MINUTES OF PUBLIC MEETING
New York City Loft Board Public Meeting
Held at 280 Broadway, Third Floor Conference Room

October 11, 2018

The meeting began at: 2:00 pm

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

INTRODUCTION:

Chairperson Hylton welcomed those present to the October 11, 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 the September 20, 2018 meeting minutes: Mr. Hylton asked if there were any comments on the minutes.

Mr. DeLaney: I had a question for Ms. Balsam regarding the conversation at the top of page 21. The discussion was about how an extension was granted, if/when a tenant was withholding rent, what the order of events would be. But I couldn't quite figure out what you were saying here. The way I read it, you're talking about X amount of days from the effective date of the law.

Ms. Balsam: Right

Mr. DeLaney: And I don't follow.

Ms. Balsam: The way that the law is drafted, the owner has a certain amount of time from the effective date of the law to do this, this, and this; and all of that starts based on the effective date of the law. That's the way that section of the MDL is drafted. So for our purposes, we treat, as the "effective date of the law," the date extension was filed. That would be our start date. We have to start somewhere, so that's our start date. So when we are granting, we ping all the deadlines from that date. Does that make sense?

Mr. DeLaney: So for the purpose of an extension application – this is your sentence – the effective date of the law is the date the application is filed?

Ms. Balsam: Yes.

Mr. DeLaney: So in this instance, if we're going to give a grace period to people who are now way out of date, how would that work?

Ms. Balsam: The grace period is only for the filing of the application. And if we granted an extension, it would start on the date of the filing of that application. In other words, now, people who are out of compliance can't even file for extensions, unless they are new owners or owners of newly covered buildings. So for those people

who would normally be foreclosed form filing, we give them a grace period of 30 days to file. And then, if we grant an extension, it would be from the date that application was filed.

Mr. DeLaney: As opposed to the effective date of the law

Ms. Balsam: Yes.

Mr. DeLaney: So then (re your sentence) "So for the purpose of an extension application, we count the effective date of the law as the date the application is filed." It's not that we're counting from the effective date of the *law,* we're counting from the effective date of *the start of the extension*.

Ms. Balsam: OK. Yes, that's correct.

Mr. DeLaney: And then there a couple of small typos…

Mr. Hylton: Did what he just said require an amendment to the minutes?

Ms. Balsam: No, I think he's just clarifying.

Ms. Torres-Moskowitz: We're going to talk about this issue later?

Mr. Hylton: Yes, this is just the minutes.

Ms. Torres-Moskowitz: Because I'd like to talk about this issue later.

Mr. DeLaney: Probably not today.

Ms. Balsam: We won't be doing anything on extensions today. Today we're continuing with protected occupancy.

Ms. Torres-Moskowitz: So when will we (be returning to this)?

Ms. Balsam: Next time. The 18th.

Mr. DeLaney: I think it would be hard for the average reader to understand what you meant. But with what you've just said, it's now clarified in today's minutes.

Vote on the September 20, 2018 Meeting Minutes:

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

Ms. Torres-Moskowitz moved to accept; **Mr. Barowitz** seconded the motion.

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

Members abstaining: 0 **Members absent:** Mr. Hernandez, Mr. Schachter

Mr. Hylton: Today we will continue discussing proposed changes to 29 RCNY 2-09(b), the rule relating to protected occupancy. Ms. Balsam will lead the discussion.

Ms. Balsam: I prepared a brief PowerPoint, which is reminiscent of the PowerPoint from last November, but I changed it a little bit, because we are not doing a wholesale revision of rules.

Presentation: Loft Board Rule Revisions 29 RCNY §2-09(b) (Attached)

Ms. Balsam recalled for the Board that the residential occupant qualified for protection is not actually defined in the law. The legislature has left it up to the Board to fill in with rule-making, clarifying who should be the residential occupant qualified for protection under the law. She…

- Summarized the current rule

- Reviewed the purposes of Loft Law MDL § 280

- Reviewed the original Loft Law MDL § 286(2)(i)

- Noted that there were, then, many cases arguing that the term "primary residence" was purposefully omitted by the legislature, which, in 1992, prompted the legislature to amend § 286(2)(i) to state that "…residential occupants qualified for protection pursuant to this article shall be entitled to continued occupancy, *provided that the unit is their primary residence…"*

- Reviewed some of the legislative history that elucidates the thinking/intention behind the amendment

- Outlined the staff's goals for the proposed change.

She then addressed the petition from the DUMBO Neighborhood Alliance, discussing where she saw problems.

Questions from the Board:

Ms. Torres-Moskowitz: On the last line [DUMBO Petition 29 RCNY § 2-09(b)(4)], can you please review why it's inconsistent, what it's inconsistent with?

Ms. Balsam: So, in the first section they proposed [DUMBO Petition 29 RCNY § 2-09(b)(1)], says, "…primary residence shall not be a consideration for the determining occupant qualified for protection." And then in (b)(4), they put back the primary residence requirement for some people. You can't have it both ways. Either it isn't a requirement, or it is. And if it is, it should be for everybody; not just for a certain sub-class of people.

Ms. Torres-Moskowitz: OK, thank you. And another question: I liked your review of the purpose of what we're doing. I just had a question about "continuing"……

Ms. Balsam: That's § 286(2)(i). "…shall be entitled to continued occupancy, provided that the unit is their primary residence."

Ms. Torres-Moskowitz: You're interpreting "continued occupancy" as a way to lead into primary residence?

Ms. Balsam: Right.

Ms. Torres-Moskowitz: The last time we met, we were looking at a case where a tenant had to leave due to construction for three months, but it turned into eleven months.

Ms. Balsam: But they were already protected, and it was their primary residence.

Ms. Torres-Moskowitz: If the purpose of the law is to prevent dislocation, does this kind of interruption in tenancy count as a break in "continued occupancy"?

Mr. Hylton: I don't think a dislocation due to construction means that the space is no longer the primary residence of that person.

Mr. Bobick: Tenants rarely relocate during construction. The case we had on the last calendar was a very rare occurrence.

Ms. Balsam: I think the point here is that, the issue before us, is how do we determine who gets protected under the law. The issue you are raising is, *once* they're protected, *what happens* if they're dislocated…due to construction. And I agree with you that one of the purposes of the law is to protect against dislocation, and it is something we talk about when we do the Narrative Statements. But that's not what this is about. Does that make sense?

Ms. Torres-Moskowitz: Yes. I just feel like there's so much weight put on the word "continuous." As something that means that the person is sitting there, not moving. We talked last time about people needing to be away, even out of the country, for long periods of time; that people have life styles that don't keep them glued to their apartment. I guess it goes back to the question of what is a primary residence.

Ms. Balsam: Right. What is a primary residence?

Mr. Barowitz: What you're saying is that it could be your primary residence, but you don't live there six months of the year. Is that what you're saying?

Ms. Torres-Moskowitz: Yes.

Ms. Balsam: This is going to be as the Court said in *Dworkin versus Duncan*. This is going to be a case-by-case analysis, considering why the person is gone for six months, for example.

Mr. Barowitz: So you're saying that if this came up again, it would have to go back into the courts? If someone was out of residence for seven months, and the landlord said, you don't live there anymore, that it would then go back into one of the courts? And have another decision be made that we don't necessarily confirm?

Ms. Balsam: So, if we, the Loft Board, found that, even though someone is routinely absent from the unit for seven months of the year, it's still their primary residence, the owner certainly could challenge that in court, in an Article 78. Is that what you're asking?

Mr. Barowitz: Yes. And if the judge found for the landlord, what we then do?

Ms. Balsam: We would appeal. And if the appellate division upheld it, then we would probably have to incorporate that decision into our cases, and if similar circumstances presented themselves, I assume we'd have to rule against the tenant. It depends on what our basis was for saying that being absent seven months of the year is OK. We had somebody who was in the Peace Corps; someone who was teaching in Michigan; someone who regularly traveled back and forth to Europe for work. People do, regularly, go away and come back. That's one of the reasons why we, the staff, are advocating for a more flexible standard than the Housing Court 183-day standard. I think we, as the Loft Board, have to look at a whole different set of circumstances than those applied to someone living in a rent-stabilized apartment. It's just not the same.

