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

February 14, 2019

The meeting began at: 1:15 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; Julie Torres-Moskovitz, Public Member; Heather Roslund, Public Member; Renaldo Hylton, Chairperson Designee; and Helaine Balsam, Loft Board, Executive Director.

INTRODUCTION:

Chairperson Hylton welcomed those present to the February 14, 2019, 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.

Panel Discussion by Loft Board Bar Attorneys David Brody, Jason Frosch, Michael Kozek and Robert Petrucci

Mr. Hylton: In November, the Board voted to ask some of the attorneys who frequently appear on Loft Board cases to come and address some questions about protected occupancy, including the issues of primary residence and protection for non-prime lessees. Appearing before the board today are the four attorneys: David Brody, Jason Frosch, Michael Kozek, and Robert Petrucci. Each attorney will make a three-to-five-minute introduction and then I will ask questions. But before we begin, Mr. DeLaney would like to make a comment.

Mr. DeLaney raised a point regarding the length and detail of the last meeting (January 31), when the Board worked extensively on rules, and how some of that might be expressed in the meeting minutes. He asked if the Board agreed that the entire discussion about the choice of particular words did not need to be included; but only a brief summary and the result.

Mr. Hylton thanked Mr. DeLaney, and confirmed that the minute-writer would take that into consideration.

<u>The Attorneys Opening Statements</u>:

Mr. Hylton introduced Mr. Brody

Mr. Brody thanked the Board for inviting himself and his colleagues to discuss issues concerning primary residence. He noted that he began practicing law in 1979, and almost immediately became involved with the arguments that preceded the existence of the Loft Law; and, since its promulgation in 1982, loft-related issues have been a significant part of his practice. He explained that the context of the initial arguments considered rent-stabilization laws and rent-control laws, all of which clearly define what constitutes primary residence; and noted that the main difference between what they (those laws) provide and what is provided here (Loft Board), is their application to two different groups of buildings: one that is already subject to regulation, and the other – loft buildings – introduced suddenly to a regulatory scheme. For the latter, it's also necessary to

look to the past – to the Window Periods – to determine how they should be considered and the criteria for that consideration.

Mr. Brody cited a case that preceded the enactment of the Loft Board, *Lipkis v. Pikus*, which considered the issues of rent stabilization and by extension, primary residence and who is a protected occupant, in light of the existing law. The decision was that rent stabilization was the appropriate place for this discussion.

He then referenced sections of MDL 280. First, "….that as a consequence of the acute shortage of housing as found and declared in the emergency tenant protection act of nineteen seventy-four, the tenants in such buildings would suffer great hardship if forced to relocate;" He then noted that toward the end of the statute, there's a declaration to the effect that, when a building is ready to leave the system, it graduates out to, at that point it was the RSA (rent stabilization), and later DHCR.

His point was that, in essence, loft buildings are part of the rent stabilization system, moving through a process that moves them from buildings that have been illegally converted to buildings that are now legal, and he cited the early cases that dealt with this.

Axelrod versus Dixon. At about the time the Loft Board promulgated its primary residence regulations, allowing the landlord to go to court to seek the eviction of a tenant he believed was not a primary resident. The decision: The regulations were *ultra vires*, as were the issues of rent stabilization and rent control.

Lower Manhattan Loft Tenants versus The Loft Board. The Court of Appeals decision: The primary residence requirements are appropriate for the Loft Board to be written, because this is a piece of the law where the Loft law is to be read *in pari materia* with the requirements of rent stabilization.

Mr. Brody noted that at that point in time, most of the Loft Board cases and arguments were all about coverage. Primary residence issues were usually argued among the tenants. But when it was addressed by the Loft Board, it was usually within the context of conversions and coverage. If the unit was covered, and the occupants were there during the Window Period, they were protected.

Mr. Brody continued: The Loft Board has the same regulations concerning primary residence as it does around rent stabilization. When his firm goes to court, that's how they argue it: coverage is one thing, protected occupancy is another. As to, when do you look at who should be a protected occupant? His view, and to a certain extent what is seen in OATH and Loft Board decisions, is that as of June 21, 2010, you have to show that you are entitled to protected occupancy. And you have to be able to continue showing it.

He cited a case his firm recently litigated (57 Jay St), in which the issue was whether the tenants were primary residents. The owner registered the building with the Loft Board and filed for de-coverage and then went into court alleging non-primary residence. He made the point that the law should be consistently applied, and it makes sense to litigate in one location, then everyone should be able to do it; and asked, why should there be two pieces of litigation on-going about what is, essentially, the continuation of a single issue?

Mr. Hylton thanked Mr. Brody and introduced Mr. Petrucci.

Mr. Petrucci introduced himself, saying he is rent-stabilized tenant in a former IMD unit, which was legalized under the Loft Law in 2000. He has been involved with the Loft Law since it was being formulated, and once it was passed, he worked with Lower Manhattan Loft Tenants (LMLT), helping to determine what regulations

were going to be promulgated to implement the law. He has been counsel to LMLT for over twenty-five years, and has been involved in every amendment to the statute since 1992

Mr. Petrucci then followed up Mr. Brody's narrative, saying there is a question about whether the Loft Board should be considering primary residency in the context of coverage or a protected occupancy claim. He read what the Loft Board said in 1994, in the *Matter of 400 W14 Street Tenants.* There was no issue of whether or not the unit was covered; it was a question of whether or not a woman named Ms. Weems was the protected occupant of the unit. The landlord was claiming that Ms. Weems hadn't lived in the unit for several years, even though she had been living there on the effective date of the law. (He read from Loft Board Order 1554).

"The owner argues that Marianne Weems is not the protected occupant of the unit 5S because she moved her primary residence outside Manhattan and has filed taxes from her new address. Although the record substantiates the claim that Ms. Weems has not used the unit as her primary residence since 1992, she still was in actual possession of it as of July 27, 1987. Therefore, she qualifies for Loft Law protection pursuant to the explicit terms of the Loft Board's rules relating to Subletting, Subdivision and Assignment. 29 RCNY §2-09(b)(2). If the owner believes that Ms. Weems has relinquished protected occupant status because her primary residence is elsewhere, the Loft Board rules are explicit in that the owner can commence an eviction proceeding in a court of competent jurisdiction based upon the allegation that the occupant does not use the unit as his/her primary residence. See, 29 RCNY §2-09(j)(i). However, it is not the province of this Board to render such determinations. Therefore, in the absence of a demonstration to the contrary, Ms. Weems is declared the residential occupant qualified for protection of unit 5S under the Loft Law."

Mr. Petrucci continued: That is not an isolated Loft Board Order. That Order has been cited countless times in all the protected occupancy cases that have happened since then. And it also reflects the practice the Board has followed since the implementation of the regulations in 1983. Basically, it's a two-step process: 1. See if the unit is covered, and if it's ever been de-covered by any permitted means (sale of rights, sale of improvements, abandonment, return to commercial use). 2. Who is occupying that unit? If there is someone residentially occupying that unit – not necessarily as a primary residence – but residentially occupying that unit, and they moved in prior to the effective date of the law, they are automatically the protected occupant. There's no need for landlord consent. There's no need for a lease. Subsequent to the effective date of the law, you have to have landlord consent, as demonstrated by either a lease, or rent payment, or direct dealings with the landlord, or otherwise. Once those things are in place, that person is a protected occupant. If there is a primary residence issue, based on the decision that was upheld by the Court of Appeals (included in the packet he provided the Board), for the landlord to bring an eviction proceeding he would have to be registered and the tenant would have to be served with thirty-days' notice. Then you can go to an eviction proceeding in court, just as with a rent stabilized unit. Then, what is the look-back period? One to two years from the date of that notice; the same as a rent stabilized unit. (Mr. Petrucci directed the Board to where in the packet they can find the relevant information re rent control and rent stabilization).

Mr. Hylton thanked Mr. Petrucci and introduced Mr. Frosch.

Mr. Frosch introduced himself, noting he is with the firm Borah, Goldstein. He explained that though he only began working on Loft Law cases five years ago, he has, nevertheless, been immersed in the material since then. He described the complex nature of some of that work, and said that it has enabled him to approach the issues from a different perspective than both Mr. Brody and Mr. Petrucci.

Mr. Frosch continued: I think that the questions posed to this panel, other than a few corner issues, which I'm sure we'll get into, are probably not strongly disputed. In the five years I've been doing this work, I've been to every Loft Board meeting I can possibly make, and think the issue the Board is currently confronted with is: What should change, if anything? And if you're going to change something, how should it change? And those are policy considerations; not necessarily contingent upon what the law is right now. What concerns me – and the Board – most, I think, is what Mr. DeLaney had described a few meetings ago as the blind men and the elephant. That is, you're blindly feeling around for a depth of information, for the fact patterns, the nuances that arise in those patterns, because you don't feel comfortable changing the rules without more information. So I'm hoping this panel can serve as a resource for you, as an enormous source of fact patterns, going back forty years, to help understand how a change in the rules and the law itself might affect the 10,000 plus people living in IMD units, the owners of those buildings, and everyone involved in legalizing those buildings. I hope the Board will use this resource; ask us as many questions as you feel comfortable asking, to try to understand how the little changes you've been debating will affect these thousands of people. Thank you for your time.

Mr. Hylton thanked Mr. Frosch and introduced Mr. Kozek.

Mr. Kozek greeted the Board and noted that he prepared and distributed some comments and information, to the Board, which he hopes they will have an opportunity to review.

Mr. Kozek continued: I am a lawyer for Loft Tenants, and let me begin by expressing my gratitude for this opportunity to appear before you today, so that we may engage in what I hope will be an open, forthright, and intellectually honest discussion of an issue that has had and will have an enormous impact on the loft community as a whole. To be clear, Mr. Petrucci and I are appearing today as two of many voices among the loft tenant community. Speaking for myself, and I think Mr. Petrucci would share the sentiment, we are not here today to represent our interests or that of any particular clients of ours. Rather we are here to speak on behalf of the entire loft tenant community, amongst whom I believe there is an absolute consensus of opinion on the issue we will be discussing today. That is, whether a tenant's eligibility for obtaining protection under the Loft Law should be conditioned upon them having to prove that their homes are their primary residences.

