MINUTES OF PUBLIC MEETING
New York City Loft Board Public Meeting
Held at 22 Reade Street, First Floor Conference Room (Spector Hall)

March 06, 2019

The meeting began at: 1:20 pm

Attendees: Robert Carver, Esq., Owner Representative, Elliott Barowitz, Public Member; Richard Roche, Fire Department *ex officio;* Robinson Hernandez, Manufacturers' Representative; Charles DeLaney, Tenants' Representative; Heather Roslund, Public Member; Renaldo Hylton, Chairperson Designee; and Helaine Balsam, Loft Board, Executive Director.

INTRODUCTION:

Chairperson Hylton welcomed those present to the, public meeting of the New York City Loft Board. He then briefly summarized Section 282 of the New York State Multiple Dwelling Law, which establishes the New York City Loft Board; and described the general operation of the Board as consistent with Article 7-C of the New York State Multiple Dwelling Law.

Mr. Hylton then introduced and welcomed the official Fire Department designee to the Loft Board, the Deputy Assistant Chief of Fire Prevention, Chief Joseph Jardin, who was in attendance to observe.

Chief Jardin thanked Mr. Hylton and noted that this was his first direct engagement with the Board, but that that Mr. Roche, who has represented the Fire Department here for some time, keeps him well-informed of the activities and products of the Board. He thanked the Board for having him, and said he hoped to familiarize himself with the proceedings quickly, and to be able to make a worthwhile contribution.

Mr. Hylton noted how much the Board values the input of the Fire Department, and thanked Chief Jardin for coming.

Vote on the January 17, 2019 Meeting Minutes

Mr. Hylton asked if there were any corrections or comments on the minutes.

Mr. DeLaney: Would I be correct that the two changes are that you removed the various little summaries in the Summary Calendar cases and inserted the Conclusion as a summary for each Master Calendar case?

Ms. Balsam: Yes.

Mr. DeLaney: My only other question is that the prior version had the 2018 Loft Board Report PowerPoint slides attached. Will you be adding those to these?

Ms. Balsam: Yes.

Mr. Hylton asked if there were any additional comments on the minutes (none); then for a motion to accept the minutes.

Mr. Carver moved to accept the January 17, 2019, meeting minutes; **Mr. Barowitz** seconded.

The vote:

Members concurring: Mr. Carver, Mr. Barowitz, Mr. Roche, Mr. DeLaney, Ms. Roslund, Chairperson Hylton

Members dissenting: 0

Members abstaining:

Members absent: Mr. Hernandez, Mr. Schachter, Ms. Torres

Members recused: 0

Mr. DeLaney: Mr. Chairman, before we engage in the rules, may I ask a question? I know the architectural members of the Board and some other practicing architects are working on the submission of comments on the Project Guidelines. Do we have a plan to discuss that among ourselves at some point? Or receive a briefing?

Ms. Balsam: Yes. In terms of the Project Guidelines, I did want to talk more about Ms. Torres-Moskovitz and Ms. Roslund having worked very hard on the comments, which they did submit to the DOB team, along with comments from other architects who had been asked to contribute. So all the comments are in, and when the document is finalized, yes, we will be having a briefing.

Mr. DeLaney asked Ms. Balsam if she would submit a copy of the individual architects' comments to the Board.

Ms. Balsam and Mr. Hylton conferred about whether or not that information might be considered an internal document, which could not be circulated. They will check on it, and if the information can be made public, it will be circulated.

Ms. Balsam then introduced a Loft Board staff member who normally does not attend the meetings, because he doesn't work on Thursdays. Stan Pollack is the staff auditor, and, among other things, is also responsible for the various nice charts you see, showing where the buildings are in the legalization process.

Ms. Balsam then turned to rule-making

My intention was to go through and ask the Board members the same questions we had asked the attorneys, to get your opinions. The staff did that among ourselves, but we wanted to have your input before doing any redrafting. I would like to start with Board members other than Mr. Carver and Mr. DeLaney. Not that they

shouldn't talk, but we do know where they stand on the issues, and I think it would be good for the other Board members to voice their opinions.

Question number 1: "Should someone claiming protected occupancy have to prove primary residence of the unit prior to the Board granting an application seeking both coverage and protected occupancy (PO) status? What if the application just seeks PO status of an already covered unit?"

Mr. Barowitz: My feeling about that, generally, is yes. What I'm a little confused about is the criteria for primary residence.

Ms. Balsam: That's the next question; we will get to that. "Generally, yes," is your answer, correct?

Mr. Barowitz: Yes.

Ms. Balsam: Mr. Roche?

Mr. Roche: I don't really have anything to say about what period of time.

Ms. Balsam: But we're on question 1, not question 2. So, should somebody even have to prove that?

Mr. Roche: OK, but I have to ask a question first. When the attorneys were here, if I understood what they were saying, it seemed they were in harmony up to a certain point. Then something happened, and the attorneys for the tenants and the attorneys for the owners began to view things differently. So in order to say what's on my mind, I need to ask a question to get some more historical background; to ask Mr. Carver and Mr. DeLaney, what exactly happened to cause that difference of opinion to develop?

Mr. Carver: I think the attorneys were talking about the change of the forum for the issue? Housing Court versus Loft Board on the issue of…

Ms. Balsam: …primary residence? I don't think so. My recollection is that Mr. Brody said that the owners never really thought about it much in the beginning**,** and then at some point....That's my recollection. That he said something along those lines.

Mr. Roche: So it's that, as time went on, it became more prevalent, and more thought was put into it. And that's what caused the parties to go their separate ways.

Ms. Balsam: And I think the precipitating event, that really forced the issue, was the 2014 Statute of Limitations that was in the Loft Law, where the Board could no longer, at that point, accept coverage applications. So staff created a separate PO application, and started looking at the rule more closely. But that really goes more toward the issue of prime lessees than it does toward primary residence.

Mr. DeLaney: I would agree in part with that. First of all, (to Mr. Roche) you're absolutely right from my vantage point. Mr. Brody made the point that the tenant attorneys would have been equally happy to make, which was that, at a certain point in time, which seems to have been triggered by the 2010 Law -- which included a deadline on the applications, but really came to fruition in 2014 -- all the sudden, the question of, is the unit the primary residence of the person claiming coverage(?), which had never mattered before, became an issue.

Ms. Balsam: It's not "covered;" it's "protected occupancy."

Mr. DeLaney: My point, precisely, is that when the Board saw the deadline on applications coming, the Board staff, without consulting the Board members, created a new category of application called "protected occupant." There was no discussion of that by the Board, or public hearings. It just came into existence. In part, it was justified as a way to allow tenants in buildings that had already been covered or that had applications pending to be able to circumvent the deadline. But from my vantage point, it had the unintended consequences of creating the current divergence of opinions. Part of my objection to this has always been that it was done by the staff with no notice; no discussion; and without seeking approval from the Board. I remember when the first case came up on the "PO" docket, I said, what's this? Now, there are two separate applications: one for coverage of the unit and one for protected occupancy. And if you read a lot of OATH decisions, you'll see that, for the most part, the OATH judges have been in agreement that primary residency should not be part of the test for protected occupancy.

Ms. Balsam: If I can just address Ms. Roslund. The question does say, "Should someone claiming protected occupancy have to prove primary residence of the unit prior to the Board granting an application seeking both coverage and PO status?" So, it's well established from coverage that you don't have to have primary residence. But because we often get both cases together, I thought it was important to understand that they're producing a lot of documentation just on the coverage aspect of the case anyway, albeit not necessarily about primary residence. So that's why the question is phrased that way.

Ms. Balsam then returned to Mr. Roche for comment.

Mr. Roche: For the sake of moving forward, I'm inclined to say that, if it used to work, and there really doesn't seem to be a reason presented as to why it was changed….then perhaps we could roll back to the pre 2010/ 2014 conditions and move forward.

Ms. Balsam: I think the answer to that would be that the law has changed and the circumstances have changed. Things aren't the same as they were in 1982. In 1982, you had a lot of people actually living there, and the law talks about a housing crisis. I gave everyone Lower Manhattan Loft Tenants, which is the Court of Appeals case, pre- 1992, when the law was amended. But the Court of Appeals there, in discussing the Loft Board's eviction rule, talks about the purpose behind the law and whether or not there should be primary residence. They are really coming out with – people are supposed to be living there. So, I don't know why it wasn't an issue years ago; I think it should be an issue now. Perhaps Mr. Carver wants to address that.