Mr. Hylton: It's like the Federal laws that protect people on active duty in the military. That's similar to what we're trying to do here. To find a way to protect those who are not physically present, but still claim (the unit) as their primary residence. That's what we're trying to find. And I don't see how we could say in any way that someone who is dislocated due to construction is excluded from protection.

Ms. Balsam: It's the same thing with a vacate order. Obviously, you've vacated. You're no longer living there, but you still have a right to take up residence in that unit.

Ms. Torres-Moskowitz: I guess I'm just trying to make a point that, if we want to uphold the law, we want to consider dislocation in whatever form, and that our definition of the word "continued" needs to be loose enough so that people are not prisoners in their units.

Ms. Balsam: Right.

Mr. DeLaney: I appreciate your putting this together, because it makes your thinking clearer. But I'd like to fill in some gaps in the history, if I may. When the Board adopted what was then called "Regulation on Eviction," it created this section that, at the time, was listed as J(1)(a). That was how it was referred to in the L and T lawsuit that Mr. Carver has pointed out as something we should take into consideration. The history is this. The Board set out very limited grounds for eviction. One of them was not the primary residence; the other was nuisance. If you're a drug-dealer, for example, you can be evicted. The Lower Manhattan Loft Tenants sued, taking the position that primary residence should have nothing to do with a tenant's occupancy up until the time that the unit left the Loft Law and entered rent stabilization. And we won on the initial court level, in a remarkable decision, written by Judge Bruce Wright, who agreed that primary residence had nothing to do with the Loft Law, and should be thrown out completely. In the case that Mr. Carver distributed is the Court of Appeals decision, there was a middle stage, that I'll skip to save time, but basically, the Court of Appeals said, no, it is appropriate to have a requirement that the unit be the primary residence for continued protection for someone who qualifies for Loft Law coverage.

And that is really the way things functioned for the next thirty years. Primary residence had nothing to do with *qualifying* for protection; it only had to do with the fact that, if the owner chose, he/she could bring an eviction proceeding, not in front of the Loft Board, but in court, alleging that the tenant did not use unit as his or her primary residence. And, Elliott, to your question, an owner can bring a primary residence suit at any time against a protected tenant, with one-hundred-percent ironclad proof that the tenants are living somewhere else - -because if the unit's not your primary residence, that means you must have a primary residence somewhere else -- owners have brought cases against tenants in which the amount of evidence they had was rather shaky, but sometimes, due to the complicated nature of determining primary residency and various

indicia , there've been tenants who probably could have prevailed in court, but they really couldn't afford the fight. So, therefore, the Court of Appeals made the final decision that, yes, the Loft Board can have the right to create the grounds for eviction, based on the protected occupant not using the unit. That was settled before the 1992 rule.

In 1992, a guy who was a counsel for the Assembly, named Don Leibowitz, said, oh, by the way, we're going to add to the law that it has to be your primary residence, to clarify all of those court decisions. So in his mind – as the drafter, he didn't provide it in the bill jacket – but in his mind, he was just stating that yes, the Board had the right to require primary residence after a protected occupant was covered by the Loft Law. So, our original position, at Lower Manhattan Loft Tenants, more than thirty years ago, was that primary residence shouldn't be a factor at all during the entire time that the unit's governed by the Loft Law. It should only become an issue in rent stabilization. We lost. What was set up has been the way things have functioned for the last thirty years, and I think it's fair.

The other thing to bear in mind is that when the Loft Board was created, we did not write "rules." What we wrote were called "regulations." And they were separate and discreet; and they only became codified as a group in 29 RCNY many years after the regulations were written in the 1980s. The regulation at that time, which has now become § 2-09, was strictly written to apply to instances where there was a fight over sub-divided space or sublet space. There was a case where a couple moved to their summer home in Long Island, as permanent residents for a couple of years, because their child was having problems and needed to get out of the New York City school system. They had sublet their loft, and the sub-tenant lived there through the entire original window period of April 1980, through December, 1981. And that sub-tenant said, I'm clearly the person who should be protected, because I've lived here through the entire window period. And the Loft Board agreed with that. And so the people who had sublet the loft for that entire period of time lost possession of it to the sub-tenant.

All of § 2-09 is devoted to separating out "sub-lessee" or "sub-lessor" in a single unit, or the case of subdivided spaces, where an enterprising tenant rented, say, 5000 square feet, divided it into four separate units, lived in one, and rented out the other three. They came to be known as "mini-landlords." The original regulation, titled, "Subdivision, Subletting, and Assignment," which was a separate regulation and had nothing to do with coverage, was written to address this. It did something quite unique, and created a great deal of uproar, not only between prime tenants and sub-tenants, but also between owners. Because it said, "I leased the floor. The lease is in my name. I live in unit A, and I've got three sub-tenants in units B, C, and D; and they're paying me X amount of rent. In fact, I may be making a fortune on the landlord's property. As the prime tenant, I may be paying $500 a month for the whole floor, and each of the three units are paying me $1000 each, so I'm coming out ahead $2500 a month. Not paying any rent. And, yes, I could argue that I did make an investment in fixing up those units…" It was a whole hullabaloo. And if you read § 2-09, reflecting only on those two issues -- in the case of the parents who moved their troubled teen to Long Island, who gets the unit, and what happens to the sub-divided space -- §2-09 makes perfect sense. And what's remarkable is that § 2-09 declares that the sub-tenants (units B, C, D) were now going to pay the same rent they were paying to the prime tenant, but pay it directly to the landlord, and enter into a privity relationship with the landlord

The subtenants weren't happy, because they said, "Why should we be paying so much rent, when the entire floor is only $500?" But the Loft Board said, "No, you're going to pay the same rent, but to the landlord." And

the landlord said, "I don't know these people. I don't want these people here. I only rented to this one guy. It's only been ten years, but had no idea what he was doing." So all of what is now §2-09 was originally written to address a specific set of circumstances, separate and apart from who's a protected occupant when you apply for coverage.

So it's only since 2014, that we started reading sections of what is now § 2-09 as defining who should be a protected occupant. I think tenants are satisfied with the notion that the primary residence requirement to continued occupancy is fair. If you have a different argument…

In terms of the provisions we're looking at now, using primary residence as a test to determine who's a protected occupant, number 1, to address the Board's concerns, I don't think it's fair, particularly since it's looking at a tremendously long period -- from the window period through a coverage case could be ten years' time. And in rent stabilization, remember, the only way you bring a primary residence suite is at the end of the lease. The owner says, I'm not going to renew your lease, if you're not using the space as your primary residence.

So I think drawing on § 2-09 as an integral part of the Board's original method to deem who is covered, is wrong. And I think there are ways "*in pari material",* which I'm sure we'll be discussing in more detail, does not apply to loft tenants with regard to how to determine who is a protected occupant. When I first got my lease to become a rent-stabilized tenant, I moved here from Iowa! And I get to rent a rent-stabilized unit, and I get a lease. Am I the primary resident of that unit before I sign the lease? Or course not. I live in Iowa. So the notion that primary residence should be a bar toward Loft Law protection, for someone who meets the criteria listed in the law, just makes no sense.

Ms. Torres-Moskowitz: Is § 2-09 the primary text that deals with protected occupancy?

Ms. Balsam: Yes.

Ms. Torres-Moskowitz: Is there anything else? Just that?

Mr. Roche: There's the discussion of coverage….

Mr. Balsam: But that's coverage. That's not protected occupancy.

Ms. Cruz: § 2-08 is coverage.

Ms. Torres-Moskowitz: So § 2-08 and § 2-09 have to do with….

