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

Sept 20, 2018

The meeting began at: 2:30 pm

Attendees: Robert Carver, Esq., Owners' Representative; Elliott Barowitz, Public Member; Richard Roche, Fire Department ex officio; Robinson Hernandez, Owners' Representative; Charles DeLaney, Tenants' Representative; Julie Torres-Moskovitz, Public Member; Daniel E. Schachter, Esq., Public Member; Renaldo Hylton, Chairperson Designee; and Helaine Balsam, Loft Board, Executive Director .

INTRODUCTION:

Chairperson Hylton welcomed those present to the September 20, 2018, 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 on July 19, 2018 Meeting Minutes:

Mr. Hylton asked if there were any comments or questions; then for a motion to accept, and a second.

Mr. Delaney noted that the attachment noted on page 4 was not included. **Ms. Balsam** said she would rectify that.

Mr. DeLaney also expressed his overall satisfaction with the way the meeting minutes have been presented.

Mr. Hylton asked if there were any other comments on the minutes; then for a motion to accept; and a second. **Mr. Roche** moved to accept; **Mr. DeLaney** seconded the motion.

Members concurring: Mr. Carver, Mr. Barowitz, Mr. Roche, Mr. DeLaney, Ms. Torres-Moskovitz, Chairperson Hylton

Members abstaining: Mr. Hernandez, Mr. Schachter

Members absent: 0

Mr. Hylton noted two changes to the agenda: The Presentation of Resolution for Chief Spadafora would be by-passed until the next meeting, so that a member of the family could be present to accept it; and that due to the fact that a board member was required to leave early, the Vote on Cases would be addressed next.

Mr. Hylton: Ok, we now turn to a vote on this month's cases. We start with the Appeals and Reconsideration calendar. There are four cases. The first is (listed below), and Mr. Clarke will present this case.

	Applicant(s)	**Address**	**Docket No**
1	Tai Loy Corp.	324 Canal Street, Manhattan	AD-00091

Mr. Clarke presented the case for the Board's consideration.

Mr. Hylton asked if the Board members had any comments about this case; and then asked for a motion to accept this case.

Mr. Carver stated that he could not vote on the case because he knows one of the parties mentioned in the opinion.

Mr. Delaney: Yes, I would comment briefly that this is yet again an example of a very creative attempt being made by the owner trying to expand what's going to be viewed as a 286(12) sale of rights. This is an area where we have seen a variety of different problems arise in the past year or two, and I think it is important for the Loft Board to consider revisiting 286(12) to tighten up and clarify exactly what does constitute a sale of rights under 286(12). This has become an area of considerable abuse. I've made this statement to the Board staff in the private meeting and wanted to go on record with it, in public. I've even heard examples now of cases where the lease which an owner offers an incoming tenant includes as one of the terms of the lease a 286(12) sale. We've also seen in the past a documented case where an owner tried to incorporate 286(12) sale language into a simple receipt for the return of security deposit on a unit a tenant is leaving. So, I will encourage the Board through this statement and in writing to revisit 286(12) as soon as possible.

Ms. Torres-Moskovitz: I would add to that a request that there be some kind of training for landlords and tenants on the sale of rights. This case makes the point that it is often confusing and that landlords don't really understand it.

Mr. Hylton: Ok, we will look at that. Thank you.

Mr. Hylton asked if there were any other comments about this case; and then asked for a motion to accept this case.

Mr. Barowitz moved to accept; **Mr. Delaney** seconded the motion.

Members concurring: Mr. Barowitz, Mr. Roche, Mr. Hernandez, Mr. DeLaney, Mr. Schachter, Ms. Torres, Chairperson Hylton

Members abstaining: 0

Members absent: 0

Members recused: Mr. Carver

Mr. Hylton introduced the next case (below), presented by Ms. Leveille.

	Applicant(s)	Address	Docket No
2	Maria Nazor and Peter Mickle	544 West 27th Street, Manhattan	R-0357

Ms. Leveille presented the case for the Board's consideration.

Mr. Hylton asked if the Board members had any comments about this case; and then asked for a motion to accept this case.

Mr. Carver moved to accept; **Mr. Barowitz** seconded the motion.

Members concurring: Mr. Carver, Mr. Barowitz, Mr. Roche, Mr. Hernandez, Mr. Schachter, Chairperson Hylton

Members dissenting: Mr. DeLaney, Ms. Torres

Members abstaining: 0

Members absent: 0

Mr. Hylton introduced the next case on the Appeals and Reconsideration Calendar (below), presented by Mr. Clarke.

	Applicant(s)	Address	Docket No
3	James Gubelmann	442 Broadway, Manhattan	R-0385

Mr. Clarke presented the case for the Board's consideration.

Mr. Hylton asked if the Board members had any comments about this case; and then asked for a motion to accept this case.

Mr. DeLaney: I voted against the original decision in this case, and I voted against the reconsideration proposed order when it came up in July. I've spent increasing amounts of time on this case; it was the subject of considerable discussion in our private meeting; and I certainly won't characterize what anyone else said in the private meeting. To review, the original claim was that there were four residential units in this building. One of them, I think, was rather conclusively demonstrated to be a showroom that was not residentially occupied during the Window Period. That's necessary for 281(5). The report and recommendation coming from the OATH judge in this case acknowledges Mr. Gubelmann's use of the third floor as a residential unit and finds two of the three units on the fourth floor as residentially occupied (the third being the showroom). But an issue has come up with regard to what I consider to be the exclusionary provisions in 281(5), which is the portion of the Loft Law that added coverage to buildings in the 2008-09 Window Period. The question then turns on whether or not one unit has legal windows that would allow it to register for coverage.

