

MINUTES OF PUBLIC MEETING  
New York City Loft Board Public Meeting  
Held at 22 Reade Street, Main Floor, Spector Hall

April 18, 2019

**The meeting began at: 2:25 pm**

**Attendees:** Robert Carver, Esq., Owners' Representative; Elliott Barowitz, Public Member; Richard Roche, Fire Department's *ex officio*; 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 April 18, 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.

**Vote to approve February 14, 2019, Meeting Minutes**

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

**Mr. Carver** noted that he was not listed as present in the Attendees section.

**Ms. Balsam** made note of the correction.

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

**Mr. Carver** moved to accept the February 14, 2019, meeting minutes; and **Mr. Barowitz** seconded.

**The vote:**

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

**Members dissenting:** 0

**Members abstaining:** 0

**Members absent:** Mr. Hernandez, Mr. Schachter

**Members recused:** 0

**Vote to approve March 6, 2019, Meeting Minutes**

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

**Mr. Carver** noted that he was not listed as present in the Attendees section.

**Ms. Balsam** made note of the correction.

**Mr. DeLaney** referenced page one, where Chief Jardin says, "Mr. Roche, who has represented the Fire Department here for some time, keeps him well-informed of the activities and products of the Board." He was not sure that "products" was the correct word. He thought perhaps the word was "progress."

**Ms. Balsam** said that she had carefully reviewed that word, and confirmed that it was, in fact, what the Chief said. She suggested he was referring to the Board's "work product;" the Orders.

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

**Mr. Roche** moved to accept the March 6, 2019, meeting minutes; and **Mr. Carver** seconded.

**The vote:**

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

**Members dissenting:** 0

**Members abstaining:** Ms. Torres

**Members absent:** Mr. Hernandez, Mr. Schachter

**Members recused:** 0

**Mr. Hylton:** Ms. Balsam will now present her report.

**Executive Report**

My first piece of news is very sad. Our assigned HPD inspector, Sumeet Sood, passed away on April 5. He worked very hard to protect all of our stakeholders. He will be missed. Discussions are underway for a replacement. We are doing the best we can with complaints that are coming in. Fortunately, most of the complaints that have come in so far were things we could route to DOB.

In terms of amendments to the Loft Law, those are still pending. In the Assembly, the bill went through committee and is considered on the floor, but there is no companion bill in the Senate yet. That's still in committee in the Senate.

The unofficial Loft Board revenue for March was \$7,877.00

In litigation, we received two new cases. The first is *Meserole A-B 83-91 Equities Corp. v. Russon*. The tenant is in Housing Court with the owner, who brought a hold-over, and the tenant is asking the Housing Court to stay proceedings pending the Loft Board's determination of the tenants protected occupancy claim. The Court has stayed the hold-over proceeding pending our decision.

The other is *Laure Sullivan and Paul Wilson v. NYC Loft Board*. The tenants challenge Loft Board Order No. 4837, which was a rent overcharge case. The Board found that their rent is \$2598 per month. Tenants argue their rent should be \$2382 per month.

**Mr. Carver:** I have a question about one of the documents you had sent us – the mandamus order from last month in 99 Sutton. One question is, did the Law Department oppose the application here?

**Ms. Balsam:** Yes.

**Mr. Carver:** On what grounds?

**Ms. Balsam:** I can send you the papers, but it basically says that whether or not to reconsider a case is discretionary on the part of the Loft Law. That the Board, itself, has discretion as to whether or not it wants to grant reconsideration.

**Mr. Carver:** I see. And we lost that argument, I guess?

There was some discussion between Ms. Balsam and Ms. Cruz to clarify exactly which case Mr. Carver was referring to.

**Ms. Balsam:** Take back everything I said, because I was thinking to the wrong case.

**Mr. Carver:** I'm glad you mentioned the other one, because that was an interesting legal argument; but this is a little different.

**Ms. Balsam:** Yes. It was to make an administrative determination on what could be second sales of rights.

**Mr. Carver:** OK, and we opposed the application for mandamus here also?

**Ms. Balsam:** Yes.

**Mr. Carver:** And we lost?

**Ms. Balsam:** Yes.

**Mr. Carver:** What were the grounds for the opposition?

**Ms. Balsam:** For our opposition?

**Mr. Carver:** For mandamus.

**Ms. Balsam:** It's complicated. We have a lot of pending cases with this particular entity. I think we need to discuss it in executive session or off-line.

**Mr. Carver:** OK.

**Ms. Balsam:** But I can certainly send you the papers.

**Mr. Carver:** My concern isn't necessarily specific to this party, but when a court actually grants mandamus, something has failed on our part, I think. That it got that far. It's very upsetting to actually see this happen. It undermines the credibility of Board in the courts when we see this, and I'm wondering what steps can the staff take to avoid being in a position where an application like this is even made in the first place, let alone lose it.

**Ms. Balsam:** Decide things faster. That's what we need to do.

**Mr. Carver:** I'm bringing this up, because I was copied on two letters to the staff, to you, threatening mandamus. I don't know what the merits of that claim might be, but I guess when the staff receives a threat like that, how is it evaluated? Is anything done about it? Is it serious? I really think it's a bad idea to see these claims made against the Board and then losing them. It really upsets me. And I think it must upset you, too.

**Ms. Balsam:** Well, I think the judge was wrong, but what can I say? Yes, we take threats of mandamus seriously; obviously, we take mandamus action even more seriously. If we jumped every time someone threatened mandamus, everybody would threaten mandamus, and we'd be right back where we are. We evaluate, and see if it's something we want to do sooner rather than later, and figure out which way to go.

**Mr. Carver:** What standards would you apply to help you decide whether or not to take it seriously?

**Ms. Balsam:** For one, how long the case has been pending. How long has it been before us? Where is it in the process? Is there a good reason why we haven't done things sooner rather than later? Assuming that's the case, which was not the case in this particular instance – the 99 Sutton one.

