

*To be Argued by:*  
DAVID S. STEINMETZ  
*(Time Requested: 10 Minutes)*

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**New York Supreme Court**  
**Appellate Division – Second Department**

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**Docket No.:**  
**2003-02335**

METRO ENVIRO TRANSFER, LLC,

*Petitioner-Respondent,*

– against –

THE VILLAGE OF CROTON-ON-HUDSON and THE VILLAGE BOARD  
OF TRUSTEES OF THE VILLAGE OF CROTON-ON-HUDSON,

*Respondents-Appellants.*

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**BRIEF FOR PETITIONER-RESPONDENT**

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Westchester County Clerk's Index No. 1788/03

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Petitioner-Respondent Metro Enviro Transfer, LLC (“Metro”), respectfully submits this Answering Brief in response to the Appeal of Respondents-Appellants the Village of Croton-on-Hudson and the Board of Trustees of the Village of Croton-on-Hudson (the “Board”) (collectively, the “Village” or “Appellants”) from the Order of Chief Administrative Judge Francis A. Nicolai, dated February 19, 2003, (i) granting Metro’s Petition seeking to annul the Appellants’ determination denying Metro’s application for renewal of its Special Use Permit, (ii) remanding the matter to Appellants to issue the Special Use Permit, and (iii) denying Appellants’ Cross-Motion for an Order transferring the proceeding to the Appellate Division.

### **PRELIMINARY STATEMENT**

The administration of justice by local governments in the exercise of their police powers and zoning authority is subject to review under Article 78 of the CPLR, not to provide a mere “rubber stamp,” but to ensure safeguarding of constitutionally protected property rights. In the case at bar, the court below correctly found that under the totality of circumstances, the determination to deny permit renewal was not supported by substantial evidence, and was clearly suspect based upon pervasive, generalized community opposition and apparent partisan politics. Absent that court’s justified intervention, the established right to continue to operate this pre-existing, legal nonconforming transfer station would have been unlawfully eviscerated.

This case was commenced, and successfully litigated below, because Appellants invoked the draconian enforcement measure of closing a solid waste transfer station under the guise of a permit renewal proceeding. However, it is a fundamental jurisprudential tenet that the punishment imposed must be proportionate to the offense committed. Here it was not.

Concededly, technical violations of the permit occurred; yet, severe penalties were imposed and curative measures implemented, all despite the complete dearth of any indicia

-- let alone substantial evidence -- of any actual or genuine potential adverse impacts to the environment and surrounding community. In contrast, detailed empirical data and expert submissions demonstrated what the New York State Department of Environmental Conservation undeniably found – namely that this state of the art facility, providing a critical link and integral function in the County’s waste stream, was deserving of permit renewal, even in light of the admitted transgressions.

Effective and fair government oversight of a highly regulated industry -- especially one disfavored in a highly charged political environment dominated by generalized community opposition -- requires that regulatory enforcement be meted out in proportion to the wrong committed and in a rational manner. To allow disproportionate penalties, such as unsubstantiated closure, sets a dangerous precedent and undoubtedly would wreak havoc upon many highly regulated industries. Where detailed terms and conditions pervade every corner of an operation, as they should with certain industries, technical violations are indeed bound to occur. If a regulatory agency were to mandate closure at the presence of even one violation, as Appellants argue, those operators would cease immediately to invest in those industries.

Accordingly, as demonstrated below, the lower court’s decision should be affirmed in its entirety, and Appellants should be directed to issue the renewed Special Permit forthwith.

**COUNTERSTATEMENT OF QUESTIONS PRESENTED**

1. Does an Article 78 proceeding allow a reviewing court to reject the denial of a special permit where that decision was devoid of any empirical data constituting substantial evidence of adverse impacts to the environment or public health and safety resulting from

technical violations of the permit, and was based on generalized community opposition?

The court below correctly answered in the affirmative.

2. Is closure of a highly regulated and vital solid waste transfer facility a disproportionate and unjust response to technical violations of a permit, where: a) there was no consideration of the magnitude or impact of the violations, b) severe penalties were imposed, and c) successful curative and remedial measures were implemented to address the violations?

The court below correctly answered in the affirmative.

### STATEMENT OF FACTS

#### The Property

This Appeal relates to a ten (10) acre parcel of land, located at 1A Croton Point Avenue, Croton-On-Hudson, New York, also known and designated on the Village Tax Map as Section 78.16, Block 2, Lots 1 and 2 (the "Property"). (Record on Appeal ("R.A.") 42.) The Property, which is located in the largest, most industrially developed section of the Village and has both highway and rail access, is ideally located for a solid waste transfer station.<sup>1</sup> (R.A. 42; 103.)

