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## Fighting Dirty Sidewalk Tickets in New York City

Sean Roman Strockyj

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# Fighting Dirty Sidewalk Tickets in New York City

By Sean Roman Strockyj\*

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In New York City (the City), a property owner has the obligation to keep the sidewalk in front of his property clear of litter.<sup>1</sup> This responsibility does not end at the curb, but extends eighteen inches into the city streets. The New York City Administrative Code establishes two one-hour periods, known as “routing hours,” during which the Department of Sanitation can conduct citywide enforcement for residential premises—8:00 a.m. to 9:00 a.m., and 6:00 p.m. to 7:00 p.m.<sup>2</sup> For commercial premises the routing hours vary by sanitation district.<sup>3</sup> Tickets are regularly issued for items such as plastic cups, bottles, cigarette butts, napkins, tissues, plastic bags, flyers, wrappers, food waste, and dog waste being found in front of a home or business.

Residential owners will receive a ticket directly from a sanitation enforcement officer, if the officer can locate the owner at the time of the violation.<sup>4</sup> Alternatively, the owner will find a ticket, called a Notice of Violation (NOV), affixed to his door.<sup>5</sup> Fines are

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\* The Author wishes to thank Kirandeep Madra and John Ryall in the preparation of this Article.

<sup>1</sup> Section 16-118(2)(a) of the New York City Administrative Code mandates that all property owners (residential, commercial, and industrial) have the obligation to keep the sidewalk in front of their property clear of litter. N.Y.C., N.Y., ADMIN. CODE § 16-118(2)(a) (2013), [http://www.nyc.gov/html/nycwasteless/downloads/pdf/laws/recycling\\_adcode.pdf](http://www.nyc.gov/html/nycwasteless/downloads/pdf/laws/recycling_adcode.pdf).

<sup>2</sup> See 16 Rules of the City of New York (R.C.N.Y.) § 15-01(c), <https://rules.cityofnewyork.us/content/section-15-01-designation-enforcement-routing-hours-residential-buildings>.

<sup>3</sup> Sanitation enforcement agents patrol commercial and industrial blocks at specified times focusing on violations for dirty sidewalks and failure to clean eighteen inches into the street. See N.Y.C., N.Y., ADMIN. CODE §§ 16-118(2)(a), 16-118.1; see also N.Y.C. DEP’T OF SANITATION, A SUMMARY OF SANITATION RULES AND REGULATIONS 6 (Oct. 2009), available at [http://www.nyc.gov/html/dsny/downloads/pdf/rules/digest/DSNY\\_Rules\\_Reg.pdf](http://www.nyc.gov/html/dsny/downloads/pdf/rules/digest/DSNY_Rules_Reg.pdf).

<sup>4</sup> See *New York City v. Shendi, Inc.*, Appeal No. 39229 (June 24, 2003), available at [http://archive.citylaw.org/ecb/Long%20Form%20Orders/2003/06\\_01/39229.pdf](http://archive.citylaw.org/ecb/Long%20Form%20Orders/2003/06_01/39229.pdf) (involving an unsuccessful challenge to affix and mail service). In *Shendi*, the enforcement officer signed an affidavit that he was not able to locate the respondent, so he affixed a copy of the NOV on the door of the premises, followed by two mailings. *Id.*

<sup>5</sup> Section 1404(d)(2) of the New York City Charter provides that, after a reasonable attempt to personally deliver the NOV pursuant to Article 3 of the C.P.L.R., alternative “affix and mail” service may be made. N.Y.C., N.Y. CHARTER § 1404(d)(2) (2013) (originally enacted as § 1404(d)(2)).

generally \$100 for a first offense and are usually the same for subsequent violations, but can reach up to a cost of \$300.<sup>6</sup>

If a New Yorker wishes to challenge the issuance of a violation, an administrative fact-finding hearing will be held before the Environmental Control Board (ECB), which is one of the largest administrative tribunals in the City.<sup>7</sup> The ECB provides hearings for a multitude of infractions of the City's laws and rules issued by various City agencies, including the Department of Sanitation.<sup>8</sup> Each hearing involving a dirty sidewalk is initially heard before an Administrative Law Judge (ALJ)—a New York State attorney with whom the City has contracted.<sup>9</sup> Under section 3-54 of title 48 of the Rules of the City of New York (R.C.N.Y.), the applicable burden of proof before the ECB is a preponderance of the credible evidence.<sup>10</sup> The responding citizen can represent himself, hire an attorney, or obtain assistance from professionals, colleagues, or even friends and family members.<sup>11</sup>

<sup>6</sup> See N.Y.C., N.Y., ADMIN. CODE § 16-118(2)(a); SUMMARY OF SANITATION, *supra* note 3, at 6. Customarily, a property owner will be given the option of paying the \$100 upon a plea of guilty. SUMMARY OF SANITATION, *supra* note 3, at 4, 6. If a property owner avails himself of the right to challenge the NOV at a hearing, the maximum fine is \$300. *Id.* However, for a first offense, the respondent should not expect to pay more than the \$100. *Id.* On June 1, 2003, the fines for several sanitation code violations, including the failure to clean sidewalks and eighteen inches into the gutter, doubled to \$100 upon order of the ECB. See *Sanitation Fines Increase on June 1st*, N.Y.C. DEP'T OF SANITATION (Apr. 7, 2003), <http://www.nyc.gov/html/dsny/html/pr2003/040703.shtml>.

<sup>7</sup> The ECB has a caseload of about 700,000 hearings per year. David B. Goldin & Martha I. Casey, *New York City Administrative Tribunals: A Case Study in Opportunity for Court Reform*, 49 A.B.A. JUD.'S JOURNAL 20 (Winter 2010), available at [http://www.americanbar.org/content/dam/aba/migrated/divisions/Judicial/MO/MemberDocuments/JJ\\_2010\\_Winter.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/divisions/Judicial/MO/MemberDocuments/JJ_2010_Winter.authcheckdam.pdf).

