

NEW YORK SUPREME COURT
APPELLATE DIVISION—FIRST DEPARTMENT

In the Matter of the Application of

GRAND IMPERIAL, LLC,

For a Judgment Under Article 78 of the Civil Practice
Law and Rules,

Petitioner-Respondent,

against

NEW YORK CITY BOARD OF STANDARDS AND
APPEALS (“BSA”), and MEENAKSHI SRINIVASAN,
CHRISTOPHER COLLINS, DARA OTTLEY-BROWN,
SUSAN M. HINKSON and EILEEN MONTANEZ, as
members of the BSA, and THE CITY OF NEW YORK,

Respondents-Appellants.

BRIEF FOR PROPOSED *AMICI CURIAE*

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STATEMENTS OF INTEREST OF THE AMICI CURIAE

Congressmember Jerrold Nadler, New York State Senator Liz Krueger, New York State Assembly Member Richard N. Gottfried, New York State Assembly Member Daniel O'Donnell, New York State Assembly Member Linda Rosenthal, Manhattan Borough President Gale A. Brewer, New York City Public Advocate Letitia James, New York City Council Member Helen Rosenthal, Goddard Riverside Law Project, Housing Conservation Coordinators, Inc., and MFY Legal Services, Inc., (collectively, the "*Amici Curiae*") submit this brief urging the Court to reverse the decision of the New York Supreme Court, First Department, which misinterprets the amendment to Chapter 225 of the Laws of 2010 ("Chapter 225"), clarifying the law governing transient occupancy of Class A multiple dwellings as defined in the New York State Multiple Dwelling Law ("MDL"), specifically as it applies to the subject Single Room Occupancy ("SRO") building at issue on appeal.

Elected Officials

The eight elected officials who submit the attached brief as *amici curiae* represent New York City residents who are most directly impacted by the interpretation of the MDL as it relates to the transient use of Class A multiple dwelling units. Each has been involved in the effort to ensure that the law reflects good public policy and works to protect the lives, health and safety of their constituents as well as visitors to the City of New York.

Goddard Riverside Law Project

Goddard Riverside Law Project was founded in 1981 to provide free legal services and tenant organizing assistance to low-income residents of SRO buildings on Manhattan’s West Side. Goddard Riverside Law Project provides free legal representation and tenant organizing to individuals and families to address a wide array of housing problems, including eviction and harassment, and to strengthen and preserve affordable housing.

Housing Conservation Coordinators, Inc.

Housing Conservation Coordinators, Inc. (“HCC”) is a community-based, not-for-profit organization anchored in the Hell’s Kitchen/Clinton neighborhood of Manhattan’s West Side. Since its founding in 1972, HCC has been dedicated to advancing social and economic justice and fighting for the rights of poor, low-income and working individuals and families. With a primary focus on strengthening and preserving affordable housing, HCC seeks to promote a vibrant and diverse community with the power to shape its own future. HCC provides legal representation, tenant and community organizing, and installation of energy efficient building systems through its weatherization program.

MFY Legal Services, Inc.

MFY envisions a society in which no one is denied justice because he or she cannot afford an attorney. To make this vision a reality, for over 50 years MFY has

provided free legal assistance to residents of New York City on a wide range of civil legal services, prioritizing services to vulnerable and under-served populations, while simultaneously working to end the root causes of inequities through impact litigation, law reform and policy advocacy. MFY provides advice and representation to more than 10,000 New Yorkers each year. For over 25 years, MFY's SRO Law Project has provided free legal services to the City's SRO population, protecting clients who are vulnerable to landlord abuse. MFY's clients face harassment, poor building conditions, and sometimes the threat of homelessness because of their precarious position as poor and low-income renters in New York City's unforgiving housing market. MFY has seen the safety and quality-of-life issues experienced by permanent tenants living in residential SRO buildings that are being rented on a short-term basis.

The existence of so-called illegal hotels is new to residential buildings in New York City over the past decade, which has negatively impacted its already depleted housing stock. Because of the far-reaching implications of this matter for its clients, Congressman Jerrold Nadler, New York State Senator Liz Krueger, New York State Assembly Member Richard Gottfried, New York State Assembly Member Daniel O'Donnell, New York State Assembly Member Linda Rosenthal, Manhattan Borough President Gale A. Brewer, New York City Public Advocate

Letitia James, New York City Council Member Helen Rosenthal, Goddard
Riverside, HCC and MFY have a substantial interest in the outcome of this case.

