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

June 7, 2018

The meeting began at: 2:30PM

Attendees: Robert Carver, Esq., Owners' Representative; Elliott Barowitz, Public Member; Richard Roche, Fire Department ex officio; Charles DeLaney, Tenants' Representative; Julie Torres-Moskovitz, Public Member; Robinson Hernandez, Manufacturer's Representative; and Chairperson Designee, Renaldo Hylton.

INTRODUCTION:

Chairperson Hylton welcomed those present to the June 7, 2018 public meeting of the New York City Loft Board and briefly summarized Section 282 of the New York State Multiple Dwelling Law, which establishes the New York City Loft Board, and he described the general operation of the Board as consistent with Article 7-C of the New York State Multiple Dwelling Law.

New Board Member:

Mr. Hylton introduced a new member of the board, Julie Torres Moskovitz, AIA, who will serve as a public member, and read her bio and qualifications.

Ms. Torres-Moskovitz greeted the Board and stated her gratitude at being able to be of public service.

MR. HYLTON COMMENCED THE MEETING by stating that it will be solely devoted to rule revisions, picking up where we left off in May with 29 RCNY 2-08(Q), page 29 of this document, but before that, Ms. Balsam had some announcements.

Ms. Balsam reported that the Assembly had passed bill 8409 B yesterday; that it is essentially the same as that passed last year; and that it will take effect immediately, assuming the Senate and the Governor sign it. It has a clause allowing those denied coverage under the 2010 eligibility requirements to reapply, and it applies to cases pending and/or on appeal before the Board. She has the text and will circulate copies after the meeting.

Mr. Barowitz asked if the bill extends the deadline for when to apply for coverage.

Ms. Balsam replied that it eliminates the statute of limitations all together, in perpetuity. It remains to be seen if it will be signed, but it's important that this has happened.

Mr. Hylton asked if anyone had seen the Crain's article about the competing legislation.

Ms. Balsam stated there was a competing bill.

Mr. Barowitz asked if the Mayor was supporting the bill.

Mr. Hylton confirmed that the administration is supporting the Glick bill -- the bill that was passed.

Mr. DeLaney asked about the new faces at the meeting.

Ms. Balsam introduced the two summer legal interns, and they were welcomed.

RE RULES:

Ms. Balsam directed the attendees to where they had left off (section 7, page 29 of the revised document she circulated) and recalled that Mr. Carver had asked what happens if/when the owner does not appear -- what is the statutory burden on the tenant? She had discussed this with the Law Department, and they agreed it should not be up to the tenant to verify everything going on in the building. It was proposed that staff develop some kind of questionnaire/ check-list for tenants to complete as part of the coverage application. It could be a yes/ no checklist, listing a lot of the uses that would be covered. The Rule could state that the tenant *certifies to the best of their knowledge*, there are no inherently incompatible uses in the residential units and as part of the application process and we would insert a questionnaire.

Mr. Carver stated that this implied a lower standard of proof for the tenants, and asked why.

Ms. Balsam explained that as tenants had no contractual relationship with other tenants allowing right of entry, as landlords sometimes do, tenants have no way of knowing with absolute certainty what is happening in all other units.

Mr. Carver made the points that tenants, who are on site all the time, would have a better idea (than the owner) of what is going on in the building; that tenants have access to all of the same building records as the owner; that as the party seeking relief, according to the law, the burden of proof is on them (the tenants); and that it may not, in fact, be possible to tamper with that basic aspect of the law.

Mr. DeLaney stated that after some consideration (since last meeting), he would make the following points. (First) Whether the owner lives in the building or not, he has an obligation to know what is going on in his building, and that he would have liability issues around compatibility of use; and (second) that all parties bear some responsibility in terms of attention to/ reporting physical aspects of the building that could be safety issues. That the owner is not responsible because he doesn't live locally is not an acceptable excuse.

Mr. Carver made the point, though, that this is the tenant's case to prove.

Mr. Hylton stated that the tenant is simply making the case that *from what they see*, there is no incompatible use, and they could complete a survey that supports their claim. He further clarified that the Building Codes of New York hold the owner responsible to maintain the building in a code-compliant manner, and that includes proper use. The owner has to know what is happening in the building, and he cannot lease space for a use that has not been approved. So who knows more about what's going on behind closed doors? The owner. And, in terms of tenants' having as much knowledge as owners, he made the point that what we do know comes from tenants filing complaints; which suggests that if no complaint has been filed, no one has seen anything.

Mr. Carver stated he does not agree with that at all, and makes the point that the lease requires the tenant to maintain the building in a code-compliant manner, and this is *how* the owner is able to satisfy that requirement.

Mr. Hylton asked how we know what's in the lease.

Mr. Carver replied that the records can be subpoenaed, and re-asserted that this is the tenant's case to prove, through a preponderance of evidence. He also noted that he's heard of tenants making complaints about some of the very uses you claim are impossible for him to prove.

Ms. Torres-Moskovitz asked what establishes preponderance of evidence.

Ms. Balsam explained that the decision-maker has to decide that it's more than 50% likely that there's an incompatible use in the building.

Mr. Carver asked for confirmation, though, that this is being stricken, and replaced with a questionnaire?

Ms. Balsam confirmed that it was her suggestion to replace it with a survey.

Mr. Carver clarified the context for Ms. Torres-Moskovitz – that they are striking the standard and making it lower.

Mr. Roche raised the point that the proposed modification to this rule, in essence, nullifies the 50% plus law. The fact that Ms. Balsam has discussed this with the Law Department makes him more comfortable, but he's still concerned that it seems to nullify the existing law.

Mr. DeLaney advised stepping back and considering, re the issue of inherently incompatible use, that we come to a consensus about what it is we are trying accomplish. He asked Ms. Balsam if she can clarify what part of the state law addresses incompatible use, and what part is in our existing rules.

Ms. Balsam stated the state law: The building cannot contain an inherently incompatible use, and the Loft Board will define and pass rules re what that is. (She will provide the exact section)

Mr. Roche asked why we are now considering striking this, when in 2010/11 it was acceptable.

Mr. Delany noted that it was not a unanimous decision. None of these are back from OATH yet, and I hear stories of people spending a lot of money trying to prove these cases. It's a huge issue. He gave some background: This language was put into the Loft Law in 2010/11 as a way of limiting the number of IMD buildings, and notes that none of it applies to the 900 buildings that were registered in 1982. In his opinion, this was a "monkey wrench." The first thing the Board dealt with in great detail was the issue of incompatible use, and all kinds of wild ideas were discussed (examples given). Personally, he felt there were other issues that should have been addressed first, but the Board felt strongly about staying with this. And the tenants were raising issues, for example, a tenant who makes furniture in his loft and uses materials that are "incompatible." But the 2010 rule said that was OK.

Mr. Carver noted that the law has been amended to give the Board broader latitude in interpreting such situations.

Mr. DeLaney's main point was that he didn't think they'd be going against the law, just revising the Board's own rules.

Mr. Hylton clarified the issue of the storage of incompatible materials (re furniture-maker example), stating that there are limits to the amounts.

Mr. Roche confirmed, stating that there are permissible amounts for just about anything.

