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

November 16, 2017

The meeting began at 2:15 p.m.

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

Absentees: Robinson Hernandez, Manufacturers' Representative; Daniel Schachter, Public Member;

INTRODUCTION

Chairperson Hylton welcomed those present to the November 16, 2017 public meeting of the New York City Loft Board.

VOTE ON October 19, 2017 MINUTES

Mr. DeLaney commented that he knows that we are having these extended discussions about the rules. It is a lot of work for somebody to create the minutes, and he notices when he reads through the minutes, sometimes there might be slight punctuation mistakes. **Mr. DeLaney** is assuming that we are letting that stuff go. **Ms. Balsam** responded that if there are punctuation mistakes that affect the meaning of the sentence, please tell the Staff. **Mr. Barowitz** commented that towards the end, the word "leave" was put in instead of "live". **Ms. Balsam** mentioned that Staff will correct that.

Motion: Mr. DeLaney moved to accept the October 19, 2017 meeting minutes. Mr. Roche seconded the motion.

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

Members Absent: Mr. Hernandez, Mr. Schachter (2).

Chairperson Hylton welcomed Aidan Mallamo, Director of Quantitative and Spatial Analytics for the Department of Buildings. Mr. Mallamo gave a presentation on the Loft Board Mapping Project.

Mr. Mallamo mentioned that the project consists of mapping out where the Loft buildings are located. The final product will be available to the public. You will be able to see basic information for each building, pending removals, and information regarding legalization milestones. As information is updated, that information will be reflected on the map.

CONTINUED DISCUSSION OF THE DRAFT OF THE PROPOSED RULES.

Chairperson Hylton mentioned that last month Board members were given a proposed rule drafted by Staff. This proposed rule changes the text of Title 29 of the Rules of the City of New York ("29 RCNY") § 2-09(b) regarding protected occupants and 29 RCNY § 2-10(d)(2) regarding sales of rights. After last month's meeting, Staff realized that some text from the old rule was erroneously left out of the proposed rule. That language has been added back. In addition, at the request of the Board members, Staff drafted several options for the proposed protected occupancy rule. The options are as follows:

Option 1: This is the rule that Staff presented last month. This option is the broadest option. It protects everyone who lived in the unit during the window period, on the effective date of the law and if there was an adjudication, on the date the record was closed.

Option 2: This option keeps the language that the prime lessee is the protected occupant to the exclusion of all others.

Option 2A: This option protects the prime lessee and the prime lessee's spouse or domestic partner.

Option 3: This option is an attempt at a compromise between the two polar positions (one - the prime lessee trumps all; two - everyone who was residing in the unit at the applicable time). This proposal protects people who demonstrate they were members of a common household. This proposal also somewhat addresses the issue of an economic connection because a factor to be considered in determining whether occupants are members of a common household is whether there are economic connections between household members, even if there are no direct economic connections between household members and the landlord. This option excludes roomers, boarders or lodgers so that mere roommates are not necessarily bound to each other through protection under the Loft Law. It's not perfect, but it does take into consideration some of the concerns previously raised.

Chairperson Hylton continued the discussion of Option 1. Ms. Balsam had some comments based on the last discussion.

Ms. Balsam mentioned that one of the things raised by Mr. Carver was the idea of the Manhattan Tenants vs. New York City Loft Board case, where the courts said that statutes in *pari materia* are to be construed together. **Ms. Balsam** took a closer look at the case and did some research and found that the full sentence in the decision states that "statutes in *pari materia* are to be construed together and as intended to fit into existing laws on the same subject unless a different purpose is clearly shown." **Ms. Balsam** thinks that, one, these laws aren't necessarily the same subject, the Rent Stabilization Law and the Loft Law, so there is a connection but they are not exactly the same, and two, she thinks the Loft Law does in fact have a different purpose then the Rent Stabilization Code, in that the Loft Law is dealing with the legalization of illegal spaces, the protection of public health and safety and the prevention of dislocation of people who are living in these spaces. So, to summarily adopt everything from the Rent Stabilization world on the issue of primary residence into an analysis under the Loft Law, **Ms. Balsam** doesn't think it should be done. **Ms. Balsam** thinks you can borrow, but she doesn't think that the court intended that to be and we can in fact demonstrate, if we were to have a challenge, she thinks we will be able to defend on the ground that the Loft Board does have different purposes. These are people that are living illegally, what they are going to have to show as their residence is completely different then somebody who is entering into a lease in a regular apartment. These are live/work spaces, so there could be differences on tax returns as a result of that. Borrowing is great, but **Ms. Balsam** doesn't think that we can wholesale adopt and she doesn't think that this case requires it.

Mr. Carver responded that he thinks it does because the topic of that Court of Appeals case was actually primary residency. **Ms. Balsam** responded that the topic was whether or not it was ok for the Loft Board to pass a regulation saying someone could not be evicted if they were using the unit as their primary residence. **Mr. Carver** commented that there is another first department case that talks about that Court of Appeals case, which he hadn't sent Ms. Balsam, as he just got it recently. **Ms. Balsam** asked which case. **Mr. Carver** responded BLF Realty, a 2002 First Department case and he was reading it for some other topic. There is a sentence in that case that jumped out at him because that case was talking about the Lower Manhattan case that Ms. Balsam was talking about, and the First Department says, talking about Lower Manhattan, "the court also recognized the illogic of imposing a primary residence requirement after a loft is legalized…" **Ms. Balsam** commented after the loft is legalized. That is what the case is about because that is the argument that was made in Manhattan Loft tenants. **Mr. Carver** responded that he thinks the full sentence goes his way. "The court also recognized the illogic of imposing a primary residence requirement after a loft is legalized and brought under rent regulation, but not imposing the same requirement prior to legalization." **Mr. Carver** is asking that the rule impose the same standard for primary residency pre legalization that is required after legalization. He thinks the court is saying what he says the case says. Law and case aside, **Mr. Carver** does not understand why you wouldn't use the same standard. After all, these tenants are going to be subject to that requirement once they get a stabilized lease. Why is there a difference?

