SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 52M

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LEXINGTON ASSOCIATES, LLC, LEXINGTON RESIDENCE HOTEL, INC.,

Plaintiffs,

- v -

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

Defendants.

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INDEX NO. 161257/2017

MOTION DATE 02/02/2021

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION (Action No. 1)

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LEXINGTON ASSOCIATES, LLC, LEXINGTON RESIDENCE HOTEL, INC.,

Petitioner,

-against-

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

Respondents.

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DECISION + ORDER ON MOTION Index No. 158727/2020 (Action No. 2)

HON. LYLE E. FRANK, J.S.C.:

The following e-filed documents, listed by NYSCEF document number (Action No. 1, Motion 004) 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169 and (Action No. 2, Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85)

were read on these motions for SUMMARY JUDGMENT and ARTICLE 78 RELIEF.

Action No. 1, *Lexington Assocs. LLC v the City of New* York, Index No. 161257/2017, and

Action No. 2, *Lexington Assocs., LLC v Commissioner of the Dept. of Buildings of the City of New*

York, Index No. 158727/2020, are consolidated for disposition and disposed of in accordance with the following decision and order.[1]

Both matters concern the occupancy of the eight-story Old Law Tenement multiple dwelling building located at 120 East 31st Street in Midtown Manhattan, which contains 103 single room occupancy (SRO) units of housing with shared kitchens and bathrooms. Plaintiff/petitioner Lexington Associates, LLC (Lexington Associates) owns the building. Plaintiff/petitioner Lexington Residence Hotel, Inc. (Lexington Residence Hotel) leases the building, and, under the trade name Hotel 31, operates it as a nightly rental transient hotel. The building is advertised as a hotel on the Internet at http://www.hotel31.com.

Defendants contend that, according to the Multiple Dwelling Law, which defendant the New York City Department of Buildings (the DOB) is charged with enforcing, the subject building is Class A, which mean that it may be used solely for permanent occupancy, i.e., occupancy for at least thirty consecutive days, and not as a transient hotel. Conversely, plaintiffs contend that the certificate of occupancy provides for Class B transient use, and that thus, its use is lawful.

Defendant/respondent the Mayor's Office of Special Enforcement (OSE) has been tasked with taking enforcement action against Class A multiple dwellings that have been removed from the permanent residential housing market and converted to transient occupancy as hotels. Beginning in 2013, a DOB inspector working for OSE issued three Notices of Violations (NOVs) returnable to defendant/respondent Office of Administrative Trials and Hearings (OATH), claiming that the certificate of occupancy only permitted Class A non-transient use. After those violations were dismissed, they issued the same violations in 2015, and again in 2017. The reviewing entities, including the DOB Manhattan Borough Commissioner, two OATH Hearing

[1] The Court would like to thank Susan Solitar, Esq, for her assistance in this matter.

Officers, and the OATH Appellate Board, all dismissed those violations because they found that the certificate of occupancy permitted Class B transient use. For example, in 2016, defendant New York City Environmental Control Board (ECB) issued a decision finding that the building could be used for Class B occupancy purposes. And, in 2019, an OATH hearing officer dismissed the 2017 NOVs on the ground that the building's SRO units could lawfully be rented short-term.

However, in 2020, after the seminal decision of *Matter of Terrilee 97th St. LLC v New York City Envtl. Control Bd.* (146 AD3d 716 [1st Dept 2017]), which held that none of the units in a tenement Class A SRO building could be used for transient use occupancy, the OATH Appeal Unit issued a ruling that reinstated the 2017 violations and held that the building's certificate of occupancy only permitted Class A non-transient use. Plaintiffs contend that, in reaching this conclusion, OATH ignored its own prior ruling, as well the historical documents that all confirmed the DOB's prior understanding that the building's certificate occupancy permitted Class B transient use.

Plaintiffs then initiated Action No. 1, in which they seek a declaration that the building's certificate of occupancy permitted Class B transient use, injunctive relief prohibiting defendants from continuing to issue NOVs, and an order invalidating OATH Rule § 3-14, which establishes the procedure for interposing, during the OATH hearing process, a prior adjudication as a defense to a NOV or summons.

Plaintiffs/petitioners also initiated Action No. 2, an Article 78 proceeding in which they challenge the 2020 OATH ruling that reinstated the 2017 violations, on the ground that such holding was arbitrary, capricious, and an error of law, thus necessitating this court to vacate the OATH Appeal Board determination.

In Action No. 1, defendants the City of New York, ECB, OATH, the DOB, and OSE (collectively, the City or defendants), now move, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' claims, and granting the counterclaim asserted in their amended answer.

Plaintiffs cross-move, pursuant to CPLR 3212, for summary judgment on all five of their causes of action, and granting the declaratory and injunctive relief sought therein.

In Action No. 2, plaintiffs/petitioners seek (1) an order under CPLR § 7803 finding that the DOB, OSE, and OATH acted arbitrarily, capriciously, and contrary to law; (ii) a declaratory judgment holding that the building's certificate of occupancy permits Class B transient use; (iii) a declaratory judgment that petitioners did not illegally advertise transient stays in the building; and (iv) an order setting aside and vacating the 2017 violations.

For the reasons set forth below, defendants' motion for summary judgment dismissing the complaint in Action No. 1 is granted, and plaintiffs' cross motion is denied. Defendants' motion for summary judgment on their counterclaim is granted in part. In Action No. 2, plaintiffs/petitioners' application for Article 78 relief is denied.

FACTS

The following factual recitation pertains to both actions; however, the citations to the NYSCEF documents refer to Action No. 1.

LEGAL FRAMEWORK OF THE OCCUPANCY OF MULTIPLE DWELLINGS

A. The Building Codes

The broad jurisdiction of the DOB over New York City buildings and structures is set forth in the New York City Charter:

> "The department shall enforce, with respect to buildings and structures, such provisions of the building code, zoning resolution, multiple dwelling law, labor law and other laws, rules and regulations as may govern the construction, alteration,

> maintenance, use, occupancy, safety, sanitary conditions, mechanical equipment and inspection of buildings or structures in the city"

(New York City Charter, § 643).

In 1898, the first comprehensive Building Code to govern construction and the maintenance of buildings in New York City was enacted. It has been revised periodically: first in 1916, then in 1938, 1968, 2008, and most recently in 2014. The 2008 revision created the New York City Construction Codes, codified in Title 28 of the Administrative Code, which includes the Building Code. The General Administrative Provisions of the New York City Construction Codes contain the following provisions:

> **§ 28-102.4 Existing buildings.**
>
> "The lawful use or occupancy of any existing building or structure . . . may be continued unless a retroactive change is specifically required by the provisions of this code or other applicable laws or rules. The continuation of the unlawful use or occupancy of a building or structure after the effective date of this code contrary to the provisions of this code or other applicable law or rule shall be a violation of this code."
>
> **§ 28-102.4.2 Change in use or occupancy.**
>
> "Any changes made in the use or occupancy of a building or structure not in compliance with this code shall be prohibited and shall be a violation of this code."
>
> **§ 28-210.3 Illegal conversions of dwelling units from permanent residences.**
>
> "dwelling units within . . . a class A multiple dwelling . . . shall be used only for permanent residence purposes. . . . It shall be unlawful for any person or entity who owns or occupies a multiple dwelling or dwelling unit classified for permanent residence purposes to use or occupy, offer or permit the use or occupancy or to convert for use or occupancy such multiple dwelling or dwelling unit for other than permanent residence purposes."
>
> **§ 28-107.2 Definitions**
>
> **Single Room Occupancy Multiple Dwelling: A single room occupancy multiple dwelling means:**

> "1. A 'class A multiple dwelling' used in whole or part . . . for 'single room occupancy' pursuant to section 248 of the New York state multiple dwelling law. . . ."

B. Certificates of Occupancy

New York City Charter § 645 sets forth the powers of the Department of Buildings. With respect to certificates of occupancy, this statute provides that:

> "every certificate of occupancy shall, unless and until set aside, vacated or modified by the board of standards and appeals or a court of competent jurisdiction, ***be and remain binding and conclusive upon all agencies and officers of the city ... as to all matters therein set forth***"
>
> (City Charter § 645 [b] [3] [e] [emphasis added]).

Administrative Code § 28-118.3.2, entitled "Changes inconsistent with existing certificate of occupancy," prohibits a change to a building that is inconsistent with the last issued certificate of occupancy (C of O or CO):

> "No change shall be made to a building, open lot or portion thereof inconsistent with the last issued certificate of occupancy or, where applicable, inconsistent with the last issued certificate of completion for such building or open lot 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."

C. Multiple Dwelling Law

The New York State Multiple Dwelling Law (MDL) defines the various types of dwelling units that fall within its purview. The MDL differentiates between Class A multiple dwellings, which are for permanent residence, that is, at least thirty consecutive days, and Class B multiple dwellings, including nightly hotels, which are for transient occupancy.

Section 4 (8) of the MDL defines the term "class A" dwelling, and prohibits using Class A dwellings for non-permanent resident, or transient purposes. Section 4 (8) (a) defines a 'class A" dwelling as follows:

> "A 'class A' multiple dwelling is a multiple dwelling that is occupied for permanent residence purposes. ***This class shall include tenements*** . . . apartment houses . . . and all other multiple dwellings except class B multiple dwellings. A class A multiple dwelling shall only be used for permanent residence purposes. For the purposes of this definition, 'permanent residence purposes' shall consist of occupancy of a dwelling unit by the same natural person or family for thirty consecutive days or more and a person or family so occupying a dwelling unit shall be referred to herein as the permanent occupants of such dwelling unit"

(MDL § [8] [a] [emphasis added]).

A "class B" dwelling, as contrasted with a "class A" dwelling, is defined as follows:

> "A 'class B' multiple dwelling is a multiple dwelling which is occupied, as a rule transiently, as the more or less temporary abode of individuals or families who are lodged with or without meals. This class shall include hotels, lodging houses, rooming houses, boarding houses, boarding schools, furnished room houses, lodgings, club houses, college and school dormitories and dwellings designed as private dwellings but occupied by one or two families with five or more transient boarders, roomers or lodgers in one household"

(MDL § 4 [9]). Thus, a Class B dwelling may be used for transient occupancy.