Mr. Carver: The question is, who do we want to be protected? Is it someone living elsewhere, using this as a second home? Wouldn't that kind of make a mockery of the law? The Executive Director gave a pretty lengthy presentation at one our meetings in the other building, as to why she felt so strongly that primary residency should be a basis for that important status. And we had a case recently where someone who wasn't living there was seeking PO status. Is that who we really want to grant protection to?

Mr. Roche: But Mr. Carver, in the whole scope of how many hundreds of loft buildings we have and how many thousands of tenants are in those buildings, how prevalent do you think that is? Because in the five years I've been involved in this, I've met a lot of folks, and unless they're doing a really good job of pulling the wool over our eyes, they don't have a house out in the country, where they live full-time. These folks are actually living

here. I don't have a hard and fast opinion on which way this should go. I know it's something we have to make a determination on, but I'm not sure how big of a problem it is.

Ms. Roslund: We're talking about two different things at the same time. The first is, should the person claiming protected occupancy be a primary resident? And the intent here is to avoid complications caused by the rise of Airbnb and some other conditions in the current climate. And there was also discussion of bringing it more in line with residential rent stabilization rules. In a regular multiple dwelling you use it as a primary residence to have a rent stabilized lease. But the question is, do they have to prove it? There seems to be agreement that the person seeking protected occupant status needs to be the primary resident. But where I see the divergence is, do they have to prove it? And some of the discussion with the attorneys had to do with tax returns and mail delivery; especially the issue of why tenants might not be receiving mail at the building….So it was a little more complex when it came to proving primary residency.

Ms. Balsam: You don't necessarily have to get to the proving part. If the Board decides that they don't have to prove it, then you don't have to worry about how they prove it. The first issue is, do we want to have a rule that specifies that they must be using the unit as their primary residence?

Mr. Hylton: To me, that's a yes or no answer.

Mr. Barowitz made the point that it's very difficult to determine who lives here and who doesn't. Many people these days may live in another country for six months, and still maintain a residence in New York. And so what kind of criteria can be used to determine which their primary residence is? Are they paying taxes here? Have they registered to vote?

Ms. Roslund: So the idea is to legitimize someone's residency. When most people move to a new city, they change their driver's license, set up a Con-Ed account, register to vote – in other words, they want to say, this is where I live. I don't want to get called for jury duty in California, because I live here. It takes a lot of work to get all your ducks in a row; so that all the entities you do business with know where you live now. But then we have other people, who don't live the "mainstream" mentality. It's almost like making a judgment call on someone's lifestyle. That's kind of where Mr. Barowitz is going with this. They may not want to pay taxes, or vote. They want to be totally off the radar.

Mr. Barowitz: The fact is that when the artists started to formalize living in lofts, there was a substantial number of them who didn't want to deal with it. They didn't want the City or the State to get in the way of what they were doing. And we still see that today.

Ms. Balsam: But I think for the most part the people living in these spaces now want to be there and want to be recognized. Again, we're talking about 2019, and there are differences between 2019 and 1982. Even between 2019 and 2010. One of the issues I think staff and the Board recognize is that the quality of the proof is not going to be the same. But the question still remains, should people at least have to say that they are living there and using that unit as their primary residence in order to be protected?

Mr. DeLaney to Ms. Balsam: Can you clarify something for me? When you say there are differences between 2019 and 2010, it sounds like you're inferring that more people are gaming the system.

Ms. Balsam: I think more people are living in these spaces and want to be legitimate. I don't know how many people want to stay underground. I think the idea is to get out of the shadows and to be legalized. That's what we see from the buildings we've covered so far -- the 2010 buildings. There are lots of people living in these buildings. It's no longer three families. It's eighty-five families or sixty-five families.

Mr. Hylton mentioned that there is perhaps not as much of a fear factor today.

Ms. Balsam agreed, but continued: I think we, the staff and the Board, need to recognize that it is an illegal occupancy, and people aren't going to have the same kind of proof. But that still doesn't get us to the answer to the first question. Because we never get there if we don't answer the first question, "yes."

Mr. DeLaney: Well, I would interpose a different question: Is the existence of people who are not using a loft as a primary residence a bigger problem today than it was before? And the reason I agree with Mr. Roche is that the system is set up now based on the decision in the Lower Manhattan Loft Tenants case, where the loft tenants took a very extreme position, and said, No; you should be able to live in your loft, even though it isn't your primary residence all the way up until the building is legalized and the owner joins rent stabilization. Only when the building becomes rent-stabilized should someone be subject to eviction for using a loft that was not their primary residence. And that position was soundly defeated, and the Court of Appeals of ultimately said, yes, you have to use the loft as your primary residence to remain a protected occupant. So we have a system in place where, the person who is a protected occupant, who's not using the unit as a primary residence, can be evicted. And consistent with the provisions of rent stabilization, as I think Bob Petrucci pointed out, in rent stabilization the onus of raising the issue that the unit is not the tenant's primary residence resides with the owner – to prove that the tenant is not using it that way – rather than with the tenant having to try to prove that they are. (So if the owner says), but your driver's license is from Maine – all that becomes something the tenant has to disprove. So there's a system in place to prevent that kind of abuse. And also, unlike 1982, a lot of buildings have put in security cameras, both at the entrance and on different floors, which allows the owner to say, gee, I haven't seen Chuck for about six months; but there are all these people coming and going from his unit. So from my vantage point, technology is actually helping owners raise primary residence questions. I agree, technology also created Airbnb. I lived through hell in my building with that, and was more than happy to see the owner evict him and put an end to that.

Ms. Roslund: If after protected occupancy is established, a tenant can be evicted for not using the space as their primary residence, then proving beforehand …….I get that there's a principle here we're considering, but if on the day before, you don't have to prove it, but on the day after, you do have to prove it…what's the difference?

Mr. DeLaney: The difference is that, on the day after you become a protected occupant, you're a protected occupant.

Ms. Roslund: So, then you're protected….

Mr. Hylton to Ms. Roslund: That's a good question.

Ms. Cruz: I think what you're getting at is that it doesn't give you any special protection, having the Loft Board declare you to be a protected occupant; because the very next day, the owner can go into Housing Court and

say, the Loft Board says this person is a protected occupant, but they're not using it as their primary residence, so I'm seeking an eviction.

Mr. Hylton: So what benefit is it to have protected occupant status, if you can be evicted the next day?

Ms. Roslund: Right. It seems like a waste of effort on our part.

Mr. Hylton: In my opinion, this just requires a simple yes or no answer. This is not creating a burden for tenants that doesn't already exist. This initial question is a matter of principle and of law. Should a person seeking protection under the Loft Law be required to prove that the space they are using is their primary residence? Yes or no? Then we can address the other issues later.

Mr. Carver: The phrase, primary resident, is in our statute.

Ms. Balsam: It was added to the statute.

Mr. Carver: And it's in the case law. So it's a question that can easily be answered, yes. And I question why we're even asking this question to begin with.

Ms. Cruz: The reason we're asking the question is because, what the panel talked about was how the Board analyzed the question of protected occupancy, historically. Prior to 2010, all you had to prove was occupancy. Since then, cases have talked about primary lessee; the application of 2-09 and 2-09(b), which address primary residency; and the question of primary residence in the statute. So the Board is discussing it because it needs to decide whether it wants to continue its pre-2010 policy– that all you have to prove is occupancy – or, are we now going to put into the rule, as it says in the statute, that the person seeking protected occupancy status should also have to prove that they occupy that space as their primary residence.

Mr. DeLaney: The statute is saying that?

Ms. Cruz: The statute uses the words, primary residence.

Mr. DeLaney: I agree that it uses the words, primary residence, and that they were inserted in 1992 by the legislature; but I don't think it's as clear as Mr. Carver views it. I was going to ask Ms. Balsam if she would read the relevant section.

Ms. Balsam read from MDL 286(2)(i): "Prior to compliance with safety and fire protection standards of Article 7-B of this chapter, residential occupants qualified for protection pursuant to this article shall be entitled to continued occupancy, provided that the unit is their primary residence, and shall pay the same rent….etc. etc."

