MINUTES OF PUBLIC MEETING
New York City Loft Board Public Meeting Held at
Department of Buildings
280 Broadway, Third Floor

October 19, 2017

The meeting began at 2:10 p.m.

Attendees: Robert Carver, Esq., Owners' Representative; Elliott Barowitz, Public Member; Richard Roche, Fire Department ex officio; Charles DeLaney, Tenants' Representative; Daniel Schachter, Public Member; and Chairperson Designee Renaldo Hylton.

Absentees: Robinson Hernandez, Manufacturers' Representative;

INTRODUCTION

Chairperson Hylton welcomed those present to the October 19, 2017 public meeting of the New York City Loft Board.

VOTE ON September 21, 2017 MINUTES

Motion: Mr. Roche moved to accept the September 21, 2017 meeting minutes. Mr. Carver seconded the motion.

Members Concurring: Mr. Carver, Mr. Barowitz, Mr. Roche, Mr. DeLaney, Chairperson Hylton (5).

Members Abstaining: Mr. Schachter (1).

Members Absent: Mr. Hernandez (1).

VOTE ON September 28, 2017 MINUTES

Chairperson Hylton clarified his opening statement, where he stated "this meeting is primarily going to involve discussing lawful changes to the Loft Board rules." **Chairperson Hylton** clarified that when he said "lawful" he meant changes to the Loft Board rules.

Mr. Carver commented that towards the end of the minutes, the minutes state that he called the rules "creepy", but he meant creaky.

Motion: Mr. Carver moved to accept the September 28, 2017 meeting minutes. Mr. Barowitz seconded the motion.

Members Concurring: Mr. Carver, Mr. Barowitz, Mr. Roche, Mr. DeLaney, Chairperson Hylton (5).

Members Abstaining: Mr. Schachter (1).

Members Absent: Mr. Hernandez (1).

Prior to the Executive Director's report, **Chairperson Hylton** announced that Ms. LeAnn Shelton resigned from the Board and her resignation is effective immediately. **Chairperson Hylton** thanked Ms. Shelton for her ten (10) years of service to the city.

Report of the Executive Director, Ms. Helaine Balsam, Esq.

In terms of changes to the Loft Law, **Ms. Balsam** wanted to inform the Board that Staff continues to be in close contact with the Mayor's Office of Legislative Affairs about proposed changes to the Loft Law. That is still very much alive and they are working on it.

For the failure to file the monthly reports, **Ms. Balsam** reported that for the May 2017 violations and fines, Staff mailed out twenty-eight (28) administrative determinations, four (4) of the owners paid the fines and one (1) called about appealing. We are still within the forty-five (45) day appeal period which ends on October 23, 2017.

In terms of registration renewals, **Ms. Balsam** reported that we have forty-six (46) buildings that still have not registered. The failure to pay notices have gone out and Owners will have until November 23, 2017 to respond.

Ms. Balsam reported that the unofficial revenue total for September was twenty-eight thousand, five-hundred ninety-three dollars, and fifty cents ($28,593.50).

In terms of rule drafting, **Ms. Balsam** reported that Staff is almost done, and would estimate that Staff is ninety-eight (98) percent done with our first pass. **Ms. Balsam** will give the Board members the material that they haven't seen once Staff does one more pass before releasing it to the Board members.

Ms. Balsam reported that the Loft Board was named in two lawsuits this month. One was actually a housing court petition, *Craine v. Dorian Realty Corp.* The tenant wants the owner to remediate mold. The second suit was a hybrid petition, *Kent Avenue Holdings I LLC v. New York City Loft Board*. This is an appeal of a determination that the Board made when the Board denied owner's code compliance deadline extension request. There was a prior net-lessee who returned the building back to owner who then turned it over to another net-lessee. The second net-lessee was claiming it was a "new owner", when in fact it is the son-in-law of the owner. The Board found there was no transfer of title and the new net lessee was not a "new owner".

Ms. Balsam mentioned that the Board members were supposed to have a presentation for the mapping project, but unfortunately the mapping person got called away on an emergency basis. **Chairperson Hylton** responded that this person was called away to Puerto Rico to help with the hurricane disaster project. The Department of Buildings has quite a presence in Puerto Rico. **Chairperson Hylton** mentioned that this presentation will be added to the agenda for next month.

Mr. DeLaney clarified that the forty-six (46) buildings that have not renewed their registrations, those owners have until November 23rd to respond. **Ms. Balsam** responded that those owners have until November 23rd to respond to the failure to pay notices. **Mr. DeLaney** commented that some percentage of owners will fail to pay. When will the failure to register cases start coming to the Board? **Ms. Balsam** responded, in the ideal world, hopefully Staff will get those to the Board members on November 30th. We are scheduled to meet on that date to discuss rules, but we could theoretically add those cases to the agenda.

Mr. DeLaney clarified that twenty-eight (28) administrative determinations were mailed out with regard to the failure to file monthly reports.

Mr. DeLaney noticed that Staff went through a lot of work getting the audio right or differently. **Mr. DeLaney** commented that he knows of at least one Board meeting in the past where the video did not work. Are we making an audio backup of the Board meetings? **Ms. Balsam** responded yes.

Mr. DeLaney mentioned that this was brought up a few months ago, but he asked for some statistics on the number of buildings registered and their locations. **Chairperson Hylton** and **Ms. Balsam** responded that was what the mapping presentation was about. **Mr. DeLaney** responded regardless of the mapping presentation, it would be nice to get a file or a piece of paper with those figures on it. **Ms. Balsam** asked for the exact figures that Mr. DeLaney wants. **Mr. DeLaney** commented that when we discussed this last, he suggested that Ms. Balsam work off of the format that had been distributed every few months by the prior Executive Director. **Ms. Balsam** responded ok, the Board members will have it next month.

VOTE ON APPEAL/RECONSIDERATION CALENDAR CASES

Ms. Cynthia Leveille, Esq., Assistant General Counsel, presented the below reconsideration calendar case for vote by the Board:

1.	141 Spencer, LLC	141 Spencer Street, Brooklyn	R-0352

Motion: Mr. Barowitz moved to accept the proposed order. Mr. Schachter seconded the motion.