D. Single Room Occupancy and the Pack Law

"Single room occupancy" is defined in the MDL as follows:

> "'Single room occupancy' is the occupancy by one or two persons of a single room, or of two or more rooms which are joined together, separated from all other rooms within an apartment in a multiple dwelling, so that the occupant or occupants thereof reside separately and independently of the other occupant or occupants of the same apartment. ***When a class A multiple dwelling is used wholly or in part for single room occupancy, it remains a class A multiple dwelling***"

(MDL § 4 [16] [emphasis added]). Thus, whereas a class A building cannot be used for transient occupancy, a class B building can be so used.

MDL § 248 defines "single room occupancy" in relevant part as follows

> "It shall be unlawful to occupy any other existing class A dwelling or part thereof ... for single room occupancy unless such dwelling or part shall conform to the provisions of this section and to such other provisions of this chapter as were applicable to such dwelling before such conversion. . . . A dwelling occupied pursuant to this section shall be deemed a class A dwelling and dwelling units occupied pursuant to this section shall be occupied for permanent residence

> purposes, as defined in paragraph a of subdivision eight of section four of this chapter"

(MDL § 248).

Historically, "single room occupancy" units came into existence when a large apartment in a Class A building was subdivided into multiple smaller rooms that were occupied separately by occupants who lived independently from each other but shared bathrooms and kitchens (*see* 4/21/11 declaration of James Colgate [NYSCEF Doc No. 120], then-Assistant Commissioner of the New York City Department of Buildings in *Dexter 345, Inc. v Cuomo*, SDNY Docket No. 11 CV 1319, which sets forth an authoritative history of the City's regulation of permanent and transient occupancy in multiple dwellings, ¶ 5, n4, ¶¶ 8 and 10). During the Great Depression, economic instability led building owners to illegally convert large apartments in Class A tenements into smaller, single-room occupancies with shared bathrooms and kitchens (SROs).

In 1939, the Legislature passed the Pack Law, giving owners two options to retroactively legalize their illegally converted units depending, for safety reasons, on the size of the building. Shorter buildings in which the apartments had been subdivided into fewer than 30 units were allowed, as a compromise to the economic necessity of the times, to be occupied transiently as "rooming houses" or "furnished rooms houses." Buildings with subdivided apartments could also be legalized for "single room occupancies," but taller buildings and buildings whose apartments had been subdivided into thirty or more units could be occupied only permanently, since the combination of more people staying for shorter periods (therefore, less familiar with the building's lay-out) increased fire safety hazards even more.

To legalize such conversions, owners were required to obtain new certificates of occupancy for these Class A multiple dwellings showing the new configuration of the interior space, and to comply with additional safety requirements and standards established by the legislature in the Pack

Law, including direct means of egress from each unit and a fire alarm system (*see* Pack Law bill jacket, Ch 769 of the Laws of 1939 [NYSCEF Doc No. 115], at 3-4, 31, 33-36, 40-41, 45-46, 62-63, 71-79, 83-84, 87-88; *see also* MDL § 248 [1]).

The legislature made clear that only buildings that had already been converted from apartments to SRO units prior to passage of the Pack Law would qualify for legalization under the law (*see* MDL § 248 [1], which refers to "existing" class A buildings, that is, class A buildings that had SRO occupancy before the 1939 passage of the Pack Law). The Pack Law was thus intended solely to address a Depression-related housing crisis and motivate owners to make their SROs safer to inhabit (*see* MDL § 4 [16] ["When a class A multiple dwelling is used wholly or in part for single room occupancy, it remains a class A multiple dwelling"]). As such, the Pack Law was never intended to transform Class A permanent occupancy into Class B transient occupancy. Specifically, the Pack Law required Class A buildings operating as SROs to comply with all other requirements applicable to Class A buildings (*see* Ch 769 of the Laws of 1939, at § 5 [Class A building converting to SROs must comply with "the provisions of the [MDL] as were applicable to such building prior to its conversion for single room occupancy"]). The Pack Law did not provide for converting Class A buildings into a Class B occupancy, i.e., transient or hotel occupancy classification.

"Single room occupancy" has consistently been defined in the MDL as Class A, that is, for permanent non-transient occupancy (Colgate declaration, ¶¶ 5, n 4, 10; MDL § 248). The MDL has also consistently defined SROs located in "tenements" like the building at issue as Class A (*see* MDL § 4 [16]). Buildings such as "hotels, lodging houses, rooming houses, boarding houses, boarding schools, furnished room houses, lodgings, club houses, college and school dormitories" are classified in MDL § 4 (9) as Class B multiple dwellings and are lawfully used for transient

occupancy. However, when SRO units are located in Class A buildings (such as the subject building), these units are Class A (*see* MDL § 4 [8] [a]).

E. I-Cards

I-Cards are historical inspection records dating back to the first half of the twentieth century. They are kept for reference purposes by the New York City Department of Housing Preservation and Development (HPD). I-Cards typically identify a building's classification, as well as its layout and the actual uses observed by inspectors conducting physical inspections on various dates. Certificates of Occupancy were not required until 1938. Where no C of O has ever been issued, I-Cards may be used, in conjunction with other historical records, to establish occupancy. However, once a C of O has been issued, pursuant to City Charter § 645 (b) (3) (e), that C of O is the binding and conclusive statement as to all matters set forth in the certificate (Colgate declaration, ¶ 7).

Printed on the I-card form were the following categories for the types of units that might be observed in a building:

Apts. Class "A"

"Other Living Rooms"

Sleeping Rooms Class "B"

Stores – Business

F. The 2010 Amendments to the MDL

MDL § 4 (8) (a) used to define a "Class A multiple dwelling" as a multiple dwelling "which is occupied, as a rule, for permanent residence purposes." The purpose of the phrase "as a rule" was to make it permissible for the occupant of a Class A dwelling unit to have guests sleep over (Colgate declaration, ¶ 15). However, in the case of *City of New York v 330 Continental LLC* (60

AD3d 226 [1st Dept 2009]), the Court ruled that the phrase "as a rule" allowed for a Class A multiple dwelling to also have a secondary use of the building for transient Class B occupancy (*id.* at 231-232). This decision impacted hundreds of thousands of Class A housing units in the City. On July 16, 2010, a bill passed by the New York State legislature was signed into law as Chapter 225 of the Laws of 2010 to amend various provisions of the MDL and Administrative Code to legislatively reverse the holding of *330 Continental*, which allowed secondary transient occupancy of Class A multiple dwellings (Colgate declaration, ¶ 19).

The Introducer's Memorandum in Support, submitted by State Senator Liz Krueger and State Assemblyman Richard Gottfried, states that the purpose of the bill is to "fulfill the original intent of the law, as construed by enforcing agencies, including the DOB, by modifying the specific provisions of the MDL 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" (*see* Bill Jacket [NYSCEF Doc No. 126], at 11). The memorandum in support also pointed to the *330 Continental* decision as an obstacle to enforcing laws against illegal hotels (*id.* at 11-15).

As part of the 2010 amendments, the phrase "as a rule" was deleted from MDL § 4 (8) (a) so as to prevent the use of Class A buildings for transient occupancies except for certain enumerated exceptions not applicable to the building that is the subject of the instant action (Colgate declaration, ¶¶ 19-20).

G. The 2016 "Advertising Act"

With the advent of websites like Airbnb that allow individuals to rent out use of their homes or apartments, many New Yorkers started to rent out their apartments in Class A multiple dwellings for transient use. In October 2016, the State enacted legislation targeted at the advertising of these Airbnb rentals. Specifically, in October 2016, former Governor Cuomo signed into law section

121 of the MDL, and section 27-287.1 of Article 18 of the New York City Administrative Code to expressly prohibit advertising the use or occupancy of dwelling units in Class A multiple dwellings for short-term rentals of fewer than thirty days. Both MDL § 121 and section 27-287.1 provide in their first paragraph that:

> "It shall be unlawful to advertise occupancy or use of dwelling units in a class A multiple dwelling for occupancy that would violate subdivision eight of section four of this chapter defining a 'class A' multiple dwelling as a multiple dwelling that is occupied for permanent residence purposes."

These statutes are known collectively as the "Advertising Act," and took effect on October 21, 2016.

THE BUILDING

A. The Building's C of O and Underlying Documents

The building is an 8-story stone facade fireproof building built in 1901 (complaint [NYSCEF Doc No. 1], ¶ 14). In 1940, the building was renovated so that a portion was devoted to permanent residency apartments and a portion could be used for transient use (*id.*, ¶ 15). The owner of the building then filed an application at the Department of Housing and Buildings (the predecessor agency of the DOB) for the purpose of obtaining a new C of O for the building, which included an Altered Building Application, Alt. No. 2091-1940 (NYSCEF Doc No. 114). The Altered Building Application stated:

> "Proposed Occupancy: Class B Single Room Occupancy (Pack Bill)
>
> Before Alteration: 2 Apts, 16 Rooms on each floor
>
> After Alteration: 16 Rooms on each floor consisting of 1furnished Apt. (3 rms) & 13 rms"

(*see id.*). Plaintiffs contend that the building has had transient use since 1940 with the authorization or approval of the DOB, and point to the Altered Building Application as proof that the building is authorized for Class B transient use (*see* complaint, ¶¶ 16-18).

The owner's application also included an Application for Certificate of Occupancy, dated October 28, 1940 (NYSCEF Doc No. 114), which provided as follows:

"O.L.T. [Old Law Tenement] (S.R.O.)"

In addition to including the same room configuration set forth on the Alteration Application, this document bore the following handwritten statement by DOB Supervisor O'Donnell:

"11-16-40 OLT (SRO)

Elevator, Standpipe

Fire alarm system present

C.O. Inspection:

Bldg conforms to the M.D. Law. Alt made conforms to A.P. [Alteration Permit] 2091-40. No objection to the issuance of a CO. Wm C. O'Donnell, Sup. Insp."

The building's C of O No. 27141 (NYSCEF No. 115) was issued on December 23, 1940. The C of O references the Alteration Application, and states that the building's occupancy classification is as follows:

"Old Law Tenement

Single Room Occupancy."

Although the C of O refers to the Alteration Application, which provided for Class B SROs at the premises, Class B is not listed as one of the occupancy classifications on the C of O (*see id.*).