<sup>8</sup> The ECB has jurisdiction to hear complaints arising from quality of life violations issues by twelve city agencies, including the Department of Sanitation. *Id.* at 23. The ECB was created in 1972 to adjudicate air and noise pollution violations and since that time its jurisdiction has been repeatedly expanded. *Id.* at 28 n.10. In November of 2008, it was transferred to the jurisdiction of the New York City Office of Administrative Trials and Hearings, however the ECB continues to have its own separate offices and caseload. *Id.* at 23.

<sup>9</sup> SUMMARY OF SANITATION, *supra* note 3, at 4.

<sup>10</sup> The ECB's procedural rules are contained in 48 R.C.N.Y. §§ 3-11 to 3-95 (2013).

<sup>11</sup> See *Frequently Asked Questions: Do I Need a Lawyer?*, N.Y.C. OATH, <http://www.nyc.gov/html/oath/html/ecb/faq.shtml#lawyer> (last visited Mar. 14,

If the aggrieved citizen loses before the ALJ,<sup>12</sup> he can appeal to the final level of administrative authority, the ECB Appeals Board.<sup>13</sup> The ECB Appeals Board will then issue a written decision, many of which are available on a fantastic website maintained by the City and New York Law School.<sup>14</sup>

When a citizen receives an adverse decision by the ECB Appeals Board, he must avail himself of Article 78 of the Civil Practice Law and Rules for New York Supreme Court review.<sup>15</sup> This article deals with the demanding nature of fighting one of the City's low level and common offenses—that of having been caught with litter in front of one's property on the City sidewalk and street. As anyone who lives in the great metropolis can attest, virtually every City property owner can be issued a ticket for having some form of litter in front of his home or business any day of the week. Consequently, it is hoped that this article will prove helpful to the unhappy property owner who is surprised to find he is subject to a three-figure fine for the failure to keep his sidewalk in pristine condition. Naturally, only the most resolute and stubborn would consider seeking Article 78 relief for a \$100 ticket.

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2014). In their article, Goldin and Casey correctly note that lawyers will often cost more than the value of the ticket. Goldin & Casey, *supra* note 7.

<sup>12</sup> The ALJ makes a recommended order and decision for the ECB. Under 48 R.C.N.Y. § 3-57, a hearing officer's decision shall set forth findings of fact and conclusions of law and the hearing officer's reasons for his finding on all material issues. § 3-57(a). If the ALJ's decision is not appealed, the decision is automatically adopted by the ECB Appeals Board. § 3-57(c).

<sup>13</sup> See § 3-74. When an appeal has been filed, the Board is to consider the entire matter on the basis of the record before it. § 3-74(a). ECB appeals attorneys then review the case and prepare a proposed decision. See N.Y.C. OFFICE OF ADMIN. TRIALS & HEARINGS, <http://www.nyc.gov/html/oath/html/ecb/ecb.shtml> (last visited Mar. 14, 2014). A proposed decision and the record are then reviewed by a panel of ECB Appeals Board members, who issue a decision. See § 3-74(c). Usually, a panel of three Board members will decide an appeal. In rare cases, a larger panel will be used. The ECB has thirteen members. Six members are commissioners of City agencies. Six members are citizens, four of which the City deems experts in the fields of water pollution control, business, real estate, and noise. There are two general citizen representatives. The final member is the Chief ALJ at the Office of Administrative Trials and Hearings (OATH). See N.Y.C. OATH, <http://www.nyc.gov/html/oath/html/ecb/ecb.shtml>.

<sup>14</sup> *Center for N.Y.C. Law*, N.Y. LAW SCHOOL, <http://www.nyls.edu/cityadmin/> (last visited Mar. 27, 2014).

<sup>15</sup> See N.Y.C.P.L.R. 7801–7806 (McKinney 2014).

## I. AVAILABLE ARGUMENTS

When a respondent chooses to fight a violation, there are a number of arguments he can present. Few will emerge victorious.

### A. *Request the Issuing Officer to Appear*

First, a respondent can demand the presence of the officer who issued the ticket for the purpose of cross-examination. In fact, 48 R.C.N.Y. § 3-51(c) specifically grants respondents the right to cross-examination before the ECB. Sadly, in most cases, the respondent will be deprived of this right.<sup>16</sup> Section 1401(d)(1)(b) of the New York City Charter and 48 R.C.N.Y. § 3-54 provide that, if sworn to, the NOV will be considered prima facie evidence of the statements alleged. Effectively, this provision is utilized to permit the government to satisfy its burden of proof without requiring the issuing officer to come to the tribunal to testify. In the overwhelming majority of dirty sidewalk cases before the ECB, the citizen is prosecuted on the basis of the written words in the ticket.

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<sup>16</sup> The right to cross-examination is expressly codified in a regulation applicable to proceedings before the ECB. 48 R.C.N.Y. § 3-51(c). Specifically, 48 R.C.N.Y. § 3-51(c) provides that every party shall have the right of due notice, cross examination, presentation of evidence, objections, motions, argument, and all other rights to a fair hearing. However, the ECB has routinely held that there is no automatic right to the appearance of the issuing officer. *See New York City v. Estantanous*, Appeal No. 1100772 (ECB N.Y. Dec. 15, 2011), *available at* <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2011/1100772.pdf>; *New York City v. Mazzarino*, Appeal No. 34818 (ECB N.Y. Aug. 3, 2004), *available at* [http://archive.citylaw.org/ecb/Long%20Form%20Orders/2004/08\\_01/34818.pdf](http://archive.citylaw.org/ecb/Long%20Form%20Orders/2004/08_01/34818.pdf). The ECB has held that a respondent must establish a need for cross-examination. *See N.Y.C. Dep't of Bldgs. v. Voidislaver Congregation*, Appeal No. 1000013 (ECB N.Y. Apr. 29, 2010), *available at* <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2010/1000013.pdf>. This is not in accord with court of appeals precedent. *See Hecht v. Monaghan*, 307 N.Y. 461, 470 (1954) (recognizing that cross examination under oath serves the critical purposes of permitting the litigant the opportunity to expose false swearing and inaccuracies of witnesses in observation, recollection and narration); *Gordon v. Brown*, 84 N.Y.2d 574, 578 (1994) (holding that the court of appeals, as a matter of due process, recognizes a limited right to cross-examine witnesses in administrative proceedings). When a respondent opts for adjudication by mail, the right to request the appearance of the officer is waived. *See New York City v. Salzman*, Appeal No. 1300108 (ECB N.Y. Apr. 25, 2013), *available at* <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2013/1300108.pdf>.