Ms. Balsam thinks the proof that loft tenants could offer is very different from the proof that somebody who entered into a lease for a rent stabilized apartment can offer because a lot of times people don't even

have leases, people don't necessarily have the same kinds of records, these are live/work spaces so there are differences in terms of the quality of proof. **Ms. Balsam** reiterated that she thinks we can borrow some of the standards, but in terms of just wholesale adopting that whole body of law and saying this is what you have to do, it is not the same. **Mr. Carver** replied that the body of law is well known, well established, easy to adjudicate because there is law out there. **Mr. Carver** encourages Ms. Balsam to think more about it and look at the case that he will leave with her.

Now, the First Department in the case that Mr. Carver did give to Ms. Balsam, actually did impose the Rent Stabilization requirement in the Loft Law context. **Ms. Balsam** asked which case was that. **Mr. Carver** replied Fishbein v. Matthews. This is not a First Department case; it is an appellate term case coming out of Housing Court, that applied the Rent Stabilization standard. **Ms. Balsam** mentioned that the original case that construed the Loft Law, which was Dworkin v. Duncan, this was right after the Loft Law was enacted, talks about the fact that the variety of the transactions in the relationships which characterize the present loft situation in New York City, is very different and the reason that the legislature used the term "residential occupant", instead of using the word "tenant" like it would under Rent Stabilization, was to provide elasticity and to free triers of fact from the stricture of the more traditional and stable housing arrangements. The judge in that decision is actually citing, as a source for that particular statement, a seminar that she attended that was conducted by Carl Weisbrod, who was the first chair of the Loft Board, and Joseph Fiocca, who was the chief drafting person of the Loft Law. So they gave a seminar for housing court judges right after the law was enacted. It seems to **Ms. Balsam** in terms of the intent, that the legislature was not intending to wholly bring in this analysis under the Rent Stabilization Code. **Mr. Carver** replied that if we continue to not use the Rent Stabilization standard, where a person qualifies under the lesser Loft Law Board standard but not under the Rent Stabilization, he supposes that there will be a lawsuit and we will have an answer at that point. **Mr. Carver** would like to leave that case with Ms. Balsam so she can take one more look at it. **Mr. Carver** appreciates that Ms. Balsam looked at this so closely. **Mr. DeLaney** clarified if the case that Mr. Carver referred to and read to, is from BLS Realty. **Mr. Carver** clarified BLF Realty.

Ms. Balsam asked if anyone had anything else to offer. **Mr. DeLaney** commented that he agrees with the way the case was described by Ms. Balsam in that the original position in the lawsuit was that at no point prior to legalization of the building exiting the Loft Law and entering Rent Stabilization, only then could a primary residence proceeding be initiated against the tenant. That position was lost, and in fact, as Mr. Carver knows and he pointed out, you wanted to perhaps refer to current 29 RCNY § 2-08.1, of the grounds for eviction, there is very clearly stated a ground for evicting a protected occupant who it turns out is not using the unit as his or her primary residence. That is in the Loft Law rules now. **Mr. Carver** understands that, but the argument, so to speak, is how to prove that. **Mr. DeLaney** clarified how to prove… **Mr. Carver** replied primary residence. **Mr. DeLaney** commented right, well the way it is set up now, it's dealt with in a court of competent jurisdiction. Such as the case that Mr. Carver sent out before. **Ms. Balsam** commented that she sees a difference between somebody being granted protection by the Loft Board and somebody who is already a protected occupant who is not using the premises as a primary residence. What we are talking about here is the former which is, do we grant somebody protection under the Loft Law and if we are going to have a primary residence requirement, what that standard is going to be. **Ms. Balsam** thinks Mr. Carver is advocating for one standard, and she is advocating for what could be termed a lesser standard, but she would say it is a different standard because of the types of proofs that loft tenants will offer versus tenants in regular Rent Stabilized housing. **Mr. Carver** is not sure that there would be a reason that the availability of proof would be different.

One thing that Ms. Balsam did not include and **Mr. Carver** is wondering if that was intentional, was to look at the number of days per year that the person is actually living in the space. That is a major factor to prove primary residency under Rent Stabilization. **Mr. Carver** noticed that it was not in the list that is in the proposed reg. **Mr. Carver** is wondering if Ms. Balsam thinks that factor should also be included. **Ms. Balsam** replied that if she thought it should be included, she would have put it in. **Mr. Barowitz** asked what the regulation says now, six months? **Ms. Balsam** replied it says one-hundred and eighty-three (183) days. **Chairperson Hylton** asked Mr. Carver, how he would establish that. How would anyone be able to provide some proof? **Mr. Carver** responded that this is standard in income tax cases all the time. If you have a house one-hundred (100) miles away from your office, and you have a house one (1) mile away from your office, and there is a fight with the taxing authority as to which is your primary residence, and you are in your office every work day of the year, it is a pretty good presumption that you are living

one mile away. **Mr. Carver** was a Rent Stabilized tenant for many years. The landlord was pretty aggressive in finding out where people live and he had a second home, and his second home was ninety (90) miles from his office. His apartment was one mile from his office and in his daily diary, he had what he did that day. He was always able to establish it.

Ms. Balsam responded how does a person who occupies a live/work space establish that? They have a diary that says I got up off my bed and walked to my studio? **Mr. Carver** replied that is not a fair counter argument, he just so happened to be telling Ms. Balsam his example. **Ms. Balsam** knows that but to her that is the disconnect here. **Mr. Carver** mentioned credit card statements, everyone is paying with things. He sees young people buying a piece of candy for twenty-five cents ($.25) with a card. There is a record of that. You are at the store Monday and Friday. It raises a presumption that you are living near that store and not at your other residence one-hundred (100) miles away. **Ms. Balsam** asked, she is not saying she would be in favor of it, but if we were to put in the one-hundred eighty-three day (183) requirement as a factor, would Mr. Carver be more inclined to vote for option one? **Mr. Carver** responded no, there are so many other problems in these options. He thinks the one-hundred eighty-three day standard is a really good one because if you really live somewhere, you should be there most of the year. It is a pretty logical factor.