Ms. Cruz: § 2-05 is about registration; about who is the occupant qualified for protection. §2-08 involves coverage of buildings; it defines the criteria for MDL §281. Section § 2-09 used to be called "Subletting and Other Matters."

Ms. Torres-Moskowitz: So you re-wrote the…

Ms. Cruz: We just changed the title, to reflect the information that's part of that section.

Ms. Torres-Moskowitz: And added dates, right?

Ms. Cruz: And added dates.

Ms. Torres-Moskowitz: And that's not enough to have a public hearing? That was just a title change?

Ms. Balsam/ Ms. Cruz: No, we had a public hearing.

Ms. Torres-Moskowitz: That was 2010?

Ms. Cruz: I don't remember exactly when that was. It was probably somewhere around 2013.

Ms. Torres-Moskowitz: Would you be able to provide me with the text of how it read prior to that 2013 change? And after that?

Ms. Cruz: Sure.

Mr. Carver: We've got a lot of issues out here right now, and I really want to address them. But the proposition that primary residency should not be required at all is kind of a bombshell concept.

Ms. Balsam: That's not our concept. That's the proposal of the DUMBO Neighborhood Alliance. We are the polar opposite.

Mr. DeLaney: That's what Lower Manhattan Loft Tenants argued in 1985. They lost and it is settled.

Mr. Carver: And you're advocating for that position now as part of the rule change?

Mr. DeLaney: No. I'm simply saying that primary residence should not be something used by the Board to determine coverage.

Ms. Balsam: It's not used to determine "coverage;" it's used to determine "protection." That's not the same thing.

Mr. DeLaney: Well, on that point, I would like to add that….

Ms. Balsam: Because we've had cases where we've covered units, but we did not protect people.

Mr. DeLaney: Yes. And I didn't vote for any of them. In fact, when the Board started to revise the rules after the 2010 amendment that added § 281(5), the initial focus and the first six months of hearings and arguments was over the incompatible use group provisions. The Board staff created the separate protected occupancy filing, basically, in reaction to the provision in § 282(a) – and Martha, please correct me if I'm wrong – that called for a deadline on applications. And so the staff then developed a way to come up with protected occupant filings, which never existed prior to that time. And that was done without any discussion with the Board. It was done by the staff. No "rule" was created to embody that. Instead, the Board has looked to § 2-09 to provide a framework for that. You went through this whole period, Elliott. The Board never had any discussion about defining a protected occupant.

Ms. Cruz: The other thing I would like to add is that, while § 2-09 did have a title of something other than, "Subletting and Other Matters," section (b) of § 2-09 *was* titled, "Occupant Qualified for Possession of a Residential Unit and the Protection of Article 7C." That *was* the title of subsection (b) of § 2-09.

Mr. DeLaney: And that was the title back when it was a rule, but it was intended to apply to who's qualified when there's a dispute. Because as you can imagine, in those subdivided cases, the prime tenant could say, OK, I'll just reclaim the space -- go back to having a 5000-square-foot loft with four bathrooms for $500 a month. So it was really about who was qualified to keep the space, when there was a controversy between prime tenant and sub-tenant.

Mr. Carver: On the issue of the history of the rule, it's important for me to understand how the rule, as it exists today, got there. I wonder if you (the staff) could do some background research on that. That's a very interesting legal argument, which I'm hearing about for the first time. I'd like to understand a bit more about the source of the elevation of the prime lessee.

So, I'd like to respond to some of the points you made, Helaine. And, unfortunately, even though I realize you were striving to be clear, I think it created a lot of misunderstanding – and I'd say, misinformation – for example: We have this controversy about how to define who is the primary resident. Do we use the Stabilization Standard or something different, as you're proposing? And I happen to think that the counting of days makes some sense. But I think you've very much mis-characterized the Stabilization Law. If you're traveling for work; if you're on vacation; those don't count against you under Stabilization. I feel like you're using that to scare the Board off adopting the Stabilization Standard, which is actually broader and more flexible than you've stated. So, let's all just understand the state of the rule at the moment. I believe…

Ms. Torres-Moskowitz: Can you provide us with a list of the Stabilization Laws?

Ms. Balsam: Yes.

Ms. Torres-Moskowitz: I'm not "scared" of it; I need it to cross-reference…The more we know, the better.

Mr. Carver: One of the benefits of using Stabilization as the standard is that it's been around for forty years, and all these issues have been fleshed out through the case law. So at this point, with the primary residency standard stabilization having been in existence for forty years, the standard is well-known in the communities of people who need to know about it.

Ms. Torres-Moskowitz: Yes, I think we know that part, but just having it in front of us would be helpful.

Mr. Carver. Yes, but I'm not sure what that would be, given that …. Well, I suppose the regulation itself is kind of short, so we just really can look at that. But realize that there's been forty years of case law that's delved into all the various holes. Any time we have a rule written in English, there' always going to be some some lack of clarity that the cases decide. And there's a very long history of case law in Stabilization, such that the standard is quite well-known at this point.

So under the current rule, I believe, if there's no lease in effect, everyone in occupancy on the effective date of the law is protected if it's their primary residence, if I'm not overstating it.

Ms. Balsam: No, that's not correct. If there had been a lease in effect, between an owner and somebody who is still there – a prime lessee – then, the way that it's defined now, that person still is the prime lessee. I'm not sure that that's a good thing or bad thing; but that's the way it's actually defined now; because it says, "whether or not a lease is in effect."

Mr. Carver: OK, I was trying to make it even simpler. Let's pretend there was never a lease. So it's not just the occupants who are protected. It's everybody.

Ms. Balsam: Well, it's the occupants who were there on the effective date of the law, right? And occupants who came after the effective date of the law with landlord consent.

Mr. Carver: Would the proposed rule change that at all? That scenario, with the total absence of a lease?

Ms. Balsam: No.

Mr. Carver: Ok, so we're really just going to be arguing about what happens if there is a lease in effect; or if there ever was a lease in effect. So we have a smaller universe. That's the universe we're talking about?

Ms. Balsam: Yes, I would agree with that.

Mr. Carver: So the material that you presented, was it necessarily geared to that issue – as between a lessee and a non-lessee?

Ms. Balsam: It was really geared more toward the primary residence. That's really where I was going, because that's what we had been discussing, and Chuck had asked about the cases on pages five to seven of the DUMBO Neighborhood Alliance petition. So it was really geared to that.

Mr. Carver: Ok, so is there any material, from the legislative history or from the statute, which supports the proposition that, if a lease exists, an occupant who's not on the lease should have equal rights to be a protected occupant? I was looking for that in your presentation, but I realized that that wasn't the point. I thought that the material you provided was really making *my* point, in that the statute and the legislative findings actually use the word "tenant." So if a lease exists, one would think that the "tenant" has priority, given the use of the word "tenant," in the legislative findings. And as I've pointed out in the past, one of the subsections of § 286 talks about the linkage between protected occupancy and the payment of rent to a landlord.

Ms. Balsam: § 286(2)(i)

Mr. Carver: From the statute itself, the use of the word "tenant," and the subsection I was trying to cite and you just did [§ 286(2)(i)], leads me to believe that the current rule makes some sense, in that it *is* echoing the language of the statute, which does give priority to a lessee, when there is a lease. So, I guess my question to you is, what's the statutory counterpart to my argument? What's the answer in the statute to the arguments I'm making from the statute, to give a preference to a lessee, when a lease exists? I'm not saying that, in the absence of a lease, we should change anything; I'm talking about the universe in which we have lessee or a prime lessee.

Mr. Barowitz: Robert, are you making a distinction between "lessee," "tenant," and "occupant"?

Mr. Carver: Yes.

Mr. Barowitz: What's the distinction?

