

Committee on  
Small Business  
jointly with  
Governmental  
Operations

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**June 19, 2008**

**Testimony of Alex Truitt on behalf of John E. Osborn P.C. before the  
Small Business and Governmental Operations Committees  
Regarding Int. No. 777**

My name is Alex Truitt. I am here to testify on behalf of the law firm of John E. Osborn P.C. to comment on City Council Int. No. 777 which proposes many modifications to the New York City Environmental Control Board. John E. Osborn P.C. represents major real estate developers, hotels, school districts and universities, as well as construction managers and one of the major companies providing scaffolding, hoisting and sidewalk bridges. We have day-to-day involvement with the Environmental Control Board.

Although we believe that the proposed changes to the Environmental Control Board presented in the legislation will enhance the efficiency, professionalism and quality of the hearings, there are many practical issues which impede the ECB's effectiveness.

Your attention is called to Section 2, Subsection d(k) of the legislation which requires the ECB to "...develop and implement technology to enable electronic case management, including but not limited to: online adjudication and payments in appropriate cases; more efficient administration of case conferences, hearings and appeals; electronic case scheduling; and generation of data and other reports to enhance the efficiency and increase public accountability..." While we believe some of the practical concerns are touched here, there are additional issues we think should be addressed, which I will comment on shortly. We also look forward to sharing our further detailed recommendations with the ECB and to assist with suggestions on implementation.

Before we get to more of the practical reforms, we strongly recommend that the City of New York allocate sufficient financial resources to implement the important reforms included in the legislation. If an adequate budget is not committed, the effort to implement the reforms suggested in the legislation will be stymied.

Effective, efficient, fair and well-reasoned adjudication of violations before the ECB lends to greater legitimacy of enforcement efforts and brings about better compliance. In the case of the devastating construction accidents of 2008, we believe that the fair, consistent and even-handed enforcement of the laws and regulations at ECB, which cover construction and development, can go a long way toward creating a consistent understanding of the law and a greater degree of voluntary compliance in construction safety, while accommodating the efficient building of the major construction projects which are so vital to New York City's future.

We believe that the following practical reforms are imperative:

1. **The ECB's recordkeeping must be upgraded immediately:** in many instances, the ECB has lost and/or misfiled records relating to hearings, docketing and evidence. This causes financial damage and significant administrative inconvenience to the respondents. In many cases respondents have been listed in default even after a fine has been paid in full or dismissed. As a result of these errors, in many instances, the New York City Department of Finance has issued judgments against the respondents, and even when the discrepancy is confirmed, the ECB's recordkeeping and docketing makes it very difficult to correct their own records and therefore it is very difficult to remove the judgment filed by the Department of Finance.

The ramifications of an incorrectly issued default may be to delay a project close-out, deny issuance of further permits to a property or company, or to deny award of future public sector contracts.

It is notable that when a file is lost or a default is issued by mistake because of the deficient recordkeeping system, it often takes a number of months for the violation to be restored to the calendar for adjudication on the merits. Meanwhile, the pending (unresolved) violation may prevent the respondent from obtaining a permit. This often forces the respondent to voluntarily pay a fine, so that the respondent can obtain a permit, prior to adjudication while the violation is still pending.

2. **The ECB does not adequately assure that the respondent receives the violation and defaults are issued because the respondent is unaware of the violation:** It is imperative that a stronger effort be made to inform a respondent that a violation has been issued. An important step to resolve this problem is to provide that an additional notice be sent to the respondent in each instance. It appears that the creation and maintenance of an integrated registry of actual copies of issued violations and an up-to-date status calendar

of the hearings and payments received should be kept. This registry would allow businesses to keep track of judgments issued against them, as well as enabling them to see when records are misfiled or when fines which have already been paid have not been "logged in".

3. **The selection process for selecting and training of the administrative law judges is inadequate and their quality is inconsistent:** it is imperative that the selection and training of administrative law judges be upgraded and that significant financial resources be devoted to increasing pay so that qualified administrative law judges can be attracted and retained.
4. **The adjudication process is unreasonably lengthy:** The process of scheduling and holding a hearing, obtaining adjudication and issuing a decision requires streamlining. When there is a delay in scheduling and conducting a hearing and rendering a decision, the respondent must continue to report the outstanding violation.