**Mr. Carver:** Is length of time the only factor?

**Ms. Balsam:** No.

**Mr. Carver:** You look at the merits...

**Ms. Balsam:** There could be any number of other things involved. Is there a pending eviction? It also depends on the kind of case.

**Mr. Roche:** Mr. Carver, are you suggesting that the Board members should be made aware as soon as the staff receives such a document?

**Mr. Carver:** No, I'm just thinking about how we can avoid being in court with the claim that we're not doing our job...and losing. I think it looks terrible.

**Mr. Roche:** But if the Board members aren't even privy to the issue...

**Mr. Carver:** Even if I knew about it, there's nothing I can do about it. We have only so much man power. I bring this up because during the annual report presentation, we mentioned that the limited resources we have to do cases were going to be side-tracked to do other things. I asked what that would mean for the backlog, and here we have a mandamus that we lost. I happen to know about two more threats; are there others out

there? I don't know. But are we going to end up with cases not being processed? How long is too long in the staff's view?

**Ms. Cruz:** What we have right now is a system in which we try to do case by the filing date; the oldest cases first. However, there are other priorities that we do consider, such as an application for access; an application for alternate plan; an application for harassment. Those applications we do try to do first; because those applications will directly impact one side and directly impact legalization and the furtherance of the goals of the Loft Board. We have discussed the backlog and are exploring different ways of assigning cases. We have not arrived at a final solution to the problem as of yet, but we are exploring ways to deal with this administratively.

**Mr. Carver:** Would life safety issues be a factor that would make a case be considered more quickly?

**Ms. Cruz:** Certainly.

**Mr. Carver:** Because that's one of the issues raised in the mandamus threats I that I saw. So that's all I have on this issue.

**Mr. Hylton** asked if there were any other questions or comments for Ms. Balsam (none), and turned to voting on cases.

**APPEALS AND RECONDISERATON CALENDAR:**

	<b>Applicant(s)</b>	<b>Address</b>	<b>Docket No.</b>
1	Peter Malerba, Elizabeth Malerba, Datya Moorman, Karen Dunn, Elizabeth Ziman, Kimberly Mongello, Matthew Schoch and Maureen Newman	255 18 <sup>th</sup> Street, Brooklyn	AD-0086

**Mr. Clarke** presented the case.

**Mr. Hylton** thanked Mr. Clarke, and asked for a motion to accept this case.

**Mr. DeLaney** moved to accept this case; and **Mr. Barowitz** seconded.

**Mr. Hylton** asked if there were any comments on this case.

**Mr. DeLaney:** I would just comment that it's rare, but not the first time, that a Certificate of Occupancy was revoked in a loft building. Mr. Clarke, in his summary, did not include the fact that the actual conclusion reads that the appeal was denied without prejudice to the tenant's ability to refile the application, requesting a finding of non-compliance with the legalization deadlines.

**Ms. Torres-Moskovitz:** I would just add that, as an architect, I do find it very disturbing that C of O was revoked, so that last statement that Mr. DeLaney just stated is an important part of how I'm voting.

**Ms. Roslund:** It was a good thing that it was revoked, because now they have to file it in the proper manner. It was just given to them, without any actual legalization of the building. Now it's been revoked, so now the owner has to go through the process of filing and bringing the building up to code, hopefully, under more observation from the DOB. That's the general gist of this, right?

**Mr. Hylton:** Yes, you're correct.

**Mr. Roche:** As an officer of the Fire Department, I've had reason to be in this building on a rather extensive matter. As such, I think it's appropriate for me to abstain from this vote. I want to avoid any possibility of the appearance that I might be favoring either the owners or the tenants.

**Ms. Roslund:** Is it that bad?

**Mr. Roche:** No, no. I just don't want to run the risk of my vote being taken out of context and considered improper.

**Mr. Hylton** said Mr. Roche's decision would be respected; however, he didn't feel it was necessary for him to abstain.

**Mr. Roche:** I've been in contact with both the owners and the tenants, and I just don't want either party to have any reason to feel that my opinion might be skewed one way or the other.

**Mr. Hylton** asked if there were any further comments. (None).

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## CONCLUSION

The Appeal is denied without prejudice to Tenants' ability to refile the application requesting a finding of non-compliance with the legalization deadlines.

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### The vote:

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

**Members dissenting:** 0

**Members abstaining:** Mr. Roche

**Members absent:** Mr. Hernandez, Mr. Schachter

**Members recused:** 0

### The next case:

	Applicant(s)	Address	Docket No.
2	Thomas Brigham	72 Warren Street, Manhattan	R-0370

**Ms. Balsam** presented this case.

**Mr. Hylton** thanked Ms. Balsam, and asked for a motion to accept this case.

**Mr. Carver** moved to accept this case; and **Mr. Barowitz** seconded.

**Mr. Hylton** asked if there were any comments on this case.

**Mr. Roche:** Mr. Chairman, while I certainly don't make it a habit to go around knocking on loft building doors, unfortunately, my role with the Fire Department has me involved in an official capacity with this building, so I will abstain from voting in this case also.

**Mr. DeLaney:** In reflecting on this case and the prior case, it occurs to me that the more appropriate way to handle this case would have been to have rejected this case rather than denying it because it was untimely. Which is what we did that triggered the administrative determination before. In the prior case, the building has a C of O; therefore, we reject this application. Here, we're denying the application, but it seems to me that the circumstances are the same as the first case. And this only occurred to me as we were covering the first case.

**Ms. Balsam:** I don't think the circumstances are the same at all. The first case asked us to do something outside of our authority; the second case didn't.

**Mr. DeLaney:** We're getting a lot of response from the staff in the public session.

**Ms. Roslund:** I agree... It's a good point. In order to reject it....

**Mr. DeLaney:** Let me explain my angle on this. We used to get reconsideration applications that were untimely, and the staff would say, even it were timely, we would reject it for thus and so. Or, if had been filed timely, we would have accepted it. But if the answer is it's untimely, then boom, that should just end the matter, rather than have further discussion on the merits.