Mr. DeLaney added, he understands that an issue in some of these commercial buildings was -- if there was an incompatible use there at the time that fell under the relevant use groups – is that amount permissible? Or is it being "ginned-up" as a way of creating a situation where coverage eligibility would be lost?

Mr. Roche stated that the back story on this is much appreciated.

Ms. Balsam read from MDL section 281(5) on incompatible use:

The term "interim multiple dwelling" as used in this subdivision shall not include units in any building, other than a building that is already defined as an "interim multiple dwelling" pursuant to subdivision one, two, three or four of this section, that, at the time this subdivision shall take effect and continuing at the time of the submission of an application for coverage by any party, also contains a use actively and currently pursued, which use is set forth in use groups fifteen through eighteen, as described in the zoning resolution of such municipality in effect on June twenty-first, two thousand ten, and which the loft board has determined in rules and regulation is inherently incompatible with residential use in the same building, provided that the loft board may by rule exempt categories of units or buildings from such use incompatibility determinations including but not limited to residentially occupied units or subcategories of such units, and provided, further that if a building does not contain such active uses at the time this subdivision takes effect, no subsequent use by the owner of the building shall eliminate the protections of this section...

So it specifically mentions Use Groups 15 – 18, as described by the zoning resolution, and talks about the Loft Board passing rules. So it's not the law that talks about burden of proof, it's the rules.

Mr. Hylton: So the rule can change the burden of proof.

Ms. Balsam stated that often, there is a rule like a rebuttal of presumption, which assumes that, if no one says anything, then there's nothing there. But she does not think the Board should go that far, though it could.

Mr. Carver made the point that we have not only an issue of burden of proof, but of safety. Laws are constantly being created or changed to make life safer, so the fact that older buildings weren't subject to safety conditions is no reason for the legislature not to pass such laws now.

Mr. DeLaney said he feels that the 2010 rule created an inconsistency, a separate category/ class, with one being safer than the other.

Mr. Carver stated that no law is perfect, and have to work within this, even if there are safety inconsistencies in the legislation.

Mr. Barowitz made the point that many creative people are leaving New York City because the rents are so high, and for the city to thrive, it's important to keep them here. In a building of 60 units, it is inconceivable

that the tenants are going to know what's going on and find a place large enough for them to meet to discuss it. Requiring them to do this because the owner happens to live elsewhere is a huge burden and unfair.

Mr. Roche said we're not suggesting responsibility be taken away from the owner, but shared equally.

Mr. Carver added, and with equal access to the relevant documents

Mr. Roche wondered: Human nature being what it is re taking the "path of least resistance," if I'm a tenant, isn't it easier for me to just say there is no incompatible use?

Mr. Delaney made the point that, although he represents tenant interests, he feels the larger responsibility to the public. If the concern of the Legislature was to protect against people being exposed to hazardous materials, conditions, and fires, then we may have to consider how this affects not only those in the building, but passers-by. If we have a condition that is so dangerous people shouldn't be living in the building, then we may have a bigger safety issue than residential incompatible use.

Mr. Barowitz noted that the Board had not confronted this with any building.

Mr. DeLaney gave the example of a business that uses toxic fumes, which are vented out to the street, being safe for building residents, but what about people on the street? We're saying it's not safe for people on the street, but we can legalize your unit. The lack of specificity is a "monkey wrench," that will cause protracted proceedings at OATH. Again, so far, none of these cases have made it to us, but what are "hazardous uses"? A crematorium, all would agree, is an incompatible use, but a spray booth? What are we trying to do here?

Mr. Hylton agreed that it's a tough issue, and stated that what we are trying to do is flesh-out *how* a claim of incompatible use can be made.

Mr. Carver added that the reason the problem is arising is that the landlord may not be at the proceedings.

Mr. Hylton asked why the landlord doesn't have to be there.

Mr. Carver replied that the Board decided that the landlord is not required to answer; that the landlord often does not appear at coverage cases; that it's the tenant's burden of proof.

Ms. Balsam stated, in terms of why this was passed this way at the time (2010/11): First, she does not believe that staff is proposing anything that is outside the law; and if it does, the Law Department will rein them in. Second, hind sight being 20-20, at the time these laws were passed, which was shortly after the eligibility requirement came in, no one really contemplated how difficult it would be for a tenant – with arguably more limited resources than a landlord -- to *prove* what is happening in a unit. And that is how it appears to be playing out in OATH. She re-asserts that it's an unfair burden on the tenants, and something needs to be done.

Perhaps the rule should be broken into two parts: if the owner is present, and if he's not present. If the owner is present, it's up to him to prove that coverage should not be given. The feedback from some of the owner attorneys is that it makes sense. But if he's not present, it is not fair to ask a tenant to prove every single use in a very large building.

Mr. Barowitz stated that owners have a long history of doing nothing.

Mr. Roche replied that, in fairness, owners have brought unsafe conditions to the Board's attention.

Mr. Barowitz added that from the beginning, the owners didn't want this, and so turned their backs on it for many years. But since 2010, they have to do it. And we still have over 900 buildings from 1983 that aren't covered.

Mr. Roche asked if all can agree to allow the staff to review both sides (Ms. Balsam's proposal and Mr. Carver's response to it), and prepare something to review at the next meeting.

Ms.: Balsam asked, so redraft Section 7? To say….what? If the owner appears…… If the owner doesn't appear….that's where we get stuck.

Mr. Hylton asked to see if the Board supports the current proposal. We should put it to a vote.

Mr. Carver stated that if we're voting on it, we should at least agree on the actual words.

Ms. Balsam continued, so change "allege" to "certify"…. and it could be a sworn statement that they could certify electronically with an e-signature

Mr. Carver said that the words have to be "truthful," and clarified that he does not support this version whatsoever.

Mr. Hylton asked if we could take a vote now to see if anything would pass.

Mr.Carver noted that the Manufacturing Board member is not here, and should be heard.

Mr. Barowitz agreed that there should be a full Board determination.

Ms. Torres-Moskovitz mentioned the provision that absentee board members could have someone sit in.

(There was a discussion about what this meant, how/ why the rule was made, etc.)

Mr. Hylton suggested language changes be addressed first.

(There was discussion/ suggestions, followed by **Ms. Balsam** recounting what seemed to be agreed upon, as follows):

"(The tenant) certifies, under penalty of perjury, on a form prescribed by the Loft Board that to the best of their knowledge, there are no uses in the non-residential units that are inherently incompatible with residential use"

Mr. Carver reiterated that he thinks it's a terrible idea.

Ms. Balsam continued, saying the form could be e-filed, because you are certifying under the penalty of perjury…. What exactly the form will consist of has yet to be worked out, but it's a moot point now, anyway, because we can't take coverage applications.

Mr. Roche asked if we could also add wording to the effect that, if the Loft Board deems it desirable, inspectors can be sent to the property to inspect.

Ms. Balsam noted that such wording already exists.

Mr. Roche stated that it would help, as we have difficulty gaining access to all the buildings we like to examine.

Ms. Torres-Moskovitz asked for clarification re the 15-18 lists. Do these businesses have to be in continuous use?