The ECB does not have a sufficient number of hearing officers to hear cases on a given day; therefore, it is not uncommon that the respondents and their attorneys be required to wait for a number of hours before the case is heard. It is important that more and better trained administrative law judges be provided and that the dockets be managed better so that only the number of hearings be scheduled which may be effectively managed on each given date.

5. **Appeals sometimes takes years to be decided:** An appeal from an adverse ECB determination must be made within 30 days but obtaining a decision often takes over a year. When an appeal is taken by either the City of New York or a respondent, the appeal will be delayed (and the time extended) while the audio tape of the hearing is located [there is no stenographic record]. On some occasions, the tapes have been lost; this leaves the party appealing with the option of proceeding with the appeal without the transcript or undertaking the expensive and cumbersome task of retrying the case from scratch.

## Conclusion

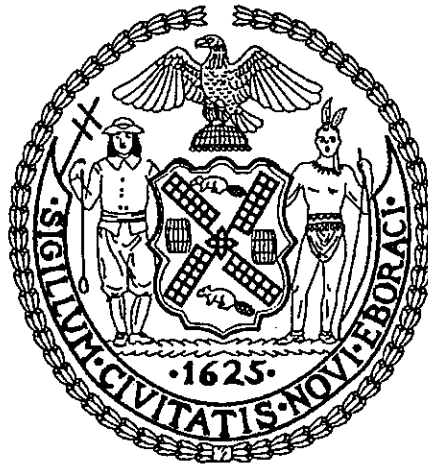
Although we believe that the amendments proposed to the NYC ECB will promote better efficiency, professionalism and quality of the ECB's adjudication process, we believe that unless these legislative changes are accompanied with specific reforms, the changes will not be effective. These essential reforms include: (1) investing significantly in selection and training of higher quality administrative law judges; (2) upgrading recordkeeping and the use of technology to allow for accessibility of all records to respondents on-line; and (3) shortening the unreasonably lengthy adjudication process.

The City of New York

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**Int. No. 777**

**In relation to the consolidation of the environmental control board with the office of administrative trials and hearings and making other changes related thereto**



The City Council

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June 19, 2008

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**Testimony of:**

**Carole Post, Director, Agency Services at Mayor's Office of Operations**

**David Goldin, Administrative Justice Coordinator**

**Roberto Velez, Chief Administrative Law Judge, Office of Administrative Trials and Hearings**

*Testimony of Carole Post, Director of Agency Services  
Mayor's Office of Operations*

Good Afternoon Chairman Felder, Chairman Yassky and members of the Council. My name is Carole Post and I am the Director of Agency Services at the Mayor's Office of Operations. I am joined today by David Goldin, the Administrative Justice Coordinator, Roberto Velez, the Chief Administrative Law Judge at the Office of Administrative Trials and Hearings (OATH), Charles McFaul, the Deputy Chief Administrative Law Judge for OATH, and Michael Moran, the Deputy Executive Director of the Environmental Control Board (ECB).

Thank you for this opportunity to discuss Intro #777 concerning the consolidation of ECB with OATH and other changes at ECB and to answer any questions you may have today. This proposed legislation represents a significant step by the City Council to advance the reform efforts at ECB. On behalf of the administration, we are happy to have partnered with the Council and worked together to develop this bill. I would like to thank the sponsors of the bill and members of Council staff for joining myself and my colleagues from the administration who worked to bring this together.

Before discussing the particulars of the bill, I would like to give you some background about the efforts that have been taken concerning ECB in the recent past, to describe how the proposed legislation will impact ECB and how the consolidation with OATH will improve the way ECB operates. I will be joined by my colleagues David Golden and Roberto Velez in providing this information.

But first, some background.

The Environmental Control Board was created in 1972 as part of the Department of Environmental Protection – or what was its predecessor at that time. It was intended to be an alternative to criminal court for adjudication of air and noise code violations. Rather than burden the criminal courts with adjudicating these types of code violations, the Council gave ECB the authority to hold administrative hearings.

Since then, ECB has become the adjudicatory body for hundreds of different quality of life infractions issued by 12 different City agencies (DEP, DOB, DSNY, NYPD, DOHMH, FDNY, DOT, DCA, DoITT, DPR, LPC, BIC).