Chairperson Hylton clarified if Mr. Carver is talking about going back a period of time. Mr. Carver mentioned the use of a credit card for example to make purchases. **Chairperson Hylton** asked whether Mr. Carver is talking about going back a period of time to establish the use. He knows that there must be other ways, but wouldn't that be some burden, not just to the tenant, but onto the Loft Board in terms of establishing that. **Mr. Carver** responded that the tenant might want to do that. Chairperson Hylton is assuming that the owner would actually use that against the tenant but that seems like a very useful thing for the tenant to say, oh wait a minute I lived here for one-hundred eighty-three days of the year. **Mr. Carver** does not know that it is biased against the person who needs/has to prove it. It might actually be helpful. **Mr. Carver** continued that because no one factor rules, having that factor might be helpful.

Mr. Roche commented that one observation that he would like to make, it doesn't necessarily lead him towards one direction, but he thinks we have a responsibility as a Board to try to simplify this as much as possible for some of the very reasons that were brought up. He knows himself, just in trying to prepare for this, he spent numerous hours reading through all the materials, compare this to this, that to this, and you can find yourself going all over the place, so kind of leaning towards what has been said on behalf of the tenants, if I am an artist and my job is to get up every day and create sculptures or portraits or something, my specialty is not trying to determine how I piece this altogether to prove my point. **Mr. Roche** is not necessarily leaning all in one way or the other, but he thinks we as a Board should try to simplify this. If there is data out there or if there is law out there that says this is how we define this, to him simplifying it is including that in with ours, so if a tenant does come across this issue, or even an owner in preparing for something, that they don't find themselves or their attorneys, spending endless hours drawing this piece from here, trying to figure out how to put it together. He is leaning towards simplifying this. **Mr. Roche** wants it to be simple for both tenants and owners alike so that they don't have to exhaust all these hours for a regulation that they are not familiar with to be able to come before the Loft Board or to be able to deal with it.

Mr. DeLaney commented that the way to simplify this is to keep the Loft Board out of primary residence cases and let them go where they currently go which is housing court. Take the one-hundred eighty-three day (183) provision, that potentially makes some sense if, as Mr. Carver described, I have my office, I have my Rent Stabilized apartment a mile away, and I have a home in Connecticut, where I might want to vote in Connecticut because I am involved in local politics, or I think that I am going to have a tax advantage by listing a different place as my primary residence. **Mr. DeLaney** mentioned that he was talking just the other day with somebody who pointed out one of the people in his building is a pretty successful musician who is away from his loft more than two-hundred (200) nights a year, but he is not in South Hampton for two-hundred nights a year, he is in Berlin for a week and Tokyo… In particular, part of the reason that making this, what is now close to a ten year demonstration of primary residence during the window period, on the effective date of the act and if there is an adjudication, at the point of adjudication, is that this is just not the way people live. If you end up with a coverage case in a small building where Joe Musician's qualifying as a protected occupant is central to the case, to have all the other applicants tied up with this proceeding before coverage can be determined, just makes no sense.

Have the building registered, register the occupants, if am a protected occupant today, but tomorrow the landlord brings a primary residence case against me in housing court, so be it. **Mr. DeLaney** agrees that you should be using your loft as a primary residence, but what that means, there is such a host of different cases that for us and the Office of Administrative Trials and Hearings ("OATH"), which doesn't have the same automatic powers of conducting its business as court does. **Mr. DeLaney** thinks this matter belongs at court. That's the way to keep it simple.

Mr. Carver wanted to point out that when a person who travels for work, that issue has long been settled by the courts as to how to handle the counting of days, so we have thirty (30) or forty (40) years of law, all the different permutations have already been adjudicated which is why **Mr. Carver** thinks we should adopt the Rent Stabilization standard. **Mr. DeLaney** replied that he would say yes it has been adjudicated, but let the people who are experts in dealing with those cases continue to deal with them. **Chairperson Hylton** asked anyone else?

Mr. Barowitz commented that there is a different flexibility here with the Loft Law for somebody that is using their apartment to work, so he doesn't think that the comparison should be simple. Being an artist, they work sixty days a year but live there, so you can't say going to work is the determinative factor as Mr. Carver did keeping the log. **Mr. Carver** responded that was one example of how to count the days. That's all that was. **Mr. Barowitz** continued, on the other hand, it could be that one of the former Mayors of New York had houses all over the place, he is not sure that the Mayor was here. **Chairperson Hylton** replied that he wasn't a loft dweller. **Mr. Barowitz** mentioned that the number is, he wouldn't say it's totally arbitrary, but he would think that should be the determinative factor. **Ms. Balsam** replied that it seems to her that what Mr. Carver is saying is that we should list it as a factor. **Mr. Barowitz** responded no question, but not the determinative factor. He has one son living outside New York City who still has his 917 area code phone number, all these years and has never changed it. You might have also had a credit card from when you lived somewhere else, so he doesn't know if those things would be determining factors. If there is a problem, **Mr. Barowitz** agrees with Mr. DeLaney, let them go to housing court, adjudicate it and see what happens.

Ms. Balsam replied that she thinks it fine for somebody who is already protected and there is a suspicion that they are in fact not using their loft as their primary residence to say to go to housing court. But the problem that **Ms. Balsam** is having, maybe the Board members don't have it which is fine because these are their rules, and if they want to go that way that is ok with her, but the problem **Ms. Balsam** is having is giving protection to people who aren't actually living there. We've had a few cases where that has happened and in terms of the quality of proof, Staff sat down after the last meeting and we really went through all of the recent cases to see what are people coming forward with and is this going to be a burden that we shouldn't be placing on tenants because it's not there now, it is just possession unless you are a prime lessee. For the most part, it came down to an all or nothing analysis. The only borderline cases that we could come up with were cases where people were travelling for work or peace corp. It hasn't, in terms of presenting itself in at least the recent cases, people are coming in with lots of documentation and credible testimony that they are living there, so we haven't really had a case where it was kind of maybe they were, maybe they weren't, how many days was it, we never get to that part of the analysis. **Ms. Balsam's** concern is the "none" because she can't see protecting people who aren't there and testifying on the record that they are not there. That's her concern and that's where this is coming from.

