will have
21 some differentials there just from an operational
22 standpoint, for which we would be more comfortable
23 with, the additional allocation of time.

24 COUNCIL MEMBER MALAVE-DILAN: Just one
25 more point regarding this issue.

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2 I am very concerned in terms of these
3 numbers and I think that before we move on with this
4 legislation, I think we need to really look at this
5 part of it in reducing the number of days in terms
6 of this entire process.

7 I will be looking towards that, Mr.
8 Chairman.

9 CHAIRPERSON SPIGNER: Thank you,
10 Council Member.

11 Okay, Council Member Nelson.

12 COUNCIL MEMBER NELSON: Thank you, Mr.
13 Chair.

14 Emotions are running very high on
15 this issue, and I have listened to the testimony, I
16 have met with advocates from various sides of this
17 issue, I have read many news accounts, this
18 legislation is lacking in a few major areas.

19 First of all, I would like to see
20 legislation to provide a much shorter time frame, an
21 unlimited time frame for inspections gives landlords
22 a free ride, obviously, with respect to our
23 children. There are legal reports that need to be
24 examined. I would like to see appropriate lead
25 removal testing. Appropriate lead removal testing,

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2 to ensure the safety of our children, and protect
3 them from the harm caused by the dust. Although an
4 extremely small percentage of my district is
5 involved in this, it is still Citywide, an issue for
6 families and children, and without changes in the
7 bill like the dust this bill should not fly, and I
8 can't support this legislation in its current form.
9 I just wanted to make that statement.

10 CHAIRPERSON SPIGNER: Let me ask a
11 question, Commissioner, as it relates to the
12 proposed legislation. Does it limit the City's
13 liability as an owner of property, in your opinion?
14 I think the Corporation Counsel --

15 COMMISSIONER ROBERTS: Yes, I am going
16 to have the Corporation Counsel come up and address
17 those issues.

18 Certainly the bill calls for legal
19 avenues to compel compliance on the part of both the
20 City and landlord and our enforcement capabilities,
21 but in terms of our liability.

22 CHAIRPERSON SPIGNER: Sir, if you will
23 identify yourself, we want to hear your views on
24 particularly the liability as it relates to the City
25 as a property owner and any other aspect of the

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2 liability issues that have been raised here this
3 morning.

4 MR. LEVY: My name is Stephen Levy, I
5 am an Assistant Corporation Counsel. Currently I am
6 the Chief of the Lead Unit in the Tort Division and
7 my job is to defend the City of New York in the
8 litigation brought for personal injuries arising out
9 of lead poisoning.

10 I have not prepared a statement here.
11 I am here to answer the questions of the Committee.
12 A few things I would just like to address in the
13 beginning is that I see the critical issue in
14 compliance to be what remedy does a child have
15 immediately when there is a complaint that there is
16 peeling paint or that there is a lead hazard found
17 in the child's apartment. And the bill, from the
18 reading of the Law Department is that it, for the
19 first time, puts mandates on the City to go in and
20 to correct those lead paint hazards when the
21 landlord fails to do it in the first instance.

22 My concern, though, is that the
23 effort by the City to go and make emergency repairs
24 particularly and to do various inspection duties
25 does not in the process incur huge tort liability

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2 down the road where none exists today.

3 Currently for bond assessment
4 purposes or for the New York Times the current tort
5 liability against the City is about \$500 million.
6 The City's internal estimates are lower and the
7 State Comptroller puts it lower. The lowest number
8 for the cases that we have now is about \$200
9 million. As an estimate of the tort liability that
10 is currently pending, that of course still wouldn't
11 change.

12 But currently there are about 1,400
13 claims against the City that is creating this
14 assessed two or three-hundred million dollars worth
15 of liability.

16 The problem with this bill from the
17 tort perspective, is that without certain
18 protections could create huge liability far, far
19 greater from that in the future, and it won't serve
20 the purpose of the bill of getting an immediate
21 abatement on immediate emergency repair for the
22 child or for the family who is living with lead
23 hazards in their apartment.

24 CHAIRPERSON SPIGNER: How do you
25 respond to the statement that this is a landlord

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2 protection bill?

3 MR. LEVY: The City has two roles
4 here, and my job as a tort lawyer is to defend two
5 parts of what the City does. I defend the Department
6 of Health, which is concerned with the health of all
7 of the children, and I defend HPD which is concerned
8 with housing issues.

9 In the City's housing stock, which is
10 approximately 20,000 units now, although when I
11 started it was almost higher, it was almost 40,000
12 units. There is a small incidence of lead poisoning,
13 far greater than anyone would want. But, for
14 example, in this year there have been four reported
15 cases. Last year there were nine reported cases.