Members Concurring: Mr. Carver, Mr. Barowitz, Mr. Roche, Mr. DeLaney, Mr. Schachter, Chairperson Hylton (6).

Members Absent: Mr. Hernandez (1).

Chairperson Hylton tabled the following case prior to vote by the Board:

2.	Karine Lavall	39 Ainslie Street, Brooklyn	R-0353

VOTE ON SUMMARY CALENDAR CASES

Chairperson Hylton tabled the following case prior to vote by the Board:

10.	Marjorie Kouns	15 Minetta Street, Manhattan	TR-1305

Chairperson Hylton mentioned that the remaining cases on the Summary Calendar will be voted on individually.

3.	Michael Brent and Aniwarti Lavett	53 Pearl Street, Brooklyn	PO-0035

Mr. DeLaney has comments regarding this building, but since it comes up again in case number 12, he will wait to comment.

Motion: Mr. Carver moved to accept the proposed order. Mr. Schachter seconded the motion.

Members Concurring: Mr. Carver, Mr. Roche, Mr. Schachter, Chairperson Hylton (4).

Members Dissenting: Mr. Barowitz, Mr. DeLaney (2).

Members Absent: Mr. Hernandez (1).

MOTION FAILED. Will be revisited during the November 2017 Board meeting.

4.	Samuel J. Jesselson	33 Union Square West, Manhattan	PO-0037

Mr. DeLaney has comments, but since it comes up again in case number 7, he will wait to comment.

Motion: Mr. Carver moved to accept the proposed order. Mr. Roche seconded the motion.

Members Concurring: Mr. Carver, Mr. Barowitz, Mr. Roche, Mr. Schachter, Chairperson Hylton (5).

Members Dissenting: Mr. DeLaney (1).

Members Absent: Mr. Hernandez (1).

5.	Ben Pomeroy	473-493 Kent Avenue, Brooklyn	PO-0042

Motion: Mr. Barowitz moved to accept the proposed order. Mr. Schachter seconded the motion.

Members Concurring: Mr. Carver, Mr. Barowitz, Mr. Roche, Mr. DeLaney, Mr. Schachter, Chairperson Hylton (6).

Members Absent: Mr. Hernandez (1).

6.	Sarita Choudhary	473-493 Kent Avenue, Brooklyn	PO-0050

Mr. DeLaney commented that he will vote no on this case, even though it is on the summary calendar. This is yet again a case where the Board allows an application to move through and deemed settled without neither accepting nor rejecting the remaining terms of the stipulation. As he reads the case, the tenant in exchange for protected occupant status, which **Mr. DeLaney** believes should be determined straight up or down, appears to have bargained for protected occupant status at 473-493 Kent Avenue, in exchange for agreeing not to participate in the narrative statement conference. **Mr. DeLaney** is not supportive of the notion of tenants or owners being able to make that kind of bargain in terms of rights that are freely given under the Loft Law or under the Loft Board's rules. Therefore, he intends to vote no.

Motion: Mr. Carver moved to accept the proposed order. Mr. Schachter seconded the motion.

Members Concurring: Mr. Carver, Mr. Barowitz, Mr. Roche, Mr. Schachter, Chairperson Hylton (5).

Members Dissenting: Mr. DeLaney (1).

Members Absent: Mr. Hernandez (1).

7.	Samuel J. Jesselson	33 Union Square West, Manhattan	TA-0223

Mr. DeLaney commented that this is a building that seems to have some issues. In this case, Mr. Jesselson, in good faith finding no evidence of a MDL § 286(12) sale of rights, filed for both protected occupant status in case number 4, PO-0037, and a rent adjustment in case number 7, TA-0223. Low and behold, the owner of the building was able to produce a MDL § 286(12) sale of rights that had been executed apparently in May of 2006. Having this case go forward without fining the owner for failure to provide that MDL § 286(12) sale, wastes time and money on the part of tenants, tenants' attorneys, Loft Board, Office of Administrative Trials and Hearings ("OATH"), and somehow we need to come up with a mechanism where these MDL § 286(12) sales are produced in a timely fashion.

Motion: Mr. Carver moved to accept the proposed order. Mr. Schachter seconded the motion.

Members Concurring: Mr. Carver, Mr. Barowitz, Mr. Roche, Mr. Schachter, Chairperson Hylton (5).

Members Dissenting: Mr. DeLaney (1).

Members Absent: Mr. Hernandez (1).

8.	Ben Pomeroy	473-493 Kent Avenue, Brooklyn	TA-0227

Motion: Mr. Barowitz moved to accept the proposed order. Mr. Roche seconded the motion.

Members Concurring: Mr. Carver, Mr. Barowitz, Mr. Roche, Mr. DeLaney, Mr. Schachter, Chairperson Hylton (6).

Members Absent: Mr. Hernandez (1).

8a.	Nicole Craine	1099 Flushing Avenue, Brooklyn	TA-0229

Mr. DeLaney commented that he will vote against this case as he did when it was up for vote last month and the September 21, 2017 minutes accurately reflect his objections.

Motion: Mr. Carver moved to accept the proposed order. Mr. Schachter seconded the motion.

Members Concurring: Mr. Carver, Mr. Barowitz, Mr. Roche, Mr. Schachter, Chairperson Hylton (5).

Members Dissenting: Mr. DeLaney (1).

Members Absent: Mr. Hernandez (1).

9.	John Gurrin	67 Metropolitan Avenue, Brooklyn	TR-1289

Motion: Mr. Barowitz moved to accept the proposed order. Mr. Carver seconded the motion.

Members Concurring: Mr. Carver, Mr. Barowitz, Mr. Roche, Mr. DeLaney, Mr. Schachter, Chairperson Hylton (6).

Members Absent: Mr. Hernandez (1).

11.	Markus W. Mazza	22 Catherine Street, Manhattan	TR-1308

Motion: Mr. Carver moved to accept the proposed order. Mr. Barowitz seconded the motion.

Members Concurring: Mr. Carver, Mr. Barowitz, Mr. Roche, Mr. DeLaney, Mr. Schachter, Chairperson Hylton (6).