### B. *The General Denial*

When the officer does not show up to the hearing and the ECB relies on the allegations in the ticket to prove the Department of Sanitation's case, a respondent can argue that the garbage was not present through making a general denial. A review of ECB decisions shows that this defense tends to result in the ALJ and ECB Appeals Board finding the denial less than credible.<sup>17</sup> In relation to a ticket given during a resident's normal work hours, when the citizen argues there was no trash at the cited area before and upon returning from work, the ECB faults the citizen for not being home at the time of the property inspection.<sup>18</sup> If the officer actually shows up to testify, there is little chance of an ALJ crediting a denial.<sup>19</sup>

Nevertheless, it should be recognized that it is settled law in New York that when a citizen makes a denial that is not fantastic in nature against the allegations in the violation notice, the government must come forward with additional evidence to support the ticket.<sup>20</sup>

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<sup>17</sup> See *New York City v. Dillon*, Appeal No. 1001082 (ECB N.Y. Mar. 24, 2011), *available at* <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2011/1001082.pdf>. In *Dillon*, the respondent denied the allegations in the NOV by asserting that he never had an accumulation of litter or debris in front of his property. *Id.* at 1. However, the ECB upheld the violation through noting that respondent was not present at the exact time the violation was issued. *Id.* Similarly, in *New York City v. Ezugwu*, the respondent represented that the property was clean when the sanitation officer inspected it. Appeal No. 1101079 (ECB N.Y. Dec. 18, 2011), *available at* <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2011/1101079.pdf>. However, the ECB favored the written statements on the NOV over the live testimony. *Id.*

<sup>18</sup> See *New York City v. Jones*, Appeal No. 1201263 (ECB N.Y. Feb. 28, 2013), *available at* <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2013/1201263.pdf>.

<sup>19</sup> See *New York City v. Rios*, Appeal No. 0900444 (ECB N.Y. Mar. 25, 2010), *available at* <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2010/0900444.pdf>.

<sup>20</sup> When a citizen makes a denial at a hearing that is not bizarre in nature, the allegation must be dismissed. See *Gruen v. Parking Violations Bureau*, 395 N.Y.S.2d 202, 202 (App. Div. 1977) (involving the prosecution of a parking ticket). In *Gruen*, the First Department of the New York Supreme Court, Appellate Division held that the naked summons, "could not, without more, preponderate over the sworn refutation by petitioner." See *id.* at 202-04 (citing *Heisler v. Atlas*, 331 N.Y.S.2d 131, 131-32 (App. Div. 1972)). Since the Parking Violations Bureau (PVB) in *Gruen* produced no additional evidence against the citizen's

If the government does not produce such additional evidence, the government must be held to have failed to sustain its burden.<sup>21</sup>

### C. Error on the Ticket

If a respondent can persuade the ALJ that the litter was found on a portion of sidewalk not controlled by the individual issued the ticket, this will result in a victory for the aggrieved citizen.<sup>22</sup> However, when a sanitation enforcement officer inaccurately describes the characteristics of the dwelling, the ECB has a tendency to find such errors as ministerial in nature, and will refuse to hold such errors against the enforcement officer.<sup>23</sup> Further, errors of the ALJ are rarely regarded as significant.<sup>24</sup> In contrast, the ECB Appeals Board pounces on any errors of the citizen—usually the only person who shows up to testify—as a way to uphold the violation.<sup>25</sup> All in all, the citizen's errors are scrutinized, but the absent government agent's errors tend to be excused.

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sworn denials of the charge in the ticket, the First Department held that the City failed to sustain its burden of proving by a preponderance of the credible evidence that the citizen violated the law. *Id.* at 202–04. The application of this rule played out in another parking violations case, *Young v. City of New York Department of Finance Parking Violations Adjudications*. No 111675/062007 N.Y. Slip Op 51460(U), 16 Misc. 3d 1117(A), 847 N.Y.S.2d 900 (Sup. Ct. June 13, 2007). Mr. Young, an attorney, fought his parking ticket by availing himself of an on-line forum and represented that he did not commit the violation at issue. *Id.* at \*1. Mr. Young averred that he parked his car on First Avenue in Manhattan after 7:00 p.m., which, as most New York motorists know, is the traditional end-of-meter regulations. *Id.* However, the NOV indicated that Mr. Young parked his car one minute before 7:00 p.m. *Id.* In *Young*, the statement on the NOV ticket was weighed directly against Mr. Young's denial. *Id.* Justice Emily Jane Goodman found that the PVB could not sustain its burden of proof when it failed to rebut Mr. Young's denial. *Id.* at \*2. This is the correct result for any case where the respondent provides the sole testimony at the hearing and makes a sworn denial of an officer's violation.

<sup>21</sup> See *supra* note 20 and accompanying text.

<sup>22</sup> See *New York City v. Polistena*, Appeal No. 0900023 (ECB N.Y. May 7, 2009), *available at* <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2009/0900023.pdf> (holding respondent is not responsible for sidewalk that does not abut his premises).