ARGUMENT

I. THE SUPREME COURT DECISION MUST BE REVERSED AS IT IGNORES THE INTENT, PURPOSE AND EFFECT OF THE NEW YORK STATE MULTIPLE DWELLING LAW

A. The Purpose Of The State Multiple Dwelling Law Is To Protect The Health And Safety Of All Building Occupants

Over the years, the City and State of New York have promulgated and amended their building, maintenance and safety codes to embody the most modern and effective understanding of how best to protect building occupants and the public at large. The strictures of the New York City Building and Fire Codes, in particular, are carefully tailored to provide the most appropriate requirements for the specific use for which a building is intended. Concomitantly, building uses and occupancies must be carefully monitored if the differing safety requirements are to have any effect.

The City's Codes clearly differentiate between the use of a multiple dwelling by long-term or permanent tenants and use by transient visitors. For example, the New York City Fire Code (New York City Admin. Code § 29, hereinafter "FC") sets specific, very rigorous requirements for non-Class A multiple dwellings, or those used for transient occupancy, such as commercial hotels. FC § 906.1 requires the provision of portable fire extinguishers in the public halls; FC§ 903.2 requires

the installation of automatic sprinkler systems; FC § 907.2 requires building-wide fire alarm systems; FC § 401.6.5 provides that a transient-use building have a designated fire safety director, certified by the New York City Fire Department. None of these requirements exist for Class A buildings, occupied by permanent or long-term tenants, who are familiar with the geography of their homes and the building in general and are thus better able to escape in the event of a fire or smoke condition.¹

Recognizing that localities, such as the City of New York, maintain and constantly improve such protective codes, the New York State MDL similarly provides distinct definitions and limitations for different categories of building occupancy and use. The definition and permitted use of Class A multiple dwellings have always been for occupancy by permanent tenancies, a term which has been interpreted historically by the City's enforcement agencies as occupancy of at least 30 days.

As described in the relevant affidavits submitted in support of the motion for permission to be heard as *amici*, the City faced an enforcement dilemma when City of New York v 330 Cont. LLC, 60 A.D.3d 226, 873 N.Y.S.2d 9 (App. Div. 1st

¹ Affidavit of Thomas Jensen, Chief of Fire Prevention, City of New York v. City Oases, LLC, Index No. 451997/2014, New York State Unified Court System, ecourts, available at: <https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=LEQyjciP3edAY1BDwk1Png==&system=prod>.

Dep't 2009), held that the statutory language on permitted occupancy of Class A multiple dwellings was unclear. Thus, as more fully discussed in Point II below, the state law was amended in 2010 to clarify the its intent and to remove any barrier to effective enforcement created by 330 Cont. LLC. The current MDL defines Class A multiple dwellings and their permitted uses clearly. Transient use in Class A dwellings is not permitted.

The City and State laws here at issue are designed to protect the lives and safety of occupants as well as to preserve affordable housing. (R 124). Both goals are undermined by the proliferation of the illegal transient rentals of Class A multiple dwellings. (R 124).

B. Illegal Transient Use Undermines The Legislative Intent Embodied In State And Local Laws

1. Illegal Occupancy Of Class A Multiple Dwellings Endangers The Health And Safety Of Occupants and Communities

As the illegal hotel industry began to emerge in New York City residential buildings in the early 2000s,² the earliest signs were seen in residential SRO buildings on the Upper West Side of Manhattan.³ The fact that SRO buildings were some of the first residential buildings to be unlawfully converted into illegal hotels

² Illegal hotels are the short-term rental (less than 30 days) of residential Class A multiple dwellings.