As I had said in my previous presentation, the word "continued," as per the dictionary definition of it, means something that continues on, after whatever the other event is. So they're entitled to protected occupancy provided that the unit is their primary residence. To me, if it's continuing, it should have already been their primary residence.

Mr. DeLaney: I take this to mean – and as the sentence begins – prior to reaching code-compliance. So the presumption is that it applies to the protected occupant. It doesn't say applicant. Ms. Roslund's question is a good one: What's the difference (in my status) the day before being declared a protected occupant, and the

day after? The difference is, the day before, if the owner hadn't registered the unit and me, I'm not obligated to pay rent; the owner doesn't have the legal standing to collect rent; and the owner has no onus under the Loft Law to bring the building up to code-compliance. So, an event occurs that activates a number of rights, and responsibilities that accrue to both the owner and the tenant when the unit is registered and the protected occupant is designated.

Mr. Carver: And then we have the problem of the very next day, if the tenant isn't using the space as his/her primary residence, they could still face the Housing Court action, correct?

Ms. Balsam: Yes.

Mr. DeLaney: It's not a problem at all. In fact, we had a case described by the attorneys where there were six units in the building, and there appeared to be a primary residence question with one of them. So there's a protracted proceeding at OATH, and the legal bills escalate over that one instance; whereas, for the other five, there's no particular issue. From my vantage point, it's much more efficient to have the owner register the building, and then move against the person about whom he has doubts in Housing Court. Then the legal cost in time and expense only accrues to the one tenant rather than to the whole group of people seeking coverage, because they can't go forward.

Ms. Balsam: I disagree with that. To be perfectly honest, that's a question of how the attorneys are doing their billing. And if I were one of the five other people in that case, I would say, I'm not paying for this. To me, that's a separate, contractual issue that has absolutely nothing to do with this.

Mr. DeLaney: Well, I know of many buildings that don't see it that way and don't treat it that way. Moreover, unlike rent stabilization, where the owner has to wait until one hundred and twenty days prior to the expiration of the lease to announce to the tenant he's not going to renew the lease, because he believes the tenant is not using the unit as his primary residence, the landlord of an IMD building can go straight to Housing Court, where the onus is on the landlord to prove – rather than on the tenant to disprove -- the allegation, and set to it right away.

Mr. Hylton: I'm not sure we're doing any justice to anyone, granting them protection and having them evicted the next day. I'm not sure the Board is doing any justice to that. I think we just need to answer this first question.

Ms. Roslund: So, in the family of six scenario, we've got the building, the units, the protected occupants -- do they necessarily have to go through all at the same time?

Ms. Balsam: That's really up to OATH, as to whether or not they would want to split it off. We don't have control over that. In a certain sense, it would make sense to split it off. I can see as a judge saying, I'm going to decide this issue, but hold this other one off. But it also makes sense to try it all together, because a lot of the proof is going to overlap. It could go either way.

Ms. Roslund: So the answer is, no, the whole building doesn't have to go together?

Ms. Balsam: Correct.

Mr. DeLaney: But they have always, so far.

Ms. Balsam: No, that's not true.

Mr. Bobick: Parties have settled different claims. We've seen parties agree to registration with one issue remaining. They're doing that now. They're narrowing down the issues for the OATH judge. So, they're doing that already.

Ms. Roslund: So, we're going to legalize all one hundred twenty of these units, except for….this one.

Mr. Bobick: The one claim they can argue against.

Ms. Roslund: So are there situations where four units out of twenty are legalized, and then someone comes along and wants to add a couple more units later?

Ms. Balsam: Yes.

Ms. Roslund: So a building could proceed in a piecemeal fashion? There could be fifty different applications going on at different times?

Ms. Balsam: Yes. And sometimes OATH will combine them. We could address that issue in our rule-making, because the way it works at OATH is, if the agency doing the referral has specific rules, they have to follow the agency's rules. If there is no agency rule, then the OATH rules govern. So we could actually address that in our rules, and force them to do it one way or the other, if we wanted to. Whether or not that would be advisable…I'd have to think about it. I hadn't thought about it before now. But that is something the Board could address.

Mr. Carver: In terms of resources, the parties are already in the room, arguing the facts at OATH. It would have to be done again in housing court, if the owner has to bring a second proceeding. So in terms of increasing legal costs for tenants – that would force the tenant to deal with the same facts twice in multiple forums.

Mr. Hylton: I was going to ask the same thing. Would this be more burdensome for tenants in terms of legal costs?

Mr. DeLaney: I don't believe so. In Housing Court, it's the owner who has to present the case. Here, you have a situation where the tenant has to prove that it is their primary residence. And prior to their appearance here, last month, one of the attorneys, Mr. Petrucci, provided an argument with supporting documentation that I circulated to some of the legislators in Albany. I also sent copies to Ms. Balsam and Mr. Hylton, but I don't believe they've ever been shared with the Board members.

Ms. Balsam: I don't know what you're referring to. Anything Mr. Petrucci gave to me was in the materials he supplied to the Board members on the day of the meeting.

Mr. DeLaney and Ms. Balsam spoke briefly about the status of this letter; what it contained; and if had been distributed to the Board members by Mr. Petrucci or not.

Ms. Balsam agreed to look into it, and if necessary, circulate the letter; but added: As I've said multiple times, they're not helpful at all. They're redacted, and they don't show any differences. They were submitted for the

purpose of illustrating what discovery demands used to look like and what they look like now. And they don't address that issue.

Mr. Roche: Mr. Chairman, would it be accurate to say that the staff is in favor of the primary residency clause, on the basis of the fact that it aligns with the statute?

Mr. Hylton: That's correct. That is their reading of the law, and should be respected. As Board members, you have to take it or not take it. And that's what I've been saying. The answer to the question is yes or no.

Mr. Roche: Can we have a vote?

Mr. Barowitz: But I'm so conflicted by this, I don't even know if I can begin to make a decision. And I don't understand why this has suddenly come up and become such a major stumbling block in our deliberations.

Mr. Hylton: We're trying to get to a set of rules that you can vote on. That's all. If we can at least have a majority agree on a set of principles first. Then we can move on.

Mr. Roche: It seems to me that we're going to have to vote, because I think we could sit here until this time next week, and not reach a consensus that everyone is going to say yes or everyone is going to say no.

Mr. Hylton: If we can just get to yes or no on question number one, the staff will have some guidelines for framing material for your consideration.

Ms. Balsam: Can I just say that I viewed this meeting as trying to gain an understanding of the Board's position on this, so that we could draft something for you to vote on. As far as a formal vote on something, I don't know that that would be appropriate. And I did promise Ms. Torres-Moskovitz that we wouldn't be doing that. It seems to me that you should be voting on a rule, so the purpose of this meeting was to ask, what should the rule look like? So to the extent that you want to say, yes, it should include language that says, to be protected you should be using the unit as your primary residence, then we'll draft that. If the Board's view is that it shouldn't, then we will draft that for you to vote on. I'd rather draft something first, for you to then take a formal vote on. So whatever the general consensus is – yes or no – we'll draft that. Or perhaps just leave it as it is.

Mr. Barowitz: What would leaving it as-is resolve?

Ms. Balsam: Leaving it as it is would be tough because, clearly, there are a lot of people out there that are unhappy. We hear it from both owners and tenants. And I always say that if no one is happy, then we're doing our job, because we're supposed to be neutral; but I think it would be better for everyone if the Board had a clearer rule. I think the way it's drafted now, particularly the, "Except as otherwise provided herein," which is how the rule starts, creates a lot of problems. So, we should redraft something and try to make it clearer.

Mr. Hylton: I'd like to clarify something. I'm not a lawyer, but I do know that rules are supposed to clarify the law. So if we have a rule that's more complicated than the law, itself, it doesn't look good.

Mr. Roche: So, if we say, yes, we'd like to see what you draft in accordance with having to prove primary residency, nobody is losing here, today, because there will be an opportunity to vote later.

Ms. Balsam: Yes.

Mr. Roche: The only problem I see is that in order to answer any of the other questions, you almost have to have an answer to the first question.

Ms. Balsam: Yes, you do have to have an answer to that, which is why it's question number 1. If the answer is no, then we go straight to number 4.

