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## Use Six Arguments to Beat Sanitation Violations

One big headache for many owners is getting hit with violations from the city's Department of Sanitation (DOS). These violations include not keeping the sidewalk in front of your building clean, not sweeping 18 inches into the street, and not properly maintaining garbage receptacles. And now that DOS has raised the minimum base fine for these violations from \$50 to \$100, it's more important than ever to challenge unfair violations before the Environmental Control Board (ECB).

We reviewed dozens of ECB rulings to find those where owners successfully challenged unfair DOS violations, and we spoke to **Adam Leitman Bailey**, a real estate attorney who represents owners who challenge DOS violations before the ECB. We'll give you some basics on how to challenge DOS violations and tell you about six successful arguments owners have used to beat them. You can use these arguments if you're defending against similar DOS violations.

### How to Challenge DOS Violation

The DOS violation notice will give you instructions for challenging the violation, says Bailey. You have a choice of submitting a written response to the violation by the date stated in the notice or appearing in person at an ECB hearing. The notice will tell you where to appear, and the time and date to do so. If

you submit a written response, sign the statement you submit and have your signature notarized.

### Six Arguments

Here are six arguments you can use to challenge DOS violations.

**Argument #1: Owner not responsible for debris in catch basin.** The ECB has ruled that an owner wasn't responsible for cleaning debris that had accumulated in a catch basin (that is, a storm drain). In that case, the DOS had issued a violation against the owner for not cleaning 18 inches into the street. The owner argued that it had rained heavily the day of the violations, and the debris had washed down the street and accumulated on the grating of a catch basin drain in front of his building. The ECB ruled that although the owner had a duty to clean along the curb line outside the catch basin, it wasn't required to clean debris that accumulated in the catch basin [Battis].

► *What to say.* If you get a DOS violation for debris in a catch basin, you may submit a letter challenging the violation. Your letter might say something like this:

I challenge violation No. 9999 issued July 1, 2003, for debris in a catch basin in front of 999 E. 99th St., New York, NY. The ECB has ruled that an owner is not required to clean debris that accumulates in a catch basin. See Battis: ECB App. No. 33847 (1/28/03).

**Argument #2: Violation notice not posted at building.** If the DOS inspector tries unsuccessfully to deliver the violation notice to you in person, the law allows him to send you the notice by mailing it to you and posting it at your building (known as the “nail and mail” method of delivery). So if you get a violation notice in the mail, but you believe it was never posted at your building, you have a potential challenge to the violation. The ECB has dismissed violations against owners if the DOS didn’t post the notice, when the inspector claims to have used the “nail and mail” method of delivery.

How do you prove a notice wasn’t posted at your building? You’ll need to appear in person at the ECB instead of submitting a written response. When you appear at the ECB on the date listed in the violation notice, ask to see a copy of the affidavit of service that should be filed at the ECB, says Bailey. The inspector must fill out and sign this sworn document whenever he delivers a violation notice, he explains. It states how the inspector delivered the violation notice to you:

Check whether the affidavit of service says that the inspector posted the violation notice at your building, as required for “nail and mail” delivery. If it doesn’t, you may use this as proof that the inspector didn’t properly deliver the violation notice, says Bailey.

For example, one owner challenged a violation notice because it wasn’t properly delivered. The owner claimed that the DOS hadn’t posted the notice at the building. The ECB ruled that the DOS hadn’t properly delivered the notice. The affidavit of service only said that the inspector attempted to deliver the violation notice personally. It didn’t say he posted a copy at the building [Bedford Holdings, LP].

► *What to say.* To challenge the violation if the affidavit of service doesn’t say that the inspector posted it at your building, you’ll need to attend an ECB hearing with the inspector present, says Bailey. So the first time you appear at the ECB and discover a faulty affidavit of service, get a copy of the affidavit of service and ask the ALJ to delay the hearing so that the inspector can be present. Bring your copy of the affidavit to the rescheduled hearing. At the hearing, you can say something like this:

The violation notice was not properly delivered by the “nail and mail” method of service, because the

inspector did not post the violation notice at my building. The affidavit of service does not state that the inspector posted the violation notice at the building. The ECB has ruled in the past that the Department of Sanitation has not properly delivered a violation notice by “nail and mail” delivery if the affidavit of service does not state that the inspector posted the violation notice at the building.

