

Respondent, owner of the cited premises, appeals from a recommended decision and order finding three violations of the Administrative Code of the City of New York (Code), as set out below, and one violation of Section 907.2.8 of the Building Code (BC), found in Title 28 of the Code, as summarized below. The four notices of violation (NOVs) involve an inspection that took place on July 6, 2015 based on a complaint of transient use of three apartments in Respondent's premises.

<b>NOV</b>	<b>Law charged</b>	<b>Violating conditions as described by the issuing officer (IO) in the NOVs</b>
351-387-16P (16P)	Code Section 28-210.3 Class 1 Code Section 28-202.1	Permanent dwelling used/converted for other than permanent residential purposes. C/O 103209092 indicates that building to be legally approved as a Class "A" multiple dwelling. Now apts. # S21C; S21D; S19E illegally used as a transient use. Additional daily penalties cited because more than 1 unit [was] converted for the building and recurrent conditions. Previous violation #351-513-57Z.
351-387-17R (17R)	Code Section 28-301.1 Class 1	Failure to maintain building in Code-compliant manner. Lack of a system of automatic sprinklers per BC 903.2 and 27-954 for transient use. Recurring condition cited. Previous violation #351-513-58K.
351-387-18Z (18Z)	BC Section 907.2.8 Class 1	Failure to provide fire alarm system for transient use. Recurring condition cited. Previous violation #351-513-59M.
351-387-19K (19K)	Code Section 28-204.4 Class 2	Failure to comply with the Commissioner's order to file a certificate of correction with the Department of Buildings (DOB) for violating conditions cited in NOV # 351-513-57Z; 351-513-58K; 351-513-59M. <sup>1</sup>

### **The hearing**

At the hearing, the counsel for Petitioner, DOB, submitted:

- 11 cell phone photographs showing websites advertising apartments in the cited premises as hotel rooms and texts between an apartment lessee and another party arranging to meet at a nearby restaurant so that the party could "check in"; and

<sup>1</sup> Although Respondent's counsel lists NOV 19K in his appeal submission, he does not address the hearing officer's findings for this NOV. The Board notes that at the hearing Respondent's property manager acknowledged that no certificates of correction were filed for the underlying NOVs. Since Respondent has cited to no error of fact or law in the hearing officer's findings, the Board sustains this NOV.

- Building Information System (BIS) printouts of the “ECB Violation Details” for the three NOVs cited as “previous violations” on the instant NOVs, showing “no compliance recorded” for those NOVs as of the hearing date.

Respondent’s counsel did not deny the allegations of transient use of the three apartments on the date of offense but maintained that Respondent was not responsible for such use. Respondent’s property manager testified as follows: The cited premises is a 28-story doorman-luxury rental building with 264 rent-stabilized apartments. After receipt of the earlier violations for transient use of other apartments in the building, Respondent initiated procedures designed to curtail transient use of apartments before the building received further DOB violations. Under the procedure, the concierge requires visitors who arrive with luggage and “look like they’re coming to a hotel” to fill out a form listing names and identification, name of the tenant and apartment number they are visiting, and how long they are staying. The concierge then enters the information in an electronic building log which the property manager reviews daily for patterns showing that tenants may be renting out their apartments to people in violation of their lease terms. Using this procedure, he identified the tenants of the three cited apartments as violators and sent each a cease-and-desist letter on June 5, 2015 advising that Respondent would terminate their leases and initiate eviction proceedings against them if they continued the illegal use of their apartments. After receipt of the instant NOVs, Respondent’s counsel had notices of termination served upon the three tenants, indicating termination of their leases as of August 8, 2015. The tenants vacated their respective apartments on July 31, 2015, August 8, 2015, and August 14, 2015.<sup>2</sup> The building has the proper fire alarm and sprinkler system for a Class A multiple dwelling, in accordance with its certificate of occupancy for the building. The building is not run as a Class B multiple dwelling.

Respondent’s counsel argued that Respondent did everything it legally could to prevent the tenants from illegally renting out their apartments and to evict the tenants after issuance of the violations showed that they continued their illegal activity. He further argued that the three apartments used for transient use did not make the building a hotel required to comply with hotel fire-alarm and sprinkler requirements. Petitioner’s counsel responded that under the New York City Construction Codes, a premises owner is legally responsible for its tenants’ illegal use of its premises. She also stated that any transient use in the building requires that it have the fire alarms and sprinklers applicable to transient use.

The hearing officer sustained all the NOVs as charged. With respect to NOV 16P, she found that Respondent did not contest the allegations of transient use but did contest the daily penalties. She credited the property manager’s testimony as to Respondent’s efforts to evict the tenants but calculated daily penalties from July 7, 2015, the date of the affixation of the NOV at the cited premises, to August 13, 2015, the date she found that the last tenant left, for a total of 37 days. With respect to NOVs 17R and 18Z, she found that use of three units as a hotel brought the building under the sprinkler and fire requirements for transient-use hotels.

