SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARTHUR F. ENGORON** **PART** **IAS MOTION 37EFM**

Justice

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STANLEY KAROL,

Petitioner,

- v -

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS, NEW YORK CITY DEPARTMENT OF BUILDINGS, NEW YORK CITY MAYOR'S OFFICE OF SPECIAL ENFORCEMENT,

Respondents.

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INDEX NO. 159706/2019

MOTION DATE 10/04/2019, 11/27/2019

MOTION SEQ. NO. 001, 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 12, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 37, 39, 41

were read on this motion for CPLR ARTICLE 78 RELIEF.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 13, 14, 33, 34, 35, 38, 40, 42, 43

were read on this motion to DISMISS.

Upon the foregoing documents, it is hereby ordered that the motion to dismiss is denied and the relief sought in the Verified Petition and Complaint ("petition") is granted.

SHORT VERSION
Definitions are not prohibitions.

LONG VERSION

The Parties
Petitioner/plaintiff Stanley Karol ("petitioner") is an individual residing at 418 37th Street, Brooklyn, NY.

Respondent New York City ("NYC") Department of Buildings ("DOB") is, pursuant to NYC Charter Chapter 26, § 643, the City agency responsible for administering and enforcing the NYC Building Code ("BC"). Respondent New York City Mayor's Office of Special Enforcement ("OSE") oversees, pursuant to Executive Order 96, issued 11/20/2006, quality-of-life issues, including those arising out of "problem properties," and coordinates various other City agencies' responses thereto. Respondent New York City Office of Administrative Trials and Hearings ("OATH") adjudicates, pursuant to NYC Charter Chapter 45-1, § 1048 et seq., summonses

(previously known as "notices of violation") and other measures imposed by other New York City agencies, including DOB.

The Facts

Despite some quibbling around the edges, the parties mostly agree on the facts underlying this hybrid plenary action/special proceeding. Neither side disputes the significant, much less dispositive, facts asserted by the other; disputes that do arise are mostly as to background matters. Assertions by one side that the other side does not dispute are deemed admitted. Furthermore, as is usually the case in CPLR Article 78 proceedings, an administrative agency (OATH) has already adjudicated the facts, and this Decision and Order perforce accepts them as true.

In 1963, when petitioner was one-year-old, his parents purchased a home ("the Karol Home") at 418 37th Street, Brooklyn, NY, in the neighborhood popularly known as "Sunset Park" (immediately to the west is Gowanus Bay and New York Bay and Harbor). He has lived there ever since. The Karol Home lacks a certificate of occupancy because it was built prior to 1961. It consists of two stories, to wit, a ground floor and a second floor and, also, a basement. The basement has two exit doors that lead directly outside; one to the front of the house and one to the backyard. NYSCEF Doc 6, ¶ 9 and Exh. D. In the 1980s the basement was "finished" with a general purpose room, a kitchen, and a bathroom. In common parlance the Karol Home is a "two-family home"; in legalistic parlance it is a "two-family residence."

According to the pleading he verified, NYSCEF Doc 1, ¶ 28, petitioner has a disability that has rendered him unable to work. To "make ends meet" (i.e., to earn some extra income), he "has at times listed the basement of [the Karol Home] on the home-sharing platform Airbnb." Ibid. The rentals are for less than 30 days, and during them he continues to occupy the upper two floors. Id., ¶ 29. He claims, NYSCEF Doc 6, ¶ 7, that many of his guests have become his friends and are now "repeat customers." One, a Parisian named Aurelie (meaning "golden") Tisseyre, attests, NYSCEF Doc 7, that she has stayed in the Karol Home "a number of times"; that she and "Skip" (petitioner's nickname) have become friends and keep in touch even when she is in Paris, where he will be visiting her "in a few months"; that she has stayed in different parts of the house, including the basement and "the bedrooms upstairs"; and that she and her host interact every visit, sharing such activities as easting meals, visiting museums, and watching television.

On July 5 (the petition mistakenly refers to July 8 at least once), 2018, the proverbial "anonymous complaint," received through the City's telephonic "311" complaint system, prompted four OSE inspectors to visit the Karol Home. They spoke to an Airbnb guest, one of three people from Brazil who paid $1,350 to rent the basement for 12 days. The Brazilians were not members of petitioner's family, and they did not constitute a "household" with him. Petitioner came outside and explained to the inspectors that he was the "permanent and long-term occupant of the home," NYSCEF Doc 1, ¶ 34, which the inspectors apparently accepted, id., ¶ 36. They asked petitioner for permission to enter the house; he refused.