[You can then cite to the *Bedford Holdings LP* case, ECB App. No. 39038 (3/25/03)].

Even if the affidavit of service states that the inspector did post the violation notice at your building, you may still be able to prove that he didn’t. Again, when you first appear at the ECB, ask for a delay of the hearing because you want a chance to question the inspector about the delivery of the violation notice. Then at the rescheduled hearing with the inspector present, you can ask the inspector questions about how he delivered the violation notice. If the inspector can’t remember or can’t give enough details, you may be able to show that the inspector didn’t post it.

For example, another owner challenged a DOS violation because the inspector didn’t personally deliver it and didn’t post it at the building. Although the inspector stated in the affidavit of service that he had posted it, at the hearing before the ALJ he wasn’t able to recall the specific details about whether or when he posted a copy of the violation notice at the building. So the ECB ruled for the owner [Donlee Realty Corp.].

**PRACTICAL POINTER:** If the inspector doesn’t appear at the rescheduled hearing, the ALJ may delay the hearing to give the inspector a chance to appear. If the inspector doesn’t appear on the next scheduled hearing date, the ALJ may rule in your favor and dismiss the violation, says Bailey. Or the ALJ may allow the hearing to take place without the inspector. In this situation, you have a good chance of winning because the inspector won’t be present to contradict your testimony. But you won’t automatically win the case simply because the inspector isn’t there. The ALJ may rule against you based on other evidence the DOS provides.

**Argument #3: Debris not in front of your building.** The DOS may hit you with a violation for debris that wasn’t actually in front of your building. If you can prove this, you should be able to get the violation dismissed.

For example, the DOS issued a violation against an owner for leaving papers and a lot of built-up debris in front of her building. The owner claimed that she wasn't responsible for the debris because it was actually located on her neighbor's property. She submitted photographs of the debris to support her claim. The ECB ruled that the owner proved that the debris wasn't in front of her building [Endlich].

► *What to say.* If you get a DOS violation for debris that wasn't in front of your building, take photographs of the debris (using a camera that shows the date the photograph was taken) to show where it was located. Then submit the photographs to support your challenge. If you submit a letter challenging the violation, it might say something like this:

I challenge violation No. 9999 issued July 1, 2003, for debris in front of 999 E. 99th St., New York, NY. The debris was actually in front of a neighboring building at 997 E. 99th St., New York, NY. Enclosed is a photograph of the debris taken after the violation notice was issued. The photograph clearly shows that the debris was not in front of my building (999 E. 99th St.). The ECB has dismissed Department of Sanitation violations if the owner proves the debris was not in front of its building. See Endlich: ECB App. No. 35390 (1/29/02).

**PRACTICAL POINTER:** If you don't have a camera that shows the date, take a photograph of the cover of that day's newspaper near the debris to show the date, says Bailey.

**Argument #4: You don't own building cited in the violation notice.** The DOS inspector sometimes makes the mistake of citing the wrong owner for a violation. If you don't own the building listed in the violation notice, you should be able to challenge it successfully. For example, the DOS issued a violation notice to one owner for not cleaning 18 inches into the street. The violation notice stated that the building in question was 2260 Prospect Ave. and listed block 3113, lot 9. When the owner showed that it owned 2260 Croton Ave., block 2101, lot 23, instead, the ECB ruled for the owner and revoked the fine [Twin Parks Northeast].

You'll improve your chances of winning if you submit proof that you don't own the building. What documents should you submit? Here are two suggestions Bailey offers:

1) A copy of the deed for the building cited in the violation. This will show that you're not the owner

of record. You can get a free copy of the deed by going to the City Register's office in Manhattan at 31 Chambers St. or in Brooklyn in the Municipal Building, 210 Joralemon St.

2) A printout of the Department of Housing Preservation and Development's (HPD) property registration. You can get a printout of the property registration of the building cited by going to HPD's Web site at [www.nyc.gov/hpd](http://www.nyc.gov/hpd). The registration statement must list the owner of the building. So you can show that you're not the person listed as the owner.