Mr. Roche: For the sake of moving forward, I don't see a problem with looking at a draft from the Loft Board staff, indicating that you should have to prove primary residency; because the Board will still have the opportunity to vote, and say, no, we don't want this.

Mr. Hylton pointed out that, for the sake of moving forward, he would agree; but he didn't want to waste time either (having the Board develop a draft for a position that will ultimately be voted down). He hoped that the Board could make a decision on the yes or no question, based on the evidence they have; the attorneys' presentations; and their general feeling about the issue at present, which could be determined by a straw poll.

Mr. Roche felt that the Board seemed too unsure to make any vote worthwhile; and he was at a loss as to how the Board should proceed.

Ms. Roslund asked if this specifically related to 2-09(b)(1), and she read the current language of the rule from the document prepared by Ms. Balsam for the Board, Chart of Current Laws and Previously Proposed Changes 02142019:

(b) Occupant qualified for possession of residential unit and protection under Article 7-C.
(1) Except as otherwise provided herein, the occupant qualified for protection under Article 7-C is the residential occupant in possession of a residential unit, covered as part of an IMD.

Ms. Balsam confirmed that this was the current wording of the law, and explained that the language in the column next to it contained the changes proposed from last year. However, the Board was not happy with them, so what they are trying to decide now is how it should be redrafted.

Mr. Hylton, Ms. Balsam and Mr. Roche explored if/ how a straw poll could be taken at the moment, in order to establish some direction.

Mr. Barowitz noted that, as there are three people absent, perhaps they should wait until the next meeting.

Ms. Roslund: Do we know how often tenants are evicted on non-primary-residence grounds?

Ms. Balsam: No, we don't. There are times when someone has applied for coverage or protected occupancy, and we learn that, as a result, they've been evicted, so the application is withdrawn.

Mr. Hylton: I think having this rule will reduce those incidences.

Mr. Barowitz: It might. I think the answer to that is not many, though I don't know for sure. It's a very good question, and the answer might make a lot of this discussion moot.

Ms. Roslund: Right. If the answer is zero, then why are we even having this discussion?

Mr. DeLaney: Another thing to bear in mind is, in my experience, under the old law, there were situations like this, from the 1980s: A fellow told me he was a loft tenant, but also had a weekend house in Pennsylvania, where he registered his car, because it's cheaper. He only spent ten or twenty weekends a year there, but when the landlord brought a case against him, alleging that it wasn't his primary residence, in Housing Court, as a covered occupant, the landlord was able to use his driver's license and raise enough questions that, ultimately, he could no longer afford legal representation, so he settled, and left.

Ms. Roslund noted that you're not supposed to have a driver's license in a state where you don't reside. It's against the law. Now we're getting back to the question of principle. You're saying this person should not be penalized for evading….

Mr. DeLaney: I don't think violating a motor vehicle law should be (grounds for eviction).

Mr. Barowitz made the point that we have no idea how vulnerable artists feel. He recounted conditions at the first two meetings about the rezoning of Soho, which he and Mr. DeLaney had attended: not enough chairs; broken microphone; and people harassed by the city's representatives. Approximately seventy-five percent of the people at the meetings lived and worked in Soho -- most of them, as the straw poll showed -- for twenty to fifty years; and that even they felt vulnerable. Even now, with Loft Board protection, people feel vulnerable. He gave as an example the removal of artists from Ninth Street, which was the first place they began living in clusters, and noted that the artists had felt alienated in their own territory. He repeated a point he makes often, which is his concern for artists; and that one of the Board's primary goals should be providing long-term protection to the tenants living in lofts, who, even when they are granted protection, are never really sure they have it.

Ms. Balsam clarified: Tenants being people who are living in the loft?

Mr. Barowitz: Yes.

Mr. Hylton: So am I hearing you to say that you would vote yes to the first question?

Mr. Barowitz: I'm a provisional yes, though I am conflicted.

Mr. Hylton. That's enough for a straw poll. And if it turns out we don't have the votes to move forward, then we move on.

Mr. Carver: May I make one more argument of substance? (To Mr. DeLaney): You had argued that Housing Court may be more of a salvation for tenants because, there, the burden of proof is on the landlord, as opposed to it being on the tenant, here.

Mr. Hylton: Salvation in terms of cost.

Mr. Carver: I thought he was saying it was helpful to the tenant on the merits.

Several Board members agreed with Mr. Hylton's clarification

Mr. Carver: Ok. But if that were the argument, the point I want to make is that during the course of proceedings, burdens of proof shift. So even in Housing Court, ultimately, the tenant is going to have to meet the factors to prove primary residence. I just wanted to make that point.

Mr. Hylton asked Mr. DeLaney if he wanted to comment.

Mr. DeLaney: I believe Housing Court is where this should be dealt with. I think it's up to the owner to bring a case…but I agree that the tenant is going to have to verify some information. And I believe that, after you're a protected occupant, Housing Court is where this issue should be addressed. And I'm not going to participate in a straw poll. Particularly on a day that is not a regularly scheduled meeting, with three people absent. Mr. Barowitz says he's conflicted. I have no idea where Mr. Schachter stands on this at all.

Mr. Hylton: Why do we need to know where he stands on it? What matters is where you stand; how you feel about it.

Mr. DeLaney: Maybe Mr. Schachter could persuade me to feel differently.

Mr. Hylton: Is it the Chair's decision to have a straw poll?

Ms. Roslund: Can we propose a different way of looking at the question? We're talking about, should there be proof? And should the protected occupant/ applicant be providing that proof?

Ms. Balsam: Who else would provide proof?

Ms. Roslund: I don't know, that's why I'm asking. Is there another way to look at this?

Ms. Cruz: The question is whether or not this should be part of the test. Should it be part of what the tenant has to prove to be a protected occupant? Does he use the space as his primary residence? That's the question. In 1983, that wasn't a question. Should it be a question today? Should we part with the rule?

Mr. DeLaney: That goes back to the question of what's changed.

Mr. Roche addressed Mr. Hylton, saying that Mr. DeLaney had made an important point in terms of fairness and the absence of other Board members. He knows that Ms. Torres-Moskovitz, for example, is very passionate about every component of this issue, and while he understood the urgency to move forward and the situation with obtaining conference rooms for the extra meetings, he didn't think it was fair to take any kind of vote on a day when so many Board members cannot make the meeting because it's being held on a day other than a Thursday.

Ms. Cruz: The decision today is not binding. It's just to help the staff produce something to generate further discussion. That's what we want to accomplish today.

(**Mr. Hernandez** arrives)

Mr. Barowitz: If that's what we're here to vote on – for the staff to draft something – I would vote yes. But if we're voting up or down on the issue, I'd probably abstain. Because I'd say I can't make a decision.

Mr. Hylton: That's what we want to do. Have a way to move forward. And it's not like this is a new question. This has been on the table and discussed for two years. Everyone will have an opinion on the matter, but we can't be stuck, and just not move forward.

Mr. Barowitz wanted to repeat what he had said earlier: Whatever burden of proof the Board decides upon, none of those things will prove to be absolute proof.

Mr. Hylton agreed, but then wanted to comment on the issue of the presence or absence of Board members: If we have a quorum, and we have a majority of votes on an issue, we have a majority of votes, regardless of how many members are present. That result would happen anyway. I'm not trying to be insensitive, but if we always do that (refrain from voting in the absence of members), we'll never move forward as a Board, because it's very, very infrequent that we do have everyone's opinion about what we do as a Board.

Mr. Hylton then turned the floor over to Ms. Balsam to lead on the question of whether or not a straw poll would be taken on question number one.

Ms. Balsam read question number one, to update Mr. Hernandez:

"Should someone claiming protected occupancy have to prove primary residence of the unit prior to the Board granting an application seeking both coverage and protected occupancy status? What if the application just seeks protected occupancy status of an already covered unit?"

The issue is, do we want to include language about primary residence in a rule? There are differing views, and we're interested in your opinion. Should someone applying to be a protected occupant under the law have to prove that they have been using the unit as their primary residence?

Mr. Hernandez said he would argue, yes. But he was interested in hearing what everyone else had to say as well.

Mr. Hylton: I would like to give Mr. Carver and Mr. DeLaney a chance to present their positions

Mr. Hernandez asked if his vote was going to be the deciding vote on the issue, and he was assured it was not.