The history of this case is that it came to the Board once, but was not voted on, with the recommendation that the building be covered as an interim multiple dwelling. It was restudied, and came back with the finding that, because one unit lacks windows, it doesn't have the requisite count of three residential units necessary to qualify as an Interim Multiple Dwelling. And therefore, what this hinges on in my mind is rule § 2-08 (d)(1), which discusses the calculation of residential units. The first statement of (this rule) is: "For purposes of counting residential units to determine whether a building qualifies for coverage as an IMD building and must be registered, each unit must meet the criteria set forth in MDL § 281 and these rules." I believe at the time this was set forth, the Board was referring to the gross qualification factors of residential use during the Window Period -- the building lacking a residential certificate of occupancy and a history of prior commercial use. The way the Board is interpreting § 2-08 (d)(1), I think, is incorrect in that the fact that a unit may not qualify under § 2-08 (5) because it lacks a window, or because it's in a basement -- which is allowed in all other kinds of dwellings in New York City -- sets up a situation that perpetuates allowing owners to have multiple units used residentially that will not, under this interpretation, apply to that count of three, because they can't qualify individually. I think they should, nevertheless, be counted to meet the threshold to determine the units that are in an Interim Multiple Dwelling. I hope that this case does lead to an article 78 if the Board adopts the denial of the consideration that's before it, because I think the Board's holding here is in conflict with the remedial intent of the statute. And therefore, I'll be voting no.

Mr. Hylton asked if there were any other comments about this case; and then asked for a motion to accept this case

Mr. Carver moved to accept; **Mr. Hernandez** seconded the motion.

Members concurring: Mr. Carver, Mr. Hernandez, Mr. Schachter, Chairperson Hylton

Members dissenting: Mr. Barowitz, Mr. Roche, Mr. DeLaney, Ms. Torres

Members abstaining: 0

Members absent: 0

Mr. Hylton: The motion is not passed

Mr. Barowitz: What's the decision on this?

Ms. Balsam: There is no decision. It's four and four. We need another Board member.

Mr. Hylton introduced the next case on the Appeals and Reconsideration Calendar (below), presented by Mr. Bobick.

	Applicant(s)	Address	Docket No
4	H.L.P. Realty Corp.	238 Melrose Street, Brooklyn	R-0363

Mr. Bobick presented the case for the Board's consideration.

Mr. Hylton asked if the Board members had any comments about this case; and then asked for a motion to accept this case.

Mr. Roche moved to accept; **Mr. Hernandez** seconded the motion.

Members concurring: Mr. Carver, Mr. Barowitz, Mr. Roche, Mr. Hernandez, Mr. DeLaney, Mr. Schachter, Ms. Torres, Chairperson Hylton

Members dissenting: 0

Members abstaining: 0

Members absent: 0

Mr. Hylton introduced the five cases (below) on the Summary Calendar, which will be voted on as a group.

Mr. DeLaney asked that case number 7 be taken up separately.

Mr. Hylton introduced the four cases that would be voted on as a group (5, 6, 8, and 9 below).

	Applicant(s)	**Address**	**Docket No**
5	Macey Connolly and Natalino Caminha	304 Eighth Avenue, Manhattan	PO-0055
6	Quinn Luke and Lisa Levine	100 Freeman Street, Brooklyn	PO-0057
7	Tenants of 50-17 Fifth Street	50-17 Fifth Street, Queens	TR-1291
8	Macey Connolly and Natalino Caminha	304 Eighth Avenue, Manhattan	TR-1340
9	Quinn Luke and Lisa Levine	100 Freeman Street, Brooklyn	TR-1343

Mr. Hylton asked if there were any questions/comments on these cases (none). Is there a motion, then, to accept these cases?

Mr. Carver moved to accept; **Mr. Hernandez** seconded the motion.

Members concurring: Mr. Carver, Mr. Barowitz, Mr. Roche, Mr. Hernandez, Mr. DeLaney, Mr. Schachter , Ms. Torres, Chairperson Hylton

Members dissenting: 0

Members abstaining: 0

Members absent: 0

Mr. Hylton introduced case number 7 from the Summary Calendar (below), to be voted on separately, and asked if there were any comments on this case.

	Applicant(s)	Address	Docket No
7	Tenants of 50-17 Fifth Street	50-17 Fifth Street, Queens	TR-1291

Mr. DeLaney: Yes. I appreciate your taking this up separately. I plan to vote no on this case. The basic circumstance here seems, frequently, to be as follows: the tenants apply for coverage; the landlord opposes it; at some point there's a settlement, and the landlord agrees to register the building, including the protected occupants, subject to a stipulation, part of which requires the tenants to withdraw their application with prejudice. This is a case like many others we've had over the past decade, where there's a sentence that basically reads, "The Loft Board neither accepts nor rejects the remaining terms of the stipulation." Sometimes there are stipulations that are so onerous that the Board rejects them as contrary to public policy, which was the case in HLP Realty, 238 Melrose Street, which we looked at earlier today. In this case, the fourth and final point of the stipulation is that the tenants waived any non-compliance with the Owner's obligations pursuant to MDL 284, provided the owner timely registers the units pursuant to the stipulation and timely seeks an extension of code compliance deadline, etcetera, etcetera. On the face of it, having the tenants agree to waive enforcing code compliance deadlines may not seem like a big thing, but we're in a gray area here. Over the years, I've seen cases where the Loft Board neither accepts nor rejects the other terms of the stipulation; where, like this case, the conditions are relatively minor, and other cases, where more and more stuff gets waived. In some cases, as I've said, it goes so far that we deem it contrary to public policy. I don't think the Loft Board or the ALJs at OATH should be in the business of structuring stipulations that do anything that's contrary to the Loft Law.

Therefore, I've made it a consistent practice to vote against all such cases, because it puts extra pressure on tenants and runs-up additional legal costs. That's why I'm voting no. It's fine with me if this passes, but I'm voting no to make a statement.

Mr. Hylton: Thank you Mr. DeLaney. Are there any other comments on this case?

Mr. Carver: Yes. I think that stip is actually *not* contrary to the Loft Law. In as much as in our order, the Board preserves all of the Board's rights. So I agree with you that, ultimately, it should be passed.

Ms. Torres-Moskovitz: I'd like to ask the staff how often this happens. It does seem to take up time.

Ms. Balsam: No, we don't answer questions here. They are for the private session.

Ms. Torres-Moskovitz: OK. Well, thank you for making a statement, because I feel this sets a precedent that I don't agree with, as to what we should be handling here.

Mr. Carver: I think the precedent is quite good. The parties are getting along. They're *agreeing* to things. The tenants are agreeing to pay rent so that the work will get done. This is a very good thing, and to the extent that language in the stip waives any tenant rights, the Loft Board, itself, is still retaining its own rights under the law. There are just no problems here. In fact, failing to pass this, ultimately, will cause the tenant to incur a

legal fee to go to court to get the result he/she needs. It's crazy that you're opposing a stip that's useful for everybody.