#### History Of Solid Waste Uses On The Property

The Property has been used continuously as an outdoor waste storage and processing facility since at least the early 1960s. (R.A. 44.) In or around 1984, Robert V. Liguori purchased the

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<sup>1</sup> The flat, rectangular-shaped Property is located within the Light Industrial (LI) District, with a single point of ingress and egress. (R.A. 42; 81.) To the South, the Property borders the Croton Train Station and its extremely large public parking facility. (R.A. 42.) To the East, the Property borders New York State Route 9, a four lane divided highway that is the main North/South artery. (R.A. 42.) To the West, the Property abuts the Croton Rail Yard, which is a large industrial complex containing storage and repair facilities for Metro North and Conrail trains, and no fewer than nine sets of tracks and switches for both commuter and freight trains. (R.A. 42.) Industrial properties border the Property to the North, including the Finkelstein Wholesale Tire Storage building. (R.A. 42.)

With respect to the Property's location, Village Manager Richard Herbek has noted that "[m]any Boards over the years have eyeballed this property for possible use by the Village [Department of Public Works]. It is in a great location as this area is for the most part segregated from the rest of the Village." (R.A. 270.)

Property for use as a wood processing, material storage and recycling facility. (R.A. 44) In 1988, the Village issued a Special Use Permit (“Special Permit”) to Liguori’s company Industrial Recycling Systems, Inc. (“IRS”), authorizing it to operate a wood processing and recycling transfer station on the Property, and the New York State Department of Environmental Conservation (“DEC”) issued a Solid Waste Management Permit (“DEC Permit”).<sup>2</sup> (R.A. 44-45.)

In 1994, IRS applied for a modification of its DEC Permit to expand the types of construction and demolition (“C&D”) materials that it could accept. (R.A. 45; 238-239.) IRS also applied to the Village for a modification of its Site Plan to increase the amount of material that it could process. (R.A. 45; 238-239.)

In July 1995, after public hearings and environmental analysis pursuant to the New York State Environmental Quality Review Act (“SEQRA”), the Village of Croton Planning Board (the “Planning Board”) determined that there would be no significant adverse impact from the operation and approved the modified Site Plan. (6 NYCRR § 617.6; R.A. 45; 7017-7020.) Thereafter, in February 1996, due to the accumulation of tremendous amounts of materials on-site in violation of the DEC Permit, IRS entered into a DEC Consent Order requiring on-site remediation, removal of large quantities of stockpiled materials, and payment of a \$35,000 fine. (R.A. 45; 5871-5885.) Despite the condition of the Property, and the rampant non-compliance of the facility, DEC did not close the transfer station, but exercised its enforcement authority to bring the site into compliance and to keep the facility a functional part of the Westchester County’s solid waste network. At about that time, DEC issued a modified Permit to Liguori. (R.A. 46; 238-239.) In May 1996, the Planning Board approved a Site Plan Amendment (together with another Negative Declaration under SEQRA) authorizing the

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<sup>2</sup> Liguori’s permitted operation consisted of, among other things, completely exposed piles of refuse and debris as large as fifty feet wide and fifteen feet in height. The facility operated without any odor, dust, noise, stormwater or leachate control mechanisms, and did not have a scale, engineered concrete processing pad or rail siding connection. (R.A. 2521; 165-167.) Fire was a persistent concern. (R.A. 2724-2727.)

construction of a concrete retention pad in accordance with the DEC Consent Order. (R.A. 46; 238-239.)

#### Metro Enviro, LLC Purchases Site And Obtains Necessary Permits

In the Spring of 1997, Metro Enviro, LLC (“Metro Enviro”), the operator of the Facility prior to Metro, agreed to purchase the operation, remedy the existing violations, bring the facility into compliance with applicable solid waste management regulations and apply for a DEC Permit. (R.A. 47; 238-239.) The Village, DEC, and all interested parties encouraged the removal of IRS, and the comprehensive clean-up of the Property.<sup>3</sup> (R.A. 47.)

