

**Testimony on Environmental Control
Board's Fine Schedule**

January 31, 2005

**New York City Council's Committee
on Environmental Protection**

**Dr. Richard Lipsky
Neighborhood Retail Alliance**

Good morning Chairman Gennaro and the members of the Environmental Protection Committee. My name is Richard Lipsky and I'm here today on behalf of the Neighborhood Retail Alliance. The Alliance has represented the interests of food retailers for the past two decades.

The purpose of this hearing is to examine the enforcement practices of the city's Environmental Control Board. The Board's regulatory authority is pursuant to the statute and laws passed by the City Council. When the Council granted this authority to the Board it created a range of possible fines for each category of violation. The purpose of the range was to allow for discretion in the adjudication process. Now, however, ECB is interpreting this statutory authority in a manner different than the Council intended when it passed its original enabling legislation.

Under its own unique legal interpretation, ECB is now arbitrarily levying fines on retailers by choosing the higher, or in many cases the highest possible fine in the Council's mandated range. This decision of the Board is not only unfair to retailers but it also gives an unintended glimpse into the Kangaroo Court nature of the city's entire enforcement mechanism.

For many years this city's supermarkets, green grocers and bodegas have been complaining about the unfairness of municipal regulatory policy. The codes are byzantine, outdated and even the most erudite retailer would be overmatched in trying to scrupulously comply with all of the myriad regulations. It is a common perception among all class of retailers that no manner of good faith effort will present the various enforcement agencies from finding code violations for levying fines.

This air of frustrating inevitability, when it comes to city regulations, is only the beginning of a process that reeks of unfairness at every level. The adjudication process itself is seen as hopeless. Only 30% of retailers even bother to show up at ECB to plead their case and their fatalism is justified since only around 2% of those who appeal are acquitted of their offense.

There has been only one aspect of the ECB adjudication process that offers a modicum of fairness. That small little breath of air comes from the ability of an administrative law judge to exercise discretion by, after listening to a retailer's explanation, levying a violation at the lower level of the fine schedule. This is precisely what the ECB is now eliminating.

There is, however, a small amount of unintended enlightenment in the actions of the ECB. In its elimination of judicial discretion and flexibility the Board has thrown into sharp relief the complete arbitrary, capricious and exploitive nature of the city's regulatory procedures. For your see, if the administrative agency can dictate fine schedules to the so-called judges it exposes the fact that these regulatory proceedings are thoroughly lacking in due process- they are rigged.

The actions of ECB are not isolated and are, in fact, the tip of the city's regulatory iceberg. The same arbitrary behavior is being practiced over at Consumer Affairs. First time offenses have escalated, in some cases doubled and tripled, and in an egregious example of regulatory double dipping, DCA is fining tobacco retailers twice for the same offense after it was given authority to enforce State as well as City statutes in this area.

We are aware that DCA enforcement is the scope of another hearing scheduled by Chairman Reed and the Consumer Affairs Committee. It is, however, important to point

out that what ECB is trying to do is part of a pattern with the Bloomberg administration. It has increased enforcement activity to an aggressive level that succeeds all prior administrations. This increase, along with the doubling and tripling of fine levies has created the worst climate for small business in the last twenty years. Put simply, we are under assault.

Over the past three years we have seen the imposition of a commercial real estate tax that amounted to a 25% rent increase for every neighborhood retailer in this city. The mayor's confiscatory cigarette tax transferred \$250 million from bodegas, green grocers and newsstands to City and State treasuries. On top of this, tax experts estimate that the city's sale tax causes a \$700 million leakage of business to lower taxed surrounding areas. In addition, the decision by the city to lift the cap on commercial garbage disposal rates has cost tens of millions of dollars for food retailers who generate so-called heavy garbage.

So now, after three years of unprecedented income transferring, and in the face of record numbers of small store bankruptcies, city regulators wait to arbitrarily increase the money unfairly taken from struggling store owners.

What the City Council needs to do, because it is apparent that the mayor simply lacks any empathy for the little guy, is to pass legislation that severely limits the ECB's scope of arbitrary action. It should also, before thousands of more retailers go under, convene a commission to study the municipal code for the purpose of eliminating arcane regulations and creating greater simplicity and transparency in the entire enforcement process. The war against small business must end. If this administration won't do it, it's up to this Council to act before the mayor's dereliction causes further harm.