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

Sept 27, 2018

The meeting began at: 2:00 pm

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

INTRODUCTION:

Chairperson Hylton welcomed those present to the September 27, 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.

Mr. Hylton noted that today's agenda is devoted exclusively to rule-making, specifically, proposed changes to section §2-09(b) which concerns protected occupancy. Before Ms. Balsam leads the discussion, Ms. Torres-Moskovitz would like to make a statement.

Ms. Torres-Moskovitz: I would like to clarify something from last Thursday's meeting. We were discussing a case that was tabled, in which the fundamental complaint was that the tenant had been told he would have to vacate the premises for three months, so that code-compliance work could be done. However, he was, in fact, out of the residence for eleven months. Now, I would never advocate that someone remain in their apartment while construction that could threaten their health and safety is underway. What I was speaking about was the public perception that if you leave your apartment, you are then vulnerable to never being allowed back in. It's a fear that I, myself, have as a tenant. But I want to clarify: my opinion is not that you should stay in your apartment amid dangerous construction. That's not what I'm saying at all. But there is the perception that this can happen – as in this example – thinking you'll be out for three months, but it becomes eleven. I've seen it happen, and the consequences it can have for a family. That was the point I wanted to make.

Mr. Hylton thanked Ms. Torres-Moskovitz and turned to Ms. Balsam.

Ms. Balsam: I've distributed to the Board members and made available to the public attendees here today the document we'll be talking about, which relates, primarily, to the protected occupancy rule; and, I also added sale of rights and penalties after that, in the event we have time to address those.

The beginning of the section is a deletion, so it starts with "(b) Occupant qualified for possession of the residential unit and protection under Article 7-C." Then all that text (after the bracket) is deleted. And I realized as I was reviewing it earlier this week, that I deleted more than I intended to. Originally, when the rule was drafted, we were breaking this section into three separate rules, but we've actually pulled back from that. So the deletion is going to change. It will go from the bracket before the (1), and continue down to number (4), which will read from "The prime lessee…" through to "…even if another person is in possession." That would

be a period there, and then a new number will be assigned to the rest of that text in that section, which will remain as is.

So the next section would start with "If the prime lessee or sub lessor fails to prove that such unit is for his or her primary residence, any right of such person to recover the unit are extinguished." Etcetera, etcetera. I'll show you that renumbering next time, and the text beyond that part is going to stay in the rule as-is. Unless, of course, the Board wants to change it. That's perfectly fine, too.

Mr. DeLaney: If I understand this proposal correctly, the first words would be the last sentence of number (4)?

Ms. Balsam: No. We're going to delete what is now 1, 2, 3 and part of 4. But we're going to put in what's added after that. So if you look at page 2…

Mr. DeLaney: Wait, let's stay on page 1. Tell me where the bracket goes.

Ms. Balsam: Sure. It goes after, "…even if another person is in possession." That should be a period and a bracket.

Mr. DeLaney: So the now sole, remaining sentence of number 4, that will go somewhere else?

Ms. Balsam: It will go under the new text that we're going to use. We're going to replace all that is being deleted, and this remaining material will follow the newly inserted material. And the Board will have this to review at least two weeks before the next meeting. I just wanted to point out that I deleted too much.

Mr. DeLaney: Thank you.

Ms. Balsam: So that brings us to the proposed rule. The first, so-called, new portion is, "(1) A protected occupant registered with the Loft Board must be a natural person."

Mr. Carver: Prior to jumping into what the rule says, I think you really do owe us an explanation as to how we got here. Because last year, we were talking about the same issue, but it was never explained to us why the issue was tabled. And now here we are again, talking about it. So, we should understand why we stopped…and why we're starting.

Ms. Balsam: The Board members, as well as others outside of the Board, expressed some concern that the scope of the rule-changes we were proposing was too broad. And we were asked to roll it back; so we did.

Mr. DeLaney: I find myself in complete agreement with Mr. Carver, that a little explanation would be helpful.

Ms. Balsam: People were unhappy with what we were doing, and we were asked to stop what we were doing, so we did. Now, we're proposing more modest changes.

Mr. DeLaney: I understand the grand scheme of extensive revisions to Chapter 2. The more sweeping proposal to revise Chapter 2 is one thing. But in particular, with the protected occupant provision, the last time we were discussing this, we were looking at four different flavors: numbers 1, 2A, 2B and 3. So the question I presume you're asking (Mr. Carver) is, on this topic, how did we get to this point?

Mr. Carver: Right. But I'd like to talk about the options also. As Chuck said, why did we stop talking about this particular topic nine months ago?

Mr. Hylton: Why do we have to go back to what happened nine months ago? Ms. Balsam explained that there were concerns about the scope of the changes. I don't see why we have to go back and discuss into history. Why can't we just discuss what's here before us? These are your rules, by the way.

Mr. Carver: Because I think that outsiders – politicians – are trying to influence the Board. And the rules as proposed may not reflect sound policy, and are instead the wishes of someone in politics.

Mr. Hytlon: Can we as a Board debate these rules aside from those influences and come up with agreement?

Mr. Carver: Yes, of course, but that's part of the debate

Mr. Hylton: I think we're being distracted a little bit. If we have these kinds of debates back and forth, we'll never get through….

Mr. Carver: I know, but you are the one who stopped it….The Board, itself, directed the Executive Director to give us options because the sole option that had been presented was, admittedly, by you guys, the most controversial and extreme. We asked for options. You gave us options. We were debating options. One of the options was characterized by the staff as the most viable. But here we are today, without the options, back to the very same proposal that had made us ask for options! And you now want to revisit this without even explaining what happened?

Ms. Balsam: I found that having all the options was very difficult to deal with. It was difficult for me, personally, to deal with. I think it was difficult for the Board members to deal with. I think it's good to have a place to start, and if you don't like what the proposed rule says, then we change that language, and we come back with the redrafted language. But having four different options on the table, I think, was not working for anyone.

Mr. Carver: But we're the ones who asked for it. We're the ones who were working with it. And suddenly they're gone?

Ms. Balsam: I don't know that we were working with anything. We had a bunch of stuff that nobody was really focusing on….because we couldn't focus; or, at least, I could not focus.

Mr. Schachter: Does what we're looking at here reflect any of the four options?

Ms. Balsam: Yes.

Mr. Schachter: Can you say which option that was?

Ms. Balsam: No.

Mr. Schachter: Is it a combination of different options that you pulled together?

Ms. Balsam: It could be. Honestly, I don't remember.

Mr. Carver: This is the very original proposal that I asked…….We didn't say, up or down, whether we wanted it or not. But we wanted to at least consider less extreme possibilities.

Ms. Balsam: So then let's talk about that in the context of what's here. If you don't like what's here, then say, I don't like what's here; I think we should change it. Then the Board can make a determination about that. I'm fine with that. But I think having four different starting points is just not manageable. So here's a starting point, and if it's not good, we change it. We've done that with other portions of the rules. Nobody's asked for multiple options on other portions of the rules. So let's follow that same procedure here, and it will evolve, as a result of the discussion.

Mr. Carver: Ok. Would you first explain what the problem is that you're trying to solve by changing the existing rule?

Ms. Balsam: There are a couple of problems. One problem is the question of primary residence. And last September, just about a year ago to the day, I gave a presentation about this, in which I discussed the concept of primary residence: whether it should be in or shouldn't be in; the law actually does talk about tenants continuing their occupancy if they use the unit as their primary residence; and it was very unclear as to who needed to use the unit as a primary residence. There's a different standard for prime lessees or sub lessors who are not in possession, as opposed to people who are occupying. That was a point of contention. So one goal here was to try to clarify and say: You have to live there. Here's what we think you need to prove that you live there. We're not giving you standards from Housing Court, because arguments are different, and people will not have the same kind of proof. So that was one issue that was important to address.

The other issue was that of the "prime lessee trumps all." So the Board's cases have evolved in a way that if the prime lessee is living there and using the unit as a primary residence, no one else can be a protected occupant. So based on a lot of feedback from many people, as well as earlier cases, a question arose as to whether or not that was the intent. One of the purposes of the Loft Law is to prevent dislocation. If we continued along this path, would we be dislocating people? So one of the proposals is to eliminate that "prime lessee trumps all" line of cases, and clarify the rule to say that if you were there on the effective date of the law, whether or not you were the prime lessee, you can stay and be a protected occupant. Unless, of course, there are other things going on that would cause someone to want to evict you. And if you were there after the effective date of the law, and the landlord consents, you could also be a protected occupant.

That's the proposal. Will that pass? I don't know. You have to discuss it.

Mr. Carver: So, I think what you're saying is the current rule does not accurately reflect the intent of the legislation?

Ms. Balsam: Yes, to a certain extent, that's true.

Mr. Carver: So prior to us jumping into the rule itself, I'd like us to explore that concept.

Mr. Carver: Last year, I had pointed out parts of our actual statute, of the Loft Law, that I thought showed a legislative intent to, in particular (Interruption, pause. Due to video issue)

Mr. Carver: Ok, so you're point is that the existing rule doesn't properly reflect the intent of the Loft Law, in that it protects prime lessees, exclusively.

Ms. Balsam: That's one thing, yes.