Members Absent: Mr. Hernandez (1).

12.	Michael Brent and Aniwarti Lavett	53 Pearl Street, Brooklyn	TR-1313

Mr. DeLaney commented that he will vote against this case and similarly case number 3, PO-0035. This building has a curious history, the owner registered three (3) units, not including the unit in question, in August 2012 and then in September 2015, owner purchased the rights in this unit, allegedly as a MDL § 286(12) purchase from someone named Holly Baxter. At the same time, owner goes out of his way in its papers to claim that the unit in question was not occupied residentially during the window period. **Mr. DeLaney** is confused as to how you can buy the rights of a tenant under MDL § 286(12) when the unit was not residentially occupied during the Window Period. Again, **Mr. DeLaney's** position is once an application is filed, whether it is an application for coverage, whether it is filed by all of the alleged residential occupants in the building, or one residential occupant who alleges there are however many additional residential units, that the party who filed the application should not be allowed to withdraw that application. The building either is or is not an interim multiple dwelling, the units either were or were not used residentially during the window period. This is not a voluntary program and in this instance there is just something that just doesn't make sense. **Mr. DeLaney** will be urging the Board as it looks over its rules over the next few months to consider looking at whether or not the Board should be proactive in that the Board has an affirmative responsibility to not only the parties in a given building but also to New York City and the public to make up or down determinations on whether or not the building is an interim multiple dwelling rather than having these kinds of situations.

Motion: Mr. Carver moved to accept the proposed order. Mr. Schachter seconded the motion.

Members Concurring: Mr. Carver, Mr. Roche, Mr. Schachter, Chairperson Hylton (4).

Members Dissenting: Mr. Barowitz, Mr. DeLaney (2).

Members Absent: Mr. Hernandez (1).

MOTION FAILED. Will be revisited during the November 2017 Board meeting.

13.	97 Wyckoff Ave. Tenants	97 Wyckoff Avenue, Brooklyn	TR-1342

Motion: Mr. Barowitz moved to accept the proposed order. Mr. Carver seconded the motion.

Members Concurring: Mr. Carver, Mr. Barowitz, Mr. Roche, Mr. DeLaney, Mr. Schachter, Chairperson Hylton (6).

Members Absent: Mr. Hernandez (1).

VOTE ON MASTER CALENDAR CASES

Ms. Balsam presented the below master calendar case for vote by the Board:

14.	Joel Saladino, Pablo Castro, Veronica Schwartz, Frank Hughes, Julian Asfour Jean Costello And 401 Wythe Tenants	401 Wythe Avenue, Brooklyn	TR-1033 TR-1158

Mr. Roche commented that although he believes the Loft Board staff did some outstanding work on this case, he personally, and maybe a few other Board members, have some questions that they would like some time to sort out in their own minds and do their own research. **Mr. Roche** moved to table this case until next month. **Chairperson Hylton** asked for a second, but **Mr. Barowitz** interjected and stated that we are out of order, because only the Chair could table. Staff cannot make a motion to table. Either the Chair will agree to table or not, but we cannot as a Board. This is according to Robert's Rules. Either we can all vote no in which case that would have the same effect. **Chairperson Hylton** asked the other Board members if they had the same feelings as Mr. Roche. **Mr. Carver** and **Mr. Barowitz** both supported that. **Chairperson Hylton** granted the Board members' wishes.

Chairperson Hylton tabled this case.

Mr. DeLaney commented that in conjunction with tabling the case, he thinks it would be very helpful if some of the interplay of the various definitions that were discussed in the Board's private meeting, with regard to definitions of things where particularly there are differences of meaning in the Multiple Dwelling Law versus the Zoning Resolution (ZR), if the staff could try to prepare a memo addressing that outside of the rather extensive discussion that the OATH Judge in this case held. **Ms. Balsam** responded sure.

Mr. Michael M. Bobick, Esq., Assistant General Counsel, presented the below master calendar case for vote by the Board:

15.	Andi Rishoi, Anna Holmgren, Kelsey Knutson, John Cannon, Jaymee Domingo, Ximena Garnica And Shigekazu Moriya	58 Grand Street, Brooklyn	TR-1252

Motion: Mr. Carver moved to accept the proposed order. Mr. Schachter seconded the motion.

Members Concurring: Mr. Carver, Mr. Roche, Mr. Schachter, Chairperson Hylton (4).

Members Dissenting: Mr. DeLaney (1).

Members Abstaining: Mr. Barowitz (1).

Members Absent: Mr. Hernandez (1).

MOTION FAILED. Will be revisited during the November 2017 Board meeting.

Ms. Leveille presented the below master calendar case for vote by the Board:

16.	Celia Gong and Man Kuen Gong	241-249 Centre Street, Manhattan	TR-1283

Motion: Mr. Barowitz moved to accept the proposed order. Mr. Roche seconded the motion.

Members Concurring: Mr. Carver, Mr. Barowitz, Mr. Roche, Mr. DeLaney, Mr. Schachter, Chairperson Hylton (6).

Members Absent: Mr. Hernandez (1).

Chairperson Hylton tabled the following case prior to vote by the Board:

17.	228 West Houston Street, LLC	228 West Houston Street, Manhattan	LE-0679

Chairperson Hylton mentioned that Staff is insisting that the landlord withdraw an existing Alteration Type 1 application, which exists right now for residential purposes, before the Board moves forward. **Mr. DeLaney** asked for the Chair to clarify. **Chairperson Hylton** clarified that the owner is claiming that the building is commercial. However, there is an existing Alteration Type 1 application that is permitted for residential purposes. Staff is insisting that owner withdraw that application before the Board votes. **Mr. DeLaney** is sorry that he didn't get to ask questions during the private session.

CONTINUED DISCUSSION OF THE DRAFT OF THE PROPOSED RULES.

Chairperson Hylton continued the proposed rule discussion, and turned to Mr. Carver for his comments regarding proposed rule § 2-17 and § 2-18.