I do not think it inappropriate for me to say that, while the attorneys appearing today are all experts in this field, there are others equally qualified to speak to these issues, who I know would have liked to participate today, so I again thank you for your patient and careful consideration of our thoughts and opinions. As a preface to my more specific statements today, I would like to take this opportunity to underscore the role that the Loft Board serves in connection with the Loft Law.

The most fundamental purpose of the Loft Law, as expressed in Multiple Dwelling Law section 280 is to encourage people who are living in unsafe conditions to come out of hiding, so that their buildings can be brought into the light of code compliance. Critically, everything the Loft Board does, must at the most fundamental level, serve this purpose. Whether you sit on this Board as a representative of owners or tenants, of the public or industry, you are public servants, and your decisions are mandated by the Loft Law to serve this purpose. You're going to hear a lot today, including starkly different views of the issues; and while you are listening to those views, I believe you should ask yourself whether what you are hearing advances the fundamental purpose of the Loft Law I've expressed to you. I do not think there is any rational way for you to

conclude that the views expressed by our colleagues on the other side of this table regarding primary residence are consistent with those purposes.

First: Placing a primary residence condition on protected occupancy status means less covered units. Plain and simple. It creates an additional burden and obstacle loft dwellers must overcome in order to obtain protection. When considering whether to come out of the dark, loft dwellers must consider the risks and costs associated with doing so. They are fearful; coming from a place of hiding; and risking eviction. The primary residence imposition entails enormous costs in the context of seeking coverage and protection under the Loft Law, given the tactics are and have used in litigation, which, I would say, have accurately been described as weaponizing primary residence. That cost alone is a deterrent to many loft dwellers, who frequently do not have the financial means to come forward. I've personally met with many loft dwellers who have elected not to come forward for this very reason. Clearly, this situation is perpetuating the problem the Loft Law is intended to remedy, as those illegal occupancies continue to exist in the dark. That is inconsistent with the Loft Law.

Second: Primary residence as a condition of protected occupancy effectively deregulates already covered and rent-regulated IMD units. Presently, the Loft Board's rules and precedents provide that a loft dweller living in a unit that is already a covered IMD unit cannot seek a rent adjustment or a rent overcharge award if he/she is not a protected occupant under the Loft Law. In other words, if a unit does not have a protected occupant in it, then it is, effectively, deregulated. And the landlord is insulated against any responsibility to charge the legally regulated rent for the unit and from any liability for illegally charging in excess of that amount. The Loft Board provides that IMD units are rent regulated, by law. Yet if an occupant is not established as the protected occupant of the unit and is deterred from seeking that protection, the owner can effectively deregulate the unit by charging whatever he wants, due to the insulation from liability for his conduct. This should give you some idea about why this issue is so important to the owners, who are, as a community, opposed to the Loft Law and to rent regulation. This, too, is directly contrary to the purposes of the Loft Law. There are, of course, many other adverse effects of the imposition of the primary residence requirement on protected occupancy status, which we will discuss further today, and which is also addressed in my submission. Thank you.

Mr. Hylton explained the procedure for the Question and Answer Session.

Question 1

Mr. Hylton: Should a tenant 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?

We will begin the discussion with Mr. Kozek.

Mr. Kozek: No. Why? First, it's my belief that the law itself does not permit this. The Loft Law has a provision that addresses primary residence, and I believe Mr. Petrucci addressed some of the history of how this provision came into existence. But MDL 286(2)(i) states: "Prior to compliance with safety and fire protection standards of article seven-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." In my view,

the statute is very clear. You have to have a residential occupant established; you have to be a residential occupant qualified for protection; that person is then entitled to continued protection; and that protection is conditioned upon them maintaining the unit as their primary residence. There's no ambiguity in the language at all. The language is clear on its face.

(Mr. Kozek called the Board's attention to an exhibit in his distribution that is a letter he obtained from an expert in English grammar, who reviewed this language and concluded there was no other way it could be interpreted).

Mr. Kozek continued: The way this is intended to work is you get the protected status, then you must maintain it as your primary residence. The landlord may seek to evict on grounds that it's not your primary residence, and that's in the Loft Board's rules. And that's consistent with the Court of Appeals decision in *LMLT v. the Loft Board*, and again, Mr. Petrucci will address this. But that provision was put into the statute in order to codify the rule with respect to seeking eviction of tenants that was challenged in the LMLT case against the Loft Board. So in terms of the statute itself, which is clear, the Loft Board is bound; there is no ambiguity; and the Loft Board has no discretion to do anything other than that.

Mr. Carver asked for the number of the entry Mr. Kozek was citing [MDL 286-2(i)]

Mr. Barowitz volunteered the general point that there are still people/ artists who have been living in fear for thirty, forty years.

Mr. DeLaney asked Mr. Frosch or Mr. Brody what would take place if the Board's answer to number 1 is, indeed, no?

Mr. Brody: Our view, certainly since the enactment of 281(5), has been that protected occupancy is an issue related to both what was happening on June 21, 2010, and what is occurring at the time the applicant files his application. Protected occupancy is not something you turn on and off as a matter of convenience. It's a matter of, if there's an emergency, and you if have a certain qualification, then you should be subject to protection.

Mr. Brody recounted the example of Mel Dixon, who preceded all of (these rules). He was a photographer who lived upstate with his wife and children, but maintained his studio in NYC, where he'd spend a few days a week working, and then return home. He asked if, per regular rent stabilization, and other documentation notwithstanding, is he a person to whom an emergency declaration applies? He noted that when all of the cases handled by his firm in which tenants are claiming protected occupancy are considered, it's clear that they settle most of those cases; because they end up at OATH, and once they get past the issue of coverage, the tenant is usually able to produce some form/ forms of documentation that show he should be protected, i.e., taxes from New York City or that he doesn't have a residence anywhere else. Mr. Brody added that he often finds himself explaining to landlords the fact that, ultimately, the building and the tenants are going to be covered (protected), so a court battle isn't worth it.

He made the point that Mr. Kozek's view of what landlords want is not totally accurate, and he offered Brooklyn as proof of this. As the buildings became obsolete for manufacturing, they would have sat vacant, producing little or no income, if residential tenants had not moved in, which increased their value. So the theory that landlords want to evict these tenants there is counterintuitive. While there is no question that it

does make landlords' lives difficult in some ways, they are not just "bad guys" whose goal is to get rid of these tenants.

Mr. Brody: So go back to the purpose of the statue, which is to provide protection for people who need protection. What's the first point of that? June 21, 2010. Suddenly, you have a Loft Law that becomes effective as of that date, which look to what was happening back two years and at that moment. It's like the Big Bang theory. The moment before, there was nothing, then all of the sudden, there's something. And at that point in time, all rights and obligations apply –for landlords, applied without question as to what they wanted or intended, and as to whether there was a reason why tenants should not be at a particular standard. The reason you have a Window Period is to tell everybody, here's what the law is today, and we need to see what you were doing back then, at a point when you had no reason to fabricate anything, and to see what that means to us from this point forward.

Mr. Hylton asked if any other Board members had questions.

Mr. Carver: I would ask the attorneys for the owners to comment on the statutory construction argument. Notwithstanding the phrase "primary residency" in the statute, an occupant should not have to show primary residency.

Mr. Frosch: If you look at 286(2)(i), and read it for yourself…. This isn't the first time the Board has dealt with this. I remember a time less than a year ago there was a presentation by the Loft Board staff about this very issue; and it was hotly contested and debated. I was in the audience watching that meeting, and it seemed clear to me that there was not a strong argument about 2(i) requiring primary residence be maintained in order for a protected occupant to be in continued occupancy. And it is a meaningless, academic parsing to say, well, first they have to qualify, and then an hour after the ink is dry on a Loft Board Order, the landlord can go into a non-primary-residence hold-over. This is a massive waste of your time, of the judicial resources involved in a second proceeding, and it creates a more expensive litigation situation for all parties involved. The statute is clear. It says you have to use it as your primary residence. And not only that, the cases Mr. Brody was discussing, including *LMLT v. Loft Board*, reiterate that primary residence is a requirement, in part, based on the fact that there is a housing emergency. There are not enough residential units to go around in New York City, and it is inequitable to those who need housing to permit people who have a primary residence elsewhere to have regulated rights in IMD units.

Mr. Petrucci: That section of the law was put in there by Don Leibowitz, who is the Assembly bill-drafter -- so someone on our side of the table. It was put in, specifically, to codify the Court of Appeals holding in *LMLT Loft Board*, which had happened seven years earlier. He told this to Chuck and to my partner, Ray Baily, when they went up in Albany at that time. They consulted with me extensively about the language of the law as it was happening. It revolved mostly around creating a new timetable; extending the law, which was about to expire for the three-, four- and five- unit buildings, which was half of our universe at the time, so we were very concerned about that; and the issue of adding the legalization milestone increases. That was the major focus. Primary residence was not even a concern. All it was doing was codifying what the Court of Appeals had said, which was: We are upholding the Loft Board's right to issue an eviction regulation that requires a registered owner to bring a proceeding of non-primary-residence in a court of competent jurisdiction. Because it's *in pari materia* with what rent stabilization and rent control do, i.e., bring an eviction proceeding after notice in a court of competent jurisdiction.

Mr. Kozek responded: I think that Mr. Frosch and Mr. Carver misconstrued what I said. I did not say that that provision of the statute does not require someone to maintain the unit as their primary residence. What we're talking about here today is, whether you must prove – *whether you must prove* – that the unit is your primary residence, in order obtain protected occupant status. It seems to me that the statute defines it. And this is a term in various provisions of the Loft Law – a residential occupant, qualified for protection. It's in the regulations, and the statute refers to that entity, that person, already qualified. It says that once they've got that satisfied, then they must maintain it as their primary residence from that point forward. That presumes that you've already obtained that status. What I'm saying here seems pretty clear: Yes, there is a primary residence requirement, but after you've already obtained that status.

Mr. Hylton: And how do you obtain that status?