Ms. Balsam explained that it would have to be there during the Window Period and at the time of the trial, that is, the period during which the Board is considering the case. (She gives example). Basically, the Board assumes it's there, unless new information is presented.

Mr. Carver asked why the certification isn't coming from an architect or engineer. At least then it would not be coming from a self-interested party, i.e. A tenant who would benefit from the conclusion that there is no incompatible use. The Building Department should be interested in "full proof."

Mr. Barowitz asked, again, who has the burden of proof. Who hires the architect?

Mr. Carver replied that this is always the tenant's claim.

Mr. Barowitz said, so the tenant has to hire an architect, but the owner, no?

Mr. Carver states that the owner has an architect confirm when he registers the building

Mr. Hylton asked if the proposed new form would be signed by the architect.

Mr. Carver confirmed, yes.

Ms. Balsam said that is returns again to the issue of who is there all the time. Should the architect put their license on the line?

Mr. Carver stated that you are asking the owner to do the same thing.

Ms. Balsam stated that, assuming there are no service issues, the owner is choosing not to appear.

Mr. Roche asked **Ms. Torres-Moskovitz** how this would be handled. They can't force their way in to these spaces. She replied that it would be a "to the best of my knowledge" situation. Not 100%, but they try.

Mr. DeLaney raised the question again of buildings with residential and commercial units. Is an architect supposed to see every unit?

Ms. Balsam stated that the owner is responsible for maintaining all the records; for knowing what is happening. The owner has all the documents.

Mr. Hylton noted that the owner could also make a "to-the-best-of-his-knowledge" statement.

Mr. Carver stated that everyone has access to the same legal documents, just as in any civil litigation.

Ms. Balsam countered that this is administrative law, not civil litigation; and that, no, tenants do not have access to the leases.

(Various points made for/ against architect or engineer doing the certification.)

Mr. Hylton suggested revisiting the idea of using an inspector, and clarified for the record that the Loft Board does not have its own inspector.

Ms. Balsam said perhaps a DEP inspector.

Mr. Hylton suggested wording: if the Loft Board deems it appropriate, it may enlist the assistance of other city agencies to conduct inspections.

Ms. Balsam suggested: The Loft Board may request additional information, or, inspect as needed, if there's a reason.

Mr. Hylton asked how the Board would determine which agency or agencies would be required.

Mr. DeLaney stated that hazardous can mean many things, and asked **Mr. Roche** if they had a variety of experts for different materials/ situations.

Mr. Roche confirmed, and gave examples

Mr.DeLaney asks if it's feasible to ask an architect or a tenant to make the determination about what kind of hazard is present and so which expert is required.

Mr. Roche stated that the FDNY has all kinds of experts, as does the Building Department, such as plumbing inspectors.

Mr. DeLaney suggested we again take a step back. If the issue is just determining IMD qualification, that's one thing, but if we're trying to guarantee health and safety to those either living in the building or walking by, maybe it's unfair to ask either the tenant or the owner to certify. Maybe it should defer to the agencies.

(Various are in agreement that health and safety is the bottom line, so inspection would be the answer)

Mr. Barowitz cautioned that it can be very difficult to get inspectors, and gives the example of how long it can take for a routine plumbing inspection. The agencies are over-burdened as it is. He makes the point that it's a very "clumsy" situation, and again, that it's a huge burden on the tenant and doesn't make sense. He asks how often this comes up, anyway.

Mr. Hylton asked how the system currently works.

Ms. Balsam explained: The tenant states in the application that there are no inherently incompatible uses, and then the tenant goes to OATH and says: here's what's in the building, and there are no incompatible uses.

Mr. Hylton continued, and the tenant has to go back to the Window Period, the 10 year period….

Ms. Balsam…. and say that these are the uses that were in the building during the Window Period, and they're there now, and none are inherently incompatible.

Mr. Hylton asked who would have the most thorough records re this.

Mr. Carver said it might not be the same owner, and it seems like this kind of conclusion has to come from an architect or PE.

Ms. Torres-Moskovitz asked why

Mr. Carver responded that lay people have difficulty now trying to understand the particulars of zoning laws. This would be even more difficult, so it seem that a certification like this from a tenant would not be very meaningful.

Ms. Torres-Moskovitz stated that the same logic would say that the owner isn't capable of saying what use group is in the building.

Mr. Carver stated that owners are required to have the building certified by an architect when it's registered.

Ms. Balsam noted that, again, it comes down to how to know exactly what's in the building; how to get access; and who can order that.

Mr. Hylton asked what can be done about ordering access.

Mr. Carver said he thinks a judge would have the power to do that.

Ms. Balsam said she will look into it.

Mr. Carver clarified that he is not in favor of any changes, but is just trying to improve the proposed changes.

Mr. Roche stated that he is in favor of inspectors because, as Mr. DeLaney noted, the bottom line is that this is a health and safety issue, and taking this into account assures that the Board is doing its best to insure that.

Ms. Balsam stated that we do have a rule based on the current rule (1-09). The proposed rule is 1-24 on page 17 of today's document. Staff may investigate claims raised in applications or any other documents filed with the Loft Board. As part of its investigation, Staff may request that the parties furnish additional evidence or memoranda relevant to the application. Staff may also request appropriate ledger, documents and other records relevant to the issues in dispute.

So that's the staff requesting additional information, and it could be cross-referenced to this rule in 2-08(q)

Ms. Balsam also explained that, currently, the onus is on the tenant to prove there is no inherently incompatible use; to prove a negative. When the owner is appearing that's not the problematic case. The problem is when the owner is not there. We're trying to craft something that would put less of a burden on the tenant, but provide the Board with enough proof for it to act. What we're currently asking the tenants to do is so burdensome that the applications are at OATH for 10 years.

Mr. Hylton suggested wording such as the following: In cases where the owner does not appear, staff may (refer back to that section) conduct its own investigation, per 1-24 Board rules, when there is the suspicion of inherently incompatible use.

So if we can break on this, and Helaine will return with language at the next meeting.

Ms. Balsam asked if she could get a sense from the Board how they felt about whether the tenant would need to hire an architect/ engineer.

Mr. DeLaney reframed the question: So, should the tenant be allowed to make the certification, as opposed to a professional?

Mr. Carver confirmed, yes.

Mr. Roche asked if it could be presented as an option, because tenants may refuse to do it, and/or not want to hire an architect.

Mr. DeLaney noted that architects may not want to sign/ certify.

Ms. Balsam concurred. She is afraid the tenant won't be able to find an architect, because he/she will want to see everything that's in the building.

Mr. Carver said that if the concern is safety, isn't that what the Buildings Department wants?

Mr. Hylton asserted the Buildings Department is also concerned with fairness; that these uses are defined; that we are not giving enough credit to people for being able to read and/or attest to what they do or do not see every day. I don't see how people would not be aware of and report something dangerous to them. If they would not, then we have a much bigger problem!

I think we have to move on from this issue for now. Helaine will try to redraft….

You definitely don't need an architect or engineer to do that, and certainly, if the city was going to do inspections, they wouldn't be done by architects and engineers.

Mr. Hernandez raised the issue of inspectors again, for clarification. Wasn't there some conversation earlier about having inspectors validate?