Mr. Carver: A lease is a real thing, right? It conveys a property interest to the lessee on the lease. And under the proposed rule, that interest is totally ignored, in that equal right to protected occupancy is given to anyone in occupancy, *even if* they're not on the lease, whether they're a couch-surfer, a roommate, a lodger or a boarder…. This would be totally ignoring the conveyance of a property interest that the lease, itself, represents. And as I mentioned last time, it would be completely wiping out the value of the lease. And mind you, the lessee has real legal obligations to the landlord under the lease. The tenant (lessee) can be sued by the landlord for failure to honor the lease, yet the right to protected occupancy, under the proposal, is being given to anyone else who just happens to be there for whatever reason. And they may be valid reasons, but unfortunately, the rule sweeps in everyone, which is why, in the past, we had asked for some options. There was a common household proposition that, though I don't support it, seemed to some Board members to be a fair compromise. Your proposal said you're looking for a just and fair outcome, and my impression was that people felt the common household definition was the most just and fair. But, obviously, I can't speak for the others.

Mr. Barowitz: Robert, if you read the reason in the justification of the Loft Law, you've got all kinds of information about that. And that is to actually protect people who are loft dwellers. So initially, that's the most important thing – to try to keep these people living in lofts, probably not paying a lot of rent (in 1982) -- to keep them there, because it serves the welfare of the city of New York. So while you make a good legal argument, my bottom line position is counter to that.

Mr. Carver: I appreciate that, but the very legislative findings that you're talking about do use the word "tenant." So you're argument is fine for me in the absence of a lease, but if there is a lease, if there is a real property interest, I don't see how, legally, you get around the existence of that tenancy. The findings, themselves, use the word, "tenant." That's a fact.

Mr. Barowitz: Prior to 1982, when artists or other people started invading these loft buildings in lower Manhattan, there were hardly any leases. Everybody was living there illegally. There was no protection. I once got into a terrible fight with Mayor Koch, because he just didn't believe that it was right for a certain group of citizens to be able to live in lofts. And fortunately, the Commissioner, understood what the law was about, and corrected the Mayor, who got very angry at me and left. So you see, to me, that's my bottom line, ever since I've been involved in artist housing, starting in the late 1960s.

Ms. Torres-Moskowitz: Along those lines, I'd like to add that, I was reading about the passage about lodgers and boarders in MDL § 4 Definitions, and I was wondering if I could just read the one paragraph from the Multiple Dwelling Law. "A 'family' is either a person occupying a dwelling and maintaining a household, with not more than four boarders, roomers or lodgers, or two or more persons occupying a dwelling, living together and maintaining a common household, with not more than four boarders, roomers or lodgers. A 'boarder,' 'roomer' or 'lodger' residing with a family shall mean a person living within the household who pays a consideration for such a residence and does not occupy such space within the household as an incident of employment therein."

Ms. Torres-Moskowitz: So I'm just wondering what we're talking about.

Ms. Balsam: It means you can rent your extra bedroom to somebody.

Ms. Torres-Moskowitz: They're human beings, but because they're boarders or lodgers, they don't deserve protection? Forget the lease for a moment. Just think about the fact that there are humans living in this space and that our purpose is to not dislocate and to allow continued occupancy. If they're living there – boarders, roomers, lodgers, and family… how are they not covered? Why they are not protected?

Ms. Balsam: Currently? Because of the way the current rule reads. It says that if there's a prime lessee, and the prime lessee is using the unit as their primary residence and claiming protected occupancy, then they are the protected occupant – to the exclusion of everyone else -- which is one of the reasons why we want to change the rule. Mr. Carver doesn't want to change the rule.

Ms. Torres-Moskowitz: So how does the way it currently is fit with the definitions of boarders, roomers, and lodgers in § 4?

Ms. Balsam: That's the definition of what a dwelling is.

Ms. Torres-Moskowitz: So the prime lessee just trumps….I like the way it's "human;" it talks about human beings. And they're all living there, and everyone knows they're living there; and we're trying to protect them in terms of life safety; trying to get them to a safe building, to a C of O; but we're not seeing them as humans, when it comes to occupants that can stay there?

Ms. Balsam: This has nothing to do with getting a C of O. And this not about them being able to stay there or not, because the prime lessee who has roommates can certainly keep their roommates, right? Just to play devil's advocate, and from the owner's standpoint – what if the issue is that the prime lessee doesn't want the roommates there, but the roommate has Loft Law protection? That's going to affect whether or not the prime lessee can evict the roommate. So if we make this change, and these people become protected under the law – and from the staff's perspective, we want to make this change – this is going to have a real-life effect out there on human beings.

Ms. Torres-Moskowitz: There might be a distinction to be made between roommates who are just people there helping to pay the rent and family members who all live there together. We're trying to cover everyone, whether it's family or boarder or….

Ms. Balsam: The easiest way to do it is to make it all-or-nothing. When you start making distinctions, when you start "pulling out" groups of people…it could create a lot of legal issues, even Constitutional arguments. So, the common household is an interesting idea, but I'm not sure it would pass the Law Department, and I'm not sure it would pass the courts. That is one of the reasons we backed away from that option.

Mr. Hylton: Mr. Carver, I'd like to know where the Board wants to go. Do we want to start looking at the rule, itself, so we can have some discussion?

Mr. Carver: What we're talking about actually affects one line in the reg, so I think we are doing that.

Mr. Hylton: Alright. Can we go right into the language of the rule right after that?

Mr. Carver: So I threw out a lot of questions. I don't know if you recall them all, but I would like to hear a response.

Ms. Balsam: I think we answered a lot of them, but the only section of the law that actually uses the word, "tenant," is the title of § 286. Everywhere else, it talks about "residential occupants." We have a rule that says a tenant is a residential occupant qualified for protection under Article 7C, and I think, as Mr. Barowitz said, if you go back to the original purpose of the Loft Law, it was to cover as many people as possible. And I think, over the years, we've kind of lost sight of that, which is why I think we need this change. So I think that answers most of your questions? But perhaps not?

Mr. Carver: Well, I don't think it adequately answers some of the questions. Because I'm looking at the legislative findings in section 280, and I see the word "tenant" being used in one more place. So that's a real mis-statement of the statute.

Ms. Balsam: Sorry.

Mr. Carver: And even if the words "tenant" and "tenancy" are not used to excess, it certainly talks about a rent-paying relationship between someone and a landlord. So since I had made legal arguments from the statute as to why a lessee *does* have an elevated position – and again, I'm just talking about the situation where there is a lease. I'm not challenging the fact that in the absence of one, all should be protected -- what's the statutory counter-argument? You keep saying that the legislature did not intend this, but once the legislature is using the word, "tenant" in the findings, that easily implies a different status for the tenant, as opposed to someone else, *and* you have the entire body of real property law, the existence of a lease is not something to be taken lightly. That's a real property interest. It's almost tantamount to a deed. I'm not saying it's the same thing, but it's a big leap you're taking, to wipe away a lessee's rights under a lease to actually control the space that they lease.

Ms. Balsam: Of course, the lessee has made a conscious decision to take in these additional people. And again, going back to *Dworkin v. Duncan*, the first case that construed the Loft Law, I would cite where the judge quoted a seminar that was held by Paul Weissbrod, the first Loft Board Chair, and Joseph Fiocca, who was the chief draftsperson of the Loft Law. Basically, what the court quoted there was that the term, "residential occupant is elastic and intended to free triers-of-fact from the structure of more traditional and stable housing arrangements." They purposely chose, "occupant," even if they used "tenants" in places – and I do apologize for my mistake. And the "residential occupant" that's qualified for protection, I think, they meant to be somebody who's not necessarily the prime lessee.

Mr. Carver: In terms of legal argument, I had asked you for language from statute, and you haven't given it, probably because there isn't any.

Ms. Balsam: No. I would argue that the statue uses the term "residential occupant qualified for protection." That, in and of itself, shows that they were trying to protect more than just people who are prime lessees. It's more than tenants. It's not just "tenants;" it's "residential occupants." They used a different term, and they used it purposefully.