The C of O further details the permitted use of each floor as follows:

"Cellar boiler room and storage

1st story	One (1) apartment, office Twelve (12) rooms, single room occupancy
2nd to 8th Story [sic]	One (1) Apartment Thirteen (13) rooms, single room occupancy, each floor"

The building's C of O thus provides for a total of 8 apartments and 103 single room occupancy (SRO) units.

B. The Building's I-Cards and Other DOB Documents

Plaintiffs also refer to the building's I-cards as proof that the building is authorized for transient use. The January 22, 1941 I-Card for the building stated that classification of the building was "Old Law Tenement," "Single Room Occ.," and that the premises contains 103 "Class 'B' Sleeping Rooms" and 8 "Class 'A' Apts." Plaintiffs allege that the I-Card confirms that "the DOB understood that language as fully consistent with a building containing both 103 Class B SROs and 8 Class A apartments" (complaint, ¶ 19).

Plaintiffs contend that other DOB records and contemporaneous evidence from around the time of the C of O all show that the DOB knew and approved of the building for transient use. For example, directly following the issuance of the C of O and the I-Card, a DOB application for the premises approved by a DOB Examiner and the Borough Superintendent on October 16, 1941 answered, "How occupied" with "Class B Multiple dwelling." Plaintiffs allege that the fact that application also listed the Owner as "Lexington Hotel Inc." reflects the building's Class B status (*id.*, ¶ 20). In addition, a lease for the premises filed with the City and commencing on August 1, 1946 provided that the premises must continue to be "used and occupied for hotel and/or rooming house purposes . . . only" (*id.*, ¶ 21). Plaintiffs contend that the transient use of the building following the C of O can also be seen in indentures dated December 30, 1946 and January 10,

1949 filed with the City, which both assigned profits from the 'hotel premises located at . . . 120 East 31st Street, Borough of Manhattan, City of New York'" (*id.*, ¶ 22).

ENFORCEMENT AGAINST OCCUPANCY VIOLATIONS

OSE is a governmental entity established by the City through Mayoral Executive Order No. 96 of 2006 (NYSCEF No. 119), which is tasked with overseeing response to conditions at properties throughout the City that threaten quality of life and require a coordinated response from multiple agencies or otherwise demand special attention. The executive order specifically refers to "apartment buildings that have been illegally converted into hotels," as one of the issues that OSE was created to address (*see id.*).

To accomplish its duties, OSE oversees and conducts joint investigations and joint inspections with various City agencies, coordinates the issuance of notices of violations, and commences civil litigation to bring violative real property conditions into compliance with the law. The OSE inspection team is comprised of inspectors who are assigned to work at OSE by the City agencies that formally employ them. Pursuant to Administrative Code § 27-287.1 and Mayoral Executive Order No. 22 of 2016, OSE is also tasked with taking enforcement action against unlawful advertising of illegal occupancy in multiple dwellings.

Plaintiff alleges that OSE targeted SRO owners to prevent them from renting rooms on a transient basis, and that its goal was to force SRO owners either to rent only to permanent tenants or to close their doors entirely (complaint, ¶ 23). In furtherance of this policy, OSE started to issue building code violations to SRO buildings. Plaintiff alleges that many of these buildings had been used for transient purposes for decades, but that, suddenly, OSE claimed that the SROs were being used in a manner contrary to their certificates of occupancy (*id.*, ¶ 24).

THE ADJUDICATION OF NOTICES OF VIOLATION

A. OATH and the ECB

City Charter Chapter 45-A, §§ 1048 et seq., establishes OATH, which conducts adjudicatory hearings for all of the City's agencies unless otherwise provided for (City Charter § 1048 [1]). City Charter § 1049-a establishes the ECB as part of OATH. The ECB is an administrative tribunal headed by a thirteen-member board that adjudicates violations of the Administrative Code and the Rules of the City of New York (RCNY). Pursuant to City Charter §§ 1049-a (c) (1) and 1049-a (d) (1) (a), the ECB adjudicates violations of a broad range of laws and regulations, including matters related to sanitation, environmental protection, fire safety, parks, street vending, public roads, landmarks, and "the . . . use, occupancy . . . of buildings or structures . . . within the jurisdiction of the department of buildings."

Pursuant to City Charter § 1049 (2) (a), OATH is authorized to promulgate rules for the conducting of hearings. Effective August 7, 2016, Title 48 RCNY § 6-01 brought ECB hearings under the auspices of the OATH Hearings Division, where summonses, formerly known as NOVs, returnable to ECB are adjudicated. As of that date, Chapter 3 of Title 48 of the RCNY was repealed and re-enacted, and the regulations that govern ECB administrative hearings are now set forth in both Chapters 3 and 6 of Title 48 of the RCNY.

Summonses are adjudicated through administrative hearings presided over by hearing officers in OATH's Hearings Division. After conducting the administrative hearing, the hearing officer prepares a written Decision and Order. A party aggrieved by a hearing officer's Decision and Order may submit an appeal to the Appeals Unit, which determines whether the findings of the hearing officer are supported by a preponderance of the evidence and whether the Decision and Order is supported by the law. The Board reviews the recommendations of the Appeals Unit,

and renders an Appeal Decision and Order, which constitutes a final agency determination of OATH that is ripe for judicial review pursuant to CPLR Article 78.

ENFORCEMENT OF THE MDL AT THE BUILDING

Based upon inspections conducted by an inspector who issued NOVs in 2013 and 2015, only 18 dwelling units within the building remained occupied by permanent residents. The remaining 93 units of housing were being operated and made available for transient stays of fewer than 30 consecutive days.

A. The 2013 Notices of Violation

On October 17, 2013, Vladimir Pugach, a DOB inspector who is assigned to OSE, inspected the building, and issued several NOVs to plaintiff Lexington Associates (*see* NYSCEF Doc No. 121). In NOV 35033774M (the 2013 Occupancy NOV), Pugach alleged unlawful transient occupancy of the subject building in violation of the building's C of O:

> "**NOV 35033774M**:
>
> Permanent dwelling used/converted for other than permanent residential purposes. C/O # 27147 indicates building to be legally approved as a class a 'apartments and OLT Class A' SRO's. Now Building Occupied as a transient hotel with 111 Rooms 18 rooms as permanent residences only.
>
> Remedy: Discontinue illegal occupancy."

At the same time, Pugach also issued a second NOV (the 2013 Door Swing NOV) asserting that Lexington Associates violated New York City Building Code Section 1008.1.2.2:

> "**NOV 35033800R**:
>
> failure to comply with direction of [door] swing. All exit doors leading into exit stair (internal) and exit door leading to cellar from fire escape swings against direction of egress travel for transient occupancy."

Lexington Associates challenged the 2013 NOVs, arguing that based on the above-described facts, the C of O classified the building as containing Class B SRO rooms, which permit transient use, and not Class A SROs as alleged in the 2013 NOVs (complaint, ¶ 28).

On November 29, 2013, Renaldo Hylton, the Executive Director of the DOB's Administrative Enforcement Unit, wrote a letter to Administrate Law Judge (ALJ) Kelly Corso, who was the Deputy Tribunal Affairs Director of the ECB. In that letter (NYSCEF Doc No. 132), Hylton stated that the DOB was withdrawing prosecution of the 2013 NOVs (the 2013 Withdrawal of Prosecution Letter) because:

> "The Borough Commissioner has reviewed Department records confirming the building is in compliance with its Certificate of Occupancy (and I-Card) allowing for Class B SROs which by definition is for transient use"

(complaint, ¶ 29).

The ALJ subsequently formally dismissed prosecution of the 2013 NOVs following a hearing on December 2, 2013 (the 2013 Decision & Order). In the section of the 2013 Decision & Order entitled "Findings of Fact and Conclusions of Law," the judge stated that both 2013 NOVs must be "dismissed," because the "Petitioner concedes that its records confirm that the cited premises is in compliance with its certification of occupancy (and I Card) allowing for Class B SROs." No appeal was ever filed challenging the 2013 Decision & Order (complaint, ¶ 30).

B. The 2015 Notices of Violation

On January 14, 2015, Pugach issued new NOVs for the building (*see* NYSCEF Doc No. 123). NOV 35151432J (the 2015 Occupancy NOV) was substantively identical to the 2013 Occupancy NOV, citing to the same infraction codes and provisions of law, and Pugach wrote almost the exact same narrative as the one he wrote in the 2013 Occupancy NOV:

"**NOV 35151432J**:

> "Permanent dwelling used/converted for other than permanent residential purposes. C/O # 27147 indicates building to be legally approved as a class A 'apartments and OLT Class A' SRO's. Now Building Occupied as a transient use with 90 Rooms 18 rooms as permanent residences only.
>
> Remedy: Discontinue illegal occupancy."

Again, as in 2013, Pugach also issued Lexington Associates a NOV asserting violation of Building Code Section 1008.1.2.2 (the 2015 Door Swing NOV), and wrote the same narrative for the 2015 Door Swing NOV as he did in the 2013 Door Swing NOV:

> "**NOV 35151434N**:
>
> failure to comply with direction of [door] swing. All exit doors swing against direction of egress travel for transient hotel."

C. Dismissal of the 2015 NOVs

Lexington Associates again challenged the 2015 NOVs. During a two-day hearing, the OSE argued that the ALJ should find that the C of O only permits Class A SROs. The OSE asserted that, despite the reference to Old Law Tenement and to Single Room Occupancy on the C of O, the entire building was nonetheless only to be used as an Old Law Tenement, and that the MDL otherwise classifies both Old Law Tenements and SROs as Class A dwellings. The OSE also argued to the ALJ that the 2013 Withdrawal of Prosecution Letter was not binding because it was based on a mistaken reading of the DOB's records (complaint, ¶ 35).

By decision and order dated May 20, 2016 (NYSCEF Doc No. 124), the ALJ rejected the OSE's arguments and dismissed the 2015 NOVs (the 2016 ALJ Decision & Order). With regard to the 2015 Occupancy NOV, the ALJ found that:

> "Alt. No. 2091 is clearly and prominently referenced on the Certificate of Occupancy and cites the proposed occupancy as 'Class B Single Room Occupancy,' clearly indicating that was and is the allowable occupancy as per the Certificate of Occupancy, allowing for eight Class A units and 103 Class B units"

(2016 ALJ Decision & Order at 5).