Ms. Balsam felt that we shouldn't go there, because the city may not have the resources, and it would involve many agencies.

Mr. Hernandez stated, so if you go into a building and try to determine what the use of that space is, you file a complaint with the department of buildings, and they send out an inspector, who determines whether it violates code or not – that happens now, already. That's complaint code number 45, and there are others in there that allow you to determine what that use is.

Mr. Hylton asked, so are you saying the Loft Board should file a complaint?

Mr. Hernandez replied, I'm not sure who can, but if we're looking at validating use, you can go ahead and make a request.

Mr. Hylton said, yes, but isn't that the language we're going to try to put in? Saying that the Loft Board may invoke…

Ms. Balsam….that we may investigate claims raised in the application. That could involve inspections or other things.

Mr. Roche noted that's already in there.

Ms. Balsam said, yes, that's in Chapter 1

Mr. Roche continued, so all we're doing is making reference to the fact that we can do this.

Ms. Balsam reiterated that she didn't think we should put this added burden on the city to do those inspections

Mr. Roche stated that, strictly from the Fired Department's point of view, we *want* to get into these buildings to see what's going on, so please do call us to go do an inspection. It gives us access to buildings we would not be able to obtain outside of a 911 call.

Mr. Hylton asked if the building would be vacated in the process.

Mr. Roche replied that he knew of no examples in the last 5 years in which the Fire Department *vacated* a building because someone called in a complaint. Fire Department vacates are done because someone has illegally subdivided an attic or basement. And, if we are allowed into a building to investigate an incompatible use, and we find that the landlord has subdivided the basement, then that's a safety issue in itself….and a bigger problem!

Ms. Torres-Moskovitz asked if FDNY had a protocol for entering/ inspecting private buildings.

Mr. Roche clarified: To gain access to a loft outside of a 911 call, we would need a warrant, and it's not done. But once 911 have been called, the building is under the control of the Fire Chief, and we can go in, no matter what an owner or tenant says.

Mr. Hylton stated the discussion is appreciated, but it is now time to move on. We will redraft, and continue in two weeks.

Mr. Carver had one more legal concern: If you're not requiring proof, doesn't that nullify the statute itself?

Ms. Balsam replied that it's an issue of clarifying the *type* of proof that would be acceptable. Ultimately, a court could say tweaking the rule in this way is *ultra vires,* but she did talk to the Law Department about it, and she is confident that if we do a little more than originally proposed, while still moving away from the current rule, we'll be on solid legal ground.

Mr. Carver responded that he thought it would be worthwhile to be very specific about the legal requirement—what authority is the Law Department resting on to conclude that we can make the standard of proof lower.

Mr. Hylton noted that the Law Department would review the rule anyway.

Mr. DeLaney asked for confirmation that we were still discussing the draft, and at some point, we'll vote the entire set of proposed amendments for Chapter 1 and 2 out for public comment, and the Law Department will review the rules before that and after?

Ms. Balsam concurred and stated that the mayor's office of operations would also review

Mr. DeLaney asked Ms. Balsam if she would summarize the "homework."

Ms. Balsam summarized: To redraft the rule in Section 7, though not sure about putting in the architect/ engineer. Will redraft language that, hopefully, the Board will reach a consensus on. Taking out "allege," and adding "certify." Adding "penalty of perjury," and "prescribed by the Board."

Mr. DeLaney inquired about the professional signing.

Ms. Balsam stated she felt that it should be the tenant who signs, and that an architect or engineer would be a secondary signing. It could be compared to the registration signed by the owner affirming the use of the building, which included verification by an architect.

Mr. Carver said that, in essence, the architect would be relying on written record that is certified by the tenant.

Ms. Balsam said she didn't know what the architect or engineer would do, but since it is their license on the line, they should probably take a walk over and see the building.

Ms. Torres-Moskovitz noted that it's also about the past…

Mr. Hylton stated, to draft without the architect/engineer piece, and that is was time to move on.

Ms. Balsam said she would like to turn to the document Mr. DeLaney submitted, on the same theme, which is a proposal to amend section 2-08(k).

The proposal is to change, "in effect," to "in legal operation," and to add the language, "and which poses an immediate hazard and threat to the health and safety of the residential occupants in the same building, that cannot be reasonably resolved through legalization of the building."

Mr. DeLaney said he thinks it's pretty clear on its face. And this goes partly to Mr. Carver's assertion that the landlord doesn't really know what's going on in the building.

Mr. Carver stated, he never said that. He said that the state of facts is equally available to owner and tenant.

Mr. DeLaney replied that yes, I heard you say that, but you also stated several times that the owner doesn't know what's going on in the building.

Mr. Carver replied, maybe, but he did not say the blanket proposal Mr. DeLaney said.

Mr. DeLaney said that one concern is health and safety; another is this: Are we going to force an incompatible use that was in existence before the law to leave the building? But that should only apply to an incompatible use that's operating legally.

Mr. Roche explained Fire Department procedure/ position: If there's an incompatible use operating, the worst case scenario would be that they'd be shut down until such a time as it could be made legal, safe, and secure in terms of the health and safety of the residents of the building. We're not going to vacate someone from a 4th floor loft because there's an unsafe manufacturing facility on the first floor. We would shut down the business until they are in compliance. Shutting it down eliminates the hazard. I think this relates to what you're saying.

Mr. DeLaney said yes, and offered the example of apartments turned into meth labs, which are toxic and dangerous to all in the area. The authorities are going to take the appropriate steps.

Mr. Roche related the story of a drug operation in a structure that exploded, and said the ideal procedure is to have Haz Mat go in, remove the dangerous material, and secure the location, without disturbance to those living in the building.

Mr. DeLaney continued: So the concern here, the proposal is that if the residential units cannot be covered under the law because there's an incompatible use, that use should be *legal* under zoning laws.

Mr. Hylton understood.

Mr. DeLaney added that this also goes to the issue he raised earlier: Yes, there's an incompatible use here, but it's totally sealed off, so there's no danger to the residents. The real danger is to the passers-by on the street, where the spray booth is venting. So do we just state that it poses a threat to the "occupants"?

Mr. Hernandez asked if we would be requesting some sort of test to confirm this. It seems like an additional burden.

Mr. Hylton stated an inherently incompatible use is one that is already deemed hazardous.

Mr. Carver confirmed, yes.

Mr. DeLaney wanted to clarify incompatible use: One that is hazardous, correct? We went through a lot of information on the levels of hazardous.

Mr. Hylton said the big issue here, in my opinion, Mr. DeLaney, is that it could take quite a while for a building to go through the legalization process, and what you're saying is that, as long as it can be handled in the legalization process, we should allow that use to co-exist until and if it ever is legalized. Is this what you're saying?

Mr. DeLaney said yes, and remembers: If there is an incompatible use, these cases have been sitting in OATH for 8 years.

Mr. Roche stated, the difference is we don't know if there is an incompatible use while the case is pending, but here you are saying we know there is an incompatible use, and we would allow it to continue?

Mr. Hernandez added, without it being confirmed in any way?

Mr. Roche asked if this means that the furniture finisher who's spraying isn't going to be shut down because the building is in the legalization process.

