

### REAL ESTATE LITIGATION

# Is Airbnb Workable In New York City?



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**T**he debate over whether and in what circumstances to allow transient short-term rentals of apartments in New York City continues to play out in real-time. Airbnb, the well-known online platform that makes a business of facilitating such arrangements, is engaged in a massive advertising campaign designed to sway public opinion and ultimately convince New York's legislators to enact regulations legalizing apartment-sharing. Similar efforts already have been successful in San Francisco and Portland.

Its motivations are obvious: according to an October 2014 report released by the New York State Attorney General, Airbnb earned revenues of \$61 million in 2010-2014 from home rentals in New York City, most of which are illegal under present New York state and city laws. Affordable housing advocates and the hotel industry, among others, have countered Airbnb's efforts by arguing that any amendment of the existing laws would undermine long-standing public policies intended to protect both New York City residents and visiting tourists.

To its supporters, apartment-sharing through websites such as Airbnb is a catalyst for entrepreneurship, enabling middle-class New Yorkers to make additional income by renting out their apart-



ments. To its detractors, it allows landlords to convert apartments otherwise available for long-term rental into illegal hotels that threaten the safety of guests and neighbors alike and make New York City less affordable. This article explores the current legal landscape.

### Legal Framework

For nearly a century, the permitted uses of rental apartments in New York City has been governed by what the Appellate Division, First Department has labeled a "complex web of rules formed by the city's zoning resolutions dating back to 1916,

the Multiple Dwelling Law, and the city's Administrative Code."<sup>1</sup> The Multiple Dwelling Law, enacted in 1929 (MDL), divides "multiple dwellings" into two classes: "Class A" and "Class B." The MDL originally required that "Class A multiple dwellings" be "occupied, as a rule, for permanent residence purposes."<sup>2</sup> "Class B" multiple dwellings are multiple dwellings "which [are] occupied, as a rule transiently, as the more or less temporary abode of individuals or families who are lodged with or without meals."<sup>3</sup> "Apartment houses" and other traditionally permanent residential buildings are specifically denominated as "Class A" multiple dwellings, while "hotels"

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are denominated as “Class B” multiple dwellings. As transient residential occupancies, Class B multiple dwellings are required to be designed, constructed and operated in accordance with more stringent fire protection requirements than those applicable to non-transient residential occupancies such as Class A multiple dwellings.<sup>4</sup>

For many years, owners of Class A buildings relied upon an interpretation of the definition of “Class A” multiple dwellings that, because it contains the phrase “as a rule,” permitted at least some amount of short-term occupancy in Class A buildings. In a 2009 case before the Appellate Division, First Department, *City of New York v. 330 Continental*, the court agreed with this interpretation.<sup>5</sup> In that case, the city of New York sought to enjoin defendants—three single room occupancy apartment hotels on Manhattan’s Upper West Side that had for 70 years rented units within the buildings for short-term, nonpermanent occupancy—from renting any units within the buildings for periods of less than 30 days.<sup>6</sup> The Appellate Division reversed the lower court and denied the city’s application for a preliminary injunction, holding that the requirement that a Class A building be occupied for permanent residency is not violated if a “minority” of units in the building are occupied as transient hotel rooms.<sup>7</sup>

Concerned that the Appellate Division, First Department’s decision paved the way for an influx of illegal hotels, at Mayor Michael Bloomberg’s urging, the New York Legislature promptly took up a bill designed to “amend the multiple dwelling law and the administrative code of the city of New York, in relation to clarifying certain provisions relating to occupancy of Class A multiple dwellings.”<sup>8</sup> Assemblyman Richard N. Gottfried, one of the bill’s sponsors, explained the bill’s purpose in his sponsor’s memorandum:

This bill, which is before Governor [David] Paterson for approval, would make it possible for the city of New York to effectively enforce the law against illegal hotels by requiring that Class A multiple dwelling units be occupied for permanent residency.