With regard to the 2013 Withdrawal of Prosecution Letter, the ALJ stated that the appellant did "not present[] any evidence to show that Mr. Hylton and/or the 2013 Borough Commissioner have re-evaluated the issue and changed their opinions so as to be in agreement with" the OSE's new interpretation of the C of O (*id.*). Therefore, the ALJ found that the 2013 Withdrawal of Prosecution Letter was persuasive and correct "when viewed in light of the history of the cited building and supporting documentation" (*id.*).

During the hearing, the DOB conceded that the 2015 Door Swing NOV "rises or falls depending on" the 2015 Occupancy NOV, because it is based on Pugach's assertion that the building had been illegally converted for transient use. Because the ALJ found that the building was legally renting the 103 Class B rooms for transient use, she dismissed the 2015 Door Swing NOV (*id.* at 6).

In sum, the ALJ stated that all of the evidence presented by Lexington Associates combined to create "a weighty rebuttal to the cited charges" and, therefore, warranted their dismissal (*id.*).

D. On Appeal the ECB Affirmed the Dismissal of the 2015 NOVs

The OSE appealed the ALJ's order to the ECB. At the ECB, the OSE made the same arguments as it had before the ALJ. In an order dated September 8, 2016 (the 2016 ECB Order [NYSCEF Doc No. 125]), the ECB panel affirmed the 2016 ALJ Decision & Order. The panel determined that the designation "Old Law Tenement" on the C of O only referred to the 8 Class A apartments, and the "single room occupancy" designation referred to the 103 SROs listed on the C of O. The ECB panel found that the OSE had presented no evidence to support its position that the entire building should be classified as Class A:

> "Subsequent DOB . . . records for the premises from 1940 to 2015 also list the cited SROs at the premises as Class 'B' units. Petitioner's attorney has pointed to no evidence or authority to support his contention that the reference to Class 'B' units in these records means that the SROs are configured as Class 'B' units within the

> Class 'A' occupancy. Petitioner has pointed to no records that list the cited SROs as Class 'A' dwellings"

(2016 ECB Order at 5).

Like the ALJ, the panel found that the 2013 Withdrawal of Prosecution Letter served as further evidence that the OSE itself had already determined that the C of O permitted Class B SRO rooms in the Building:

> "The Board notes, however, that DOB's withdrawal letter stated that the Borough Commissioner had reviewed DOB records and confirmed that the building was in compliance with its CO allowing for Class 'B' SROs. Petitioner's attorney submitted no evidence that the Borough Commissioner had changed his position on the legality of the occupancy of the SROs for transient use"

(*id*. at 6).

Without any substantive discussion, the ECB panel affirmed the ALJ's dismissal of the 2015 Door Swing NOV (*see id*.). The OSE did not appeal.

E. The January 31, 2017 First Department Decision in the *Terrilee* Matter

On January 31, 2017, the Appellate Division, First Department, issued a seminal decision that interpreted a C of O of another Old Law Tenement owned by Terrilee 97th Street LLC. The C of O stated that the building was an "Old Law Tenement Class 'A' Mult. Dwelling & S.R.O." The First Department found that, pursuant to the 2010 amendments to the MDL, the *Terrilee* tenement building, which consisted solely of SRO units, could be used only for permanent occupancy, not transient occupancy, even if such use had been lawful prior to the 2010 amendments to the MDL (*Matter of Terrilee 97th St. LLC*, 146 AD3d at 716).

F. The 2017 NOVS

On April 7, 2017, Pugach again came to inspect the building, and on behalf of the OSE and the DOB, he issued new NOVs for the building (*see* NYSCEF Doc No. 127). Violation No. 35220846X was identical to the 2013 Occupancy NOV and 2015 Occupancy NOV (the 2017 Occupancy NOV). It cited the same two infraction codes associated with the same two provisions of law as the 2013 Occupancy NOV and the 2015 Occupancy NOV. Again, the narrative portion of the 2017 Occupancy NOV was nearly indistinguishable from the narrative in the previous two violations:

> "**NOV 35220846X**:
>
> Permanent dwelling used/converted for other than permanent residential purposes. C/O # 27147 indicates building to be legally approved as a class A 'apt and O.L.T. Class A' SRO's. Now Building Occupied as a transient hotel with 66 Occupied Rooms."
>
> Remedy: Discontinue illegal occupancy."

Pugach also issued an NOV (Violation No. 35220847H) for the alleged door swing violation (the 2017 Door Swing NOV). Again, he cited to the same infraction code (B106), the same section of law (Section 1008.1.2.2) and wrote the same narrative for the 2017 Door Swing NOV as he did in 2013 and 2015:

> "**NOV 35220847H**:
>
> failure to comply with direction of [door] swing. All exit doors swing against direction of egress travel for transient (hotel)."

G. The 2017 Advertising Summonses

In addition, on April 7, 2017, Pugach issued nine summonses (the 2017 Advertising Summonses [NYSCEF Doc No. 128]) to plaintiff Lexington Residence Hotel under 2016's Advertising Act regarding plaintiffs' advertisement of transient occupancy at the building. Each

summons was predicated on a different advertisement for short-term stays that was found by an inspector doing Internet searches. The summonses read as follows:

> "Unlawfully advertised on [name of website] listing [listing identifier] for use or occupancy in violation of MDL 4(8). 120 E 31 St (Hotel 31), a Class A multiple dwelling."

Each of the 2017 Advertising Summonses is substantively the same, with the only difference that each lists a different website that Pugach claims Hotel 31 illegally advertised on. The websites included Hotels.com, Booking.com, and Tripadvisor.com.

H. Two 2018 OATH Decisions Regarding the Branic Old Law Tenement

In 2018, OATH issued two appeal decisions regarding an Old Law Tenement owned by Branic International Realty Corp. whose C of O stated that its lawful occupancy was the same as Terrilee's: "Old Law Tenement Class 'A' Mult. Dwelling & S.R.O." The building consisted of SRO units, two offices, and a store. At issue was whether the notation "& S.R.O." provided for the SRO units in the building to be occupied transiently, that is, as Class B dwelling units. In decisions dated January 4, 2018 and September 6, 2018 (*see* NYSCEF Doc No. 130), the OATH Appeal Decisions rejected every argument in favor of that interpretation of the C of O, and ruled that the SRO units were to be occupied for permanent residence, that is, as Class A units.

I. OATH Overruled Its Own Appeal Decisions Regarding Transient Occupancy of Tenements

In February 2019, in the context of an OATH appeal regarding unlawful transient use summonses issued to the *Terrilee* Old Law Tenement containing SRO units, *DOB v Terrilee 97th Street LLC*, OATH Appeal No. 1801127 (NYSCEF Doc No. 131), OATH, relying on the 2017 First Department *Terrilee* decision, expressly overruled its own 2016 ECB Order to the extent that it allowed transient occupancy of the building, as well its 2011 determination in *City of New York*

v Helms Realty Corp., OATH Appeal No. 1601233, the only other OATH decision ever allowing transient occupancy of an Old Law Tenement containing SRO units:

> "On this record, the Board finds that the cited premises is a Class 'A' multiple dwelling subject to the amended MDL, and, consequently, the transient use of such premises is a violation of Code § 28-210.3. The CO lists the occupancy classification as 'Old Law Tenement Class "A" Multiple Dwelling & S.R.O.' Such occupancy classification language has already been determined by the Board to be synonymous with a SRO Class 'A' multiple dwelling as defined in Code § 28-107.2. *See Branic International Realty Corp.*, 1700915; *NYC v Branic International Realty Corp.*, Appeal No. 1800766 (September 6, 2018). Under *Matter of Terrilee 97th Street*, 146 AD3d 716, once a building is classified as a Class 'A' building, the amended MDL provisions of 2010, effective in 2011, apply. There the Appellate Division found that the 2010 amendments extinguished the accrued rights which a premises owner otherwise would have enjoyed under MDL § 366 (l) or the ZR's nonconforming use scheme. MDL § 4 (8) (a), as amended in 2010, provides that a class 'A' multiple dwelling shall only be used for permanent residence purposes. And MDL § 248, Single Room Occupancy, in Article Seven, Tenements, provides that '[a] dwelling occupied pursuant to this section shall be deemed a class A dwelling and dwelling units occupied pursuant to this section shall be occupied for permanent residence purposes, as defined in paragraph a of subdivision eight of section four of this chapter.' Accordingly, historical legal Class 'B' SRO use in a tenement of any Class 'A' multiple dwelling, even if formerly authorized by DOB records could no longer legally continue after the 2010 amendments. ***To the extent that the appeal decisions in Lexington Associates, LLC, 1600696, and Helms Realty Corp., 1601233, found otherwise, those decisions are overruled***'

(*id*. at 3-4 [emphasis added]). The ECB treated the entire building as a class A dwelling, despite the fact that some of its rooms historically had been used as SROs for transient occupancy.

In March 2019, the OATH Appeals Unit issued a decision in *DOB v Dexter Properties LLC*, OATH Appeal No. 1801766 (*see* NYSCEF Doc No. 133). It again found that a building whose C of O stated it was a "New Law Tenement Class A Mult Dwell - Single Room Occupancy" could lawfully be occupied only by permanent residents and could not be occupied by transient guests.

In June 2019, in the context of an administrative appeal at OATH regarding Advertising Act Summonses issued to the Branic Old Law Tenement containing SROs, OATH, relying on the

2017 First Department *Terrilee* decision, again expressly overruled its own 2016 ECB Order to the extent it allowed transient occupancy of the subject building, as well as the *Helms* decision (*OSE v Branic Intl. Realty Corp.*, OATH Appeal No. 1900403 [June 27, 2019] [NYSCEF Doc No. 132]):

> "The Board finds that the 1964 C of O does not authorize the use of the premises as Class 'B' SROs for the reasons set forth in its two prior decisions issued to Respondent. ***The Board notes that Lexington Associates, LLC and Helms Realty Corp., to the extent they held that historical Class 'B' SRO use in a tenement or Class 'A' multiple dwelling could legally continue after the 2011 MDL amendments, were overruled***"

(*id*. at 3 [emphasis added]).