Mr. Kozek: Bring an application for protected occupant status. The Loft Board's rules currently require that in order to obtain protected occupant status, you must be an occupant of the unit. There's nothing in the Loft Law or in the Loft Board's rules that says that someone who is not in actual occupancy of the unit would be able to obtain that status. The rule itself says explicitly, you must be a residential occupant of the unit. In order to establish that, some documentation that shows a connection to the unit must be presented, and perhaps testimony if necessary. But that is a qualitatively different analysis than having to prove it's your primary residence, which requires, as we've seen in many cases I've tried with Mr. Brody and Mr. Frosch, where they want discovery of every single possible document that exists out there with this person's name and address on it. And they're going to question them about every transaction on a bank statement: where they were on a particular day; why they were there; what they were doing. That is different than putting forward some documents showing you have a connection to the unit, to establish, just as a baseline matter, that you residentially occupy the unit, which would qualify you for protected occupancy status under the Loft Board's regulations.

Mr. Hylton asked the Board members if they had any questions.

Ms. Torres-Moskovitz asked if the attorneys could offer any information on more recent trends or cases (than those that had been distributed), perhaps since c. 2000, or 2010.

Mr. Petrucci: I can tell you that the cases have been identical to all of those; until the Board changed its mind in 2014 or so. There has never been a case that required primary residence for protected status prior to 2014.

Ms. Torres-Moskovitz asked if there was a case from 2014.

Mr. Kozek : *Matter of Cohen*, 2013, was the last decision I'm aware of that didn't require it, and in fact, rejected primary residence as part of the analysis.

Mr. Frosch: *Matter of Mariner-Smith* might have been the first one the Loft Board adopted that enshrined primary residence as a qualification.

Mr. Petrucci: And that was without any discussion; without any change in rule. It just appeared from proposed Orders offered to the Board, which were eventually adopted. We were at a loss at the time.

Mr. Brody: There are a number of cases pending before the Board, in which the issue is raised and discussed, and where the OATH judges make decisions saying, this is the standard to use, and this is what we find. At least one of the problems we have going forward is that we're waiting for decisions, to get instruction in terms of what we think is correct or incorrect. Notwithstanding Mr. Petrucci's opinion about the earlier law, I think the Court decisions that have come out over the last five or six years have changed how we have to look at these things.

Mr. Brody gave an example of a case that will eventually go before the Board, which is similar to the *Ansonia v. Unwin* line of cases out of the Appellate Division First Department which, basically, say that the law doesn't extend rent regulation to people whose tax returns indicate they actually live elsewhere. Do they, for example, deduct one hundred percent of the rent as a business expense? That's what *Birnbaum* went to *(Matter of Desjardins and Richer).* The answer is in that one factor. He cited Bianca Jagger as another case where one factor – whether your resident status in this country permits you to have a primary residence here -- was enough to determine the result. He also mentioned a case he and Mr. Kozek have been arguing for some time –*Goldwater v. Amicus* – where the Court found that, "The law does not extend the protection of rent stabilization to a person not using the subject apartment as a primary residence."

Mr. Brody concluded: The point is, if you can't extend the protection, where is the protection ever? And why don't I get to argue it both as to 2010, and as the point at which a person makes an application?

Mr. Carver: I have an important question. The main problem I have, and which I think many members of the Board will also have with this concept of the primary residency question being adjudicated in the Housing Court, is that this Board cares about the definition of what a primary resident is. And if it's adjudicated in the Housing Court, we would lose control over that definition. If it's adjudicated in the Loft Board, we have the ultimate say through our case law. And we would lose the ability to control the definition if it were adjudicated outside of the Loft Board. What are your thoughts about that?

Mr. Petrucci: Primary residence is a legal standard. It's not something the Loft Board can somehow decide is "primary residence light." It's either primary residence or it's not. I don't understand how you think you can decide what it is and how you're going to apply your cases in relation to a term that is well set.

Mr. Carver: I certainly agree with you on that small issue; although I don't believe that's the opinion of most of the Board members or our staff.

Mr. Hylton said that they would now move on to question two. But if time allowed, they could certainly return to these issues later.

Question 2

Mr. Hylton: If the answer to question one is yes, during what time period should the person have to prove the unit was their primary residence?

Mr. Frosch: Right now, under the current state of the law, it is beyond dispute that the answer (to number one) is yes. In terms of what time period they should have to prove primary residency for, it should be from

the date they moved in through the date of the closing of the record, or from the effective date of the law to the date of the closing of the record, whichever is the later period.

Mr. Frosch noted that this was addressed in the *Goldwater v. Amicus* appeal, which was circulated to the Board. He began to describe the case Mr. Kozek made on Mr. Goldwater's behalf in terms of tax returns not being a factor because there is a limited period of time, called the called the Galla period, when that rule should apply, as well as the skepticism of several of the judges, who wondered how someone could have a lease; not use the space as a primary residence; then a year later, suddenly start using it and claim they have a right to continue to occupy it as a rent- stabilized unit.

Mr. DeLaney: If I understand correctly, this case never came before the Loft Board?

Mr. Frosch: It came before the Loft Board as a denial of a motion to withdraw without prejudice and the granting of a motion to dismiss.

Mr. Kozek: This is inaccurate. This case was never before the Loft Board. You are talking about an action in Supreme Court regarding a claim for rent stabilization.

There was discussion among **Mr. Frosch, Mr. Kozek, Mr. DeLaney, and Mr. Brody** as to the proceedings of this case and which parts of it were adjudicated in Court and by the Loft Board.

Mr. Brody clarified by recounting that there was a decision by Judge Casey. Owner registered most of other units in the building voluntarily, but because Mr. Goldwater never produced discovery material, finally, a motion was made by counsel to withdraw Mr. Goldwater's claim without prejudice. Mr. Brody opposed, saying it should be with prejudice; the decision was that it should be with prejudice; it came to the Loft Board, which accepted that decision. Then, Mr. Kozek commenced a Supreme Court action, saying Mr. Goldwater should be subject to rent stabilization; and that was the first time Mr. Brody gained access to Mr. Goldwater's taxes. The result in lower court was summary judgment, saying he is not subject to rent stabilization, and the Appellate Division was unanimous in the same decision.

Ms. Torres-Moskowitz asked Mr. Frosch if he would clarify the time period he had specified.

Mr. Frosch: It should be from the effective date of the law forward, but obviously, if someone were to move in after the effective date of the law you would be looking at the period from when they moved in, backwards

Mr. Brody: The litigation on the issue at OATH has been robust. In some cases they argue to the end of the record and with proof to the end of the record. Again, this is something the Board will ultimately decide. The attorneys for both landlords and tenants have differing and strongly held opinions about it. The issue is not one of good faith/bad faith, but one of how do you view the statute? How do you view the requisites of the statute? How do you view what is to be done in order to give the theory behind the statute a real and true meaning?

Mr. Frosch volunteered some details from a recent decision, *the Matter of Hughes,* where the decision was to adopt the Proposed Order denying reconsideration. The tenant had admitted on the stand at OATH that he had stopped residing in the unit. And the period of time during the pendency and during the trial was found to be relevant in terms of showing lack of primary residence.

Mr. Hylton asked to hear from Mr. Petrucci and Mr. Kozek on question two, which he repeated.

Mr. Kozek began by stating he has no idea why *Goldwater v Amicus* had been discussed at such length. The facts have been misrepresented and misconstrued, and it is completely irrelevant to what is being discussed here today. But as it was raised, he wanted to clarify that, at the Appellate Division, the judges' skepticism was because he was seeking a renewal lease in that case, to which he was not entitled, because it was not his primary residence.

Mr. Kozek continued: In terms of primary residence, if the question is, are you a protected occupant(?), the question has to be asked, is it currently your primary residence? That's the determination. When you file your application, I suppose your obligation would be to show that at that point in time, it is your primary residence. If it's going to be from that point forward, you have an on-going, endless obligation to produce discovery until the time of trial, which makes no sense. And it is the landlord's obligation, in the rent stabilization context, to prove that it is not the tenant's primary residence. It's not the tenant's burden to prove it is.

Mr. Hylton: What is the application? You're talking about an application seeking protected occupancy. But what if it's seeking coverage? What would be your position on that?

Mr. Kozek: It's an interesting question, because it's well-established by Court of Appeals law that you don't have to show that the unit has been occupied as your primary residence in order to establish coverage for the unit, but at the same time you'd have to prove that you occupy as it as your primary residence in order to obtain protected occupancy status, so they conflict with each other. If you're trying to show you're entitled to protected occupancy, you should do it at the time you're seeking that coverage. And in the rent stabilization context, there's a look-back period. The history of the tenant's usage of and connection to the apartment will be examined to determine if it's their primary residence at present. It doesn't make sense to have to prove it at any later point.

Mr. Petrucci directed the Board to the rent stabilization and rent control regs in the packet he distributed, and continued: They contain a definition of items to look at to determine primary residence, one of which is whether, in the prior calendar year, the tenant stayed in the apartment one hundred and eighty-three days. But that has a specific, triggering point. In the rent stabilization context, it's when the landlord sends a notice of non-renewal of the rent-stabilized lease. In a rent control -- and even in loft -- contexts, it's when the landlord sends a notice of termination. So whatever happens subsequent to the notice of termination is not really significant. You look back a calendar year before the notice was served. That seems to make sense, so if you're going to do something with primary residence it seems like it should be in *pari materia* with rent control and rent stabilization. There's a look-back period of maybe a year, and that's it. What Mr. Kozek is talking about is a rolling obligation (to prove primary residency). These cases pend at OATH for years; and to have a discovery demand every six months, asking for more and more documents….As Mr. Brody said earlier, we do settle a lot of cases where primary residence was an issue; but we just fought two cases where primary residence was an issue. If we were just talking residential use, we would have settled those cases.

Mr. Hylton asked Mr. Kozek if he felt the tenant should have to maintain the unit as their primary residence, continually, after the point of initial application, in order to remain protected occupant.

Mr. Kozek: To clarify, do you mean after the application is filed, but before it's adjudicated? Should the tenant have to continue to show (prove that it's their primary residence)? I agree with Mr. Petrucci, as a practical matter, it doesn't make sense that that would be the standard, because you would impose this continuing discovery burden

Mr. Hylton: What if someone just files and moves?

Mr. Kozek: They have to be a residential occupant of the unit. If they're not occupying the unit, they're not going to get protection.