<sup>23</sup> See *New York City v. Voyticky*, Appeal No. 1000761 (ECB N.Y. Nov. 18, 2010), *available at* <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2010/1000761.pdf>. In *Voyticky*, the NOV inaccurately described the dwelling as a one to two family



#### D. *The Strange Case of Death*

Additionally, the respondent can prevail if he can show that the person who was listed as the property owner was dead at the time the violation was issued.<sup>26</sup>

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residence, when it was a four family residence. *Id.* at 1. Similarly, in *Henriquez*, the agent described a property as a multiple dwelling when it was actually a two family house. *New York City v. Henriquez*, Appeal No. 1300514 (ECB N.Y. July 25, 2013), *available at* <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2013/1300514.pdf>. The mistake was regarded as harmless error. *Id.* at 2.

<sup>24</sup> See *New York City v. Horowitz*, Appeal No. 1100482 (ECB N.Y. July 21, 2011), *available at* <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2011/1100482.pdf> (identifying an incorrect address); *see also* *New York City v. Bashist*, Appeal No. 35058 (ECB N.Y. Jan. 27, 2004) (identifying incorrect borough and address); *see also* *New York City v. Wallace*, Appeal No. 39293 (ECB N.Y. June 24, 2003), *available at* [http://archive.citylaw.org/ecb/Long%20Form%20Orders/2003/06\\_01/39293.pdf](http://archive.citylaw.org/ecb/Long%20Form%20Orders/2003/06_01/39293.pdf) (finding that when ALJ made an error on the date of violation, the Board regarded mistake as ministerial).

<sup>25</sup> See *New York City v. Pohl*, Appeal No. 41542, at 2 (ECB N.Y. Mar. 30, 2004), *available at* [http://archive.citylaw.org/ecb/Long%20Form%20Orders/2004/03\\_01/41542.pdf](http://archive.citylaw.org/ecb/Long%20Form%20Orders/2004/03_01/41542.pdf) (pointing out that “Mr. Pohl’s testimony at the hearing that he cleans each morning conflicts with his statement on appeal that the building super cleans each morning”); *see also* *New York City v. Gordon*, Appeal Nos. 36606–36609, at 2 (ECB N.Y. Mar. 30, 2004), *available at* [http://archive.citylaw.org/ecb/Long%20Form%20Orders/2004/03\\_01/36606-9.pdf](http://archive.citylaw.org/ecb/Long%20Form%20Orders/2004/03_01/36606-9.pdf) (finding inconsistencies of respondent’s witness supported upholding of violation, including the witness’s initial testimony that he cleaned the sidewalk “almost every morning,” but later amended it to “every morning”).

<sup>26</sup> See *New York City v. Alongi*, Appeal No. 1100493 (ECB N.Y. July 21, 2011), *available at* <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2011/1100493.pdf>. An appeal was submitted by City counsel member Michael C. Nelson that Patsy Alongi died three years before the violation; the death certificate was also submitted. *Id.*

*E. The Affirmative Defense of Reasonable Efforts*

If the property owner concedes that some litter was in front of his property when the officer wrote the violation, but claims that he did not have any knowledge of the refuse, the last hope is an affirmative defense.<sup>27</sup> This affirmative defense created by the ECB has come to be utilized as something of a straw man—an argument given to a respondent by the ECB, just so it can nearly always be knocked down. This chief defense permits the citizen to argue that he makes reasonable efforts to keep the sidewalk free from litter. Therefore, it is known as the reasonable efforts defense.<sup>28</sup>

This concept of reasonable efforts sounds plain, and even fair, to the layman who will be called upon to argue such cases. After all, few of us have not committed the sin of littering at some point.<sup>29</sup> Additionally, many of us have neighbors who do not clean up in front of their homes and fail to secure their trash on garbage night. This is frustrating to live next to, but infuriating when one is made to pay a fine because of the conduct of others.

The responsibility to keep the public sidewalk clean rightfully falls on the homeowner. While regulation in this regard is surely a public good, through an examination of the decisions of the ECB, the City is imposing unreasonable expectations on residents. Specifically, the term “reasonable efforts” has been interpreted to pretty much mean “Herculean efforts,” in relation to maintaining one’s abutting sidewalk and street.

Overall, reasonable efforts require that a respondent establish that adequate cleaning efforts and frequent, regular, and thorough inspections of the cited area are made on a daily basis, and that they

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<sup>27</sup> N.Y.C., N.Y., ADMIN. CODE § 16-118 (2013).

<sup>28</sup> See *New York City v. Kirshenblat*, Appeal No. 1300239 (ECB N.Y. May 30, 2013), available at <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2013/1300239.pdf> (finding that respondent failed to establish a reasonable efforts defense).

<sup>29</sup> See Steve Spacek, *The American State Litter Scorecard: A Sociopolitical Inquiry into Littering*, presented at the 2008 American Society for Public Administration Conference (Mar. 9, 2008). Mr. Spacek’s article notes that most Americans litter, and studies show “*litter begets litter.*” *Id.* at 3. Additionally, it has long been recognized that people feel more self-conscious about littering when in non-littered areas. *Id.* Interestingly, studies cited by Mr. Spacek show that men, youth, rural dwellers, and single persons litter more than women, seniors, urbanites, and married persons. *Id.*

were made on the day of the charged violation.<sup>30</sup> The cleaning efforts required to meet the reasonable efforts defense vary with each case, depending on type of premises involved, the wind conditions at the site, the nature of the surrounding neighborhood (e.g., commercial or residential), a pattern of continual littering at the site, and the amount of pedestrian and vehicular traffic.<sup>31</sup> When an area is heavily trafficked, the City resident is obligated to use greater efforts to maintain the cleanliness of the area affected.<sup>32</sup>

A close assessment of ECB decisions is warranted in view of the fact that the ECB Appeals Board is not at all reasonable in its interpretation of the term “reasonable efforts.”