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Illegal hotels are residential units that are designated under the New York State Multiple Dwelling Law as permanent residences but are improperly used as transient hotel rooms. They have grown exponentially in recent years, removing thousands of rental apartments from an already tight housing market, disrupting the lives of the permanent residents who live in the

pancy by house guests or lawful boarders, roomers or lodgers, so long as the permanent resident is present, (2) house-sitting without compensation, and (3) college and university-owned dwellings that use no more than five percent of the building units to temporarily house non-students, such as visiting professors and academic guests, provided no money is paid to the college or university, and the college or university complies with several other enumerated requirements.<sup>13</sup>

Given that the law is crystal clear that the use of programs like Airbnb for short-term transient rentals is impermissible, landlords, tenants and apartment owners need to proceed with caution when considering whether to put their apartments in such a program.

buildings, and depriving the city of tax revenue. Because illegal hotels do not comply with the applicable laws and codes that are required for buildings used for transient occupants, they pose a serious threat to public safety. Tourists who sign up to stay in illegal hotels through various websites are generally not aware that the units do not conform to fire safety standards, and are often distressed to find that their accommodations are cramped, illegal, and do not provide hotel services. Housing advocates estimate that there are roughly 300 such buildings in New York City, mostly in Manhattan and North Brooklyn but also in other boroughs.<sup>9</sup>

Signed into law by Patterson, the new law amends the definition of “Class A” multiple dwelling in the MDL to make explicit that it prohibits the operation and occupancy of hotels in Class A buildings even for a minority of units.<sup>10</sup> This law deleted the ambiguous “as a rule” language from the MDL and added language that explicitly limits occupancy of Class A buildings to “permanent residency purposes.”<sup>11</sup> The 2011 law also specifies that permanent residency of a dwelling means “occupancy of a dwelling unit by the same natural person or family for 30 consecutive days or more.”<sup>12</sup>

The new law contains a few exceptions, excluding from its prohibition: (1) occu-

Pursuant to Section 304 of the MDL, one who violates the law is “guilty of a misdemeanor punishable, for a first offense, by a fine of not exceeding five hundred dollars or by imprisonment for a period of not exceeding 30 days, or by both such fine and imprisonment; for the second and any subsequent offense arising from the failure to remove the violation upon which the first offense was based, by a fine of not exceeding one thousand dollars or by imprisonment for a period of not exceeding six months, or by both such fine and imprisonment.”<sup>14</sup>

Additionally, in October 2012, Bloomberg signed into law a bill that revised the New York City Administrative Code to increase the penalty for running an illegal hotel from approximately \$800 to up to \$25,000 for repeat offenders.<sup>15</sup> While targeting persons renting out multiple units in Class A buildings, the revised law also imposes these fines on a repeated offender “at the same dwelling unit or multiple dwelling.”<sup>16</sup>

## Enforcement

Landlords and tenants alike need to be cautious in permitting the use of apartments for short-term rentals. The number of violations issued against residential landlords who illegally house temporary occupants in their apartment buildings

has increased exponentially in the wake of the 2011 state legislation curbing illegal hotels. Between January and August 2014, the Mayor's Office of Special Enforcement, inspected 617 apartments after receiving complaints about short-term rentals, compared with 434 during the same time period in 2013. An unresolved issue in situations where a tenant in a residential rental building rents (unbeknownst to the landlord) his or her apartment using a website like Airbnb, is who is liable—the landlord, the tenant or both—when the illegal short-term rental is discovered.

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In addition to responding to complaints concerning individual violations, the Mayor's Office of Special Enforcement also has commenced a number of enforcement actions seeking to enjoin large-scale illegal hotel operations in New York City. In *City of New York v. Smart Apts.*, 39 Misc. 3d 221 (Sup. Ct. N.Y. Cty. 2013), the city asserted claims and sought injunctive relief against defendants that “operate[d] a multi-tiered business, advertising, booking, operating and maintaining transient accommodations for short-term stays of less than 30-days in as many as 50 or more Class A [i.e., non-transient] multiple dwellings in New York City.”<sup>17</sup>

The city argued, and the court agreed, that the defendants' business practices were illegal because they violated both the Multiple Dwelling Law and the New York City Administrative Code, resulting in unsafe conditions because the transient occupants were denied the fire safety devices and protections, such as fire extinguishers, sprinklers, alarms, evacuation plans, etc., required of transient hotels. Finding that the city had the defendants “dead to rights,” the court granted the city's preliminary injunction motion enjoining the defendants from continuing to facilitate illegal transient occupancy of New York City Class A multiple dwellings.<sup>18</sup>