Defendants submit four additional OATH Appeal Decisions that have similarly found Class A occupancy to be the only lawful occupancy for SRO units in Old Law Tenements -- *NYC v Terrilee 97th Street, LLC*, Appeal No. 1300391 (July 25, 2013); *NYC v Grand Imperial LLC*, Appeal No. 1700215 (May 4, 2017); *NYC v Grand Imperial LLC*, Appeal No. 1700520 (July 20, 2017); and *DOB v Terrilee 97th Street, LLC*, Appeal No. 2000284 (September 10, 2020) (*see* NYSCEF Doc No. 133).

J. The OATH Hearing Decisions on the Lexington 2017 NOVs and Summonses

The two 2017 occupancy NOVs and the nine advertising summonses were heard before an OATH Hearing Officer on December 12, 2019. By OATH decision dated December 30, 2019 (NYSCEF Doc No. 134), the OATH Hearing Officer dismissed the two NOVs related to transient occupancy on the basis that the due process rights of plaintiff Lexington Associates had been violated by the issuance of a third round of NOVs for illegal conversion of permanent residential dwelling units to short-term transient occupancy contrary to the building's C of O. The Hearing Officer also stated that he would have found that the subject building's SRO units could lawfully be rented short-term and dismissed the NOVs on the substance (*see id*.).

By OATH decision dated December 31, 2019 (NYSCEF Doc No. 135), the OATH Hearing Officer dismissed the nine summonses related to the advertising of transient occupancy at the building, as a finding of violation on those summonses depended on a finding of liability on the occupancy charges, which the Hearing Officer had dismissed.

The City appealed the main occupancy NOV for illegal conversion and the nine summonses for illegal advertising to the OATH Appeals Division.

K. The 2020 OATH Appeal Decisions on the 2017 NOVs and Summonses

By Appeal Decision dated June 18, 2020, OATH found that the building was, by definition a class "A" multiple dwelling," and that plaintiffs continued transient occupancy of SROs in a class "A" multiple dwelling resulted in violations of the New York City Administrative Code:

> "The Board further finds that Respondent did not refute Petitioner's case by establishing that its premises was authorized for occupancy as a class 'B' multiple dwelling. Code § 28-210.3 prohibits any person or entity who owns a multiple dwelling classified for permanent residence purposes to occupy it for other than permanent residence purposes. Here, Respondent's CO classified the premises' occupancy as 'Old Law Tenement Single Room Occupancy.' Per MDL § 4 (11), a tenement is by definition a class 'A' multiple dwelling, which contradicts Respondent's claim that the premises is a class 'B' multiple dwelling. *See* MDL § 4 (8) (a) (providing that class 'A' multiple dwellings are all multiple dwellings *except* class 'B' multiple dwellings). Consequently, once a building is classified as a class 'A' multiple dwelling, the 2010 amendments to the MDL (effective May 1, 2011) apply. *See Matter of Terrilee 97th St. LLC*, 146 AD3d 716 ('None of the units in petitioner's class A multiple dwelling may be used for occupancy periods shorter than 30 days . . . . The 2010 amendments extinguished the accrued rights which petitioner otherwise would have enjoyed under Multiple Dwelling Law § 366 (1)'); *Terrilee*, 1801127 ('historical legal class "B" SRO use in a tenement or any class "A" multiple dwelling, even if formerly authorized by DOB records, could no longer continue after the 2010 amendments. To the extent that the appeal decision[] . . . in *Lexington Associates, LLC*, 1600696 . . . found otherwise, [that] decision[] [is] overruled'). Consequently, Respondent's continued transient occupancy of SROs in a class 'A' multiple dwelling results in violations of Code §§ 28-210.3 and 28-2021"

(*DOB v Lexington Associates*, OATH Appeal No. 2000325, at 5 [June 18, 2020] [NYSCEF Doc No. 138]).

By a second Appeal Decision dated June 18, 2020 (collectively with the first decision, the 2020 OATH Decision), OATH found plaintiff Lexington Residence Hotel in violation for illegally advertising permanent dwelling units for short-term transient occupancy (*OSE v Lexington Residence*, OATH Appeal No. 2000320, at 3 [June 18, 2020] [NYSCEF Doc No. 139]).

ACTION NO. 1

A. Discovery Motions

On September 23, 2019, plaintiffs served document demands and notices of deposition to depose two City employees. The City answered some of the document demands and objected to the others. Plaintiffs made a motion to compel further document discovery (NYSCEF Doc No. 44). With respect to the notices of deposition, the City moved for protective orders, and plaintiffs submitted papers in opposition.

B. Plaintiffs' Request for a Stay of Action No. 1

While the appeals of the adverse decisions received at OATH were pending before the OATH Appeals Unit, plaintiffs requested that this court stay the proceedings in Action No. 1 (*see* plaintiffs' letter dated June 10, 2020 [NYSCEF Doc No. 136]). In the context of the court granting plaintiffs' request for a stay of the action pending decisions at OATH, by order dated June 11, 2020 (NYSCEF Doc No. 137), the discovery motions were denied without prejudice to bring them again.

C. The City's Amendment of Its Answer to Interpose a Counterclaim

By letter dated July 7, 2020 (NYSCEF Doc No. 140), plaintiffs stated their intention to discontinue Action No. 1 after losing the 2020 OATH Decision, which plaintiffs intended to challenge instead via an Article 78 proceeding.

By letters dated July 8, 2020 and July 10, 2020 (NYSCEF Doc No. 141), the City stated its opposition to a discontinuance of Action No. 1, and its intention to move to amend its answer so as to add a counterclaim that could result in a full resolution by this court of the occupancy issue.

By motion dated July 10, 2020 (NYSCEF Doc No. 86), the City moved to amend its answer to add a counterclaim for a declaration as to the lawful occupancy of the building. By order dated July 28, 2020 (NYSCEF Doc No. 100), the City's motion to amend was granted.

D. The Causes of Action in the Complaint

By summons and complaint dated December 20, 2017, plaintiffs commenced Action No. 1, in which they assert five causes of action. In summary, the first, fourth, and fifth causes of action challenge continued enforcement attempts by the City against transient hotel occupancy in the building (collectively, the occupancy causes of action). The second and third causes of action challenge the validity of an OATH procedural rule promulgated in 2012 and codified in Title 48 of the Rules of the City of New York (RCNY) as 48 RCNY § 3-14 (collectively, the procedural rules causes of action).

1. The Causes of Action Concerning the Occupancy of the Building

The first cause of action is for a declaratory judgment that the "2016 ECB Order" that found transient occupancy lawful in the building is binding on the City and its agencies, and that the City and its agencies are estopped, both by res judicata and collateral estoppel, from re-litigating the issue of the proper occupancy classification of the building or its use for transient

stays. Plaintiffs also seek an injunction against the City taking any further enforcement action against plaintiffs' use of the building as a transient hotel (complaint, ¶¶ 67-79).

In the fourth cause of action, plaintiffs seek injunctive relief against the City's issuance of summonses against plaintiffs under the Class A Advertising Law for transient occupancy of the building on the basis that it was unconstitutional (*id.*, ¶¶ 102-106).

In the fifth cause of action, plaintiffs seek injunctive relief against the City's issuance of summonses against plaintiffs under the Class A Advertising Law as violative of the NY State Constitution (*id.*, ¶¶ 107-109).

2. The Causes of Action Challenging an OATH Procedural Rule

In the second cause of action, plaintiffs seek a declaratory judgment that OATH Rule 48 RCNY § 3-14, which establishes the procedure for interposing, during the OATH hearing process, a prior adjudication as a defense to an NOV or summons, is invalid as ultra vires and is in excess of OATH's rule-making authority (*id.*, ¶¶ 80-88).

In the third cause of action, plaintiffs seek a declaratory judgment that OATH Rule 48 RCNY § 3-14 is unconstitutional, as it effectuates a violation of due process (*id.*, ¶¶ 89-101).

E. Defendants' Counterclaim

In their counterclaim, defendants seek "declaratory and injunctive relief against the owners, managers, lessees, licensees, operators, and agents of the subject building, declaring that the subject building and all of its dwelling units may lawfully be advertised and occupied only for permanent residence purposes, and enjoining the owners, managers, lessees, licensees, operators, and agents of the subject building from advertising and operating the subject building for transient term occupancy in violation of the Multiple Dwelling Law" (amended answer [NYSCEF Doc No. 102], ¶ 112).

ACTION NO. 2 (ARTICLE 78 PETITION)

By Notice of Petition and Combined Verified Article 78 and Declaratory Judgment Petition efiled on October 16, 2020, plaintiffs/petitioners commenced a hybrid action-proceeding to challenge the OATH Appeal Decisions on the 2017 Occupancy NOVs and the 2017 Advertising Summonses.

DISCUSSION

Action No. 1 -- The City's Motion for Summary Judgment and Plaintiffs' Cross Motion for Summary Judgment

"'[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993] [citation omitted]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853; *see also Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982 [1993]).

The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. [DE] v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]). The court is required to examine the evidence in a light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). Summary judgment should not be granted if there are genuine material issues of disputed fact (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *Tronlone v Lac d'Amiante Du Quebec*, 297 AD2d 528, 528-529 [1st Dept 2002], *affd* 99 NY2d 647 [2003]).

As set forth below, this court finds that defendants are entitled to summary judgment dismissing the complaint, as well as summary judgment on part of their counterclaim. Accordingly, plaintiffs' cross motion for summary judgment is denied.

A. The Occupancy Causes of Action (First, Fourth and Fifth Causes of Action)

In support of their motion for summary judgment, defendants contend that they are entitled to a dismissal of all of the occupancy causes of action set forth in the complaint because the law is clear that the only lawful occupancy of the subject building is for permanent occupancy, not transient occupancy. On that basis, the first, fourth, and fifth causes of action, which seek to enjoin further enforcement by the City against the unlawful transient occupancy of the subject building as a hotel and the advertisement of that unlawful occupancy, must be dismissed.

In opposition, plaintiffs contend that the 2016 ECB Order correctly found that the C of O permits Class B transient occupancy of the building, and that the OATH Board should have applied res judicata and collateral estoppel to dismiss the 2017 NOVs and the 2017 advertising summonses.