In August 1997, Metro Enviro requested a renewal and transfer of the pre-existing Special Permit held by Liguori/IRS, and filed the necessary applications with DEC. (R.A. 47; 2520-22.) After a thorough review of the application, the Planning Board recommended granting the application.<sup>4</sup> (R.A. 47-48; 168-170.) Metro Enviro applied for a renewal and transfer of the Special Permit because the Village treated the upgraded operation as a change of a nonconforming use, which under the Village Code requires a Special Permit to ensure that adequate regulatory measures were implemented to protect the health, safety and general welfare of the community.<sup>5</sup> In a matter of mere

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<sup>3</sup> Metro Enviro proposed numerous changes, “which would reduce potential environmental impacts from on-site operations,” including: an upgrade from moveable concrete Jersey barriers to permanent integral concrete push walls; an upgrade from open pipes, ditches and a retention pond to almost entirely underground permanent fixed stormwater drainage system; an upgrade from gravel roadways to a paved entrance road with gravel side roads; and upgrade from moveable sprinklers to a permanent misting system; the elimination of the outdoor storage of wood chips; and the elimination of a permanently installed large wood shredder. (R.A. 240-241.)

<sup>4</sup> In making such a recommendation, the Village Planning Board found, *inter alia*, that “[t]he use is compatible with the orderly development of the zoning districts in which it is located . . . will have no negative impact on pedestrian or vehicular traffic . . . [and] that the ecological and environmental assets of the site will be protected.” (R.A. 168.) Recognizing the constitutionally protected property rights in continuing a nonconforming use, at no time during the period of 1997 and into 1998, did the Village attempt to terminate the pre-existing use of the Property as a solid waste facility or claim it was unlawful from a local land use standpoint.

<sup>5</sup> Although Metro Enviro stated to the Board that the use of the Property as a transfer station in an LI District was an as-of-right or principally permitted use pursuant to the Village Code Section 230-18, it agreed, without prejudice, to continue processing the Application before the Board as a Special Permit in early 1998. (R.A. 50; 220.)

months, in November 1997, the DEC Permit was issued allowing Metro Enviro to operate a C&D processing facility (the “Facility”), subject to capacity limitations and comprehensive monitoring by DEC personnel at the operator’s expense. (R.A. 48; 171-179.)

During 1997, Metro Enviro spent between approximately \$1.0 and \$1.5 million dollars on an extensive and expensive cleanup and remediation of the mountain of waste that had been deposited on the Property, and then proceeded to spend approximately \$2.0 million dollars on site improvements.<sup>6</sup> (R.A. 48-49; 224.) This cleanup was done in good faith reliance upon and with an expectation that the Facility, once remediated and rehabilitated, would operate uninterrupted as a modernized, environmentally sound transfer station.<sup>7</sup> (R.A. 181-232.)

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<sup>6</sup> The “before and after” photographs submitted to the court below depict the results of Metro Enviro’s substantial investment in the comprehensive remediation and clean-up, which formed the basis for the opening of the Facility. Since the Appellants’ Record contains unclear, black and white copies of the photographs, color copies of the versions submitted to the court below will be delivered to the Clerk’s Office. These comparative photographs resoundingly illustrate that the Village got what it bargained for – a horrendous site was cleaned up in accordance with DEC guidelines, and the Property was restored to productive use in accordance with its legally protected property rights.

Exhibit “S” (R.A. 290) compares the entry to the Property from the South before the site was remediated and the Facility’s improvements installed, including the offsite parking lot, the unkempt entryway to the Property, and the materials strewn on the Property, to the existing entryway with its gates capable of keeping vehicles and individuals out of the Facility during non-operating hours, the Facility signage, the retaining walls on either side of the entry drive, the scale house and the processing building. Exhibit “T” (R.A. 291) compares the massive piles of wood and debris that were stored, uncovered and strewn on the Property, that were removed during site remediation, with the small scale house and office building and the traffic control gates and concrete pads on the East and West side of the scale house used in connection with the operation of the inbound and outbound scales. Exhibit “U” (R.A. 292) contrasts the literally massive piles of soil, wood and other debris stockpiled during the operation of the soil screening and wood processing machinery during the remediation period in 1997, with the clean and organized industrial Facility operating today on the Property.

<sup>7</sup> A transfer station is essentially a facility where materials enter by one mode of transportation (*i.e.*, trucks) and leave by another mode of transportation (*i.e.*, larger trucks or, as here, rail cars). These types of transfer stations are critical to the local and regional economy because transportation is the major cost in waste removal: the farther a disposition site is from the point of generation, the greater the cost. (R.A. 43; 122-158.) Since Westchester County has no more active landfills, materials must be transported out of the County. (R.A. 43.) Thus, materials – like C&D – can either be transported by rail or by truck. The advantage of the Facility is that it is the only C&D transfer station with a rail connection in Westchester County. (R.A. 43; 97.)