## II. THE ECB’S TOLERANCE FOR THE ELDERLY AND INFIRM

The ECB has a low level of tolerance for our elderly and handicapped residents when it comes to the reasonable efforts test. An illuminating ECB Appeals Board decision is that of *New York*

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<sup>30</sup> See *New York City v. St. George & St. Demetrios Orthodox Greek Church*, Appeal No. 1100777 (ECB N.Y. Dec. 15, 2011), available at <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2011/1100777.pdf>. This standard has been stated in many ways by the ECB Appeals Board. For example, in *New York City v. Teitelbaum*, the ECB Appeals Board held that:

A defense to the charge may be established by presenting credible evidence to show that reasonable cleaning efforts are routinely made on a regular, daily basis, including the date in question, to maintain the cited area. What constitutes reasonable efforts depends on many factors including the nature of the neighborhood, the volume of pedestrian traffic and proximity to public transportation.

Appeal No. 1100585 (ECB N.Y. Aug. 18, 2011), available at <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2011/1100585.pdf>.

<sup>31</sup> See *New York City v. Gordon*, Appeal Nos. 36606–36609, at 1 (ECB N.Y. Mar. 30, 2004), available at [http://archive.citylaw.org/ecb/Long%20Form%20Orders/2004/03\\_01/36606-9.pdf](http://archive.citylaw.org/ecb/Long%20Form%20Orders/2004/03_01/36606-9.pdf).

<sup>32</sup> See *New York City v. Parisi*, Appeal No. 1000227 (ECB N.Y. Aug. 19, 2010), available at <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2010/1000227.pdf>; see also *New York City v. Voyticki*, Appeal No. 1000761, at 1 (ECB N.Y. Nov. 18, 2010), available at <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2010/1000761.pdf>.

*City v. May*.<sup>33</sup> Here, the homeowner, a seventy-five-year-old amputee, Ms. May, was issued a violation for having papers, containers, and bottles scattered about the sidewalk.<sup>34</sup> Ms. May owned a three-family house and her only income was from social security.<sup>35</sup> When she could afford to do so, she paid someone to clean the sidewalk two or three times a week.<sup>36</sup> She further averred that she hired a boy from the neighborhood to clean the area on the date of the violation, but he failed to show up.<sup>37</sup> It was determined that the efforts of the disabled woman were not “reasonable.”<sup>38</sup> The ECB held that while “accommodations are provided for the benefit of handicapped persons” in other areas of life, this does not “lower the standard of care imposed on [owners for] maintaining the cleanliness of the sidewalk.”<sup>39</sup> Though common sense dictates that Ms. May was reasonable in her efforts to hire someone to clean her sidewalk when she could afford to do so, the ECB Appeals Board provided her no accommodation.

Similarly, in *New York City v. Trenkle Living Trust*, two violations were issued to Ms. Trenkle, a ninety-year-old, legally-blind Brooklynite.<sup>40</sup> Upon receipt of an NOV, Ms. Trenkle gathered up all her energy and trekked to the administrative hearing on Bond Street and testified that ruffians continually dropped food, newspapers, pizza boxes, industrial garbage bags, and even bags of human feces in front of her Coney Island property on Oceanview Avenue.<sup>41</sup> Ms. Trenkle stated that she got help cleaning the sidewalk from Russian students who swept in front of her home from time to

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<sup>33</sup> *New York City v. May*, Appeal No. 36179 (ECB N.Y. May 25, 2004), available at [http://archive.citylaw.org/ecb/Long%20Form%20Orders/2004/05\\_01/36179.pdf](http://archive.citylaw.org/ecb/Long%20Form%20Orders/2004/05_01/36179.pdf).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *New York City v. Trenkle Living Trust*, Appeal No. 1000993 (ECB N.Y. Apr. 28, 2011), available at <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2011/1000993.pdf>, superseded by, Appeal No. 1100501 (ECB N.Y. June 23, 2011), available at <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2011/1100501.pdf> (involving one family home).

<sup>41</sup> *Trenkle Living Trust*, Appeal No. 1000993, at 1.

time.<sup>42</sup> Further, Ms. Trenkle's daughter made arrangements for someone to come to the home each day to sweep.<sup>43</sup> However, once swept, litter routinely accumulated within a few hours.<sup>44</sup> The ECB Appeals Board's decision conceded that other judges recognized that Ms. Trenkle made reasonable efforts in light of her age and income in the past.<sup>45</sup> In a powerful admonition to the elderly respondent, the ECB found the source of the debris not relevant to the ninety-year-old's duty to clean.<sup>46</sup> Additionally, in the superseding opinion, it was noted that Ms. Trenkle could be found out in front of her home sweeping every day, against doctor orders, as she feared racking up more fines.<sup>47</sup> It will be quite interesting to see if Ms. Trenkle's efforts will be considered reasonable when she reaches the century mark, as the ECB is consistent with denying relief to ninety-year-old City residents.<sup>48</sup>

### III. RELIGIOUS EXCUSE

A building owner's religious observances will not provide an excuse from complying with the requirement to keep the building or premises free from litter.<sup>49</sup> The owner is required to hire others to

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<sup>42</sup> *Id.* (stating that the schedule of the students was to clean less than every other day in the afternoon).

<sup>43</sup> *Trenkle Living Trust*, Appeal No. 1100501.

<sup>44</sup> *Trenkle Living Trust*, Appeal No. 1000993, at 1.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Trenkle Living Trust*, Appeal No. 1100501.

<sup>48</sup> See also *New York City v. Horowitz*, Appeal No. 1100482 (ECB N.Y. July 21, 2011), available at <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2011/1100482.pdf> (involving a ninety-two-year-old homeowner who could not pass reasonable effort tests); *New York City v. Kooghasian*, Appeal No. 1300207 (ECB N.Y. May 30, 2007), available at <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2013/1300207.pdf> (involving ninety-three-year-old husband and ninety-one-year-old wife who were not granted any accommodation after recyclables bottles were scattered on day of recyclable pickup).