16 In terms considering that the housing
17 that the City took in was the worst abandoned
18 housing stock that exists in this City, HPD has
19 taken tremendous steps to get as far as it has and
20 needs to take further tremendous steps to completely
21 eliminate the incidence of lead poisoning.

22 But as the City as owner, this bill
23 has a smaller effect. The greater tort concern
24 toward liability is where the City goes out into a
25 privately-owned building, to respond to a complaint

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2 or sent by the Department of Health or for any
3 reason, or on a spot inspection, starts to do
4 inspections, starts to get the landlord, to try to
5 force the landlord to fix it and goes out and spends
6 three, four, five or \$10,000 on emergency repairs,
7 that whole process needs protection from the Council
8 to not have tort liability occur in the future, so
9 that \$20 million spent next year on lead emergency
10 repairs does not create \$400 million or \$500 million
11 in tort liability five or ten years down the road.

12 CHAIRPERSON SPIGNER: What is the
13 current status of the stay of the judgement in the
14 NYCCELP case, which was required that the City
15 implement regulations in accordance with Local Law
16 1; has an extension been granted by the judge? And
17 to what date?

18 MR. LEVY: There is a current stay of
19 the proceedings in NYCCELP --

20 CHAIRPERSON SPIGNER: Commissioner
21 Roberts, are you through?

22 COMMISSIONER ROBERTS: Yes.

23 CHAIRPERSON SPIGNER: Thank you.

24 MR. LEVY: I think that the last day
25 was granted I think for 30 days until the end of

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2 this month. And then if necessary, the parties will
3 go, and there is some disagreement in the lawyers in
4 whether or not the parties to the litigation can
5 themselves agree to an extension, or whether the
6 court has to also join in that by so ordering the
7 stipulation.

8 It is the Law Department's view that
9 because we are dealing with civil contempt issues
10 before the court that the judge has to sign off on
11 it.

12 There are those in the litigation who
13 do hope that we will be able to get a bill that will
14 solve the issues in the litigation before the
15 stipulation runs out.

16 CHAIRPERSON SPIGNER: Council Member
17 Michels, do you have a question of the Corp Counsel?

18 COUNCIL MEMBER MICHELS: Yes, I do.
19 Thank you.

20 As I understand it, you have entered
21 into a stipulation and that the complainants in the
22 lawsuit have agreed to have a stipulation so ordered
23 by the judge. Has it been so ordered by the judge?

24 MR. LEVY: Let me ask the attorneys
25 assigned the case.

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2 We are seeing the judge on Wednesday.

3 COUNCIL MEMBER MICHELS: On Wednesday.

4 I understand that offer was made two
5 weeks ago, I don't know what the delay is.

6 Further, I understand there was an
7 offer by the plaintiffs to give you a stipulation to
8 extend time until October, are you aware of that?

9 MR. LEVY: Yes.

10 COUNCIL MEMBER MICHELS: Now, I was
11 interested to learn the fact that you are not
12 concerned about liability for owning the buildings,
13 you are concerned about liability from repairing
14 buildings. That is what you seem to say. That the
15 ownership of the buildings, the failure to fix
16 buildings which are owned by the City, the liability
17 is something that doesn't concern you as much, I
18 thought I heard you say that.

19 MR. LEVY: Right. In terms of the cost
20 to the City in tort liability --

21 COUNCIL MEMBER MICHELS: Right. That
22 is what I am talking about.

23 MR. LEVY: Only in that sense. Not in
24 terms of properly maintaining housing, or the
25 property issues of lead poisoning.

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2 COUNCIL MEMBER MICHELS: Fine. Fine.

3 MR. LEVY: But it is a smaller number
4 of cases.

5 COUNCIL MEMBER MICHELS: You are aware
6 of the Juarez case, aren't you?

7 MR. LEVY: Yes, sir.

8 COUNCIL MEMBER MICHELS: And you are
9 aware the landlords consider that a victory because
10 they did away with strict liability, or absolute
11 liability on the part of the owners, right?

12 MR. LEVY: Well, the landlords who are
13 co-defendants, or co-defendants that actually think
14 that Juarez --

15 COUNCIL MEMBER MICHELS: Well, now
16 they are changing their minds, but they considered
17 it a victory at that time because they no longer
18 were strictly liable, and that under the Juarez case
19 --

20 CHAIRPERSON SPIGNER: Stanley, do you
21 want him to answer the question?

22 COUNCIL MEMBER MICHELS: Yes.

23 CHAIRPERSON SPIGNER: Well, then why
24 don't you permit him to answer it?

25 COUNCIL MEMBER MICHELS: I am sorry. I

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2 am sorry, yes, please answer.

