

Use Nine Arguments to Beat DOB Violations

If you're like most owners, you've probably spent some time at the Environmental Control Board (ECB) fighting violations issued by the Department of Buildings (DOB). And you know it isn't easy to beat those violations. That's why it's important to have as much ammunition as possible, to fight those violations successfully.

To help you, ALI has reviewed dozens of ECB rulings to find those where owners successfully challenged DOB violations. We spoke with Adam Leitman Bailey, a real estate attorney who has represented owners who challenged DOB violations before the ECB, and with Mark Hertz of Mark Hertz & Co., building code consultant. We'll give you some basics on how to challenge DOB violations and tell you about nine successful arguments owners have used to beat them. You can use these arguments if you're defending against similar DOB violations.

How to Challenge DOB Violation

When you get a violation from the DOB, what you can do about it depends on whether it was a nonhazardous or hazardous violation.

Nonhazardous violations. You have two options:

Option 1: You can file a "certificate of correction" form with the DOB. In it, you admit that the condition or conditions causing the violation existed, and you sign a statement that says you corrected the condition(s). If you file this on time, you should avoid getting a fine for the violation *and* avoid having to appear before an administrative law judge (ALJ) at a hearing, says Bailey. But if you file the certificate late, or if an inspector inspects the building and finds that you didn't really correct the condition, you must appear at the hearing, where you can then challenge the violation. After you certify correction of the violation, the DOB should send you a letter letting you know that it has accepted your certification of correction.

If you don't get this letter, you should appear at the hearing, Bailey says.

Option 2: You may choose not to certify correction of the nonhazardous violation and instead appear before an ALJ on the hearing date stated on the violation notice to challenge the violation, says Hertz. For example, say you get a violation for making illegal alterations. If you don't want to remove those alterations, you may want to challenge the violation by showing the ALJ why they aren't illegal.

Hazardous violations. You must appear before an ALJ at a hearing on the date listed in the violation notice. At the hearing, you can either show that you corrected the violation or challenge it.

Nine Arguments

Here are nine arguments you can use to challenge DOB violations.

Argument #1: Repair being made when violation issued. If you get a violation notice for a nonhazardous condition and you're in the process of repairing it when the violation is issued, you can simply certify its correction with the DOB and avoid a fine. But if you get a hazardous violation, that course of action isn't open to you. However, you may still be able to get the hazardous violation dismissed if it was issued while you were repairing the condition.

For example, in one case, an owner got hit with a DOB violation for not maintaining the exterior building walls (a hazardous violation). The owner challenged the violation and proved that at the time it was issued, workers were at the building repairing the condition. The ECB upheld the dismissal of the violation [H.D.S. Funding Co.].

PRACTICAL POINTER: Bring to the hearing any proof you have to show that you were repairing the condition when the violation notice was issued. For example, says Bailey, if you used an outside contractor, you could ask the contractor or one of its employees to come to the hearing with you and testify that the condition was being repaired when the violation was issued. Or you could try submitting an affidavit (that is, a sworn statement) from the contractor stating this.

It's also a good idea to take photographs of the repaired condition, using a camera that shows the date each photograph was taken, and bring those photographs to the hearing, says Bailey. If you don't have a camera that shows the date, take a photograph of the cover of that day's newspaper near the repaired condition, to show the date, he says.

What to say. If you get a violation notice for a condition that you were in the process of repairing at the time the violation was issued, here's what you could tell the ALJ:

I request that the violation be dismissed. On [insert date], the date the violation was issued, there was a contractor in the building repairing the [insert condition that caused violation]. I have an affidavit signed by the contractor to prove this. In the case of H.D.S. Funding Co., ECB Appeal No. 22826, decided on June 25, 1997, the ECB dismissed a DOB violation where the owner was in the process of repairing the violating condition when the violation was issued.