Mr. DeLaney: I take issue with that on two counts. The tenants have succeeded in what they wanted to do in that the units are registered, and they've been named as protected occupants. And, if you believe that we don't have to worry about the rights of individuals, because the State will take the right actions, then… I don't believe in that. I don't think people should be required to give things up or waive things with the assurance that the Loft Board or Police Department or any other agency, State, local, or Federal, will come in and save the day, so you can just go ahead and waive your rights. I don't think that's right.

Mr. Carver: I would just point out that freedom of contract is a very important basis of our law, and we should respect the wishes of parties to make agreements amongst themselves. The courts certainly do. We should, too.

Mr. Hylton: Thank you. Is there any other comment? Is there a motion, then, to adopt the case?

Mr. Carver moved to accept; **Mr. Hernandez** seconded the motion.

Members concurring: Mr. Carver, Mr. Barowitz, Mr. Roche, Mr. Hernandez, Mr. Schachter, Chairperson Hylton

Members dissenting: Mr. DeLaney, Ms. Torres,

Members abstaining: 0

Members absent: 0

Mr. Hylton: There are six cases on the Master Calendar (below). The last five cases are removal cases and will be voted on as a group after presentation and voting on the first case, number 10, separately. Mr. Clarke will present.

	Applicant(s)	**Address**	**Docket No**
10	Thomas Brigham	72 Warren Street, Manhattan	LI-0046
11	Board of Managers of 583-587 Broadway Condominium	583-587 Broadway, Manhattan	LE-0675
12	262 Mott Street Condominium	262 Mott Street, Manhattan	LE-0692
13	1196 Metropolitan Corp.	1198 Metropolitan Avenue, Brooklyn	LE-0694
14	1196 Metropolitan Corp.	1196 Metropolitan Avenue, Brooklyn	LE-0695
15	HPG 29 2nd Avenue LLC	29 Second Avenue, Manhattan	LE-0696

Mr. Clarke presented the case for the Board's consideration.

Mr. Hylton asked if the Board members had any comments about these cases.

Mr. DeLaney: This case was also the subject of considerable discussion in our private meeting. I think that the Board's conclusion in this case is incorrect, and, if adopted as currently written, would set a very dangerous precedent. To quickly recap the facts of the dates here – Originally, there was an agreement in Housing Court

from March of 2014, that the tenant vacate for 90 days. There was a fire ten days later, causing water and other damage in the building, particularly in the tenant's unit, where the fire started. One of the counts the tenant raises among the three reasons he seeks a finding of legalization interference is an incident that occurred in April of 2014, where dust and rock came into his unit through a hole in the ceiling, I believe. Having survived both the code compliance work in my own loft and the narrative statement process…I had about six pounds of dust and rock land in my unit. That kind of thing does happen. So I do not find the tenant's argument on that ground persuasive. However, my concern is with the overall delay in the legalization work.

Back to housing Court in June, 2014, a stipulation was signed in which the tenant agreed he would leave within 30 days, and the landlord agreed to complete the work within 90 days. And there was a second narrative statement conference held in June, 2014. On July 15, 2014, the tenant vacated. It was not until October 9 that an engineer's report was provided to the owner, citing problems with the floor joists and the bricks in the building. By this time, the tenant had been out almost 3 months. The architect summarized the damage and the work required in February, 2015. In mid-March, 2015, the tenant filed the legalization interference claim. There was a third narrative statement conference held in March, 2015, and on June 4, 2015, that the tenant was handed the keys by the owner, when they both appeared in Housing Court, because the tenant had sought to find the owner in contempt, for having, by that point, taken close to 11 months to restore him (the tenant) to the unit.

There is a significant difference between being out for three months and for 11 months. What I see here is a failure of the owner to communicate with the tenant. The owner really should have done more investigative work prior to (agreeing to) the June stipulation, where he said he could complete the work in 90 days. You're dealing with very old buildings. It was almost three months after the tenant vacated the premises, on July 15, before the engineer's report concerning the joists and bricks was issued, on October 9.

The third concern is about the loss of 25 square feet, and this is something I could go either way on. It's a five-and-a-half-inch deprivation of space that runs the entire length of the loft, apparently, because instead of treating or laminating the brick wall, the owner chose to fur it out with 2 x 4's and sheet rock. The other thing here is that the tenant represented himself, prose, at the OATH hearing, and from the way the opinion was written by the OATH administrative law judge, I got the distinct sense that the judge really didn't like the tenant that much. And I can't say for sure that I would like him that much. And there were points made that the tenant had not been paying rent….So somehow, therefore, three months turning into 11 months, with no real communication…. I don't think is acceptable. And therefore, I would like to propose an amendment to the current proposed order, that would, in essence, deny finding legalization interference on two counts; find legalization interference on the third count, with regard to the excessive delay – because I think not to do that sets a very bad precedent for legalization work in the future.

There is a fine associated with the finding of legalization interference, but I propose that we impose no fine on the owner, but I think it's very important to set a precedent that says, "You can't say it's going to be three months, and it turns out to be 11 months." If you don't know, then don't give a number; or arrange to do the testing required to make an accurate determination. It's not that hard to remove the surface over a one-square-foot section of wall, to see if there's a more serious issue to be addressed. This is also a perfect example of why I've argued in the past that at least the final conclusions of narrative statement conferences should be reduced to some kind of writing. And in this case, in pro se, the tenant claimed that certain

comments were made to him during the narrative statement process, but there's no way to establish whether that's true or not. This is a very important case in terms of how code compliance work is done and the timing of it.

Mr. Hylton: What is your basis for finding unreasonable interference, but not imposing a fine? What is your reason?

Mr. DeLaney: My principal reason is that a three-month delay turned into an eleven-month delay. The tenant vacated the premises in mid-July, and the engineering report not completed until October 9. It is my opinion that the landlord and his architect and engineer were dilatory in moving forward and assessing the true nature of the situation. Not fast enough; not thoughtful enough.

Mr. Hylton: Are there any other comments?

Mr. Roche: I plan to vote no for this case, but I'd like to say that I'm always very proud of the work the Loft Board staff does, and very respectful of the work our city administrative law judges do; but every once in a while, there's a case that I feel I, personally, have to research more to be comfortable with my vote. This is one of those cases, so I plan to vote no, because I'd prefer to have additional time to research this. The second point I wanted to make is - - Chuck, I think you had stated that the "Board" concluded, and I think you mean to say that "staff" concluded, because the Board actually hasn't

Mr. DeLaney: To be more accurate, I should actually say that the staff has agreed to approve the recommendation of the administrative law judge, so….