Mr. Carver: But that same section, § 286(2)(i), assumes that there's a rent-paying relationship between the occupant and the landlord. And a citation from a training seminar-- that's not a legal argument, when you have the statute…

Ms. Balsam: But you have the *drafter* of the statute, saying, this is why we used this term. I don't know what better legal, legislative history you could get.

Mr. Carver: The drafter of the statute did not *vote* for the statute. We have the *statute, itself,* which talks about a rent-paying relationship……A training seminar by someone who didn't vote for the law, that's not a basis for contemporary interpretation. That's not legal argument. That's kind of silly.

Mr. Hylton: Does it go to the intent of the legislation?

Mr. Carver: No because we have the actual legislative intent, through the actual words of the statute.

Ms. Torres-Moskowitz stated Mr. Carver's position, for confirmation: When there's no lease, you're open to everyone being protected. But when there is a lease, because you believe in leases, then you're favor of the prime lessee?

Mr. Carver: Right. And that's the current state of our rule, as interpreted by our current cases.

Ms. Torres-Moskowitz: And if the lease is a template, commercial lease, that the landlord spent two seconds Xeroxing and handed out, that commercial lease for a residential occupancy is still, to you, really important?

Mr. Carver: I think that's the state of the rule now, right?

Ms. Balsam: Right. It doesn't matter what kind of lease it is.

Ms. Torres-Moskowitz: So any lease trumps….?

Mr. Carver: Sure. Any *deed…* any lease…. is the conveyance of a property interest. Almost every deed in the United States is exactly the same template. That's just how these things go, because the courts have construed the language in the template as valid, so everyone uses them so as not to run afoul. So the fact that a lease is just a templet isn't an issue.

Mr. Barowitz: Robert, what if there's a lady's and gentleman's agreement between a landlord and a tenant. "You owe me X-hundred dollars a month." Is that now a lease?

Mr. Carver: In the absence of a lease, everyone's protected, right? So…there's something called a Statute of Frauds, when it comes to real estate, which talks about when something has to be in writing and when it doesn't. So in answer to your specific question, I don't know.

Ms. Balsam: It depends.

Mr. Carver: But for the purposes of what we're talking about with rule -change, we're talking about the narrow case where you have a lessee under an existing lease – or an expired lease. And in the current rule, succession rights exist for those who are related to the lessee, which may, in fact, be many of the people who are actually occupants.

Ms. Balsam: I think it's more than those who are related. I'd have to look at it.

Mr. Carver: So if we're talking about just protecting the lessee, the succession of rights also exists. So there are others who would have rights of protection, should the lessee leave; although I haven't looked at that section since last year, so I don't recall off-hand exactly how it reads. I thought the current rule, with the right of succession, was enough, in itself, somewhat of a compromise position, which is why I didn't think we needed to go further. But if we're going to go further, I think that a sweeping change that just pulls everyone in is an over-reach and wipes out the rights of the prime lessee, which could be very substantial. And there's no mention of any compensation for that loss.

Mr. Roche: Robert, please correct me if I'm wrong, but I think the undertone of your argument is that we should just leave it the way it is. Is that your position?

Mr. Carver: As the owner's rep, yes, that is absolutely my position. But *if* you're going to change it, I feel that, as proposed, it's just too sweeping.

Mr. Roche: So, theoretically, moving forward, we could actually accept a motion stating that? Is that true?

Mr. Carver: Yes, that's true. But it might be more helpful to take a straw poll to see where people stand in terms of all, nothing, or something in the middle. That's also one way of doing it. Just to see where we want to move. We're short some members, but so be it. We can't wait forever. I know Mr. Hernandez had had some problems with your proposal. My impression was he wanted to comment, but I don't know. I can't speak for others.

Ms. Balsam: We did, actually, take a vote last time, I believe, to expand the rule. We did vote on it, didn't we?

Mr. Roche: I think you're right.

Mr. Carver: What was that vote?

Ms. Balsam: I think the Board voted last time that we wanted to expand the rule to protect more people.

Mr. Carver: Was that on your specific proposal? To actually adopt your proposal?

Ms. Balsam: No, no, no.

Mr. Hylton: That was a motion, right? Wasn't there a motion on the floor?

Various comment on who made the motion and the vote on this issue (from September 27 Board Meeting)

Ms. Cruz: I just saw the video. It was motion and the Board voted to make changes. What those changes would be was not specified, but the majority of the Board agreed that changes were necessary.

Mr. Carver: So, we should be talking about what changes.

Mr. Roche: That's what I was hinting at. Despite the fact that what everyone had to say was extremely beneficial information, somehow or other, we have to nudge this ball forward. We agreed we were going to change the rule, and now let's argue the changes. Again, some really good arguments and debating, but maybe if we follow the Chairman's lead and get back into this actual document, we can move the ball forward in some fashion.

Mr. Barowitz: I don't want to throw another monkey wrench into this, but in Class A apartments in this city, there are several people – generally, they work for airlines -- with one lease, and three or four bedrooms. And the people not on the leases are living there. And sometimes they sleep in the same bedroom. This goes on in the city all over the place. And we're talking about very big rents. So now we're making this funny little distinction about a small class of people, while at the same time, a lot of stuff is just ignored.

Mr. Carver: I think I agree that it's a complication that we shouldn't get into, but I don't expect that all those people have the same rights of occupancy. That's my belief.

Ms. Balsam: So, is there a consensus? No. We could redraft to say that, if there is no lease, here's who's covered – and let's leave primary residence aside for the moment – if there isn't a lease, here's who is covered; and if there is a lease, then we can tackle that. That might be a way to approach it.

Mr. Carver: Yes. In fact, I had asked about that last time. I thought that's where we were headed, and then I got this draft that had no change.

Ms. Balsam: Ok, I didn't realize I was supposed to do that. Does the Board want us to do that? We can do that.

Mr. Roche: We need a motion.

Mr. Hylton: So what is the motion on the floor?

Ms. Balsam: There's no motion.

Mr. Hylton: Is someone going to make a motion?

Mr. Roche: I would be willing to make the motion if Helaine would just summarize again, what we'd be voting on.

Ms. Balsam: To redraft this draft to explicitly state, here's what happens if there is no lease in effect – here are the people who'd be covered; and then, here's what happens when there is a lease in effect – here are the people who'd be covered.

Mr. Roche: Ok, I think we had already voted that we don't want to leave it the way it is. So I would make the motion that we have the staff draft language for us to look at saying, here's what happens if you have a lease, and here's what happens if you don't have a lease.

Ms. Torres-Moskowitz: Or an expired lease?

Ms. Balsam: I was going to ask about that. We need guidance from the Board, as to where you want us to go.

Mr. Carver: Similar to what it says now. An actual lease and an expired lease have had the same weight, I think.

Ms. Balsam: Yes.

Mr. Carver: Let's keep that as is, just for the sake of simplicity. Then, if we want to get deeper into it in the future, we can. But let's not veer too far off.

Mr. Roche: I'm in total agreement with all this, but if you expect me to remember what you all said in terms of the wording of the motion…So, again. We already voted that we're going to move forward; and now we're moving forward by saying that we want to see language from the staff that indicates what would happen if there is a lease, and what would happen if there is no lease.

Ms. Balsam: Yes.

Mr. Roche then moved that the Board ask the staff to draft language, as described above, and **Mr. Carver** seconded.

The vote commenced, but was stopped when Mr. DeLaney asked if they were going to have discussion about it.

Mr. DeLaney: First off, current lease or any lease? That is expired?

Ms. Balsam: I believe that is the motion.

Mr. DeLaney: So for a lease that expired in 2007, for someone who's no longer in the unit?

Ms. Balsam/ Ms. Cruz: No, because if that person's no longer there, they're not the prime lessee.

Mr. DeLaney: I'm trying to understand. (Are we including) a lease that expired a year ago, a lease that expired five years ago, that says, I'm using this only as an artist's studio as permitted by law; I'm not going to live there?