<sup>49</sup> See *New York City v. Teitelbaum*, Appeal No. 1100585 (ECB N.Y. Aug. 18, 2011), available at <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2011/1100585.pdf>; *New York City v. Toibman*, Appeal No. 1000526 (ECB N.Y. Nov. 18, 2010), available at <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2010/1000526.pdf>.

keep the property free from litter on the day(s) he is observing.<sup>50</sup> For example, a Sabbath observer who can only clean once a day on Saturday is deemed to have failed the reasonable efforts test.<sup>51</sup>

#### IV. BAD TENANTS, NEIGHBORS, AND PROTESTERS

When your dirty neighbors or terrible tenants are creating the mess you were fined for, relief will be hard to come by under the reasonable efforts defense. In *New York City v. Josaovich*, a homeowner argued that her tenants, who she was in the process of evicting, were purposely dirtying up the area to cause sanitation violations.<sup>52</sup> Despite acknowledging that the respondent was elderly with health problems and had difficulties with her tenants, the ECB Appeals Board made clear that every homeowner has a non-delegable duty to keep their sidewalk clean.<sup>53</sup>

In the City, property owners often face unexpected sources of litter, such as in January 2013, when picketing school bus drivers reportedly threatened a homeowner who complained about the litter created by the strikers.<sup>54</sup> In said circumstance, the ECB will not provide any quarter to the homeowner who suffered the accumulation of litter.

#### V. THE TYPICAL OUTER BOROUGH HOMEOWNER

For the normal New York City homeowner, cleaning three times a week in front of one's property will not be considered

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<sup>50</sup> *New York City v. Prince*, Appeal No. 1201084 (ECB N.Y. Feb. 28, 2013), available at <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2013/1201084.pdf>.

<sup>51</sup> *See id.*

<sup>52</sup> *New York City v. Josaovich*, Appeal No. 1100946 (ECB N.Y. Dec. 15, 2011), available at <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2011/1100946.pdf>. Here, respondent was cited for a large accumulation of matted cigarette packs, pieces of paper, and wrappers on the sidewalk along the fence line. *Id.* at 1.

<sup>53</sup> *See id.* at 2.

<sup>54</sup> *See New York City v. Deraffele*, Appeal No. 1300264 (ECB N.Y. May 30, 2003), available at <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2013/1300264.pdf>.

reasonable before the ECB.<sup>55</sup> Further, cleaning the curb once a day, with supplemental picking up of trash at random, will fall short of reasonable in the eyes of the ECB when the test is applied to the one family home owner.<sup>56</sup>

If you are thinking of buying a home in the City, you should know that living by a bus stop can come with additional expenses. In *New York City v. Dunoyer*, a man's home was situated in front of a bus stop with heavy pedestrian traffic without any type of wastebasket placed near the bus stop.<sup>57</sup> Testimony that respondent and his wife picked up larger pieces of garbage daily and swept the sidewalk on weekends was not considered sufficient to satisfy the reasonable efforts standard.<sup>58</sup>

Further, a complete family effort to monitor the sidewalk nearly all week long may still not be considered reasonable. In *New York City v. Rios*, the owner of a single-family residence in a residential area cleaned the sidewalk on the weekend, while one of her sons swept and cleaned the sidewalk once a week, and her other son checked the sidewalk daily and cleaned as necessary.<sup>59</sup> Ms. Rios even testified that the sidewalk was clean when she left for work and generally denied the enforcement officer's observations that litter was even present.<sup>60</sup> Despite the level of daily monitoring Ms. Rios

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<sup>55</sup> See *New York City v. Trimble-Vallon*, Appeal No. 1100118 (ECB N.Y. July 21, 2011), *available at* <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2011/1100118.pdf>.

<sup>56</sup> *New York City v. Ally*, Appeal No. 0900239 (ECB N.Y. Dec. 3, 2009), *available at* <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2009/0900239.pdf>.

<sup>57</sup> *New York City v. Dunoyer*, Appeal No. 0900524 (ECB N.Y. Mar. 25, 2010), *available at* <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2010/0900524.pdf>.

<sup>58</sup> *Id.* at 1. Respondent submitted photos to show only a few items of litter on the sidewalk and tree pit, including some flyers and a wrapper. *Id.* This was reportedly quite different than the large amount of garbage described in the NOV. *Id.*

<sup>59</sup> *New York City v. Rios*, Appeal No. 0900444 (ECB N.Y. Mar. 25, 2010), *available at* <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2010/0900444.pdf>. Here, the respondent was cited for "an accumulation of newspaper, paper, wrappers, circulars, scattered along the fence line and sidewalk." *Id.*

<sup>60</sup> *Id.*

swore to, the efforts were found less than reasonable.<sup>61</sup> Further, the ALJ did not credit the denial that the litter was present.<sup>62</sup>

There are a few instances where a respondent has been able to satisfy the reasonable efforts standard before the ECB. In *New York City v. Kidd*, the occupant of a four family brownstone testified that she cleans her sidewalk once daily between 7 a.m. and 8 a.m., as well as in the afternoon when litter is present.<sup>63</sup> She also inspected the area in the afternoon.<sup>64</sup> She testified that she made such an inspection on the day of the violation and that there were windy conditions that could have blown the debris at issue, including papers, wrappers, and plastic bottles, which were found scattered on the sidewalk.<sup>65</sup> These efforts were sufficient to be considered reasonable.<sup>66</sup> So homeowners should be guided—one cleaning plus a second when litter is present, plus a third inspection, was considered reasonable in front of a four family home.<sup>67</sup> In the *Kidd* decision, the ECB Appeals Board also found significant that there were “no inconsistencies, equivocations or evasive answers to the ALJ’s questions that might lead the ALJ to disbelieve Respondent.”<sup>68</sup>

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* In this case, the officer appeared at the hearing and affirmed the observations on the NOV. *Id.*

<sup>63</sup> *New York City v. Kidd*, Appeal No. 47478 (ECB N.Y. Sept. 24, 2009), available at <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2010/47478.pdf>.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* The ECB held that a windy condition in and of itself is not a defense to a charge because an owner is responsible for cleaning the sidewalk no matter how debris ends up there. *Id.* However, the ECB Appeals Board also noted that wind can explain why a sidewalk was again dirty within two hours of allegedly being cleaned. *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> See also *New York City v. Song*, Appeal No. 1300590 (ECB N.Y. July 25, 2013), available at <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2013/1300590.pdf> (cleaning twice a day, every day, in front yard of one to two family home held sufficient to beat ticket); *New York City v. Patrick*, Appeal No. 1201156 (ECB N.Y. Feb. 28, 2013), available at <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2013/1201156.pdf> (finding that twice a day efforts were enough to satisfy reasonable efforts in face of violation for inspection that revealed raw food waste in front of one to two family dwelling).