Mr. Roche: I think this is a good time to interject this, and I would direct it to Mr. Petrucci and Mr. Kozek. There was discussion about fear among loft tenants of even coming forward to request protected occupancy status; and about them living with that fear for decades. Of course, the Fire Department doesn't believe anyone should live in fear, and I would like to get a sense from you about what you think the number of people living in loft buildings who are not coming forward, due to fear, is. And, can you give two specific examples, without giving mentioning names or addresses, of tenants who have told you that they do not want to come forward for this reason.

Mr. Petrucci: There is an incredibly large number. When someone comes to me, and I feel they have a case under the Loft Law, my advice is, you need to go forward, and you need to do it now. But many people don't have the financial means to do it. They're concerned about the cost and about the inspections.

Mr. Roche: But that's not fear. I mean people who say, I'm afraid that if I say anything about the unsafe living conditions I'm living in….

Mr. Petrucci: I was coming to that. There are cases, even among buildings that have applied, where the Fire Department or Building Department has issued vacates or partial vacates. Then they're lifted, and the people come back, and then they're issued again. People are constantly dealing with this, because the conditions that are causing the vacates are not being corrected by the landlords, and the tenants can't correct them themselves.

Mr. Roche: I'm going on the record with something I've said before here. In the roughly four to five years I've been involved in the Loft Board, I know of no time that the FDNY vacated any loft tenant. I keep hearing about fear of vacate, but no one has yet provided me with any statistics or facts to prove to me that it's actually happening.

Mr. Petrucci: Maybe we can figure out a way of doing that. I don't feel comfortable doing it in this forum.

Mr. Roche: I don't want anyone living in fear anywhere in this country, let alone in the five boroughs of New York City, which I'm sworn to protect. If this is a problem, we need to work together to find out how to resolve it, but I keep asking for facts and numbers showing how many times the FDNY has vacated a loft tenant, but I'm not getting any. And to the best of my knowledge, it hasn't happened in the past four to five years. So the tenants and the attorneys and the Board all have to get on the same page here, so we can put this fear factor aside. What I am seeing is tenants starting to come forward directly to the FDNY, because I believe that in my time on the Board, I've fostered an atmosphere of trust. I'm being asked to come visit some of these people, and I want this to continue – that tenants are not afraid to come forward with their concerns. I would ask that

we all work within the context of what the Chairman and the Board are trying to accomplish here to make this one of our paramount concerns.

Mr. Petrucci: I greatly appreciate that, and I do tell my clients, when they're having issues, to go the local fire department and let them know that they're there. And that takes some of the pressure off, in case something happens in the future. But there are specific instances, and I don't know how to convey them to you without being specific.

Mr. Roche clarified that he just wanted Mr. Petrucci to tell him the story of the situation. I just want some factual information about actual situations.

Mr. Torres-Moskowitz asked Mr. Roche if he was saying that Fire Departments are a safe space, where you can report issues?

Mr. Roche: With all due respect, I don't want to veer off from what our focus is here today. We can discuss that at any point time.

Mr. Hylton did make made the general point that the Loft Board works with all the city agencies to provide health and safety for all the citizens of New York City. They all communicate with the Loft Board.

Ms. Roslund: The issue of vacate orders seems to me to be a much more complex issue, because we get into life safety issues, which we're not talking about today.

Mr. Roche: Well, we're talking about time periods and proof. My question is perhaps related more to the first question, which involved application for coverage and protected occupancy. The issue of people living in fear for thirty years had been raised in that context, so I think it's extremely relevant to try to obtain some facts. I keep hearing that people are living in fear. OK, how many people, roughly? And what are some examples of what they're telling you? So the Board can correct those situations. And gentlemen, with all due respect, if they're afraid to come to us – which, allegedly, is the case -- are you going to be able to help us fix that? If that is what you're hearing among your colleagues, if the people are afraid to come to us, which is supposed to be their safe haven…

Mr. Hylton then directed the discussion back to the questions.

<u>Question 3</u>

Mr. Hylton: If yes to question one, what evidence should the Board consider in determining primary residence?

Mr. Petrucci: No one factor would determine it. You'd have to look at the entire record of the case. That's the standard at Housing Court and for rent stabilization, and that's how we've always litigated these cases.

Mr. Hylton: Should the Board adopt the standard set by Housing Court standard? Yes or no?

Mr. Petrucci: I think the answer is yes. That's how the Board's regulation is worded – the eviction regulation. That's what it would have to be. As I said before, I don't know how the Board can develop a concept of primary

residence that doesn't include what primary residence has always been. That's why I think residential use, residential occupancy, which, until recently, has always been the standard this Board has applied, is what we should continue with.

Mr. Hylton: Should the board adopt a more flexible standard given that these occupancies differ from regular rent-regulated apartments?

Mr. Petrucci: If you're talking about primary residence, I don't think you can. I think the Board should adopt a more flexible standard. It should be the standard of residential occupancy that been the standard for thirty years.

Mr. Hylton: So you're saying those standards have changed even in Housing Court?

Mr. Petrucci: No. They haven't changed in Housing Court; they've only changed here.

Mr. Hylton: What types of documents should the Board be looking at to make these determinations?

Mr. Petrucci: There's an incredibly wide range of documents, and if you get a discovery demand, I don't know how you could limit, if you're trying to prove primary residence. I keep coming back to, if you're assuming the requirement of primary residence, you're going to have a problem with limiting the documents. That's why you should stick with what you had before, residential occupancy, and in those cases that I cited, David and I would have stipulated to those cases.

Mr. Hylton asked Mr. Kozek if he remembered all those questions.

Mr. Kozek: I do. The standard as expressed in various cases addressing primary residence is "substantial physical nexus with the unit for actual living purposes." That's what's in the cases. And in the rent stabilization code, it speaks to the various factors to which Mr. Petrucci alluded to determine that issue. How do you satisfy that standard? It's the standard in the courts. I agree with Mr. Petrucci, that it would be difficult for the Loft Board to formulate something different. And I haven't seen in the proposed rule-making that there's a different standard. So I think what you're asking is, what factors do you look at in order to satisfy whatever that standard is going to be? And again, I agree with Mr. Petrucci. We're litigators, and the standard is always going to be relevance. Is it relevant to the determination? And there's a pretty broad standard for relevance. Is it even likely to lead to relevant information? That's pretty broad, and allows landlords to go pretty deep. They have the right to, basically, look at any document out there that has that person's name and address on it or that might otherwise indicate that person's connection to that address or to another address. And this is exactly what we've been talking about here: That burden is what is creating this cost; this deterrent for tenants, because they unabashedly seek every single document they can to determine that standard.

Mr. Hylton: Thank you. Mr. Frosch?

Mr. Frosch: We dispute what Mr. Kozek just said about discovery, and we'll talk more about that. That's not what's happening at OATH, in terms of discovery. But I agree that the standard is anything that's reasonably likely to lead to the discovery of relevant information is permissible in terms of dealing with the issue of primary residence. As to what are the factors, I believe it is the *Matter of Lopez*, Loft Board Order number 4533, decided in June, 2016, by the Loft Board, that specifically states that the rent stabilization code factors

are the factors that should be used for assessing primary residence at the Loft Board. So it's the same standards, the same factors, and I don't think we have much disagreement in terms of applying the Housing Court standards to the issue of primary residence here.

Mr. Hylton: Thank you. Mr. Brody?

Mr. Brody: What needs to be added to that is, yes, the Housing Court Standards, the Appellate Division, the Court of Appeals standards are all what we've been using in our fights at OATH. The one change that has occurred (was due to) the *Ansonia v. Unwin* decision and its interpretation. Generally, the standard is, no single factor may be solely determinative, with the caveat that is *Ansonia Unwin* and the cases that followed it, and *Mahoney-Buntzman*, (which established) that there are two circumstances where a single factor is determinative. One is what you do with your taxes in terms of taking business deductions, declaring yourself somewhere else; the other is, as in the Bianca Jagger case, if your visa status does not permit you to have a primary residence in the United States. Otherwise, the question is, what matters?

For instance, and this is something that comes up frequently with people in Williamsburg: I was doing a database search on someone, and there was an address that came up repeatedly as being their address at a particular period of time. It was an address right below the address in the building in which they were claiming to live. And I thought, great, I got them. But no, it was a mail drop. And people regularly tell me or testify that the reason they use drops like that is because there are problems with security in the building, so mail is delivered there. So, in a different context, that would be a factor that matters. You have to look at the person's life. What do their documents show you? How deep do I need to go? If I do a public database search, and this address shows up as the only address they've ever been at for the last twenty years – they vote here; their driver's license is here; their lease is here, I then make my usual discovery demand, which hasn't particularly changed from landlord-tenant court to here over the past decade. I ask, what can you show me that will make this definitive? So when we get to court, and there's no question that this is where the person has lived, then it's settled. On the other hand, if they have twenty different addresses – taxes there, schools there – then it might not be possible to get a client to settle a case, so we try it.

Mr. Hylton: I'd like to ask this question of each member of the panel: Is there one type of document that comes to your mind -- that would be acceptable -- that the Board should be looking at?

Mr. Frosch: I think the premise of that question is problematic. Respectfully, I know what you're getting at, but….

Mr. Hylton repeated his first question: What types of documents should the Board be looking at to make these determinations?

Mr. Brody: It sounded like you were talking in the singular as opposed to plural. That's why you're getting the answer you're getting.

Mr. Frosch: But even then, I would say, I don't know the answer, because when I'm looking at a set of facts and documents, that is going to lead me to other documents that might be relevant. So I just can't sit here today and list the ones I think are relevant. It could be anything.

Mr. Barowitz: Are you saying it could be any one (of those)?

Mr. Frosch: What I'm saying is, as we've all agreed, it could be anything that is likely to lead to relevant information.

Mr. Hylton: Thank you. Mr. Petrucci?

Mr. Petrucci: That's the problem with primary residency versus residential occupancy. "Primary" has a specific meaning. As Mr. Frosch pointed out, there's an incredibly wide range of documents that someone looking at primary residency is going to want to see. We've delivered thousands of pages of documents in discovery. Whereas, if it was residential use, as we said before, we would have stipulated to that. We wouldn't even have that issue.