Mr. Roche: If I understand the consensus – and I kept my motion short – we were trying to just move the ball a few inches. And then we would tackle that, once we moved it a few inches. That was my intention. It wasn't my intention that we were creating a signed-sealed-and-delivered one or two options.

Mr. DeLaney: I'm just trying to understand, because sometimes a couple of inches is a lot.

Ms. Torres-Moskowitz: I was wondering about that, too. I didn't necessarily want the draft language. I'd be interested in it being researched. What have you accomplished if you end up making it more convoluted than it already is, which is pretty convoluted? So before it's drafted into any language that could ever be accepted by anyone, I just want some research.

Mr. Roche: That doesn't really help us.

Mr. Carver: I was contemplating the current state of affairs with regard to the existence of a lease, either expired or in effect. That's the category. My thinking is to keep the same category, and consider changing what happens in that category. The question is, how far to expand. Is it everyone at the table? Is it common household? Is it something else? Or is it no changes? So in terms of "which lease," we're thinking of the current state of affairs -- a lease in effect with the lessee still there. I'm not suggesting changing the categories. The only issue is, what happens to that category. That's my understanding of what you're proposing.

Mr. Roche: Right. And I think we have to see it in draft form, so we can say we don't like it, or we do like it. We're in discussion mode now for a few hours based on research (that's been done). But we need to see a draft, so we can vote it down, or make changes to it. But to just have staff do more research and come back with options…I don't think that would get us much farther than we've already gotten. We have to see the language, so we can say what we do and don't like about it. And I trust the staff to draft language that's close enough to what we want, that we might only need to make some modifications.

Mr. Barowitz: I don't know that we really need a motion to implement that. There could be a consensus, *or* we ask the staff to make these changes. But if you want to go ahead with that vote…

Mr. Roche: The nice thing about a vote is that we're *definitively* moving forward a few inches to the next level, so if there's a question at the next meeting, we *can't* go backwards. That's my point of view.

Mr. DeLaney: As we've just witnessed over the last twenty minutes, there's some lack of clarity as to what, if anything, we voted on last week. I would like someone to read me the text of what was proposed/ motioned.

Ms. Balsam: My understanding of the motion is for the staff to draft another version of this proposed rule that makes a distinction between people who have no lease whatsoever, and people who have, or have had, a lease. And what would happen to the group of people if there's no lease at all; and what happens to the people if there is a current or expired lease.

Mr. DeLaney: I see two big problems; two causal factors in the difficulty we're having with this. The first is that we're really chasing two rabbits at the same time. One question is, who's eligible for protection, based on whether or not there's a lease; and secondly, and of much greater concern to me, what they have to do to qualify for that protection in terms of the primary residence requirements. And all of this only matters if the Board is the one making the decision, because the landlord still has the right to register whomever he chooses to be a protected occupant. If we were clear or had a draft where primary residence was not a requirement for protected occupancy, that would draw my vote.

Mr. Carver: I think the staff has some very strong opinions about that.

Ms. Balsam: I think it would be *ultra vires.*

Mr. Carver: We have a statute.

Mr. DeLaney: I'm sorry, what would be *ultra vires*?

Ms. Balsam: To take primary residency out of protected occupancy.

Mr. DeLaney: Actually, I would make the opposite argument; that to interpose primary residency as grounds for coverage (protected occupancy) could be *ultra vires.*

Ms. Balsam: Everyone's entitled to their own opinion. But your opinions are the ones that count, because you get to vote.

Mr. DeLaney: And my second problem, to be very frank, is that this is yet another meeting where we only have seventy-five percent of the Board present. And Mr. Carver and I are making opposite arguments, so it will

ultimately be the folks in the middle who will decide this. It's difficult to have a significant number of meetings where we don't have the benefit of being able to make those arguments to people. I pat myself on the back. I thought I did a pretty good job early on of summarizing the history of the law – why I think this is a separate rule; why I think my *ultra vires* argument might trump yours -- but the fact that I'm missing a quarter of my audience – or more, if the vacant seat is ever filled -- makes this kind of a tough process.

Mr. Roche: Mr. Chairman, with all due respect, I think we've fallen a little bit away from the issue of the motion. I have no issue with discussing all these things, but I don't want to lose focus.

Mr. Hylton: Is there any more discussion on the motion? No.

(The vote resumed where it had left off)

Vote on whether or not to redraft language re protected occupancy status, with and without lease

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

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

Members abstaining: 0

Members absent: Mr. Hernandez, Mr. Schachter

Members recused: 0

Mr. Hylton: So the motion is not passed.

Mr. Barowitz: I agree with Chuck. There are two people not here, and we really need a full Board to move forward. My dissenting vote was really to confirm that we really need to have a full Board.

Mr. Hylton: If we're going to move forward on this rule; if we're going to move forward as a Board…..I have no control over absentee Board members. We have to carry out our function with those who are present. We cannot be dependent upon who's here and who's not, because the next Board meeting might be the same thing. Then what are we doing? We're wasting hours of the people's time and of your time. We need to do our job while we're here, and do the best we can with the people here. If we can't act as a Board because there's not a *quorum*, I can understand that. But once we're here, we need to do our jobs.

Mr. Roche: I support what the Chairman says. We have no idea why some of our colleagues are absent. And with all due respect, how do you control that? People have emergencies, things that come up in their lives. I'm not sure you can control that, so I think we have to put that aside.

Mr. Barowitz: I don't disagree with that. I think, nonetheless, that we have conveyed enough information and are set to go on and to proceed with some clarification. There are one, two, three, four, five staff members here.

Ms. Balsam: That's the *entire* legal staff.

Ms. Torres-Moskowitz: Yes, I like where Elliot's going. I think the discussion was really good. But while I've been trying really hard to learn everything I can – from you, from reading a lot of material -- what I need to see is…. What I'm really interested in is what happens if we really segregate out these prime lessees from the overall mission of covering more people. It seems like we're creating a special group, instead of the broad law that you wanted.

Ms. Balsam: It's already there. I'm not creating it. That's how the rule is *now.* The prime lessee trumps all.

Ms. Torres-Moskowitz: My experience in my building is different.

Ms. Balsam: That's because your landlord registered your building.

Ms. Torres-Moskowitz: My landlord doesn't care. If you have a landlord fighting you, then it matters.

Ms. Balsam: Correct. Mr. DeLaney takes issue with that also. That the landlord shouldn't have that power. I believe, right?

Mr. DeLaney: I think everything in § 2-09 has nothing to do with this discussion. As I said earlier, it's designed only for a limited set of circumstances: subdivided space, sublet space, and questions of assignment.

Ms. Balsam: Let me just ask you this, though: How would you decide protected occupancy cases without using § 2-09?

Mr. DeLaney: That's an excellent question, and the suggestion I was about to make….One of the things that is stultifying about this process is that we're going to come up with something, then we're going to submit it to the Law Department to see if it flies with them. It seems to me that, where there are very different opinions, we could distill a number of questions, and submit those questions to the Law Department to get some guidance, instead of spending another two, three, four meetings discussing this; *then* submit it to the Law Department and the "department of proper language" – "may" versus "shall" -- and wait for it to come back, with them saying, oh that's great, but you can't do that! So I think the stress points are crystal clear. In a week's time, I could provide you with a list of questions I would like to see answered by the Law Department before we go further.

Mr. Hylton: The Law Department does not make our rules for us. We submit them for review by them, and also by the Mayor's office. We're not in control of the Law Department. We can't ask them to do work that's outside of their normal purview. That's not the normal way rule-making is conducted.

Ms. Balsam: I have reached out to them on certain issues that I thought would be problematic. It's not that they haven't been in the loop; but to give them a set of specific questions to answer? I don't know how they would react, or when we would see answers.

Mr. Hylton: They're going to come back asking, what context is this?

Mr. Roche: Chuck, I think you're idea might have some merit, but I thought *this* was our Law Department? (indicating the staff). If we come up with something that they don't think is going to pass muster with the city Law Department, I think they'll let us know. Now, maybe our legal counsel will tell me I'm wrong, but that's how I see it: that this is our Law Department.