**Ms. Roslund:** Which we haven't.

**Mr. DeLaney:** Right. Which in this case was not done. But if it's untimely, why are we denying it rather than rejecting it? It's just a procedural thought that occurred to me.

**Mr. Carver:** I would certainly want the input of the staff, so we should go back into private session for five minutes so we can resolve it and move the case.

**Mr. Hylton** and **Ms. Balsam** agreed that clarification should be done in private session.

**The Board adjourned** for a brief private meeting, then returned to vote on this case.

**Mr. Hylton:** We are back on the record. Are there any other comments on this case?

**CONCLUSION**

The Loft Board denies Tenant’s application for reconsideration because Tenant did not timely file the application.

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**The vote:**

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

**Members dissenting:** 0

**Members abstaining:** Mr. Roche

**Members absent:** Mr. Hernandez, Mr. Schachter

**Members recused:** 0

**THE SUMMARY CALENDAR**

**Mr. Hylton** noted that case number 7 would be voted on separately. He then read the remaining five cases.

**Mr. Roche** asked if case number 4 could also be voted separately.

**Mr. Hylton** clarified that the cases voted as a group would be 3, 5, 6, and 8; and asked for a motion to accept these cases.

	<b>Applicant(s)</b>	<b>Address</b>	<b>Docket No.</b>
3	Noel Johnston	467 Troutman Street, Brooklyn	PO-0092
5	Tom Soper	365 West 36 <sup>th</sup> Street, Manhattan	TH-0216
6	Chiara Diva Pittala	365 West 36 Street, Manhattan	TH-0217
8	Tenants of 210 Varet Street	9 White Street aka 201 Varet Street, Brooklyn	TH-1370

**Mr. Carver** moved to accept these cases; and **Mr. Barowitz** seconded.

**Mr. Hylton** asked if there were any comments on these cases. (None).

**The vote:**

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

**Members dissenting:** 0



**Members abstaining:** 0

**Members absent:** Mr. Hernandez, Mr. Schachter

**Members recused:** 0

**The next case:**

	<b>Applicant(s)</b>	<b>Address</b>	<b>Docket No.</b>
4	Pamela and Christopher Brown	255 18 <sup>th</sup> Street, Brooklyn	TA-0230

**Mr. Hylton** asked for a motion to accept this case.

**Mr. Carver** moved to accept this case; and **Ms. Roslund** seconded.

**Mr. Hylton** asked if there were any comments on the case.

**Mr. Roche:** I'm going to abstain from this vote as well, for the same reason. It's the same address as before.

**Ms. Roslund** asked whether tenants would have another opportunity to bring a case.

**Mr. Balsam** confirmed that the case was dismissed without prejudice.

**The vote:**

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

**Members dissenting:** 0

**Members abstaining:** Mr. Roche

**Members absent:** Mr. Hernandez, Mr. Schachter

**Members recused:** 0

**The next case:**

	<b>Applicant(s)</b>	<b>Address</b>	<b>Docket No.</b>
7	Tenants of 255 18 <sup>th</sup> Street	255 18 <sup>th</sup> Street, Brooklyn	TM-0091

**Mr. Hylton** asked for a motion to accept this case.

**Mr. Carver** moved to accept this case; and **Ms. Roslund** seconded.

**Mr. Hylton** asked if there were any comments on the case.

**Mr. DeLaney:** I'm going to vote no on this case. This is one of the cases where I believe the terms of the stipulation are not something the Loft Board should turn a blind eye to by neither accepting nor rejecting them.

**Mr. Roche:** Again, Mr. Chairman, we have the address of 255 18<sup>th</sup> St, where I've operated as an officer of the Fire Department, so I believe I should abstain.

**Ms. Torres-Moskovitz:** I'm going to vote yes, but it's because I believe there will be a rigorous Department of Buildings process now that the C of O has been revoked on this building.

**Ms. Roslund:** I'm going to vote with Mr. DeLaney here, because I think there's the potential to set a precedent that might not be in spirit of what we're supposed to uphold.

**The vote:**

**Members concurring:** Mr. Carver, Chairperson Hylton

**Members dissenting:** Mr. DeLaney, Ms. Torres, Ms. Roslund

**Members abstaining:** Mr. Barowitz, Mr. Roche

**Members absent:** Mr. Hernandez, Mr. Schachter

**Members recused:** 0

**Mr. Hylton** noted that the motion did not pass.

**THE MASTER CALENDAR**

**Mr. Hylton**

	<b>Applicant(s)</b>	<b>Address</b>	<b>Docket No.</b>
9	Gregory Boustead and Katharina Poblitzki	57 Thames Street, Brooklyn	TA-0228
10	W28 Street Holding LLC	40 West 28 <sup>th</sup> Street, Manhattan	LE-0653 and RA-0015

**Mr. Hylton** stated that these two cases would be tabled until the next meeting; then turned the floor over to Ms. Balsam to continue the discussion of rules.

**Proposed rule changes:**

**Ms. Balsam:** At the March 6 meeting, the Board had asked us to do some research about lease provisions surviving the expiration date of the lease, where the tenancy becomes a month-to-month situation. Ms. Cruz will present some information on that.

**Ms. Cruz:** The Board members had asked the staff to research the question of whether or not a hold-over tenancy -- meaning a tenancy that continues after the lease expires -- continues under the same terms and conditions as those contained in the original lease. My research is on-going, but this is an update on what I've found so far. It is general rule in case law that a hold-over tenancy continues under the same terms and conditions as those contained in the original lease. There is a case from 1975 that upholds this theory; however, it's not an absolute rule. The same case (1975) lays out exceptions to this rule, including 1) the acts and conducts of the party negate the existence of the original lease; 2) when the lease term is inappropriate by reason of changed circumstances; and 3) when the circumstances tend to refute the party's intent regarding the continued application of the lease term, which is not an essential element of the landlord-tenant relationship.

I am now in the process of researching what this language means. I found cases that seem to interpret some of it, but I'm not ready to say to the Board that right now that, under our circumstances, the Board is required to exclude all others who were there on the effective date of the law pursuant to this general rule. The cases do lay out these carve-outs, but without fully understanding what they mean, I'm not prepared to tell the Board that this rule is applicable to our situation. Research is on-going, and hopefully by the next meeting I'll have the staff's recommendation on this issue.