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<sup>2</sup> In support of the property manager’s testimony, Respondent’s counsel submitted copies of: (1) the June 5, 2015 cease-and-desist letters; (2) the July 9, 2015 notices of termination, along with affidavits of service showing completion of service on the Apt. S21C and S21D tenants on July 15, 2015 and on the Apt. S19E tenant on July 17, 2015; (3) the August 13, 2015 Surrender Agreement with the Apt. S21D tenant that she would vacate the apartment on August 15, 2015; and (4) an August 5, 2015 email from the Apt. S21C tenant verifying that he vacated the apartment and returned the keys to the doorman on July 31, 2015.

## **The issues on appeal**

The issues on appeal are whether:

- a premises owner's lack of knowledge or acquiescence in its tenants' unlawful activities was a defense to the Code Section 28-210.3 violation;
- BC Section 907.2.8 and Code Section 27-954 apply to premises being used transiently where only three out of 264 apartments are so occupied; and
- the penalties imposed were excessive and grossly disproportionate to the offenses charged.

## **Applicable law**

Code Section 28-210.3 provides:

Except as otherwise provided . . . , dwelling units within (i) 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 . . . .

Code Section 28-201.2.1(16) designates violations of Code Section 28-210.3 as Class 1, immediately hazardous, where they involve "more than one dwelling unit or a second or subsequent violation of section 28-210.3 by the same person at the same dwelling unit or multiple dwelling."

Code Section 28-202.1 provides that, in addition to the civil penalty for an immediately hazardous violation, "a separate additional penalty may be imposed of not more than one thousand dollars for each day that the violation is not corrected."

Section 102-01(g) of Title 1 of the Rules of the City of New York (RCNY) provides that applicable daily penalties:

will accrue at the rate of \$1,000 per day for a total of forty-five days running from the date of the Commissioner's order to correct set forth in the NOV, unless the violating condition is proved by the respondent at the hearing to have been corrected prior to the end of that forty-five day period, in which case the daily penalties will accrue for every day up to the date of that proved correction.

Pursuant to BC 310.1, a Group R-1 occupancy includes "[r]esidential buildings or spaces occupied, as a rule, transiently, for a period less than one month."

BC Section 907.2.8 requires fire alarm systems to be installed in Group R-1 occupancies as specified in the subordinate subsections.

Code Section 28-301.1 requires makes the owner of the premises "responsible at all times to maintain the building and its facilities . . . in a safe and code-compliant manner."

Code Section 27-954 of the 1968 Building Code requires the installation of automatic sprinkler systems in buildings and spaces classified in occupancy group J-1 (residential occupancy on a day-to-day or week-to-week basis).

### **The appeal**

On appeal, Respondent's counsel argues as follows. Respondent did not use or occupy, offer, or permit its tenants' illegal rentals of the apartments. It is settled law that out-of-possession landlords have no liability for nuisance conditions in the leasehold where the landlords did not create the nuisance. Respondent has an established policy and procedure against the illegal renting of apartments by tenants. After it ascertained that three tenants were using their apartments for short-term rentals, it sent out cease-and-desist letters to them on June 5, 2015, about one month prior to issuance of the NOV's. After receipt of the NOV's, it took prompt legal action to evict the tenants. All three tenants vacated their apartments by August 15, 2015, prior to the ECB hearing date. Respondent could not act any faster because of Rent Stabilization Code restrictions. The fire-alarm and sprinkler violations do not apply because the cited provisions only relate to R-1 occupancies, and the cited building is an R-2 occupancy. BC Section 310.1 defines R-1 occupancies as "[r]esidential buildings or spaces occupied, as a rule, transiently." The brief illegal actions of the tenants do not transform the building or any portion thereof into an R-1 occupancy, occupied "as a rule, transiently." Finally, the penalties imposed are excessive, in violation of the United States and New York State constitutions.

Petitioner's counsel responds as follows. As an owner, Respondent was properly cited for the violations. Code Section 28-301.1 makes an owner responsible at all times to maintain its building in a Code-compliant manner. Ignorance of the illegal conditions is not a defense. Respondent neither refuted the violations nor established how the findings in the hearing decision were contrary to the Code or ECB precedent. The penalties were properly imposed.

### **The Board's determination**

The Board denies the appeal.

#### ***The owner is liable for violations caused by its tenants***

On this record, the Board finds that the premises owner's lack of knowledge or acquiescence in its tenants' unlawful activities was not a defense to the Code Section 28-210.3 violation. *See NYC v. Pamela Equities Corp.* (ECB Appeal No. 1500603, August 27, 2015); *NYC v. Mosco Holding LLC* (ECB Appeal No. 1500169, April 30, 2015). That section, in pertinent part, makes it "unlawful for . . . [an] entity who owns . . . a multiple dwelling or dwelling unit classified for permanent residence purposes to use or occupy, offer or permit the use or occupancy [of] . . . such multiple dwelling or dwelling unit for other than permanent residence purpose."