Ms. Balsam agrees.

Mr. Hylton: That was a great comment. Thank you. So Board members, you have a set of lawyers here working for you. You either trust them or not. But even if you don't trust them, and they have something drafted, it does have to pass muster with the city's Law Department. You don't have to adopt what they present. In fact, they can draft what you want. They're just giving you guidance as to what may not pass muster with the Law Department. So again, we have to do our job. It's the Board's job to make these rules. It's not the Law Department's job to tell us how the rules can go before you even send it to them. They're not as familiar with all the processes as you are. We do have some very smart lawyers in the Law Department, who are familiar with the Loft Law, but this is not their job. They're reviewing laws for all the city agencies, as well as other things, so we have to do our job by forwarding to them a product that they can review.

Ms. Torres-Moskowitz: Following on what I was saying earlier, about the other piece – primary residence. What would help me … last time there was a list of things?

Ms. Balsam: That's in the proposed rule.

Ms. Torres-Moskowitz: Rather than just seeing a final list, I'd like to be able to compare it to the Rent Stabilization Law list, to see where we might differ from them, in terms of defining primary residence. Then we would have a bunch of ideas and could consider each one carefully, with the intention of not dislocating people and providing continuous coverage, as the Law intends. It would help me, rather than just looking at a draft…….I guess I'm afraid of the draft. Let's research this together and find some commonality….When I just see six things….I just need more to be able to do my job. Does that make sense, in terms of how you do rule-making? I need to see how Rent Stabilization defines it, and how we did it in the laws before. It was really helpful to me when you did your presentation of 1992… for me to know when all these rules have been modified, legislatively. I like the timeline of the history. It would be very helpful to me, as a new person on the Board, to understand how we got to where we are. I love hearing the institutional memory that's alive here on the Board, but if I could have a timeline: in 1992, this law changed… There must be a list somewhere of what changed when.

Mr. Carver: You might limit it to just the issues on the table.

Ms. Torres-Moskowitz: Not case work. Just modifications to the rules.

Mr. Carver: That's big also. It has to be very limited, or else it will be a full-time job for somebody.

Ms. Torres: OK, how would we limit it then?

Mr. Hylton: To what's on the table

Ms. Torres-Moskowitz: 1992 seemed to be a big year.

Ms. Balsam: We did § 2-09(b) and § 286.

Ms. Torres-Moskowitz: I really respect all the lawyers and their research, but for me to make a decision about something I'll be voting on, I feel an obligation to the people to understand what I'm voting on; and I

can't understand when it's just handed to me. I have to see a little more. I'm not frustrated; I just think this is a normal, healthy, government process.

Ms. Balsam: I've never seen a process like this in over thirty years.

(Lots of laughter)

Mr. DeLaney: I'm more than happy to agree with Rich, and say, this is my Law Department, great. Now, I know that we had a very interesting piece of research presented to us on the question of retroactivity, which was done, I realize, by an intern. And I know that the Board's legal department has a lot of work before it, whereas, I assumed the Law Department was just rolling in lawyers. But, for example, we've gone around several times now on a couple of Mr. Carver's arguments with regard to how, when, and conversely, when *not* the Loft Law should be read *in pari materia* with rent control and rent stabilization. We've had arguments about the significance of where (Article) 7C uses "tenant" versus "occupant" or "residential occupant qualified for protection," and for those of us who are not attorneys, certainly, having some clear legal opinion from *some* Law Department, whether it's from you (staff), Corp. counsel, or Task Rabbit, would be helpful in a lot of ways.

Mr. Hylton: But that's what you're getting from the staff, when they speak.

Mr. DeLaney: Yes, I appreciate the degree to which Helaine presented a PowerPoint today, that started to clarify the thought process in a way that hasn't been put forward before, but having that in a two-or-three-page memo with some reaction to the cases outlined on pages five through seven of the DUMBO Neighborhood Alliance proposal, would be even more helpful.

Mr. Hylton: I want to revisit Mr. Barowitz's comment that we didn't actually need a motion for the one that failed, is that correct? In the interest of trying to get something done here…What are we coming back to next month with respect to the rules and what we were discussing today? Is staff going to draft something? Where are we? Are we deadlocked?

Mr. Roche: Mr. Chairman, I'm concerned that we've had two rules meetings, with outstanding debate and a tremendous amount of good things brought forward, and maybe I'm wrong, but I don't think we've even moved the ball one inch. We're in the same place we were two meetings ago, possibly even two meetings before that. I have no knowledge of what point in time somebody can step in and say, we're not going to continue indefinitely, having two meetings a month, with this process. I don't know the answer, but I'm concerned, because it seems that this continues and continues. I'm thinking that at some point in time, someone will say, we're not going to continue; you're not making progress. We leave it the way it is or….. So take that word of caution. If we, as a Board, can't figure out how to move this ball a few inches at a time, maybe we won't have the opportunity to move the ball at all, and someone should just say, we're going to leave this the way it is.

Mr. Hylton: That has the effect of not changing the rule at all.

Mr. DeLaney: I would comment to your question, that I think, the Chair has every right to direct the staff to alter the draft in some way without the Board voting in favor of it.

Mr. Hylton: Thank you, Mr. DeLaney. So, I direct the staff to redraft these rules to encompass the ideas that were brought up in the motion. I really do appreciate the debate. But the staff does work really hard to get these things done, and we hope by next month we'll have something better for you to look at. We'll see if we can pull some stuff together. We do have a lot of other stuff to do, including cases. So it's not easy to dedicate so much time. We just don't have the manpower to do all that, but we'll take our best shot at it, and see what happens, when we redraft this.

Mr. DeLaney: Your conclusion is so definitive; before we do that, can we just be clear on, in addition to the cases for next week, what portion of the rules we should prepare?

Ms. Balsam: I guess we should go back to extensions, because obviously we're redrafting this, and I won't have two weeks to get it to you.

Mr. Hylton: I also want to remind you that at the next meeting, we also have the presentation for Chief Spadafora, and I hope you'll encourage as many members of the public as possible to come to witness the presentation.

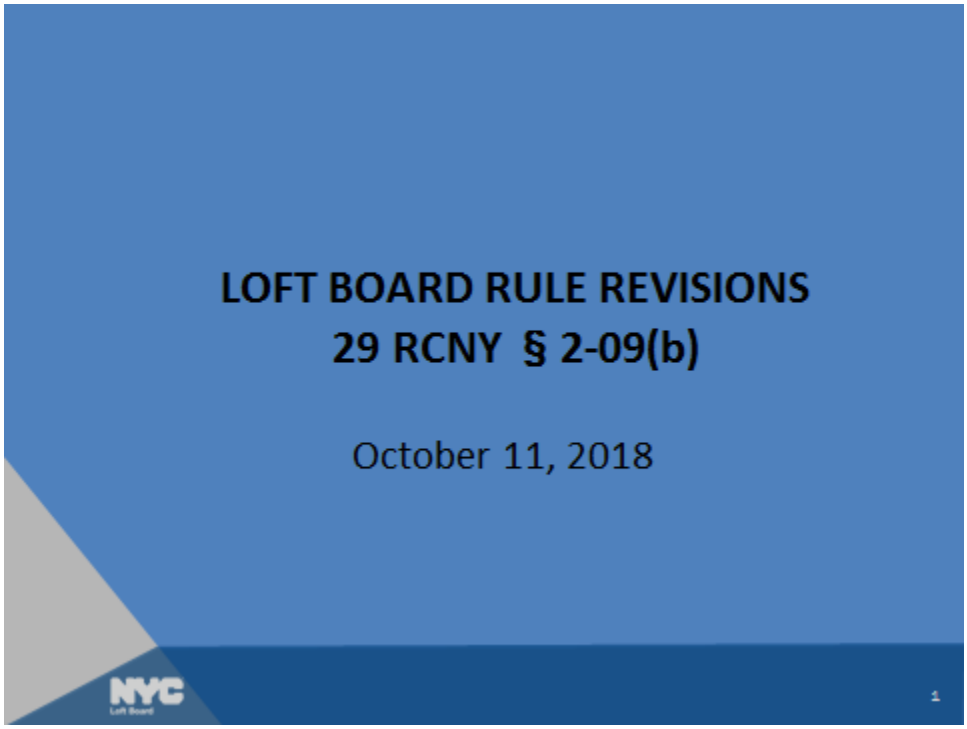
Mr. Roche asked Mr. Hylton about the schedule for the holiday months of November and December. If there would be a second meetings in those months?