**Mr. Carver** asked the name of the case and which court it was from.

**Ms. Cruz:** *Transit Drive-In Theatre v. Outdoor Theatre Caterers*. It's a 1976 Appellate Division case, in which these three things were laid out. It's a case in which the original lease said that the individual parties would not be responsible for each other's negligence, and the court decided not to honor the provision of that agreement. And that was part of the original lease. So I'm interested in the reason for these carve-outs.

**Mr. DeLaney** had asked if he could be sent a copy of the case.

**Mr. Carver:** I had sent some case law over...

**Ms. Cruz:** Yes, I read it. The original -- *the City of New York v. Pennsylvania Railroad Company* -- that's a 1975 case I mention that lays out the general rule. It references back to a case from 1903. It was interesting to read.

**Mr. DeLaney:** Someone was going to look into the question of the ability to cure a non-primary residence allegation, rent stabilized proceeding. I know you're short staffed; just asking...

**Ms. Cruz:** I am working on it, and I have a general answer, but I don't want to present anything until I can answer the question completely.

**Ms. Balsam:** That brings us to the redraft of section 2-09. We'll keep in the "Place holder for prime lessees with lease in effect being protected occupants to the exclusion of everyone else if applicable." We'll leave that

in as section (2). The staff discussed Section (4) and redrafted. The issue we discussed at great length on March 6, was, if we were going with primary residence, which seemed to be the way the Board wanted to go, when would the tenant have to prove primary residency? And we had different dates: on the effective date of the law; the date the application was filed; the date the record closes; or is it something else?

The issue concerning effective date of the law is whether or not there is landlord consent. So we tried to separate out the consent element from the overall rule. This is only a draft, and you'll tell us what you want to do, but I kept coming back to the question everyone keeps asking: who are we trying to protect? And I came to the conclusion that the people we are trying to protect are the people that are there. Whether or not they were there on the effective date of the law goes to whether or not they need to prove owner consent to them being there. And that's a separate issue, apart from whether or not they deserve protection now, as of the application date.

So we came up with the application date through the date the record closes, and that's what we have in the draft. The only issue we have with that is this rolling discovery issue. If it's the date the record closes, what happens if someone testifies and then the record closes? It could be a year later, because the record was reopened for some reason -- briefs being filed, or whatever. The staff came up with all kinds of ideas about what we could or couldn't do; and we could change this to reflect the process on the ground, to say from the date of application through the last day that person testifies, if there's a hearing.

That's what we're thinking, and we'd like to get your thoughts on this. Of course, we can re-draft again. Big picture: Separate out the consent issue, and then proving primary residency on the application date through the date the record closes or the last date that the person testifies at a hearing.

**Mr. Carver:** So landlord consent is not required if the occupant is in occupancy on the effective date of the law?

**Ms. Balsam:** Yes.

**Mr. Carver:** That's the old rule and the new rule. No change?

**Ms. Balsam:** Correct.

**Mr. Carver:** But are we changing something about the period between the effective date of the law and the application date? Is that what's changing?

**Ms. Balsam:** Yes. The Board had talked about inserting a primary residence requirement and when that should be.

**Mr. Carver:** Under the proposal, that would commence as of the application date only?

**Ms. Balsam:** That's what we decided. That's where our discussion led us, which, of course, is not written in stone. You're the Board; you'll decide. But it seemed to us that if the question is, who are we trying to protect with the primary residence requirement, and if the answer is, the people who are there, then those people should be there as of the date they are applying to become a protected occupant. I'm falling back from my initial position, because I've been thinking through it, and maybe what we're trying to address is people who are filing and then moving. Although we did have one person who moved and then filed.

**Mr. Carver:** So this would in essence help someone who was in occupancy on the effective date of the law, moved, and then came back?

**Ms. Balsam:** It could, yes. Should we care? I don't know. If they're there now.... It's as if they are someone who came back after the effective date of the law.

**Mr. Carver:** You would think you'd need landlord consent then. Because you've kind of waived your status by leaving, I would think.

**Ms. Balsam:** It's something to consider.

**Mr. Carver:** I'm opposed.

**Ms. Balsam:** I'm not surprised.

**Mr. Barowitz** (to Mr. Carver): Do you mean you're opposed to them moving out and then moving back in?

**Mr. Carver:** Yes. At least on that narrow aspect. We have to talk more about what happens later.

**Mr. Barowitz:** It's such an obscure possibility, but...

**Mr. Hylton:** You mean any break?

**Mr. Barowitz:** Yes. It's just so difficult in live in this city. Period. To deny somebody on this small, technical ground, makes it very difficult for me to accept.

**Mr. Hylton:** Mr. Carver, any break?

**Ms. Balsam:** I don't know that we'd be denying them.

**Mr. Barowitz** to Mr. Carver: You would deny, is that correct?

**Mr. Carver:** Absent landlord consent, yes.

**Mr. DeLaney:** I had written to Ms. Balsam that I haven't had time to review this yet, so I'm not going to comment.

**Ms. Torres-Moskovitz** asked Ms. Balsam if she could review the section about the date a person testifies.

**Ms. Balsam:** Let's assume an example given to us, I think, by both sides of the attorneys who presented. There were several tenants who had applied together, but with one of them, there was an issue of primary residence. So let's carve out that one person. Under what I'm proposing, the Board would protect that person if they prove it was their primary residence on the date they applied, and it remained their primary residence through the last date of their testimony at OATH. If we go to the date the case closes, that could be much farther along, and you don't necessarily want to do more fact-finding after both sides have submitted their briefs.

We considered the idea of them being able to submit an affidavit saying nothing has changed; but then, shouldn't the other side have the opportunity to cross-examine that affidavit? That's an example of a scenario

we thought wouldn't work. So we felt that if the person is there testifying, then that would be a good cut-off date.