One inspector, a DOB employee named Eduardo Cautela, issued petitioner four summonses. The first one, # 353-302-47L, cited petitioner for using his home in a manner

"inconsistent with the last issued certificate of occupancy," thus violating New York City Administrative Code ("AC") Article 118, § 28-118.3. The second one, # 353-302-48N, cited petitioner for failing to maintain a fire alarm system (see BC § 907.2.8, covering Group R-1 occupancies). The third one, # 353-302-49P, cited petitioner for failing to maintain his home in a "safe" and code-compliant manner by providing an automatic sprinkler system (see BC § 903.2, covering "new buildings and structures"). The fourth one, # 353-303-00L, cited petitioner for failing to maintain his home in a "safe" and "code-compliant" manner by providing two separate means of egress on every floor (see BC § 1020).

On September 26, 2018 petitioner certified that he had corrected all alleged violations to avoid further penalties. Pet. ¶ 45.

The Administrative Proceedings

At a December 17, 2018 OATH hearing petitioner disputed that short-term rentals of his basement violated any provision of the AC or the BC, arguing that the law allows for secondary uses of residential property as long as the primary use remains consistent with its occupancy group classification. He also introduced into evidence photographs showing that the Karol Home has two means of egress. In a December 31, 2018, Decision, NYSCEF Doc 4, OATH Hearing Officer Louis Rasso found that the Karol Home is a two-story, two-family residence with two Class A units. He sustained the first three summonses, dismissed the fourth, and assessed a $4,375.00 fine. Petitioner timely paid the fine. NYSCEF Doc 9. He also appealed to the OATH Appeals Unit.

In a June 6, 2019 Appeal Decision, NYSCEF Doc 5, OATH affirmed the hearing officer's determination. The Decision starts out by finding that the Karol Home "is a two-family home." It then goes on as follows:

> Nevertheless, whether the premises consists of one or two class "A" units or a class "A" multiple dwelling, transient use of any of those properties results in a violation of Code § 28-118.3.2. Respondent's counsel relies on BC § 310.1.3 for the proposition that Respondent need only occupy his two-family home "as a rule" on a long-term basis; however, BC § 310.1.3 is a broad provision that generally describes all Group R-3 properties and is not exclusive to two-family homes. BC § 310.2 specifically defines a two-family home as any building or structure occupied exclusively for residence purposes on a long-term basis for more than a month at a time. See Code § 28-102.1. ("Where a general requirement conflicts with a specific requirement, the specific requirement shall govern.") Consequently, although the language in BC § 310.1.3 may convey a benefit to some Group R-3 properties by requiring only primary or "as a rule" permanent residence occupancy, that latitude does not extend to one- and two-family homes.

Simply put: Transient use [i.e., occupancies of less than 30 days] of any Class A (i.e., non-transient) building violates AC 28-118.3.2. Although pursuant to BC § 310.1.3, and the fact that [petitioner] "as a rule" lives in the Karol Home, it is an R-3 occupancy [which by itself would allow limited transient use], nevertheless, as BC § 310.2 "defines" two-family home as one used "exclusively for residence purposes," and specific requirements trump general requirements, and [petitioner] is using his home partly for "transient" purposes, he is violating AC 28-118.3.2 [by violating BC § 310.2].

The Instant Case

Petitioner styles his pleading as a "Verified Petition and Complaint." His First Cause of Action, which seeks to annul the Appeal Unit's June 6, 2019 Decision and to recover the fine he paid, essentially claims that that decision erred, as a matter of law, in finding that the Karol Home is not "occupied exclusively for residence purposes on a long-term basis," thus violating BC 310.2, and in turn violating AC § 28-118.3. Petitioner's Second Cause of Action, seeking declaratory relief, essentially claims that Group R-3 residences may be used for short-term rentals as long as their primary use remains long-term residential occupancy. Petitioner's overall Prayer for Relief asks this Court to set aside the Appeals Unit Decision; to dismiss the three remaining summonses; to direct respondents to refund the $4,375 fine petitioner paid; to declare that respondents acted unlawfully in issuing and sustaining the summonses; and to award petitioner costs, "fees" (unspecified and not supported), and disbursements.