However, in making this argument, plaintiffs ignore the controlling *Terrilee* decision, which is contrary to the 2016 ECB Order. In *Terrilee*, the Appellate Division, First Department held that a building whose C of O stated that it was an Old Law Tenement (pursuant to MDL §§ 4 [8] [a] and 248, by definition Class A) that contained SRO units, could lawfully be occupied only for permanent occupancy, not transient occupancy, as follows:

> "Under the Multiple Dwelling Law (MDL), as amended effective May 1, 2011 [citation omitted], none of the units in petitioner's Class A multiple dwelling may be used for occupancy periods shorter than 30 days (*see* MDL §§ 4 [8] [a], 248 [1]; *Matter of Grand Imperial LLC v New York City Bd. Of Stds. & Appeals*,137 AD3d 579, 519 [1st Dept 2016], *lv denied* 28 NY3d 907 [2016]). Petitioner's suggestion that the 1947 I-card (which recorded use of the subject building for 'Class B sleeping rooms'), and not the most recent 1964 certificate of occupancy (CO), controls the building's lawful occupancy is meritless (*see Matter of 345 W. 70th*

> *Tenants Corp. v New York City Envtl. Control Bd.*, 143 AD3d 654 [1st Dept 2016]). Petitioner's contention that it has, in effect, grandfathered rights to continue its preexisting legal use of the premises also lacks merit. The 2010 amendments extinguished the accrued rights which petitioner might otherwise have enjoyed under MDL § 366 (1) (*see Grand Imperial*, 137 AD3d at 579). Hence, ECB properly reinstated NOV 349-803-05Z, stating that the building's use 'in part as a transient hotel' violated the CO (*see* Administrative Code of City of NY § 28-118.3.2)"

(*id*. at 716).

Applying this precedent here, this court finds that no disputed issue of fact exists to preclude granting summary judgment to defendants. According to City Charter § 645 (b) (3) (e), the C of O is "binding and conclusive upon all agencies and officers of the city . . . as to all matters therein set forth." By the express terms of its C of O, the building is an "Old Law Tenement" under the MDL, and therefore a Class A multiple dwelling. The MDL unambiguously classifies tenements as Class A, and not Class B (MDL §§ 4 [8] [a] and 4 [9]). Although plaintiffs point to the fact that the *Terrilee* C of O includes not only language identical to that of the building's C of O ("Old Law Tenement Single Room Occupancy") but the additional phrase "Class 'A' Mult. Dwelling," this is irrelevant, as "the status of the [building] . . . as an old law tenement is sufficient to make it a class A dwelling" (*Helms Realty Corp. v City of New York*, 397 F Supp3d 379, 387, n 6 [SDNY 2019], *vacated and remanded on other grounds*, 820 Fed Appx 79 [2d Cir 2020]) (the decision was vacated on the basis of *Younger* abstention).

Plaintiffs also argue that the reference to "SRO" on the C of O signifies and authorizes Class B transient use. However, contrary to what plaintiffs contend, "it does not matter that the [building] contains dozens of SROs, even class B SROs," because "'[w]hen a class A multiple dwelling is used wholly or in part for single room occupancy, it remains a Class A multiple dwelling'" (*id*., citing MDL § 4 [16]).

Plaintiffs also point to a number of 1940 and 1941 documents, including the I-Cards the Altered Building Application, the CO Inspection document, indentures, and a lease signed by the prior owners of the building as evidence that the lawful occupancy of the building is Class B, or transient occupancy. However, as a matter of law, the documents upon which plaintiff rely do not determine the lawful occupancy of the building, which is only determined by the C of O (*see e.g. Matter of 345 W. 70th Tenants Corp. v New York City Envtl. Control Bd.*, 143 AD3d 654, 654 [1st Dept 2016] ["The 1945 I-card, which indicates that the cellar apartment was not in use at the time of a November 1945 inspection, does not establish any change in the apartment's legal use. I-cards 'provide evidence of the inspector's observations and thus of the nature of the use or occupancy, whether legal or not,' but do not 'amend or supersede the certificate of occupancy' or themselves 'determine the legality of an existing use or occupancy'"] [citation omitted]).

Plaintiffs also contend that these documents also show that the DOB knew and approved of the building for transient use. However, after *Terrilee*, which held that the 2010 amendments to the MDL "extinguished" the pre-existing rights of a class A multiple dwelling to use any of its rooms for transient occupancy, "any disputed facts regarding the historical use of the [building] are not material to plaintiffs' claims" (*Helms Realty Corp.*, 397 F Supp3d at 387).

Plaintiffs further argue that, by applying the Class A Advertising Law to Hotel 31, defendants are attempting to prevent Hotel 31 from advertising the legal use of the building. Plaintiffs contend that, because advertising is a form of protected free speech, preventing Hotel 31 from advertising the legal use of the building is a violation of their free speech rights as guaranteed under the First and Fourteenth Amendments to the U.S. Constitution, and Article I, § 8 of the New York Constitution. However, because use of the building for transient occupancy is illegal, neither the U.S. Constitution nor the New York Constitution "protects plaintiffs' advertisement of such

use" (*Helms*, 397 F Supp3d at 387, citing *Zauderer v Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 US 626, 638 [1985] ["The States and the Federal Government are free to prevent the dissemination of commercial speech . . . that proposes an illegal transaction"]).

Finally, plaintiffs argue that the OATH board should have applied res judicata and collateral estoppel to dismiss the 2017 NOVs and the 2017 Advertising Summonses. Plaintiffs contend that the 2016 ECB Order is binding, and that thus, the City is estopped from relitigating the issue of the proper occupancy classification of the building or its use for transient stays.

The court rejects this argument. Plaintiffs' res judicata and collateral estoppel claims fail because the City cannot be enjoined from correcting prior errors or enjoining unlawful conduct, even if long-standing.

"It is blackletter law that a valid final judgment bars future actions between the same parties on the same cause of action" (*People v Cook*, 128 AD3d 928, 932 [2d Dept 2015] [citation and quotation marks omitted], *affd* 29 NY3d 114 [2017] [internal quotations omitted]). The courts have implemented two sub-species of this principal, res judicata and collateral estoppel. Res judicata (i.e., claims estoppel) bars a party from "bringing additional actions between the same parties on the same claims based upon the same harm" (*Matter of LaRocco v Goord*, 43 AD3d 500, 500 [3d Dept 2007]). "Collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party or those in privity," but does not require the parties to be identical (*Buechel v Bain*, 97 NY2d 295, 303 [2001]).

For collateral estoppel, or issue preclusion, to apply, "[i]t is required that an issue in the present proceeding be identical to that necessarily decided in a prior proceeding, and that in the prior proceeding the party against whom preclusion is sought was accorded a full and fair

opportunity to contest the issue" (*Allied Chem. v Niagara Mohawk Power Corp.*, 72 NY2d 271, 276 [1988]). Collateral estoppel can apply to determinations of administrative agencies if the agency proceeding was "quasi-judicial" (*id.* at 276).

However, "[r]es judicata and collateral estoppel do not cement the status quo into perpetuity," because "'[m]odifications in 'controlling legal principles' could render a previous determination inconsistent with prevailing doctrine'" (*Monahan v New York City Dept. of Corrections*, 214 F3d 275, 290 [2d Cir 2000] [citations omitted]; *see e.g. Matter of Hodes v Axelrod*, 70 NY2d 364, 373-374 [1987] [on the basis of a change in controlling law, court found that res judicata did not bar a second operating certificate revocation proceeding against a nursing home based on the same industry-related felony convictions since "the statutory rights of the parties were altered between the first and second proceedings," and "[i]f the pending proceeding against petitioners under the amended statute were precluded by res judicata, petitioners would be left with a license to operate a public health facility . . . despite the fact that others operating comparable facilities automatically lose their licenses upon comparable convictions"]).

Moreover, the decision of an administrative tribunal cannot prevail when there is contrary controlling authority from an appellate court (*see Matter of 345 W. 70th Tenants Corp.*, 143 AD3d at 655 ["ECB's own administrative precedent regarding the legal effect of i-Cards is unavailing, as (it is) based on (a) fundamental legal error"]; *see also Matter of Charles A. Field Delivery Serv. (Roberts)*, 66 NY2d 516, 518-19 [1985] ["Stare decisis is no more an inexorable command for administrative agencies than it is for courts. They are, therefore, free, like courts, to correct a prior erroneous interpretation of the law by modifying or overruling a past decision"] [internal citations omitted]).

In *Helms Realty Corp.* (397 F Supp3d 379), the Federal court considered the very same situation that is before this court. The Helms building's 1942 C of O is identical to that of the building here: "Old Law Tenement Single Room Occupancy." The OATH Appeals Unit had issued a decision that found Class B transient occupancy of the Helms building to be lawful, based in part upon on the terms "Sleeping Rooms Class 'B'" on the building's I-Cards. OATH's *Helms* decision was issued almost simultaneously with the First Department's *Terrilee* decision, and clearly with no knowledge of that decision. OATH subsequently overruled that decision and found that the Helms C of O allowed only Class A occupancy. Helms brought the same challenges as plaintiffs herein to the reversal of OATH's Appeal Decision, arguing that it may not be prohibited, under the doctrines of res judicata and collateral estoppel, from advertising its use of rooms in The Broadway Hotel & Hostel for transient occupancy, because a City administrative review board had already held that such use was lawful. The Southern District court analyzed the matter as follows:

> "Application of collateral estoppel may be inappropriate where '[t]he issue is one of law and . . . a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws.' Restatement (Second) of Judgments § 28 (2) (b) (1982); *see also* Siegel, N.Y. Prac. 5 461 (6th ed.) ('An intervening change in the law, such as to suggest a different result under the rule now applicable than that reached under the prior rule, is . . . a ground on which to deny an estoppel.')"

(397 F Supp3d at 385).

The court then cited to Comment c to § 28 (2) of the Second Restatement of Judgments, which reads in relevant part as follows:

> "[T]he choice must be made in terms of the importance of stability in the legal relationships between the immediate parties, the actual likelihood that there are similarly situated persons who are subject to application of the rule in question, and the consequences to the latter if they are subject to different legal treatment. In this connection it can be particularly significant that one of the parties is a government

> agency responsible for continuing administration of a body of law that affects members of the public generally"

(*id.*). The *Helms* court then contrasted New York State law regarding claim preclusion and issue preclusion in the context of a change in decisional law, citing to 18 Fed Practice & Procedure Juris § 4425 (3d ed), which states that "just as changes of statutory law may defeat issue preclusion, '[t]he same is true for changes of decisional law.'"