Mr. Brody: I'd just like to point out that there have been cases where we have stipulated to coverage, then had fought about protected occupancy.

Mr. Hylton asked the Board if they had any questions.

Ms. Torres-Moskovitz: So, it seems that, the way law is practiced, you all want to keep this as open-ended as possible? Is there an end to it? Or the discovery can just keep going on forever?

Mr. Brody: With some individuals it continues for a long time, because they have complex lives, and there's a lot of material pointing in different directions. You wind up with a pile of material, and a judge gets to determine what matters. In other cases, it's pretty simple. But if you limit it to, these are the documents that matter….What if you decide there are four definitive documents, and where their kids go to school doesn't matter; where they keep their clothes, where they park their car don't matter. Then you're really veering away from what primary residence is.

The question is, what is really going on here? So for instance, you file your taxes somewhere upstate, because that's where it's easiest/ safest to receive your mail. And the Board decides that your tax return is going to be the determinative document. From my point of view, representing landlords, that would make my life incredibly easy, because as soon as I see that document, I'm done. On the other hand, from a tenant's point of view, if he has a good reason for doing that, but everything else in his life is at the unit he's claiming, why would you block that?

So how do you want the system to function? It's based on an issue of need, and if, outside of the *Ansonia* and *Jagger* contexts, you say this one document is determinative, then you're no longer looking at the basic idea, which is, you look at what is going on, and no single factor shall be determinative. And if you do this here, it also sets up a problem. Because then, and I'm just thinking off the top of my head – because I never thought this could possibly be a question outside of *Ansonia* and *Jagger* – do I now wind up in landlord-tenant court arguing that there's not a collateral estoppel basis on a primary residence issue, because the Board has decided to interpret primary residence differently than rent stabilization and all the courts have decided.

One of the things I talk about regularly is the rule of unintended consequences. You make a particular decision for a particular reason, but you can't figure out all the things that could happen as a result of it. If you're lucky, the unintended consequences are minor, and it doesn't matter. And if you're unlucky, something hideous happens as a result. And I'm not just talking about landlords and tenants. You have theory behind the system, and if you're going to change the theory that the system has operated on for forty years, how are you going to

figure out what good/bad is going to happen, other than, as a particular circumscribed view of what you're doing today and what you think it means?

Mr. Hylton: Thank you, Mr. Brody.

Ms. Torres-Moskovitz: I have a follow-up to that. I understand your views, but I'm trying to see…If you're a person who can turn over a binder of every single bill you've ever received, fine. But for someone else, that's not their thing, and they are an equally important citizen of New York. What do you say to that?

Mr. Petrucci: What you've been touching on with your questions is the whole issue of the difference between primary residence and residential occupancy. For residential occupancy, you have pictures of the place. There's the kitchen, there's a bathroom, there's a bedroom; you have various documents showing that somebody is living there. You don't have to go through every bank statement, credit card statement, phone bill, (and track their movements and actions). That's something that can happen later.

For a rent stabilized tenant, it's a legal, residential unit when they move in, and they know what their obligations are. When a loft tenant moved in in 2008, they had no idea what their obligations were going to be. And many were trying to hide their existence, because they weren't supposed to be there. It was illegal for them to be there, but now you're asking them to present documents that prove that they were there. In the briefs for *Lower Manhattan Loft Tenants v. Loft Board* and the *Bor Realty* case, the Loft Board represented to the Court of Appeals that we are not trying to make people prove primary residence during the Window Period….because it's difficult, if not impossible, for them to prove that, when they were, in fact, hiding their existence.

Mr. Brody: I think there's also a difference between the original Loft Law and the 2010 amendment. It's much more reasonable to talk about tenant fear back in those days as opposed to here and now.

Ms. Torres-Moskovitz: As a tenant, I beg to differ with that.

Mr. Brody: I'm speaking about what I have seen and what I have litigated. I'm not pretending to know what goes on in the minds of people I have not had to deal with. What I've seen is that, with the early Loft Law, it was really a state of warfare for a period of time. The owners in SoHo, who saw Robert Moses' great plan expire and were renting out (to the artists) just to have a little money coming in, soon started thinking in terms of big dollars, and they went after them (their existing artist-tenants). And that's *Lipkis v. Pikus* and any number of the other cases that dealt with (SoHo). And yes, there was fear there.

With a lot of the conversion that's happened between the original Loft Law -- particularly from about the late 90's on to the enactment of the Loft Law – everybody knew what was happening. All were willing participants in the process. You look at a building like 475 Kent, where you have one hundred units. To suggest that those tenants were living in fear doesn't fly.

Mr. Hylton asked Mr. Kozek: You said earlier that the owners were asking for a large number of discovery documents. What rules should apply to the request for those documents?

Mr. Kozek: The rules of evidence and discovery. There's a legal standard set as to what you have to prove in your case. If you're talking about primary residence, as I said, you have to satisfy "substantial physical nexus

with the unit for actual living purposes." The owner's going to issue a discovery demand, saying here are all the documents I want. The tenant's attorney is going to go through the list, agreeing that some are relevant, but rejecting others as irrelevant or over-burdensome. And then the judge will make a determination about what is and is not relevant. But when you're talking about primary residence, there is no way to limit that. Everything is relevant. That's the rule. The judge will simply say, you have to turn all of these items over because they're either directly relevant or may lead to relevant information.

I've been through many discovery periods with Mr. Brody and other attorneys, where that was the standard applied. There were very little, if any, limitations placed on discovery. You present your client/ tenant with the list, and they ask (in disbelief), you want me to produce every single statement from every single account I've had for the last seven years? That is an enormous burden. We're talking about a truckload of documents that are turned over. And then at trial, what happens is, the first line of questioning is on the discovery demand: Did you produce every bank statement? Do you have any other bank statements? The tenant: No, I didn't. I had another bank account, which I closed years ago and forgot about. Owner's attorney: You were required to produce it.

So now, we're not arguing about the issue at hand – whether or not they were occupying the unit for residential purposes – but whether or not they've complied with the discovery demand. I had a two-day trial with Mr. Frosch in which we didn't even get to any of the issues regarding residential occupancy. The trial was focused exclusively on the discovery demands.

Mr. Frosch: May I please respond to that? This was a trial where the first witness Mr. Kozek presented disclosed in direct examination that he owned a house upstate. My discovery demand had asked for deeds and/or leases for any properties clearly related to the issue of primary residence. I was never told that such property existed during the normal course of discovery, but find out in the middle of trial that relevant documentation existed for such property, but it wasn't produced. This was a particularly anomalous situation, which resulted in extended examination about this issue.

The problem we have here is that a 2010 law, that people could have applied for in 2010 and 2011 – at which point, would have only looked back to less than a year's worth of documents – has now gone on for eight years, with those same dates never changing. No one ever expected to have eight years of worth of documents be relevant to the issues at hand. That's really the problems. It's not the owner making this request for some bad-faith reason. It's because that's the relevant period, like it or not. Neither the owners nor the tenants chose this.

Mr. Petrucci: Just another reason why primary residence is a mistake for this kind of procedure. There's no way around this incredible amount of documentation. If you're a rent-stabilized tenant, it's keyed to the notice. If you're a loft tenant, prior to this discussion the Board is having based on the Board's eviction regs, it was keyed to the service of the thirty-day notice. A year or two back from the date of the thirty-day notice is a very discreet period of time. Now we're talking about documentation from 2008 to the present. It's just impossible.

Mr. Hylton: Mr. Frosch, your position is that it's because the law requires it?

Mr. Frosch: The law has dates built into it. Those are the relevant periods of time, and they're long periods of time.

Mr. Hylton: What if the law said twenty years back?

Mr. Frosch: There are many different types of litigation that do look back to periods twenty, thirty, forty years ago. They're grandfathering cases before the Board of Standards and Appeals that look to aerial photographs and all sorts of different complicated evidence going back to 1961. So this is not even the most onerous type of case in terms of discovery.

Mr. Brody: If the Loft Law is amended to provide a new Window Period and a new coverage date, then the problem of having to go back to 2010 is pretty much obviated for the new cases that will be brought. But one of the things necessary is that, once tenants are aware of this, the faster they get their applications in, the less they'll have to deal with. Another point is, since there's no sunset date for the law, we can expect that twenty years from now, every year, you'll get one laggard building which, for whatever reason, they're only coming forward then, and yes, they'll have to deal with producing a significant amount of documentation. That's the way the system is set up.

Mr. Hylton: So the system is broken. Is that what you're saying?

Mr. Brody: There are many issues with what this law is and what it requires. And I think at a certain level, we're all struggling to make what we are doing make sense and to advance the purpose of the law.

Ms. Roslund: I was thinking while you were talking that, at a certain point, you're trying to prove a negative. If someone registers their unit as commercial, with all bills addressed to the business and with a PO box for their mail -- but they are actually living there -- you can ask for discovery until the cows come home, but there won't be any.

Mr. Brody: Yes, there are cases like that. I remember at least one of the tenancies we stipped out at 83 Canal Street. The particular tenant had no documentation whatsoever. We went through a hearing and were satisfied on credibility grounds that this tenant had lived there through the entire Window Period. His parents and some of the other tenants testified, and it was quite obvious where this was going.

If you go back through the case law, there have been tenants who had no documents with which to support a coverage claim, but they said, this is what I'm doing, this is the only place I've ever lived, etc., and they brought in some credible people to testify. The issue of coverage often becomes the credibility of the person in question, of the witnesses. As litigators, we deal with this in court. There are people who are not going to have papers. So going back to the question of, what are the papers you have to have? If you have papers, they need to come out to show what's going on; but if you can't produce anything, then the court has to hear you, and the Loft Board has to make a decision.

Mr. Hylton: Thank you, Mr. Brody. We have to get to the next question.

Question 4

Should only the prime lessee(s) be protected? And,

- Does it matter if a lease is in place? And,

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

Mr. Brody: Let me break this down into a couple of pieces. One of the early cases out of landlord tenant court in the 1980's, when they were dealing with these issues more actively before the Loft Board was really set up, was *Dunkin v. Dworkin.* One of the issues, which is…out there… asks, is it an illusory tenancy situation? Where, this particular tenant, with or without connivance of the landlord, is holding onto the premises for personal profit. And there's a lot of case law that deals with that. So that's one issue you get to play with. And the law talks about an "occupant' rather than a "tenant" as being protected, so you have to look at that.