Procedural Posture

Petitioner now moves for the relief demanded in the petition. NYSCEF Doc 2. Respondents now move, pursuant to CPLR 3211(a)(7) (failure to state a cause of action), to dismiss the petition. NYSCEF Doc 13.

DISCUSSION

Occupancy Group Classifications

BC § 302.1 classifies structures "with respect to occupancy in one or more of the [following] groups." There are 10 groups, including "Business," "Educational," "Factory and Industrial," "Storage," etc. Group Eight is "Residential [including] Groups R-1, R-2 and R-3." BC § 310, "Residential Group R," delineates those three sub-groups as Group R-1 (§ 310.1.1) (hotels, motels and the like); Group R-2 (§ 310.1.2) (apartment houses and non-transient "apartment hotels" and the like); and Group R-3 (§ 310.1.3) (one- and two-family private homes and the like). BC § 310.1.3 defines Group R-3 residences as those that "contain no more than 2 dwelling units, occupied, as a rule, for shelter and sleeping accommodation on a long-term basis for a month or more at a time, and are not classified in Group R-1, R-2 or I[nstitutional]." The Karol Home is in Group R-3 (as are, interestingly, "[c]onvents and monasteries with fewer than 20 occupants in the building" and "group homes"). Petitioner points out, early and often (e.g., NYSCEF Doc 41, Reply Memo at 3), that "Two-family dwelling" is not an occupancy group classification.

Building Code Definitions

BC § 310.2, "Definitions," defines a "Dwelling, Two-Family" as "[a]ny building or structure designed and occupied exclusively for residence purposes on a long-term basis for more than a month at a time by not more than two families."

Standard of Review

Respondents are, of course, correct that courts must defer to administrative agency determinations unless clearly erroneous. See CPLR 7803(3) (limiting review to whether a determination "was affected by an error of law or was arbitrary and capricious"). True, too, "the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld." Howard v Wyman, 28 NY2d 434, 438 (1971).

The Heart of the Matter

Here, respondents' construction of the relevant AC and BC provisions is not "irrational," but it is "unreasonable" because it flies in the face of the statutory language. No provision of law at issue herein prohibits the owners of Group R-3 residences, be they "two-family dwellings" or not, from renting out space on a transient basis. Thus, DOB and OATH's interpretation is "inconsistent with the governing statute." See generally, Moran Towing & Transp. Co. v New York State Tax Comm'n, 72 NY2d 166, 173 (1988).

The First Summons, upheld by the Hearing Officer and the Appeals Unit, charged petitioner with violating AC Article 118, § 28-118.3.2., titled "Changes inconsistent with existing certificate of occupancy." That provision provides as follows:

> No change shall be made to a building … inconsistent with the last issued certificate of occupancy or, where applicable, inconsistent with the last issued certificate of completion for such building … or which would bring it under some special provision of this code or other applicable laws or rules, unless and until the commissioner has issued a new or amended certificate of occupancy.

As an initial matter, this section proves very little; it is almost a tautology: if the law does not allow something, then you may not do it. For example, if you own a house, and your certificate of occupancy says "house," you cannot turn your house into a commercial parking garage without a new or amended certificate of occupancy. Fair enough. You also may not turn your building, whatever it is, into an opium den or a gambling den, because they are illegal. The provision functions, if at all, something like a "traffic cop," pointing out ways in which some other provision can make an act illegal. Nevertheless, this is the provision on which respondents have had to, or chosen to, hang their hats.

The sine qua non of a violation is that an owner "changes" a building. This Court doubts that renting out the basement of a private home "changes" the "building." It changes the use, arguably, but not the building itself, i.e., not the physical structure. However, as petitioner does not argue this point, and there is a deeper, more substantial flaw in respondents' reasoning, this Court will assume, without deciding, arguendo, that petitioner has "changed" his building.

A "change" to a building can violate this section of the AC in three ways. The first two can be dispatched without much ado. The Karol Home does not have a certificate of occupancy, so no "change" could be inconsistent with it. And nobody has said anything about a "Certificate of Completion," much less directed this Court's attention to one. Thus, respondents are reduced to arguing that petitioner "changed" his house by renting out the basement, occasionally and transiently, and that this "change" "bring[s] it under some special provision of th[e] [AC] or other applicable laws or rules." In other words, petitioner violated this provision because he violated some other provision.