³ *Room by Room: Illegal Hotels and the Threat to New York's Tenants*, June 2008, Illegal Hotels Working Group, pg. 5, available at: http://www.hcc-nyc.org/tenorg/documents/IHWG_Report_2008.pdf.

is not surprising. SROs have similar layouts to European-style hostels, with most consisting of single rooms with shared bathroom facilities located in the common areas of the building. Many lack access to kitchen facilities of any sort. With significantly lower monthly rents than Class A apartments and housing a relatively older, poorer, and more vulnerable population, SROs are considered New York City's "housing of last resort."⁴

Many owners of Class A SRO buildings, including Petitioner-Respondent Grand Imperial, LLC ("Grand Imperial"), readily recognized the significant profits to be made by charging exorbitant nightly rates – often netting the equivalent of an entire month's lawful rent in only a few nights. But for the MDL's prohibition against transient rental of Class A SRO buildings, the profit potential would motivate owners to decimate the SRO tenant population.

SRO owners have historically harassed tenants out of their homes to make way for more lucrative occupants, or to simply warehouse rooms until a building is empty.⁵ The potential for substantial profits and the opportunity to deregulate units created enormous incentive for SRO owners to harass long-term rent-stabilized

⁴ See Brian J. Sullivan and Jonathan Burke, *Single Room Occupancy Housing in New York City: The Origins and Dimensions of a Crisis*, CUNY Law Review, Vol. 17, Issue 1 (Winter 2013).

⁵ See Debra S. Vorsanger, *New York City's J-51 Program, Controversy and Revision*, Fordham Urban Law Journal, Vol. 12, Issue 1 (1983) 143 (discussing the role J-51 tax benefits played in encouraging the use of arson to remove SRO tenants).

tenants from their homes to make room for their illegal hotel operations.⁶ See Affidavit of Senator Liz Krueger (“Krueger Aff.”) ¶ 7; and Affidavit of Assembly Member Richard N. Gottfried (“Gottfried Aff.”) ¶ 4. Virtually overnight, permanent tenants found the buildings in which they lived, once fully occupied with permanent tenants, transformed into full-blown commercial hotels. Unsurprisingly, this transmogrification caused a myriad of problems for permanent tenants and the respective communities, including quality of life, safety and security concerns and the loss of affordable housing.⁷

In approximately 2002, tenant advocates, community organizations and elected officials, including *amici* herein, began receiving complaints from tenants about illegal hotels in their buildings. These complaints included excessive noise from late night parties, overcrowding of common bathrooms, excessive garbage in the common areas, congested elevators, dangerous overcrowding of rooms with multiple bunk beds in small single rooms, lack of building security and strangers entering and leaving the buildings.⁸ See Krueger Aff. ¶ 3; and Gottfried Aff. ¶ 3.

⁶ See supra note 3, pgs. 6-7. See also Make the Road New York, *Rent Fraud: Illegal Rent Increases and the Loss of Affordable Housing in New York City* (August 2011), available at: http://www.maketheroad.org/pix_reports?DHCR%20Report.pdf.

⁷ See e.g. supra note 3, pgs. 6-8; see also “Airbnb in the city,” NYS Attorney General, Eric T. Schneiderman, October 2014, pg. 2, available at: <http://www.ag.ny.gov/pdfs/Airbnb%20report.pdf>.

⁸ See supra note 3, pgs. 6-10.

By 2004, illegal hotels had begun to spread from Class A SRO buildings to Class A apartment buildings on the West Side of Manhattan, with large concentrations in Hell’s Kitchen.⁹ Tenant advocates and elected officials saw a sharp increase in complaints from tenants living in buildings used as illegal hotels, as did city agencies. See Affidavit of Gale A. Brewer (“Brewer Aff.”) ¶ 6; Krueger Aff. ¶ 3; and Gottfried Aff. ¶ 3. In response to these complaints, tenant advocates and elected officials joined forces in 2005 to create the Illegal Hotels Working Group. The Illegal Hotels Working Group worked with tenants living in illegal hotels and advocated on their behalf to bring awareness to the issue and seek avenues of enforcement by the City. It was during this period that recognition of illegal hotels increased and the issue received media attention.¹⁰ See Krueger Aff. ¶ 8.

During the time that illegal hotel activity began at the Grand Imperial, the permanent tenants living in the building complained about quality of life and safety issues and experienced increased harassment and pressure to move out to make room for tourists.¹¹ To raise consciousness of the issue, New York State Assembly Member Linda Rosenthal made a reservation on the building’s

⁹ Id., pg. 5.

¹⁰ Id., p. 5.