Mr. Hylton: Should only the prime lessee be protected?

Mr. Brody: The answer there is no. And the reason is, unfortunately for me --- and it's more so in Brooklyn -- you can have (the prime lessee) renting 10,000 square feet and whacking it up into ten units. And they are still holding the prime lease, and may or may not be living there.

Mr. Hylton: Does it matter if there's a lease in place?

Mr. Brody: I think the place you have to look is the lease. I think you also wind up with "taking" issues, ultimately. I haven't litigated that, but I think it gets there at some point in the discussion.

Mr. Hylton: Who are the other people we should protect, regardless of a lease?

Mr. Brody: I think that where there is a prime lessee, who is in occupancy as a primary tenant, that is the answer. The children and spouse come along by way of succession, and I think that anyone living with him, unless they can show basis for a succession claim, doesn't get to stay.

Mr. Hylton: Protected.

Mr. Brody: Protected. I think with people who are occupants of a tenant, you have these fights between prime lessees and sub-tenants. Mr. Petrucci mentioned *Matter of Smulka,* where you get to look at who should be protected and under what circumstances? And if the prime tenant isn't' the person, then you look at the other two people, the owner and the occupant, and you say, why does each one have an issue? And that's the way it's interpreted correctly.

Mr. Petrucci directed the Board to tab G in the packet, where they would find the case.

Mr. Frosch: The Loft Board had a good conversation a few months ago, where Mr. Carver was talking about the serious constitutional and ethical concern of erasing the right that a prime lessee has to exclude other people whenever they wish. I've circulated to the Board members a case or two dealing with an exemplary set of facts on this, where a couple, who end up becoming co-tenants and co-protected occupants of a unit, then have a pretty serious domestic dispute. She obtains a protective order against him; he has to leave the premises for that temporary period of the protective order; then she's unable to make one hundred percent of the rent. But they are, nevertheless, jointly and severally liable for one hundred percent of the rent. So the concern here is that if we say there is no significance to someone being on a lease, versus being there pursuant to the license and the sub-tenancy or roommate status given to them by the person on the lease, you are

creating all sorts of potential conflicts that are completely unintended. And I don't think many people are anticipating that that would be the consequence.

So if the law were to work the way it did in 2010 – take a snapshot of whoever was in occupancy in 2010, and say they're all equally protected occupants -- you're erasing whatever preference the prime tenants have to say there may come a time when I don't want this person living with me forever.

Mr. Hylton: Thank you Mr. Frosch. Mr. Petrucci?

Mr. Petrucci: We wrestled with this back in 1983. Even though there's been a lot of talk about 29 RCNY

2-09(b)(iv) in your recent subletting regs and your recent Order, there've been claims made about what it meant. But that regulation was basically written by LMLT. And it was written because the landlords didn't really care – in fact, they were having a great time – because we were fighting among ourselves about the sub-prime issue. That regulation was only intended to deal with a prime lessee being able to recover space that was occupied by someone else. That was the only intent of that regulation. And I'm surprised to see people talk about it in your Orders that often means something else. It was never meant to be that.

I remember it very clearly, because we had a lot of different people on different sides – sub and prime tenants with different views of this. And the Loft Board basically just stayed above the fray, or the Executive Director and Counsel stayed above the fray. The landlords were laughing at us, fighting it out among ourselves. And that's the regulation we came up with. And I still feel that it's a really good compromise. It does present other problems, but other choices would present greater problems, in my view. So I'm comfortable with the regulation as it stands now in terms of determining who's protected, meaning: If you're in place, prior to the effective date of the law, you obtain protected occupancy status. If there's a prime tenant that wants to recover that space, then they have to exercise that right in a court of competent jurisdiction, showing that it's their primary residence. That's the standard we came up with then, and I still subscribe to it.

Mr. Hylton: Thank you Mr. Petrucci. Mr. Kozek?

Mr. Kozek: I wasn't around in 1982, when the Loft Law was enacted, but my understanding of why the law used the term "occupant," as opposed to "tenant," was because the relationships between the occupants were often not very clearly defined, prior to that. And that there was supposed to be a broader idea of whom this was intended to protect, because you had commercial entities on loft leases and various people living together in loft spaces.

So if you were there before the date of the enactment, the existence of a lease was sort of irrelevant. And Loft Board case law has said, disregard the lease. The way the Loft Board regs are currently set up, you have people who were there before the date of the enactment of the law and those who came in afterwards. There's a broader standard applied for those who came in before, and there's a stricter standard for those who came in afterwards. And the latter has to do with their relationship to the landlord; whereas prior to that, it doesn't. It has to do with the relationship to the space itself. So if you came in afterwards, and there's a prime lease-holder in place, the rules say that, in order to obtain protected status, you also have to have a relationship with the landlord.

The Loft Board's precedent on this has talked about that consent; and the consent talked about payment of rent; direct dealings with the landlord. So the lease itself doesn't define who's renting the space, when you've got other people in direct relationship with the landlord over dealings with that space. So the existence of a lease is irrelevant to all of this. The question is: At the date of the enactment of the law, were you there? Afterwards, what was your relationship with the landlord? Seems straightforward to me, and that's how it's always been dealt with at the Loft Board, so that's how we view it.

Mr. Carver: We're talking about a change that's on the table. So to be clear, the rule presently on the books, says in essence that, in the absence of any lessee, anyone in occupancy, could, if they meet other standards, qualify. But, in the presence of a lease, presently, if the prime lessee is eligible, that eligibility acts to the exclusion of all others. Is that right?

Ms. Balsam: Yes. I would also clarify that the lease, in terms of the definition of prime lessee, includes whether or not the lease is currently in effect. So it lasts past the expiration of the lease.

Mr. Carver: So the proposal that you've made, in essence, is to revoke the superior status of the lessee, is that right?

Ms. Balsam: That is a concept we're exploring.

Mr. Carver: That's the draft that's on the table, and that's why we have these guests here today.

Ms. Balsam: Correct.

Mr. Carver: So I guess my first question to all of the panelists is -- is there support in the statute, itself, in Article 7C, to give equal status to occupants, whether or not they are a lessee?

Ms. Torres-Moskovitz: Can you clarify what you mean by "present"? Is it June, 2010? Is it eight years later?

Mr. Carver: I want to assume that those people would be qualified otherwise.

Ms. Torres-Moskovitz: Is the prime lessee "present." What is present?

Ms. Balsam: Present in the unit and claiming protection.

Mr. Carver: At the right time. I want to put to the side all other issues of qualification and just focus on the status of the occupant. Are they an occupant in the presence of the lessee, or not? The question is a bit convoluted, but what I want to know is, is there statutory support for the change being proposed? Which is putting all occupants on an equal footing, whether or not the occupant is a lessee.

Mr. Petrucci: The statute refers to "occupant," not "tenant."

Mr. Carver: But the word tenant appears in places in the statute, even in the same section where the word occupant appears. In fact, in the section you cited, 286(2)(i), which talks about a rent-paying relationship between the "occupant" and the landlord.

Mr. Kozek: I can address this question. The term "protected occupant" is a rephrasing of the term, "residential occupant qualified for protection." There is no definition of that phrase in the Loft Law anywhere,

but that phrase is used in a couple of important places. 286(2)(i) is one place; the other two places are in 286(6) and 286(12), which speak to the rights of someone to sell their fixtures and improvements and their rights to sell their rights in the unit. Those are critical for this discussion, because if you're talking about who has rights to the unit, it's the person who has the right to sell these things. And in those two places, it uses the word occupant, not tenant. So by virtue of the failure of the legislature to define that term, the Loft Board has been handed the task of figuring out what that means and who is entitled to that protection. So that's where the authority comes from.

Mr. Carver: Of course, that's one way of looking at it. The very title of that section uses the word tenant, not occupant. So I don't know that the statutory argument is going to be strong either way. Let me ask the attorneys for the owners about the statutory support for either the current rule or the proposed change.

Mr. Frosch: I think, at least currently, the law is pretty solidified since 2014 -- that a prime tenant blocks the claim of a roommate for protected occupancy. This was also discussed by Mr. Carver at a few prior meetings. I would disagree with Mr. Kozek that the use of the word occupant alone is used in any of those key provisions. It's always, "occupant qualified for protection under Article 7C." And that's the question. What allows someone to be qualified as the protected occupant? And §286 – Tenant Protection – sub 1, refers to violations of a tenant's lease or rental agreement as a basis for eviction of a protected occupant; and 2(i) refers to the requirement to maintain as a primary residence, and says that the occupant entitled to protection "…shall pay the same rent, including escalations, specified in their lease or rental agreement." It then talks about what would happen in a secondary factual scenario, where there is no lease or rental agreement. So it's indicating a primacy to the situation where there is a person with a lease, as opposed to when there's no lease.

As to what Mr. Kozek said about the rights to sell improvements and rights -- that is why, in addition to the right to exclude that a prime lessee may have, it's crucial to understand the possible consequences of wiping out that hierarchy, and saying, now everyone who happens to be there – whether they were staying temporarily, visiting, or sub-leasing for a year – now all have a co-equal protected occupancy right, so no one of them can unilaterally sell improvements or rights. It's a serious consequence amongst tenants, so wiping away the expectations the people in the unit who are on the lease have, with respect to those who are not, shouldn't be taken lightly.

Mr. Brody: Going a step further, certainly there is a bit of room to move under the law, and notwithstanding that the Loft Board has pretty much stated what its opinion is in this context, in terms of the case of law that has been developed, you need to remember that law exists in an historical construct. And a lot of what we're talking about is, how do you deal with historical concepts of privity? Is it fair to a landlord to say, you made a lease agreement with this person, but we're going to make you keep this person? There are circumstances where it's a rational thing to do, such as the illusory tenant situation, and there are places where it may not make sense. And you can also come up against a Constitutional construct, with what you're doing ending up being challenged as a taking.