That other provision is BC § 310.2, which, as noted above, defines a two-family dwelling as "any building or structure designed and occupied exclusively for residence purposes on a long-term basis for more than a month at a time by not more than two families." Respondents fix their gaze on the word "exclusively." This Court is unconvinced that renting out the basement of a private house to transients means that the house is no longer being "occupied exclusively for residence purposes." Granted, the transients do not "reside" there, but "residence purposes" may simply mean "as opposed to commercial or industrial purposes." After all, we are interpreting a building code, the main goal of which is physical safety. For all that appears, if petitioner had young children or grandchildren, they could live and sleep in the basement. But, again, petitioner does not argue this point, and there is a deeper, more substantial flaw in respondents' reasoning, so this Court will assume, without deciding, arguendo, that petitioner is no longer using his home "exclusively for residence purposes."

That deeper, more substantial flaw is that a definition is not a prohibition.

Respondents lay their cards on the table at Page 9 of their Moving Memorandum of Law:

> There is no dispute that the legal occupancy of the Subject Building is that of a two-family dwelling. See Exs. L [the Hearing Officer's Decision] at 2 & N [the Appeals Unit Decision] at 5; see also Verified Petition & Compl. ¶¶ 25-26. Because Karol permitted the occupancy of the entire basement apartment unit of the Subject Building by three (3) guests for a period of less than thirty (30) consecutive days, OATH's determination that Karol violated Administrative Code § 28-118.3.2, as DOB submitted, was rational and should be upheld by this Court.

As best this Court can discern, the Hearing Officer only determined that "Respondent's building is a two-family residence." He did not determine (nor could he have) that this constituted a "legal occupancy" category. NYSCEF Doc 27 ("Exh. L") at 2. The Appeals Unit Decision "Analysis" Section (NYSCEF Doc 29) states, at 5, that "Petitioner [DOB] established the legal occupancy of the premises as a two-family home." But this appears, when read in context, to be based on nothing more than the Hearing Officer's interpretation of the Issuing Officer's observation that, in physical appearance, the Karol Home resembled "a two-family home." The "legal occupancy" language is simply respondents' legal gloss, without support or citation.

Finally, respondents' citation to ¶¶ 25 and 26 of the Petition is baffling. Those paragraphs state, as here relevant, that the Karol Home "contains no more than two dwelling units" (an obvious, uncontested fact) and that the home "is the equivalent of a Group R-3 occupancy for purposes of the Building Code." Thus, the petition, far from acknowledging "two-family dwelling legal occupancy," instead claims R-3 occupancy. Elsewhere, of course, the petition vehemently denies that "two-family dwelling" constitutes a legal occupancy group.

A casual reader might deduce from the second sentence block-quoted above that Admin. Code § 28-118.3.2 prohibits the transient renting of living units in two-family dwellings by three or more people. But it does no such thing. Indeed, it says nothing about transient renting, nothing about living units, nothing about two-family dwellings, and nothing about three or more people.

In yet another iteration of their "Tinker to Evers to Chance" relay — the AC to the BC to petitioner's transient rental — respondents claim (Moving Memo at 9) that the "very definition [of a two-family dwelling] excludes the occupancy of either of the units … for less than a month by the family occupying each respective unit." Again, that proposition itself is highly debatable, but the absolute most it could prove is that the Karol Home, by definition, is not a two-family dwelling, when all that petitioner is claiming is that he owns an R-3 residence.

In a similar vein, respondents note (Moving Memo at 9) that "a change in use of a two-family dwelling 'which would bring it under some special provision of th[e] [Building] [C]ode or other applicable laws or rules,' without the issuance of a new certificate of occupancy, is prohibited. N.Y.C. Admin. Code § 28-118.3.2." And (as if we did not know) what is that "special provision"? Respondents do not say right away. Instead, they first go into an extended discussion of the facts. Then they cite to § 310.2, which they acknowledge contains "definitions" (and which, by the by, does not seem particularly "special"). Then they circle back around to AC § 28-118.3.2.

To quote Gertrude Stein (about the Oakland, CA of her upbringing), "There's no there there." And to quote Walter Mondale, "Where's the beef?"

Another classic instance of respondents' faulty reasoning can be found in their Moving Memo, at 5: "The applicable law here, the Building Code, contains a … specific provision that explicitly provides that the building may only be used exclusively for residence purposes on a long-term basis for more than a month at a time by not more than two families." But that is not what the law says; the law simply includes "designed and occupied exclusively for residence purposes" as part of the definition of a two-family dwelling; it does not set forth the purposes for which a two-family dwelling may be used.