3 CHAIRPERSON SPIGNER: Let him answer
4 it.

5 MR. LEVY: It is the law of the land,
6 I don't know whose victory it is.

7 COUNCIL MEMBER MICHELS: Are you aware
8 that this law as written would change the Juarez
9 case? It would not be successful, the Juarez case as
10 this law is not presently in front of us, this
11 proposed bill?

12 Because it says, and i will refer you
13 to page 12, starting with line three and ending in
14 line six, it says:

15 "In any dwelling unit in a multiple
16 dwelling erected prior to January 1st, 1960 in which
17 your child under six years of age resides, it shall
18 be presumed that the paint and coating material in
19 the interior of the dwelling unit is lead-based
20 paint" solely for the purpose of this article which
21 takes it out of the use in the tort liability
22 action, right?

23 MR. LEVY: I don't agree with that.
24 Right now there is a split in the law in the First
25 Department and the law in the Second Department --

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2 COUNCIL MEMBER MICHELS: I am talking
3 about what this bill does. I am reading from the
4 bill, the bill in front of us, it says this is not
5 the present law. The law that we are proposing would
6 say you cannot use the presumption, which as you
7 know in the Juarez case is why you have constructive
8 notice. And without constructive notice of a lead
9 condition, you cannot sue. You can sue but you can't
10 recover. You are aware of that, aren't you?

11 You are aware that we are trying to
12 change the law, the Juarez case is being changed by
13 this bill.

14 MR. LEVY: Well, I disagree with
15 several aspects of what you are saying.

16 One thing on the status of the law,
17 there are cases of course that are not multiple
18 dwellings in which there is litigation for lead
19 poisoning.

20 COUNCIL MEMBER MICHELS: I am talking
21 about cases based on Local Law 1, and the
22 presumption.

23 MR. LEVY: But to use the analogy of
24 the cases in which Local Law 1 doesn't apply, then
25 landlords have been held in the First Department,

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2 for example, there is a case called Espanol in the
3 First Department in which even without Local Law 1,
4 an owner of a facility in which children attended
5 was deemed to be on notice of lead hazards --

6 COUNCIL MEMBER MICHELS: We are
7 talking about multiple dwellings, please, sir, don't
8 beg the question. We are talking about multiple
9 dwellings, we are talking about this law here, we
10 are talking about Local Law 1, don't tell me about
11 something else. Let's talk as lawyers together. We
12 are talking on all floors of multiple dwellings
13 built prior to 1960 with a child under five, now,
14 under six then, where you have a presumption,
15 presumed lead paint violation. Rebuttable
16 presumption which gives you constructive notice.
17 Without that constructive notice you and I know
18 Juarez could have never been successful.

19 MR. LEVY: But there are other ways to
20 prove constructive notice.

21 COUNCIL MEMBER MICHELS: Fine, but we
22 know Juarez wouldn't have been successful. Are you
23 going to answer my question? I know lawyers don't
24 like to answer questions, but the fact of the matter
25 is Juarez would not be successful under this law

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2 which takes out the presumption which gives them
3 constructive notice; isn't that correct?

4 MR. LEVY: Juarez --

5 COUNCIL MEMBER MICHELS: Say yes. Say
6 yes, it is true. I know it is hard to say yes, but
7 it is true.

8 So, this law is attempting to change
9 the law of the state. The proposed bill is
10 attempting to change the law of the state by taking
11 out constructive notice; isn't that correct?

12 MR. LEVY: It seems that this law is
13 seeking to amend the local law, Local Law 1.

14 COUNCIL MEMBER MICHELS: Which had a
15 presumption that could be used in the courts, but
16 now it doesn't.

17 MR. LEVY: But the problem with the
18 presumption is that for landlords to be issued a
19 violation in an apartment, if there is a
20 presumption, then the landlord has a motivation, an
21 impetus, to rather than immediately correct the
22 hazard, contact his lawyer, contact an independent
23 inspector, and try to find out if he can contest
24 those initial violations. Because the presumption of
25 lead paint is a presumption --

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2 COUNCIL MEMBER MICHELS: It is
3 rebuttable.

4 MR. LEVY: It is rebuttable. Now,
5 because a landlord under the threat of tort
6 liability would almost be advised, I would advise
7 them, I would say don't go and fix it right away, go
8 get an environmental crew, talk to a lawyer, try to
9 contest it, because with that presumption you could
10 be liable in torts.