Citizens Advisory Committee Formed And Professional  
Consultants Retained To Review Application And Operation

In early 1998, the Board formed a local Citizens Advisory Committee (the “Committee”) to assist the Board in its review and deliberation with regard to Metro Enviro. According to Seth Davis, Esq., Committee Chairman, at the beginning “there wasn’t a single person on that committee who was in favor of the application.”<sup>8</sup> (R.A. 185.)

Shortly thereafter, the Board decided to retain the environmental consulting firm of Allee King Rosen & Fleming (“AKRF”) to work with the Committee, to advise the Board and to conduct a technical review of the proposed operation. (R.A. 51; 235-254.) Metro Enviro continued to utilize the services of Spectra Engineering and its principal, Mark Millsbaugh, PE, who had been working on the Property for a considerable period of time as a consultant. (R.A. 51.)

Metro Enviro’s Traffic Study

Unquestionably, the single largest issue that was discussed and debated by the Committee, members of the general public at large, and the Board and its consultants was traffic. (R.A. 25; 51; 264; 1812-28; 1835-36; 1900; 1936; 1945-46.)<sup>9</sup> A persistent concern was that there would be an abundance of trucks coming into the Village, and along Croton Point Avenue, generating intolerable traffic conditions in and around the Facility, particularly during peak traffic flows into and out of the Croton Train Station. (R.A. 51; 1813.)

In response to the Village’s concern regarding truck traffic, Metro Enviro retained Adler Consulting Transportation Planning & Traffic Engineering, PLLC (“Adler Consulting”), a highly

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<sup>8</sup> Metro Enviro initially opposed the proposed Committee as a potentially improper delegation of authority by the Board, but ultimately determined that such an open and deliberative review with the local citizenry would be legally and politically appropriate, and consistent with the type of environmental review process espoused by the Court of Appeals in Merson v. McNally, 90 N.Y.2d 742, 665 N.Y.S.2d 605 (1997). (R.A. 51.)

<sup>9</sup> This fact was confirmed by former Committee Chairman Davis in his September 9, 2002 letter to the Board. (R.A. 3051.)

regarded traffic engineering firm in Westchester County, to perform a comprehensive traffic analysis. (R.A. 51; 856-954.) Adler Consulting established, and AKRF later confirmed, that the operation of the Facility within the proposed permitted capacity limitations would not have an adverse impact on traffic in the Village generally, or in and around the Facility's intersection with the train station on Croton Point Avenue. (R.A. 890-954.)

#### Public Hearing Held

It was understood that any Special Permit would need to contain adequate environmental safeguards to protect the Village from and against, inter alia, the traffic problems, noise, dust, odors, contaminated stormwater, and massive stockpiling of debris persistent during the IRS operation. (R.A. 52.) During the Spring of 1998, representatives of Metro Enviro met personally with the Committee and AKRF on no fewer than ten occasions.<sup>10</sup> (R.A. 52.)

On May 4, 1998, the Board convened a public hearing on the proposed issuance of a Special Permit to Metro Enviro.<sup>11</sup> (R.A. 53.) The Board received a 20-page report from its consultant, AKRF, dated April 16, 1998, which found that based upon the proposed design and intended protocols, there would be (i) "no significant adverse impacts from dust or other airborne contaminants," (ii) no "potential odors from on-site operations," (iii) "no adverse public health impacts on the surrounding community with the proposed design for the facility," (iv) "no significant adverse impacts on water quality," (v) no "significant vibrational impacts from the processing operations," (vi) no "adverse noise impacts from on-site operations," and that (vii) "the applicant's [1998 Adler] Traffic Study provides a

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<sup>10</sup> Metro Enviro also met separately with the Committee Chairman, Village Attorney Seymour Waldman, Esq. and Village Manager Richard Herbek, to identify and examine all relevant issues regarding the Facility, and to formulate conditions that would be acceptable to the Village and consistent with the DEC Permit. (R.A. 52.)

<sup>11</sup> At this and the numerous other public hearings held on the matter of renewing the Special Permit to allow a transfer station use at the site, the same small group of vocal residents were in attendance. (See, e.g., R.A. 782-87; 1814-18; 1974-76; 1907-08; 1921-22; 1935; 1944; 1975-76; 2091-2140; 2171-73; 2236-76; 2280-92; 2314-16; 2392; 2400-31; 2484-85.)

reasonable approach for assessing the potential traffic impacts from the proposed operations.” (R.A. 235-254.) Significantly, Chairman Davis explained that the Committee’s comprehensive and objective analysis of the proposed Facility culminated in a “clear consensus” that “this facility be allowed to proceed.” (R.A. 186.)