Ms. Balsam further clarified for him that the issue on the table is the staff drafting something. It's not that the Board is adopting that standard.

Mr. Carver: Well, frankly, this is not so much my position as it is that of the staff; that the law requires. The Court of Appeals case we have in front of us would suggest we need it, and as a practical matter, do we really want people for whom the loft unit is a second home to have this exalted status (protected occupancy)? If not, then we have a situation where, the day after the second-home occupant is granted protected-occupant status, they're in Housing Court being evicted for lack of primary residency there. Which strikes me -- and the staff -- as a waste of resources; having to do the proceeding twice. I think Ms. Balsam made quite a forceful case a few months back at one of our meetings, as to why, in the midst of a housing crisis, you would want to give this status to someone whose primary residence is elsewhere.

Mr. DeLaney: I continue to adhere to the principle that primary residence should not be an issue until one has protected occupant status. I'd also point out that it was an unusual circumstance for us to have a panel of

experts come and discuss an issue with us before making a decision. And I'm still interested in hearing the opinion of all the people who heard that before participating in any kind of straw vote.

Mr. Hernandez: Based on my reading of this material earlier, I would say, yes, someone applying for protected occupancy should have to prove primary residency.

Ms. Balsam: I think we can take a straw poll of the people who are here, and draft something based on that, which we can discuss at the next meeting. With a two-week turn-around, it might be tough, but we'll do it. Based on what happens at the next meeting, if we have to re-draft, we'll re-draft. But at least we'll have a starting point.

There was some discussion of how the straw poll should be executed; if it should be recorded, etc. It was decided that members could just raise their hand.

Mr. Hylton: In answer to question number one: "Should someone claiming protected occupancy have to prove primary residence of the unit prior to the Board granting an application seeking both coverage and protected- occupant status?"

Mr. Hylton asked for a show of hands from those who say yes.

Mr. Barowitz noted that in a straw poll, the names and votes of the members are not recorded. Just the number of votes.

Ms. Balsam: Ok, so we'll draft that way (Yes).

Mr. DeLaney: I would like the record to reflect that I am not participating; I'm not voting no. I object to the concept of straw polls, whether they're in private meetings, where we're trying to determine how we might vote on a case in public, or in any other circumstance. If you want to vote, vote. If you don't want your name on it…

Mr. Hylton: We just voted on moving forward, Mr. DeLaney, so that the Board can carry out its function. That's all.

Chief Jardin asked Mr. Hylton: If I can just clarify, we voted to move the discussion forward, so that we can get to a vote on the actual language?

Mr. Hylton confirmed that.

Ms. Balsam: So having a straw vote yes to question one, we come to question two:

Question number 2: "During what time period should the person have to prove the unit was their primary residence?" And we have some choices.

- Do they have to prove it was their primary residence on the effective date of the law? And that would only apply to people who are applying for coverage and for protected occupancy; for obviously, if someone is applying for protected occupancy in an already covered unit, they could have come at a later date.

- Is it the date they file their application?

- If there's a hearing, is it the date the record closes?

Does everyone understand the concept of the three different dates?

Chief Jardin asked Ms. Balsam to repeat the three dates, which she did.

Mr. Carver asked Ms. Balsam if the Window Period concept was involved here, or if that was only for coverage.

Ms. Balsam confirmed that it applied only to coverage.

Ms. Balsam repeated the three possible dates for Ms. Roslund.

Mr. Carver: Is it necessarily one of the dates; or might we require more?

Ms. Balsam: We could require more than one. We would have to figure out what the circumstances are; we probably wouldn't.

Mr. Carver: I seem to recall that all of those were part of a draft at one point, no?

Ms. Balsam: Yes, you could require all three.

Mr. Carver: And that is, in fact, your recommendation?

Ms. Balsam: Well, actually, I've moved away from the effective date of the law, because I realized that if someone is applying for a unit that's already covered, they would never be able to prove that.

Mr. Carver: But that's only in certain circumstances…

Ms. Balsam: Yes.

Mr. Carver: If someone was, in fact, in occupancy on the effective date of the law, would you still recommend that that be a factor?

Ms. Balsam: Yes, I would.

Ms. Roslund: Generally speaking, when we talk about the effective date of the law, we're referring to the latest iteration of the Loft Law? We're not talking about 1983, are we?

Ms. Balsam: We're referring to the effective date of the section under which they are filing. Usually, it's coverage and protected occupancy together. Actually, we recently had a case where, even though it was way after 1982, someone filed under 281(1). So for them, that date would have been 1982. But most of the applications we have now are under 281(5), and that would be June 21, 2010. And clearly, if the statute is amended, it would be whatever date the theoretical 281(6) is effective. Yes, that's the date. That's how we've always treated it, and it would be very difficult treat it any other way.

Ms. Roslund: I'm sure I'll learn more about this part which, from day one, seemed a little arbitrary to me. Whether your building counts or doesn't count; whether you as a person count or don't count -- as opposed to whenever these changes continue to happen? So the effective date of the law – nine years ago (June 21,

2010); if that were codified, no building or occupant could be considered, if they couldn't prove that in 2010 the building was occupied?

Ms. Balsam: That's coverage, so let's put that aside. It's whether or not they could be protected. And if we required everyone who's applied for protected occupancy to prove they were there on the effective date of the law, then someone who came later, and moved into a covered unit – and we recently had a case like this…

Ms. Roslund asked about a unit not-yet covered…

Ms. Balsam: You can't be protected unless you're in a covered unit. There is no question about that. Usually coverage and protected occupancy are tried together. But we need to be sensitive to the fact that we could have a situation where coverage has already been established, and someone is just now applying for protected occupancy. For whatever reason, they came later, and they want to be protected. So we should have a rule that's flexible enough to allow for that, because we want that. At least, I think the Board wants that.

Our argument in terms of considering when the record closes is that the way the rules are structured now, the Board is supposed to consider everything in the record. So if we use the application date as the effective date, that could be problematic if testimony or other documentation comes out at the hearing that shows the person doesn't live there. Which we've seen fairly recently on more than one case, but one egregious case, where one person just moved out, and another moved back in. So the staff's argument as to why we should choose when the record closes is that the Board's rules regarding hearings require the Board to hear all the evidence that comes in. That's why we think it should be that date.

Ms. Balsam clarified for Mr. Carver that it would be the date the record closes – the last date; because that's when the Board has all the evidence. She continued: The problem with doing that, which the lawyers point out, is that it can create a rolling discovery request, which can be very burdensome to the tenants. I'm definitely sensitive to that, and perhaps we could tailor, in terms of discovery, what kinds of documents they would have to produce after their initial production of documents to try to mitigate that issue. So, something else for you to think about.

Chief Jardin: So to be clear, you're saying all three?

Ms. Balsam: For someone applying for coverage and protected occupancy, I think it should be all three. For someone who came later, it should be the last two.

Ms. Cruz felt it should just be the date of the application.

Mr. Carver said that was a problem.

Ms. Balsam: The only problem is that someone who testifies that they no longer live there would then be protected and evicted.

Ms. Balsam, Ms. Cruz, Mr. Hylton conferred briefly about some of the specifics.

Ms. Cruz: My understanding of the way it works in Housing Court is that once someone files, there's a two year look-back period. So the non-primary activity must have happened within that two-year period.

Mr. Carver: I think the effective date of the law needs to be the date, because the owner's obligations start from that point. Why should the tenant's not also?

Ms. Cruz: I suggest the effective date of the law, or from inception of occupancy.

Mr. Carver: Yes, exactly. And of course the statute was meant to protect those people.

Mr. Hylton asked Mr. Carver if he was suggesting only the one date?

Mr. Carver said, no, all three.

Ms. Balsam: The statute also provides that the unit remain rent-regulated, and another person could qualify for protection, unless there's a deregulating event. The onus is on the owner to prove a deregulating event -- a sale of improvements, a sale of rights, or abandonment. So I think it was also meant to protect people who come later.

Mr. Carver agreed.

Ms. Balsam asked if there were any comments on "when the record closes."