Prior to discussing Chapter 2, **Mr. DeLaney** mentioned that at the last rule meeting that we held last month, in addition to starting to discuss Chapter 2, we kind of finished our first pass through Chapter 1. **Mr. DeLaney** asked, can the staff create a "as it stands now version of where we are" with Chapter 1 and distribute it to the Board in the next few weeks? **Ms. Balsam** responded that she would be happy to do that, but we are not quite done with Chapter 1 because we still have an outstanding issue for § 1-30 which was the settlement issue. It is not quite finished but she can certainly send everything else.

For § 2-17, **Mr. Carver** commented that a "responsible party" is defined to include a lessee and yet here in this section we are enabling a responsible party to in essence determine which occupant would have rights under this section. He is not sure staff meant to use responsible party in this section, and he thinks staff meant to use owner or others claiming to be in the shoes of the owner. Staff's definition of "responsible party" is too broad, at least for this section. **Mr. Barowitz** commented that he absolutely agrees and thinks it should say "landlord", "owner" or "manager/managing agent". **Mr. Barowitz** further commented that he never liked the term "responsible party" even when it first came up. **Mr. Carver** moved on and commented that the other parties who are in the definition, might have the rights of an owner but that depends on their particular circumstances, is it a contract between the owner and the parties, or court order or is it the law. He knows the rules kind of say that, that those other entities have powers, unless they actually do have the power by contract, by court order or by law. Maybe something along the lines of owner or others claiming powers through the owner. **Ms. Balsam** mentioned authorized representative or authorized representative of owner. **Mr. Carver** responded just something to be thought over. **Mr. Barowitz** commented that he believes § 2-17(c) should come earlier. **Mr. DeLaney** commented that before we move on, for the term "responsible party", **Mr. DeLaney** asked Mr. Carver if he would include owner or other authorized individual. **Mr. Carver** responded that he is not sure that he would use those words. **Mr. DeLaney** asked, in general, who would you be looking to include? **Mr. Carver** responded anyone who has the power of an owner. **Mr. DeLaney** responded so that could include a net lessee. **Mr. Carver** stated yes. **Ms. Balsam** mentioned that staff accepts registrations from net lessees now. **Mr. Carver** commented that he is concerned about the owner who often assigns its rights, when it gets a loan for instance, and the terms of that assignment may or may not have the power to assign. That's why he is afraid to specify who other than the owner specifically has the power. They would have to prove their power somehow. **Mr. Carver** doesn't think it will come up much, but he thinks it is a flawed definition for purposes of this section. **Ms. Balsam** mentioned that staff will discuss it internally and come back with a proposal for the Board. **Mr. Carver** had some notes written down, owner or other holder of the owner's interests.

Ms. Balsam clarified for the Board that as to when primary residency needs to be demonstrated, she thinks the unit should be the occupant's primary residence certainly when the Board finds protected occupancy. Normally, these things look back in time and people are coming in with hundreds of documents that they were there during the window period. It's really a distinction without a difference, except for Mr. Hughes because he is the exception, and Ms. Marriner-Smith and those others who have

moved out and admitted that they have moved out. It seems to her that it is when the Board is awarding them that status. Staff can clarify or leave it vague. **Ms. Balsam** further commented that she does not want to go too far because you then run the risk of being accused of being *ultra vires* because the law doesn't specifically say it. The law says "continues" and to **Ms. Balsam**, she interprets that as they were living there before and now they are living there still. **Mr. Carver** responded that the rule should say that if that is the intent, there is no harm if that is what it is meant to do. **Ms. Balsam** responded that it is up to the Board. Looking at the legislative history of the 1992 amendment, and the way that the language is worded in that section, that's her opinion and it is really up to the Board. **Ms. Balsam** feels strongly about people needing to live there to be protected. She doesn't think you should live somewhere else and be protected. **Ms. Balsam** asked would you propose adding language that says what? **Mr. Carver** responded the points in time that Ms. Balsam just described. **Ms. Balsam** asked, so upon application and awarding and board decision? **Mr. Carver** responded well you said that primary residence was required at some time in the past as well. **Mr. Balsam** said yes. **Mr. Carver** would imagine that should be incorporated in this rule also. **Ms. Balsam** asked what everybody else thinks. **Mr. DeLaney** commented that he finds § 2-17 a little hard to read. It would be helpful if the staff could take a step back and explain what the intention is. **Ms. Balsam** thought she did that the last time, but she could do it again. The first thing is that somebody could be registered, if somebody who has control of the building decides to register someone, they can certainly register people as protected occupants. If the Board issues an order, then that person is a protected occupant having the board make that determination, so here are the factors that we thought were in important, that the person uses the unit as their primary residence. We have some information here as to factors that could be considered to make that determination, and we could certainly add or subtract. They also had to have resided in the unit as their primary residence on the effective date of the law and lack of consent of the responsible party does not affect the right of a person to protection under Article 7-C. **Ms. Balsam** mentioned this is from the old § 2-09(b). That's really not a change. So if someone was there on the effective date of the law and using the unit as his or her primary residence on the effective date of the law, the owner cannot say that the occupants are not protected because they do not need consent. That is § 2-17(d). § 2-17(e) is for the people who came in after the effective date of the law if the owner consents to them being there and residing there, then they can be protected occupants, and here are some factors for the Board to consider in making that finding. Really, § 2-17(c) is the biggest change. **Ms. Balsam** further mentioned that we are trying to capture people that are actually living there. **Mr. Carver** commented § 2-17(e) is a change. **Ms. Balsam** responded no, that is there now. That is in the section now. It is just re-worded. **Mr. Carver** responded you scraped the prime lessee trumps all other. **Ms. Balsam** responded oh yes, that's kind of § 2-17(c). § 2-17(e) captures the section about landlord consent. § 2-17(d) and (e) talk about consent. § 2-17(c) is really the one that changes § 2-09(b)(4), at least in her mind in terms of drafting. **Ms. Balsam** confirmed that staff scraped the prime lessee trumps all others language. **Ms. Balsam** asked Mr. DeLaney if that helped clarify things. **Mr. DeLaney** responded looking at § 2-17 just with regards to protected occupant versus eligibility of coverage for the unit, and he knows that we have kind of been headed in that direction since the 2010 amendment, in part because we felt we had the right to address protected occupant issues even during a period of time such as this when no coverage applications can be submitted. He needs to give this some more thought with regard to his overall sense of how the Board should be proceeding determining what is a covered unit. **Ms. Balsam** responded that this section is not about a covered unit, this is about who should be protected. **Mr. DeLaney** commented that he understands that but the whole notion of the primary residence test being a part of determining protected occupant status is still an issue that he is looking at and is not comfortable with. **Ms. Balsam** replied that's fine. **Mr. DeLaney** further commented particularly in a week where he doesn't have to think about basements and windows and court yards. He hopes to have his thoughts clearer in a week from now. **Ms. Balsam** said ok, we can certainly discuss it in a week from now, but if there are other comments that we could get on the table now for people to at least think about in the next week, she thinks that would be very helpful. **Mr. Carver** mentioned that he has many more.