Mr. Brody detailed a situation/ case from the 1980s (Sewall Associates), which was the last time there was a successful attack on a rent-regulation idea that was a taking. The Court basically said that, while there are many requirements you can enforce, at the point where you are telling someone they have got to fix-up an apartment and rent it out, you've stepped over the line. And while this case does not have a direct correlation to what is being discussed today, it does make an important point he would advise the Board to keep in mind

as they make their determinations about the rules: What, under traditional privity and traditional contract law, gives the Board the ability to do what they are contemplating doing?

Mr. Carver: As a practical matter, if every occupant is equal to the lessee, what happens if you have one bedroom and nine occupants? I imagine there will be situations where the space can't handle the number of occupants, and you'd run up against some statutory limits on how many people can actually be in a single unit.

Mr. Brody: Depending on the relationship of the people, the argument becomes an issue of considering whether or not what has been created constitutes an SRO. If it constitutes as an SRO, there are certain legalization issues. And in terms of legalization, let's say I have a unit with five roommates; but because of light and air constraints, there's only one bedroom. What do you do about that? Who is controlling? Landlords sometimes stand back and laugh at this, while tenants, subtenant and co-occupants fight it out amongst themselves; but there are serious implications in terms of how the unit continues and how the people in that unit continue. The Loft Board's responsibility in the first instance is not to just look at who you're going to give protected occupancy to, but how that is going to play out in terms of the use of the unit, the legalization of the unit, and the relationship amongst the occupants of the unit.

Mr. Frosch to Ms. Balsam: Is it OK to talk about 13-15 Thames now? (Yes). I did circulate the most substantive, on-the-merits Loft Board Order on that case. And I think that presented the most insightful fact patterns in terms of a situation where this problem is pretty difficult. This was a case where a prior owner had stipulated that seven people claiming protected occupancy in a single unit with a lack of windows – there was only one window in the back on the lot line and one in the front – all be protected. In the Loft Board's view and in the OATH judge's view, this ran up against the limit on how many people that are not a family can be the occupants of a Multiple Dwelling Unit. Without a finding that all of these people were a family, it was not possible to permit all of them to be protected occupants of this unit, particularly considering how difficult it was to see how the unit could be legalized in a way that allowed each of these people to have bedrooms.

This went up and was ultimately reversed on the grounds that, because the owner had stipulated that they were protected, all of the necessary criteria underneath what that meant were, implicitly, stipulated to. And we can agree or disagree about that, but the ultimate basis for why the Loft Board had a problem with this is still a concern. And outside of that limited factual scenario, where an owner (a prior owner, in this case) stipulated that everyone's protected, it's still a problem without a clear resolution that's going to come up for Loft Board.

Part of the issue here is, what is the limit to the number of occupants who can qualify for protection? Considering that not only can protected occupants have a thousand children in occupancy, but there are also a certain number of roommates, limited by applicable law, that may also be unrelated, but permitted to stay with them. You could end up with seven protected occupants, each of whom could have a spouse, children, perhaps even dependent adult family members, and also an unrelated roommate with a spouse, children, and other dependent adult family members. So how can you possibly provide for legal, healthy, and safe accommodations for that many people? It's a concern that hasn't really been addressed yet.

Mr. Hylton: I'm curious as to whether you would have the same concern for a prime lessee with a very big family.

Mr. Frosch: It could be problem, but I imagine if that was the way the unit was being used; if it was functioning in a reasonably healthy manner; if certain children were in the same bedroom during the Window Period and on the effective date, then it's perhaps a little less difficult. Although if you have a scarcity of light and air, it may be difficult, if not impossible, to legalize.

Mr. Brody: If you look a 13-15 Thames, where there's a family of nine, it's a one-hundred-foot long building, built fully to the lot line. There's a large window in the front, but short of moving the back wall in five feet, which would still only get you a limited quantity of light and air, you have no real ability to build bedrooms.

Ms. Roslund: So we're talking about a situation where we're creating an IMD that does not conform to the Multiple Dwelling Law?

Mr. Brody. No. In legalization, with the exception of Soho, you have to be able to get a Certificate of Occupancy pursuant to MDL 302. Article 7B outlines certain lesser restrictions than what would ordinarily apply. And the Loft Board's regulations apply to the effect that, if a unit cannot be legalized, the Board can do what it thinks is necessary, including de-coverage, ultimately.

Mr. Brody named some older cases, where this had happened, but also offered an example of one of the buildings he represents in which the owner had created duplex apartments consisting of the ground-floor and the basement levels. The end result was that the Loft Board Executive Director issued an order de-covering the basement portion of the units.

Mr. Brody continued: So if you're a family with nine children, and you're in a unit that, legally, can only contain one bedroom, you have to decide how you're going to function in that circumstance.

Ms. Roslund: So, what you're saying is, in certain circumstances, pursuing one aspect of protection is going to negate another aspect of protection?

Mr. Brody clarified by explaining that, sometimes, it's impossible for a unit to be legalized, so it has to be de-covered. But at 13-15 Thames, for example, a legal (coverable) floor plan and protected status could be achieved; however, the only possible layout, in terms of light, air and other requirements, resulted in a space that may not work very well for someone with nine children. So the options are, ask the landlord to buy them out, and move; or find a way to organize your nine children.

Mr. Carver: Then you have the problem of having everyone protected, but they don't get along. What happens then?

Mr. Kozek: I would like to respond. We've heard a lot from the other side of the table on this issue. I find it odd that one isolated, extreme, and still unresolved case should, somehow, result in the nullification of the rights of, potentially, thousands of other people, who would otherwise have rights under the Loft Law. But how it's resolved doesn't' really matter, because those people are the occupants of the unit, and it's up to them to decide how they're going to organize themselves, deal with these issues, and have the space legalized. The very purpose of the Loft Board is to figure out how such units, involving unusual conditions, can be legalized, in light of all of the legal and personal requirements.

Mr. Hylton wanted to note the fact that, in the State of New York, the laws governing the occupancy of loft dwellings are the same as those governing residential housing.

Mr. Carver: I don't agree. Here, you're wiping out the value of the lease-holder.

Mr. Hylton clarified that he was referring to the Building Code.

Mr. Carver: But all these things are operating in tandem right now.

Ms. Torres-Moskovitz asked, regarding Mr. Carver's question about occupants getting along, if that was really a topic for the present discussion. Mr. Carver explained why he felt it was very relevant to the whole issue of protected occupancy status and their rights.

Mr. Frosch: I have an answer for that. It does affect legalization. The ability to get through a narrative conference is directly related to the difficulty in coming up with a solution for legalizing the unit. If you have one protected occupant in a unit, who wants and is entitled to one bedroom, it's easier to get through legalization, than if you have seven people who claim they're entitled to a bedroom, and are filing oppositions, and applications for interference, and slowing the process down, based on this claim, when it may not be easy or even possible to achieve that (bedrooms for all).

Mr. Hylton: How did it get to that point?

Mr. Frosch: Because the decision to provide protection to everyone, regardless of whether they're on the lease, or a roommate, or a temporary occupant, directly affects how many people are entitle to co-equal protected occupancy rights – and perhaps bedrooms and other rights in terms of how the unit is legalized.

Mr. Hylton: So the occupancy was fine up to the point where the occupants filed for protection?

Mr. Frosch: If I understand your question, the answer is, it was fine before it came under the Loft Board's jurisdiction. So what's the disconnect? It's that people were living in conditions that were not compliant, and now they have to be brought into compliance with health and safety requirements, and sometimes it's very difficult when you increase the number of people with a right to remain in occupancy as protected occupants.

Mr. Brody noted that this may be a problem that the tenants' attorneys deal with more than the landlords' attorneys. But he did cite a case he had worked in the early 2000s (*Stellweg v. Welch*), the result of which showed that, as with every other form of rent-regulated unit, there's no such thing as an action in partition. But he ended by saying that, in a case where there are five roommates in dispute who are all protected occupants, he would not know how to resolve that.

<u>Question 5</u>:

Mr. Hylton: How did the process function in the past, and what changed?

Mr. Kozek noted that while Mr. Petrucci and Mr. Brody would probably have more experience, he had lived in several different lofts throughout his life, and started working in this field right after completing law school. He was there from the enactment of the 2010 law for the early cases that were first coming before the Loft

Board and OATH, and litigated many of those early cases, up until 2014, when everything changed, with *Matter of Pak*, then *Matter of Belke*, and then the *Mariner-Smith* case.

Mr. Kozek continued: In that period of time, when I was at litigating these cases at OATH, there wasn't a single attorney on either side of the table who believed you had to prove the unit was your primary residence in order to obtain protected status. Not one person made that argument. Something happened in 2014 with *Matter of Pak*. I don't think the landlord's attorney in that case argued that the unit had to be the primary residence; I think somehow, the Loft Board did that on its own, sua sponte decided, this now is going to become a thing. So it changed in 2014, and since then, has been adopted over and over and over again for some reason. Prior to that time, all you had to do was show that you residentially occupied the unit. That's it. And some documents and some testimony that proved that got you there.

Mr. Hylton asked if any of the attorneys present had been part of *Matter of Pak.* There were none.

Mr. Petrucci concurred, and repeated what he had said earlier: Once the unit was covered, there were two possible positions for the tenant: If you came in before the effective date of the law, you were automatically the protected occupant, and didn't have to prove anything. If you came in after the law, you had to show that the landlord accepted you as a tenant, either by lease or rent or some other means. You will not find a case, prior to 2014 that looked at primary residency in the context of protected occupancy, unless, it had to do with (b)(4) and the very limited posture of a prime tenant recovering a unit from a subtenant.

Mr. Frosch: As an equally young attorney, who came in just before *Matter of Pak* was decided, this is the universe I've been practicing in, and I think it's *ultra vires* not to have a primary residency requirement. It's also absurd, because we'd end up fighting two litigations, and the tenant would bring the same litigation against the owner in a separate court, while simultaneously fighting about coverage here. It doesn't provide any more efficient resolution of the issue, and it's just not worth discussing exporting the issue to a different court, rather than dealing with it all as one proceeding here.