Mr. Carver: Putting aside the primary residence issue, when I asked the question, what's the problem with the current rule, the only problem I heard come back was that the current rule doesn't express the intent of the legislation properly by protecting prime lessees to the exclusion of all others. I did not hear another problem. But if there are, we can certainly talk more about the problems the rule is trying to solve.

Mr. Schachter: Correct me if I'm wrong, but I thought part of the issue was protecting the people who are not on the lease. And that then got into the issue at the time, which was that the landlord regarded the protected occupant as the person with whom they had a contractual relationship; the person who had signed the lease; that was someone he knew and could identify. For simplicity's sake, that was the easiest person to have as the protected occupant. The problem is that, beyond that, there's an ambiguity in terms of the other people who may also be living there at that time, whom we may or may not have been aware of.

Mr. Carver: That sounds like a problem with the proposal. But my question, prior to getting to the proposal, is what is the problem with the existing rule that is necessitating the proposed changes?

Mr. Schachter: And I thought the idea was that we were having difficulty trying to figure out how to protect people who were not signatories to the lease.

Ms. Balsam: Correct.

Mr. Carver: I'm asking, why is that a problem?

Mr. Schachter: It's a problem because there are people living there about whom it was unclear how they are to be treated in terms of the law's intent. The law is saying we're here to help the tenants who are living in these properties, and the application of that was challenging, because once you've gone beyond the people who are on the lease….

Mr. Carver: Certainly what you're saying is a very fair statement. But if the problem with the existing rule was that it's not properly implementing the intent of the legislation, I don't agree with you, because of the way the legislation is written. As I pointed out last year, the legislation links protection to a *tenancy*. To an actual tenancy; not merely an occupancy. The legislative findings in the statute also talk about "tenants" and "tenancies." So I don't agree with you at all that the existing rule in any way subverts the intent of the legislation. In fact, I think the existing rule *properly* implements the intent of the legislation, which actually links protection to a tenancy.

So if (you're saying that) the problem is that the existing rule is not expressing the intent of the legislature, I think you're wrong. You're going to tell me that the cases say it's OK. That's going to be your response. But just because the courts have not been faithful to the legislation doesn't mean that we shouldn't be faithful to the legislation. The courts are not requiring the rule-change. If they did, this rule would have been overturned already. I don't know that case law that's not faithful to the legislation is a reason for us to ignore the plain language of the statute, which links protection to the tenancy. If implementing the intent of the legislation is the problem…. I don't see how we have a problem.

Mr. DeLaney: I remember struggling with this nine months ago. Can you just reiterate your hypothesis as to how this is contrary to the intent of the legislature?

Mr. Carver: Yes. I'll cite you the two sections of the statute.

Mr. Hylton: Can you do that in about five minutes? Then we then have to move on.

Mr. Carver: But this is *rule-making*. I can't imagine doing anything other than talking about the intent of the legislature, when the intent of the legislature is the stated goal of the discussion.

Mr. Schachter asks if a point of the discussion isn't the interpretation of "tenants."

Mr. Carver: Right, and I was asked for the cite….

Ms. Balsam: At least §286. Last year, you cited §286.2(i).

Mr. Carver: Yes, and also the legislative findings in 280, I think.

Mr. Carver: Yes, the citations are §286.2(i) and section §280.

Ms. Balsam: So, §280 talks about residential tenants, "… so that residential tenants can assist in paying the cost of such legalization without being forced to relocate" with or without a lease. §286 entitles tenant protection, but it says [in §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 there was at least once case that I cited, which I believe was a footnote in *Dworkin vs Duncan*, which was probably the first case to construe the Loft Law, where the judge said that they purposefully did not use the word "tenant;" that they focused on the word "occupancy," because they recognized that there might not be leases in place; that these kinds of occupancies were different, and they wanted to differentiate an "occupancy" from a "tenancy." And that was a quote from people in the legislature who came to train the Housing Court judges.

Mr. Carver: Yes, but we have a statute that talks about a lease or rental agreement. So that is talking about a tenancy derived from a *lease.*

Ms. Balsam: Unless there isn't a lease in place. It also says, [in §286.2(i)] "in the absence of a lease or rental agreement,"

Mr. Carver: But we're talking about changing a rule with regard to a state of facts where a lease is in existence.

Ms. Balsam: Or not. The rest of the sentence says that they "shall pay the same rent specified in the lease or rental agreement *or* in the absence of a lease or rental agreement," so there may not be a lease or rental agreement. And the statute acknowledges that these occupants may be there *without* leases or rental agreements.

Mr. Carver: But at the moment we're only concerned with the state of facts when a lease exists. So that's not relevant to…

Ms. Balsam: Ah, OK.

Mr. Carver: ….this portion of the rule, that a prime lessee trumps others. So when *there is a lease*….this is crystal clear. And when was this rule written?

Ms. Balsam: The original rule?

Mr. DeLaney: 1983

Ms. Balsam: I think so, yes. There may have been a couple of additions, because there were amendments to the law and those amended dates are in there.

Mr. Carver: When was the statue passed?

Ms. Balsam: The effective date was June, 1982.

Mr. Schachter: So that I can keep up, are we now dividing the fact patterns into two sets: one in which there's a lease, and one in which there's no lease?

Mr. Carver: That's the current state of affairs.

Mr. Schachter: That's your interpretation? So we've got one group where we have a specific tenant, and the other is there's no lease, so therefore, there are one or more tenants who are, effectively, then eligible to be protected?

Mr. Carver: Yes, I think that's the current state of affairs.

Ms. Balsam: Under the current rule, if there's no prime lessee, then anyone who's occupying the unit would be the protected occupant, if they were there at the effective date of the law, or if they were there after the effective date of the law with landlord consent.

Mr. Schachter: So we already have that?

Ms. Balsam: We have that.

Mr. Carver: When there's no lease.

Ms. Balsam: When there's no lease. Well, when there's no prime lessee. There could be a lease, and the prime lessee is gone or whatever.

Mr. Barowitz: So both these things seem to be very clear. So where are we?

Ms. Balsam: The question is whether or not we want to eliminate the part of the rule that says, when there's a lease, the prime lessee is the protected occupant.

Mr. Carver: That's a very big deal, because that will completely wipe out the value of the lessee's interest in the unit.

Mr. DeLaney: It's nice of you to be concerned about that. I can only stress, for example, how perverted this became in *Schuss* . A married couple moved into the loft, and only the husband, who signed the lease, we found to be the protected occupant. From my vantage point, number one, we started going astray in 2014. A large number of the protected occupant decisions that the Board has adopted have been at odds with what I think is correct; and, also, most of the OATH judges are very reluctant to go along. Secondly, I think the protected occupant question and the primary residents question are two very separate issues. Somehow, we need to find a way to discuss those separately. The first step to that is to come to a conclusion in our own

minds as to whether to give particular weight to the language the drafters used to draft the Loft Law, because it's part of tenant protection versus occupant protection, then let's do that. But it now seems to me we then have five or six different topics on the table.

Ms. Balsam: Well, it seems to me that we're discussing the prime lessee issue. The question was, what are the proposals? Mr. Carver is focusing in on the prime lessee issue, and I think it's fine to resolve that first.

Mr. Carver: (To Mr. DeLaney) Thanks for bringing up the issue of the spouse. There is a right of succession in the current rule for spouses and family members. So I think that concern has been addressed already.

Mr. DeLaney: I think that's incorrect.

Mr. Barowitz: How?

Mr. DeLaney: It's incorrect in the sense that I moved into my loft in 1975. I married my wife in 1992. She is not a protected occupant. If something happened to me, she would have the right of succession. In *Schuss*, we had people who moved in well before the window period; lived there all through the window period -- husband, wife and child, fixtured the loft together; and the Board, applying what I think is a completely incorrect reading, that began with this *Matter of Belkie* in 2014, found that because the lease was only between the husband and the landlord, that the husband is the only protected occupant. Contrary to thirty years of ……

Mr. Barowitz: So that doesn't make sense. It seems what we have to do is to amend that. To say that if you have succession rights, you can stay there, but you're not a protected occupant --- doesn't make sense. It's either one thing or the other. Somehow, that's how the rule should change. We had this incident where woman moved to California for two years. She gave up her loft. And then she was entitled to come back, because she was the prime lessee. I think that's correct. However, if she had *left it totally*, the two sub-lessees there would have no rights, is that how it reads now? They would have no rights whatsoever? The landlord could do whatever he/she wishes to do. Is that correct?

Ms. Balsam: I think that is correct. That if the protected occupant vacates, the sub-lessees could be evicted in a holdover proceeding. Martha's not here, so I'm saying that cautiously. I'm not 100 percent sure, but yes, I believe that is the case. And I will also note that prime lessees and protected occupants have the right to sublease under the Loft Law, so the fact that they left for two years is OK. They're allowed to do that. Sublease for two years.

Mr. Carver: So I go back to my original question: What's the problem with the existing rule?

Ms. Balsam: This is my personal opinion. This is what's in the proposal, and if the Board doesn't want to go that way, that's fine. They're you're rules; not my rules. I think there are people that the legislature meant to cover, who are being excluded, and that we need the rule change to bring those people under the protection of the law.

Mr. Carver: But do you agree that this rule change would come at the expense of the prime lessee?