Mr. Hylton said, I like the first part, in legal operation, but the second… that the incompatible use is problematic, if not a hazard. And this would remain "OK" until the building is legalized. That's what you're saying?

Mr. Carver interjected that he had an over-riding legal problem with this. Under the definition of an IMD, if you have an inherently incompatible use, you're defined *out* of an IMD. Therefore, you have no opportunity to legalize under the law. You can't simultaneously have something that's not IMD under state laws, and under our regs, say it's an IMD that can be legalized. This is definitely *ulta vires*. This can't be done by rule. We can't do this on our own.

Mr. Hylton said he thinks we can put "in legal operation."

Ms. Balsam agreed. Her only question about that (and she has no vested interest either way) is this: If the issue is really health and safety, does it matter whether the operation is legal or not? So you have a spray operation that was there during the Window Period and the trial, but it was illegal and is still there…

Mr. Hylton noted that it shouldn't have been there. If it's illegal, we have to get rid of it anyway, right?

Ms. Balsam asked, in terms of process, how does this play out? The tenant files a coverage application that says I don't think there are any inherently incompatible uses in the building. The owner comes back and says, yes there is. There's a spray-paint operation.

Mr. Hylton suggested using a different scenario: someone storing a million gallons of propane in cylinders. That's an incompatible use, and it's not legal, so can be removed. So that should not be a disqualifier for the building being covered.

Ms. Balsam continued: So if the owner, during the Window Period and continuing, is storing an excessive amount of propane, that still poses a danger from a health and safety standpoint…….

Mr. Hylton said, we can deal with it if it's continuing, and it's not legal.

Mr. Roche said that the spray booth would be a better example, because there are very stringent requirements re storing propane……

Mr. DeLaney offered: I have a bakery, and a friend asks if he can store some tanks. I have no idea what it is….that should not be grounds to exclude residential use.

Mr. Roche noted, I don't know that it would be, because if it was known, it would have to go.

Mr. Hylton stated that this is part of what we were trying to achieve prior to shifting gears to this. It was determined that, if that was in there, it has to go. I would hope that no one would certify under the penalty of perjury that there are not 50 propane tanks being stored next to me, if they knew that.

Mr. Hernandez asked, what does it add if we include "in legal operation?"

Ms. Balsam said she thinks the import is that if there's an inherently incompatible use that's illegal to begin with, that should not trump coverage under the law. It's a very good thought, and she actually agrees with

that, but I'm not sure the wording does that. So we need to think about the drafting issue. But still, if the business is *not* shut down…. If it's still there, should we grant coverage in that situation?

Mr. Carver asked, how do you reward that illegal activity?

Ms. Balsam replied, she is not saying that the Board *should*. She is just trying to view this from an on-the-ground perspective. How does it play out in real life, when we have a pending coverage application, and there's this illegal incompatible use. That business has to be shut down somehow.

Mr. Roche offered, or the hazard has to be removed. Re the baker scenario, the baker isn't the illegal problem. The propane is. So you remove that, and the bakery is fine. If there's a known, incompatible use going on at the time of the filing…..as long as circumstances don't change somewhere down the road.....the illegal use has to go.

Ms. Balsam offered the following scenario/ question: During the trial, let's say the tenant makes an allegation that there's an inherently incompatible use that's also illegal. That information has to be conveyed to the proper authorities for enforcement, which may or may not happen. So we are to assume that this will happen, and all will be OK? I agree with the principle, but trying to work out how it's going to work….

Mr. Barowitz mentioned the fact that artists use tons of various toxic materials.

Mr. Roche: But they're within permissible limits.

Mr. Barowitz: I'm not sure what that is. (He lists examples of various artists' materials that are very toxic). As that as long as we don't overdue and start getting into the artists' studio, he is perfectly satisfied.

Ms. Balsam posed the question: Is the Board in favor of adding this to the proposal for the rule changes? If so, staff will try to draft something that will narrow down the concept in a way that is agreeable to the Board.

Mr. Carver asked if she would state, again the exact problem being addressed.

Ms. Balsam recapped:

- During the Window Period, you have a building that has an inherently incompatible use,
- but it's illegal.
- Tenants file for coverage,
- and all agree there is an inherently incompatible use in the building,
- but it's an *illegal* inherently incompatible use.
- So the issue: Why should an entity operating illegally be used to deny coverage to people who are entitled to protection under the law?

Mr. Carver notes, at first you said, with the safety concern being an issue, it shouldn't matter…

Ms. Balsam noted, that's what she is saying, from a practical standpoint, if health and safety is the issue, does it really matter whether it's illegal or not, and then how would that play out? If it is an *illegal* inherently incompatible use, then the outcome should be that *that* use goes away, and the tenants get coverage.

Mr. Carver added, not necessarily. You could then have an incompatible use that *is* legal.

Ms. Balsam asked Mr. DeLaney to confirm that this is meant to deal with *illegal* situations. If it's there legally, then it's allowed to stay. The law says that. This is only addressing ones that are there illegally.

Mr. Hernandez asked, is it addressing use? Because what I'm concerned about is that if you remove that illegal practice, you still can have a legal industrial use.

Ms. Balsam noted, yes, but, you can't move something in after the Window Period that would cause a denial in coverage.

Mr. Hernandez asked, but in the case of the propane tanks, the person can say, Ok, I'll remove the tanks, and then the business is compatible?

Ms. Balsam replied, and then you would have had a legal incompatible use.

Mr. Hernandez said, Ok, just to make sure that the language allows for that, for the removal.

Mr. Carver stated that, again, we're back to the legal issue about the statute. Wouldn't the rule be re-writing the statute? Shouldn't this have been a legislative choice? I think you have the same *ulta vires* problem.

Ms. Torres-Moskovitz asked for clarification of her interpretation of "illegal operation" -- That whoever is reviewing the case is double-checking the use groups for the zone, so that they don't miss the fact that this entity/ tenant that shouldn't even be there in the first place. Just checking that it's legally allowed to be there. That's how I read it. I could picture somebody like a lawyer who doesn't know architecture or zoning well, missing the fact that something is operating illegally.

Mr. Carver stated that, this raises a whole host of issues around what it means to be legal. If your permit has lapsed, but you're otherwise allowed to operate under the zoning, is that legal or illegal?

Mr. Roche offered a case scenario to help clarify. Engine 5 goes out on routine loft inspection, and in the process, comes upon a hazardous use in a building. If it's a loft building, they realize there are issues there with the Loft Law in the State of NY, before they make any decision (and he discounts the propane example as not the best), they're going to call the Fire Prevention office and report the condition (problematic examples given). We check to see when they came into existence, and if it was within a period of time that allows them to be there, all we have to do is be sure they have the permits for the activity. We're not going to let them have several 55 gallon drums of…turpentine' but if they have a quantity of it that exceeds the allowable limit, they'd have to bring their limits down. Technically, the business may not be allowed to be there, and we often refer to the DOB for their opinion, but the "magic word" is written on the DOB print-out: Loft Building. I don't know if this example of a real-world process helps clarify any of this….