Argument #2: Owner unable to get access to repair condition. If you can show that you tried to repair the condition that caused the violation but were unable to get access, you may be able to get the violation dismissed. For example, one owner got a DOB violation based on an inspection that showed that the support beams in the rear basement were cut, were structurally unsafe, and could cause collapse of the first floor. The owner claimed that it couldn't immediately correct the violation because an illegal tenant was living in the basement.

The owner showed that before issuance of the violation, it had repeatedly sought access to the basement for repairs, but the tenant had denied access. The owner eventually sued the tenant to get access. The ECB dismissed the violation, finding that the owner had done everything possible to maintain the building in a safe condition [Gerontis].

In another case, an owner got a DOB violation for bricks that had fallen from the water tower enclosure wall onto part of the terrace roof of a penthouse apartment, leaving a hole that wasn't repaired. The owner challenged the violation, claiming that the penthouse tenant wouldn't cooperate in permitting repairs. The owner showed that the penthouse tenant had caused the damage by placing heavy concrete tree planters on the roof. The owner couldn't repair the roof until the planters were removed, and it

had started a court case against the tenant for access. The ECB dismissed the violation [Edelman].

PRACTICAL POINTER: Be sure to bring to the hearing any proof you have to show that you tried to get access, says Bailey. For example, if you've sued to evict the tenant to get access, bring the court papers used in the case. Also bring any letters you've sent to the tenant, in which you asked for access.

What to say. If you get a DOB violation for a condition that you can't get access to correct (and you've tried to get access), here's what you could tell the ALJ:

I request that the violation be dismissed because the tenant will not give me access to correct the condition. I have tried to get access by [insert all steps taken to get access]. In the cases of Gerontis, ECB Appeal No. 30252, decided on Jan. 30, 2001, and Edelman, ECB Appeal No. 31823, decided on Feb. 24, 1999, the ECB dismissed violations against owners who tried to make repairs but who were unable to get access.

PRACTICAL POINTER: When you send a letter to a tenant requesting access so that you can correct a violation, send the letter by certified mail, return receipt requested, suggests Bailey. That way, you'll have proof that the tenant actually got the letter.

Argument #3: Temporary condition due to emergency situation. You may be able to beat the violation by showing that the condition in question was a temporary one caused by an emergency situation, says Bailey. For example, he explains, say you get hit with a violation for doing roof work without a permit. You may be able to show that you didn't have time to get the permit because you needed to work quickly to repair a roof that was in danger of collapsing.

What to say. Say you challenge a DOB violation for a temporary condition that occurred while work was being done at your building in response to an emergency situation. Here's what you could tell the ALJ:

I request that the violation for [insert condition causing violation, e.g., work without a permit] be dismissed because it was based on a temporary condition that occurred during an emergency. On [insert date], the day the violation was issued, a contractor was [insert type of work being done, e.g., repairing building's roof]. This was an emergency situation requiring immediate repairs because [insert explanation of emergency, e.g., roof was in imminent danger of collapse].

Argument #4: Violation duplicates prior hazardous violation. Say the DOB hits you with more than one hazardous violation for the same condition. It's legitimate for the DOB to give you a second violation and fine you a second time if you didn't correct the first violation. But if you get more than one notice about a violation at the same time and the violations cover the same condition, you should be able to get the extra violation dismissed and

avoid paying more than one fine by arguing that you got duplicate violations.

For example, the DOB issued two violations to an owner—one for violating a law banning illegal alterations involving change in occupancy, and the other for violating a law barring change of occupancy or use that’s inconsistent with the last issued certificate of occupancy for the building. The owner challenged the second violation as being a duplicate of the first. The ECB agreed with the owner. The evidence to prove both violations was the same—the creation of an apartment in the cellar [Owner of 142-22 60 Ave.].

In another case, the DOB issued three hazardous violations to an owner for improperly maintaining the building’s exterior wall. Though the three violation notices were issued on different dates, the owner got all three on the same day. The owner challenged the second two violations, claiming that they duplicated the first. The ECB ruled for the owner. Although the DOB can issue more than one violation for a hazardous condition that remains uncorrected, it must give the owner a chance to correct the condition before it issues another violation. In this case, the owner wasn’t given that chance because she got all three violations at once [DaSilva].