**Ms. Roslund:** And that's assuming all other proof has been submitted before the date of testimony?

**Ms. Balsam:** I assume they'll be submitting proof as they're testifying as well. You're going to have your bank records, etc. with you. That will come in to the record through your testimony.

**Ms. Roslund:** That happens concurrently?

**Ms. Balsam:** Yes.

**Ms. Torres-Moskovitz** asked about how long a period of time that might be?

**Ms. Balsam:** Let's take the 2010 law. The Window Period is 2008 – 2009. So under the prior proposal, they would have gone back all the way to the Window Period if it was coverage and protected occupancy. Under this proposal, yes, they'd have to provide proof back to the Window Period for coverage, but for protected occupancy, they would have to prove primary residency only as of the date they filed the application, which could have been 2017 – let's assume they got it in at the last possible second, June 15, 2017, prior to 4PM – up until whatever date it is they testify at OATH. How long that would take will depend on how many people are in the action; how many settlement conferences there are; discovery; all of that. But it's a shorter, more finite period. IT could be five years. That's possible. There could be motions back and forth. There are all kinds of things that could cause delays. So it could be a longer period of time, but it will certainly be shorter than from the Window Period. It cuts off all the time from the Window Period to the application date.

**Ms. Torres-Moskovitz** noted that this is really clarifying the separation between the IMD unit and the occupants -- between coverage and protected occupancy...which had seemed muddled.

**Ms. Balsam:** The whole exercise is to try to make it clearer. It has gotten muddled, and we do want to try to make it clearer.

**Ms. Torres-Moskovitz:** And I like that it's less time. Last time we were talking about this, it was ten years.

**Ms. Balsam:** Yes, we took that very seriously. That was a real concern the Board had and we discussed what would be a good way to deal with that. And this is what we came up with. We think it's fair.

**Ms. Torres-Moskovitz:** And they can apply at the same time for both?

**Ms. Balsam:** Yes.

**Mr. Carver:** It still seems complicated. And we always talk about these things at the end of the meeting, when everyone's brains are fried.

**Ms. Balsam:** Yes it is (complicated). But you don't have to vote on anything. We can just get some more thoughts and come back with more language.

**Mr. Carver:** So I think it says from the date of application to the date the record closes is the period you're recommending for which primary residence would have to be proved?

**Ms. Balsam:** What I said was, ideally, it would be through the date the record closes. From the application date through the date the record closes. The problem with that is that once the person is off the stand, there's no way to get additional information into the record without re-opening the record. So you'd end up with situation where you're constantly re-opening the record; and you don't want to do that. So our suggestion is, rather than through the date the record closes, it be through the last date that person testifies, when they are testifying.

**Mr. Barowitz:** I think that simplifies it.

**Ms. Torres-Moskovitz** asked if the person had to actually appear, or if their attorney could appear for you.

**Ms. Balsam:** They're going to have to appear. If they're making a claim, they have to appear. The attorney can't testify for you. The attorney can present records, but I don't think there's ever been a case where the tenant didn't testify. Usually they want to testify.

**Ms. Torres-Moskovitz** wondered what happen if someone can't be present at court due to work.

**Ms. Balsam:** If they're bringing application, they should be prepared to prove their case.

**Mr. Carver:** Let's just talk about the time lag between the last day the person testifies and the date the record closes. You're going to be treating people in a large building very differently, I suppose. If you have a lot of people testifying over the course of months or years, someone early in the process will be held to a different standard than someone late in the process.

**Ms. Balsam:** Why would they be held to a different standard? Everyone would be held to the same time period. If someone filed an application in 2010, and had that application heard in 2012, it would be the same two years, as filing in 2017 and having the application heard in 2019. I'm not sure why that's a different standard.

**Mr. Carver:** I think these trials take place over very long time periods.

**Ms. Cruz:** So different people in one building would be testifying at different times.

**Mr. Carver:** You've got twenty-five people. The first person finishes testifying in year two; and the last person finishes in year five.

**Ms. Balsam:** Yes, that's possible.

**Ms. Roslund:** It helps if they file separately. If they file together, then it's a hindrance.

**Ms. Balsam:** Yes, if they filed separately, it would be helpful, but it's problematic. People usually file together because they're sharing legal fees.

**Mr. Hylton:** What's wrong with saying it's until after the record closes?

**Ms. Balsam:** Because after someone's left the stand, how do you prove that they're still there? Let's say someone comes in; they filed in 2017; and their hearing is in November 2018. So they're on the stand in November 2018, but the case doesn't close until June 2019. How do you get into the record at that point that

the person who testified in November 2018 is still there in June of 2019? How does that get into the record, other than putting that person back on the stand to say, yes, I'm still there? That's the dilemma we faced.

**Mr. Hylton:** Wouldn't it be up to the owner to raise this?

**Ms. Balsam:** No, because in this case, it's the tenant's application. The tenant is making the allegation that they want to be protected. So they have the burden of proof. Of course, the owner could come back and say, they're gone.

**Mr. Hylton:** If the owner doesn't come back....that's almost like consent.

**Ms. Balsam:** There could be a presumption that absent something else...

**Mr. Hylton:** Could we put that in?

**Mr. Barowitz:** Well, assuming they're paying rent...is that correct? I would think if people are paying rent for a Class A apartment – and they're there some of the time.

**Ms. Balsam:** But it's not a Class A apartment yet. If the unit is already an IMD, it's legal for them to be there. But if the PO application is paired with a coverage application, it's an illegal occupancy until the coverage application is granted. So it's not a Class A apartment.

**Mr. Barowitz:** But we've all lived illegally in lofts, including maybe several hundred who didn't file by June 15, 2016. So isn't possession....

**Mr. Hylton:**... 9/10's of the law?

**Mr. Carver:** Yes, but for our issue, it's the type of possession that matters. Is it their primary residence?

**Ms. Balsam:** Right. And do we know they're still there if it's after the last day they testify.

**Mr. Carver:** How is it being handled now?

**Ms. Cruz:** If you're the prime lessee, you have to prove primary residency. If you were there before the effective date of the law, you don't.