Mr. DeLaney said that he finds these concepts a little hard to understand without a scenario (to compare them to). He appreciated Ms. Cruz' observations about Housing Court, and provided an example of a situation that further illuminated the two-year look-back period, as follows:

My two-year lease (2017 – 19) expires today. Two years ago, it was renewed. But, secretly, for the last year of the old lease (2015 – 17) -- so 2016 - 17 – I was not using the unit as my primary residence. Now, it's one hundred and twenty days before my current lease expires, and I get a notice that the owner is going to bring a hold-over proceeding. Even though I wasn't using the unit as my primary residence and was subletting without the owner's consent for the last year of my old lease and the first year of my new lease – but then I came back and have been using it as my primary residence for the past year -- it's my understanding that Housing Court is going to find that it is my primary residence.

Ms. Cruz: I would have to double check, but my understanding is it's not something you can cure. If you weren't using the unit as your primary residence, and the owner's found out and filed a case against you, you can't just move back in and say, I'm here now. I'm not sure about that; but my understanding is that it's not something you can cure.

Mr. Barowitz: I don't understand this. So you move out, but you've paid the rent every month.

Ms. Cruz: But just paying the rent doesn't mean you're using the space as your primary residence. So even if you're paying the rent, you can be evicted.

Mr. Barowitz: But then you move back…

Ms. Cruz: But that's my point. I believe in rent stabilization laws it's not something you can cure. If you haven't used the unit as your primary residence, and the owner finds out and brings a case against you, you can't just say, now I'm going to come back; now I'm here.

Ms. Roslund: This is where it gets sticky. You're allowed to leave under certain circumstances. There are some exceptions, such as military service. But there aren't subletting protections as there are in the residential leases for other multiple dwellings. If I want to sublet my apartment so I can go serve my country or further my education, I shouldn't have to give up my rent-stabilized apartment. But if I don't have that protection yet, I can't do that without risking my coverage?

Mr. DeLaney: I'm just trying to understand.

Ms. Roslund: But that would be a scenario. I'm living in a loft for ten years, and one of the exceptions is illness. So I'm diagnosed with cancer, and I go to live with my sister in Boston for six months to get treatment, and I come back. If somehow that's discovered, that disqualifies me?

Mr. Barowitz said, no, it doesn't, and he could not see how Housing Court could evict you, when the law allows for mitigating circumstances, such as illness, military service, a temporary job, or other provable circumstances; whether you sublet or leave the unit empty.

Ms. Cruz: Yes, I believe there are exceptions.

Ms. Balsam: "Reasonable grounds."

Ms. Cruz: Let's say that there is that exception. The Loft Board has held that if you leave temporarily for employment purposes, it doesn't mean that you are no longer a protected occupant. And I believe it says something like that in the rent stabilization code or law. But it's a different situation if you're not living in the space because you just want to live somewhere else for a while. Not because of military service or education or due to illness – in other words, not for any reason that could be considered an exception. My understanding is that that is not something you can cure by returning.

Mr. DeLaney: It would be helpful to me if we could get confirmation of that, because I'm not quite clear on it.

Ms. Balsam: I'm fine with getting confirmation on that, but how does that impact the question we're asking here?

Mr. DeLaney: As you heard two attorneys state on February 14th, to ask people to prove now…. The concept, the language, we're considering now is: This has been my primary residence all throughout the period from June 21, 2010, until today. And there wasn't any period that I went anywhere, for any reason, whether bonafide, or just to sublease the space for profit…… I'm just trying to understand…

Ms. Balsam: The Board has already decided on certain exceptions, particularly in the case of being away for work, in terms of both coverage and protected occupancy. We had someone in the Peace Corps; we had someone teaching in Michigan; we had a television correspondent in the Netherlands. And the Board has said they should be protected.

Mr. Carver: So the phrase, "primary resident" would carry with it all the exceptions. So if you wanted to go down the Housing Court definition, which I know you might not, it would carry with it the exceptions. Or, you could make your own definitions with exceptions. So merely having the phrase (primary resident) would not preclude all the various exceptions we all think of as still enabling you to claim status as a primary resident. That's not what the rule seeks to do. In fact, I think Ms. Balsam is trying to make it looser.

Ms. Balsam: The reason I'm so against wholesale adoption of the Housing Court law is because there is a different standard. People who've been living under the radar are not going to have the same kind of proof as someone living in a regular, rent-stabilized apartment. Our law is looking backward in time. They're supposed to already have been there. That's what the law is all about. It protects people that are already there. So the quality of proof they're going to have won't necessarily be the same. And as someone said before, there are people who don't believe in paying taxes and whatever. But if there's a challenge, they are going to have to come in and sit before an OATH ALJ and convince them that they are living there. Sometimes credible testimony will be enough. Usually there's credible testimony and some supporting documentation. We have a really great case coming on the calendar this month, which has all of the permutations. But unfortunately, we can't talk about it. I don't want to make a value judgement about anyone's lifestyle, but the Board does have to make a decision about the quality of proof that can be offered by the tenants living in lofts; and that is going to be different than what can be offered in Housing Court. Which is why I've said, yes, they have to prove it, but what they have to bring in is going to be different. That's my position.

Mr. Carver to Ms. Balsam: I'm actually glad you brought that up, because it was interesting to see that none of the four speakers agreed with that positon.

Ms. Balsam: I know. I was surprised at that, too.

Mr. Carver: They saw some real practical problems with having two different standards. And I've always argued that, legally, you can't change the standard. And we both (Ms. Balsam and himself) rely on a Court of Appeals case, *Lower Manhattan Loft Tenants,* for each of our propositions; while the very attorney for the tenants on that case, I believe, was here. Wasn't it Mr. Petrucci?

Ms. Balsam: No, it was Jeffrey Ween.

Mr. Carver continued: Mr. Brody bought up the preclusion issues that could occur in a later proceeding if you were to change the statute from that of Housing Court. So given that none of our speakers agree with you, have you changed your mind?

Ms. Cruz: I can say that I have not changed my mind – that the proof should be slightly different – because the truth is that tenants don't have mailboxes in loft buildings; that the mail is thrown into one box in the lobby. So I think it's important to note that there are significant differences like this with our buildings.

Mr. Carver: But Housing Court standard is quite flexible about proof from multiple sources.

Ms. Cruz: Right. But the point is that there are differences. So I'm not sure that the wholesale adoption of Housing Court standards is what the Board should do.

Ms. Balsam: And I would say, if we did that, what we'd wind up doing is distinguishing our cases from the Housing Court cases. So you could have a case where someone filed taxes somewhere else. And I think in Housing Court the rule was if you had sworn on your tax return that you lived somewhere else, then that's it, you're out of your rent-stabilized apartment. But with our buildings, there are a lot of reasons why people file their taxes somewhere else, not the least of which is they just don't receive any mail where they live. So in that situation, we would probably recommend to the Board that, yes, but here are the circumstances that make it different; here are the reasons why the Board shouldn't follow what is done in Housing Court.

Mr. Carver: This just came to me. Rather than throw the baby out with the bathwater, why don't you bring in the Housing Court standard with a qualifier? Rather than try to reinvent forty years of regulation, exceptions, and case law, what if you adopted it with a qualifier? What those words would be, I don't know right now, but something that says, where circumstances unique to a loft require modification – again, I don't like that phrase, but it's that concept, that the Board would somehow be empowered to make an adjustment and also be required to state what the adjustment was and why they made it. Rather than trying to start from scratch. You've got a list of four or five factors, but what good is that? Life has so many complications, how are the factors we're trying to develop in this room going to play out in real life? That's my suggestion, off the top of my head.

Mr. Hernandez noted that he was concerned about how the Board would figure out these exceptions. He felt that by allowing folks to put forward their individual circumstance for consideration, the Board was opening the door to an environment where they (the Board) become stuck in endless debate at meeting after meeting about each case. He felt that having more definitive qualifiers would help prevent that, and if looking to Housing Court standards as a guide would contribute to establishing those boundaries, he thinks that what the Board should do.

Ms. Cruz said she felt that what the Housing Court does could be instructive; it could help the Board make decisions, if the circumstances are similar. But that their standards should not be adopted wholesale.

Ms. Roslund raised the point that requiring criteria that is too specific or rigid could also backfire, because if a different decision is made in the face of certain evidence, then the rule would have to be changed again.