Mr. DeLaney commented that the other component of the primary residence question again is asking people, first to document the window period, where they may have been induced by the landlord at the time to provide evidence contrary to fact. There is no window period in Rent Stabilization, you sign a lease you are a Rent Stabilized tenant. **Mr. DeLaney** mentioned that the whole purpose of the window period was to say that if there has been a sufficient period of time where you have lived openly in the space, that demonstrates that you were using it residentially, regardless of language in a "Bloomberg form" lease that said loft studio is permitted by law or no living allowed or all of the various kinds of phrases that landlords put into these leases to try to protect themselves against the danger of the Multiple Dwelling Law coming into play at some point in time. The original court cases before the Loft Law starting with Lipkis v. Pikus, it was the finding that these people had lived openly in the buildings and if the landlord claimed he didn't know then he wasn't paying attention. When you are dealing with some of the coverage cases where we had people say oh I haven't lived there in a couple of years, in Rent

Stabilization, the period that's looked at, **Mr. DeLaney** believes, is two years from the time that a non-primary residence case is brought. Here we are asking people to go back close to ten (10) years, hit three (3) different points in time and have good solid documentation for all that, that is asking an awful lot of people. **Mr. Carver** replied that it is not just documentation. It is also sworn testimony. **Ms. Balsam** mentioned there is a lot of testimony. **Mr. Carver** also mentioned witnesses. It can be done, it is done all the time. **Chairperson Hylton** asked if he was right based on what he was hearing from Ms. Balsam, that this is much to do about nothing, in terms of focusing on that. **Mr. Carver** responded that over the next few weeks Ms. Balsam will look at the other case he gave her and will think about, and speak to Staff, about whether or not the one-hundred eighty-three day (183) threshold is something that we want to pursue because it is not necessarily anti-tenant and actually might be helpful to either side. **Ms. Balsam** mentioned that she is certainly willing to do that.

In terms of the concept of privity, **Ms. Balsam** mentioned that she did some research, looked at older cases. There are a couple cases, one from 1986 which is a Supreme Court case, and there is a First Department case, 545 Eighth Avenue… **Mr. Carver** asked in terms of privity, is this in response to his argument that MDL § 286(2)(i) would preclude… **Ms. Balsam** finished, people who are not in privity with the landlord from being protected occupants. **Mr. Carver** confirmed. **Ms. Balsam** continued that we have a whole slew of Loft cases that talk about privity, that you do not need privity, but the case that **Ms. Balsam** found that she thinks is the best demonstrator of that was an Appellate Division First Department case from 1996, 545 Eighth Avenue Associates. "The applicable regulation provides coverage for a residential occupant in possession of a covered residential unit, even if the occupant is not a prime tenant and even if the landlord did not consent to a sublet, assignment or subdivision, as long as the occupant was in possession prior to the effective date of the law." Then there is an older case, Korn v. Batista which is a 1986 case, which specifically says the Loft Law was designed to protect all residential occupants whether or not they are in privity of contract with the landlord. **Ms. Balsam** mentioned that our cases say the same thing in terms of roommates, spouses. We've had a series of cases even since the shift in the protected occupancy analysis, where you had people who were basically leasing a room and had access to the common areas from a net lessee. So those people were not in privity with the landlord either, they were in privity with the net lessee. The Board did cover them so maybe there is a decision there that she is not seeing, but it seems to **Ms. Balsam** that over the years we have not looked at privity and the courts are instructing us to not look at privity. **Mr. Carver** commented if he could take a look at those two cases, we can talk more about it next time. **Ms. Balsam** agreed. She will send the cases to everybody. **Ms. Balsam** asked Mr. Carver if he wanted all of the roommate cases too or does he want just the court cases. **Mr. Carver** responded just from the courts. **Mr. DeLaney** commented that it would be helpful if there are both Loft Board cases and court cases that are being looked at, if you can circulate things to all of the Board members so that we have a common body of knowledge to work from. **Ms. Balsam** responded sure. She has no problem with doing that but is concerned with over burdening the Board members.

Mr. DeLaney asked what is the green and yellow on the documents given to the Board members by Ms. Balsam. **Ms. Balsam** responded that the things that are yellow are things that we have to fill in dates and stuff for. On the statement of basis and purpose, the green highlights are things that change from option to option because if you are doing a different option then you need a different statement of basis and purpose. On the rule itself, **Ms. Balsam** changed a heading, she added in a line pursuant to the discussion we had the last time and she added in section four (4). **Ms. Balsam** mentioned that she will use a color other than green to show what is new. **Chairperson Hylton** asked as far as option 1, has the Board exhausted the topic? **Ms. Balsam** mentioned that Staff did have one thought about combining options one and three. Option three originated, as yes a middle ground, but also from the concern that we have this court case, that was circulated to all the Board members, about the number of people in a unit exceeding the Multiple Dwelling Law ("MDL"). We were actually thinking about incorporating the common household standard into option one to the extent that if there were to be more than what's legally allowed under the law, then the Board and OATH, ultimately, would be required to make an inquiry into a common household and use those factors. So we were thinking of moving option three into option one.