Respondents compound their error by stating (ibid.) as follows: "Plainly construed, the provision [BC § 310.2] does not ever permit an entire unit in a two-family dwelling to be rented out for stays of less than a month, as was the case here." But the relevant question is not whether the provision permits anything, the relevant question is whether it prohibits anything. By its plain meaning, it does not. If you define an elephant as a large mammal with gray skin, four legs and a trunk, a giraffe is not illegal, it just is not an elephant. Tribunals should never construe a definition as a prohibition, particularly to impose a penalty.

Put another way, respondents' logical fallacy is that because, as a matter of fact, the Karol Home is a two-family residence, as a matter of law, it must comply with the BC definition of a two-family residence. But if the shoe does not fit, then do not wear it. Petitioner is not claiming any legal right because he owns a two-family residence; he is claiming a legal right because he owns an R-3 residence.

Even beyond all that, as petitioner argues (Reply Memo at 1), DOB issued the first summons to petitioner for using his home in a manner inconsistent with his R-3 occupancy group, not for failing to meet the definition of a two-family dwelling, and respondents do not seem to, nor could they, dispute that an R-3 building can, per se, be used for transient rentals.

The nub of petitioner's argument is that R-3 status requires only "as a rule" residence, a criterion that petitioner clearly satisfies, and that any R-3 residence is entitled to secondary uses, such as transient rentals. Petitioner correctly claims that the Appeals Unit decision effectively means that even a single instance of a short-term rental, because it negates "exclusivity," essentially re-classifies an R-3 residence into a hotel, with the attendant heightened fire safety requirements.

Fire Safety

Neither side here spends much time on the fire safety summonses, and this Court will follow suit. As best this Court can determine, they apply to hotels, not houses. For example, respondents note (Answer ¶ 140) "Building Code § 907.2.8 states that "[f]ire alarm systems shall be installed in Group R-1 occupancies … ." By expressio unius est exclusio alterius, R-3 structures are excluded. This Court is mindful of the fire safety issues in large residential buildings being used, at least in part, transiently. See City of New York v Smart Apartments, LLC., 39 Misc 3d 221, 226 (Sup Ct, NY County 2013) (Engoron, J.):

> The New York City Fire and Building Codes require transient residences to observe significantly higher fire safety standards than non-transient residences … because, the theory goes…, the occupants of the former are less familiar than the latter with their surroundings, with fire evacuation procedures, etc. Whether this is justified, as plaintiff and this court believe, or faintly ridiculous, as defendants argue, it is the law.

However, there is a huge quantitative and qualitative difference between the 68-story Courtyard by Marriott Hotel in Manhattan (as of 2014, the tallest hotel in North America); the 82-story 432 Park Avenue apartment house in Manhattan (as of 2014, the tallest residential building in the world); and the Karol Home in Sunset Park, Brooklyn (undistinguished two stories plus basement). The egress procedures for the first two must be monumental; the egress procedure for the Karol Home basement is simple: walk out the door; and if that is blocked, walk out the other door.

To the extent that sprinkler and alarm systems arguably must be installed where the "primary" use of a structure is transient, petitioner's renting out of his basement on a few occasions does not make his home of almost 60 years "primarily transient," the way a hotel is. Respondents

claim (Moving Memo at 15) that "because Karol used the Subject Building on a transient basis, he brought it under Building Code provisions applying to transiently-occupied buildings." If the drafters of the BC wanted every single instance of transiently renting out space in a private residence to render the home as a "transiently occupied building," they easily could have said so.

A word about "multiple dwellings" is in order. Multiple Dwelling Law (MDL) § 4(7) defines them as dwellings that are "the residence or home of three or more families living independently of each other." Everyone agrees that the Karol Home is not a multiple dwelling; rather, it is a two-family dwelling. Why, one might ask, are such structures not considered "multiple dwellings" for regulatory purposes? Why is a two-family residence considered more like a one-family residence than a three-or-more family residence? Two obvious, related answers present themselves. First, such structures are ubiquitous in the City's middle- and working-class neighborhoods; the owners of such structures have a lot of political pull and power; and they do not want Albany or Manhattan bureaucrats telling them what to do in the privacy of their own homes. Second, those bureaucrats have decided, rightly, wrongly or indifferently, that the owners and occupiers of two-family homes are more able to take care of themselves, with less regulation, than "multiple dwelling" owners and occupiers require. In various areas of the law, such as, to take one arbitrary example, the "Scaffold Law," Labor Law § 240(1) ("except owners of one[-] and two-family dwellings"), a strong line of demarcation runs between private homes and multiple dwellings. The relevance here is that, in considering both occupancy rules and related fire safety regulations, two-family dwellings should be considered in the same league as one-family dwellings (i.e., private homes), rather than in the same league as "multiple dwellings," consisting of boarding houses, apartment houses, and hotels.