Ms. Balsam: I'm sorry. The staff doesn't agree or disagree. The staff drafts proposed orders.

Mr. DeLaney: Fine

Mr. Barowitz: I'm going to vote yes on this thing, only because there appears to be mitigating circumstances…

Mr. DeLaney: Can I just say…you're a great believer in procedure, and I'm making a motion…

Various: We're making a motion on creating and amendment.

Mr. Barowitz: We have to do one thing at a time. The Chair has to make a ruling on this.

Mr. Hylton: I'm hearing two things, but I first want to address Mr. DeLaney's motion, if you would repeat it…

Mr. DeLaney: The motion is that the tenant made three claims for legalization interference, and my motion is that we find that the tenant is correct on his first point, which is that the time to complete the legalization work *did* cause unreasonable interference. And further find that, though this was an instance of legalization interference, we would impose no fine. With regard to his second point - -that the landlord departed significantly from the work described when he covered the west wall with sheetrock. I'm neutral on that. I don't see any reason to consider that. I think it was poor communication. This should have been covered in the narrative statement conference. And the third allegation, that the landlord violated the provision of the tenant protection plan with the dust and debris --- I do not believe that. My concern is only with the first. And I would further recommend not imposing any fine on the landlord.

Mr. Hylton: You've heard the motion. Is there a second?

Mr. Carver: Can we have a discussion on the motion? It's not the time to do that?

Various: We need a second.

Mr. Barowitz: Wait. You can't do both. Chuck made a statement about why he was going to vote no. Then on top of that, made a motion. I'm sorry, but you can't do both.

Ms. Torres-Moskovitz: Can we have comments first, and then…?

Mr. Barowitz: No, you can't do both. You have to go through the process of voting on this thing, and then make a motion. But you can't start discussing the order, and in the middle of that, make a motion.

Mr. Hylton: Mr. DeLaney said he intends to vote no, but in lieu of that, he would make a motion. Am I correct?

Mr. DeLaney: Yes, if I may, Mr. Chair? I'd be interested in Elliott's opinion on this: I think it would be better to start with a motion and then have discussion, rather than have discussion followed by a motion.

Mr. Barowitz: I would agree with that. In the future.

Mr. Hylton: Where are we now? Is there a second to that motion?

Ms. Torres-Moskovitz: Yes.

Mr. Carver: May we speak about the motion?

Mr. Hylton: Yes. Mr. Carver, you're in order.

Mr. Carver: Thank you. So, we have a case on the agenda. The agenda says we need to vote on it. I think the motion to amend the draft is premature until the proposed order on the agenda fails. So, those who want to amend it would vote no. But I think we owe it to the parties and to the Board members to actually vote on what was proposed.

Mr. Hylton: I hear you, and there is actually something else to consider. Another member here has asked for time to consider this, so perhaps this is something we want to put off until next time. We can always take it up again.

Mr. Roche: Now I'm a little confused, because I intend to vote in a direction that would allow me more time to go back and review this case so I can feel comfortable with my vote.

Mr. Barowitz: I just wonder whether or not we can get more details about this particular case. My feeling is that we ought to put it off – table it – in the hope that we can get a little more information, as to one, are there mitigating circumstances in terms of why it took the landlord eleven months rather than three? And second, was the landlord deleterious in his initial statement? And these things just happen, so whether we can get more information about this – including the fact that we've discovered that this flooring came from, where, New Zealand? There's hardly any way you can get anything done in three months' time if the materials

are coming from New Zealand. I think there are too many unknowns here to make a decision, so I recommend that the Chair table this pending more information.

Mr. DeLaney: The question is, will I withdraw the motion to allow either the Chair to table or vote to table. Yes.

Mr. Hylton: Thank you.

Ms. Torres-Moskovitz: May I make a comment? I understand there are risks with the tenant representing himself, that he didn't have a lawyer, but I feel we have a responsibility to make clear to tenants the risks of moving out. I think I've seen information in the subways that tells tenants not to move out, ever. So I just want to make sure that that information is getting relayed to the loft tenants.

Ms. Balsam: That would be the Loft Board giving advice to tenants, and we're not allowed to do that. We're supposed to be neutral.

Ms. Torres-Moskovitz: Well, knowledge that there are risks involved. Because construction is always delayed, three months versus eleven months is a long time to be out on the street, figuring out how to survive. So I feel that, maybe "advice" isn't the right word, but the public needs information in front of them so they don't make a decision that will leave them and their families vulnerable to being left out of their home for long periods of time. Because once they're out, it's often difficult to get back in, as this case, with its voluminous backup, illustrates.

Mr. Roche: I'd like to add to what Ms. Torres-Moskovitz said, partly in support. But there's always also a concern that – I think Helaine said it best – the Board cannot be in the position of giving advice, because as the Fire Department representative, I can say that there are times, when it is unsafe for people to be living in buildings that are under-going renovations – having floors replaced, things of that nature. So there has to be a balance. You can't say, well I'm going to stay in this one room, while you remove the flooring all around me, and then, if there's an incident in the building, expect that the Fire Department will be able to operate as usual in that building. Our executive director phrased it best: we have to be careful when giving advice in terms of should you stay or should you go. Certainly, there's a concern that an owner might use your leaving as a way to prevent you from returning, but do keep in mind that there is a safety component to this, that the Fire Department, the Buildings Department, and the Housing Preservation and Development Department have to be concerned with. And that is, can someone be safely living in a basement when some of this renovation is going on? There are provisions available, yes, but I do want to get it on the record that there is a safety component involved.

Ms. Torres-Moskovitz: May I just add to that, my understanding is that it's not often the case that tenants move out. And that had this person had a lawyer, he/she would have been giving him advice; but as I suggested earlier in terms of sale of rights: could there be some kind of training? Or a sheet with bullet points? Not "advice" but just "equal education," so that people can make informed decisions.

Mr. Hylton: Sure. Information, that is. Alright, **so we are making a decision to table this (number 10 from the Master Calendar, Thomas Brigham, 72 Warren St, Manhattan, Docket No. LI-0046)**, until next month's meeting. And thank you Mr. Clarke.