<sup>68</sup> *Kidd*, Appeal No. 47478, at 1.



Another case where the residential owner prevailed is *New York City v. Bahadure*.<sup>69</sup> Here, the owner of a two family house stated that he regularly cleans the sidewalk and curb area before leaving for work at 5:00 a.m. or 5:30 a.m., and when he returned home between 5:30 p.m. and 7:00 p.m.<sup>70</sup> He also testified that he cleaned the cited area before leaving for work on the date of the occurrence.<sup>71</sup> Additionally, he gave his tenant \$50.00 per month to monitor the sidewalk in front of the premises.<sup>72</sup>

#### VI. DESCRIPTION THAT THE TRASH WAS “MATTED”

When a sanitation enforcement officer describes the litter in front of someone’s property as “matted” in the body of the ticket, this is treated as a magic word by ECB. Even if a respondent testifies that he cleaned the property an hour before the violation issued, the ECB will favor the talismanic word “matted” on the violation notice over the sworn testimony of the citizen.<sup>73</sup> To the ECB, the fact that trash was described as matted establishes—without any other evidence—that the trash was on the property for a length of time that dispels any attempt of the citizen to argue reasonable efforts.

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<sup>69</sup> *New York City v. Bahadure*, Appeal Nos. 36625–36626 (ECB N.Y. May 24, 2004), *available at* [http://archive.citylaw.org/ecb/Long%20Form%20Orders/2004/05\\_01/36625.pdf](http://archive.citylaw.org/ecb/Long%20Form%20Orders/2004/05_01/36625.pdf).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *See New York City v. Voyticki*, Appeal No. 1000761 (ECB N.Y. Nov. 18, 2010), *available at* <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2010/1000761.pdf>; *see also New York City v. Attn Condo Pres*, Appeal No. 1200234 (ECB N.Y. May 31, 2012), *available at* <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2012/1200234.pdf> (stating that when the ECB found that the officer cited a “large accumulation” of litter, the ECB disregarded the testimony and two written statements of condo owners); *New York City v. Zanger*, Appeal No. 1300188 (ECB N.Y. May 30, 2013), *available at* <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2013/1300188.pdf> (discrediting testimony that area in front of residential home near bus stop and school was “immaculate” on morning of violation issues and was regularly cleaned three times per day).

## VII. LARGER RESIDENTIAL UNITS

The larger the residence, the more superhuman the efforts to clean need to be. In *New York City v. Pohl*,<sup>74</sup> respondent was the owner of a twelve-unit residential apartment complex. Here, the officer observed matted-down papers, sheet rock and dirt in the city street, presumably eighteen inches from the curb.<sup>75</sup> In light of fact that the Midtown area was highly commercial, with heavy pedestrian and vehicular traffic, warehouses, businesses, a school and trucks lining the curb, the home owner's twice daily cleaning efforts did not represent reasonable efforts.<sup>76</sup>

Another of the few reported cases where the citizen emerged victorious within the framework of the reasonable efforts test is *New York City v. Pyrovolakis*.<sup>77</sup> Here the owner of a thirty-eight unit apartment building testified that the superintendent was actually cleaning the sidewalk and curb area during the enforcement routing hour (then starting at noon) while a tenant was moving and discarded items in the area cited.<sup>78</sup> The ECB Appeals Board held that this representation was substantiated through the officer's notation that he "[s]poke to super."<sup>79</sup> Here, the owner's testimony that she had the premises cleaned three times daily, with additional cleaning as needed, satisfied the reasonable efforts standard.<sup>80</sup> Therefore, three plus efforts is what might be considered reasonable for such a large complex.

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<sup>74</sup> See *New York City v. Pohl*, Appeal No. 41542 (ECB N.Y. Mar. 30, 2004), available at [http://archive.citylaw.org/ecb/Long%20Form%20Orders/2004/03\\_01/41542.pdf](http://archive.citylaw.org/ecb/Long%20Form%20Orders/2004/03_01/41542.pdf).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> See *New York City v. Pyrovolakis*, Appeal No. 43047 (ECB N.Y. Jan. 19, 2006), available at <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2006/43047.pdf>.

<sup>78</sup> *Id.* at 1. Here, the issuing officer observed, "raw waste, tissues, food containers, paper bags, loose papers and other debris scattered in container area of premises." *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

## VIII. COMMERCIAL PROPERTY/MIXED USE PROPERTY

In the case of properties with a commercial designation, the obligation to clean is unyielding. Even cleaning up to three times a day in front of one's property will likely prove insufficient.