330 Continental LLC

Understandably, both sides discuss, at length, City of New York v 330 Continental LLC, 60 AD3d 226 (1st Dep't 2009), even though the Appellate Division, First Department, decided that case over a decade ago; the opinion interpreted the Multiple Dwelling Law and the City's 1916 and 1961 Zoning Resolutions ("ZR"), not the AC or the BC; the three "single-room-occupancy apartment hotels" on the Upper West Side of Manhattan at issue had certificates of occupancy and were vastly different from the Karol Home in Brooklyn; and the State Legislature expressly overturned the result. Nevertheless, this Court will follow the parties' lead.

The 330 Continental court essentially held that "apartment hotels," which are Class A, i.e. permanent-basis, multiple dwellings, could legally rent out fewer than half of their rooms on a transient basis because the buildings would still be used "as a rule" (the MDL phrase) and "primarily" (the ZR phrase) for permanent residence purposes. The trial court had erred in finding that transient rental of even a "significant number" of rooms was illegal.

In a key section of the opinion, the court wrote as follows:

> The use of the word "primarily" in the ZR's definition of "apartment hotel" indicates that a *secondary* use of a building, other than "permanent occupancy," is consistent with the status of an "apartment hotel." [The MDL] requires that a class A multiple dwelling be "occupied, *as a rule*, for permanent residence purposes"

> (emphasis added). Here again, the statute's use of the phrase "as a rule" indicates that a secondary use of the building, different from the specified primary use, is permitted.

In other words, as long as your primary use is permanent, your secondary use can be transient.

Interestingly, the court noted that it was "also influenced by the vagueness and ambiguity of the relevant language of the Multiple Dwelling Law and the ZR." Id. at 232. Similarly, "[a]dditional uncertainty is created by the phrase 'as a rule' in the Multiple Dwelling Law's definition of a class A multiple dwelling … and by the word 'primarily' in the ZR's definition of an apartment hotel." Id. at 233.

To the extent that owners of private homes are faced with "vagueness," "ambiguity" and "uncertainty," the Appeals Unit Decision cannot stand. "In circumstances where the proper construction of a statute or regulation is open to legitimate debate, the application of the statute or regulation must be construed against the municipality … ." Food Parade, Inc. v Office of Consumer Affairs of County of Nassau, 19 AD3d 593, 595 (2d Dep't 2005), aff'd, 7 NY3d 568 (2006). Cf. Matter of Allen v Adami, 39 NY2d 275 (1976): "Since zoning regulations are in derogation of the common law, they must be strictly construed against the municipality which has enacted and seeks to enforce them. Any ambiguity in the language used in such regulations must be resolved in favor of the property owner." Id. at 277 (citations omitted).

All of which fits within the rubric that penalties may not be meted out for violating a rule that is void for vagueness. See In the Matter of the Petition of Principal Mutual Life Insurance Company, 1998 WL 459387, aff'd in part and rev'd in part, 1998 WL 1657262 (New York State Division of Tax Appeals, July 30, 1998): "Under the two-pronged void for vagueness test, a statute must first be sufficiently definite to provide fair notice of the required or prohibited conduct, and second, must provide explicit and objective standards by which a violation may be determined." See also, Kolender v Lawson, 461 US 352, 357 (1983) (O'Connor, J): "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited." If the state legislature decreed that "Owners of one- and two-family residences may not rent out space for less than 30 days," ordinary people could understand that.

Respondents note (Answer ¶¶ 130-132) as follows:

> Following the Appellate Division, First Department's decision in 330 Continental, on July 16, 2010, the New York State Legislature enacted Chapter 225 of the Laws of New York State of 2010 … for the purpose of clarifying that [the MDL and the AC] have always prohibited the occupancy of units in such [i.e., Class A] multiple dwellings in New York for anything other than permanent residence purposes.

The legislative history (Answer ¶¶ 135-136) indicates that the purpose of the new law was to prevent Class A, i.e., permanent basis, apartment houses from renting out rooms on a transient

basis, thus converting the buildings, in effect, at least partially, into hotels, but without all the fire safety paraphernalia. In sum, Class A apartment house units can only be rented out on a permanent (if you consider 30 days or more to be "permanent"), not a transient, basis.