Ms. Torres-Moskovitz thanked him. So, legally, he's allowed, per DOB zoning…

Mr. Roche continued, saying we rely heavily on the DOB when it comes to CofO and such, but the Fire Department staff, in general, is trained to know that when the DOB records say "loft building," there will be some leniency within state law regarding certain Window Periods. So those officers will call into Fire Prevention for clarification. If it's easy to determine that it's been there since 2007, it's Window Period, it can be there, then it's, OK, how much varnish are they allowed to store? They'll then check with the district office that provides the details re permissible limits. If they've got three 55-gallon drums of it, then Haz Mat comes

and confiscates that which takes it down below permissible limits; OR, if the district office sees fit, we can say, OK, but you have to have a permit for it (that amount). Now they're on our radar, so every year, inspectors will return to ask about that varnish and the permit. If the person got out of the business and no longer has it, then obviously, a permit is no longer required. But it doesn't affect the fact that business can still be there, under the New York State Loft Law.

Ms. Torres-Moskovitz stated, I'm trying to see this from the perspective of a lawyer sitting in OATH, trying to make an argument, who may not realize that that operation is even allowed there.

Mr. Roche said, I can't answer that part of it, and would have to defer to Helaine, who came from OATH. How would that be handled?

Ms. Torres-Moskovitz …because there aren't architects and engineers in OATH. It's just lawyers, tenants and landlords.

Ms. Balsam noted that architects and engineers testify – are called as witnesses -- all the time, by both sides.

Ms. Torres-Moskovitz reiterated that she's just trying to understand how "in legal operation" is determined. To me, it's just making sure that people checked that it's legally, actually allowed there.

Mr. Hernandez noted, my concern is we're opening up a Pandora's box here. Any violation can then cause someone to be an illegal operation……

Mr. Hylton: In legal operation just means it's allowed. A violation for improper storage doesn't mean it's not allowed….

Mr. Hernandez suggested stating, "Operating legally, and"instead of"in legal operation."

Mr. Hylton asked if we should say, "Permitted," then.

Ms. Balsam said, well it could be allowed by the CofO….the section talks about the zoning resolution so…Let me ask this: If you have a use group 18 operating in a zone for 16 – that doesn't permit 18 -- that's an *illegal* operation, unless there's a variance, correct? So is the import of this to say that the use-group-18 operation, that wasn't legal to begin with, shouldn't be used to *deny* coverage?

Various agreed.

Then we return to Mr. Carver's point, where the rule doesn't really talk about legal or illegal, but there could be an argument that the Legislature was only considering uses that were allowed. Why would they be thinking of illegal entities? They were concerned with the legitimate people and manufacturers, allowed to be there. They did not want to make them move. She (Ms. Balsam) have to check the legislative history (which for this period, is not so great), but she believes their concern was protecting the businesses that were operating legally. So, she finds it hard to believe that the State would have approved *not* granting coverage because someone is operating illegally.

Mr. Carver added that there is still the safety problem…

Mr. Hylton said that the remedy then, for something that's illegal, would be either making it legal or removes it.

Mr. Roche said, but you're not going to hold the tenants responsible… So in other words, if there's an incompatible use in the building, even though it started in the Window Period, the tenant wouldn't be able to get coverage.

Ms. Balsam confirmed, and explained if the building is zoned for use group 16, and you have a use group 18 operating in the building during the Window Periods and continuing, that tenant can't be covered, the way it reads now. But the tenant is living there anyway, so the coverage is moot. However, the landlord can evict them if they can't get coverage.

Mr. DeLaney: The landlord can evict, or allow them to live in the unit without being covered. So perpetuating whatever the health and safety issue is.

Mr. Hylton: The landlord can allow them to live there?

Mr. DeLaney confirmed, sure. That's the problem with all these exclusionary provisions.

Mr. Roche: But we also don't have the ability to do away with the incompatible use, as long as it's in the acceptable use group, correct?

Ms. Balsam: If it was a legal use that was there, say a 16 in a 16, and there were no other legal impediments, then no…

Mr. DeLaney ….the piece of language that gives us leeway to determine…)

Ms. Balsam read: <u>The Loft Board may, by rule, exempt categories of units or buildings from such use……incompatibility determinations.</u> It's 281.5

Mr. Carver noted that that's the language, but it's hopelessly vague. Helaine, your suggestion to look at the legislative history would be helpful to determine whether this change would be in furtherance of the intent, or would be changing the intent.

Ms. Balsam said, she is willing to do that, but the only issue would be if this part of the history is not there. She then asked if the Board was interested in adopting the proposal.

Ms. Torres-Moskovitz commented that she likes the component, "in legal operation," but is in favor of using "permitted as of right…"

Ms. Balsam continued, as of right under zoning?....

Mr. Hernandez said he would be much more comfortable with that. He still think that "in legal operation" can be translated into someone forgot to get the proper certification from FDNY, and would find some way to ……so I think it should be made narrower.

Mr. Hylton suggested, how about "legally permitted"?

Mr. Hernandez said that goes back to someone forgot to file some stupid paperwork or a district operation inspection.

Mr. Hylton offered, so legally permitted, but in a use group?

Ms. Balsam noted that a business could have a variance. Then it's legal.

Mr. Carver noted that we still haven't necessarily resolved the safety issue.

Pause while **Mr. Bobick** prepares to speak:

Mr. Bobick: I read the statute as, if you fall within 15 to 18, you cannot be an IMD. So regardless of whether you have a use that falls within 15 – 18, and it's legal for that zone, it doesn't matter. You still cannot be an IMD, so I'm not sure what legal operation you do, if it's a 15 – 18 use group.

Mr. Hylton: What Mr. DeLaney is saying is, that use/operation is brought in to circumvent/ override what would have been normally, illegal.

Mr. Bobick: But it wouldn't be an IMD. If you're a 15 – 18 use group, who cares if it's legal or not? If there is a 15 – 18 use group, in a building that is in effect on the effective date of the law, and continuing on the date the application is filed, it's an incompatible use, and the building is not an IMD. So if the use group is a legal use group, and you're an IMD, it doesn't matter. But if you're not an IMD, and it's a 16 in a 16, go for it. But if you're a 15 -18, it's my reading that you cannot be an IMD. So it doesn't matter if the use is legal or not.

Mr. DeLaney: However, we went through all the uses in groups 15 – 18 and excluded a lot. So I'm not sure I see your blanket interpretation.

Mr. Bobick: But the statute, as written in 281.5, does that exclude uses in 15 – 18? Because my reading of it is, it doesn't. My reading of the statute is that if you're in use group 15 – 18, if it's raised and it's proven, then the building is not an IMD.

Ms. Balsam: And if the Board excluded it?

Mr. Roche: That plays into what you've been hinting at, that we can't just make a determination that nullifies the statute.

Mr. Carver: It says 15 – 18 in the statute

Mr. Roche: So we said we're going to exclude it, but the statute still says they exist…

Ms. Balsam: The statute allows the Board to exempt.

Ms. Torres-Moskovitz: Where is the exempt list?

Ms. Balsam: It's in the appendix. I can get it to you.

Mr. Carver: It's vague in the statute.