ECB is now the 2<sup>nd</sup> largest administrative tribunal in New York City after the Parking Violations Bureau and one of the largest in the country. On an annual basis, ECB processes approximately 700,000 violations and conducts more than 175,000 hearings.

In 2006, the Mayor's Office of Operations partnered with the Administrative and Criminal Justice Coordinators and the leadership at ECB to review ECB operations top to bottom and identify areas for improvement. At the same time and since then, we began implementing changes to improve the way ECB delivers services.



A few examples of some of the improvements that have been made include increasing transparency for respondents by adding much more information to the ECB website and by developing user guides and reference material; implementing electronic decisions to make it faster for judges to issue rulings and improve the appearance and professionalism of judicial decisions; and improving accessibility by offering translation services for non-English speaking respondents at hearings in each borough office.

These improvements are all steps in the right direction, and the proposed legislation will enable us to pursue additional operational and organizational improvements, particularly the consolidation of ECB with OATH. By consolidating ECB with OATH, ECB will benefit from OATH's expertise at tribunal administration. And it will leverage the experience, resources and best practices at OATH to ensure that ECB makes the best possible use of new technology, insists on the highest standards of professionalism and places a premium on convenience, fairness and effective enforcement.

With that as a backdrop, I would like to introduce David Goldin to speak in further detail about how the legislation will impact ECB operations, and shortly Roberto Velez will speak about how OATH will help to accomplish these improvements.

*Testimony of David Goldin  
Administrative Justice Coordinator*

Good afternoon, Chairman Felder, Chairman Yassky, Council members. I am David Goldin, the Administrative Justice Coordinator in the Mayor's Office.

Intro 777 basically does six things to improve ECB. I would like to go through those six things, briefly, one by one.

First, the bill would transfer the overall administration of ECB from the Department of Environmental Protection to the Office of Administrative Trials and Hearings. Whatever the rationale for locating ECB within DEP, or its forerunner, when ECB was created over 35 years ago, the fact is that today that arrangement is outdated. Oversight of a tribunal is not critically related to DEP's core mission. By contrast, OATH is the City agency with expertise in tribunal administration. Locating ECB within OATH means that ECB will be able to benefit from that expertise, draw on OATH's resources and be part of a management structure geared to enhance fairness, efficiency and professionalism in adjudication.

The point of the transfer, however, is not to change the basic set of processes ECB follows or the basic set of services it provides. ECB will continue to have five branch offices, and it will continue to employ the same administrative and clerical staff and administrative law judges. ECB and OATH will maintain their separate jurisdictions over different types of

cases, and ECB will continue to have its own rules and its own more informal approach to handling cases.

Second, the bill will put into law the requirement that ECB offer language services to a respondent whose primary language is not English to help that respondent participate in his or her hearing. In fact, ECB has already initiated use of Language Line to fulfill that requirement. Language Line is a telephone-based service that allows an administrative law judge, at the start of a hearing, to place a call to a national bank of language interpreters and conference in a trained interpreter. The interpreter participates by speaker phone, so a record is made of the entire process. Language Line gives ECB access to over 170 languages. Since fall of 2007 ECB has expanded the use of Language Line successfully throughout its system, and feedback from both judges and respondents has been very positive. Of course, a respondent who prefers to rely on someone he or she has brought with them to the hearing, such as a friend or relative, is not forced to use Language Line.

Third, the bill will reduce the inconvenience to respondents of participating in ECB hearings by imposing new limitations on when hearings can be adjourned. This is an area where ECB can do a better job for respondents – and for the important goal of enforcing our quality-of-life laws, too. The process of contesting a violation can be time-consuming, and for many respondents a trip to ECB means hours away from the store or business. So the bill has provisions that will minimize the number of times a respondent has to come to ECB.

Under the bill, if a respondent appears at ECB on the date, at the time and at the place specified in a notice of violation, the hearing cannot be adjourned by the administrative law judge unless the respondent agrees to the adjournment, or a representative of the agency that issued the notice of violation is present, or the representative's absence is due to extraordinary circumstances. In other words, a respondent won't come into ECB and then find his or her hearing being adjourned to another date without the issuing agency even having shown up. Also, if the first hearing date is properly adjourned to permit the officer who wrote the notice of violation to appear, and if the respondent then appears as required on the adjourned hearing date, the hearing won't be adjourned if the officer doesn't appear, unless the respondent consents or there are extraordinary circumstances. Under these rules, hearings will move ahead more quickly, and cases will be more efficiently resolved.