Mr. Hylton introduced the five remaining removal cases on the Master Calendar (numbers 11 – 15), and asked if the Board members had any comments about these cases.

	Applicant(s)	Address	Docket No
10	Thomas Brigham	72 Warren Street, Manhattan	LI-0046
11	Board of Managers of 583-587 Broadway Condominium	583-587 Broadway, Manhattan	LE-0675
12	262 Mott Street Condominium	262 Mott Street, Manhattan	LE-0692
13	1196 Metropolitan Corp.	1198 Metropolitan Avenue, Brooklyn	LE-0694
14	1196 Metropolitan Corp.	1196 Metropolitan Avenue, Brooklyn	LE-0695
15	HPG 29 2nd Avenue LLC	29 Second Avenue, Manhattan	LE-0696

Mr. Carver asked that we vote separately on number 11.

Mr. Hylton identified this case, and asked if there were any comments on it; then for a motion to accept it.

Mr. DeLaney moved to accept; **Mr. Barowitz** seconded the motion.

Members concurring: Mr. Barowitz, Mr. Roche, Mr. Hernandez, Mr. DeLaney, Mr. Schachter, Ms. Torres, Chairperson Hylton

Members dissenting: Mr. Carver

Members abstaining: 0

Members absent: 0

Mr. Hylton asked if there were any comments on the remaining four cases; then for a motion to accept them.

	Applicant(s)	Address	Docket No
10	Thomas Brigham	72 Warren Street, Manhattan	LI-0046
11	Board of Managers of 583-587 Broadway Condominium	583-587 Broadway, Manhattan	LE-0675
12	262 Mott Street Condominium	262 Mott Street, Manhattan	LE-0692
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14	1196 Metropolitan Corp.	1196 Metropolitan Avenue, Brooklyn	LE-0695
15	HPG 29 2nd Avenue LLC	29 Second Avenue, Manhattan	LE-0696

Mr. Hernandez moved to accept; **Mr. Carver** seconded the motion.

Members concurring: Mr. Carver, Mr. Barowitz, Mr. Roche, Mr. Hernandez, Mr. DeLaney, Mr. Schachter, Ms. Torres, Chairperson Hylton

Members dissenting: 0

Members abstaining: 0

Members absent: 0

Mr. Hylton: We will turn now to the Executive Director's report

Executive Director's Report:

Ms. Balsam: Thank you. In terms of registrations, as of today, we have 21 buildings that have not registered, which is well ahead of last year at this time, when we had 42 buildings; so, for those of you who have not registered, we are going to start drafting orders that will impose fines, so please get those registrations in.

Revenue: during July, the Loft Board unofficially collected $631,000; and during August, unofficially, almost $103,000.

Litigation: In July, I reported on a bankruptcy case, where the owner of the property filed for bankruptcy and made a motion to sell the property free-and-clear of all encumbrances, including Loft Law compliance. The judge denied that motion; the owner has appealed; the bankruptcy judge certified the appeal to go directly to the Second Circuit Court of Appeals, by-passing an intermediate appeal, which is very interesting. We don't know, however, whether the Second Circuit will actually hear the appeal.

We also received a *mandamus* on Sydney Sol, Ltd. vs New York City Loft Board and Nazor and Mickle. That was case number 2 on today's calendar. That proceeding asked us to decide the case, so we did.

In addition we received two more *mandamus* cases, both from 99 Sutton LLC, asking us to decide an appeal of a staff determination that was issued earlier this year. And that's all I have.

Mr. DeLaney: Two *mandamuses* in just a month? From the same party?

Ms. Balsam: Yes

Mr. Carver asked about discussing the retroactivity memo. **Ms. Balsam** responded that the Board would do that when they discuss the rules.

Mr. Hylton asked if there were any additional questions for Ms. Balsam.

Mr. DeLaney: In October, we're having two meetings? (Yes). Is the expectation that the presentation of cases will be October 18th?

Ms. Balsam: October 18th

Enforcement Plan Overview Part 2

Mr. Hylton reminded the Board that Part 1 of the plan had been presented at the July 20th meeting, and that Ms. Leveille would now present Part 2.

Ms. Leveille re-stated the objective of the Enforcement Plan -- to induce compliance with the legalization requirements of the Loft Law and encourage overall compliance with the Loft Board's rules. She then briefly summarized what had been covered in Part 1 -- basically, what enforcement measures the rules allow for – and stated that Part 2 would focus on the proposed strategies devised to roll out some of the measures.

See attached outline:
Loft Board Enforcement Plan Part 2: Strategy and Implementation

Mr. Hylton: Thank you. Are there any questions for Ms. Leveille?

Mr. Carver: Is the intention for one staff member to actually manage a particular property in this process? Would it be the same person dealing with the owner?

Ms. Balsam: In terms of commencing enforcement, or conferences?

Mr. Carver: For example, in sending out warning letters, you're expecting a response. So for the non-punitive measures, would there be just one person managing the correspondence? Because if you say there are three from each category…that would be 20 properties…

Ms. Leveille: Yes, that's why we're only working with three buildings from each category right now, in the initial stage.

Mr. Carver: In the normal course of your work day, are you working on cases also…?

Ms. Leveille: Yes

Mr. Hylton asked Mr. Carver if there was a point he wanted to make…

Mr. Carver: Well, last month I had mentioned the back-log of cases, and that parties are bringing mandamus lawsuits; and then, by coincidence, you just announced another three or four…

Ms. Balsam: Let me just say that one of those decisions was drafted by Ms. Leveille, who, at the same time, was working on the Enforcement Plan.

Mr. Carver: I'm just saying that the cases are mandatory and this is somewhat optional. I think it's smart to try to pick the right properties. But I just continue to be concerned about the pace of the cases. This is a long-standing problem, long before you got here, and taking resources away from it will only make it worse.

Ms. Balsam: We'll keep an eye on it.

Mr. Hylton recognized **Mr. Schachter**

Mr. Schachter: I'm wondering if there is any way to know, among these buildings, which might have significant health and safety issues that have been sitting for a long period of time, unaddressed. In particular,

in cases where permits have either expired or not been filed, so presumably, the issues haven't been addressed.