Ms. Balsam: Let's say cardboard manufacturing is use group 15 – 18. And the Board, by rule, exempted cardboard manufacturing for some reason……

Mr. Bobick: I would say, instead of "legal operation," and if the Board has exempted a few uses, then you should cite to the exceptions. If it's a use within 15 – 18 that's been exempted by the Board….there's an exception.

Ms. Balsam: But then they could be covered anyway.

Mr. Bobick: Yes, it would be a legal operation.

Mr. Carver: You don't need to do that (make a change) because this rule, (k), *is* the exemption, no?

Ms. Balsam: Yes it is. Plus the Appendix

Mr. Carver: So there's no need for the change.

Mr. Hylton: So let's go back to the author. Mr. DeLaney, are you convinced?

Mr. DeLaney: No

Mr. Hylton: OK, you'll have the last word, and then we have to move on.

Mr. DeLaney: As Helaine said earlier on the question of in legal operation suggestion, and you agreed with it, but it is question of drafting. I understand the question of a lapsed permit versus wildly illegal use – I would ask that staff take a look at this to see if there's a way to fine tune it.

Mr. Hylton: Ok, we'll do that.

Mr. Carver: But we still have the problem raised by Michael.

Ms. Balsam: Staff will consider that as part of the discussion.

Two minute break

Ms. Balsam stated that at the last meeting, we said we would look at a submission from Mr. Brody at Borah, Goldstein, concerning the narrative statement process; so we'll return to that. Then next meeting we'll get to Section 8, the protected occupancy rule, which I'm sure will engender a lot of discussion.

Mr. Brody had this proposal in a letter dated May 17, 2018. Mr. Carver?

Mr. Carter: One of the problems with the narrative statement process – which we've spoken about before – is that it's really "loose." If a tenant really wants to "put the brakes" on a process, he can. And the tenant has the incentive to go slow, because if the owner is out of compliance with certain time frames, the owner is unable to collect rent, if the tenant stops paying. That's not to say that every tenant does this, but just one

tenant in a large building could stop the process, even though all others want to move forward. So what this does is put milestones in the narrative process. The tenant would have to make an objection to plans within a certain amount of time, and if he failed to do that, the ability to object would be waived.

In the past, when this was discussed, the Board felt there was a fairness issue, because tenants might not be fully informed or understand what they're reviewing; and, if under the current procedure, there's potential for abuse on the tenant side, with revisions, there was the potential for owners to abuse the process. But I think as drafted, the setting of milestones with allowable extensions for "good cause," would overcome problems on the tenant side. And of course, tenants would never by bound by any subsequent changes. The owner would also be bound by certain promises they made during the process. So what this proposal does is tighten things up, and enables the owner to have a set of plans at the end of the process, instead of receiving the tenants' objections at the end of the process. It's a way of tightening and trying to move things faster. It's similar to ideas I've presented before, but here it is in writing, with safeguards for extensions on the tenant side, where needed.

It there is any interest in initiating this kind of procedure, I'd like us to work on language for this concept. Is there any interest among the staff for this kind of procedure?

Ms. Balsam said she has several issues with this exact proposal. Streamlining is good, but this doesn't do that, and in fact, seems to give the tenant more "clout." She has a lot of questions.

The first part says (paraphrased/ summarized) that tenant objection sheets would be posted on line, and the architect could request a hard copy. So my first question will always be a practical one: Where on line? Is that something that the Loft Board is maintaining? Or the owners? How does that work? Because if it involves electronic submission to the City, this could create a lot of IT problems. Not that they couldn't be overcome, but just noting that.

My second concern, overall, is that it seems to remove the "face-to-face" interaction, which is bad, because when people are at the table, talking to each other, a lot is accomplished. The "45-day" period for each side to file at various points would serve to stretch out the process. And it's unclear how the exchange works. (she reads from the proposal). For me, the process doesn't flow. It's confusing.

Also, it says on page 2, to the extent the owner accepts the tenant's proposal, those issues are foreclosed unless DOB does not accept the changes. Ok, but what if the owner doesn't accept the tenant's proposed changes? Where do you go from there? And what if the DOB *does* object?

Mr. Carver: I think you're still within the regular process….

Mr. Bobick: For the objection sheet, would you be waiting for the owner to have his objection sheet set? Which would take six months on its own? Or are you saying it's a fluid process – every time there's an objection, you're posting it? Because you want to know what the objections are; tenants want to know what the objections are. In a large building it could take 5 months for every single objection to be raised, but during that time, the owner could already be clearing these objections. In this proposal, you're saying the owner won't have any contact with the tenants for the first 6 months.

Ms. Balsam: Moving on to the paragraph about the CCD1s. It presupposes that the tenant has an architect or engineer, or is one. I don't think we can require that the tenant have an architect. A tenant can't file a CCD1 (unless the tenant is an architect). A tenant must have an architect or an engineer do it. And then it says, in the event the CCD1 is not successful, the issue would then be foreclosed. But there are appeals of CCD1s, so why would we want to do that? Why would you stop at the first process when there's the possibility of succeeding on appeal from a CCD1? And that has happened in the past. There have been appeals of CCD1s, where borough commissioners have worked with the parties and come up with something, so I'm not sure why you would want to foreclose it after a CCD1.

On the next page is the issue I raised about which 45 days we are talking about.

Mr. Hylton: What if the owners want to limit themselves to just CCD1s?

Ms. Balsam: Because from a legalization standpoint, you might be able to legalize without unreasonable interference of diminution of services, if you go past CCD1 requirement. So you get in front of someone. A lot of it involves waiver by the DOB, and correct me if I'm wrong, but don't you have to be a certain level in the DOB to actually get those waivers? A plan examiner may say no, then the CCD1 doesn't go to the borough commissioner, it goes to someone else?

Mr. Hylton: The same CCD1 rises up.

Mr. Hernandez: Chief plan examiner, borough commissioner…

Mr. Hylton:…….people outside tech affairs, even to the first deputy commissioner. He wonders if there's not a process outside the department for appeals of CCD1s such as BSA. It seems to me that the owner's architect is proposing that the appeals stop at CCD1, is that correct?

Ms. Balsam: This proposal says that…first, it puts the burden on the tenants to file the CCD1, and if the CCD1 isn't granted, then that's it. You don't go anywhere else, and I see no reason to stop at that level. Because the person deciding the CCD1 may not be at a level high enough to feel comfortable issuing a waiver. A lot of this involves waivers that the commissioner can do. I'm thinking of handicap issues, for example.

Mr.Hernandez: Does it allow for a provision to amend? Because you can submit as many CCD1s as you want.

Mr. Hylton: There's a rule change.

Ms. Torres-Moskovitz: Two of them?

Mr. Hylton: And then the cost is enormous.

Ms. Torres-Moskowitz: $1500 and then $2500.

Ms. Balsam: Which could be one of the reasons the owners want to shift this to the tenants. And if it's something that's required for legalization, I don't see why the tenants should have the burden of filing the CCD1.

On the next page, third paragraph down: "Any application alleging undue interference would receive expedited scheduling by the Loft Board." I don't see anything wrong with that, but we would have to talk to OATH. We could change our rules to require it, but we'd need OATH to be on board to actually do that.