11 Now, when the presumption does not
12 apply in a tort lawsuit, then the landlord can
13 freely go in and make those immediate repairs.

14 COUNCIL MEMBER MICHELS: We lawyers
15 can do a lot of things with words, can't we?

16 You know, if the threat of lawsuit is
17 there the landlord is going to go in and clean up
18 his apartment. We are talking about prevention. We
19 are not talking about a child who has already been
20 lead poisoned. We are talking about it is the
21 landlord who wants to avoid being sued is going to
22 clean his apartment up so he doesn't have to go to
23 his lawyer. Isn't that what you are going to have
24 here? If he doesn't have any compulsion of being
25 sued, if he can't be sued because he doesn't have

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2 the benefit of the Juarez case and presumption of
3 leaded paint, he is not going to have a problem.

4 MR. LEVY: If that would work, we
5 wouldn't have a lead problem today.

6 COUNCIL MEMBER MICHELS: We wouldn't?

7 MR. LEVY: No, because there is
8 hundreds of millions of dollars in tort claims that
9 have been paid up. There have been \$11 million
10 verdicts, there have been \$7 million verdicts --

11 COUNCIL MEMBER MICHELS: Based on the
12 Juarez case?

13 MR. LEVY: If tort liability worked to
14 prevent lead poisoning, it was even an incentive to
15 prevent lead poisoning we wouldn't have it because
16 the tort liability is out there.

17 The City has \$500 million of tort
18 liability now.

19 COUNCIL MEMBER MICHELS: And do you
20 know how many kids would have been lead poisoned if
21 you hadn't had that threat of lawsuits? Do you have
22 any idea? You have no idea, so you are just
23 speculating, isn't that correct?

24 All I am trying to -- you are a
25 lawyer, I don't want to argue the substance of the

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2 case, I just want you to admit with without the
3 Juarez case and the presumption that is in the
4 current law, and taking it out, your difficulty is
5 almost overwhelming to win a lawsuit in a multiple
6 dwelling; isn't that correct?

7 MR. LEVY: I disagree with that.

8 COUNCIL MEMBER MICHELS: You disagree.
9 Why do you disagree?

10 CHAIRPERSON SPIGNER: Stanley, he
11 can't disagree with you?

12 COUNCIL MEMBER MICHELS: You don't
13 believe constructive notice is necessary in the
14 Juarez case?

15 MR. LEVY: The constructive and actual
16 notice --

17 COUNCIL MEMBER MICHELS: Fine, actual
18 notice. I am talking about constructive notice.

19 MR. LEVY: You are asking me in a
20 landlord who fails to properly maintain his
21 apartment --

22 COUNCIL MEMBER MICHELS: Right.

23 MR. LEVY:-- And a child who is living
24 in his apartment gets lead poisoned --

25 COUNCIL MEMBER MICHELS: Right.

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2 MR. LEVY: That child will be able to
3 go in and successfully sue his landlord under the
4 old bill, and likely under the new.

5 COUNCIL MEMBER MICHELS: He would have
6 to show actual notice. He would have to show and
7 prove in court that the landlord actually knew at
8 the time he was poisoned that that paint was leaded
9 paint. That is what you would have to show. I am a
10 litigator also.

11 You would also have to show, as you
12 probably know under this law, which is different,
13 that the landlord knew that he lived in that
14 apartment. You would also have to show that he gave
15 a landlord written notice or actual notice of the
16 condition. That is how far this bill goes to
17 insulate landlords from liability. And you want to
18 hide from it and change it around all you want, but
19 you know something? I am a lawyer, thank God I am a
20 lawyer and I can read.

21 CHAIRPERSON SPIGNER: Thank you.

22 Thank you, Corp Counsel.

23 Moving along now to Council Member
24 Linares who has a question.

25 Well, let me complete HPD.

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2 Commissioner, you are on another tight time frame.

3 Corp Counsel, please don't leave, we
4 may have some more questions for you.

5 Council Member Linares, you have a
6 question?

7 COUNCIL MEMBER LINARES: Yes.

8 Commissioner, the City Comptroller
9 found several years ago that while the City had at
10 that time some 66,000 lead paint violations in its
11 database, some 43 percent of immediate hazardous
12 violations still existed, an average of about one
13 year after identification by HPD inspector. How will
14 this bill that we are considering today improve that
15 situation?