Ms. Leveille: While it will require a lot of front-load work, the benefit of the Enforcement Plan is that we have a snapshot of where all these buildings are in the process. And not just numbers, but the status of actual buildings. It forced us to go through all our documents and find out what's going on with buildings we have had no contact with. Once we have this data base in place, it will not be difficult to keep up and to find out about any inspections, violations, and/or complaint issues. And we are still on the front line. We still get calls; we talk to the public, so we do have an idea of what's going on in the buildings.

This Excel spreadsheet -- which I believe you all have access to, so you can see what we know in terms of where the buildings are -- won't be that difficult to keep up, once we have the system in place.

Ms. Torres-Moskovitz: Yes, I have it, and it's really helpful.

Mr. Schachter: I guess what I'm suggesting is that that, as resources are slim, as you're juggling cases and enforcement, that among this population, those should be the priority, the focal point, for the Board (those meaning, buildings with stalled health and safety issues, as mentioned above).

Ms. Leveille: Yes, and we welcome feedback from the Board, in terms of how we should start implementing.

Mr. Hylton: Does anyone have any idea why we would have any appreciable amount of buildings with C of Os and no removal applications?

Ms. Leveille: C of Os without removal pending 11 buildings, and we have about 28 with the C of O application pending. So they are progressing in the right direction, and having 11 without removal pending, in terms of enforcement, what we've suggested is sending a letter to advise them about what they need to do, and if not, then I believe we've agreed that we would initiate Loft Board removals for those who have not responded.

Mr. DeLaney: With regard to the spreadsheet, that should be updated routinely, I would think?

Ms. Leveille: Yes, there are staff members who help with this, and we keep it updated as best we can. But keep in mind that it is an Excel spreadsheet – it's not automatic.

Mr. DeLaney: So what you (staff) has now is more up-to-date than what was sent to Board members a few months ago?

Ms. Leveille: Yes.

Mr. DeLaney: So, for it to be a useful document for us, it should be circulated…every couple of months.

Ms. Balsam: Would you want the actual spreadsheet? Quarterly? Is that OK?

Mr. DeLaney: Yes, sure.

(**The Board agrees**. Quarterly)

Mr. DeLaney: Sometime earlier this year at a Board meeting, we had a presentation about the mapping project. How is that doing?

Mr. Hylton: We are in the process of redesigning the Loft Board's website, and that will part of that project, so it would be counter-productive. Also, the staff who initiated that project are no longer involved in it but we are still moving ahead with it.

Mr. DeLaney: In the interim, is there something I could look at:

Ms. Balsam: Yes. And to the extent that I can, I have been updating the maps, so that when it is put on the new website, it will, hopefully, be accurate.

Mr. Hylton: Thank you very much Ms. Leveille. And now we'll take a few minutes' break.

Resuming after the break

Rules:

Mr. Hylton: We are now going to discuss rules, and in the interest of time, and at the request of some Board members who really do have to go, we're going to try to adhere to a 15-minute time frame as closely as possible.

Ms. Balsam: I want to start the discussion today with the memo. The Board had asked whether or not the rules could be retroactive. One of our summer interns, Trishawn Raffington, did a very good job researching this and wrote a memo giving an overview of the cases, basically saying that there's a Supreme Court case that seems to say no, but there are Federal and State cases that say yes. So, I think it's up to the Board what it wants to do.

Mr. Carver: So I have some questions. I think at the moment, none of the rules, or the proposed changes, are intended to be retroactive, is that correct?

Ms. Balsam: Yes, that's correct.

Mr. Carver: By the way, this is very well done. But there was very little New York authority. There was one appellate division case and one lower court case. I'm just concerned that we're not necessarily getting a full or right answer without a higher case. Is that just a consequence of that issue not having gone up there?

Ms. Balsam: Correct. She did very extensive research; so, if there had been a Court of Appeals case, she would have found it.

Mr. Carver: Also absent from the memo is, are there any other areas of law that would also impact the conclusion? For example, is there some line of Constitutional cases that would impair her analysis?

Ms. Balsam: I believe she did touch on that, though I don't recall exactly where. But one of the factors considered in determining retroactivity and whether or not to apply it is whether or not parties have relied on

certain rules as they were at the time the proceedings commenced. It is in there somewhere. But that is definitely a concern, and something for the Board to consider.

Mr. Carver: Ok. I just wanted to be sure we were hitting all the bases. Thank you very much for this; it's really helpful.

Mr. DeLaney: Is this considered a public document?

Ms. Balsam: Yes. I guess.

Ms. Balsam: We're talking about it here, so….It's attorney work product. It's just an overview of the cases.

Mr. Hylton: It's informational

Ms. Balsam: She's not giving an opinion; she's saying this is the state of the law. If there was an opinion, I might feel differently. We don't need to make any decisions today, but it's something for the Board to think about (meaning, retroactivity).

Mr. DeLaney: Well, I don't know what's currently out there, being dealt with at OATH, for example. One of the proposals we discussed with regard to changing the burden of proof in incompatible use, obviously, the question is, if we were to adopt that, how would that affect cases in the pipeline? I can see that generating considerable controversy, given that, at the moment, no new applications are being accepted. If we decide nothing is retroactive, then these would all be in place if/when the curtain ever comes up, and we start accepting new applications.

Ms. Torres-Moskovitz: I agree

Mr. Roche: Ms. Balsam, I greatly respect your opinion. Do you have any thoughts to add on this?

Ms. Balsam: I think there's precedent out there that would support it, if the Board wanted to say that some of the rules are retroactive. But I think it's dangerous. You could end up with a lot of people relying on a rule that's supposed to be retroactive, and it goes to court and is overturned. So…could we do it? Yes. Is it risky? Yes. That's my opinion. So, I think it's something the Board really needs to think about.

Mr. Hylton: Wasn't there a Supreme Court case about this?

Ms. Balsam: Yes, there is a United States Supreme Court decision mentioned in the memo. The Court said that the enabling legislation for the agency passing the rules would have to provide for the agency to make retroactive rules. However, despite that, there seem to be lines of cases where agencies are doing it anyway. It could be that no one sought to challenge it further. That's why I think it's risky.

Mr. Barowitz: So we can get away with it, as long as some lawyer doesn't challenge it somewhere down the line. And it probably would be challenged, as they seem to challenge everything.

Ms. Balsam: Can just make a point? It's lawyers representing clients, who are challenging. It's not the lawyers.