¹¹ J. David Goodman and Joshua Brustein, *As Tourists Find Rooms, Tenants Face Disruptions*, N.Y. Times, September 17, 2007, available at:

<http://www.nytimes.com/2007/09/17/nyregion/17hotel.html>.

website and spent the night of February 10, 2007 in one of the SRO rooms.¹²

The morning after Assembly Member Rosenthal stayed at the Grand Imperial Court, the members of the Illegal Hotels Working Group held a press conference in front of the building to expose both the blatant illegal commerce, and the safety and quality of life issues affecting the permanent tenants living in the building.¹³ Based on the tenants' complaints and the increased attention from the media, the City issued numerous violations to Grand Imperial for operating contrary to its Certificate of Occupancy for renting rooms for periods of less than 30 days as well as for Fire Code violations.

The Illegal Hotels Working Group conducted a study on illegal hotels in the City and, based on the data collected, issued the report, "Room by Room: Illegal Hotels and the Threat to New York's Tenants," in June 2008.¹⁴ The report identified the large number of complaints regarding illegal hotel activity and residential buildings in Manhattan in which rooms or apartments were being rented to persons for periods of less than 30 days and reflected that this illegal use was a growing problem. The report also highlighted the very serious quality of life and security issues faced by permanent tenants living in these affected buildings.¹⁵

¹² News from Assemblymember Linda B. Rosenthal, *Not for Tourists: The Fight for Permanent Affordable Housing for New Yorkers*, Fall 2007, available at: http://assembly.state.ny.us/member_files/067/20070906/.

¹³ *Id.*

¹⁴ See *supra* note 3.

¹⁵ *Id.*, pgs. 6-7.

The City began to step up its enforcement in response to the increased complaints from tenants living in buildings being illegally used as hotels. The New York City Department of Information Technology and Telecommunications established a special code to track complaints related to illegal hotel activity made to the City's 311 information service. The Mayor's Office of Special Enforcement ("OSE"), created in 2006 to enforce laws prohibiting illegal hotels, is a multi-agency task force with inspectors from the New York City Department of Buildings, Police Department, the Fire Department, the Department of Health, and the Department of Finance.¹⁶ OSE is responsible for coordinating efforts across these agencies to respond to quality of life issues, including but not limited to those involving the illegal conversion of residential buildings into hotels. OSE has the authority to conduct inspections, issue violations, including vacate orders, and commence affirmative litigation against buildings that are being operated as illegal hotels.¹⁷

As part of the administration's enforcement of illegal hotels in the City, it commenced litigation against an owner of three SRO buildings located on the Upper West Side of Manhattan seeking, among other relief, an injunction to stop

¹⁶ News from the Blue Room, "Mayor Bloomberg Creates the Office of Special Enforcement to Expand Enforcement Initiatives Across the City and Improve Quality of Life in all Five Boroughs, December 14, 2006, available at: <http://www1.nyc.gov/office-of-the-mayor/news/434-06/mayor-bloomberg-creates-office-special-enforcement-expand-enforcement-initiatives-across>

¹⁷ *Id.*

the owners' illegal hotel operations.¹⁸ The City's case was based on the relevant State and City laws and statutes, including the MDL, which was enacted in 1929 and historically interpreted by the City to require occupancy of Class A multiple dwellings for periods of at least 30 days. In September 2007, the City obtained a preliminary injunction against the owners.¹⁹ On appeal, the Appellate Division, First Department, reversed, interpreting the relevant sections of the Multiple Dwelling law as equivocal, and permissive of limited transient use of Class A buildings. The court's reading of the law in the 330 Cont. opinion does not comport with the City's long-held interpretation of the MDL. Faced with the decision, the City's enforcement agencies, in conjunction with members of the Illegal Hotels Working Group, decided that amending the City and State laws was essential to clarify any confusion and to ensure the City's long-held interpretation was codified into law. See Gottfried Aff. ¶ 5; Krueger Aff. ¶ 13; and Brewer Aff. ¶¶ 8 and 9. The MDL was subsequently amended in 2010 to clearly prohibit the rental of Class A multiple dwellings for fewer than 30 days.²⁰

¹⁸ City of New York v. 330 Cont. LLC, 60 A.D.3d 226, 873 N.Y.S.2d 9 (App. Div. 1st Dep't 2009).