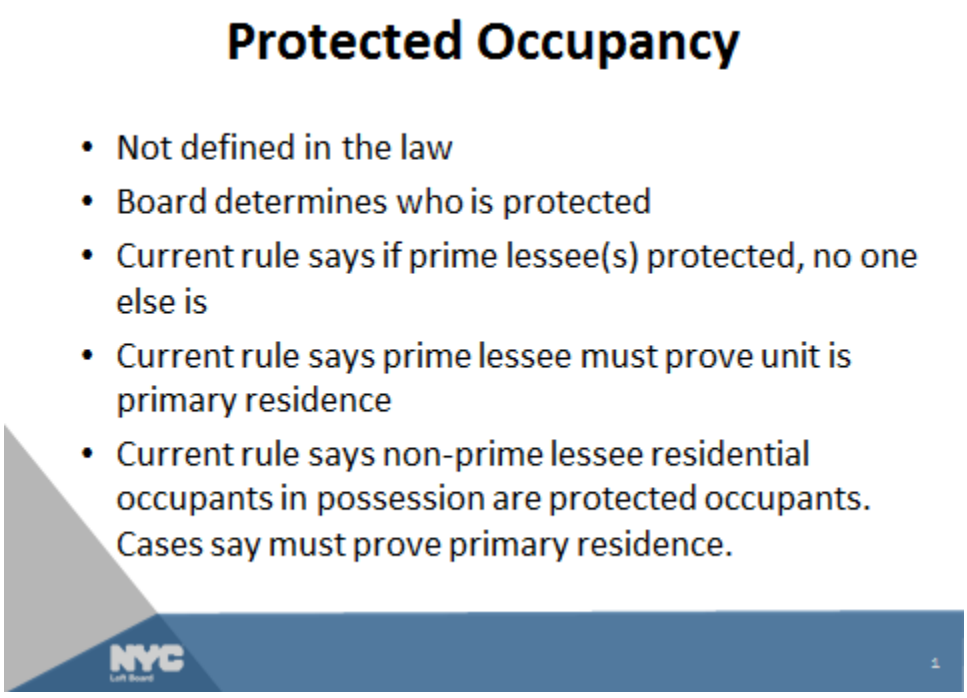
Ms. Balsam responded that there is one scheduled meeting for November, there is nothing scheduled for December, and we are leaving it that way.

There was some discussion/ explanation of what would happen at the Spadafora presentation, who would be speaking, etc.

Mr. Hytlon: This will conclude our October 11, 2018, Loft Board meeting. Our next public meeting will be held at 22 Reade St. Main Floor, Spector Hall on October 18, 2018, at 2:PM.

The End


LOFT BOARD RULE REVISIONS
29 RCNY § 2-09(b)
October 11, 2018
NYC
Loft Board
1


Protected Occupancy
• Not defined in the law
• Board determines who is protected
• Current rule says if prime lessee(s) protected, no one else is
• Current rule says prime lessee must prove unit is primary residence
• Current rule says non-prime lessee residential occupants in possession are protected occupants. Cases say must prove primary residence.
NYC
Loft Board
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Relevant Purposes of Loft Law MDL § 280

- Residential tenants assist in paying costs *without being forced to relocate*
- Prevent uncertainty, hardship and *dislocation*
- Reduce disputes between landlords and tenants and ease burden on courts

Original Loft Law MDL § 286(2)(i)

- "Prior to compliance with safety and fire protection standards of article seven-B of this chapter, residential occupants qualified for protection pursuant to this article shall be entitled to continued occupancy, and shall pay the same rent…"
- No mention of primary residence

Court Cases

- *Bor Realty*, 129 A.D.2d 496, 514 N.Y.S.2d 339 (1st Dept, 1987), *aff'd*, 70 N.Y.2d 720 (1987)
- "The term 'primary residence' was a familiar one to the Legislature at the time article 7-C was enacted and had a well-established meaning. Therefore, the omission of that term in a jurisdictional section may reasonably be believed to be purposeful."

1992 Amendment MDL § 286(2)(i)

- Prior to compliance with safety and fire protection standards of article seven-B…residential occupants qualified for protection pursuant to this article shall be entitled to continued occupancy, **provided that the unit is their primary residence**, and shall pay the same rent…

Legislative History: Budget Report

- This bill also…provides **continued occupancy** rights for tenants of subject units **provided the unit is the primary residence**
- This bill would provide those who lease IMDs **the opportunity to continue to live in their units** at a regulated rental

Legislative History: Assembly Memo in Support

- Allows tenants **to lawfully remain** in their loft residences
- If the law expires, **tenants occupying these lofts** would be exposed to the threat of immediate law suits which could result in **eviction from their homes**…These changes to the law **allow tenant [sic] to remain in their homes**

Staff Goals

- Simplify
- Delete problematic language "Except as otherwise provided herein"
- Come up with a comprehensive and fair scheme

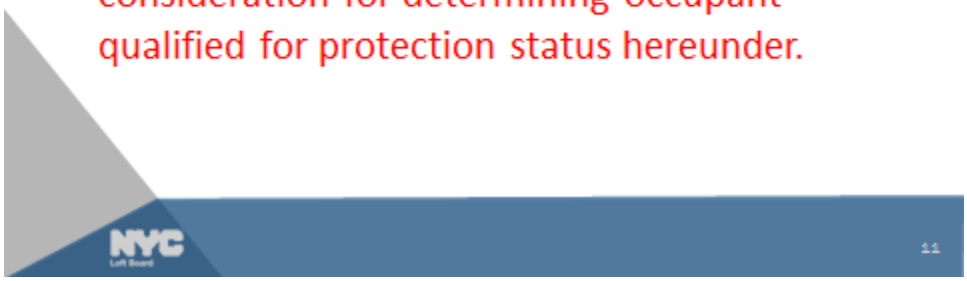
NYC Loft Board 9

Petition by DUMBO Neighborhood Alliance

NYC Loft Board 10

Petition: 29 RCNY § 2-09(b)(1)

- Except as otherwise provided herein, the occupant qualified for protection under Article 7-C is the residential occupant in possession of a residential unit, covered as part of an IMD, and primary residence shall not be a consideration for determining occupant qualified for protection status hereunder.



MDL § 286(2)(i)

- Prior to compliance with safety and fire protection standards of article 7-B…residential occupants qualified for protection pursuant to this article shall be entitled to *continued* occupancy, provided that the unit is their *primary residence*…

Petition: 29 RCNY § 2-09(b)(2)

- A residential occupant in possession of a unit, as set forth in 29 RCNY § 2-09(b)(1) shall qualify for protection…notwithstanding that such occupant was a prime tenant, assignee, subtenant, or roommate, provided that such residential occupant was in possession of such unit on [the effective date of the law].

NYC Loft Board 13

Petition: 29 RCNY § 2-09(b)(4) First Paragraph

- Where another occupant is in possession of an IMD unit, an out-of-possession prime tenant or sublessor who is not a prime lessee, of such unit, may be deemed to be the residential occupant qualified for protection…if such prime lessee or sublessor can prove that the residential unit covered as part of an IMD is his or her primary residence. If such prime lessee or sublessor fails to prove that such unit is his or her primary residence, any rights of such person to recover the unit are extinguished.

NYC Loft Board 14