The Court concluded that the City was not barred from continuing to seek cure of the Helms building's occupancy violation (transient occupancy in a Class A building):

> "Here, *Terrilee* changed the applicable legal context concerning the application of the MDL to tenements and class A multiple dwellings with a history of SRO use. This change of decisional law was significant and directly relevant to the issue on which Plaintiff seeks issue preclusion, as reflected by the ECB's recent overruling of its earlier holding in the 2017 Helms ECB *on the exact question at issue in this lawsuit*. Additionally, the City's ability to regulate building owners' advertising of unlawful room rentals is an issue of public importance, having generated substantial legislative attention over the past decade. Preventing the City, in perpetuity, from enforcing key provisions of the MDL against Plaintiff would give Plaintiff an exemption from advertising restrictions not enjoyed by similarly situated building owners, resulting in inequitable administration of the laws. These considerations weigh strongly against issue preclusion. . . . Accordingly I hold that issue preclusion does not apply to bar Defendants from rearguing in this lawsuit the issue decided in the 2017 Helms ECB Appeal: whether the MDL permits use of the Hotel for transient occupancy"

(397 F Supp3d at 386).

Likewise, here, the September 8, 2016 ECB Order was rendered almost six months before the First Department issued its decision in *Terrilee* that clarified the law concerning the application of the MDL to the meaning of the exact terms found on the C of O of the subject building: "Old Law Tenement" and "Single Room Occupancy." The First Department's *Terrilee* decision is directly applicable to the occupancy of the building, the issue on which petitioners seek to prevent further enforcement. Since it was evident that *Terrilee* essentially overruled the 2016 ECB Order, the doctrines of res judicata and collateral estoppel did not bar the City from relying on that

controlling judicial precedent to continue taking enforcement action against the transient occupancy in the building, including the issuance of the advertising summonses

In sum, under MDL § 4 (8) (a), class A multiple dwellings may not be used for transient occupancy. Accordingly, because the C of O unambiguously provides that the building is a Class A multiple dwelling, this court holds that the use of any of the rooms in the building for transient occupancy is unlawful under the MDL, and the City is entitled to summary judgment dismissing the occupancy causes of action (first, fourth and fifth causes of action).

B. The Counterclaim

In light of the above holding, the City is also entitled to summary judgment on its counterclaim for a declaratory judgment that the lawful occupancy of the building is Class A. However, summary judgment is denied with respect to its counterclaim for a permanent injunction against transient occupancy of the building, and directing plaintiffs to operate the building in conformance with its Class A occupancy. "To sufficiently plead a cause of action for a permanent injunction, a plaintiff must allege that there was a 'violation of a right presently occurring, or threatened and imminent,' that he or she has no adequate remedy at law, that serious and irreparable harm will result absent the injunction, and that the equities are balanced in his or her favor" (*Caruso v Bumgarner,* 120 AD3d 1174, 1175 [2d Dept 2014] [citation omitted]; *accord Aponte v Estate of Aponte*, 172 AD3d 970, 974 [2d Dept 2019]). "'A permanent injunction is a drastic remedy which may be granted only where the plaintiff demonstrates that it will suffer irreparable harm absent the injunction'" (*Merkos L'Inyonei Chinuch, Inc. v Sharf,* 59 AD3d 403, 408 [2d Dept 2009] [citation omitted]; *Matter of Long Is. Power Auth. Hurricane Sandy Litig.,* 134 AD3d 1119, 1120 [2d Dept 2015]).

Here, defendants fail to sufficiently allege any of the three elements required for the "drastic remedy" of a permanent injunction. The court rejects defendants' argument that a municipality seeking injunctive relief is entitled to such relief upon prima facie showing that its local laws are being violated, and that proof such violation alone is sufficient grounds for the issuance of injunctive relief. Although that may be the rule in the Second Department, the First Department requires that all three elements be satisfied (*see City of New York v Tominovik*, 2020 NY Slip Op 30158[U], ** 4-5 [Sup Ct, Queens County 2020], citing *City of New York v Untitled LLC*, 51 AD3d 509, 511 [1st Dept 2008] ["the motion court's summary denial gave inadequate consideration to the three-prong test for preliminary injunctive relief"]). Importantly, defendants fail to demonstrate that they would suffer irreparable harm, since they failed to show that an award of money damages, such as a civil penalty, would not be fair compensation (*see Meissner v Yun*, 126 AD3d 565, 566 [1st Dept 2015]; *Zodkevitch v Feibush,* 49 AD3d 424, 425 [1st Dept 2008]). As such, that portion of the counterclaim seeking a permanent injunction is denied.

The Procedural Rules Causes of Action

In the second and third causes of action, plaintiffs challenge 48 RCNY § 3-14, entitled "Claims of Prior Adjudication." On August 7, 2016, Title 48 of the RCNY, which governs proceedings at OATH, was re-codified, bringing the ECB Tribunal into the OATH Hearings Division. Rule 48 RCNY § 3-14 was promulgated pursuant to the City Administrative Procedure Act (CAPA). The rule as currently codified reads as follows:

> "Whenever a party claims that a summons was previously adjudicated, the hearing officer must allow both parties to present all relevant evidence on all the issues in the case, including the claim of prior adjudication. If a party has raised a claim of prior adjudication, the hearing officer must not decide such claim, but must preserve the claim for the purposes of subsequent appeal to the Appeals Unit, a panel of Board members, or the Board pursuant to § 3-15. If, on appeal, a party properly raises and preserves a claim of prior adjudication, the Appeals Unit will review the records of the first and any subsequent hearings in order to assist the

> panel or Board in determining the claim of prior adjudication. In deciding the claim, the panel or the Board will consider the interests of justice and public safety."

The reasoning supporting the rule was set forth in the Statement of Basis and Purpose of Final Rule (*see* NYSCEF Doc No. 129) as follows:

> "The rule establishes the procedure that must be followed when a party claims that a notice of violation has been previously adjudicated. Decisions of the Board, including, for example, Appeal No. 1100289, *NYC v Leon Goldstein*, have stated that in certain circumstances, claims between the same parties that have been previously adjudicated should not be adjudicated again at a subsequent hearing.
>
> Repeated adjudications of the same claims can create inefficiency and weigh against the interests of fairness. This rule creates a uniform process that parties, hearing officers and the Board must follow when making and deciding claims of prior adjudication.
>
> The rule requires the Board itself to review claims of prior adjudication, rather than assigning such review to hearing officers. Analyzing whether a notice of violation has been previously adjudicated requires a labor intensive examination of the records in two hearings, including listening to the record of the previous hearing. Therefore it would be impractical to have hearing officers review these claims. Board review of these claims would be the best use of limited governmental resources and would best serve the interests of justice."

Plaintiffs assert that the promulgation by OATH of the provisions that have now been recodified as 48 RCNY § 3-14 was ultra vires and in excess of OATH's rule-making authority, and effectuates an unconstitutional violation of due process. According to plaintiffs, under the new rule, administrative law judges can no longer dismiss NOVs based on claims of res judicata or collateral estoppel. Instead, under Rule 3-14, only the appellate panel of the ECB can rule on such claims. Thus, a party wishing to challenge an NOV on res judicata or collateral estoppel grounds must conduct a full administrative hearing before the ALJ, incurring the costs, expenses, legal fees, and expert testimony fees to do so, preserve their res judicata or collateral estoppel objections, and then raise the objections again before an appellate panel in order to have a previously adjudicated issue dismissed. Therefore, a target of a DOB violation, which was

dismissed on the merits previously, would still need to go through the time and expense of a new hearing, and then an appeal, in order to have his prior adjudication even considered. Plaintiffs contend that forcing them to repeatedly re-litigate a matter they already won violates their due process rights, and as such, the rule is ultra vires.

The court rejects this argument. First, plaintiffs provide no basis for their claim that 48 RCNY § 3-14 was ultra vires, or in excess of OATH's rule-making authority. The plain language of City Charter § 1049 (2) (a) authorizes OATH to promulgate rules for the conducting of hearings. CAPA also contains the following general rule applicable to all agencies:

> §1043. Rulemaking. a. Authority.
>
> "Each agency is empowered to adopt rules necessary to carry out the powers and duties delegated to it by or pursuant to federal, state or local law."

This court finds that the rule was enacted pursuant to OATH's authority to promulgate procedural rules governing adjudications that come before it. Moreover, OATH does not purport, by way of this rule, to exercise authority over any matter not within its jurisdiction as an adjudicatory tribunal. Accordingly, this court finds that the rule is a proper exercise of OATH's authority.

Plaintiffs complain about the burden they will bear as a result of 48 RCNY § 3-14, in that they will not be able to have NOVs and summonses for transient occupancy and related advertising summonses dismissed by hearing officers but will have to go through the process of having hearings on those NOVs and summonses, and preserve their res judicata objections for the appeal process. However, the burden of having to litigate repeat NOVs and summonses for the same violations related to its use of its Class A building for transient occupancy is self-created. The First Department has made clear that Class A buildings are not to be occupied for fewer than 30 days. The MDL is also clear that Old Law Tenements and SROs are Class A buildings. It is

plaintiffs' refusal to comply with the law that leads to the ongoing issuance of multiple NOVs and summonses for the same violations on different dates.

This court also finds that the rule does not violate due process. The essential principle of the constitutional right to procedural due process is that a deprivation of life, liberty, or property be preceded by notice and an opportunity to be heard (*Mullane v Central Hanover Bank & Trust Co.*, 339 US 306, 313 [1950]). In order to make out a claim for denial of procedural due process, the threshold question is whether the person claiming to be aggrieved has been deprived of a cognizable property interest that is subject to due process protection (*Board of Regents of State College v Roth*, 408 US 564, 569-70 [1972]). A plaintiff must "'first identify a property right, second show that the State has deprived him of *that* right, and third show that the deprivation was effected without due process'" (*Local 342, Long Island Public Serv. Employees, UMD, ILA, AFL-CIO v Town Bd. of town of Huntington*, 31 F3d 1191, 1194 [2d Cir 1994] [citation omitted]).