The next one I had a lot of questions about: "Any agreement whereby the owner will perform/ provide more than the minimum work required to legalize, who determines what the minimum amount of work to legalize is? That would be an issue of fact. A premises or public portion of the building – why should the tenants sign off if the owner decides to do more than is required in the public spaces?"

I just don't understand what this means.

In terms of partial certification, we do partials now for health and safety concerns: for sidewalk sheds, for heat. I think the idea behind the whole process is to have everyone see the "big picture." If you start issuing a lot of partial certifications, you can lose sight of that, and it could end up bad for everybody, certainly bad for the tenants. When they pull an Alt-1 permit, they're pulling it for the entire job. We had this recently, where everyone was ready to go, except 2 units. So we lifted the hold and let them pull the permit, and the owner was told they can't work in those 2 units. But technically, legally, they're allowed to. But our certification said they can't. But legally, the permit, itself, allows them to do all the work in the plans. Which would include those 2 units, where there hasn't been a determination, because it's still at OATH.

I understand the idea of letting the work commence, but there has to be an agreement on the "big picture" before that happens. Maybe there's a middle ground there that could be reached, but we'd have to think about what the parameters would be. So that's what I have to say.

Mr. Carver: I think I should refer back to the author of the proposal, to consider your points, and to see if there's anything that can be better crafted to move the process along. But the number one issue for the owners is the tenant's ability to stop paying rent. Obviously, it's not everyone, but there are those who would prefer not paying rent to having the property legalized. One solution is to streamline the process, but the other has to do with a change to our rule that allows owners only one extension.

Ms. Balsam: Yes, that's how it reads.

Mr. Carver: But I believe it wasn't always that way? There was a time when you could get more than one extension?

Ms. Balsam: Pre-2006, owners could apply, *ex parte,* for an unlimited number of extensions, and my understanding is that there were a lot of abuses, so the Board decided to tighten it up and put in the one extension per deadline rule. As the Executive Director, I've taken that very literally. They get one. But usually we give them for all of the ones they ask for. We don't make them come back each time.

Mr. Carver: I guess the problem is that sometimes "life happens," and in such cases, more than one extension is needed and should be granted to an owner working in good faith. Because once you hit the deadline, if rents stop, you can't do the work due to the lack of funds. So I'm proposing to submit new language for consideration. And then at some point, not necessarily next time, but at some point, think about the proposal.

Ms. Torres-Moskovitz: Can you quantify this? I know the landlord lobbyist is talking about people not paying rent, but I think that's playing up the idea of "squatters," which isn't true, and most people pay rent. So can you quantify that?

Mr. Carver: I'll ask.

Ms. Torres-Moskovitz: Because the more you repeat it, the more people start to believe it.

Mr. Carver: I'm not talking about squatters; I'm talking about the state of the law. It's a legal fact that an owner cannot enforce rent collection if he's out of compliance with the deadlines.

Ms. Torres-Moskovitz: Is there an escrow account?

Mr. Carver: No, I don't believe so. (Confirms with Helaine. No). And from my anecdotal interactions with owners, it's a big problem. But I will certainly ask so see if there's a sum-total type of number.

Ms. Torres-Moskovitz: I'm just curious, because I think most pay rent. I realize that the condition is there, but I don't think people use that.

Mr. Carver: Why do you think that? Because I'm being told just the opposite.

Ms. Torres-Moskovitz: It would be good to have clarification, if you're trying to direct the narrative process, which I think is the most unique….If you're trying to cut this part out of the Loft Law with Brody's letter….You're taking a lot of power there. I don't understand why this is a concept that would clarify…. To me it's nowhere near as good as what's written in the rules already.

Mr. Carver: We had moved off the proposal, and I was talking about getting more than one extension to avoid a break in the rent roll. That's another way of addressing the problem, if the route offered by Brody is not acceptable to you.

Ms. Balsam: So keep the narrative statement process as-is with the proposed changes and the proposed rule that allows for additional extensions for owners that meet the statutory standards, which are that it's circumstances beyond their control, and they're making good-faith efforts.

Mr. Carver: Yes, on the extension issue, but on the narrative process, I still want to go back to him (Mr. Brody) now that we have your thoughts. But I can't believe that the existing process cannot be improved somehow.

Ms. Torres-Moskovitz: What if the narrative process were recorded or if there were notes? I've heard that from both sides.

Mr. Carver: We've heard that, and staff thinks otherwise, but isn't some sort of agreement at the end of a session more important than how we got there?

Ms. Torres-Moskovitz: As someone who works closely with clients, there's so much detail in plans, to think that the 45-day process would work; with no one meeting face-to-face….It's taking away the most unique component of Loft Law, and adding to the confusion.

Mr. Carver: As I said, if this isn't going to work, there are other things we can do. But I also want to ask him for other thoughts, from the owners' side, what can be done to make the process quicker. I can't believe that it's as good as it can be, as is, because there are just too many complaints about it.

Mr.Barowitz: You want to make the process quicker, but then again, adding how many extensions? Two, three, multiple? What exactly are you hoping to gain by allowing the landlords to have multiple extensions?

Mr. Carver: They will then be able to lawfully collect rents, which they need to continue the work. The last 2 months, we've had buildings leaving the jurisdiction that have been here for 35-40 years. Now, I know it's not necessarily the tenants' fault. There's fault on all sides for that. But the inability to collect rent because you're only allowed one extension is a huge problem. Things happen outside of the owner's control, where they need the extra time. You're not helping the process by enabling the tenants to not pay rent. The process relies on that income.

Ms. Balsam: Just for clarification, we're talking about 29 RCNY 2-01 (b) (3). That's the section of the law that has the applications for extensions will be limited to one extension per deadline.

Mr. Carver: So I'll circulate some changes to that that I think will be helpful.

Mr. Hylton: So we're going to break here. I appreciate the debate.

Mr. DeLaney: With regard to the meeting schedule for June 21st, will we be doing cases, as well as going back to the rules? And do you have a sense of where are we going to pick up with the rules?

Ms. Balsam: Yes to cases. We'll go back to the inherently incompatible use that's being drafted. I don't know if we'll get more feedback from Mr. Brody, but if we don't, I would like to move to protected occupancy. Unless the Board wants to skip over protected occupancy and do fines, and then come back.

Mr. Carver: On the issue of extensions, we should wait till the very end

Ms. Balsam: Oh, yes, we can talk about proposed extensions language too

Ms. Torres-Moskovitz: So the Friday before the next meeting, we'll have an agenda?

Ms. Balsam: Yes. Hopefully sooner.

Mr. Roche: Also to clarify, we're not going to have any meetings in August, correct? No rules, no cases?

Mr. Hylton: We're trying to avoid it, but there's no guarantee

Mr. Roche: It doesn't really matter for me, but for some, it might be important. Historically, we don't meet in August, but since we're dealing with the rules…

Mr. DeLaney: Things haven't been too historical lately…

Ms. Balsam: We'll see how far we get in the remainder of June and July.

Mr. Hylton: This will conclude our June 7, 2018 Loft Board meeting. The next public meeting will be held here, at 22 Reade St. Main Floor, Spector Hall. June 21 at 2:PM. Board members please remember to turn in your attendance sheets.

The End