Ms. Balsam: I don't want to opine on that. But I will say that we've had situations where we had prime lessees with – for lack of a better term – roommates -- who filed for protected occupancy, and the prime lessees opposed those applications. That has happened more than once.

Mr. DeLaney: Can I just ask if we've had the opposite situation? Where the prime lessee was supportive?

Ms. Balsam: That's a good question. Yes, I think we have. I may not have taken much notice of that, or there may have been no opposition. I can't recall a specific case, in my experience, where the prime lessee has said, yes, I want these people to be protected occupants. But to me, if the roommates are filing for protected occupancy, and the prime lessee is not opposing it, then they're supporting that application, because they're not saying, I'm against it. Right?

Mr. DeLaney: So that would posit that there are many instances of that?

Ms. Balsam: I think that's totally possible.

Mr. DeLaney: And I believe, based on your report, that there's actually an Article 78 pending in 79 Lorimer Street that addresses this very topic.

Ms. Balsam: Yes.

Mr. Carver: What's the nature of that case?

Ms. Balsam: 79 Lorimer? There are a couple of 79 Lorimer cases, but that particular law suit is based on the Board's decision to award protected occupancy to the three prime lessees of the units, and to exclude from protected occupancy the roommates of those tenants.

Mr. Carver: So the issue is actually being squarely addressed in that case?

Ms. Balsam: Yes.

Mr. Carver: And what's its posture?

Ms. Balsam: I think it's submitted.

Mr. Carver: It's an Article 78 in the trial court?

Ms. Balsam: Yes. The Supreme Court hasn't decided yet.

Mr. Carver: So why aren't we waiting for that? Are they challenging the validity of the existing reg?

Ms. Balsam: Honestly, I'd have to review the papers to see exactly what the arguments are; but I don't know that we should wait for that outcome, because that's just going to be one judge's opinion; and if the Board wants to make a rule….I think the Board can change the rule if they want to, right?

Mr. DeLaney: Well, just for the sake of drawing this out -- 79 Lorimer is a very interesting case in many respects. One is that we pivoted and re-wrote the order, and the order that was finally adopted, which is the one that's being challenged, was where the Loft Board for the first time spelled out why it felt that what it had been doing for the past thirty years was wrong, and this is why we were making an adjustment. It's also significant because it's yet another of the many cases involving both protected occupant and primary resident,

where the OATH judges had gone out of their way to express their doubt as to whether the path that many of these decisions had taken was correct.

Mr. Roche: If I understand correctly, you're basically saying, in your professional opinion, you think we should leave this portion the way it is and make no changes, is that correct?

Mr. Carver: Yes, which is why, when this was first proposed, I asked that one option be the existing rule, and then later, we asked for some more options. And I don't think the explanation for not having options is satisfactory. I think we're very capable of dealing with options, even if it's one meeting at a time. My preference is that we leave the rule alone; that we don't go to such an extreme position that puts borders and roommates and adult children and Aunt Fran on the same plane as the person who has signed the lease and has real responsibilities to the landlord. That would be my preference.

Mr. DeLaney: Spouses too?

Mr. Carver: I think I conceded that last year.

Mr. Barowitz: It gets very complicated with marriages and roommates and so on. I think we have to get ourselves up-to-date with what's going on in the real world. I think Chuck, at one point, you said there could be two people who are not partners living in the space, and perhaps both of them should be protected occupants. I see no reason why that can't be so. We just have to get ourselves up-to-date with the real world. Then, what happens when the landlord gives the spouse or the holdovers a new lease? Does that person become a PO? And the answer is….No?

Ms. Balsam: Yes. Under the current rule, they would.

Mr. Barowitz: But if the landlord keeps taking the rent from the spouse, whether husband or wife, and that spouse is not on the lease, then what is the answer? Is that yes or no? Does that person become the protected occupant?

Ms. Balsam: That's a harder case. You'd have to see. There'd be an argument to make that the landlord accepted all this rent from me, so clearly the landlord is consenting to my occupancy. That's an argument that could be made, and the Board would, ultimately, have to decide it.

Mr. Carver: There are some practical reasons why, when a lease exists, the lessee should be given preference. There's a sense of permanence that comes with having a lease, as opposed to a roommate or occupancy situation without a lease.

Mr. Roche: When we first began talking about this, didn't we say that we should try to find some real world folks who are affected by these things?

Ms. Balsam/ Mr. Carver: That was the sale of rights.

Mr. DeLaney: But it's a great idea in this instance as well. To some extent, look at some of the crazy cases we've decided. *Ukai*, where the husband moved out, leaving the mother and son, and we were having a hard time deciding whether the son was a protected occupant. *Schuss*, I believe, is an abomination. There've been a dozen cases…

Mr. Roche: It seems to me that there's gridlock among the Board here. Not in a hostile way, but just in uncertainty, and in some cases, lack of being able to relate. I personally feel we would benefit from hearing from some people about real-world situations in terms of clarifying our thought processes.

Mr. Hylton: The Chair recognizes Ms. Torres-Moskowitz.

Ms. Torres-Moskowitz: I like very much what you were just saying. And I think Elliot's comment about keeping up-to-date about what's going on is important. Because there was that one case, where I was reading about family?

Mr. DeLaney: Thames St. Where we said, that's too big, and the judge said, you're wrong.

Ms. Torres-Moskowitz: It was reversed in the Courts, am I right? They said a family can be recognized as roommates that eat together and pool their money?

Ms. Balsam: Yes, that's correct.

Mr. Carver: One of the options that was proposed was allowing people in a common household to be on an equal plane as the lessee. I don't support that; I think it's too broad. But that was one of the ideas that was being thought about last year.

Ms. Balsam: No. Can I just say that, unless it's a CAPA public meeting -- where we're taking comments from the public – the public is not allowed to speak at the meetings. And hopefully we will actually get to that point someday, where you'll be able to stand up and tell us what you actually think of this proposal. But we have a long way to go before we get there.

Mr. DeLaney: Yes, we will be able to do that; however, in my experience, by the time we vote on the proposed rules, it's pretty much a done-deal.

Ms. Balsam: Can I say that, in my experience, that is not true. I did rulemaking for ECB for many years for many years, and when we had public comments on rules, and there was good reason for the Board to change what was proposed in the rules, the Board changed the rule. So in my experience, that is not the case. That's where I'm coming from, Mr. DeLaney. I'm open to changing the rules, if the public makes comments, and the Board wants to change the rules. That's the way it's supposed to work.

Mr. Barowitz: Well, I didn't say that. But wouldn't it be easier for us as a group, to listen now, rather than after the fact? Just a suggestion.

Mr. Schachter: What would be sufficient? If we're going to have a public meeting, how many people, for how long? Could we have a review of the different kinds of speakers? Do we limit it in terms of groups, so we don't have one group versus another group? Do we have geographical diversity? How do we represent the different types of residency? Different types of buildings? What is the proposal? There's a significant diversity of buildings; of neighborhoods; of ownership structures; different unit/ property situations -- before getting into the different configurations of the residents. And I say that with respect. So if we're going to broach this idea, then when we have an actual public comment period for a rule – when we actually say, "Hey everybody, this is what we're thinking about. Come and tell us what you think" -- and some of us actually listen, and then try to talk about what people have told us, how long a comment period is that? And how many speakers come in?

Ms. Balsam: We can make the comment period as long as we want. My understanding from what has happened in the past is that it has been hours, and maybe days. People get three minutes. And what happens when people go over three minutes? If there's nobody in the room, talk for three hours if you want to. But my opinion is that everyone who comes and wants to speak should be able to. *And*, we can hold the comment period open. We've checked this with the Law Department. We can hold the comment period open for further written comment from members of the public, who have questions they'd like the Board to answer or additional comments they'd like to make.

Mr. Roche: I believe we could work it so that people who want to speak could register ahead of time with the Loft Board, so their name is on a list of people who want to speak, rather than have it turn into a never-ending forum. Is that a possibility?

Ms. Balsam: Honestly, I don't know. I'd have to look that up and see if it's OK. But there's a part of me that thinks that's not fair. What if you can't register in advance? What if you're not sure you can be at the meeting that day, but at the last minute, it turns out you can, and you really have something valid to say? Does that mean you can't speak, because you're not on the list? And again, it's slowing things down. So, again, we're not talking about the rules, we're talking about maybe *doing something else* to do something about the rules….

Mr. Schachter: If I understand this correctly, the base idea of a rule is that it's supposed to fulfill the law. And I think that's what the basic question was: Whether the rule, as it currently stands, accurately reflects the law or not. Because if it does reflect it, however much we may wish it to be otherwise, or however much we may feel there is a public need for it to be otherwise, we're stuck with the law that we've got. So before we go further, and hear in greater detail about needs that should be addressed, the threshold question is: can we legally do so?

Ms. Balsam: So I would never make a proposal that I felt was *ultra vires.* I think the current rule is within the ambit of the law. That doesn't mean that you can't amend the rule in such a way that it is still within the ambit of the law, but which allows it to accomplish a broader end.

Mr. Roche asked for the Chairman's opinion at this point.

Mr. Hylton stated that last month and last week, the Board members had said they wanted to debate these rules, and that after hearing the discussion so far today, he felt that instead of continuing on the current course of discussion, the best course, again, was just to review what was before them today. He reiterated that these are "your" rules (the Board's), and that the Board should decide what they like about it; what they don't like about it. If someone doesn't want to do this, then they should make a motion to that effect and see what the other Board members say about it. Then take a vote and move on. Otherwise, we will be debating this until death do we part.