Plaintiffs fail to make out a due process claim on the basis of the procedure set forth in 48 RCNY § 3-14 that delegates to the Appeals Unit the time-intensive task of comparing a prior adjudication with a current adjudication in order to determine whether the earlier adjudication determines the outcome of the latter on the basis of res judicata. Plaintiffs cannot show that they are deprived of due process merely because of the timing of that procedure, as no litigant is being deprived of raising a prior adjudication as a defense. The rule merely sets forth at what stage that defense can be raised. The purpose of the rule - to avoid the impracticability of hearing officers conducting labor-intensive examinations of the records of prior hearings - is set forth in the Statement of Basis and Purpose that was published as part of the promulgation process. That basis is rational in that it creates a consistent and efficient process by which OATH can methodically assess claims of prior adjudication. This court finds that, as such, the rule does not violate the due

process rights of the litigants who are subject to that procedure. Indeed, the 2020 OATH Decision that determined the occupancy NOVs rejected the Hearing Officer's finding of a due process violation, as follows:

> "The Board first finds that Petitioner's issuance of the instant summons did not deprive Respondent of its due process rights. A thorough review of the record shows that Respondent received a full and fair hearing, wherein its attorney presented evidence, had the opportunity to examine and cross-examine any witnesses, and received ample time to make factual and legal arguments. *See* 48 RCNY § 6-11 (d). Although Petitioner previously withdrew a similar summons it issued four years earlier because it determined that Respondent did not violate Code g 28-210.3, OATH rules permit a petitioning agency to withdraw a summons at any time. *See* 48 RCNY § 6-08 (e)"

(2020 OATH Decision, at 4).

Accordingly, the City's motion for summary judgment dismissing the second and third causes of action is granted.

ARTICLE 78 Proceeding

In the Article 78 proceeding, petitioners challenge the 2020 OATH Decision that reinstated the 2017 violations, on the ground that such holding was arbitrary, capricious, and an error of law, thus necessitating this court to vacate the OATH Appeal Board determination. Petitioners also contend that re-litigation of this matter, as well as 48 RCNY § 3-14, which permits re-litigation *in seriam*, violates petitioners' right to due process.

For the reasons set forth below, plaintiffs/petitioners' application for Article 78 relief is denied, and the petition is dismissed.

Administrative agencies have broad discretionary power when making determinations on matters they are empowered to decide. Section 7803 of the CPLR provides for very limited judicial review of administrative actions. In a challenge to an administrative decision pursuant to CPLR 7803 (3), judicial review is limited to an inquiry into whether the challenged determination had a

rational basis, or whether the action was arbitrary and capricious, or affected by an error of law (CPLR 7803 [3]; *Matter of Wooley v New York State Dept. of Correction Servs.*, 15 NY3d 275, 280 [2010]; *Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 758 [1991]; *see Matter of Pile Found. Constr. Co. Inc. v New York City Dept. of Envtl. Protection*, 84 AD3d 963, 963-964 [2d Dept 2011] [citation omitted] ["The standard of judicial review is whether the determination that the petitioner was in default of its obligations under a contract with the New York City Department of Environmental Protection . . . was arbitrary and capricious, affected by an error or law, or lacked a rational basis"]).

A rational or reasonable basis for an administrative agency determination exists if there is evidence in the record to support its conclusion (*see Sewell v City of New York*, 182 AD2d 469, 473 [1st Dept 1992]). Conversely, an action is arbitrary if it "is without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell v Board of Educ. Of Union Free School Dist. No. 1 of Town of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Courts do not review the facts de novo to arrive at an independent determination (*see Matter of Heintz v Brown*, 80 NY2d 998, 1001 [1992]; *see also Matter of Sullivan County Harness Racing Assn. v Glasser*, 30 NY2d 269, 276-277 [1972]).

Under this standard, "the court's scope of review is limited to an assessment of whether there is a rational basis for the administrative determination without disturbing underlying factual determinations" (*Heintz*, 80 NY2d at 1001). It is well settled that:

> "[A] 'court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary and capricious.' Where the judgment of an agency involves factual evaluations in the area of that agency's expertise and is supported by the record, such judgment must be accorded great weight and judicial deference. In such circumstances, 'a reviewing court may not reevaluate the weight accorded the evidence adduced . . . since the duty of weighing the evidence,

> interpreting relevant statutes and making the determination rests solely in the expertise of the agency'"

(*Awl Indus., Inc. v Triborough Bridge & Tunnel Auth.*, 41 AD3d 141, 142 [1st Dept 2007] [citations omitted]; *see Sullivan County Harness Racing Assn. Inc.*, 30 NY2d at 277 [court may not overturn decision merely because it would reach a contrary conclusion; once a rational basis for the determination is shown, the function of judicial review has ended]; *Matter of Ignizio v City of New York*, 85 AD3d 1171, 1174 [2d Dept 2011] ["courts may not substitute their judgment for that of the agency for it is not their role to weigh the desirability of any action or [to] choose among alternatives"] [internal quotation marks and citations omitted]).

If the reviewing court finds that the determination is "supported by facts or reasonable inferences that can be drawn from the record and has a rational basis in the law, it must be confirmed" (*Matter of American Tel. & Tel. Co. v State Tax Commn.*, 61 NY2d 393, 400 [1984]).

Moreover, as is relevant here, "'[i]t is well settled that the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld'" (*Matter of City of New York v New York State Nurses Assn.*, 130 AD3d 28, 34 [1st Dept 2015] [citation omitted], *affd* 29 NY3d 546 [2017]; *see also Matter of Tommy & Tina, Inc. v Department of Consumer Affairs of City of N.Y.*, 95 AD2d 724, 724 [1st Dept 1983] [citation omitted], *affd* 62 NY2d 611 [1984] ["'an administrative agency's construction and interpretation of its own regulations and of the statute under which it functions is entitled to the greatest weight'" and "[a]bsent an arbitrary or capricious regulation or interpretation of said regulations, courts should defer to the agency"]).

Here, the 2020 OATH Decision, in which the OATH Appeals Board reinstated the 2017 violations, and held that the building's certificate of occupancy only permitted Class A non-transient use, was not unreasonable, arbitrary, capricious or an abuse of discretion, as the

determination had a sound basis in fact, was supported by the evidence in the administrative record, and was in accordance with the applicable laws and rules. OATH, which is responsible, among other things, for adjudicating violations of laws pertaining to the use and occupancy of buildings, was called upon to analyze the statutory provisions and legal precedents that governed the building and reach conclusions of law. After reviewing the memoranda of law submitted both by petitioners and by the DOB, OATH reached the conclusion of law that petitioners' use of the building for transient tourists was in violation of the applicable provisions of law, finding that the only lawful occupancy of the subject building is for permanent occupancy, not transient occupancy.

The court rejects petitioners' contention that it was arbitrary and capricious for the OATH appellate board to not apply res judicata and collateral estoppel, and to ignore the holding set forth in the 2016 ECB Order. As this court held in Action No. 1, res judicata and collateral estoppel do not apply to bar respondents from rearguing the issue decided in the 2016 ECB Order – whether the MDL permits use of the building for transient occupancy. Since it was evident that *Terrilee* essentially overruled the 2016 ECB Order, the doctrines of res judicata and collateral estoppel did not bar the City from relying on that controlling judicial precedent to continue taking enforcement action against the transient occupancy in the building, including the issuance of the advertising summonses. Accordingly, it was not error for OATH to find that *Terrilee* constitutes the controlling authority regarding the lawful occupancy of the building, not the prior 2016 ECB Order, and hence, OATH's determination to sustain the challenged occupancy NOVs and advertising summonses were reasonable, rational, and in conformance with all applicable law. Thus, the 2020 OATH Order must be upheld.

The court also rejects petitioners' arguments that 48 RCNY § 3-14 is unconstitutional, as it deprives them of due process. As this court found in Action No. 1, the rule clearly has a rational

purpose – to save time and resources (*see* Statement of Basis and Purpose ["Analyzing whether a notice of violation has been previously adjudicated requires a labor intensive examination of the records in two hearings, including listening to the record of the previous hearing. Therefore it would be impractical to have hearing officers review these claims. Board review of these claims would be the best use of limited governmental resources and would best serve the interests of justice"]).

Although petitioners argue that the rule "requires a litigant, who has already had an identical charge dismissed, to: litigate the entire case for a second time before a new Hearing Officer; incur the costs, expenses, legal fees, and expert testimony fees to do so; preserve the legal arguments of res judicata and collateral estoppel; pay the fines if it loses as a condition to even taking an appeal to the OATH Appeals Unit; and finally, await a determination by the OATH Appellate Board on the legal issue of res judicata and collateral estoppel (petition, ¶ 83), they do not explain how this process will deprive them of due process. Indeed, in an administrative determination, as long as petitioner is "given an opportunity 'to be heard' and to submit whatever evidence he or she chooses," due process is satisfied (*Matter of Scherbyn*, 77 NY2d at 757-758; *see also Matter of Tully Constr. Co. v Hevesi*, 214 AD2d 465, 466 [1st Dept 1995] ["(t)he availability of an article 78 proceeding at the conclusion of the administrative process also satisfies any due process hearing requirements"]). Given that petitioners were afforded a full and fair hearing, due process was certainly satisfied here.

The court has considered the remaining arguments and finds them to be without merit.

Accordingly, it is

ORDERED that, in Action No. 1, *Lexington Assocs. LLC v the City of New* York, Index No. 161257/2017, defendants' motion for summary judgment is granted, and the complaint is dismissed; and it is further

ORDERED that in Action No. 1, *Lexington Assocs. LLC v the City of New* York, Index No. 161257/2017, defendants' motion for summary judgment on the counterclaim is granted to the limited extent that they are entitled to a declaratory judgment that the building and all of its dwelling units may lawfully be advertised and occupied only for permanent residence purposes; and is denied in all other respects; and it is further

ORDERED that, in Action No. 1, *Lexington Assocs. LLC v the City of New* York, Index No. 161257/2017, plaintiffs' cross motion for summary judgment is denied; and it is further

ADJUDGED that, in Action No. 2, *Lexington Assocs., LLC v Commissioner of the Dept. of Buildings of the City of New York*, Index No. 158727/2020, the petition is denied, and the proceeding is dismissed.

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11/15/2021
DATE

LYLE E. FRANK, J.S.C.

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