Mr. Frosh also wanted to point out again the *Mariner-Smith* case, the Loft Board Order that enshrined the new primary residence requirement. He recounted the details of the case (in which he was not involved), paraphrasing the Loft Board decision, which was, basically, that Ms. Mariner-Smith was not living in the unit, but was a mini-landlord, who tried to change various documents at the last minute to prove that the unit was her primary residence in order to obtain protection. And that, he said, raises the central question: In a housing emergency, who should be considered the protected occupant? Someone living in Long Island, or the people actually residing in the space, as their home?

Mr. Brody pointed out that the law is evolutionary. What we knew and began with in 1982 is much different than what we know today, and how we practice today. Both from the landlord and tenant point of view. He gave the examples of, from the tenant's viewpoint, what compliance has come to mean today, as opposed then; and that, back then, coverage and primary residence were regarded as somewhat synonymous terms. We all get smarter over time, but the problem with that, is that you see more issues that need to be addressed.

Mr. Brody didn't remember when his earliest involvement with the primary residence/ coverage issue. It was perhaps 206 Bowery, with Mr. Petrucci, who prevailed. But he made the point that they both learned and

contributed much to its definition while developing their respective arguments. He mentioned another case he and Mr. Petrucci litigated, regarding incompatible-use, about which neither of them knew very much; but over the course of preparing for the case, through their research and conversations, they developed the science, the definitions, and the arguments around the issue.

Mr. Brody continued: The reason you talk to us about this is because our insights and the way we go about things is useful, and these are things you need to be thinking about in terms of how you approach these issues. In terms of how we functioned in the past, there is a certain level of instruction there. Just as the world before *Roe versus Wade* has an instruction. But then you want to ask, what has happened since this particular decision? How have we developed since? How have we thought since? And given our experience over time, what matters in terms of saying how the law should act? How it should develop further? What is our function in it? And what is your function in it?

So how many protected occupants should there be in a unit? Does the lease matter? Does primary residence matter? It's not just a matter of how difficult it might make the litigation; it's a question of, how does it go to what the purpose of the law is? Which is to determine whether or not these buildings should be subject to rent regulation, and how the people living in them should be protected occupants of some specie; and, if we enact rule "X," where do we go from there? If we enact rule "Y," what are the intended and unintended consequences of that?

Yes, we have very strong views about this, but to look at it as landlords are anti-tenant and tenants are anti-landlords misses the point. Whether we like it or not, we're all stuck in this together, so what are the answers that move us forward in the best manner?

Mr. Kozek wanted to respond to what was said about the Mariner-Smith case. He noted that, at the trial, Ms. Mariner-Smith had testified that the unit was not her primary residence; and he took exception to the use of these extreme cases (1315 Thames St. the other) to undermine the rights of the many other people living in lofts, who don't have documents to prove that it is their primary residence. Should they be subject to the burden of having to prove that? He felt this was totally inappropriate.

Mr. Hylton: At this point, Board members will ask questions for the brief time remaining.

Mr. DeLaney: Regarding this whole question of how did the process function in the past, and what changed: one of the cases that came before the Board, where the Order that was ultimately adopted, articulates what happened, is 79 Lorimer Street. The OATH judge found much broader coverage in terms of the number of protected occupants than the Board did ultimately decide. The first Proposed Order, in the summer of 2017, was not adopted by the Board; it could not gain a majority. The Board rewrote its opinion, and in its analysis, there's one paragraph I'd like to read, and then I'll get to my question. (Mr. DeLaney read from Loft Board Order 4688):

"After the 2010 amendment, the Loft Board made changes in its administrative processes and in its quasi-judicial functions because the statutory deadline for coverage and registration applications did not apply to determinations for protected occupancy. To avoid restricting the rights of occupants seeking protection, the Loft Board staff administratively created a separate protected occupant claim by adding it to the General Application form, while the claim for coverage remained as a separate application. In addition, the Board

began to include more detailed analyses of the protected occupancy issue in its decisions. The Board adopted a more disciplined approach, adhering to the plain language of 29 RCNY§ 2-09(b). This change in the Board's approach was the catalyst for a divide between interpretations of §2-09(b) by the Loft Board and OATH."

Mr. DeLaney then asked Mr. Petrucci if he had attended the hearing, when the Board made these changes.

Mr. Petrucci: No. The first time I heard about the changes is when I read the Order that was adopted.

Mr. DeLaney: Were you notified of the hearing?

Mr. Petrucci: No, I was not.

Mr. DeLaney: Do you know if a hearing was held?

Mr. Petrucci: I have no idea.

Mr. DeLaney: Do you know if there was any discussion by the Board for that administrative change?

Mr. Petrucci: Not that I know of. I've had plenty of discussions with Mr. Brody and other landlord attorneys and with OATH judges, but I haven't had any discussions with the Board or the staff.

Mr. DeLaney: Thank you.

Mr. Brody volunteered that his firm litigated this case with Mr. Kozek; and that Mr. Frosch was trial counsel, and did most of the writing on it.

Mr. Frosch: I don't think Mr. DeLaney's question got to the merits of that case; he was just reading that summary from the Loft Board order. But my understanding of what that's describing is -- it's such a ministerial change. I think it's beyond dispute that the history has always been that coverage and protected occupancy were addressed in the same application, called a coverage application. And when the time period for filing coverage applications expired, the view the Loft Board had was, that doesn't put a time limit on filing protected occupancy applications. Prior to the existence of a sunset period for filing – something that came about in the 2010 law – it wasn't a concern. This is simply creating a way of filing that claim, which used to be a combination claim, without running afoul of the formalism of filling a coverage application. Mr. DeLaney, I think I understand the implication of your question, but with all due respect, I think it's making a mountain out of a mole hill.

Ms. Torres-Moskovitz asked if there's a way to differentiate between a prime-lessee living on the west coast, who is more of a mini-landlord, and one who's living in the space with several other people; especially considering the importance of keeping things as broad as possible.

Mr. Petrucci stated the landlord could sue the tenant is a court of competent jurisdiction.

Mr. Brody responded that the case of mini landlord is, for the most part, easy to answer. The more difficult situation is when you have several unrelated people living together in the one space. What does the Board want to do about it? And then, what are the attorneys for landlords and tenants, responsible for.

Ms. Torres-Moskovitz asked Mr. Petrucci if he could clarify the difference between the rights and authority of the primary landlord and the mini- landlord.

Mr. Petrucci: Re that prime tenant – the mini-landlord: The owner of the building could serve a thirty-day notice on that….

Ms. Torres-Moskovitz: Why would the primary landlord try to get rid of the mini-landlord, who doesn't even know what's happening in the building?

Mr. Petrucci: That's the nature of the system. If the landlord doesn't care, there's no requirement. The tenant has to do it in order to assert a right. If the landlord doesn't care what's going on in the building, then there's no issue.

Ms. Torres-Moskovitz: And the sub-tenant living there?

Mr. Petrucci: The sub-tenants living there would have other rights. Possibly overcharge. But if they didn't have any independent protection – i.e., they moved in prior to the effective date of the law – they wouldn't have any independent claim. Then you get into the constitutional issue of someone who has no connection with the landlord, post-law, being able to assert some right. Unless the landlord was in cahoots with the mini-landlord. Then the sub-tenant could claim he's been accepted by the landlord, and therefore has the rights that the mini-landlord has.

Mr. Brody noted that, if you review the Loft Law's privity regulations in terms of determining who has the right, between a tenant and a former sub-tenant, part of the question is, what, ultimately, is the rent? One of the benefits under those regulations – and I hate trying to figure out the math under it – is generally this: If the tenant does not have rights to that space, and the sub-tenant is paying the tenant a rent that is somehow different and greater than what the tenant is paying to the landlord, one of the benefits to the landlord in resolving that situation is that some portion of that increased rent inures to him, upon him coming into privity with this now former sub-tenant.

Mr. Petrucci thought the landlord obtains all of the rent.

Mr. DeLaney: The math is the Weisbrod formula for calculating the new rent for the prime tenant, who gave up the space. In fact, it's a negative rent, because there was a profit. But the appeal to the owner in the privity of subdivided spaces is that all the rent that was being paid to the mini-landlord…

Mr. Brody: If the space being recovered is the entire space, yes, you're absolutely correct.

Mr. Petrucci: The adjustment is with the prime tenant, if he/she gets to stay.

Mr. Brody: Or if the prime tenant has divided up the space, with he/she in one unit and his now former sub-tenant is in the other. So the landlord winds up getting good rent from the former sub-tenant, but the prime tenant is now paying $100 or $200 dollars. And that's speaking more to 1982 law than to current law.

Ms. Roslund: So to Mr. Petrucci and Mr. Kozek, do you then have tenant-versus-tenant cases, where a lease-holder has sub-let some space, but then wants to reclaim it, and the sub-tenant won't leave?

Mr. Petrucci: Yes, I've had those cases. Are they common? Not for me. *Matter of Smulka*, one of the cases in your packet, is an example of one where the sub-tenant did not have any independent rights because she moved in after the effective date of the law. I've had other situations where the prime lessee buys out the sub-tenant, and that's the end of it.

Mr. Kozek: I've had one or two. Loft Board rules currently have a structure for dealing with that. If the prime-lessee wants to recover the space, they have to do so within a certain amount of time; and they have to show it's their primary residence; they have to have a bona fide claim to the unit. I have had a case where the sub-tenant was there on the effective date of the law, so the mini-landlord could not recover the unit.

Mr. Frosch volunteered that some information he found in small-claims court cases, where several protected occupant tenants splitting the rent are all jointly and severally liable for the full rent; and if there's a falling out, and one stops paying, the others must all still pay the full rent. So that can get complicated.

Mr. Hylton: Unless there are any further questions….

Mr. Roche: This isn't a question. I'd just like to thank each of the attorneys. This has been very enlightening, and I appreciate your taking the time out of your busy schedule to be here.

The attorneys thanked the Board for having them, and made the point that they are always there to help the Board with any insight they might be able to provide.

Mr. Hylton also thanked and complimented the panel, in particular for the tremendous amount of thought and preparation they put into this appearance. It is greatly appreciated, and we are honored that you would give so generously of your time so that we might better understand these issues.

Mr. Hytlon: This will conclude our February 14, 2019, Loft Board meeting. Our next public meeting will be held February 21, 2019, at 2:00PM, at 22 Read Street, Spector Hall.

The End