Mr. Carver: My whole line of conversation here is in regards to page one, in terms of what's being crossed out. That's part of what we're doing today. The reason I asked you about when the rule was drafted is because it's so close to when the statute was passed, our own rule is good evidence of legislative intent, that the prime lessee is protected, precisely because it was drafted in conjunction with the statute. When you're looking for intent, the timing of the rule is a factor also. So I don't understand where this other intent is coming from – to ignore the lease. As a matter of policy.

Mr. Hylton: It's not to ignore the lease. It's to include people who are not on the lease.

Mr. Carver: Right. But the effect is to nullify any real significance of a lease, and to actually nullify the value of the holder of the lease. And if this is such an important issue, why is the City not offering to compensate the victims who will lose from this proposal?

Mr. Roche: The prime lessee?

Mr. Carver: Yes.

Mr. Hylton: If we're going to move forward, we need someone to make a motion.

Mr. Carver: Let's get a consensus first. Whether we want to leave the rule alone, or pursue the most extreme option, which is what's on the table.

Ms. Balsam: So there could be a motion to not change the rule. That could be the motion, and there could be a vote on that. I'm not sure what the consensus is.

Mr. Schachter: That sounds like you're voting.

Mr. Barowitz: You're asking for a sense of the discussion, before a motion is made.

Mr. Carver: My position is that it shouldn't change, but my sense is that there are some Board members who want at least some small change, maybe more. If there's consensuses that most just want some small change…then maybe that's the way to go.

Mr. Roche: If what Robert says is true, then perhaps the Chair would be comfortable with a motion that says we'd like more options brought back to the table.

Mr. Hylton: I can't make a motion, but this is what we need to do. There needs to be a motion so that we can move forward, and there are two options: one is not limited, that means we go forward, or to leave the rule as is.

Mr. Hylton: Do I have a motion?

Mr. Schachter: I motion that we consider changes in order to review how to protect those who are not on the lease.

Mr. Hylton: Do I have a second?

Someone asked for the motion to be repeated.

Mr. Schachter: The motion is that we consider how to protect occupants who are not on leases. And that we start by looking at the language drafted, in front of us.

Mr. Roche seconded the motion.

Mr. Hylton asked if there were any comments.

Mr. DeLaney: I'm inclined to vote no or abstain, simply because we jumped to the protected occupant piece because it's so intriguing and there are so many permutations. (And to have my esteemed colleague, Mr. Carver, looking out for the rights of the prime tenants, I'm…..). The problem is that part of what's in the proposal on the floor with regard to the way that the Board has, through questioning that originated, to be perfectly honest, not with the Board but with the former executive director, (and that) dragged primary residence into OATH hearings in a way that had become so pernicious, that I'm really hard-pressed to vote in favor of debating this draft, which contains such a ruthless approach to primary residence.

Mr. Hylton: So isn't that what we're debating?

Mr. Roche: But leaving it alone, doing nothing isn't really an option is it? At least we're making an effort to do something.

Mr. DeLaney: In my opinion, this draft we have before us is attempting to do the impossible, by trying to chase two rabbits at once. The primary residence provision that's been worked into this is -- over this sequence of cases as they've evolved between 2014 and 2018 -- we should really deal with that separately. They're two very distinct and very different issues.

Mr. Hylton: Mr. Barowitz, I thought you'd have noted by now that we are off-ballot, is that correct?

Mr. Barowitz: No. We're discussing the motions. We have a motion on the table. But we can certainly discuss this until the Chair calls the question.

Ms. Torres-Moskowitz: So is the motion on the table that we would work to help resolve the first issue about covering more people? But that motion has nothing to do with primary residence, right?

Mr. DeLaney: Well, it's in there. You have to ask the maker of the motion.

Ms. Torres-Moskowitz (to Mr. Schachter): Can you clarify whether or not your motion has anything to do with primary residence?

Mr. Schachter: I think at this point we're having a debate about the language drafted, which has then been folded into whether to have a debate about the language drafted. I mean, we can adjourn and leave it as-is.

My sense was that the majority of the Board has a concern that there are occupants in these units who are not being protected by the rule, as-is. Therefore, to try to address that outstanding need, the staff have drafted this language. Now whether this language involved two or more rabbits, I don't know. But if the idea is that people are not concerned about those other residents who are not on the lease, and that the rule as it currently stands is fine, then I think we should not waste our time looking at this language. But debating about whether the language is worth debating starts to become a little bizarre.

Mr. Roche: If this motion passes, it means we that agree, as a Board, that this is our base line. We're going to work from this language the staff has provided. We'll craft it and mold it in a way that we feel is beneficial; that, as Mr. Barowitz said earlier, up-dates the rule to reflect the changes that have occurred in society. I don't feel there's anything in this motion, which I seconded, that is hurting the tenants.

Mr. Schachter: And either we like it, or we don't like it, or we want changes or we don't want changes or whatever. But the idea is that there's a consensus that there's a need that is not currently addressed, and we'd

like to try to address it. Now, you can say, I don't agree. We should stay with the current rule, which focuses on the signatories to leases, because those are contractual arrangements, that's fine. Then there's no point in considering changes.

Ms. Torres-Moskowitz: I guess where I'm hesitant is that it seems like the draft could potentially make the law worse, so I don't want to move backwards.

Mr. Schachter: Then you would want to talk about the draft.

Mr. Hylton: You're not voting on anything.

Mr. Schachter: It's a draft for discussion. Either everything is perfect the way it currently is, and we love it, we're going to stay with it; or, we're going to consider a change. And if we're going to consider a change, we can start by talking this afternoon. Either we're ready to start thinking about whether it's worth doing something, or we're thrilled with the way it is, and I can go back to my office and catch up on all my emails. So what are we doing?

Mr. Hylton: Ms. Rivera?

Vote on whether or not to consider changes to Section 2-09(b)

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

Members dissenting: Mr. Carver

Members abstaining: Mr. DeLaney

Members absent: 0

Members recused: 0

Mr. Hylton thanked the Board and announced a five-minute break

Ms. Balsam: I think since we spent a lot of time already discussing the concept of prime lessee versus not-prime-lessee we should stay with the new (b)(2), which is very broad, and says "A person is a protected occupant if (i) an owner or responsible party lists the person on a registration or otherwise represents to the Loft Board that the person is a protected occupant, or (ii) the Loft Board issues an order determining that the person is a protected occupant." I think that is probably the place where we would want to insert more requirements. We would want to limit it. So it's up to the Board to decide how you want to limit it, and what we should put in there. Bearing in mind that the Law Department will examine it for Constitutional issues.

Mr. Carver: I had a question about the language that you wrote, but that's not your issue.

Ms. Balsam: No.

Ms. Balsam: You have "owner *or* responsible party."

Mr. Carver: I think your definition of "responsible party" is a little too broad here, because that would enable a lessee to register… I don't know that that was your intent.

Ms. Balsam: Right.

Mr. Carver: I think someone should go back and look at it. I had suggested, "owner or other holder of the owner's interest." At some point, that was in there, but it seems not to have made it through.

Ms. Balsam: That's a good point.

Mr. Hylton: How about "designee"?

Mr. Carver: Well, sometimes it's by operation of law that someone holds the owner's interest, so you don't want to make it that. Someone should look at it.

Mr. Hylton: So we need to look at this, or we've decided this?

Ms. Balsam: No, I think he's correct. We need to fix that language.

Mr. Hylton: But are we taking his words? What was it you said?

Mr. Carver: I said "owner or other holder of the owner's interest." I don't know that that's the best solution; I'm just throwing that out there for consideration. It's an important point, and it's highly technical, so it's worth some private study by the staff.

Ms. Balsam: Yes, I agree with that.

Mr. Carver: So, Helaine, when you said, other factors that you're seeking from the Board, you're looking for factors other than just mere occupancy?

Ms. Balsam: I don't know. There seems to be an issue that this is too broad, and if so, then we have to figure out how to limit it. And I'm open to suggestions as to how to do that.

Mr. Carver: I think the non-lawyers on the Board may not entirely follow what the statute is doing. So to be clear, this is saying, in essence, that mere occupancy on a "magic date," is enough. Yes?

Ms. Balsam: Are you talking about (2)?

Mr. Carver: I'm sorry; I was on to (3) already.

Mr. Schachter: We're just at the beginning. We've been here over two hours, and we've gotten to (2)(i) and….

Mr. Carver: The conversation we had for 90 minutes was directly related…

Mr. Schachter: I understand. But we've only gotten as far as (2)(i).

Mr. Carver: Helaine, I don't understand why (ii) is an issue, if the substance is occurring later in the statute. I don't understand what you're seeking here, in (ii). Because (2)(ii) is a reference to elsewhere…

Ms. Balsam: Ok, I see what you're saying. So I guess we're on 3, actually. Unless anybody has a problem with (2)(i). Other than the responsible party part.

Mr. DeLaney: At some point I'd like the Staff to explain (1).

Ms. Balsam: A natural person? Beings other than corporations or partnerships that wanted to be protected.