¹⁹ Id., Decision and Order of J. Michael D. Stallman, New York State Unified Court System, eCourts, available at:

http://decisions.courts.state.ny.us/fcas/fcas_docs/2010JUN/3004063502007002SCIV.pdf.

²⁰ Chapter 225 of the Laws of New York State of 2010.

Despite the 2010 amendment to the MDL clarifying the definition of permanent residence, the Grand Imperial has persisted with its illegal hotel operation to the present day. One brazen act involved the owner's efforts to illegally convert an entire line of units in the building by constructing an interior stairwell to attempt compliance with the more stringent Fire Code requirements for commercial hotels with regard to egress. The DOB erroneously issued a permit to the building without requiring a Certificate of No Harassment ("CONH"), which is needed before an owner can lawfully obtain permits to alter the use or occupancy of an SRO building.²¹ Based on this erroneously issued permit, the owner sent notices to the tenants in the affected units informing them that they had to vacate their units within 30 days. Once this error was brought to the attention of the proper City officials within DOB, the permits were rescinded.²²

2. Illegal Transient Use Reduces The Severely Limited Supply Of Permanent Affordable Housing in New York City

²¹ Local Law 19 (1983) (codified at NYC Admin. Code § 27-2093).

²² The Grand Imperial subsequently applied for a CONH in 2011. Based on submissions by tenants and community groups, HPD made an initial determination that harassment had occurred and commenced a proceeding against the Grand Imperial at the Office of Administrative Trials and Hearings to challenge its application. After a hearing during which more than ten tenants testified, Administrative Law Judge Casey issued a 36-page decision recommending denial of the CONH based on findings of harassment and intimidation by the owner and its staff including commencement of frivolous eviction proceedings against the permanent SRO tenants, denial of essential services and refusal to make repairs. (R 339-371). Deputy Commissioner Vito Mustaciuolo denied the Grand Imperial's CONH application on December 12, 2012. (R 375).

It has become clear over the past decade that, in addition to the significant quality of life and safety and security issues experienced by permanent tenants living in illegal hotels, short-term rentals have had and continue to have a significant and detrimental impact on the City's affordable permanent housing stock. According to the 2014 New York City Housing and Vacancy Survey, the City's vacancy rate is 3.5 percent.²³ New York State law defines a vacancy rate of less than five percent for New York City as a housing emergency.²⁴

While illegal hotels initially appeared on the West Side of Manhattan, the problem quickly spread throughout the City.²⁵ Aiding this expansion particularly over the past three to five years has been the advent of online rental platforms, such as Airbnb, Flip Key, VRBO, HomeAway, and Hotels.com, to name a few.²⁶ Airbnb, the biggest offender, caught the attention of the Office of the Attorney General of the State of New York ("NYAG"), which conducted an investigation of Airbnb and its hosts. The NYAG issued a report in October 2014 based on data obtained from Airbnb through subpoena for the period of January 1, 2010 to June 2, 2014.²⁷ According to the report, 72 percent of the listings on Airbnb's website

²³ <http://www1.nyc.gov/assets/hpd/downloads/pdf/2014-HVS-initial-Findings.pdf>.

²⁴ http://www.tenant.net/Rent_Laws/RSL/rsl.html.

²⁵ Initially, illegal hotel operators were landlords who rented from between one to multiple units in a building to third-party operators who operated numerous illegal hotels in multiple buildings. While this is still a significant part of the illegal hotel industry, the way in which illegal hotels are created has changed with the advent of online rental platforms.

²⁶ Report by NYS Attorney General, Eric T. Schneiderman, *supra* note 7, pg. 2

²⁷ *Id.*, p. 4.

violated the law. One-third of the unique listings in New York City were found in the Manhattan neighborhoods of the Lower East Side/Chinatown, Chelsea/Hell's Kitchen and Greenwich Village/SoHo. In Brooklyn, 40 percent of Airbnb's revenue came from the Williamsburg/Greenpoint neighborhoods. Other popular areas included Downtown Brooklyn/Fort Greene, Prospect Heights/Bedford Stuyvesant and Park Slope.²⁸

The report further highlighted the gravity and breadth of the problem and its effects on the City's residential housing supply. The report found that thousands of residential units listed on Airbnb were dedicated to private short-term rentals, including over 4,600 unique units that were booked as private short-term rentals on Airbnb three or more months in 2013. Two thousand of those unique units were booked for at least 182 days of the year.²⁹ The sheer number of units and the length of the booking times indicate that the units were largely unavailable for permanent residential rental and indicate that the buildings were being operated as illegal hotels.