Mr. Carver commented that he had a bunch of language comments that he sent Ms. Balsam on option three, but he thinks they are applicable to more than option three. He was wondering if that is something Ms. Balsam wants to go through with the Board so that he could explain the concept he was driving at with those changes or the loophole that he was seeking to close. **Ms. Balsam** responded that she didn't

want to send them out because she had already sent out the version currently being discussed. **Mr. Carver** replied of course. That is one thing we might want to talk about. Since option three is the one that Ms. Balsam is now recommending… **Ms. Balsam** commented that she doesn't know if she is recommending any of them. She was asked to come up with different options, so that is what Staff came up with. **Mr. Carver** commented that he is had some global thoughts about the whole concept of option three to share. In terms of, do we want to talk about that first or do you want to talk about word changes? **Ms. Balsam** replied word changes. **Mr. DeLaney** asked whether Mr. Carver suggested some language changes that he sent to Ms. Balsam. **Mr. Carver** stated yes. **Mr. DeLaney** responded he would be happy to talk about them at the next meeting. He is not interested in talking about language changes on the fly. **Mr. Carver** said ok, and asked would Mr. DeLaney like him to talk about the concepts. **Mr. DeLaney** said sure. **Mr. Roche** commented that he would like as much information from all directions as anybody has time to stay here and give. **Mr. DeLaney's** only point here is that last meeting we talked about a document that he had not seen until he walked into the room and even if a Board member checked their email every five minutes, they would have only had that document in their possession for something like an hour and a half. Now, if Mr. Carver has suggestions to modify option three that he shared with Ms. Balsam, that's great, but he thinks in terms of everybody being on the same page, stuff that comes in needs to get circulated beforehand. **Chairperson Hylton** gets Mr. DeLaney's point, but it is not like the Board is making a final decision here, it is a public discussion. Why can't he express whatever he wants to express? **Mr. DeLaney** responded that he is happy to listen and take notes, but he is not in a position to respond. **Mr. Carver** replied that he does have some global issues with option three. **Chairperson Hylton** asked Mr. Carver to start with the global issues.

Mr. Carver commented that it is not clear to him what the problem is that Staff is trying to solve. The statement of basis and purpose was not helpful either. **Mr. Carver** thought about what is the state of affairs now. Now, if a prime lessee exists, the prime lessee is a protected occupant to the exclusion of all others. That sounds a little harsh, but when you look at the succession rule, that shows that friends and family basically have a right to succeed a prime lessee so that in the event that the prime lessee leaves, those other people are not left out in the cold at all. **Ms. Balsam** commented if they have been there the required amount of time. **Mr. Barowitz** mentioned one or two years. **Mr. Carver** replied right, a short amount of time. In terms of a compromise, **Mr. Carver** thinks that was the compromise. If people in good faith are looking for a compromise, it already exists. You have a right of succession for a whole host of people, they are just not qualified as the protected occupant, but they have pretty far reaching rights there.

Chairperson Hylton asked what happens to their rights before the succession event happens. Succession happens at what point? **Mr. Carver** responded if the prime lessee leaves. **Chairperson Hylton** again asked what happens to their rights during the period of time before that. **Mr. Carver** responded, like in any other area of life and real estate law, you are living in someone else's apartment, under someone else's lease, you are bound to their circumstances. Now, let's think about a child. A child is ten or eleven years old, he is in occupancy on the magic date, he qualifies as a protected occupant under the rule, the parents who are on the lease will be very surprised to find out that the child has equal rights to occupy that apartment for the rest of his life. The same goes for Aunt Fran. Aunt Fran was living with the family, the lessee, and low and behold they were in occupancy on the date and it will come as a shock that the leaseholder is now stuck with Aunt Fran for the rest of Aunt Fran's life by having the same legal status under Staff's proposal. The proposal is not recognizing the rights of a lessee to control the unit that they in fact leased. So the compromise is the fact that you got protected occupancy limited to the lessee when you have a lessee and the rest have other rights when the lessee leaves, that's a pretty good compromise. It recognizes the lessee's rights and it gives a helping hand to the friends and family who live there in the event the lessee leaves. So the compromise we are all seeking, **Mr. Carver** believes, already exists. He thinks it is perfectly fine and is not sure why it needs to be changed. In a related issue, if a lessee is obligated under the lease to pay rent, what happens if rent isn't being paid? Does only the lessee get evicted and the rest stay who have no legal obligation under any lease to pay the landlord? How would that work?

Ms. Balsam replied wouldn't it all depend on why there are not paying rent? If the landlord is out of code compliance… **Mr. Carver** responded let's assume that they are just not paying rent. **Chairperson Hylton** clarified that the lessee is not paying rent but the others are. **Mr. Carver** clarified no one is paying. You have twenty-five (25) protected occupants and one lessee, what happens under Staff's rule? **Mr.**

Barowitz commented that he doesn't know if that is how he read it. If an eleven year old kid is living there, and then grows up to be eighteen (18) and moves out. **Mr. Carver** replied let's assume the kid is not moving out. **Mr. Barowitz** commented that it is a hypothetical and can't deal with it. **Mr. Carver** commented that it is the same as any other occupant under this new proposal. The lessee is stuck with them for the lives of those occupants. **Chairperson Hylton** asked whether those other occupants would have to pay rent. **Mr. Carver** replied that he is asking Staff. Under Staff's proposed rule, if rent is not being paid, and you only have one lessee and you have twenty-five other protected occupants, what happens? **Mr. Carver** doesn't know. **Ms. Martha Cruz, Esq., Deputy General Counsel,** commented that her understanding is if an owner is not getting rent, he has recourse in housing court to bring a non-payment action and he can name the prime lessee which is the person who he's in contact with, and what he does in the caption is that he sues Jane and John Doe if he doesn't know the names of the other people living there. The owner can get a judgment against those people or against the prime lessee and a warrant to evict everyone in the house. **Mr. Carver** replied so they have an obligation to pay rent under a lease that they haven't signed? **Ms. Cruz** responded that an owner can bring a holdover, they can bring a non-payment action, there is recourse in housing court if what the owner wants is possession of the apartment. The owner can bring a case against aliases, if he doesn't know the names of the people who are living there. **Mr. Barowitz** thinks in some ways that's a good question. If the landlord accepts the payment of rent from Aunt Matilda, then he would think that Aunt Matilda has a right to stay there, but if the landlord doesn't accept it, then that's another question. **Mr. Carver** asked if there was a mechanism to unprotect prior to a stabilized lease being issued if it turns out that someone leaves occupancy and the unit is no longer their primary residence. **Ms. Balsam** replied yes, the landlord could take them off and put someone else on. Usually the problem is the other way around, that the person that was named as the protected occupant leaves and then the owner never actually updates the record even though other people are living there and the landlord is accepting rent. But the landlord could update the Loft Board's records to say this person is no longer there and now we have somebody else living there. **Mr. Carver** asked if Staff accepts that representation from the owner. **Ms. Balsam** replied she thinks we would update our records. **Ms. Cruz** clarified the representation that there is a new tenant. **Mr. Carver** replied no, that a particular protected occupant is no longer a primary resident. **Ms. Balsam** mentioned that it usually comes with a sale of rights. **Ms. Cruz** mentioned that she doesn't think she has ever seen this situation in which an owner has written us and said this person should not be the protected occupant because they don't use the space as their primary residence. **Mr. Carver** replied that this is a real possibility if we have twenty-five protected occupants. **Ms. Balsam** commented that record keeping in the loft world on both the tenant and owner side is not necessarily what she wants it to be.