**Mr. Carver:** I guess my question is, where does the end point of the proof exist now?

**Ms. Cruz and Ms. Balsam** consulted on this, the result being that there really hasn't been a cut-off date. The impetus to put one in place, which the Board is currently working on, is to put a stop to the rolling discovery. That's the reason for the cut-off date.

**Mr. Carver:** This is something that requires all of us to think a little more about.

**Ms. Balsam:** Yes, I assumed you would.

**Ms. Torres-Moskovitz:** If a new law did pass, would this help incentivize people to apply sooner?

**Ms. Balsam:** Yes, it would.



**Mr. Barowitz:** I have a suggestion. Since Mr. DeLaney hasn't had a chance to review this, why don't we discuss this at the next meeting, right after the Executive Report, rather than waiting until the end of the meeting when, as Mr. Carver says, we're all a bit fried. Maybe we can come to a simple resolution early on next week.

**Ms. Balsam:** I'm fine with that; however, I want to be sure we get the cases done. The cases are our primary responsibility. If you want to discuss this after the Executive Report, we can do that, but we'd have to limit the amount of time we spend on it, and people have to be willing to stay to finish the cases.

**Ms. Torres-Moskovitz:** I think we should prioritize the cases, but we should do some homework.

**Mr. Barowitz:** What homework can we do but go home and contemplate this over and over again. And I don't think that's going to resolve it.

**Ms. Torres-Moskovitz** suggested that since the Board had been spending a good amount of time on micro issues, that perhaps they could pull back and see the macro picture by reviewing the one-page summary Ms. Balsam had prepared, showing an overview of the work on rules. Rather than continuing with this issue, the Board could spend time reviewing that summary.

**Ms. Balsam:** We've made more forward motion on this particular rule than we have in the last two years. So I'm not necessarily in favor of leaving it and coming back to it. I feel like we're on a roll, so I'd like to keep discussing it until we've finished this rule; and then go on to other things.

**Mr. Hylton** asked the Board members if they thought they could resolve this in the first fifteen minutes of the next Board meeting?

**Mr. Roche:** Personally, I believe the public comes here to hear discussion of cases that affect them; so if I have to preserve my mental energy, I would prefer to devote that to the cases.

**Mr. Hylton:** You will have that option in the first hour, in the private session.

**Mr. Roche:** I just don't see what switching will accomplish. I don't think it's going to make any difference whatsoever. Obviously, I'm a big fan of a separate meeting for rules, so the Board members can focus specifically on what the issue is. But putting rules before cases is a concept I don't personally agree with.

**Ms. Torres-Moskovitz:** It's that first hour – the first session – that's really the tiring part.

**Mr. Roche:** It's really not that for me. I'm coming in here right up to the last minute thinking about these cases and the lives that are affected by them...

**Mr. Hylton** asked Ms. Balsam if she could arrange for an additional meeting in June to discuss rules.

**Ms. Torres-Moskovitz** asked Ms. Balsam if it would be possible to go over the one-page summary today.

**Ms. Balsam** said she didn't have it with her; that it wasn't quite ready yet.

**Mr. Hylton:** It seems like there's a consensus that we're not doing this right.

**Mr. Roche:** I'm not saying that. I'm completely for continuing our time here.

**Ms. Balsam:** We can still continue the discussion in terms of a vote.

**Mr. Carver:** But we still have more to discuss on this.

**Ms. Balsam:** Right. We could continue this discussion.

Before continuing Ms. Balsam and Mr. Hylton conferred about a possible second meeting in June. Ms. Balsam said she will check available dates and contact the Board members.

**Mr. Carver:** I'm concerned about this notion that says you can still qualify for protection when you've had a break in occupancy. This concept of, you're in on the effective date of the law, then you're out, then you're back on the application date...Having left, I think, demonstrates that you don't need the protection of the Loft Law because you left. You have someplace else to live.

**Ms. Balsam:** We have people who come in after the effective date of the law and apply for protected occupancy, and we entertain those applications, and we grant some of those people protected status... with the landlord's consent.

**Mr. Carver:** Yes, of course, with consent. That I understand. The issue is without consent.

**Ms. Balsam:** So you would be in favor of someone having a break – and we'd have to determine how long that break would be – and then coming back and applying as if they weren't there on the effective date of the law, and then had to show landlord consent?

**Mr. Barowitz:** What you're saying is, you can leave and come back, as long as the landlord says, OK fine, you can leave for six or eight months and come back. Pay your rent for that time, and come back. Is that what you're saying?

**Ms. Torres-Moskovitz** to Mr. Carver: Are you talking about someone with a lease or no?

**Mr. Carver:** Without.

**Ms. Torres-Moskovitz:** Without a lease? They would have to have the landlord's consent to live there?

**Mr. Carver:** That's how our rule works now, if you're not in occupancy on the effective date of the law.

**Mr. Roche:** Hypothetical situation: I'm an artist living in a loft and my artwork is going to be shown in a London gallery for the next three months. I ask the landlord if it would be OK for me to be away that period of time and then return, and he says yes. But when I return, the landlord says that while I was away, he rethought things, changed his mind, and now I can't return. How can you avoid that if you didn't have a lease? Verbal agreements can easily be broken. So can a lease, but at least you have a document...

**Ms. Roslund:** If someone leaves for three months, but they pay their rent every month, they're still fulfilling their obligation as a tenant...

**Ms. Balsam:** If they're away for work, then it would be OK. We have cases that have covered that.

**Mr. Roche:** But again, what happens when I receive a letter in the mail in London from the landlord, returning my rent check and telling me he's decided to go in a different direction, so you can't come back here....The tenant is out in the cold.

**Ms. Roslund:** But he can do that any time, right?

**Ms. Balsam:** Right; once the lease is expired. We have seen this situation – where the tenant has been paying rent, but the landlord refused to cash their checks.

**Mr. Roche:** I'm not against that concept, but I think there should some sort of document that has to be filed with the Loft Board that says the department will be there for that person when they return from wherever.