The report also found that, while New York prohibits for-profit hostels, many residential units that would otherwise house permanent tenants, were being rented on a short-term basis and essentially operating as illegal hostels.³⁰ To illustrate this

²⁸ Id., pg. 17.

²⁹ Id., pg. 12.

³⁰ Id., pg. 14.

fact, the report highlighted that in 2013 approximately 200 units in the City were booked as private short-term rentals for more than 365 nights during the year, which indicates that multiple transients shared the same listing on the same night, similar to an illegal hostel. The report went on to find that in 2013 the 10 most-rented units for private short-term rentals were each booked for an average of approximately 1,900 nights. The top listing was in Brooklyn and accepted 13 reservations on an average night.³¹ These findings reflect that units are made unavailable to New Yorkers for rental and removed from the housing market as permanent housing, exacerbating the City's housing crisis.

A recent report jointly issued by the organizations New York Communities for Change and Real Affordability for All, features findings from an independent analysis of Airbnb's website by www.insideairbnb.com.³² The report demonstrates that nearly 16,000 Airbnb listings are in direct violation of City and State laws because they list the entire apartment available for rental without the leaseholder present – in other words, illegal transient use as opposed to guest hosting. These units had been effectively removed from the rental market. The report also reveals the dire impact that illegal hotels have on the increase in rents in neighborhoods where illegal hotel activity is most concentrated. For example, in the four zip codes

³¹ Id.

³² *Airbnb in NYC: Housing Report* (2015) available at: <http://www.sharebetter.org/wp-content/uploads/2015/07/AirbnbNYCHousingReport1.pdf>.

within which the East Village, Williamsburg, the West Village and the Lower East Side are located, entire apartments listed on Airbnb comprise over 20 percent of total rentals. The report also illustrates how the use of Airbnb to facilitate illegal hotel rentals contributes to increasing rents. For example, average rents increased more than the citywide average in the top 20 zip codes for Airbnb listings from 2007-2009 to 2011-2013. From 2002-2014 the average rents increased by at least 32 percent in all of the top 20 Brooklyn zip codes for Airbnb.³³

II. THE SUPREME COURT DECISION MUST BE REVERSED AS IT MISINTERPRETS THE 2010 MDL AMENDMENTS

A. The Purpose Of The 2010 Amendment Was To Clarify The Permitted Use Of Class A Multiple Dwellings

The Court is respectfully directed to the affidavits of State Senator Liz Krueger and Assembly Member Richard Gottfried submitted in support of the motion seeking permission to submit the within brief as *amici curiae*. Each was the drafter and sponsor of the bill in their respective house of the New York State Legislature that amended the language of the MDL sections that were the basis of the holding in City of New York v. 330 Cont. LLC, 60 A.D.3d 226, 873 N.Y.S.2d 9 (2009). The amendments clarified the permitted use and occupancy of Class A multiple dwellings in New York State. See Gottfried Aff. ¶ 7; and Krueger Aff. ¶¶ 14 and 15. The amendments that were adopted and signed into law eliminated any

³³ Id., pg. 3.

existing equivocal language and eliminated the possibility that some percentage or area of Class A buildings could legally be used for transient occupancy.

Numerous elected officials, tenant advocates, the Administration of the City of New York, and the respective commissioners of the New York City Building and Fire Departments worked together to effect a change in the law that would enable effective enforcement of the protective fire and safety codes. They came together across various philosophical and political divisions to help protect the lives and safety of New York City residents and visitors alike, and to prevent the continued loss of existing permanent affordable housing.

B. The 2010 Amendment Was Remedial In Nature And Designed To Apply Retroactively

Even assuming, *arguendo*, that the transient use of the SRO rooms in question was lawful in 2009, the clearly intended remedial and retroactive nature of the 2010 amendments to the MDL should be given precedence over the purported saving clauses used by the lower court to rule against the Respondent-Appellant and find that the Petitioner-Appellee's improper use of the subject premises was "grandfathered" and permitted despite the remedial amendments to the MDL.