You'll also improve your chances of winning by showing that you own a different building, which may have a similar address to the one cited, says Bailey. So it's a good idea to also submit a copy of the deed for the building you do own, he says

► *What to say.* If you get a DOS violation for a building you don't own, and you submit a letter challenging it, your letter might say something like this:

I challenge violation No. 9999 issued to me on July 1, 2003, for a building located at 999 E. 99th St., New York, NY. I do not own this building and have no connection with it. Rather, I own 999 E. 98th St. I have enclosed a copy of the printout of the HPD property registration for 999 E. 99th St. as well as a copy of the deed for the building. This registration lists John Smith as the building owner. The ECB has dismissed Department of Sanitation violations where the wrong owner is cited for the violation See Twin Parks Northeast: ECB App. No. 33027 (3/29/00).

**PRACTICAL POINTER:** If the building is owned by a company, check to see that the company's name is correctly stated in the violation notice, suggests Bailey. He has seen violations dismissed where the name of the company wasn't stated correctly.

**Argument #5: Items improperly placed for collection weren't yours.** The DOS has specific rules for how garbage must be put out for collection. For example, cardboard boxes must be broken down and tied up. But if improperly placed items find their way in front of your building through no fault of yours, the ECB won't hold you responsible.

For example, one owner got hit with a violation for leaving cardboard boxes out for collection without tying them up. The owner claimed that he didn't leave the boxes out. The night before the violation was issued had been windy, and the owner claimed that the boxes must have blown in front of his build-

ing from down the block. The ECB believed the owner and dismissed the violation [Rudowsky].

► *What to say.* Say you get a DOS violation for improperly placing untied cardboard boxes out for collection, and you didn't place those boxes there. If you submit a letter challenging the violation, make sure to state where you believe the boxes came from. Also, include whatever proof you have to support your claim. Your letter might say something like this:

I challenge violation No. 9999 issued July 1, 2003, for improperly placing untied cardboard boxes out for collection in front of 999 E. 99th St., New York, NY. I did not place those boxes out for collection. They appear to have come from a neighboring building because they are addressed to a store, XYZ Inc., which is down the block from my building. I am enclosing a photograph of those boxes taken after the violation notice was issued, showing the address on the boxes. The ECB has ruled that an owner is not responsible for improperly placed garbage that comes from another source if the owner has not placed the garbage there. See Rudowsky: ECB App. No. 39424 (3/25/03).

**PRACTICAL POINTER:** Note that this argument doesn't always fly when it comes to violations for not cleaning in front of your sidewalk. The ECB has often ruled that you're responsible for cleaning up debris in front of your sidewalk, regardless of where that debris comes from.

**Argument #6: Description of violation doesn't match law cited.** The violation notice should give both the law you violated and a description of the violating condition. These two must match each other. If they don't, you should be able to get the violation dismissed, says Bailey.

For example, an owner got cited with a violation for mixing recyclables with other trash. The owner

claimed the violation notice didn't cite the proper section of law it claimed to be based on. The law cited in the violation stated only that rigid, green containers should be used for recyclable paper. The ECB dismissed the violation [D'Onofrio].

**PRACTICAL POINTER:** To find out what the law cited in the violation notice says (so you can compare it to the description of the violation), check the DOS's Digest of Codes. You can download this Digest from the DOS Web site at [www.nyc.gov/html/dos](http://www.nyc.gov/html/dos), or you can call the New York City Citizen Service Center at 311 and ask them to mail a copy to you.

► *What to say.* Say you get a DOS violation and the cited law you violated doesn't match the description of the violation. If you submit a letter challenging the violation, your letter might say something like this:

I challenge violation No. 9999 issued July 1, 2003, for not cleaning 18 inches into the street because the description of the violation does not match the law cited. Although the description of the violation says I did not clean 18 inches into the street, I am cited with violating section 16-120(d) of the Administrative Code, which bars placing loose rubbish out for collection. The ECB has dismissed Department of Sanitation violations against owners if the description of the violation does not match the law cited. See D'Onofrio: ECB App. No. 32281 (4/28/99). ■

#### LEGAL CITATIONS

- Battis: ECB App. No. 33847 (1/28/03).
- Bedford Holdings LP: ECB App. No. 39038 (3/25/03).
- Donlee Realty Corp.: ECB App. No. 33720 (7/30/02).
- D'Onofrio: ECB App. No. 32281 (4/28/99).
- Endlich: ECB App. No. 35390 (1/29/02).
- Rudowsky: ECB App. No. 39424 (3/25/03).
- Twin Parks Northeast: ECB App. No. 33027 (3/29/00).

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