Mr. Carver commented that you definitely need the primary residence requirement at the point that the stabilized leases are issued. **Ms. Balsam** would argue that the Loft Law itself requires primary residence. That has been her argument from the get-go. You are allowed to continue in occupancy as long as the unit is your primary residence. **Mr. Carver** replied as drafted there is now an end date, the date the record closes. **Ms. Balsam** responded because there is no way to know after that. What **Ms. Balsam** is trying to do is, when the Board is evaluating a protected occupancy application, what the Board is going to have in front of it, is the proof that was offered at the trial, so we are not going to have anything from after the record closes, which is the law. It doesn't make sense to have something else. That is why she chose that particular phrase. She is not wedded to it, but it seems to **Ms. Balsam** that if you are going to put in some sort of timeframe, what is the Board going to be able to look at? Whatever was in the record. What happens after the record closes, we don't know what happens after the record closes, and she guesses that would be the situation where the landlord could find out after the record closes that there is an issue about primary residence and maybe bring an eviction proceeding in that situation. **Ms. Balsam** reiterated that the Board should not be considering that because the rule says you consider what is in the record, quasi-judicial proceeding. **Mr. Carver** asked should the rule elsewhere state that primary residency is required at all times thereafter. **Ms. Balsam** responded that the law says that, but we can certainly add that, although she isn't certain we need a rule.

Mr. Carver asked about any response to his contention that Staff is unreasonably infringing on the rights of a lessee to actually control who's in their apartment. **Ms. Balsam** thinks that to the extent that the lessee is letting these people in, the lessee is taking that chance. The lessee has made a decision to let somebody move in, for better or for worse. **Ms. Balsam** asked Mr. Carver if he is saying that they didn't understand that these people could be protected under the Loft Law. **Mr. Carver** replied yes. **Ms. Balsam** asked if some sort of grandfathering provision would alleviate that concern so that from a certain

date moving forward, which she didn't think the rule would be retroactive anyway, people are on notice that this is a possibility. **Mr. Carver** replied that it somewhat alleviates the concern but it still doesn't stop the rule going forward from being unreasonable, in his view. **Ms. Balsam** mentioned that some of the cases that she was reading in terms of the subdivision cases, if you want to talk about nuts, so you have the net lessee who rents a space to somebody else who divides that space in half and person A keeps their half and rents the rest to person B, and then person B subdivides into three separate units, so now you have A, B, C, and D, so C and D are paying B, B is paying A, and A is paying the landlord. There are a lot of these cases in particularly the subdivision area where it is just wild. Then one leaves, another comes in. It is all very hard to follow. Of course the question is, is it really their house, if it is a loft and they are protected under the Loft Law. It is a different animal. Are you thinking of it as a traditional apartment, it is not a traditional apartment. **Mr. Carver** responded the concepts of real property still apply. He wonders even constitutionally if you can take these rights away from a lessee like Staff proposed. **Ms. Balsam** responded that under the current rule, if the prime lessee isn't there, anybody who is there gets covered. If the prime lessee isn't asserting coverage or if the prime lessee is asserting coverage, but we find that they are not using the unit as their primary residence, they are not protected. This is happening now. **Mr. Carver** understands that, but the existence of the prime lessee, legally, he thinks makes a huge difference. Let's just stick with that scenario. **Chairperson Hylton** asked what rights are being taken away from the prime lessee. **Mr. Carver** responded the right to control who's in the apartment. **Mr. DeLaney** commented that he can't evict his ten year old daughter, to follow one of Mr. Carver's examples. **Ms. Balsam** commented but you could evict an eighteen year old. **Mr. Carver** commented you can evict when you are eighteen (18), nineteen (19), twenty (20) and up to one-hundred (100). The owner now has the child for life. **Ms. Balsam** mentioned that the owner could have the child for life anyway under succession. **Mr. Carver** replied could, but this is for sure. **Mr. DeLaney** commented that some of the scenarios that Mr. Carver constructed don't really take into account the way these lofts are being used by people. Particularly, we are down a couple Board members and hopefully we will get some new Board members sometime. **Mr. DeLaney** thinks it would be beneficial for the Board members if it could be arranged, to take a look at some of these lofts so that we have a clearer understanding of what is involved. **Mr. DeLaney** mentioned that he doesn't know of a unit with twenty-five people so he thinks that is a bit of an exaggeration. There are lots of units, and he has said this before, where yes, one person holds the lease with the landlord but they all contributed to building out the space, they share the rent. These are very creative living situations and it's not as absurd as the picture Mr. Carver would paint. **Mr. Carver** responded that he thinks the concept of helping to build out is a vestige of the older cases and he doesn't know if that is necessarily happening in the current cases. This rule does not rely on the sweat equity of anyone. **Ms. Balsam** commented if you are talking about option three, there's a factor about sweaty equity, but it's not solely sweat equity.