Statutes generally are applied prospectively unless there is clear legislative intent to the contrary. See Nelson v. HSBC Bank USA, 87 A.D.3d 995, 997, 929 N.Y.S.2d 259, 262 (2011); In re Gleason (Michael Vee, Ltd.), 96 N.Y.2d 117, 122,

726 N.Y.S.2d 45, 48 (2001). But there are clear exceptions to this general rule, and the legislation at issue here falls well within those exceptions.

In determining whether legislation should be applied retroactively, courts look to the legislative history and circumstances surrounding its enactment to determine whether it was meant to apply to pre-existing circumstances or only to future actions. See Bros. v. Florence, 95 N.Y.2d 290, 299, 716 N.Y.S.2d 367, 371 (2000). In this case, the statements of the drafters, the language of the statute and the circumstances in which it came to pass all show the clear and unequivocal legislative intent. The clarifying legislation contained in Chapter 225 was meant to address the circumstances at the time the legislation was enacted and the uses of Class A multiple dwellings at that time. (R 114).

The statute also falls within the exception to the general rule of prospective application in that it is clearly remedial in nature. Its sole purpose was to address an ongoing problem and clarify the parts of the statute that were found subject to interpretations that undermined its purpose. Statutes or amendments that are remedial in nature are meant to have retroactive effect, especially where it embodies the recognition of the need for clarification or need to correct imperfections and unintended consequences of current law.

A remedial statute can and usually should have retroactive effect, especially where it embodies the recognition of the need for clarification or need to correct

imperfections and unintended consequences of current law. In order to determine whether certain legislation should be applied retroactively, the Court of Appeals of New York has looked for clear language in the legislation of such legislative intent. See Matter of On Bank & Trust Co., 90 N.Y.2d 725, 730, 665 N.Y.S.2d 389, 392 (1997).

In the case at bar, the legislative intent clearly evinces the fact that the changes made by Chapter 225 were to be applied retroactively. Senator Liz Krueger's memorandum in support of the bill (R 118-121) unequivocally stated that the bill was intended to correct and clarify an ambiguity in the MDL that impacted existing Class A multiple dwellings:

It is impossible to enforce the law against illegal hotels if the law is interpreted in the manner compelled in this case. This bill will fulfill the original intent of the law, as construed by enforcing agencies, including the New York City Department of Buildings, by modifying the specific provisions of the Multiple Dwelling Law and applicable local codes that have been cited by defendants in enforcement proceedings as authority for the use of Class A dwellings as illegal transient hotels.

This clarification was in response to the Appellate Division ruling in City of New York v. 330 Cont. LLC, 60 A.D.3d 226, 873 N.Y.S.2d 9 (2009), which relied on the ambiguity in the MDL to prevent the City of New York from enforcing the long-standing City and State regulations against transient use. This Court and others have found that the legislature's intent to clarify a judicial question and

restore the original meaning of a state statute shows that a bill was intended to be retroactive. See e.g., Nelson v. HSBC Bank USA, 87 A.D.3d 995, 996, 929 N.Y.S.2d 259, 261 (2011); Bros. v. Florence, 95 N.Y.2d 290, 299, 716 N.Y.S.2d 367, 371 (2000); and Matter of OnBank & Trust Co., 90 N.Y.2d 725, 730, 665 N.Y.S.2d 389, 392 (1997).

The legislative intent to remediate rather than institute a wholly new regulation is even more evident in Section 2 of the bill. This section allowed a small number of Class A buildings that have been used as hotels prior to 1929 or 1961 (when relevant zoning changes occurred) to convert to a Class B occupancy. This section clearly demonstrates the legislature's awareness that this bill would affect existing buildings and provides relief to a small number of buildings that would be unjustly affected. Finally, in the lead-up to the passage of the bill, the supporters of the bill at multiple times stressed a sense of urgency that is evident in the immediate effective date of the legislation. See Gottfried Aff. ¶ 5; and Krueger Aff. ¶¶ 13 and 16. All these factors taken together show a clear legislative intent for this amendment to have retroactive effect.