In § 2-17(c), **Mr. Carver** mentioned that staff is listing factors to determine primary residency. **Mr. Carver** asked why have you not just wholesale adopted the rent stabilization section, which is a big body of law. In other words, the courts have already, over many years, determined what factors to use. There is a statute and includes tax returns, vehicle registration, driver's license, other documents filed with public agencies, how many days you actually resided there. Considering that the Rent Stabilization statute and the Loft Law have similar goals, and they interplay all the time, it seems to him, why not just cross reference the Rent Stabilization statue. **Ms. Balsam** doesn't think it the same thing. For one thing, in the

regular rent stabilized world, you only have to use the unit as your primary residence after you sign the lease. That's certainly not true here, where people are living there already in the loft world. These factors are based on our cases which the Board has already said are some of the factors to consider. That's why we chose to do that. If the Board thinks we should go that way, **Ms. Balsam** is certainly not opposed to that. **Mr. Carver** mentioned that tax returns have appeared in our cases, but is not listed in this section. **Ms. Balsam** replied she doesn't think the Board has actually ruled on tax returns one way or the other. **Mr. Carver** brought up the case of Rishoi (58 Grand Street, TR-1252), which failed the last time but **Ms. Balsam** mentioned that case has not gone through yet. That case has been tabled twice and voted on twice. **Mr. Carver** replied the proposed order does reference tax returns. **Ms. Balsam** reiterated that the case has not gone through. **Mr. Carver** mentioned that we are talking about rules, and the question is whether or not tax returns are a good idea. **Ms. Balsam** stated if you want to add that as a factor, let's discuss it as a Board. **Mr. DeLaney** commented under what Mr. Carver is discussing in rent stabilization, those are the grounds for an eviction proceeding for someone whose not using a rent stabilized unit as his or her primary residence. **Mr. Carver** responded that is probably true, although the relevance he is not sure of. **Mr. DeLaney** replied we have an existing rule that talks about grounds for eviction from an IMD and he doesn't know if we've gotten to redrafting that. **Ms. Balsam** replied no, but we have re-drafted to put it in plain language.

Mr. DeLaney's position is that primary residence use should not be an issue in determining whether or not the unit is covered. Then when we split apart after 2010, the notion of the unit being covered versus who is the protected occupant, there was a desire to start to apply some kind of primary residence test to determine whether or not someone could be a protected occupant, which he is opposed to. In his opinion, the proper order of things is to determine… this was one of the first big court cases where a rather well known artist whose unit was found to be covered, but there was the issue that the unit wasn't the artist's primary residence. The tenants challenged the grounds for eviction and lost. But that was grounds for eviction, not grounds for determining whether or not the unit is covered under the Loft Law. It was kind of settled that a unit that might or might not be someone's primary residence still had to be registered and the registered unit back in the day also automatically made that person the protected occupant. Then, the primary residence issue was a ground for eviction, and as **Mr. DeLaney** has learned over the years, there are times where you have a tenant who has another address, whether it is a weekend home or registered at their parents address for some tax or parking, auto insurance benefit. Even if you can successfully prove that the IMD unit was your primary residence that becomes so expensive and in many instances people will fold simply because they cannot afford to make that fight. Now in the last few years, we've seen the concept of primary residence work its way into coverage and protected occupant issues where, in his opinion it doesn't belong.

Mr. Carver stated but we are dealing with a draft rule that if it goes forward, should be tightened up. **Mr. Carver** thinks the courts have said that the Rent Stabilization Law and the Loft Law should be read together. He thinks there is legislative history on that and city council was required to pass a resolution to stabilize the units covered under the Loft Law. So this kind of legislative affirmation for rent stabilization should at least, it's some authority to at least consider some of the factors, and he supposes even if you don't accept that the factors should be exact or adhere to the factors exactly, certainly the factors should make the list. We are saying no one factor should control, that's fine, but where you say on your tax returns you live, where your car is registered, where your license is from, all of those things are factors. **Mr. Carver** is not saying the case is closed after one factor, but why not look at the stabilization code, look at those factors and bring them into the list. Not as conclusive if you do not want to go that strongly, although **Mr. Carver** thinks we may be compelled to follow the stabilization code on this issue. There may be some court cases on this. **Ms. Balsam** is ok with taking a look at the other factors and incorporating some one way or the other. **Ms. Balsam** addressed Mr. DeLaney's comment and made it very clear that primary residence is not a factor in determining coverage. The term "primary residence" does not appear in MDL § 281, but it does appear in MDL § 286 and that's a distinction. **Ms. Balsam** doesn't know exactly what case Mr. DeLaney was referring too, but to her, 1992 is the applicable date here. Anything that happened before 1992 in terms of talking about primary residence, **Ms. Balsam** thinks the legislative enactment in 1992 was in reaction to cases that held that primary residence has no place under the Loft Law. Primary residence is only used to determine protected occupancy. It is a hard sell to say people should be entitled to this really great protection if they don't actually live there. But the Board will decide. **Mr. DeLaney** mentioned that our rules as currently written provide for that because the failure to use the unit as a primary residence is a ground for eviction. **Ms. Balsam** responded but the