Mr. DeLaney: And if the lease is in the name of a commercial entity or artistic organization, how would that play out?

Mr. Balsam: Assuming that there's a lease, I think the signatory of the lease would be the "natural person," who would be the protected occupant.

Mr. Hylton: The signatory or the person?

Ms. Balsam: I don't know.

Mr. Roche: Chuck, can you give us a scenario?

Mr. DeLaney: If you go back and look at Loft Board cases, you'll find that, quite often, in addition to other ways that the residential occupants who should be qualified for protection got around to the mutual satisfaction of the tenant and the landlord, that the space was not being used for residential purposes, the lease may have been between the landlord and an arts organization, a dance troupe, there's a case where it's a church – how you then sort out who the protected occupants are, where the lease is between whatever entity the landlord is and some kind of corporation or DBA or LLC, has been an issue in the past.

Mr. Hylton: So just to clarify, this issue is when there's a corporation or similar entity, in which there is more than one "principal"….? Who then would be protected?

Mr. DeLaney: The main concern I'm expressing here is that, as we see, one can have a significant discussion– and in this case, I don't think that Mr. Carver is correct -- but in the law, sometimes it says "tenant," sometimes it says "occupant," what does it mean… I would hate to see that by inserting "natural person" we're creating some other argument that is perhaps off target. Somehow, we've gotten through thirty-five years without needing to define a protected occupant as a "natural person," so I'm just curious as to what caused this to become a need now.

Ms. Balsam: Because at the end of the process, the lease isn't going to go to the corporation; it's going to go a tenant, to a person. The housing maintenance standards apply to real people, not to corporations. The corporation isn't freezing; the person who's in there is freezing, if there's no heat. That's why.

Mr. DeLaney: When you say, "At the end of the process," you mean after legalization?

Ms. Balsam: Right.

Mr. DeLaney: So if it's an issue of removal, I'm not sure why it becomes part of the definition of protected occupant.

Ms. Balsam: You asked me for a reason; that was a reason I gave. I gave you another reason also.

Mr. Roche: What if the corporation had listed officers? Wouldn't that turn it into a person?

Ms. Balsam: No.

Mr. DeLaney: The Supreme Court has turned corporations into people.

Ms. Balsam: They're separate legal entities, but they're not "people."

Mr. Carver: Under the rules as proposed, the lease no longer has any meaning in this context. So, I don't think this matters if the lease is in the name of something other than a natural person.

Mr. Hylton: Let me just ask for my own edification, why would the entity change the principals of a corporation?

Mr. Schachter: If the lease is with Acme, and the Road Runner leaves and is no longer living there; and instead you have another occupant…. The focus should be on who is actually living there during the appropriate time, not the corporate structure.

Ms. Balsam: Correct.

Mr. Roche: Chuck, are you advocating for adding to that? Not just leave it as natural person, but add some broader definition?

Mr. DeLaney: I didn't understand why this was in here in the first place, so I asked. Now that I have an answer, I'll give it some thought. I'm just concerned that we put things in, and later they come back and bite somebody, for reasons we had no way of foreseeing at the time.

Ms. Torres-Moskowitz: What if you just eliminated "natural"? What does "natural" mean?

Ms. Balsam: Other entities can be defined as a "person." A "natural person" is a human being.

Mr. Hylton: Would the word "individual" be an acceptable substitute?

Ms. Balsam: "Natural person" is the accepted legal term, so...

Mr. Hylton: Ok, is everyone clear on that? I know you have to give it some thought. But can we move on from that?

Mr. Barowitz: What if we said "person or persons"?

Ms. Balsam: Without "natural"?

Mr. Schachter: Is anyone against the "natural" word?

Ms. Torres-Moskowitz: Personally, I don't understand what the significance of "natural" is. Are we talking about a "citizen"?

Ms. Balsam: We've defined "person" in Chapter 1. (She reads that definition). So, the term "person," itself, includes other kinds of entities that may be considered as human beings, while they are not, in and of themselves, human beings. And the idea here is to insure that the beings that are being protected are *human beings,* because they are what is important. It's *people* who are going to freeze. You wouldn't want the landlord to be able to come by and say, well, you're not an officer of the corporation, so I don't have to provide heat for you. That makes no sense. So the staff was concerned about protecting these people, and the legal term for that is "natural person."

Ms. Torres-Moskowitz: And if you leave out "natural"?

Ms. Balsam: Well, then it gets into the definition of "person" in Chapter 1. We'd have to change that, and I don't think we'd want to do that, because there are times when we need *that* definition of "person."

Ms. Torres-Moskowitz: I don't know……If we're trying to include everyone…

Ms. Balsam: We're trying to include "people." *Natural* people.

Mr. Hylton: "Person" is defined, so "natural person" will make it clearer.

Mr. Barowitz: I'm not sure that what you've said makes much sense to those of us who aren't lawyers – to say "natural person" is more important than just saying "person."

Ms. Balsam: "Person" is a term that's defined in the rules. So if we just said "person," it would include corporate entities and partnerships and legal people *that are not* living breathing *human beings.*

Mr. Barowitz: Maybe I'm not following you, but if we're trying to be more inclusive, using the word "natural person" is not being more inclusive. It's talking about one, particular individual.

Mr. Schachter: We're excluding non-humans. We are requiring that the "people" who are going to be protected are, actually, *people.* So we won't have a situation where the owner says, I have a lease with Acme, and you have been living there, but "you" are not "Acme." Therefore, you are not protected.

Mr. Roche: So we could say "natural person or persons."

Ms. Balsam: Yes, of course

Mr. Barowitz: OK. Yes, that's what I meant.

Mr. Hylton recognized Mr. Carver

Mr. Carver: I would rather talk about legislative intent, but…….. So the reason that it's a singular person is because a protected occupant "singular" is a person. It doesn't preclude having multiple protected occupants. As it's drafted by the staff…

Mr. Hylton: So maybe we should say "protected occupants."

Mr. Carver: But is everything singular? That's the convention going on here: applicant, owner…

Ms. Balsam: After occupant we could put an (s), and after person we could put (s). I think that would solve the issue. So that's what I'm going to do.

Mr. DeLaney: It strikes me that so far all I've heard is hypotheses about how this could be a problem down the line. I don't think this is an issue that's ever been a problem to date. I'm concerned that there's enough treachery in this rule as it is, so I would like to make a motion to strike number 1 from the draft.

Mr. Hylton: The motion from Mr. DeLaney is to strike number 1, and eliminate it from the proposed draft. Is there a second?

Mr. Hyton: There's no second.

Ms. Torres-Moskowitz: Wait. I guess I would second that. If it's confusing language….

Mr. Hylton: It's not about confusing language. Mr. DeLaney is saying he doesn't think the entire concept is necessary because of its – what was the term you used? Treachery?

Ms. Balsm: Can I just say that I resent the use of the term "treachery;" that we have to start somewhere, and so this was put out there as a proposal with the intent that the Board may have strong opinions and would want it to be changed. So, there is no treachery involved. We are trying to be transparent. It's what we think it should be. But if you don't want it, then that's fine, too; and you should advocate for that, and we'll change it, as you see fit. Thank you.

Ms. Torres-Moskowitz: I would second it if it were redundant. It does seem like a very vague statement.

Ms. Balsam: It's because people have tried to register protected occupants as corporations. So it's not redundant. It's what we felt was necessary.

Ms. Torres-Moskowitz: To protect against corporations? Chuck's mentioning stories….

Mr. Hylton: Chuck is saying it's not an issue. I think that's what I'm hearing.

Mr. DeLaney: To my knowledge, this has never come to the Board. If there are people trying to register the XYZ Corp. as a protected occupant, that's news to me. But I guess those have been dealt with at an administrative level.

Mr. Hylton: Right. By the staff. That's why she put it in. So I don't see a problem in putting this in. There's a motion on the floor, and there's a second, and there's a discussion.

Mr. Roche: Just to clarify: we do have a motion and a second?

Mr. Hylton: Yes. And now we're in discussion.

Mr. Roche: Well, I respect the fact that the legal minds felt the need to put this in, so I'm sure it's important, and I would greatly appreciate being able to understand that reason. So if Ms. Balsam would give us the legal reason why we should have that in there, that would be important for me to know, in order to vote.

Ms. Balsam: The staff was concerned that, if a corporation is the protected occupant, then the humans would not be protected. That's the reason. And if you look at the rules, particularly the Housing Maintenance rules, they are there to protect humans and not corporations. So I don't want anyone to freeze when the heat fails, because the landlord can say, well they're not protected, so I don't have to do anything about it.

Mr. Hylton: Is there any other discussion on this? (No)

Vote on whether or not to strike number 1 from the proposed draft

Ms. Torres-Moskowitz: What's that one where you can remove your….?

Ms. Balsam: You want to withdraw your second?

Ms. Torres-Moskowitz: Yes.

Mr. Hylton: Mr. Barowitz, we'll have to refer to you on how to proceed here.

Mr. Barowitz: There's a motion and a second, so it has to proceed to a vote.

Mr. Hylton: And is the person who made the second able to vote against the motion?

Mr. Barowitz: Yes.

The vote commences again, but stops amid various questions and comments about procedure.