Extensions:

Ms. Balsam: In terms of extensions, I did send everyone the draft, more than two weeks before. One thing I want to point out: I included something that the Board had touched upon but had not really come to a consensus on. On page 3 – and I'm not married to any of this language, but as there had been a big discussion about the amounts of time requested and granted – I included the concept of an owner having to include some kind of time estimate from an architect or engineer with their application for extension. I understand that presents problems for owners, as they may not have access to all the units, but I just wanted to put something there as a place-holder, to remind the Board that there were differing views on this. It's something that wasn't there before and that we hadn't discussed in advance, so I wanted to point that out. The rest, I think, is pretty much everything we had discussed, in terms of prospective changes to be made to the rule. So if there are any questions…

Mr. Carver: I had a few issues. Regarding the architect saying what the time frame would be. That's very interesting in that it's coming with someone who has some professional basis for that assessment, and not just the owner. But do you want to outsource that to someone else? In other words, do you still have ultimate control (referring to the proposed wording of the rule): Is the wording, "you 'shall' " or "you 'may' "?

Ms. Balsam: "May." It should be "may."

Mr. Carver: Right, you should still have some oversight. The second issue is at the top of page 1. We'd giving owners 30 days from the effective date of the rule to make an application for those who are currently out of compliance. That's somewhat of a short time period, if you don't have notice that the rule is about to take effect. Would there be some way of keeping the Bar informed as to where the adoption of the rules is in the pipeline? Because if someone has to have an architect give a timeline, having only 30 days to do that, without any notice, could be hard to do. One solution would be to make the period longer; the other would be to have a way to communicate to the owners' attorneys that the "gun is about to go off," to start your "sprint," so to speak.

Ms. Balsam: The City has a website: New York City Rules (http://rules.cityofnewyork.us/content/welcome-nyc-rules), where all the proposed rules, past rules, comment periods, all the information about rule-making is on New York City Rules. Any agency involved in rule-making is required to submit/ post the proposed rules, the final rules, as well as publishing in the City Record. So that's one thing. We are also required to put copies of the rules on the website, but we could add information to the website, too – something we haven't done before – saying that the Board has passed a rule that will become effective on a certain date. So, are you talking about something more than that? And if so, what form would you like that to take?

Mr. Carver: I don't know all the details of the process, but it's possible that not every agency's rules take the same amount of time at each stage of the pipeline, or am I wrong about that?

Ms. Balsam: Basically, what would happen here is that the Board would adopt a final rule; we would publish that in City Record and post it to New York City Rules, and the rule becomes effective 30 days after that. Then, the owners would have another 30 days after that, based on this rule. So, if they're in the loop and following what's going on…

Mr. Carver: So this is after the comment period and all of that?

Ms. Balsam: Oh yes, this is at the very end of everything.

Mr. DeLaney: The point is well taken. If all of the sudden, you've got 300 owners of registered IMDs, all of whom think they have reasonable ground to apply for an extension, trying to get the experts to supply the necessary documentation in 30 days, it would be like the gold rush. But given that it's the case that the loft bar is pretty small on both sides, I would think that it's partly your job and that of learned counsel to make the owners aware that this might be coming. The only question is – in state legislation, there are times when the act takes effect immediately, and there are times when it takes effect 180 days from the date of signing. I know in city rule-making, it can take effect right away if the mayor or someone makes a declaration/ statement of need. But is there a similar mechanism that would have allowed a rule to take effect in 60 days rather than 30 days?

Ms. Balsam: Yes, we can always make it longer.

Mr. Carver: I'm just trying to be sure that, if we do this, we can make it work for everyone. As opposed to squeezing it, so that some worthy applicants won't fit in.

Ms. Balsam: Yes, I understand what you're saying. Again, I just threw this out there.

Ms. Torres-Moskovitz: There's an application, and they get 30 days. How difficult is that application to complete?

Ms. Balsam: Currently, it's an application form to which they attach various documents that attest to compliance with the statutory standards – which are circumstances beyond their control and good-faith efforts. There's usually an affidavit, there's supporting documentation. If the rule goes through the way I proposed, they would also need a statement from an architect. Many already submit statements from architects. Not being on that side of the coin, it's hard for me to know how long it takes. I would assume for those that are very "together," it's a relatively short period of time.

Mr. DeLaney: That engineer from Warren Street took three months.

Ms. Balsam: Yes, that's true. That's a good point.

Mr. DeLaney: As we reviewed in July, we tightened up the extension provision significantly from the way it was in the free-wheeling 90s. Now, we're going to loosen it a little bit. But not, as I understand it, changing the grounds for which an extension would be granted, which are still fairly minimal. But I agree that if we give a 30-day grace period that anyone with a worthy claim will be able to amass that, and hopefully won't be crowded out by those without good grounds just taking a pie-in-the-sky shot.

Ms. Torres-Moskovitz: To get that information out to people – they're all on track to get a C of O, but some of them have stalled, right? So, if there was awareness that this was, potentially, going to be voted on, they could prepare for this happening. They're supposed to be preparing anyway, right?

Ms. Balsam: Yes. Certainly for the owners who are actively pursuing legalization and are out of compliance for legitimate reasons, this should be relatively simple, because they're doing it anyway. For those who are stalling, it would be hard.

Mr. DeLaney: My question is about the wording on page 3 [(3)(ii)] "The owner or responsible party must serve a copy of the extension application on the occupant of each IMD unit…" Residential occupants are affected parties?

Ms. Balsam: Yes

Mr. DeLaney: What about commercial or manufacturing tenants?

Ms. Balsam: This is just a rephrasing of what's already there. If you look at what's in blue above it that's been crossed out…I just made it the active voice instead of the passive. I just reconfigured what was there. If you want to add for commercial and manufacturing units, we certainly could. I don't know why they would be concerned about whether or not the owner has a code-compliance extension to legalize the residential portions of the building.

Mr. DeLaney: I'll give it some thought. It's the first time I'm seeing it. And on page 4: (He reads (4)(i), which states that the Executive Director will promptly decide the first two applications for extensions, but it would be up to the Board to approve any additional extensions after that). But if I've missed all four deadlines, I can file one application that applies to all four.

Ms. Balsam: Yes, that's actually how everybody does it now. That isn't exactly how the rule is drafted, but

Mr. DeLaney: So how do we do this going forward?