Respondent acknowledges that the three dwelling units were used for transient use on the date of offense. Although Respondent's counsel cites various court cases in support of his argument that an out-of-possession landlord cannot be held strictly liable for illegal rentals by its lessees, none involves Code Section 28-210.3 or any other New York City Construction Code provision.

According to Code Section 28-301.1, an "owner shall be responsible at all times to maintain the building and its facilities . . . in a safe and code-compliant manner." Respondent, as the building's owner, is ultimately responsible for keeping the property in a Code-compliant manner, even if its tenants caused the violating conditions and it had no knowledge of the tenants'

actions. *See NYC v. John Scalia* (ECB Appeal No. 1300289, June 27, 2013) (premises owner liable despite lack of knowledge for sign tenant erected without permit). Consequently, Respondent's ignorance of its tenants' short-term rental activities on the date of offense is not a defense.

Neither Respondent's prior notice to its tenants to cease illegal transient rentals nor its prompt actions to correct the violations constitute a defense to the charge. The Board notes that Respondent's property manager acknowledged that prior to the date of offense he was aware that tenants in the building were using their apartments for transient use, including the tenants involved here. The Board further notes that correction of the transient-use violation, for purposes of stopping daily penalties, does not require eviction of the prime tenants, but merely cessation of the transient use.

***BC Section 907.2.8 and Code Section 27-954 apply to premises that are being used transiently even if only one apartment is so occupied***

BC Section 907.2.8 requires fire alarm systems to be installed in Group R-1 occupancies as specified in the subordinate subsections. BC Section 310.1 defines a Group R-1 occupancy so as to include "[r]esidential buildings or spaces occupied, as a rule, transiently, for a period less than one month."

Code Section 28-301.1 requires owners to maintain their premises in a "code-compliant manner"; accordingly, the descriptions set forth on the NOV reference conditions that are contrary to the Code and cite the specific sections that are being violated.

Code Section 27-954 of the 1968 Building Code, cited on the Code Section 28-301.1 NOV as the specific Code section being violated, requires installation of automatic sprinkler systems in buildings and spaces classified in occupancy group J-1 (residential occupancy on a day-to-day or week-to-week basis).<sup>3</sup>

On this record, the Board finds that the partial transient occupancy of the building required Respondent to comply with the cited fire protection laws. *See NYC v. J.J.N.K. Corp.* (ECB Appeal No. 1500708, September 25, 2015). Here, Petitioner established that at least three Class "A" apartments in the residential building were occupied on a transient basis. It was not necessary that a majority of the building be occupied on a transient basis. Transient use of even one unit required the cited safety measures. *See NYC v. Muffy J. Perlbinde* (ECB Appeal 1200618, September 27, 2012).

***The Board will not adjudicate constitutional challenges to penalties***

Respondent cites to the 8th Amendment to the United States Constitution and Article 1 of the New York State Constitution in support of its claim that the total penalty imposed is excessive and grossly disproportionate to the offense charged. However, the Board notes that it is not the proper forum to adjudicate constitutional claims, including those going to the amount of the imposed penalties. *See NYC v. Indrjeet P. Tajeshwar* (ECB Appeal No. 1500481, July 30, 2015). The penalties imposed by the hearing officer were those set forth in ECB rules for the respective

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<sup>3</sup> BC Section 903.2.8, the other provision of law cited on the NOV, requires the installation of an automatic sprinkler system in Group R fire areas in new buildings and structures.

violations charged and are all within the range of penalties authorized by statute. *See* 48 RCNY Section 3-103.

The Board notes, however, that daily penalties under Code Section 28-202.1 are counted from the day after affixation to the date of correction. In this case, daily penalties run from July 8, 2015 to August 13, 2015, for a total of 36 days. The Board therefore modifies the daily penalties imposed to \$1,000 a day for 36 days, for a total of \$36,000.

Accordingly, the Board affirms the findings of violations but modifies the penalties as follows: Code Section 28-210.3 (Class 1), an Agg. I penalty of \$8,000; Code Section 28-202.1, penalties of \$1,000 a day for 36 days, totaling \$36,000; Code Section 28-301.1(Class 1), an Agg. I penalty of \$2,500; BC Section 907.2.8 (Class 1), an Agg. I penalty of \$4,500; and Code Section 28-204.4, a penalty of \$800.

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Additional information from ECB records (not in original decision)

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Master NOV #

Name of Respondent's counsel or other authorized  
representative (if any)

35138716P

DEAN DREIBLATT. ROSE & ROSE