16 COMMISSIONER ROBERTS: Well, I am not
17 familiar with the Comptroller report that you have
18 referenced but it sounds as though it references
19 what is kind of an ongoing issue of concern and
20 discussion between the agency and this Committee as
21 to how and when violations are removed, removed from
22 the record and so forth.

23 The continued existence of the
24 violation does not in and of itself represent the
25 continued, or mean that the conditions still exist.

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2 In many of the same ways that our
3 complaint system --

4 COUNCIL MEMBER LINARES: How --

5 COMMISSIONER ROBERTS: Because, I will
6 give you one example. In those instances, for
7 example, where the City has performed work under our
8 emergency repair system or program, the violations
9 are not removed, even though we know that the work
10 has actually been performed because we have done so.

11 In many of the same ways that the
12 system is a complaint-driven system, the corrections
13 are only removed when the landlord initiates a
14 removal of the -- an action to remove the violation
15 from the system. And so many circumstances that are
16 repaired in fact don't get removed from the system
17 and one of the discussions that we constantly have
18 is around the over 2 million violations that
19 continue on the record and I have no reason to doubt
20 or disagree with the numbers that have been outlined
21 by the Comptroller, but I don't think that
22 necessarily is representative of the picture.

23 COUNCIL MEMBER LINARES: But you do
24 acknowledge that this a problem, that there have
25 been difficulties in addressing it, when we talk

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2 about 43 percent, that is almost half of the 66,000
3 violations that were in the database, and I just
4 raise this because this is a current problem that
5 exists that is still needed to be addressed and I
6 just don't know how this bill would help respond.

7 COMMISSIONER ROBERTS: I don't know
8 whether the -- I do acknowledge that it is a
9 problem, inasmuch as the violations exist. I don't
10 agree necessarily that it is reflective of the
11 condition of the housing stock. And so that is where
12 I guess we would -- because the violation exists,
13 continues on the record, it doesn't mean that the
14 condition has not been corrected.

15 COUNCIL MEMBER LINARES: But it still
16 leaves pretty much up in the air, you know, what the
17 answer is. You know, do you have a clear sense of
18 what percentage, you know I know that it is 43
19 percent here so we are assuming 63 percent within a
20 one-year period which is a long period of time, by
21 the way.

22 The question is, would this law
23 aggravate that situation? And my sense is that the
24 answer would be yes.

25 COMMISSIONER ROBERTS: I mean, I don't

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2 follow that, why it would aggravate the situation. I
3 mean, you are not going to have -- I mean, again,
4 these conditions are C violations under the current
5 system and I guess this legislation goes to a
6 variety of different aspects of that system --

7 COUNCIL MEMBER LINARES: I guess this
8 is an area of concern that is still consistent with
9 your agency, and in terms of the resources that you
10 would need, obviously you have not been able to
11 comply to fulfill and to respond to the level of
12 complaints in an expeditious way, either because you
13 don't have the resources, the inspector and so
14 forth. So, this is a serious area of concern that
15 currently exists.

16 I guess my question is how would this
17 law rectify or respond to this existing situation of
18 the poisoning, or at least with the number of
19 violations that you have on your database?

20 COMMISSIONER ROBERTS: Well, again,
21 without addressing that directly because I am not
22 sure I understand, we can talk about that. But I
23 guess the question also relates to, from a lead
24 paint poisoning standpoint, that there are a variety
25 of other circumstances which not only deal with the

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2 reporting of the existence of the hazard in
3 children, but also mechanisms for encouraging and
4 giving incentives to owners to address this issue
5 that occur outside of the context of just the
6 complaint system.

7 So, the legislation deals with that
8 as well.

9 So, you talk about the global issue
10 of whether this can serve to assist in reducing the
11 incidence of poisoning, yes, you know there are
12 other mechanisms that work as well, in addition to
13 just the complaint system.

14 COUNCIL MEMBER LINARES: This is still
15 a gray area, an area of concern that I think we need
16 to look closely at.

17 I turn it back to you, Mr. Chair.

18 ACTING CHAIRPERSON NELSON: Thank you,
19 Council Member.

20 Council Member Quinn.

21 COUNCIL MEMBER QUINN: Thank you.

22 Is it true that under the proposed
23 bill HPD would have no requirement to notify the
24 Department of Health for violations?