Fourth, the bill codifies a provision that is now part of ECB's rules, which says that if a party improperly fails to comply with a discovery order or a legitimate discovery request, an administrative law judge may impose sanctions, which could include limiting the evidence the party is allowed to present at the hearing.

Fifth, the bill reflects a commitment on the part of ECB to decide appeals within 180 days after a respondent has filed an appeal. Bear in mind, either party – the respondent or the City agency that issued the notice of violation – may take an appeal from a decision issued by an administrative law judge at ECB. Let me describe the appeal process for a moment to explain what change the bill makes. To bring an appeal, a party must file a timely

appeal letter with ECB. The appeal letter must explain the party's objection to the ALJ's decision. All appeal letters are reviewed to make sure they meet that and other legal criteria. If they do, they go to an ECB Appeals Unit ALJ, who reviews the record, including the transcript, and prepares a draft decision. After the draft appeal decision has been reviewed by ECB's legal staff, it is presented to a panel of ECB board members. The final step in the process is approval of the decision by the full ECB board.

Intro 777 provides that if a respondent files an appeal and no decision has been rendered within 180 days, the respondent may proceed directly into state court and treat the decision of the administrative law judge as the final action by ECB. That way, a respondent who has appealed from a judge's decision won't be stuck in limbo, needing to wait for a board decision on the appeal to be able to challenge ECB's decision. Of course, the goal here is to have ECB actually issue every appeals decision within 180 days after the appeal is begun. Again, that will be an important step toward increasing efficiency and reducing the inconvenience an ECB hearing imposes on respondents.

The last thing that this bill does is to require ECB to develop and put in place an electronic case management system and to report back to the Council by December 1, 2008 on planning and progressing toward fulfillment of that goal. There is no question that the improvements of ECB we are all looking to achieve are critically dependent on new information technology. We are already in the process of developing that technology, building on the significant steps Carole Post just mentioned and such other already in-place improvements as providing respondents with the ability to make online inquiries to check on the status of a violation or to obtain a billing statement that lists outstanding violations

and the installation of an automated call distribution system to track call volumes at our customer service center to better allocate staff for telephone responses at peak times.

When we make our full report later this fall, we look forward to detailing for the Council what we will have achieved by then and what we will be anticipating achieving in the near future after that. The legislation directs that this initiative include steps toward maximizing the possibility of conducting adjudication and related processes online, so that respondents can contest or pay a violation without having to appear physically at an ECB office; steps toward doing all conferencing and scheduling online, so if a case does have to be heard in person, the number of times the parties have to appear physically at ECB is reduced; and steps toward developing and issuing more data reports, so ECB has the benefit of more effective internal management, and the Council and members of the public have greater insight into ECB operations.

Overarching the improvements contemplated in this legislation is the transfer of ECB to OATH, and the opportunity we have to align management of ECB with the goal of enhancing the fairness, efficiency and professionalism of tribunal administration. Chief Judge Roberto Velez of OATH, who serves as the chair of the Environmental Control Board, will speak further to that.

*Testimony of Roberto Velez, Chief Judge  
Office of Administrative Trials and Hearings*

Good afternoon Chairman Felder and Chairman Yassky and members of the Governmental Operations and Small Business Committees. My name is Roberto Velez and I am the Chief Administrative Law Judge at the Office of Administrative Trials and Hearings (OATH) and Chair of the Environmental Control Board (ECB).

I think it would be helpful to the hearing today if I provide you with some background facts about OATH.

OATH was established in 1979 to professionalize the administrative hearing system by functioning as an independent tribunal. In 1988, OATH was incorporated into the City Charter as the City's central tribunal with authority to conduct administrative hearings for all agencies, boards and commissions of the City of New York.

OATH is a general jurisdiction tribunal, that is, we hear cases from many different agencies, including: vehicle forfeitures referred by the Police Department; license and regulatory matters filed by the Department of Buildings, the Taxi and Limousine Commission, and the Department of Health and Mental Hygiene; housing disputes referred by the Loft Board and the Department of Housing Preservation and Development; discrimination complaints brought by the City Commission on Human Rights; contract claims filed by contractors; and civil penalty proceedings referred by the Conflicts of Interest Board.