Mr. Roche asked Mr. DeLaney, when he proposed that the Board take a look at lofts, what Mr. DeLaney's thoughts are. **Mr. DeLaney** replied that right after the Loft Law passed initially in 1982, we arranged to have a tour of loft units for Board members, particularly the public members who may or may not have had any real experience with what was involved. We did it again in the mid 1990's when there was significant turnover in the Board. The reality of how live/work spaces are used, it is hard to grasp if you have never really had the chance to take a look at some of these. **Mr. Roche** asked if there has ever been a time in history of the Board that the Board has actually allowed the people who the Law affects, both owners and tenants, to speak and describe some of the situations. **Mr. DeLaney** responded yes, in the sense that when, what were then called regulations, were first being written, there was extensive public testimony, as he thinks there will be at the hearings on whatever changes will be made to the current rules. He thinks there will be quite a bit of people coming forward to offer their experiences. With regard to Ms. Balsam talking about some of these crazy subdivision cases, the reality is it all worked out pretty well. The landlord who was getting five-hundred dollars ($500) from space A, who now all of a sudden saw the rent coming in from these subtenants who had been granted privity with the landlord, it was to the landlords economic advantage as well. Despite the way that one can postulate this could cause a problem, that could cause a problem, actually the law has worked pretty well and there haven't been many problems.

Ms. Balsam mentioned that she would welcome public testimony in the context of passing a rule. She is very big on getting public input at the appropriate time. **Mr. Roche** asked Chairperson Hylton if it is possible to arrange some sort of town hall forum where both owners and tenants could speak. **Chairperson Hylton** asked outside the rule making process? **Mr. Roche** replied yes, outside the rule

making process. Just like he has never lived in a loft building, he has visited many of them and inspected some of them, and he has not had the privilege of owning a loft building, despite the fact that he believes at the end of the day the law is what matters, he sees a certain advantage to be able to understand, right from the mouths that the law affects, both owner and tenant, in the process of looking at all of this and bringing it together and making a responsible vote. He didn't know if this was feasible, that is why he asked for some historical perspective. **Chairperson Hylton** asked Mr. Roche what he meant by town hall. **Mr. Roche** responded that he knows we have these public meetings but the public never has an opportunity to speak, so we never really hear from the owners and tenants other than when the meeting is over. Some sort of forum where prior to so that it doesn't become some sort of free-for-all. **Chairperson Hylton** commented that he doesn't believe we will be able to visit people's apartments as a Board. **Mr. Roche** clarified that he was referring to where they can come and stand behind a microphone and express their views. **Chairperson Hylton** asked Mr. DeLaney if stuff like this has happened. **Mr. DeLaney** mentioned that there have been a few times that there have been, usually organized around a topic. Representatives of the various communities have been invited to address something other than a pending rule or regulation.

Mr. Barowitz mentioned that a couple of public meetings years ago in the boroughs which he attended, he doesn't think it a bad idea. The thing is that there are so many people, not only in lofts, but in low cost housing that are living under the radar anyway. Those for example who are living under the radar in low cost housing, nobody knows about it and nobody cares, and they go on and they sort of live there, and they share rent and they don't share rent. He remembers when the first Loft Law came into effect; there were a whole bunch of artists who didn't want it because they preferred to live under the radar. There's a dilemma here on what exactly to do. **Mr. Barowitz** also commented that he doesn't really see a whole lot of problems with the way Staff outlined it in three. **Mr. Roche** clarified that he is not advocating we put up billboards and encourage people to come out from behind closed doors, but we have quite a few familiar faces that he has seen at numerous Loft Board meetings that obviously either represent tenants or their owners and it seems to him that if they take the time and initiative to come to these meetings on a regular basis, that they may be willing to express their perspective as to what their needs are as a tenant, and also as an owner.

Ms. Balsam addressed Mr. Roche's point. She has two concerns with that. The first concern is that what people say could involve pending cases. Once you open that door, you could wind up hearing things that you are not supposed to hear. The second comment that **Ms. Balsam** has is that the City Administrative Procedure Act ("CAPA") has a rulemaking process. That rulemaking process incorporates public comment. After the public comment, the Board has the right to change a proposed rule as a result of that public comment. So the time to hear that information, in her opinion is during the CAPA process. She knows that there are people out there who want the Loft Board to be listening to them now so Staff can formulate something, but **Ms. Balsam** thinks you have to start somewhere, and the Board can change and tweak the rule after getting that input. **Chairperson Hylton** mentioned that the members of the public could certainly reach out to the different Board members in order to kind of make the case, whether it be after this meeting to share your contact information, and you Board members could make their case at the Board meeting.

Mr. Carver commented that other than public comment, there is this issue of fact-finding that Mr. Roche is talking about. He believes we do need to do some fact-finding, but it is not on the issues we've spoken about so far. The sale of rights section that's proposed could potentially be a ground breaking change in terms of owners not being able to buy out rent stabilization, tenants not being able to receive buyout money. **Mr. Carver** really thinks we need to understand what is going on there and is beyond the capacity of Board members to just hear from people. He thinks we need to bring in one or two owner representatives, one or two tenant representatives and maybe someone who has actually studied the housing market to really properly explain what the effect of the buyout rule change would be. He doesn't see how we can vote on that. **Chairperson Hylton** asked why that can't be done during the CAPA process. **Mr. Carver** responded that we need to be able to interact with these witnesses. There are plenty of people who deal with this issue every day. His understanding is that in the First Department, which is Manhattan and the Bronx, there is a case that is consistent with the proposed rule. He believes in the Second Department, which is Brooklyn, Queens and Staten Island, that rule is not followed. So we have a bunch of buildings with the proposed rule going on and a bunch without, and **Mr. Carver** would really like to hear from people in the field to better understand what the proposed rule would mean, how

this would change what is happening. This isn't necessarily a pro owner or anti-tenant rule. He doesn't know if owners or tenants want it. That is his sense, and doesn't know if that is true, but he would really like to hear from people, testimony. It can be short, can be one of these sessions and in that way, members of the Board can interact with the witnesses. That's his thought on having members of the public interact with the Board members at this stage. He would limit that interaction to the buyout rule. **Chairperson Hylton** clarified that Mr. Carver is asking Staff to get some expert testimony as to the impact on that, before we consider the rule. **Mr. Carver** replied yes.