25 COMMISSIONER ROBERTS: I don't know if

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2 there is a -- how we changed the notification of DOH
3 in this bill, and I apologize for that. We will have
4 someone --

5 COUNCIL MEMBER QUINN: I could tell
6 you.

7 COMMISSIONER ROBERTS: We will have
8 someone look at that.

9 COUNCIL MEMBER QUINN: Okay.

10 COMMISSIONER ROBERTS: I just want to
11 clarify how it is working now so I just wanted to
12 get that.

13 COUNCIL MEMBER QUINN: Okay, great.

14 COMMISSIONER ROBERTS: So I will have
15 them get to that.

16 COUNCIL MEMBER QUINN: I mean, my
17 sense of just, as you are looking at the answer, you
18 can correct if I am wrong, is that presently HPD
19 notifies DOH of violations so that DOH can then
20 follow up with the families and the children, and
21 under this proposal, HPD would refer the families
22 and the children to DOH so there wouldn't be direct
23 communication between the agencies. So that is my
24 understanding, so if you could get back to me on
25 that, that would be very helpful. And just for the

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2 record, if my understanding is in fact correct, that
3 is in my opinion unsatisfactory notification and I
4 would want and think that agencies could just speak
5 to each other to really make sure we are going to
6 get things cleaned up and prevent health problems
7 for children.

8 Is there, under this proposal, what
9 is the change in the landlord's duty to prevent?

10 COMMISSIONER ROBERTS: Meaning?

11 COUNCIL MEMBER QUINN: You know, their
12 duty to prevent there from being future problems.

13 COMMISSIONER ROBERTS: You mean in
14 terms of an ongoing basis? I am not quite sure what
15 you mean by that.

16 You know, a threshold becomes created
17 when you have got a building of a certain age, and
18 then you have the notification that there is a child
19 six or under in the unit and then you have an
20 obligation to inspect. Now, all that being said, one
21 thing I want to be very clear about is that does not
22 take you out of the general system of code
23 enforcement and compliance that occurs throughout
24 the City of New York, so that being said, as
25 inspectors may or may not --

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2 COUNCIL MEMBER QUINN: That doesn't
3 calm my fears.

4 COMMISSIONER ROBERTS: -- Be visiting
5 the building or particular units, that would also
6 trigger inspections and obligations to actually
7 remediate and so forth. But then you would be back
8 into the process, articulated by the statute.

9 COUNCIL MEMBER QUINN: Once again, if
10 you could just check, my sense is that presently
11 there is -- that presently and then under proposed
12 legislation which has been out there recently there
13 was a desire to continue the duty to prevent and
14 that this law we are talking about today doesn't do
15 that.

16 Just a couple of last questions. What
17 requirement or restrictions does the law we are
18 talking about today have as it relates to common
19 areas?

20 COMMISSIONER ROBERTS: The common
21 areas are not -- this particular piece of
22 legislation does not address common areas, but I
23 think that the Department of Health can talk about
24 the health risks associated or that they perceive in
25 those areas.

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2 COUNCIL MEMBER QUINN: So you think it
3 is efficient or satisfactory, enough protection not
4 to have any restrictions in common areas?

5 COMMISSIONER ROBERTS: I think that is
6 the question for the Health Department. So, I don't
7 know if you want to --

8 CHAIRPERSON SPIGNER: Thank you.

9 COUNCIL MEMBER QUINN: Does Health
10 answer now or do we ask them later?

11 CHAIRPERSON SPIGNER: I want to finish
12 up with Commissioner Roberts.

13 COUNCIL MEMBER QUINN: Okay, then we
14 will go to Health.

15 CHAIRPERSON SPIGNER: I have Council
16 Member Ognibene, Council Member Perkins and Council
17 Member Michels.

18 So, let's move now to Council Member
19 Ognibene.

20 COUNCIL MEMBER OGNIBENE: Thank you,
21 Mr. Chairman.

22 Welcome, Commissioner.

23 COMMISSIONER ROBERTS: Hi.

24 COUNCIL MEMBER OGNIBENE:

25 Commissioner, as you know, this is probably one of

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2 the most significant legislations I think that we
3 are going to be working on, certainly in my tenure
4 as a member of the Housing and Buildings Committee,
5 and all of us are concerned that we are coming out
6 with a piece of legislation that is going to get the
7 job done, and I had been trying to compare some of
8 the practices and procedures that were in place
9 before or presently in force and effect and what
10 this law will do to change that.

11 One of the things that concerns me is
12 under the present scheme it appears that the City is
13 not mandated to repair lead hazard where the
14 landlord doesn't.

15 Would you clarify that, and how does
16 that change under the present legislation?

17 COMMISSIONER ROBERTS: As it currently
18 stands we don't have a mandated duty to correct this
19 type of violation under current law. This
20 legislation does impose on the City a mandated duty
21 to correct the violation if the owner does not do
22 so.