OATH also hears cases referred by non-mayoral agencies, including disciplinary cases from the Tri-Borough Bridge and Tunnel Authority and the Transit Authority, and prevailing wage cases from the City Comptroller. Most recently, the Office of the City Clerk referred review of its denial of marriage licenses and enforcement proceedings under the City's recently amended Lobbying Law. In Fiscal Year 2007, OATH docketed 2,328 cases emanating from 27 mayoral agencies and four non-mayoral agencies, including three state public authorities.

OATH's administrative law judges are appointed by me after an extensive recruitment and selection process. Recruitment involves a rigorous review of credentials, skills and abilities, and a decision-writing competition. OATH ALJs have five-year terms and are removable only for cause. They are full time managerial employees drawn from varied backgrounds of legal experience, including practice in the Law Department, the Attorney General's Office, other government agencies, the Legal Aid Society, and private law firms.

OATH's ALJs follow the Rules of Conduct for City ALJs as well as the New York State Code of Judicial Conduct. The Rules of Conduct and the State Code set high ethical standards for OATH judges and restrict activities deemed inconsistent with their judicial positions. The Rules of Conduct for City ALJs were created through the collaborative efforts of Deputy Mayor Robles-Roman, Administrative Justice Coordinator David Goldin, myself, and other ethics professionals. The Rules establish exemplary standards for the City's administrative law judges and mandate accountability, transparency, and accessibility at the City's tribunals. Unique to these Conduct Rules are the provisions



aimed at offering self-represented litigants the opportunity to have their cases heard fully on all relevant points.

I also want to mention two important programs OATH has undertaken. In 2003, OATH established the Center for Mediation Services to serve as an independent conflict resource center for City agencies and employees. The Center provides mediation, group facilitation, training, and conflict consultation to assist government personnel in resolving and managing conflict in the workplace.

Another OATH initiative is the Administrative Judicial Institute, which was established in 2006. The Institute serves as a professional development and educational resource for the City's administrative law judges. Administrative adjudication in the City's 14 tribunals depends upon the training, skills, and abilities of the 500 administrative law judges and hearing officers who preside over thousands of cases each year.

Traditionally, city tribunals were responsible for training their administrative law judges. Unfortunately, in many instances inadequate budgets meant that training was not provided on a regular basis and the quality varied from tribunal to tribunal. To remedy this situation, the Mayor issued Executive Order 84 in January 2006, creating the Administrative Judicial Institute within OATH with a mandate to provide comprehensive, consistent, and regular training to all city administrative law judges.

As my colleagues, Ms. Post and Mr. Goldin, have testified, the Environmental Control Board serves as the tribunal whose jurisdiction covers most of the codes and regulations

designed to protect the quality of life in the City. ECB's jurisdiction includes sanitation and street vendor violations, air, asbestos, water and noise violations, as well as violations of the Building and Fire Codes.

Although many members of the public often believe that the violations they receive come from ECB, as a tribunal, ECB does not issue notices of violation. Neither does it establish enforcement policies, employ inspectors or enforcement agents, or direct, control or otherwise influence where, when or to whom violations are to be issued. However, once a notice of violation is issued, the matter may only be resolved through the ECB adjudication process. For that reason, ECB often becomes a lightning-rod for enforcement issues or complaints that are outside its authority to address or resolve.

Let me now briefly review some of the benefits expected from the proposed consolidation of OATH and ECB. As the City's central tribunal, OATH can bring comprehensive and enduring change by introducing its expertise and "best practices" to ECB operations in the areas of:

- data reporting and accountability, by requiring more robust reporting tools and thorough reporting policies;
- customer service and public information, by opening communications internally and to the public and development of materials to guide and assist users;
- legal recruitment and training, by leveraging the Administrative Judicial Institute to focus on improving skills and expertise of judges;

- technology and innovation, by guiding and managing the implementation of a new case management system; and
- professionalism and credibility, by ensuring the highest standards of judicial integrity and competency.

As always, the members of this Committee have a standing invitation to visit OATH and ECB facilities and to observe our hearings. I will be happy to answer the Committee's questions at this time.

*End*