What to say. If you should get two violations for the same hazardous condition at the same time, here’s what you could tell the ALJ:

I request that the second violation [insert second violation #] be dismissed as duplicative of the first violation [insert first violation #] issued at the same time. These two violations both relate to the same condition. In the cases of Owner of 142-22 60 Ave., ECB Appeal No. 30780, decided on Oct. 28, 1998, and DaSilva, ECB Appeal No. 11835, decided on Sept. 29, 1994, the ECB ruled that an owner should not get fined for more than one violation issued for the same condition at the same time.

Argument #5: Building was sold before violation issued. If you get a violation for a building you sold before the violation was issued, you should be able to challenge the violation successfully, says Bailey. At the hearing, bring proof that you sold the building. For example, bring either the original deed of sale or a certified copy of it, or the closing statement. In one case Bailey handled, he convinced the ALJ to dismiss a violation when he submitted a certified copy of the first page of the deed to show that the building was sold before the violation was issued [Palmer].

What to say. If you get a DOB violation for a condition at a building you sold, here’s what you could tell the ALJ:

I request that the violation be dismissed because the violation notice improperly cited me as the building owner. I did not own the building on the date the violation was issued. I sold this building to [insert buyer’s name] on [insert date], and the violation was issued

on [insert date], after the building was sold. I have a certified copy of the deed of sale, showing that the building was sold on that date. In the case of Palmer, DOB Violation No. 34371128N, decided on March 24, 2003, an ALJ dismissed a violation after an owner proved that he did not own the building at the time the violation was issued.

PRACTICAL POINTER: You can also try getting a copy of the deed from the DOB’s Web site, www.nyc.gov/html.dof, says Hertz. Click on Property Records-ACRIS. He says that an ALJ will accept deeds you get from this Web site.

Argument #6: Affidavit of service not filed with ECB. After the DOB delivers the violation notice to you, it must file proof with the ECB of how the notice was delivered. This proof must be in the form of an “affidavit of service.” This is a sworn document signed by the DOB officer who delivered the violation notice, detailing when, how, and to whom the violation was delivered. If the DOB doesn’t file the original affidavit of service with the ECB, you should be able to get the violation dismissed.

When you appear before the ALJ at the ECB hearing, the first thing you should do is ask for that affidavit, which should be attached to the back of the copy of the violation notice in the case file, says Hertz. If the affidavit isn’t attached, ask the ALJ to dismiss the violation on the spot, based on what’s known legally as “improper service.”

For example, an owner asked the ECB to dismiss a DOB violation because there was no affidavit of service on file at the ECB’s offices. The DOB claimed that the affidavit of service was lost in transit from the DOB to the ECB. The ECB dismissed the violation for improper service. The DOB presented no proof that it had filed the original affidavit with the ECB and didn’t request a delay to conduct a further search for this document [New York Telephone].

What to say. If the affidavit of service isn’t on file with the ECB, here’s what you could tell the ALJ:

I request that the violation be dismissed because it was not properly served on me. There is no affidavit of service on file with the ECB. In the case of New York Telephone, ECB Appeal No. 21492, decided on May 29, 1996, the ECB dismissed a DOB violation when there was no affidavit of service on file.

Argument #7: Violation notice not mailed to second address. If the DOB tries but isn’t able to personally deliver the violation notice to you, the law allows it to use what’s known as the “nail and mail” method of delivery. With this method, the DOB mails the violation to you at the building address listed on the notice and posts the notice at that building. If the DOB uses this method to deliver the violation notice to you, and you (as the building owner or manager) are listed on the violation notice as the “respondent,” New York City Charter section 1404(d)(2)(b) requires the DOB to check whether you’re listed on other agency records—for example, at the

Department of Finance (DOF)—at a different address from the one listed on the front of the violation notice. If so, the DOB must also mail the violation notice to you at that address.