23 COUNCIL MEMBER OGNIBENE: And what
24 kind of a time frame is imposed on that owner? What
25 are looking at?

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2 COMMISSIONER ROBERTS: Well, there are
3 a variety of different time frames outlined in the
4 legislation. We have an obligation depending upon
5 the time of year to actually issue the violations,
6 to do the -- rather, to perform the inspection
7 within 25 or 15 days, and then an obligation to
8 actually issue, duly notify the owner within a
9 60-day period.

10 Then there is a 15-day period, or is
11 it 21 first? Twenty-one day period first, where the
12 owner can actually perform the work consistent with
13 the procedures that are outlined in the legislation.
14 And then it goes on from there.

15 There are opportunities for a
16 postponement that we can grant if the owner
17 petitions us for that extention. We have to evaluate
18 that and identify some criteria in which we would
19 grant those extensions.

20 COUNCIL MEMBER OGNIBENE: Also, would
21 you explain to me under the present law, what is the
22 obligation on the part of an owner to correct a
23 lead-based paint hazardous condition where there is
24 no violation that has been issued? In other words,
25 HPD hasn't issued a violation, what is his

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2 obligation under present law?

3 COMMISSIONER ROBERTS: I assume that
4 there is none, I don't think there is -- I mean, you
5 have got to have a violation in order to be --

6 COUNCIL MEMBER OGNIBENE: Now, does
7 that change significantly under this present
8 legislation that is being proposed?

9 COMMISSIONER ROBERTS: It does. So
10 there is an obligation to conduct an annual
11 inspection and survey in connection with this
12 specific condition which does not exist now under
13 law.

14 COUNCIL MEMBER OGNIBENE: That
15 represents a significant improvement certainly under
16 the present --

17 COMMISSIONER ROBERTS: Absolutely.
18 That is a significant change under the current --

19 COUNCIL MEMBER OGNIBENE: That there
20 is now an affirmative duty on the part of the
21 landlord to correct this --

22 COMMISSIONER ROBERTS: To check this
23 out.

24 COUNCIL MEMBER OGNIBENE: To check
25 this out, and if discovered, to correct the

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2 condition.

3 COMMISSIONER ROBERTS: Right.

4 COUNCIL MEMBER OGNIBENE: Not present
5 today.

6 One of the things that had concerned
7 me was the discussion we had at the last meeting
8 concerning the rules used to implement the previous
9 law, and I believe that we will be using different
10 rules under this new statute if it is passed.

11 And there was a discussion as to why
12 the old rules weren't good enough. My sense was that
13 the old law was draconian and therefore the rules
14 used to implement it would also be draconian. But I
15 think there was a concern as to which rules we would
16 be applying if this law passed. Would you explain to
17 me what are the rules and regulations that would
18 apply if this law is passed?

19 COMMISSIONER ROBERTS: The statute you
20 know contemplates, I think the biggest thing,
21 Council member, is the difference between what is
22 contemplated under local law 1 and this piece of
23 legislation, is the difference in approach.

24 The approach from a lead-safe
25 approach that we are contemplating under this

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2 current legislation to one that is lead-free, which
3 we think gets you into a set of circumstances which
4 might actually create more harm in terms of
5 disturbing intact paint and so on and so forth.

6 So, that is I think the major
7 difference. Now, as it relates to the specifics of
8 implementing the legislation, that goes to the
9 timeframes and the various obligations that we will
10 have to correct and so forth, that come up that you
11 have alluded to in your prior questions.

12 COUNCIL MEMBER OGNIBENE: It was my
13 understanding that part of the rules and regulations
14 that we would be adopting would be the rules and
15 regulations that are in use or that have been
16 promulgated by the Department of Environmental
17 Protection and are in prevalent use throughout the
18 United States; is that true?

19 COMMISSIONER ROBERTS: Well, we do
20 think that this is more consistent with what has
21 been promulgated by federal agencies, whether it is
22 DEP or EPA or HUD. But that is a significance
23 difference in this legislation.

24 But, again, the approach is the
25 approach that we think has a common acceptance

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2 throughout the country.

3 CHAIRPERSON SPIGNER: Council Member
4 Perkins.

5 COUNCIL MEMBER OGNIBENE: Thank you
6 very much.

7 COUNCIL MEMBER PERKINS: Thank you,
8 Mr. Chairman.

9 Good afternoon, Commissioner.

10 COMMISSIONER ROBERTS: Hi.

11 COUNCIL MEMBER PERKINS: It's good to
12 see you outside of your job.

13 COMMISSIONER ROBERTS: Likewise.

14 COUNCIL MEMBER PERKINS: I know your
15 health is very important to you and I know that as a
16 new father of a child under seven that you are
17 sensitive to the concerns of children.