question is if we know for a fact that the person isn't there, take Mr. Hughes for example, why would we say you are a protected occupant only to have the landlord go to court and evict him. Why should the Board do that? **Mr. DeLaney** commented Hughes is in the case we didn't decide today, is an issue that he needs to look more closely at. **Ms. Balsam** replied that she is only using him as an example. We can use Ms. Marriner-Smith because she is a similar example and that case has been decided on already. She lived out in Southold, Long Island. **Mr. DeLaney** responded Ms. Marriner-Smith is a set of facts that he found clearer then Mr. Hughes. **Ms. Balsam** stated that in terms of Ms. Marriner-Smith, she is not there, she is renting it and has been for years and years, admitted that she didn't leave there. **Mr. DeLaney** added she divided her unit into two units. **Ms. Balsam** commented what is the rationale behind giving her protection. **Mr. DeLaney** responded in that instance he couldn't find the rationale. **Ms. Balsam** replied this rule is basically trying to incorporate that line of cases. If you are not there, you shouldn't be protected. But if you are there, you should, and whether or not you are the person that leased the unit, she doesn't know if that matters for the Loft Law. **Mr. Barowitz** asked what does "being there" mean? In some cities, some states, it is six (6) months. In one instance, some occupant went to California to teach for two years and she was still found to be the protected occupant of her unit even though she might have subletted or didn't sublet. **Ms. Balsam** responded that was Ms. Pels and she didn't sublet, she came home during vacations. She had a teaching assignment. **Mr. Barowitz** further mentioned on the other hand, Mr. Hughes only came to feed his cat. **Ms. Balsam** commented that you had Ms. Pels who was off in Michigan teaching but she didn't sublet, you had Mr. Ukai last month who was in the Peace Corp., so people will be absent, they have lives, but it is still their home. That is the question. It is not an easy determination, but it is a determination that should be made because this is a tremendous benefit to people and rightly so. **Mr. Barowitz** commented that this is a difficult thing. Our former Mayor of the City of New York has houses in three places around the country, around the world, and he doesn't know if he spends six (6) months at any of them, and he was selected Mayor of New York twice. **Ms. Balsam** replied he is not applying for protected occupant status. **Mr. Carver** mentioned that is a good point because the way to count days has long been settled by the regs and the courts which is why incorporating the rent stabilization standard would be a good thing. **Mr. Barowitz** replied that he sorts of agrees with that but emotionally he can't. Basically because of the whole situation in how one gets legalized and you become protected is totally different then renting an apartment somewhere or living there for years under rent stabilization. **Ms. Balsam** replied let's take a look at the other factors that are considered in rent stabilized world and let's throw them out there for Board discussion. Staff is proposing these rules, the decision is yours. **Ms. Balsam** is not wedded to any of this. She can tell you what she feels strongly about and why, but these are the Boards' rules. **Mr. Roche** asked that in the process of the next week, if you come across some of the case law that Mr. Carver was referring to, could you forward to the Board members? **Mr. Carver** mentioned that he could send Ms. Balsam a few cases he has that talks about the relationship between the Loft Law and the Rent Stabilization Code to see how much weight she thinks it warrants. **Mr. DeLaney** replied that he would be interested in looking at those and the city council determination that Mr. Carver mentioned, is one **Mr. DeLaney** has never heard of, or heard of but forgot. **Mr. Carver** has a copy of something and will send it to Ms. Balsam, who will share it amongst the Board members.

Mr. Carver clarified Ms. Balsam's statement that § 2-17(c) is the mechanism by which you scrap the prime lessee trumps all others. This is a good time to talk about that concept. **Mr. Carver** stated that this is an enormous change that staff is proposing and he appreciates Ms. Balsam saying that it is the Board members' choice. **Mr. Carver** thinks that on an issue this big, he thinks that it might be the biggest issue in the rules, he thinks staff should have given the Board alternate sections. **Mr. Carver** sees it as bias, but doesn't want to make that accusation because it is not fair for him to say, but he knows that last time in the presentation, Ms. Balsam mentioned that staff thought it resulted in problems, but of course that was the first time the Board had heard of such problems. These cases appear every month, virtually. **Mr. Carver** has been on the Board nineteen (19) months and he has never heard of a problem, in all that time, case after case. **Mr. DeLaney** commented other than from me. **Mr. Carver** responded yes of course, that goes without saying. **Mr. Carver** feels like this scrapping of the whole "prime lessee trumps all others" concept is being driven by forces outside the Loft Board. We certainly have large audiences show up to these things, we have politicians showing up. But nevertheless, however we got here, we are here and he will address the merits. **Mr. Roche** interjected and mentioned that he has reached out to just about every member of staff about clarification on things and thoughts that go through his head and staff has been absolutely phenomenal on getting back to him, offering to explain things, offering to take layman's language and translate it to legalese and vice versa. **Mr. Roche** believes maybe some of these

feelings are simply because we are not reaching out like we should. They are here for us, but he is quite sure that staff does not spend all day sitting there wondering what the Board members are thinking. **Mr. Carver** appreciated Mr. Roche's statement, but responded that his comments were in no way meant to be a personal commentary whatsoever. **Mr. Carver** mentioned that he worked with both Ms. Balsam and Chairperson Hylton at the Environmental Control Board for many, many years and our relationship is fantastic. It was not meant to be a verbal criticism whatsoever. If it came across that way, it was not intended. Nonetheless, staff did put out one version of a hotly contested issue and he thinks staff should have put out both versions. **Ms. Balsam** asked if Mr. Carver wanted staff to draft another version for next month. **Mr. Carver** responded he does, if it can be done. **Chairperson Hylton** clarified next week. **Ms. Balsam** replied that we can try. **Mr. DeLaney** mentioned that there is a lot more in what we have for chapter two so if it takes more than a week to… **Ms. Balsam** replied to be perfectly honest, the rest of chapter two is all downhill so if we can hammer this section out, she thinks it would be so much easier. **Ms. Balsam** stated that she is certainly willing to put in effort between now and next week. She is not sure about the factors, because that might require more research, but at least another draft.