The two sides here debate whether the legislature's amending the MDL to prohibit apartment houses from renting to transients, without amending the BC to prohibit one- and two-family dwellings from renting to transients, demonstrates an intent to leave the latter unchanged. Both sides have marshalled significant authority. By a whisker, petitioner appears to get the better of the debate, which in its general contours is perennial. State legislators would hardly be surprised to learn that private homes, and regulations thereof, which could be amended, exist. In any event, at the very least, Chapter 225 of the Laws of New York State of 2010 does not prohibit the conduct here at issue, specifically, transient rental of an R-3 residence unit. Thus, under existing caselaw, an R-3 occupancy need only be primarily, not exclusively, used for long-term occupancy.

Philosophical Considerations

Beyond, or astride, the legal analysis this case requires, to an admittedly activist judge it also cries out for some philosophical musings.

William Pitt famously said:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter — all his force dares not cross the threshold of the ruined tenement!

Or as we say in modern-day America, "A person's home is his or her castle."

The instant enforcement effort surely was made in good faith. This Court appreciates inspector Cautela's diligence; Hearing Officer Rasso's concern; and the Appeals Unit's grappling with the law. Nobody wants to see three innocent Brazilian tourists burnt to a crisp in a Brooklyn basement. Indeed, a fear that sleeping in a basement, especially one containing a boiler, albeit with two means of egress, is unsafe may be motivating respondents. However, they neither rely on nor even cite to any particular universally applicable fire safety standard(s) of the BC or other codifications. This case is all, and only, about what an owner is allowed to do with his or her own private home.

As petitioner argues, a single, one-day rental of part of one's private home should not convert it, in the eyes of the law, into a hotel. Do we want to live in a society in which if you own and live in a two-family dwelling, you cannot rent out one of the units for less than 30 days (although you can for 30 or more days) without installing prohibitively expensive equipment, or becoming a criminal?

Finally, respondents state (Moving Brief at 4) that one reason to limit transient rentals is that they "exacerbate[e] the City's shortage of affordable permanent housing." However, the City's officially declared and widely acknowledged "housing emergency" predates Airbnb by decades, if not centuries. Skip Karol is not responsible for causing, or for alleviating, the City's housing shortage. He owns his own home, and he is not obligated to rent out any or all of it, transiently or non-transiently. The City's endless, intractable housing shortage probably has many causes and many possible solutions. However, limiting transient rentals would decrease the substantial flow of tourist money entering Gotham, decrease international camaraderie, and decrease the standard of living of the many homeowners, of whom this Court will take judicial notice, who have worked hard enough and lived frugally enough to afford a two-family residence dependent on some rental income.

So, in sum, I say, "Leave the poor guy alone."

Declaratory Relief

The instant summonses surely were not one-off. Indeed, given respondent's vigorous, vociferous defense of them, without declaratory relief indubitably there will be more of them. Thus, petitioner is entitled to a declaration that owners of one- and two-family residences within the R-3 residence group classification are entitled, per se, to rent out space therein on a transient basis, as long as such rental is otherwise lawful.

Conclusion

Thus, for the reasons set forth herein, the motion to dismiss is denied and the relief sought in the Verified Petition and Complaint is granted, and the Clerk is hereby directed to enter judgment in favor of petitioner Stanley Karol and against respondents New York City Department of Buildings, New York City Mayor's Office of Special Enforcement, and New York City Office of Administrative Trials and Hearings (1) setting aside and dismissing Department of Building Summonses # 353-302-47L, # 353-302-48N, and # 353-302-49P; (2) setting aside the New York City Office of Administrative Trials and Hearings' December 31, 2018 Decision of Hearing Officer Louis Rasso against Stanley Karol and the June 6, 2019 Appeals Unit Decision against Stanley Karol; (3) declaring that Stanley Karol is entitled to the return of the $4,375 fine he paid to non-party City of New York pursuant to the summonses and proceedings set forth above; (4) declaring that owners of one- and two-family residences within the R-3 residence group classification are entitled, per se, to rent out space therein on a transient basis, as long as such rental is otherwise lawful; and (5) awarding Stanley Karol costs and disbursements.

5/8/2020
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[ ] **DENIED**	[ ]	**GRANTED IN PART**	[X]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**