Ms. Balsam: Just to remind everyone, the motion is to strike – take out – number 1. So if you vote yes, you're voting to take it out; if you vote no, you're voting to leave it in.

Some more clarification for Ms. Torres-Moskowitz from various

Mr. Carver: The motion was to strike it. So if you want to leave it in, you vote no. Mr. Schachter and I recommend that, and your legal staff, you vote no. We *need* this sentence.

The vote commences again

Members concurring: Mr. DeLaney

Members dissenting: Mr. Carver Mr. Barowitz, Mr. Roche, Mr. Hernandez, Mr. Schachter, Ms. Torres (also noted that she wants more discussion), Chairperson Hylton

Members abstaining: 0

Members absent: 0

Members recused: 0

Mr. Hylton: The motion has not passed. But now I think there is a new motion, to change or make amendments to this?

Ms. Torres-Moskowitz: Yes, I want to get to the right language, but I can't tell when we're discussing and when we're authorizing.

Mr. Hylton: All this means is that we're back to square one, and if you want to make changes…

Ms. Torres-Moskowitz: I'd prefer to read through and understand all of this, before I decide on one piece of it.

Mr. Schachter: But we haven't adopted anything, right? There's been no commitment made on any language…other than we haven't gotten rid of it.

Ms. Balsam: But *you have* decided to change the old language in some way. That has been decided.

Mr. Schachter: Or at least to have a discussion about that?

Ms. Balsam: Yes.

Mr. Roche: So we have no motions on the floor? But we have a desire to modify number 1? Chuck, do you have any thoughts about how we might do that?

Ms. Balsam: Does anyone have any thoughts on changing it?

Mr. Roche: Mr. Chairman, can I make a motion that we task the staff with coming back with an alternate to number 1?

Ms. Balsam: I would need guidance from the Board. I'm sorry.

Mr. Hylton: So we seem to be saying that we don't see anything wrong with keeping number 1 there; except that Julie may want to have a motion to modify it? Does that sound right?

Ms. Torres-Moskowitz: Yes. I think we talked about putting (s)'s…

Mr. Hylton: Yes, staff can fix that. So would you like us then to move on? And staff will come back with a fix to number 1?

Ms. Torres-Moskowitz: Yes. And I guess I want what Chuck's bringing up…and what you're saying with you own case load that we don't know about. If you're encountering corporations (that are claiming they are protected occupants), if we know more about that….

Mr. Hylton: I just want to remind everyone that we're not voting on adopting these changes; we're voting on changes that make sense right now, but it will all be revisited again in the future.

Ms. Balsam: So, let's put aside primary residence for a moment, and just sit with the idea of spouses, roommates, etcetera. We will get there, Mr. DeLaney, I promise. And I know you'll want changes, and I assume the Board will change it. But for now, since we have spent so much time discussing this concept -- spouses, roommates, etcetera – I would appreciate input from the Board as to what we should add to this; how we should change it to help determine who to add.

Mr. DeLaney: I take it that you're referring to who we would cover in (3), or what conditions would determine that?

Ms. Balsam: Yes.

Mr. DeLaney: I'm happy to hear what the Board thinks, and I'd be interested in what the staff thinks. But I just want to reserve the fact that with number (ii), where we have the division between number (i), which says that anyone -- the owner or responsible party or whoever -- lists as a protected occupant……..In its interplay with (ii), where the Board issues an order, is an issue I've stressed in dissenting opinions in Board meetings previously. Because, basically, this lays the groundwork for bringing back what used to be referred to in the 60's and 70's as a "key fee." "Oh, you want to be a protected occupant? Great, I'll make you one. All I want is a little consideration for that." So, in my opinion, to have a system whereby, if the tenant has to apply for coverage, there's one set of criteria and qualifications, versus owners being able to make anyone they choose a protected occupant. This is part of what I would consider to be, in my own language, "not a good thing."

Ms. Balsam: I think it's an interesting point. So you would be in favor of saying, "a person is a protected occupant *if*," and then listing things? Without the separation between the registration and the findings by the Board?

Mr. DeLany: Since the Board took what, in my mind, was the wrong pathway, starting in 2014, with *Belkie* -- and we've seen this. We've seen cases where the landlord has granted protected occupancy to tenants to whom *we* would not grant it.

Ms. Balsam: I don't think that's true.

Mr. DeLaney: I think *Pak* was one.

Ms. Balsam: *Pak* was remanded. And then the owner registered.

Mr. DeLaney: Right.

Ms. Balsam: It was a remand. It wasn't said that Ms. Pak's niece could not be a protected occupant. The Board remanded to OATH to get facts on the issue.

Mr. DeLaney: The Board remanded because of all these new criteria that had been put in place.

Ms. Balsam: Criteria as in eligibility for coverage as a unit, or criteria as in …?

Mr. DeLaney: I'd have to re-read it before I could give you a definitive answer on that.

Ms. Balsam: There was a husband and wife with a niece. The husband and wife moved, and the issue was whether or not the niece, who remained in the unit, would be a protected occupant. And it was remanded for that. And after that, the owner registered the niece.

Mr. DeLaney: And in my opinion, the remand on the issue of primary residence was inappropriate, because I don't think that primary residence has anything to do with determining who is a protected occupant.

Ms. Balsam: Coming back to the rule, do you think we shouldn't have (2)(i) and (ii); that we should get rid of the (i) and the (ii)?

Mr. Carver: Well, Helaine, we have to better understand what the implication of that is. We have to understand how it works when people (who) are cooperating with each other on this issue. What happens then?

Ms. Balsam: If an owner comes in and voluntarily registers, then we usually name whoever the owner names as the occupant of the unit as the protected occupant, unless someone contests it. The registration is an application. It's supposed to be mailed to everyone in the building, so people have a right to contest that. That's how it works now.

Mr. Carver: So your intent with this language is to keep the *status quo*?

Ms. Balsam: Yes.

Mr. Carver: Have you experienced any problems with the *status quo*?

Ms. Balsam: To the extent that owners down the road, when we were removing properties, were not happy that people who had been named on the initial registration were considered protected occupants, yes. We have had problems with that. But the Board clearly ruled, just a couple of months ago, that these people are protected occupants. Plus, in that particular case, where the owner was bringing it up, there was also a Board order that had found the daughter was a protected occupant. But it has always been the Loft Board policy that whoever they listed, that's who we name as the protected occupant. So owners are not happy about that.

Mr. Carver: So at the moment, the policy is in the case law, but it's not in the rules. This would be codifying that case in point?

Ms. Balsam: Yes.

Mr. Carver: Were the owners on notice of the implication of listing the occupant on the registration?

Ms. Balsam: I can't really answer that, because there could be a different owner than the original owner.

Mr. Carver: I guess if they were diligent during the purchasing process, it could have been found.

Ms. Balsam: They could at least ask who is listed on the registration…

Mr. Carver: Is this everyone's common understanding out there? That once you're on there, once the owner writes you in, you're it?

Ms. Balsam: So, once again, Martha is not here, she has the institutional knowledge, but yes, it is my understanding that that's the understanding.

Mr. Carver: Ok. This is something I'd like to think about for next time.

Ms. Balsam: Which brings us back to (3)?

Mr. Carver: This is an extension of the conversation I was having earlier. And it was not meant to make the meeting longer. I was getting to the substance. You have no problem with that?

Ms. Balsam: I'm fine.

Mr. Carver: So, as drafted, mere occupancy is enough to be granted the status (of protection).

Ms. Balsam: Yes, I think that is our intent.

Mr. Carver: So this draws in everyone: roommates, lodgers, boarders, whatever those terms mean…

Ms. Balsam: That is, in fact, the proposal. And if the Board wants to look at that, and tell us how you want to limit it, and we'll write it.

Mr. Carver: This includes the adult child who won't leave; it includes Aunt Fran, who lost her own house. As I said before, this is a tremendous upheaval. It absolutely wipes out the value of the tenancy of the prime lessee, and I'm really serious when I ask, why isn't the City willing to pay for their loss? If this is so important, why isn't this cost shifted to all the tax-payers? Why does the burden fall on the prime lessee and the owner, for whom this would have tremendous, negative economic consequences?

Ms. Balsam: I think it's an interesting issue. It is not within the authority of the Loft Board to award owners or prime lessees any kind of monetary awards. The Loft Board does not have the authority under the law to do that. So I think it's a moot point to discuss here.

Mr. Carver: So what you're saying is that you have the authority to wipe-out a right, but not compensate for it?

Ms. Balsam: The Board has the authority to determine who is and is not a protected occupant; to make a rule about that. But that's not the same as compensating people for different things. We don't have that authority.

Mr. Carver: I mention this only because we're making a change to an existing *status quo.* That's a little different than establishing a rule, which was done in the past. This is affecting real live owners and real live prime lessees. And I don't know that that is the case – that the City is legally in capable of compensating…

Ms. Balsam: I didn't say the City doesn't have the authority; I said the Loft Board doesn't have the authority. There's a difference.

Mr. Carver: Well if it can be done, then why isn't it part of the proposed rule? Not necessarily to us, but to whoever needs to do that?