In *New York City v. Shendi, Inc.*, the respondent was the owner of a mixed use building with eighteen apartments and three ground floor commercial tenants—a bodega, barber shop, and beauty salon.<sup>81</sup> Here, there was a bus stop in front of the building, along with heavy pedestrian and vehicular traffic.<sup>82</sup> Respondent argued that he cleaned the premises three times a day.<sup>83</sup> Once between 6:30 a.m. and 7:00 a.m., again early in the afternoon at approximately 2:00 p.m., and a third time if needed.<sup>84</sup> Despite the owner's diligence, said efforts were shockingly not reasonable in the eyes of the ECB.<sup>85</sup>

The mixed use property owner will prevail, however, when he is issued a ticket during residential hours. The Board will defer to the Department of Sanitation New York City's enforcement policy that violations issued for dirty sidewalks should not be issued to owners of mixed use premises during residential routing hours, unless the commercial space is vacant or no longer in regular operation.<sup>86</sup>

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<sup>81</sup> *New York City v. Shendi, Inc.*, No. 39229 (ECB N.Y. June 24, 2003), available at [http://archive.citylaw.org/ecb/Long%20Form%20Orders/2003/06\\_01/39229.pdf](http://archive.citylaw.org/ecb/Long%20Form%20Orders/2003/06_01/39229.pdf).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 1–2. Here, the ECB held, “cleaning twice daily, once in the early morning, a second and last cleaning at 2:00 p.m., and an additional cleaning only ‘if needed,’ is insufficient to establish a reasonable efforts defense.” *Id.* at 2–3.

<sup>86</sup> *New York City v. Sansone*, Appeal No. 1000827 (ECB N.Y. Dec. 16, 2010), available at <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2010/1000827.pdf>; see *New York City v. Rivera*, Appeal No. 0900564 (ECB N.Y. Jan. 21, 2010), available at <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2010/0900564.pdf>.

## IX. COMMERCIAL PROPERTIES AND THE SPECIAL EFFORTS TEST

Section 16-118.1 of the Administrative Code, as construed by the ECB Appeals Board, mandates that the owners of commercial premises must make “special efforts” during the two one-hour routing to keep the sidewalk clean.<sup>87</sup> In order to establish the defense of special efforts, a commercial establishment, in addition to showing reasonable efforts, must also show that the area cited in the violation was cleaned just prior to a routing hour and was periodically cleaned throughout that hour.<sup>88</sup> Basically, if a small business owner is doing anything other than guarding his property against the scourge of litter, there appears little that he can do to fight this type of ticket. For example, sweeping once throughout the routing hour will not suffice.<sup>89</sup>

However, it will be of some comfort for the ground floor merchant to learn that he is afforded a one-hour grace period from the opening of his store to clean the sidewalk and required areas.<sup>90</sup>

## X. COMMENT: THE ECB SHOULD BE MORE REASONABLE

When utilizing their reasonable efforts test, the ECB should envision the reality of a working class homeowner and business owner in the City, especially in the outer boroughs. It is a commuter city, where homes are adjacent to schools, bus stops, train stops, and every conceivable commercial entity. We have surely earned the reputation as the Great American Metropolis. There is no debate that the amount of trash generated in New York is something that should be regulated. It is due to the Sanitation Department’s efforts—New York’s “Strongest”—that our City is so much cleaner than it was in

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<sup>87</sup> N.Y.C., N.Y., ADMIN. CODE § 16-118.1 (2013); *see* New York City v. Primerica, Appeal No. 0900376 (ECB N.Y. Jan. 21, 2010), *available at* <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2010/0900376.pdf>; New York City v. Owner of Better Sight Vision, Appeal No. 33772 (ECB N.Y. Dec. 15, 1999).

<sup>88</sup> *Primerica*, Appeal No. 0900376, at 1.

<sup>89</sup> *See id.*; *see also* New York City v. B&H Wireless Commc’ns Inc., Appeal No. 1001017 (ECB N.Y. Feb. 24, 2011), *available at* <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2011/1001017.pdf>.

<sup>90</sup> *See* New York City v. Gifts on Parade, Appeal No. 1300136 (ECB N.Y. Apr. 30, 2013), *available at* <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2013/1300136.pdf>.

the past. In fact, in the Department of Sanitation's summary of rules and regulations, Commissioner John J. Doherty notes that New York is the cleanest it has been in over three decades.<sup>91</sup>

Nevertheless, the word "reasonable," when used in the context of the affirmative defense available to homeowners, should reflect the very nature of that term. Reasonable should never be interpreted to mean unrealistic efforts at keeping one's portion of the sidewalk tidy. For instance, the City's reasonable efforts test should acknowledge that some homeowners are old and infirm. Others have just enough money to get by and cannot hire a person to sweep the sidewalk each day. Such individuals, such as the ninety-plus-year-old Ms. Trenkle, should have their circumstances given more consideration by the ECB. Further, regular working class homeowners and business owners, who make the effort to come to the administrative forum and testify under oath that they clean their property once a day, or once before and after work, should generally be found to have provided reasonable efforts.

Simply, there has to be a recognition that a working homeowner will not be standing guard of the City sidewalk twenty-four hours a day with a catcher's mitt guarding against the scourge of litter. Furthermore, for most homeowners, it is just not realistic to hire someone to perform said function. Another problem with the dirty sidewalk law is that it does not require that a property owner have any notice of litter being on one's property. The ECB uses each of these realities to uphold said tickets. Additionally, a business owner who faces the special efforts test has virtually no chance of succeeding against the criteria.

In closing, not all homeowners in New York City can be like the diligent Mrs. Nunez of Manhattan.<sup>92</sup> Mrs. Nunez was able to prevail before the ECB and clear the reasonable efforts hurdle after plastic, paper, and other debris were found in front of her small New York City property on West 10th Street.<sup>93</sup> For twenty-three years she had never faced such a fine. When she was finally given a ticket, she testified that she had the sidewalk swept at 7:00 a.m. daily, and was then diligent enough to check whether there was debris in front of her

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<sup>91</sup> See SUMMARY OF SANITATION, *supra* note 3.

<sup>92</sup> See *New York City v. Nunez*, Appeal No. 47922 (ECB N.Y. Feb. 26, 2009), available [at](http://archive.citylaw.org/ecb/Long%20Form%20Orders/2009/47922.pdf) <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2009/47922.pdf>.

<sup>93</sup> *Id.*

property every twenty minutes thereafter.<sup>94</sup> Though this was found reasonable by the ECB, few New Yorkers are able to do anything resembling this.

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<sup>94</sup> *Id.*