Mr. Hernandez: We have something clear here that outlines some clear exceptions and "reasonable grounds." If we can bring a little more clarity to what "reasonable grounds" are, with that qualifier, it would make it easier for us to consider a case before us. I think if we leave it open-ended, it's going to be difficult for us to come to a consensus on what scenarios are to be excepted.

Mr. Barowitz wanted to reiterate what is always his main concern: that it's very difficult to live in the city. Rents are sky-high, and people are moving out. With that in mind, he agreed with Mr. Hernandez, but asked that whatever the Board decided to do be as reasonable as possible.

Mr. DeLaney to Ms. Balsam: So what are you taking away from this?

Ms. Balsam: I think we'll try to draft something that incorporates – perhaps as guidance – the standards in the Housing Court. I think that's a good way to phrase it; that we'll use that as guidance. Obviously, there would be exceptions. And then we can think about whether or not we want to put in specific exceptions.

Mr. Hylton reviewed his understanding of what Ms. Balsam had said with her.

Ms. Balsam: Yes, I think the way we might say it is that the law and the cases that have construed the law at Housing Court would provide guidance to the Loft Board, but not necessarily be binding, because we could have circumstances that are different. That's the track I'm thinking along.

Ms. Balsam then turned to the next question for review, saying: If we could put aside question 3c, as to what kind of documents, (c. What types of documents should the Board be looking at to make these

determinations?), because I'd like to get some guidance from the Board on question 4, which is the roommate issue.

Mr. DeLaney to Ms. Balsam: Before we move forward, just so I'm clear – because we veered off into the quality of proof -- with regard to question 2, what is your take-away? (2. If yes to question 1, during what time period should the person have to prove the unit was their primary residence?)

Ms. Balsam: I don't think we resolved that, actually. We just slid onto **question number 3**. I apologize.

Ms. Cruz: I think what came out of that discussion was that staff would research and prepare information for the Board regarding how it's done in rent stabilization. If I'm correct, there's no cure. And if that's accurate, then the Board will decide whether to follow that or not. If it's not curable, then we can pick one of these, and say, the way it's done there is a two-year look-back period. So here, you might say two years from the date of application. Or if you want to make something that's curable, if I'm correct, that's completely different from what the Housing Court does. So first, we need to confirm what the Housing Court does; we can then provide you with that information; and then you can make a decision.

Mr. Hernandez asked for clarification.

Ms. Cruz summarized the topic discussed previously, based on the scenario provided by Mr. DeLaney. She believes that if you haven't used the unit as your primary residence, and the owner finds out and brings an eviction case against you, you can't just say, now I'm going to come back; now I'm here. That is, the situation is not curable.

Mr. DeLaney to Ms. Cruz: The more information you can get, obviously, the better. In particular, if there's any precedent or clarity around -- Gee, I got the Golub notice; now move back from Oklahoma. As opposed to, yeah, I was in Oklahoma for a year six years ago, but I've been back since that time. So how does something that happened three years to one year ago (affect the concept of curable)?

Ms. Balsam: To the extent that we're going to propose some language, we'll just leave it blank. We haven't decided anything yet, so we can fill it in later.

Ms. Balsam turned to **Question number 4:**

4. Should only the prime lessee(s) be protected?

   a. Does it matter if a lease is in place?

   b. If we decide to protect others regardless of the lease issue, who should we protect?

Staff discussed this a lot; the Law Department had weighed in a long time ago; and Mr. Carver has noted on multiple occasions that if there's a lease in effect there's a contractual obligation, which we could be impairing, so we could run into a lot of legal hassles. Ultimately, our recommendation was that if there is a lease in effect on the date that protected occupancy application is filed, we should cover the prime lessee to the exclusion of everyone else. And if there is no lease in effect on the date of the PO application, we can cover everybody who meets the primary residence, etcetera. And we also said that a protected occupant should be able to add a spouse as an additional protected occupant at any time. Obviously, if they're both prime lessees and they're

both applying for PO status, that's fine. Or if they're both on the PO application and only one of the spouses is the prime lessee, they should both be protected. That is the staff position, so thoughts, comments…

Mr. Carver: The succession rule still holds?

Ms. Balsam: Yes.

Mr. Carver: That's not changing?

Ms. Balsam: No.

Ms. Roslund: Do we have any statistics on how many loft-dwellers in New York City have leases, as opposed to those who do not?

Ms. Balsam: We don't have statistics, but anecdotally, most have expired leases. It's very rare that we see leases that are actually in effect, by the time the Loft Board is making a decision. A certain percentage will have them at the time the applications are filed, but then they expire and are not renewed.

Mr. Hernandez asked if the expired leases were considered legitimate; if the conditions of such a lease continued.

Ms. Balsam: The way the rule is worded now – the definition section has that the person who was the prime lessee continues to be the prime lessee, whether or not the lease is in effect. So if you ever had a lease, you continue to be the prime lessee.

Mr. Carver to Ms. Balsam: You're saying you want the rule to give preference to the lessee only if the lease has not expired by its terms.

Ms. Balsam: Yes.

Mr. Carver: Which is probably no one.

Ms. Balsam: No, that's not true. And it will incentivize people to renew. It would incentivize the owner, because the owner doesn't want to have to deal with the roommates; and it would incentivize the prime lessee, because he may not want to protect Aunt Fran.

Mr. Carver: Yes, but the law, the common law, and probably the RPL, it is probably statutory by now, says that a month-to-month tenancy persists after the expiration on the same terms as the lease. So that lease is still alive. By law. If the lessee remains in occupancy after the stated expiration of the lease, that lease is not gone. In fact, they often have a special provision calling for the rent to be higher during that period as an incentive to get the person to renew or move-out. So I don't see that what you're proposing is a viable legal solution. If there ever was a lease, and the lessee is still in occupancy, I think then the lease is still in effect.

Ms. Cruz: The person becomes a lessee for the thirty days, for the month, after paying their rent. I don't become a lessee indefinitely. So come June, the owner can say, I'm not taking the rent because I want you out. And if you're not out by the end of the month, the owner can bring a summary eviction.

Mr. Roche asked Mr. Carver if what he is saying is that, if the lease expires, but the person stays on, three years later, if an issue arises, the terms of that lease will be what the Courts will refer to.

Mr. Carver: That's right.

Ms. Cruz: If you are in a covered unit, you are the statutory tenant. If you are the prime lessee and the owner has registered the unit with you as the protected occupant, you are entitled to remain due to the Loft Law. Absent the Loft Law, if I'm in a two-family house, and I have a two-year lease, once the lease expires, I become a month-to-month tenant. If I pay my rent at the beginning of the month, I will be entitled to remain until the end of the month.

Mr. Carver: You're entitled to remain until the marshal evicts you.

Ms. Cruz: Yes, of course. That's if I stayed. If the owner says, I'm not accepting your rent for the following month because I want you to leave, and I'm giving you thirty days to leave…I'm in a two-family house, not subject to rent regulation – I don't have a right to remain. But our tenants (loft tenants) have a right to remain.

Mr. Carver: Right, so the right to remain extends at least until the landlord gives whatever written notice is required to terminate that tenancy, which is past the stated expiration date of the lease.

Ms. Cruz: Yes.

Mr. Carver: So at the very least, your definition of a lease in effect should extend until such date as the law provides that it's no longer in effect, past its stated expiration date. You're too short. In other words, if the lessee remains in occupancy past the stated expiration date, that lease still lives, as long as the landlord does not, at the very least, send the notice to quit. If you're going to go in this direction, I would ask that your definition of a lease in effect properly reflect the state of the law on this issue, whatever it might be. I'm saying off the top of my head what I think it is. It could be different. And when I say the state of the law, I mean that the lease survives on a month-to-month basis past the stated expiration date. And that additional occupancy should count toward a definition of a lease in effect.

Ms. Balsam: That's what we have now.

Ms. Cruz: What we have now is, whether the lease is expired or not, you're still considered the prime lessee.

Mr. Carver: Well this is a little lesson. If it's expired, and the landlord has given the notice to quit, I guess I'm conceding that, if the law says that's end of the lease, then that would be the cut-off date.

Ms. Balsam: But for a tenant protected under the Loft Law, how could an owner give a notice to quit?

Mr. Carver: But they're not protected yet.

Ms. Balsam to Ms. Cruz: Can a tenant who filed an application for protection, or say coverage and protection, be evicted while the case is pending if the lease expires?