Mr. Schachter asked if Mr. Carver could elaborate a little bit about some of the repercussions as to why this is a major fork in the road for the change. **Mr. Carver** wanted to briefly talk about the merits of the current concept and the down falls of what is proposed. Currently, we have a bright line rule that is very easy to administer. Everyone's rights are clear. That is the difference between a rule and a standard and in this kind of landlord-tenant concept, a bright line rule is very clear, the cases are easy to decide, we don't get endless litigation, and people know their rights. A prime lessee trumps all others. By enabling you will have more protected occupants in the presence of a prime lessee, you created the possibility of a prime lessee creating a single room occupancy ("SRO"), selling rooms to the highest bidder because these are very valuable rights if you get to be a protected occupant, by being there in essence and he realizes that there are other factors to consider. You wind up in the situation where you can have more protected occupancy then the maximum occupancy under the law allows. The MDL and the Zoning Resolution have a limit on the number of people in a particular dwelling. You have more protected occupants then the law allows and there is no mechanism here to resolve those claims of having more protected occupants then the law allows to even be there. **Ms. Balsam** understands the argument that Mr. Carver is making, and is actually an argument that was raised in an Article 78 and the court held that the definition of family doesn't necessarily include relatives, so you could have lots of people who are living together and constitute a family even if they are not blood relatives. **Ms. Balsam** does understand the point Mr. Carver is making, where you have one person and four boarders, etc. but the court actually applied a very expanded definition of family in that case because you had lots of people who were not related to each other but had lived together for a very long time. **Mr. Carver** responded that might not be the only standard for maximum occupancy. It is a potential problem that you don't have when the prime lessee trumps all others. **Mr. Barowitz** mentioned that there are buildings in this city where a landlord has rented out six or seven different loft spaces to different people with one kitchen and one bathroom and he personally knows of one instance where this has occurred. That's bringing up a completely different problem and somehow the city has to really make a concerted effort to try to get these illegal spaces into some kind of legal form and we have stopped doing it. **Mr. DeLaney** responded the flip side to Mr. Carver's concern is the notion that the prime tenant could create an SRO, but he is not quite sure how they go about doing that under § 2-17(c). But one of the ways that loft units, IMD units are distinctly different from rent stabilized units is in a lot of cases with the landlord's blessing, tenants did a lot of work in the unit, creating rooms, sanding floors, putting in plumbing, putting in a kitchen, so if you have two people who agreed to move into a space together but only one signs a lease with the landlord, you can have someone who has a tremendous sweat equity investment or sweat equity plus an investment in materials that went into constructing that unit. **Mr. DeLaney** thinks this is one of the areas where the concept of reading the rent stabilization law and loft law *pari materia* doesn't work. In these larger units there are a lot of issues that we are going to have to sort out but he is also focused on the two or three people who built an IMD unit with a lot of work but only one person holds the lease. From 1982 to 2010, if those people submitted proofs of residency they got covered. **Mr. Carver** addressed some of Mr. DeLaney's comments. **Mr. Carver** stated, as written, this would offer protection to people with no investment whatsoever, people who came later and never sanded the floor and they really have no reasonable expectation to be protected. **Ms. Balsam** replied only if they were there with the consent of the landlord. The other people had to have been there prior to the effective date of the law. So we are talking about people who were there during the window period and who were there on the effective date of the law. **Mr. DeLaney** clarified that Ms. Balsam is reading § 2-17(c) and (d) together. **Ms. Balsam**

replied yes. Further, **Ms. Balsam** commented that people who came later, if the landlord consents to them being there, that's § 2-17(e), which we have now, just a little re-worded, then yes they can be protected too. **Mr. Carver** responded Ms. Balsam's standard for consent is not well done. **Ms. Balsam** replied that she is open to suggestions. **Mr. Schachter** asked if you have people who are living in an apartment but they don't have the correct legal relationship with the landlord, part of these changes is to provide them with protections. Is that correct? **Ms. Balsam** replied if they were there on the effective date of the law, or with the landlord's consent, then yes. **Mr. Schachter** clarified then the landlords consent is not really that much of a requirement. **Ms. Balsam** asked when they got there. **Mr. Schachter** clarified that he is not looking at the timing. He is trying to separate out the different factors so that he could get a better grip on what the focus is because the focus seems to be moving away from the lease and focus more on the actually occupancy. **Ms. Balsam** replied that is correct. **Mr. Schachter** further clarified that if the people are using the unit as their primary residence, whether the landlord is having a direct relationship with that person or not, whether there is a lease or not, whether they have subleased, or triple subleased, that's not part of the criteria if they are living there during the pertinent time frame. **Ms. Balsam** replied right. **Mr. Carver** responded that is part of the problem. **Mr. Schachter** commented that is what he is trying to flush out. **Mr. Carver** commented with respect to a prime lessee and someone else is there, if you didn't sign the lease, you don't have obligations that the lessee has. The lessee is much more warranted of the protection then just a roommate. A roommate just doesn't have the kind of expectations that a lessee has. The other thing is in the world of landlord-tenant, in the world of real estate, ordinarily the statute of frauds, he is not saying it is applicable, but as an analogy, in matters of real estate, you need a writing precisely because of people trying to make claims. It seems to **Mr. Carver** that the prime lessee requirement is helpful in sorting out fraud, in making evidence clear, all the reasons why you have a statute of frauds. **Mr. Roche** asked if there is anything we can settle at this point. **Mr. Carver** responded that it should be settled as a whole. **Mr. Schachter** commented because they are connected. **Ms. Balsam** commented that is a concept. **Mr. Carver** commented in terms of drafting, he knows clarity is Ms. Balsam's goal, and the current rule lacks clarity for sure, clarity is everyone's goal, but as this is drafted with the word "notwithstanding" appearing not only in this section also, but in other sections referring back to this section, it is just not clear. There are not that many sentences and words here, this could be one section. It would take some effort, but to make things perfectly clear, it needs to be condensed, and you can't have this notwithstanding thing and referring back and forth. **Mr. Schachter** clarified that Mr. Carver would rather have it consolidated so that the moving parts are more interrelated. **Mr. Carver** responded within the section, sub-sections, exactly. This is really difficult. Even the subletting section needs to be moved here. **Ms. Balsam** responded that she doesn't want to do that because you end up with really long rules. **Mr. Carver** replied with proper headings and indentations. **Ms. Balsam** replied you think so. **Mr. DeLaney** mentioned that it is conceptualization more than headings and indentations at this point. **Mr. Schachter** commented that there are two different issues, one is the substantive and the other is presentation. **Mr. Carver** stated that a lot more work needs to be done. **Ms. Balsam** responded that she is more than willing to do the work. **Mr. Schachter** asked if it would be worthwhile to have a substantive conversation rather than a presentation one at this point. **Mr. Carver** replied yes it is. It seems to **Mr. Schachter** that the thought is to try to decrease the focus on the lease relationship and increase the focus on the actually tenancy. It sounds like Mr. Carver's concern is that when you move away from the written document, the legal relationship between who the landlord is leasing to. By its nature, that makes it more difficult to make decisions and evaluate people's rights. **Mr. Schachter** thinks as a general thing, moving farther away from kind of the real estate law and moving it to more of the housing law, so we are moving more into the fact that people are by definition living there, people have known that they have been living there and therefore we are deeming them to have certain rights based on that. **Mr. Carver** responded that this is granting an enormously valuable right. Another argument is the owners have certain expectations, if they traded buildings on the market place while the current rule is in effect, you got economic expectations then you know that the law in terms of financial matters respects economic expectations and you don't make a change this big without really good reason. **Mr. Schachter** responded in the first place, with all due respect to real estate, property owners, they are attempting to trade on the economic value of a property that is currently not a legal building, by definition. **Mr. Carver** replied that is ok because we have Article 7-C. **Mr. Schachter** replied that is not ok because until it goes through the Loft Law, there is essentially an illegal use that in effect, the state is saying we are granting a stay on enforcement. There is a risk factor. **Mr. Roche** clarified that in essence, Mr. Schachter is saying that there should be an expectation upon the owner that if you are trying to sell the property there is going to be issues because he is trying to deal with a property that is not completely normal. **Mr. Schachter** replied yes, it is like trying to sell a property with an