In September 2014, the city commenced another action against two buildings owners allegedly operating illegal hotels in New York City. In *City of New York v. City Oases*, Index No. 451997/2014 (Sup. Ct. N.Y. Cty.), the city asserted similar claims and sought injunctive relief against the owners of 59 Fifth Avenue and 5 West 31st Street from continuing to operate their buildings as illegal hotels. The city alleged that the building owners had been using website operators like Airbnb to advertise units in their building for short-term rentals in violation of state law. The court granted the city a temporary

restraining order that “[n]o new persons shall be permitted to be registered as guests or to be allowed occupancy” at the buildings except a limited group of guests with stays planned for the same week the order was entered.

### Ongoing Debate

Airbnb is leading an effort to convince lawmakers to pass legislation legalizing this form of short-term rentals, which it calls “home-sharing.” Airbnb's Global Head of Public Policy, David Hantman, earlier this year sent a letter to all 213 members of the New York State Legislature and all 51 New York City council members suggesting six “common-sense regulations” Airbnb believes will address the concerns of lawmakers while at the same time permitting New Yorkers to occasionally rent out their apartments while they are away. A primary reason Airbnb argues for a more nuanced approach to the issue is that, by legalizing this form of short-term rental, Airbnb estimates that New York could generate \$65 million in 2015 alone in hotel and other tourists taxes that now largely go uncollected.

Despite Airbnb's lobbying efforts, two bills introduced by legislators last year that would have adopted Airbnb's suggested law changes did not pass.<sup>19</sup> The proposed

bills both sought to exempt so-called “good actors” from the 2011 law targeting illegal hotels. Similar bills, allowing for individuals to rent out their own apartments for limited durations, have recently been enacted in San Francisco and Portland.

In addition, an October 2014 report released by the New York State Attorney General was largely critical of short-term rental platforms like Airbnb, finding that short-term rentals displace long-term housing in thousands of apartments, and that at least 72 percent of units used as private short-term rentals on Airbnb violate existing laws.<sup>20</sup> The attorney general's report also raised safety concerns because apartments being used as short-term rentals are not required to comply with fire safety and evacuation regulations that are imposed on hotels.<sup>21</sup>

### Conclusion

Given that the law as it currently stands is crystal clear that the use of programs like Airbnb for short-term transient rentals is impermissible, landlords, tenants and apartment owners need to proceed with caution when considering whether to put their apartments in such a program. Moreover, given that the law requires the collection and payment of hotel taxes on income generated through short-term rentals, anyone considering using Airbnb should carefully ensure compliance with the tax laws.

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1. *City of New York v. 330 Continental*, 60 A.D.3d 226, 227 (1st Dept. 2009).

2. Multiple Dwelling Law §4(8)(a), subsequently amended by Sponsor's Memorandum, Bill Jacket, ch. 225, L. 2010.

3. *Id.*

4. N.Y.S. Office of the Att'y Gen. Report, *Airbnb in the City*, Oct. 2014, at Ex. B.

5. *City of New York*, 60 A.D.3d at 231.

6. *Id.* at 227-29.

7. *Id.* at 231-32.

8. Sponsor's Memorandum, Bill Jacket, ch. 225, L. 2010.

9. *Id.*

10. Multiple Dwelling Law §4(8)(a).

11. N.Y.S. 6873, 232nd Sess. (2009).

12. *Id.*

13. *Id.*

14. Multiple Dwelling Law §304(1).

15. NEW YORK, N.Y., Local Law No. 45 (2012).

16. NEW YORK, N.Y., ADMIN CODE Title 28, Chap. 2, §201.2.1 (LEXIS through September 2014).

17. *Id.* at 224.

18. *Id.* at 233.

19. N.Y.S. 4263, 234th Sess. (2011), N.Y.S. 7495, 236th Sess. (2013).

20. N.Y.S. Office of the Att'y Gen. Report, *Airbnb in the City*, Oct. 2014.

21. *Id.*