Ms. Cruz: Well, the tenant should raise their claim. The claim is a defense in an eviction case.

Mr. Carver: So I don't think this new definition can work legally, because the lease legally survives if the lessee remains in occupancy past the stated expiration date. I don't see how this new structure cures the whole economic reliance issue that you're trying to overcome. (In response to Ms. Cruz asking about a specific document): I'm not looking at anything at the moment; I'm just reacting to your statement that your change is now to grant a lessee preference over other occupants if the stated expiration of the lease has not yet run? Is that what you're saying?

Ms. Balsam: On the date of the application. Yes, that's what we're saying.

Mr. Carver: Ok, and what I said is, that's a problem, because technically, legally, the lease still survives if the lessee is in occupancy, notwithstanding the stated expiration date.

Ms. Roslund: It's who, then, is the lessee?

Ms. Cruz: No, because according to the rule, it is the person who's the lessee in the lease….that is now expired.

Mr. Bobick: The owner is charging the same amount.

Mr. Carver: Not necessarily the same amount. The lease might specify some other amount, in a hold-over situation.

Ms. Cruz: In a non-IMD situation.

Mr. Carver: Yes, because these leases are not residential leases either. So they're actually likely to have a hold-over rent. In fact, they're likely to be contemplating that.

Ms. Cruz: Even if they have a hold-over rent, the rent is regulated by the Loft Law now.

Ms. Balsam: The issue is, who are we protecting? That's the difference, isn't it? So if the lease has expired on the date that person who was the prime lessee on that lease files their application, why should only that person be protected? I think Mr. Carver's argument is because the lease survives, and they're still the prime lessee.

Mr. Carver: And if they're still in occupancy, I believe – and this might require some research – the lessee remains a lessee under the same terms as the lease provides, only on month-to-month basis. So if the lease still lives, all the economic reliance arguments in favor of giving preference to the lessee still survive.

Mr. Barowitz: What happens if there's no lease, but just a "gentleman's agreement" that you pay me X amount of dollars every month and you can stay?

Mr. Carver: I think under the current rule and under the proposal, absent a prime lessee, everyone can qualify.

Ms. Balsam: Right.

Mr. Hernandez: But it requires a lease, right? Not just a gentleman's agreement? There needs to be a piece of paper somewhere.

Ms. Balsam: No. For people to be protected? But for the prime lessee to trump everyone else, yes.

Ms. Roslund: What if a second person would like to be added to the lease, but the landlord refuses?

Ms. Cruz: According to what Mr. Carver just said, that person would not be protected, because the lease trumps everyone else.

Ms. Roslund: If the prime lessee agrees (to this person being added to the lease), can there then be two protected occupants?

Mr. Hylton: It's not the prime lessee who has to agree; it's the landlord.

Ms. Balsam: The owner could certainly register an additional protected occupant; but it's when the owner isn't consenting that the issue arises. The Board has already said we definitely want to protect more people than just the prime lessee, and I think everyone was in agreement as to spouses. Whether or not we were going to go beyond that…

Ms. Roslund: Once the unit was covered and the occupant is protected, can then a second occupant come back, with someone else? Can you add protected occupants later?

Ms. Cruz: My understanding is you have a right to add a spouse.

Ms. Balsam: In rent stabilization you have the right to add a spouse. You can ask the landlord to add your spouse to the next renewal lease. The problem here is that, usually, we don't have renewal leases.

Mr. Hylton to Ms. Roslund: Is your question, can you have more than one person as the prime lessee? (Yes)

Ms. Balsam: Yes (you can).

Mr. Hylton: But they would have to have been there at the time the lease was signed, right?

Ms. Balsam: Yes.

M. Hylton to Ms. Roslund: So other people can be on the lease.

Ms. Roslund: Yes, I understand that. Two people with businesses could have the space together – I get this half, you get that half. But, it's all at the landlord's discretion. And usually they want one point of contact, because when two parties sign a lease (and split the space), it's usually because they can't afford the entire amount on their own. And if one party leaves, the remaining party is responsible for the entire rent, which can be a problem in terms of meeting the rent; which is why landlords usually are not amenable to multiple parties being on the lease.

Mr. Carver: From my perspective, this proposal is certainly preferable to the prior ones – even though I do not support the change. But I think the change does require a little more legal research. And even when the revision is done, the question then becomes, so what? In other words, would we care?

Ms. Balsam: Yes. To the extent that I don't want to open us up to law suits and pass a rule that could be struck down…. Having gone that route once….and it wasn't struck down, but it was very nerve-wracking, so I don't

want to do that again. OK, we'll do more legal research on that issue and come back to the Board. We'll draft something…but nothing on this particular issue; because I don't know that we can even phrase it.

Mr. Hylton: That's question number 4, right?

Ms. Balsam: Yes. As **question number 5** is not particularly relevant to this discussion, we could go back to **question number 3C**, and talk about the types of documents the Board would be looking to see. Or we could talk about limiting discovery, although I haven't really thought that through yet. I do know there have been multiple complaints about how burdensome discovery is, and if we are going to go with "the date the record closes" as the answer to question number 2, we should fashion something, I think, that would limit discovery from the application date to the date the record closes. I just don't know what form it should take. So if anyone has thoughts on that, I'd be happy to hear them.

Mr. Carver: On that issue, I certainly see the concern, but once the person applies, their incentive to live underground more-or-less ceases, right? Wouldn't they be more likely to have proof after the application date? Your whole concern was that they might lack proof because of (their hidden-occupancy status); but once an application is made public, wouldn't there no longer be a reason to have a lighter burden?

Ms. Balsam: It's a different issue. The first issue is they may not have the same kind of documentation as someone in Housing Court would have. The other issue is the burden of continuous discovery during the time the case is pending. So to the extent that we would want to address that burden….I think it's something the Board should at least consider.

Mr. Carver: I think so, too. But once the application is made, the person would then be on notice about the requirement to furnish proof. So the tenant wouldn't be blind-sided anymore.

M. Balsam: But that doesn't necessarily mean that they still wouldn't be overly burdened by discovery requests, i.e., give me five thousand documents to prove coverage and protected occupancy – and you're talking about Window Period documents – and they have to come forward with those things. But then, in terms of protected occupancy, if we go the route of, "until the record closes," there's a continuing burden. So how many of those five thousand documents do they need to produce until the record closes? Do they need to produce all five thousand for every single month until the record closes? That, to me, seems like a lot. There's got to be a middle ground.

Ms. Balsam noted that, if five thousand documents is rare, she does receive thousands of documents, in huge binders from OATH, with every page of bank statements…when perhaps the first page would be good enough.

Mr. Barowitz: Right now we have three, four, five criteria. But nowhere do I see that you have to swear, legally, that you live there? Why isn't that listed? And why isn't that sufficient? Would that be case law?

Mr. Bobick: There are cases where we've based protected occupancy and coverage solely on testimony. Credible testimony is as important as documents.

Mr. Barowitz: Well, I haven't seen it (mentioned) in there.

Mr. Bobick: But you've seen such cases before you.

Mr. Barowitz: Yes, I know. But can we include credible testimony as one of the criteria?

Mr. Bobick: Do you mean listing it as a factor? Yes, we can discuss listing it, but the whole point is, your going to trial and testifying on your own behalf will be as important.

Mr. Barowitz: I think that's probably the best form of proof, because if you lie, you're in serious trouble.

Ms. Balsam: What I would say is this: I ask the Board members to think about discovery, which has been raised again and again as overly burdensome, and to what extent we can do something about it. If we're going to extend primary residency to the date the record closes, then I do think we should couple that with some sort of limitation on the continuing burden for discovery. So Board members should think about what we would want to do: Should we go that way? Then we can work on drafting something.

Mr. Hylton: Are we saying that the Board should take the position that the discovery burden on tenants should be lightened?

Ms. Balsam: I think in certain situations we might want to do that. And we should think about how we would do that.

Mr. Carver: In that final period?

Ms. Balsam: Yes, that's my proposal. In that final period.

Mr. Hylton asked if there were any further comments (none), and closed the meeting.

Mr. Hytlon: This will conclude our March 6, 2019, Loft Board meeting. Our next public meeting will be held March 21, 2019, at 2:00PM, at 22 Reade Street, Spector Hall.

The End