Mr. Roche commented that he is not opposed to that, but if he had understood Ms. Balsam's statement regarding proper administrative process, that would be done after the rules are actually voted on, then you would have the hearing. **Ms. Balsam** responded that she is not as concerned about cases, pending cases in terms of sales of rights because there aren't any. That's her primary concern. Normally you would have the public hearing during the CAPA process but if the Board really feels like they just can't go forward and fashion a rule without more information, at least in terms of the economic impact of this, which **Ms. Balsam** can understand, then she doesn't think there is any law that says we can't do that, she's just always hesitant to do it. As opposed to the other rule where you run the risk because there are a lot of cases. **Mr. DeLaney** commented that his experience has been that sunshine is always a good thing and particularly, in our quasi legislative function, it is certainly not uncommon for either state or local or federal legislatures to hold fact-finding missions, travel to places, speak to people prior to crafting legislation. Particularly again as the Board evolves as new Board members come on, how are they supposed to have enough information to form an opinion. **Mr. DeLaney** mentioned he is in favor of that sort of thing. **Mr. Roche** clarified Mr. DeLaney's point is theoretically one of the vacant seats could be filled with somebody who has never even been inside of a loft before. **Mr. DeLaney** mentioned that we have had a lot of public members who have never been in a loft and sometimes were not very interested in the subject. **Chairperson Hylton** stated that he will discuss with Staff to see what we can do to accommodate the Board's wishes. He gets the sense that a majority of all Board members here are in favor of some sort of arrangement as Mr. Carver described.

Mr. DeLaney had a few general questions, but one section that we have not spent any time on and would be helpful to him is the distinction between the little triple i (iii) under three in 29 RCNY § 2-08. **Ms. Balsam** asked which option. **Mr. DeLaney** thinks they are all the same as far as he can tell. He would like an explanation of what the alternatives are intended to do and how it differs. In option one, it is on page five. **Mr. Carver** responded that it actually specifies what the proof is. It has bright lines as opposed to a standard. He thinks that is the difference. **Mr. DeLaney** clarified in the D, E, F section. **Ms. Balsam** replied yes. In other words, it is adding in the material from (3)(i) at the top where we inserted additional language, so it is adding in that additional language to the person that is there after the effective date of the law but with owner consent. The first is just the date, and the other is the date and you have to show these things. **Ms. Balsam** mentioned that one of Mr. Carver's comments, and he was correct, is that you don't necessarily need this for all of the alternatives because if you have it up top, you don't necessarily need it below.

Mr. DeLaney further commented that we are considering amending these rules, we kind of have on the back burner a complete look at all of the rules, and Ms. Balsam mentioned the question of what if anything would be viewed as retroactive. **Mr. DeLaney** asked for some clarification. **Ms. Balsam** responded that she doesn't think anything should be retroactive. When you do rule making, you usually go forward. When she thinks of the term grandfathering, she usually thinks of it from the zoning standpoint, where something was there before and you let it stay. To the extent that there were agreements before, we let them stay. **Mr. Carver** commented in this context though, moving forward would it be as of new applications coming in. This is kind of tricky. **Mr. DeLaney** stated exactly, and added at the moment, for overall coverage, there are no new applications. **Ms. Balsam** responded that again, this is about protected occupancy, not coverage, but there are some pending protected occupant applications. **Mr. DeLaney** added he is sure there are proceedings going on at OATH that would turn on these potentially. He was just curious if Staff has had time to give thought to that. **Ms. Balsam** replied that normally when you do a rule, you apply that rule from the date that it's enacted moving forward, because it wasn't in effect before that, so you can't look back. For the people whose applications are currently pending, they would have to go under the old rule, which is sort of bizarre. They would have to withdraw and re-file if it would be advantageous for them to do so if the record hasn't closed. Clearly a coverage application is not going to be withdrawn because they can't refile.

Mr. Carver asked in terms of witnesses, if Ms. Balsam wants to go down that road on the rights issue, he wonders if the Board members could actually recommend witnesses. **Chairperson Hylton** responded that Staff will actually rely on that advice.

Before adjourning, **Mr. DeLaney** asked if we are clear on the December schedule. He knows there was a question about morning or afternoon on December 28th. **Ms. Balsam** mentioned that she is still waiting to hear from the two members of the Board who are not here today, but it looks like it will be in the afternoon. Preference seems to be in the afternoon on the 28th. **Ms. Balsam** mentioned that November 30th is in the morning. **Mr. DeLaney** asked if we know the location yet. **Ms. Balsam** clarified that all of the meetings will take place at 22 Reade Street.

Mr. DeLaney mentioned that he waited for the mapping presentation and while the mapping presentation is very interesting, and will provide a new tool, he is still concerned that Board members are not getting the kind of reports they are used to getting. **Ms. Balsam** replied that she sent the Board members the spreadsheet. **Mr. DeLaney** pulled out some samples of what he had in mind, for example the number of pending cases, that kind of thing. **Mr. DeLaney** provided Ms. Balsam and Chairperson Hylton with copies of reports from 2014. **Ms. Balsam** asked if these were quarterly. **Mr. DeLaney** responded that sometimes they were given twice a year, maybe three times a year. He thinks it would be very helpful to have a sense of that information. **Ms. Balsam** replied she is all in favor of it.

Mr. Carver asked if the plan was for Ms. Balsam to send some new language around. **Ms. Balsam** responded that she will circulate the language that Mr. Carver sent because everyone wants to see it. **Mr. Carver** asked if that is something that Staff wants to see as part of the rule. **Ms. Balsam** replied that she thinks he had excellent suggestions and everyone should see them. Does she agree with all of them, no she doesn't.

Chairperson Hylton concluded the November 16, 2017 Loft Board public meeting at 4:03 pm and thanked everyone for attending. The Loft Board's next public meeting will be held at 22 Reade Street, first floor, on November 30, 2017 at 11:00a.m.