C. The MDL Saving Clauses Do Not Authorize The Continued Illegal Use

In the decision below, the court relies on the MDL's saving clauses, §§ 336(1) and (4), which provide:

1. The repeal of any provisions of this chapter, or the repeal of any provisions of any statute of the state or local law, ordinance, resolution or regulation shall not affect or impair any act done, offense committed or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred or imposed prior to the time of such repeal, but the same may be enjoyed, asserted, enforced, prosecuted or inflicted as fully and to the same extent and in the same manner as if such provisions had not been repealed.

* * *

4. No existing right or remedy of any kind shall be lost or impaired by reason of the adoption of this chapter as so amended unless by specific provision of a law which does not amend all articles of this chapter.

Saving clauses similar to these are common in New York State law and Section 1, in particular, is almost word for word identical to the saving clause in Section 93 of the General Construction Law (“GCL”). The treatment by the courts of GCL § 93 is instructive of the general interplay between remedial statutes and saving clauses. Courts in New York State, since at least 1912, have held that saving clauses similar to the ones in the MDL should not be used to nullify the clear and definite legislative intent of a legally and correctly enacted law. *See, e.g., Kellogg v. Travis*, 100 N.Y.2d 407, 794 N.Y.S.2d 376 (2003); *People v. Oliver*, 1 N.Y.2d 152, 151 N.Y.S.2d 367 (1956); and *Matter of City of New York v. (Remsen Ave.)*, 153 A.D. 418, 138 N.Y.S. 594 (App. Div. 2d Dep’t 1912). As the Court of Appeals observed in *Kellogg*, “[s]tated simply, state statutory law, including the General Construction Law,

provides no ground for invalidating another, later-enacted state statute.” 100 N.Y.2d 407 at, 411. The use of the saving clause should be “merely a principle of construction to be applied in determining the scope of legislation which expressly or impliedly repeals earlier statutes. In the absence of evidence of contrary intent such legislation is not to be given retroactive effect.” People v. Roper, 259 N.Y. 635, 182 N.E. 213 (1932).

In addition, the language of the MDL saving clauses simply does not apply to the 2010 amendments at issue in this case. MDL § 366(1) cited in the decision below concerns an instance in which a provision of the MDL was repealed. It states that any right previously provided under the repealed section may continue, as may any enforcement or prosecution for violation of a repealed provision. However, the 2010 amendments did not repeal any section of the law. The elimination of two – confusing – qualifying phrases cannot be interpreted as the repeal of any provision. Prior to the 2010 amendment, and prior to the holding of the court in 330 Cont., it was settled belief of the City’s enforcement agencies, housing advocates, legislators and government officials that the use of Class A buildings for transient occupancy was illegal. See Krueger Aff. ¶ 15. The law was clarified to have it reflect the interpretation and understanding that had existed for decades, and thus to enable full enforcement of the already-existing law. No provision was repealed.

The court below also erroneously interpreted MDL § 366 (4) as a saving clause, permitting the transient use of the subject building despite the clarifying 2010 amendments. The section states:

No existing right or remedy of any kind shall be lost or impaired by reason of the adoption of this chapter as so amended unless by specific provision of a law which does not amend all articles of this chapter.

(Emphasis added).

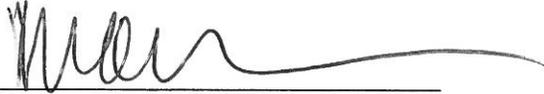
Section 366(4) was included at the time that the MDL was enacted in 1929, continued into its recodification in 1946, and clearly refers to the adoption of the entire MDL itself. It excepts subsequent laws or amendments that do not change the entire MDL itself.

As described above, the remedial nature of the 2010 amendments clarifying the relevant sections of the MDL is absolutely clear. The wording and design of the statute, bill sponsors' memoranda in support, as well as the history and events leading to the amendments, all indicate that the legislation was intended to address and cure a perceived flaw in the law. It was without any doubt intended to be applied retroactively. This clear and unambiguous intent must be the controlling factor in determining retroactivity.

CONCLUSION

The New York Supreme Court order misinterprets the clarifying amendment to the MDL and should be reversed.

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