If there's more than one other address listed on the records of other agencies, the DOB need only mail it to one of the other addresses listed. If the DOB doesn't take this additional step, you should be able to get the violation dismissed for not having been properly delivered.

For example, the DOB delivered three violation notices to an owner by posting them at the building and mailing copies to the owner at the building address. But it didn't mail a second copy of the violation to the owner at its second address, listed on DOF records. So the ECB dismissed the violation notice against the owner because it wasn't properly delivered [Keses Corp.].

What to say. If you get a DOB violation that wasn't mailed to a second address you had listed on another agency's records, here's what you could tell the ALJ:

I request that the violation be dismissed because it was not properly served on me in accordance with New York City Charter section 1404(d)(2)(b). I am listed on the violation notice as the [insert owner or manager] of the building. The violation notice was served by the nail and mail method of service, but the DOB did not mail a copy to my second address of [insert second address], listed on Department of Finance records. According to New York City Charter section 1404(d)(2)(b), if the DOB serves the violation notice using the nail and mail method of delivery, it must also mail a copy of the violation notice to a second address I have listed on other city agency records. In the case of Kesep Corp., ECB Appeal No. 33882, decided on Oct. 30, 2001, the ECB ruled that the DOB must mail the violation notice to this second address when it delivers a violation notice by nail and mail service.

Argument #8: Owner's name incorrectly stated in violation notice. If the owner's name isn't correctly stated on the violation notice, you may be able to get the violation dismissed. But usually, this will only happen if the incorrectly stated name causes confusion or prejudice (say, you didn't get the violation notice because of the incorrect name or it wasn't clear from the name that the notice was issued to you).

For example, the ECB dismissed a violation against a corporate owner who claimed that he never received the violation notice. The owner showed that the notice sent to the New York secretary of state listed "CCS Enterprises Corp." as the owner. The owner's name was "LCS Enterprises Inc."

This typographical error caused the process server and the New York State secretary of state to misread the name of the corporation. The violation notice wasn't sent to LCS Enterprises Inc. [LCS Enterprises Inc.].

But in another case, the ECB refused to dismiss a violation against an owner based on a problem with the name listed in the violation notice. In that case, an owner challenged a violation, claiming that the violation notice identified the respondent as "Maidan," without identifying a first name. But the ECB ruled that unless omitting the respondent's first name created confusion, the violation notice itself remained valid. The owner didn't show that the omission of a first name resulted in any confusion as to the identity of the named respondent [Maidan].

What to say. If your name isn't properly identified on the violation notice and this causes some confusion or prejudice, here's what you could tell the ALJ:

I request that the violation be dismissed because the violation notice incorrectly stated the name of the building owner as [insert incorrect name]. In fact, the owner's name is [insert correct name]. This mistake caused confusion as to who was responsible for the violation. In the case of LCS Enterprises Inc., ECB Appeal No. 25864, decided on Sept. 24, 1997, the ECB dismissed a violation because the owner's name wasn't correctly stated in the violation notice.

Argument #9: Incorrect date of occurrence. If the violation notice incorrectly states when the violation occurred, you should be able to get it dismissed. For example, the DOB issued a violation to an owner, stating that the violation had occurred on July 1, 1988, which was four years before it sent the owner the violation notice. The DOB conceded that the date listed was probably incorrect. The ECB dismissed the violation, finding that the violation notice was defective because it incorrectly stated the date the violation occurred [Jong Mok Che].

What to say. If the violation notice incorrectly states the date the violation occurred, here's what you could tell the ALJ:

I request that the violation be dismissed because the violation notice incorrectly states the date of occurrence as [insert date stated on violation notice]. This can't possibly be the correct date because [insert why date must be incorrect, e.g., it's a few years earlier]. In the case of Jong Mok Che, ECB Appeal No. 19118, decided on June 29, 1994, the ECB dismissed a violation because it stated an incorrect date of occurrence. ■