imperfect title or with some other legal dispute which is outstanding and needs to be discounted accordingly. **Mr. Carver** replied but of course there is reliance on an existing… **Mr. Schachter** responded that he understands, agrees, he is just saying there is a risk factor, not that it is worthless. The presumption is we are talking about people who are living in the building. **Mr. Carver** replied true. **Mr. Schachter** stated we are not talking about some kind of residual right that as Mr. Carver mentioned about fraud, that people are going to come out of the woodwork. **Mr. Carver** responded well as someone who happens to be there without a lease, they could have been there recently with little ties to the unit. **Mr. Schachter** responded right but presumably they have got to prove, maybe this needs to be harder, more rigorous, that they need to prove that they were actually living in the building during the period. **Ms. Balsam** replied that's the thing, there is still going to be people filing claims, owners answering, cases go to OATH, and factual determinations. **Mr. Carver** commented that our current rule, that cutoff does reduce a lot of problems. There's no doubt about it. We can see that in our own cases every day. We can get rid of the issue. For § 2-17(e), for these factors, accepting rent from the occupant, is it one time or a continued basis. Just something for staff to think about. For number (2), contacting the occupant for access. Owner has a leak and needs to get in there, someone answers the door, you are now a protected occupant. **Ms. Balsam** commented that the idea is that the owner knew someone was living there because if you know someone is living there and they are not supposed to be there, and they are not really covered, why aren't you getting rid of them. That's where those kinds of things come from. **Mr. Carver** asked if that was the public policy she wants pursued. Do you want the owners to start acting out, sending letter saying they don't consent to the occupants tenancy. **Ms. Balsam** replied no. **Ms. Martha Cruz, Esq., Deputy General Counsel,** commented that idea came from a case in which the owner actually filed an access application against the person, so it is hard to say that I didn't consent when you filed an application with the Loft Board because you want access to do legalization, and in another case, the owner actually called the person and said I need access. So the owner knew the person was there and actually had conversations and knew of all the personal information about the person, and in the case the owner said I didn't know that person was there. **Mr. Carver** responded well that is more than what number (2) says. For number (3), listed the occupant in filings is nice but what does that mean. That needs to be flushed out. And of course any other factors the Board deems relevant (number (4)). This is going to breed litigation. **Ms. Cruz** mentioned for number (3) staff was envisioning the narrative statement. You know you serve the narrative statement on someone and you are inviting them to be aware of what's happening in their unit. **Mr. Carver** asked are they obligated? **Ms. Cruz** and **Ms. Balsam** replied yes. **Mr. Carver** commented so if they are obligated, you automatically consent to their occupancy. **Ms. Cruz** replied that the owner send the narrative statement to whoever they know is in the space, all occupants in the building. **Mr. Schachter** commented in other words it is proof. **Ms. Cruz** added it is proof that they were there. **Mr. Carver** asked if knowledge was the standard. **Ms. Cruz** mentioned that it is more than knowledge. If the owner knew that the person was there, this narrative statement was filed ten (10) years ago and you have known that the person has been living there for ten (10) years, you can hardly say you didn't consent when you have taken no action to evict the person. **Mr. Carver** asked what if they sent a letter today I hereby do not consent to your occupancy. Will that undercut this? **Mr. Bobick** replied that we are talking about coverage. The narrative statement means the building is already covered. If the tenants are getting a narrative statement, the building is already covered, it is most likely the unit is already covered and the occupant is already covered. **Mr. Carver** asked if Ms. Balsam minded if he started off next time by summarizing his comments. **Ms. Balsam** responded sure. **Chairperson Hylton** clarified next week, at 2PM. **Chairperson Hylton** further mentioned that the Board has two public-member vacancies, and asked if the Board members have any recommendations.

Chairperson Hylton concluded the October 19, 2017 Loft Board public meeting at 4:05 pm and thanked everyone for attending. The Loft Board's next public meeting will be held at 280 Broadway, third floor, on October 26, 2017 at 2:00p.m.