Ms. Balsam: We're talking about rules the Loft Board can pass. That's what we're talking about. This is an issue that is totally outside of the proposed rule. If someone wants to call us and say, the City passed this rule, and it's going to cost me $5 million, then file your claim. Go for it, if that's what you want to do. But that's not within the purview of this rule. And if the Board tried to pass a rule that said, we're changing the protected occupancy rule, and we're going to include all these other people, so the prime lessees and owners are all going to get X amount of dollars, the Law Department would never sign off on it. So why are we even talking about it? It would be *so ultra vires*…..if there is such a thing!

Mr. Carver: Frankly, I think that's a reason to keep the rule as is. And this is where we had asked for options. We had options on the table. I think this is the time for you to bring back the options, and for us to talk about which make sense and which don't. Because the inclusion of all these other parties (adult children, Aunt Fran, etc.), creates an enormous economic impact on owners and prime lessees. We previously indicated we had a problem with that – and again, it wasn't just me. The whole Board wanted to look at options. And if you think it's unwieldly, let's just look at this one paragraph, about who would be counted. You can go back to the language you had in the past. Then you'd have a list, and Board members could discuss among themselves who would merit this status at the expense of the prime lessee.

Mr. Barowitz: It's been a long time since the rule first came into effect. I'm not sure what was going on in the minds of the legislators who initially granted this. But we want to provide legal housing for as many people as we can in the City of New York, in order to keep them here. I hate to use the word "artist," but that was the first impetus to put the Loft Law in place. Now as time has gone by, I understood that, three of four years ago, the vacancy rate in New York City was 2.8, which included new units that hadn't been rented yet. So there's essentially no vacancy in the City. There are other things the City could have done to increase vacancies in Brooklyn and Queens. My bottom line on this is that we want provide safe, legal housing for as many people as possible in order to keep the City the vibrant, dynamic place that it is.

Mr. Carver: I appreciate those thoughts, but the question is, why should the prime lessee have to pay for it? And if the City wants that right, the City can give them houses. Why is it coming out of the pocket of the prime lessee and the owner? That's the ultimate problem.

Ms. Torres-Moskowitz: Isn't this for them to figure out on their own? The way a couple figures out the shared rent?

Mr. Carver: No, I'm not talking about operating expenses. I'm talking about the value of the prime lessee's interest. I'll use $1 million because that's the value we put on a unit in a letter to bankruptcy court. I'm talking about how valuable these units can be. Suddenly, a prime lessee, who had a property that was worth $1 million, and who always had a roommate, now, with the passage of this law, the roommate has equal rights to the unit to stay forever. So he now has a property worth half that amount. And if you add to that the adult child that won't leave, you now have that value divided among three people with equal status. So you've divested the prime lessee of all that value. That's what I'm talking about.

Mr. DeLaney: I'm sorry. You mentioned a letter with a million-dollar value going to bankruptcy court?

Ms. Balsam: This is the case, I reported the case. The bankruptcy court asked for a letter about sales of rights. And what we wrote in the letter is that we had seen sales that were worth $1 million.

Mr. DeLaney: I'm sorry I missed that. It's very interesting. I'd like to request a copy of it.

Ms. Balsam: Sure.

Various comments about the copy of that case.

Mr. Hylton: I'd like to move along. I'm sorry, but we have less than a half an hour. Twenty minutes. Ms. Balsam?

Ms. Balsam: So if I understand correctly, you want us to create some kind of list and/or definition that would encompass *more* people, but not necessarily *everybody.*

Mr. Carver: Well, we had previously asked for that.

Ms. Balsam: Right. Well, I do want to go to the Law Department. I raised some concerns back when we initially spoke about this and had all of those options. So I will resurrect the options and come up with something that will pass muster with the Law department. Because let's face it, if they're not going to sign off on it, then what good is it?

Mr. Carver: I'm not trying to be difficult. It's just that if you want something done, I think you have to give us the broadest possible choices.

Ms. Balsam: I thought I gave you the broadest possible choice. Isn't this the broadest possible choice? And you said, I don't like that; I want something narrower. So now I'm asking, how narrow?

Mr. Carver: I mean choic*es*. I think that would be the most useful path.

Mr. Hylton: Can you answer a question, Mr. Carver? If you had four or six choices on the table, how would you get to the first? To debate six choices?

Mr. Carver: Well, who on the list is going to make it in? Everyone seems to want spouses. Ok, spouses. Then we consider roommates, boarders, Aunt Fran….

Mr. Hylton: OK. I appreciate the discussion.

Ms. Balsam: So, I guess we should start talking about primary residence.

Mr. Roche: I have a question. Number (3)(ii), "Whether the IMD unit contains the applicant's furniture, clothing and other personal effects." I'd like a little clarification in terms of what exactly qualifies as "clothing and personal effects." If I could somehow prove that I had a shirt hanging in the closet….

Ms. Balsam: This is a list of factors to be taken into consideration, and they could weigh one way or the other. Would you be more inclined to find that someone is living there if they had no furniture or clothing there? I would think if someone is living there, they would have furniture and clothing there. On the other hand, we have had a case where… well, I can't talk about it.

Mr. Roche: I understand the case of furniture, which is substantial, and I'm not opposed to this. I'm just trying to clarify personal effects. If there's a book on a shelf that says, property of Mr. Roche….In other words, what you're saying is that the Loft Board would make the determination as to what was enough?

Mr. Hylton: These are just factors to be considered.

Ms. Balsam: And these were taken from cases.

Mr. Roche: I'm just trying to understand. I'm good with it.

Mr. Barowitz made the point that it is somewhat ironic now that the situation has turned around 180 degrees. That now, what you have to do is display items that prove that you're living there, when back when this all began, the occupants were hiding things that would prove they were living there.

Mr. Barowitz also made the point: I think that (ii) and (iii) seem to be a little silly. Bank statements can be mailed anywhere you want. I think we have to be little more careful.

Mr. Hylton: These are factors to be considered. Most people have these things to prove their primary residence.

Ms. Balsam: When we were drafting this, we asked, what has come out of the cases? With the exception of attending a local school, I put that in. But for (i), (ii), and (iii), these are factors that the Board has considered in cases, so here we're codifying some of those factors, and we're qualifying it by saying that no one factor is determinative. It could be that people are not having the mail sent to their residence because they don't have mailboxes, or because they're been broken into, so they have a PO box. But if there's going to be a trial, and someone's going to be testifying to that, then that's a reasonable explanation; and if they are found credible, why would the Board say no? So that's where (i), (ii), and (iii) came from.

Ms. Torres-Moskowitz: Did you look at the Rent Guidelines Board?

Ms. Balsam: The Rent Guideline Board has many other factors that we felt probably wouldn't apply. And in cases that we've had, some of those would be problematic. Like the 183 days. The whole idea was to not use everything from the Housing Court, because we know that our occupancies are different.

Ms. Torres-Moskowitz: But is it the same issue? You don't necessarily need everything….?

Ms. Balsam: No, of course not. That's the point. The cases come in with some sort of combination of "stuff." It's usually some of these things; it's not always all of these things. But a lot of people wanted guidance. We had one comment that we should put in exactly what people had to have. But I don't think we want to limit ourselves that way. What if someone doesn't have a bank statement mailed to them there, even though, technically, they "should"? That doesn't make sense either. You don't want to box yourself into a corner you were never meant to be in. So we felt that this was flexible enough that the Board could consider all kinds of "proof."

Ms. Torres-Moskowitz made the point that we want everyone who is there to be "safe."

Ms. Balsam: Yes, that's right. We want the people who are there to be safe. But the question is, are they there?

Ms. Torres-Moskowitz: But the onus shouldn't be on the tenant to overly produce a large quantity of "proof"?

Mr. Hylton: Not "overly," but to use some of these guidelines here.

Ms. Torres-Moskowitz: So the more flexibility, the better?

Ms. Balsam: Yes.

Ms. Torres-Moskowitz felt that the Board should think a little more about the factors. She noted, for example, the part about one's children attending the local school; that many people today send their children to schools that are outside their neighborhood.

Mr. Hylton: But wouldn't it also be true that if someone's child was attending a local school, it's a safe assumption that he lives in that neighborhood?

Ms. Balsam: It's something to consider. If it proves problematic, we can certainly take that out.

Mr. Hylton: Yes, I get your point about school attendance. Nowadays, people are sending their children to school all over the place. So, if the child attending a certain school had a listed address? Would that be acceptable?

Mr. DeLaney: If what you're trying to get at is that the occupant has a child who is in school….It's entirely possible that the kid could be in middle school sixty blocks away….

Mr. Hylton: That's exactly what I'm saying. So the address that is registered for that child at the school is what would be used.

Ms. Balsam: Yes, we can change that.

Mr. Carver: I've got some more on this issue, but I don't know how much time we have.

Mr. Hylton: We have 10 minutes.

Mr. Carver: So, I mentioned that there's case law that I can cite that requires the Rent Stabilization standard in this context. I cited it to you. I don't know how you're getting around it. There's a clear statement from the

Appellate Division, Second Department, that interprets a case from the Court of Appeals, which squarely addresses this and says we need to apply the same standard in both contexts.

Ms. Balsam: And there are also cases that say that these occupancies are different, and you can't apply the same standards.

Mr. Carver: But this is exactly on this particular issue. I sent you three cases on this, and as the general counsel -- and I don't mean to be contentious – I just don't know how you're getting around it.