**Ms. Balsam:** But the person isn't protected yet. That's the whole point. So how can you require someone to file something when they're not even protected yet.

**Ms. Torres-Moskovitz:** The other thing I'm concerned with has to do with coverage. The unit is an IMD, but the bar is so high (to be protected) that there's no human living in the space. I don't care about the space if there's nobody in it. For example, on Craig's List, for example, you see spaces that have several subtenants living in them, without a lease. I thought those people would be protected, or be able to apply for protection, because they're living there. That's how I saw the purpose of the law. But if Mr. Carver is saying that they have to have the landlord's consent....The landlord really is doesn't care; he's collecting rent from the prime lessee in another state. I don't want to see the people who are actually living there thrown out, and covered unit sitting there empty. That seems counter to our tenet of not displacing people.

**Ms. Balsam:** Under the current rule – the way it would work now – is that a subtenant who came later, after the effective date of the law, does have to prove consent of the owner.

**Ms. Torres-Moskovitz:** How do they do that?

**Ms. Balsam:** It could be a lot of different things, but usually it's that they're interacting with the owner in some substantive way: they're paying rent directly to the owner; the owner is contacting them for legalization work; they're listing them as affected parties on Loft Board applications....Similar to what we've actually listed here.

**Ms. Torres-Moskovitz:** I would like to see that, because I see that as a real issue.

**Ms. Balsam:** Well, if you look at part (5), we've put some things in there. The current rule doesn't actually have much about it, so we decided to add to it, to provide more guidance.

**Mr. Carver:** The fact that you need to show consent is really not that controversial. What's controversial is how to show the consent.

**Ms. Balsam:** I'm not sure everyone would agree with you there. We were trying to separate out the consent. If they use the unit as their primary residence on the effective date of the law, we don't have to worry about consent. Other than that, if they need to prove primary residency, (it would be from) the date of application until when the record closes or the last day they testify, if you want to go that way. The current rule [ 2-09(b)(3) ] reads:

“When a residential occupant took possession of a residential unit covered as part of an IMD, on or after (and there are various dates that are the effective dates of the law), such occupant is qualified for the protection of Article 7-C if:

- (i) The occupant is a prime lessee with a lease currently in effect or, if the occupant took possession of the IMD unit with the consent of the landlord, as a statutory tenant (pursuant to Article 7-C), without the issuance of a new lease; or
- (ii) The occupant is the assignee of a prime lessee and such assignment was consented to by the landlord; or
- (iii) Prior to establishment of such occupancy, the landlord was offered the opportunity to purchase improvements in the unit pursuant to § 286(6) of the MDL and these rules.”

That’s how the current rule reads.

**Mr. Barowitz:** I understand what you just said, and it’s very interesting in that, if the landlord is accepting the rent, isn’t that consent?

**Ms. Balsam:** The redraft lists that as one of the considerations for the Board, in terms of determining consent.

**Mr. Barowitz:** Is that not enough for us?

**Ms. Balsam:** No, because you can have people paying rent who aren’t living there. We had the case last month, where the person was paying the rent to someone in Maine, and then that person was paying the landlord.

**Ms. Roslund:** And we’re trying to discourage profiteering.

**Ms. Balsam:** So it’s a factor, but not the only factor.

**Ms. Torres-Moskovitz** wondered if the simple fact that the landlord is accepting rent – from whomever – and not going to the unit and questioning who’s there, etc... Can that not be construed as consent?

**Ms. Balsam:** So consider this hypothetical. If someone is paying rent to someone in Maine, who’s then paying the landlord – but the landlord is knocking on the loft door saying he needs to install ductwork, because he has to legalize the building; then that tenant, who is letting him in, is substantially interacting with the landlord. I think that’s another way to show consent, and I have included that.

**Mr. Carver:** But that’s not actually interaction. That’s “forced” interaction. The owner has no choice. That’s consent “by accident.” Consent means some sort of purpose in your mind.

**Ms. Balsam:** But if the owner knows they’re there, even though they’re not supposed to be there, and he’s not taking any legal action, and is collecting rent from a third party...

**Mr. Carver:** Yes, but that fact on its own can’t possibly (constitute consent).

**Ms. Torres-Moskovitz:** Here’s another hypothetical based on reality. The landlord is present on site with the sprinkler company, having a discussion about doing a survey. So access is gained. There’s interaction between the person living there and the landlord, who brought in the subcontractor. Does that count as consent?

**Ms. Roslund** noted that the person who lets a contractor in is not necessarily the person who lives there; that it’s very common for people to have a friend, or neighbor, or cat sitter, or whoever, be there to let a contractor

in for them, if they can't be there. She felt it was "a stretch" to assume that the person answering the door for a contractor is the primary resident, and that the contractor knows that.

**Ms. Torres-Moskovitz** did not agree. She felt it was totally rational to assume that the person answering the door lives there.

**Mr. Hylton** agreed it was too much of a stretch.

**Ms. Balsam** felt it could be but one factor to consider, along with others.

**Mr. Carver** pointed out that Ms. Balsam's proposal had actually isolated that factor, and as drafted, that factor alone would hold up. It says, "Consent may be shown by any of the following." So that's a problem, I think. Anyway, it seems to be four o'clock.

**Ms. Torres-Moskovitz** said that they should stay and work this out. They can't just be tired. This is for the people.

**Mr. Hylton** agreed they should try to press on.

**Mr. Roche:** I'm not a lawyer, but I think what Ms. Torres-Moskovitz is saying is legitimate. To me, that situation is implied consent. If the landlord is taking a rent check, and someone at the apartment is letting contractors in to do work...

**Mr. Carver:** If it's the same person, it's one thing. If it's a different person, that's different.

**Mr. Roche:** What do you mean, if it's a different person?

**Mr. Carver:** If it's the person paying the rent...

**Mr. Roche:** Who would pay the sprinkler people to come other than the owner?

**Mr. Barowitz:** What happens if it's an eighteen-year-old kid?

**Ms. Balsam:** No, on the tenant side.

**Mr. Barowitz:** What if it's the kid of the primary resident?

**Mr. Carver:** Joe opens the door. Steve is paying the rent, and now Joe is claiming protection, merely by opening the door. That's the issue.