Ms. Balsam: I envision that they will still be applying for extensions over the same deadlines, but let's say they were given until February 15 to get a permit. They won't get the permit by February 15, but will probably be able to get it by March 15. So they're going to apply for an extension to kind of "move" that deadline. The ultimate amount of time stays the same, but within the timeframes, they could move around – move things. That's how I contemplate it working.

Mr. DeLaney: If I'm an owner, and I make an application for an extension of a permit and also the other deadlines, that's one… I'm just trying to figure out when there would ever be more than two. I think it could only be if you actually enforce the provision that each application can only be for one deadline.

Ms. Balsam: We had a building where they had to get Landmark approval, and were stalled on that. And once they got that, another issue came up and they had to go the BSA. So that would be two. Does that come up often? No. But….I think it's a good point.

Mr. DeLaney: So let's give it some thought.

Mr. DeLaney: So, I'm an attorney advising tenants in a building that's a registered IMD unit, and for whatever reason, the tenants are withholding rent because the owner is not in line with the code compliance time table. There's some debate as to whether it's a large number or not, but now the landlord has applied for an extension. So I advise my clients that they could find the owner back in compliance and they would have to start paying rent. But that would come to pass only if the extension is granted?

Ms. Balsam: That is correct.

Mr. DeLaney: And that would be applicable at that time; it's not retroactive?

Ms. Balsam: That's right.

Mr. Carver: Would that date be as of the granting the application or the filing the application?

Ms. Balsam: We usually do it from the filing. The law says you can have an extension for X amount of days from the effective date of the law. So for the purpose of an extension application, we count the effective date of the law as the date the application is filed. That's just been our policy.

Reasonable access/ access application:

Ms. Torres-Moskovitz: On page 1(i), where you propose to take something out because it was defined in Chapter 1. I just want to be sure you're going to reference where that is.

Ms. Balsam: Ok. I'm not big on cross-references.

Ms. Torres-Moskovitz: Or leave it in. Because I asked you about it, otherwise I wouldn't have known where to find it.

Ms. Balsam: Ok, I'll insert something.

Ms. Torres-Moskovitz: And then there was something under Statutory Standard, where examples of circumstances beyond the owner's control are given. Regarding the third example – denial of access to an IMD unit – you had explained to me that there's an access application. So that whoever is reading this understands what defines "denial of reasonable access," would you explain that to the public?

Ms. Balsam: In such a case, where the owner is claiming an extension due to denial of reasonable access, we usually require them to have filed an access application. Or, they could go to court. That's another option. There has to be some objective showing that they tried to get access. They can't just say, I asked, and I didn't get access. It depends on what the body of proof is. If they show the notices, and they have an email from an attorney, saying my client will not give you access, that would be something. Does that answer your question?

Ms. Torres-Moskovitz: Right, I just wanted clarification.

Ms. Balsam: Tenants are required to give access, and it could be that the owner couldn't go forward because they couldn't get access. But somehow, they have to prove that. One way is to go to court; another way to prove it is to file an access application; another way to prove it would be something from the tenant or his/ her attorney, saying we're not giving you access. And I see those emails. We get those. Then it becomes a question of whether or not it's reasonable. And that would be a call we would have to make.

Ms. Torres-Moskovitz: So it could be an email, not just the access application.

Ms. Balsam: It could be. If you have an email from the tenant saying, I'm not letting you in, what else would the owner have to show? Whether or not it's reasonable… there could be a good reason why the tenant is not allowing access. But these are resolved on a case-by-case basis.

Ms. Torres-Moskovitz: Landlord's make sense, because it's a process with the City. An IMD unit, not getting access….It's how many IMD units are in the building….

Ms. Balsam: If the owner is filing for an Alt 1, that's supposed to be for all of the units in the building. If there are 100 units in the building, and they've had access to 99, they still can't fil the Alt 1 until they've had access to all 100.

Ms. Torres-Moskovitz: I guess my point is that there should be some kind of history, some record, that the owner has tried more than once, and has not been able to gain access. He can't just say, I tried, but they won't let me in.

Ms. Balsam: Yes. There is a requirement that they attach supporting documentation.

Amount of time to obtain a C of O:

Mr. Carver: On page 4, (4)(ii): I'm not sure what this means. Is it that no extension can ever go beyond that period?

Ms. Balsam: What is it to complete the process: 30 months? So the Board could grant extensions up to 30 months. And then, if they've achieved 7B compliance, they could get another two years to obtain a final C of O.

Mr. Carver: I was worried that if we've already passed that date now, that no one would ever benefit from this new rule. The time periods would start a-new?

Ms. Balsam: From the date of the application.

Mr. Carver: Ok, I see.

Ms. Balsam: But if we get a huge influx, we might have to make an adjustment for that. If we got 300 applications at once, we might have to think about that.

Mr. Carver: Ok, so I want to think about this a little more, and may have more questions at the next session.

Ms. Balsam: Well, let me just make perfectly clear that next week, we are discussing protected occupancy.

Mr. DeLaney: With regard to that, if we get through protected occupancy, would we then go on, or that's all we're going to do next session?

Ms. Balsam: Do you honestly think we'll get through it?

Mr. DeLaney: I don't know; I just want to know what to prepare.

Ms. Balsam: I think I said protected occupancy and then added a couple of other brief items, just in case we do get through it. I think the extension rule is a longer discussion, so it would probably be better to come back to it. But I did attach to the packet I sent to everyone a few things that aren't problematic.

Mr. DeLaney: If we get great headwind on protected occupancy, we could look at penalties as well. And then come back to look at everything

Ms. Balsam: Yes, we still have some narrative statement things…

Mr. DeLaney: By November? Ok, thank you.

Ms. Torres-Moskovitz: And maybe we could send everyone the milestone chart you mentioned, with the estimated time in relation to what the law is?

Ms. Balsam: Yes, we can send that out.

Mr. Barowitz: We're meeting at 2PM?

Ms. Balsam: Yes. This is rules.

Discussion/comment by various re time and place of next meeting. It will be on the web site.

Mr. Hytlon: This will conclude our September 20, 2018, Loft Board meeting. Our next public meeting will be held at 280 Broadway in the third floor conference room, on September 27, 2018, at either 12:30PM or 2:00PM.

The End