Ms. Balsam: I'd have to go back and look at my notes, but I think we had a discussion at a meeting about that issue, and how the Courts have acknowledged that these occupancies are different. How is someone who's on the road with a band going to prove that they were there 183 days, when they weren't there 183 days, because they're on the road with the band?

Mr. Carver: That's OK in the stabilization context, if you're working away from home, so that wouldn't be an issue. The Stabilization standard has the advantage of forty-years-worth of case law, so that all the issues – like the band – it's all been resolved.

Ms. Balsam: Forty years of a *different* type of occupancy. That's my concern.

Mr. Carver: But the issue is, either it's your primary home, or it's not. Maybe we can talk after the meeting or at another time about these three cases, so I can understand why the Board is not bound by this.

Ms. Balsam: Sure. OK.

Mr. DeLaney: I wonder (Mr. Carver), if you wouldn't mind circulating those three cases?

Ms. Balsam: We will re-circulate them.

Mr. Carver: In terms of factors, the address you put on your income taxes. Why is that not on here?

Mr. Hylton: Do you know what that address means? Does that mean that you live at that address?

Mr. Carver: I believe for school tax purposes, and for school attendance, the address matters. But I'm not entirely sure. I just think that there are some better factors to consider. Especially, where you sleep for a certain number of days. I just think that many of the factors in the Stabilization Law are better proof. And while I realize that you've given yourself latitude to consider other things, I think that once you list factors, you're giving special weight to them.

Ms. Balsam: We took these from cases. So what has the Board considered? The Board has considered these things. So that's why we listed these things.

Mr. Carver: Are there other things that you think are better?

Ms. Balsam: If there are things that the Board thinks are better, then we can add them. Again, this is a starting point.

Mr. Carver: So I suggest the address on your personal tax return and the number of days you sleep in the unit. I think it made it in there in the past, as a proposal.

Ms. Balsam: It's a factor.

Mr. Hylton: We'll ask the Board members.

Mr. Carver: I assume this list would be very useful to judges.

Mr. Hylton: But can't you do the same thing with your address on your income tax as with the school address?

Mr. Carver: But the income tax in the law carries more weight. It may be difficult to deny that address in some contexts.

Ms. Balsam: There is the Housing Court context, yes. There's a case that says just that. The Board hasn't decided it yet, but…

Mr. Carver: That's not to be taken lightly.

Ms. Balsam: I understand. But the Board hasn't gone there yet. Again, this is a list of circumstances the Board has considered, with the exception of the schools. What we've codified here is from material the Board has already looked at. The Board has talked about tax returns, but it hasn't been decided. But I think you're making a motion to ask, can we add those to the list?

Mr. Carver: Well, at first I want to know if the staff thinks it's a good idea.

Mr. Hylton: Well, a way of finding that out is to actually put it to a vote. You just make a motion as to what you want to see on there.

Ms. Balsam: Do we do those separately? Taxes and the number of days…?

Mr. Barowitz: (If we did both) I would have to oppose. The tax thing is alright, but the number of days…

Mr. Hylton: Mr. Carver, can you make your motion one at a time?

Mr. Carver: Yes. Next time, I can make the number of days a little more clear. It's more than half a year, but the question is, what counts toward you being there? I'm happy to do this, but it has to be done correctly.

Mr. Hylton: It seems a little burdensome also, wouldn't you say?

Mr. Carver: I think that proving the truth is not burdensome.

Mr. Hylton: Yes, it is.

Mr. Carver: It can be.

Mr. DeLaney: Before we adjourn, I would like to make one statement and one request. The statement is that, without having discussed primary residence, which is the 800 -pound gorilla in the room, getting into specifics of proving occupancy….I would really like to turn to the issue of primary residence, which we've skirted for the past 2 ¾ hours. That's my statement. My question is this. The Board is meeting twice (a month) now. It's meeting October 11, and again, to do cases, on October 18. I'd like to know now what we're going to be discussing on October 11.

Ms. Balsam: Let's do primary residence. I think that's fair. So, I think that what you're saying is, that it's premature to ask for a list of factors proving primary residence, if the Board hasn't decided it has to be proven?

Mr. DeLaney: Can I just read two paragraphs? I think it will give everyone something to think about. This is from an attorney, who said,

"I suggest you emphasize the burden on tenants to prove primary residence, as some landlords and attorneys have turned the discovery process into flat-out harassment. I've had cases where the landlord's attorney has demanded thirty or more categories of documents, amounting to thousands of pages. The date of the hearing requirement also creates a permanent, rolling discovery period, where tenants can be required to keep producing documents up to the day of trial. Finally, all of the standard "problems" of primary residence, of primary residence documents, e.g., failure to change addresses on accounts, licenses, and other documents, has made trials much longer and more expensive, as landlord attorneys spend time on these distractions, even though there is no good-faith claim that, say, the thirty-year-old tenant employed in New York City, actually resides with his parents in Texas. I recently had two clients drop their claims, because they didn't want to go through a hostile process, and incur thousands more in legal fees."

So, ultimately, if we keep this primary residence requirement that we've drawn into protected occupancy to being covered, then where you're kids are going to go to school isn't going to make any difference, because you're not going to get that far. Thank you.

Ms. Torres-Moskowitz: I'd like to add to that, too. My presentation, with the draft we received… I feel like if you google how many times "primary residence" is written into the (new) rules, as opposed to the previous rules…

Ms. Balsam: It's there more.

Ms. Torres-Moskowitz: Much more.

Ms. Balsam: Absolutely, much more. We've had a lot of issues around whether or not someone is actually living there. We have all kinds of Airbnb allegations. It's really bad. You weren't at the meeting where I said this, but I view this as a huge gift to the people who live in these spaces. The fact is that there have been abuses, and somehow, we need to address that. We've had a situation where tenants have had three apartments in three different buildings. How can that be? You can only live in one place. So, that's where this is coming from – from having seen abuses, and allegations of abuses. There are also times when a tenant will leave. Just leave. They're not there. The landlord found out they're not there; and they come to some sort of agreement; and the tenant's gone. It's to preserve affordable housing.

Ms. Torres-Moskowitz: It seems like it's doing the opposite, but I guess that's where we started.

Ms. Balsam: Do you think people shouldn't live there?

Ms. Torres-Moskowitz: No, I just think (you're) dealing with the one "bad egg," rather than the overall, grand scheme. And so we're not covering as many people ….It puts a burden on them…. First of all, they started out in an illegal building, where the landlord was doing something illegal…so, help us get to a final C of O, here.

Instead of making them spend thousands of hours and dollars proving it's their primary residence. They're trying to do right, but they're being treated as the criminal, and the burden is being placed on them.

Ms. Balsam: This is a much bigger discussion for this time of day.

Ms. Torres-Moskowitz: Maybe we can have a little paper on that. It's because I don't understand your viewpoint, and I've heard lawyers say the opposite of what you're saying….

Ms. Balsam: So let's assume we've granted protected occupancy, according to the rules we worked to establish. But then you have rules that allow the landlord to drag the tenant into Housing Court and sue them there. So they're paying money in Housing Court. So the Loft Board spent all this time and effort to give someone protection, who maybe didn't deserve protection. And the tenants are going to pay for it anyway. They'll pay in Housing Court. They'll pay it in OATH or in Housing Court. And the fact that the landlords are exercising their rights – they have rights. And if the discovery process is being abused, then it's up to the tenant's attorney to say to the OATH judge, "The discovery process is being abused. My client should not have to produce 30,000 pages of documents." That's why they have a lawyer.

Ms. Torres-Moskowitz: So you think that this is within the law?

Ms. Balsam: I think that landlord's attorneys are going to be vigorous in representing their clients, and I think tenant attorneys are going to do the same. And that if a tenant's attorney feels there are abuses, the proper channel for that is to take action – and not read a statement that says, "there are abuses." That's my opinion.

Mr. DeLaney: The problem is that often you have a group of units in a building seeking coverage, and if there's one unit with a primary-residence issue, that becomes an issue that they require to determine coverage, then that means all the parties to that suit end up having to share the legal costs for that.

Ms. Balsam: So the answer to that is to sever the issue. We could go around forever on this.

Ms. DeLaney: It's already appropriately severed, because once the owner registers the unit…And I know it's there, if you read the petition that was submitted on behalf of Dumbo Neighborhood Association, (it) goes into this in great detail. The real responsibility to be a primary resident comes once you are the protected occupant.

Ms. Balsam: I disagree with that.

Mr. Hylton: You disagree with that?

Ms. Balsam: I disagree with that. It's an incorrect statement, from the petition. That is an incorrect statement of the law, in my opinion. And it hasn't been litigated yet. The law clearly says you are entitled to continue in occupancy and to prevent dislocation. So that means you're there. To me, it's just plain language that's being contorted.

Mr. DeLaney: Well then perhaps it would be helpful if, at the start of the next meeting, we walk through pages five through nine of the arguments in the petition.

Ms. Balsam: I already did that, but we can go through it again.

Ms. Torres-Moskowitz: When did we do that?

Mr. Hylton: This was a year and a half ago.

Ms. Balsam: September 28, 2017.

Mr. Hytlon: This will conclude our September 27, 2018, Loft Board meeting. Our next public meeting will be held at 280 Broadway in the third floor conference room, on October 11, 2018, at 2:00PM.

Then End