18 I enjoy the privilege of being a
19 father, too, and I have on my staff an extraordinary
20 person who unfortunately is a parent of a child that
21 has been victimized by lead poisoning and whose
22 child is suffering severely in terms of educational
23 achievement, et cetera. So, this is a very serious
24 concern of mine, and one aspect of the concern that
25 I have relates to standards, relates to this bill

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2 that seems to offer an incentive to landlords at
3 what I would say is a second class standard. In
4 other words, it is sort of a perverse form of social
5 promotion in that, you know, if you comply within a
6 certain period of time, you will get us an incentive
7 that says you do not have to live up to the highest
8 standards of the Health Code.

9 And I read the section here where the
10 owner receives a notice of violation of Subdivision
11 A of this section does not comply with the
12 provisions for the timely correction of a violation
13 pursuant to paragraph one of subdivision 1 of
14 section 27-215 of this code.

15 The correction of the violation
16 specified in subdivision A of this section shall be
17 performed in accordance with section 173.14 of the
18 Health Code of the City of New York. That is on page
19 15, starting with line one going to line five.

20 So, basically what it says is there
21 is an incentive, that we are going to encourage you
22 to do this by punishing you if you don't, and making
23 you do it right. So, you are allowed within a
24 certain period of time to get away with doing it on
25 a lower level, on a less healthy level, but if you

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2 don't do it within that period of time, then you are
3 going to be punished and you are going to have to do
4 it right.

5 That seems kind of perverse, that
6 seems kind of unfair, that seems kind of dangerous
7 to children, and I am kind of wondering if that is
8 in fact what this is saying and how do you feel
9 about that?

10 COMMISSIONER ROBERTS: Well, I will
11 let my colleague speak to the Health Code and to the
12 comparisons, although I think you obviously read the
13 bill correctly and indicate that there is a
14 distinction, and we are trying to I think
15 incentivize owners to comply in a more timely
16 fashion. But I guess the difference with what you
17 have outlined is a concern or a characterization
18 that what is contemplated by the statute is not a
19 safe -- you know, is not a safe or effective means
20 of dealing with the problem.

21 And I do think one of the reasons
22 that in my prepared statement, I went through kind
23 of in detail in numbering and laying out, that it is
24 extensive in terms of what is required, and we do
25 believe that it is sufficient to conduct a work in a

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2 safe and effective manner.

3 You know, as it compares to the
4 Health Code, you know, others can address that, but
5 I do think it accomplishes, it gets accomplished
6 what needs to be done.

7 COUNCIL MEMBER PERKINS: That is Dr.
8 Cohen.

9 CHAIRPERSON SPIGNER: Yes, that is the
10 Commissioner of Health.

11 COMMISSIONER ROBERTS: That is the
12 Commissioner of Health.

13 COUNCIL MEMBER PERKINS: Oh, you are
14 going to wait until he testifies to respond?

15 CHAIRPERSON SPIGNER: Yes.

16 COUNCIL MEMBER PERKINS: All right.
17 Whatever you want, Mr. Chairman, you know you will
18 get.

19 Let me just ask HPD for
20 clarification.

21 But you do agree that the highest
22 standards should be the standard no matter what.

23 There should not be one standard for
24 one time frame that is lower than the highest
25 standard?

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2 COMMISSIONER ROBERTS: No. I think
3 that the procedures that are outlined in the statute
4 do constitute a high standard for effectively
5 completing and accomplishing the work --

6 COUNCIL MEMBER PERKINS: Is that the
7 highest standard?

8 COMMISSIONER ROBERTS: Well, I don't
9 know whether the Health Code -- I don't know whether
10 he would characterize the Health Code as a higher
11 standard or one that -- I suspect that it is one
12 that is going to be maybe more onerous without
13 necessarily accomplishing the public health goals
14 that are outlined. I am not going to put words in
15 his mouth, I will let him deal with that.

16 What I am saying is that I think this
17 is a high standard that is effective for
18 accomplishing the task at hand.

19 COUNCIL MEMBER PERKINS: Thank you
20 very much, Mr. Chairman. I just wanted to suggest
21 another more positive incentive as it relates to the
22 J-51 program. But I don't want to overwhelm the --
23 so, maybe I will get to that on a second round. But
24 I think J-51 offers something in a more positive
25 vain as opposed to the negative approach that this