**Ms. Balsam:** Yes.

**Ms. Torres-Moskovitz:** I disagree, because I live in this scenario. I see it all the time, and I think if we don't make a law that deals with reality, we're allowing the Loft Law to keep extending and extending, and you don't protect people. The point is to protect people in these buildings.

**Mr. Carver:** The point is to protect qualified people; not any people.

**Ms. Torres-Moskovitz:** Yes, but they keep living there, and if they're not protected, that's not a condition I'm in favor of. I'd like the rules to be improved so that the people actually living there – who really live there – get protected.

**Ms. Balsam:** I think that's what we're trying to do.

**Mr. Carver:** "Really living there" is not the standard.

**Ms. Roslund:** The flip side of what we're talking about is, if in Mr. Carver's scenario, Steve applies for protected occupancy, then the person who's actually living there loses, and loses twice, because they're being overcharged, and they get evicted, right?

**Ms. Balsam:** Only if Steve's not living there.

**Mr. Carver:** I'm not following.

**Ms. Roslund:** Steve lives in Maine. He pays \$1000 per month, but he's charging Joe \$1500 per month. And then he decides he wants to move back, so he says, sorry Joe, you're out. I'm the primary resident (lessee); I want to be the protected occupant; I'm taking back my apartment; and thanks for the extra \$500 per month for the last five years. And that's another scenario we're trying to avoid, right?

**Ms. Balsam:** Yes.

**Ms. Roslund** to Ms. Torres-Moskovitz: Do you not agree with that?

**Ms. Torres-Moskovitz:** But I don't think that letting the landlord decide....

**Ms. Roslund:** But it's not the landlord doing the eviction; the renter's doing it.

**Ms. Torres-Moskovitz:** I just don't want the rule to read in a way that creates a situation where we have empty spaces, with no people in them, because we've made the bar so high in terms of proving that you actually live there. Everyone but Mr. Roche seemed to think what I was saying is a "stretch," when that was my reality last month...Should I have filmed the whole interaction so they could use it as proof in court?

**Mr. Roche:** Actually, an additional defense of what she's saying, whether it's the law or not, my experience is that in some of these buildings I've been in it's very much a family atmosphere. Everyone knows everyone, and there's cooperation among them all. I can see Steve or Joe or anyone letting people in or out of apartments, but ultimately, if someone comes there to do sprinkler work....

**Ms. Balsam** to Mr. Carver: Let me ask you this: You don't like the language, "Consent may be shown by any of the following." We can change it to be similar to the wording in (6): "Although no single factor is solely determinative, factors for the Loft Board to consider in determining whether (the owner has consented) include but are not limited to..." Which I think is where the Board seems to be going. You could consider this, or that, or a combination of things.

**Mr. Carver:** It's certainly better than it exists, but I really think more thought needs to go into consent being shown by intention of the owner, and not an accident.

**Ms. Balsam:** These factors are based on Board cases; on cases the Board has decided. And how can you show intent?

**Mr. Carver:** Over the next month, I'll talk to people who are in the trenches; who are at these hearings and have dealt with these issues before. I'll get there input and come back with more information.

**Mr. Barowitz** noted that the Board should use the term "loft," instead of "apartment."

**Ms. Balsam** said that the term "unit" or "IMD unit" is what is normally used.

**Mr. Hylton** proposed closing the meeting.

**Mr. Roche:** May I just say one thing before closing. We've talked about this in the past, and I don't know how we accomplish it, because we're only a few, but I think there needs to be an educational component to what we do here. Ms. Torres-Moskovitz and I have discussed this. I think the Loft Board should make educational material available for tenants and owners alike, on how to deal with certain situations. And maybe the time to do that is after we complete work on the rules. We sit here as people who have a background in IMDs, and loft buildings, and the law, but it's not really the real world. There are people living out there who don't understand all of these components, and they rely on people like us, who are professionals in some related capacity, to make information available to them on how to avoid problems. So I'd like us to keep this in mind, and look at it more in the months to come.

**Mr. Barowitz:** You are so right. I've attended three or four meetings about the rezoning of SoHo and NoHo, and most of those people don't understand the Loft Law, sometimes totally misinterpreting it. It's a problem, and I don't know how we can make this information more widely available.

**Mr. Hylton** noted that there are organizations that do this.

**Mr. Roche:** I'm not saying that the onus should be on the Loft Board. Please don't misunderstand me; but we live in an era of social media – Facebook pages, web sites, YouTube; there's no reason why we can't come up with some snippets to put out to people to help them avoid some of these pitfalls. And again, I want to stress, this should be for owners and tenants alike.

**Ms. Torres-Moskovitz:** The Fire Department does that, right?

**Mr. Hylton:** The Fire Department has a lot of funding to do fire safety campaigns.

**Ms. Roslund:** What is the City's position on Board members talking to community groups or tenant organizations?

**Mr. Hylton:** I think it would be welcomed, except you can't discuss cases.

**Ms. Balsam:** And that's always the biggest problem. You go with the intention of doing a general presentation, and then everyone comes up to you at the end and wants to discuss their particular case.

**Mr. Hylton:** It would have to be done in a very cautious manner to be sure you're not violating any Loft Board protocols.

**Mr. Hylton:** If a member of the Board wants to come up with some educational material they'd like to present, we'd be happy to engage the Department of Buildings Press Office to do help with that.

**Mr. Roche:** And I would clarify that anything we'd develop should be read by our attorneys here, as well as advising them of what we'd be doing and where.

**Mr. Hylton:** Yes, I'd appreciate that.

**Mr. Hylton:** This will conclude our April 18, 2019, Loft Board meeting. Our next public meeting will be held at 22 Reade St. Main Floor, Spector Hall, on Thursday, May 16, 2019, at 2:00PM.

The End