#### Board Grants Special Permit

After an exhaustive Public Hearing at which members of the public at large spoke, members of the Committee reported to the Board, Metro Enviro and its representatives made presentations, and the Board had a full and fair opportunity to evaluate the issues and deliberate, the Board took two critical and dispositive actions. First, the Board adopted a Negative Declaration pursuant to SEQRA, determining that, in light of the process that had been engaged in by the Village, the Committee, the Applicant, and all respective consultants, there were no adverse environmental impacts associated with the Facility that had not been adequately investigated and mitigated. (R.A. 54; 1828-29.) Second, the Board adopted a Resolution approving the issuance of the Special Permit for the Facility. (R.A. 53; 255; 1829.)

The Special Permit was issued for a three-year period, and set forth 42 conditions addressing a wide range of issues concerning the day-to-day operation of the Facility. (R.A. 54; 255-269.) Most importantly, the Special Permit set capacity limitations designed to control the potential amount of truck traffic.<sup>12</sup> (R.A. 54; 249-50; 262-63.) Therefore, by implementing such safeguards, the Village could ensure mitigation of potential adverse environmental impacts.

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<sup>12</sup> The Special Permit (Condition No. 32) set forth an initial capacity limitation of 600 tons per day, which increased automatically to 700 tons per day when the rail siding or connection became operational. Capacity was to increase automatically in the second year of the Permit (1999) to 850 tons per day, and in year three (beginning in May 2000) to 1,000 tons per day. Because of the anticipated step up in capacity, all environmental and traffic analyses were predicated upon an operational capacity of no less than 1,000 tons per day (See, e.g., R.A. 115 n.2.)

The Special Permit itself (Conditions Nos. 2 and 7) and the Operations and Maintenance Manual (the “O&M Manual”) identified “non-acceptable materials” that could not be brought onto the site. (R.A. 255-257; 334.) The Special Permit and the O&M Manual acknowledged that such materials would inadvertently enter the Facility, and prescribed a protocol to deal with such reasonably anticipated occurrences. (R.A. 255-257; 333-334.) Certainly, the Village was aware that unauthorized waste would enter the Facility.<sup>13</sup>

The Special Permit also provided that “[a]ny material additional activities beyond those permitted hereby shall be deemed a violation of the conditions and terms of this special permit.” (R.A. 258 (emphasis added).) It further provided that “[i]f any governmental agency has found the operation of the site to be in violation of any law or regulation, the operator must confirm that it has corrected the violation or is taking steps to eliminate the problem as expeditiously as possible.” (R.A. 261 (emphasis added).)<sup>14</sup> At no time prior to January 27, 2003, did the Village issue a stop-work order or revoke the Special Permit.

Metro Enviro Transfer, LLC Acquires The Facility  
And Applies For Renewal Of Special Use Permit

In March 2000, Petitioner-Respondent Metro Enviro Transfer, LLC (“Metro”), a wholly-owned subsidiary of Allied Waste Industries, Inc. (“Allied”), acquired the assets of Metro Enviro, including the Facility, and the equipment, contracts, permits, and goodwill associated with the

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<sup>13</sup> In fact, the Village Attorney explained the protocol, stating that: “Obviously it would be silly for anybody to sit here and say that it is never possible for some prohibited material despite all of the signs from being brought onto the site. There is a specific provision here [in the Special Permit] that if garbage, and the word is inadvertently, if it’s inadvertently brought, it can remain at the site no longer than 12 hours; that’s one of the conditions.” (R.A. 215-216.)

<sup>14</sup> The regulatory regime called for the Village to notify Metro Enviro of a violation and that it should “remedy the violation within five days,” which period would “allow applicant to rectify and cure any such cited violation.” (R.A. 267.)

business for in excess of \$10,000,000. (R.A. 60; 82-83.) Metro the requested a transfer of the DEC Permit from Metro Enviro.<sup>15</sup> (R.A. 60; 2838-41.)

Metro continued the same transfer station operation,<sup>16</sup> and made important and costly improvements to the Facility, including installing fast-sealing doors on the truck entrance to and exit from the processing area, and repairing the highly-engineered, concrete reinforced tipping floor in the processing area. (R.A. 56; 83-85.) The Facility is a state-of-the-art transfer station with paved driveways providing access to the processing area, a scale house with computerized inbound and outbound scales, a camera that focuses on the trucks entering the facility, and a radiation detection device. (R.A. 43; 56; 81.) Metro calculates the quantity of waste each truck deposits into the Facility. (R.A. 82.) The processing area of the Facility is in an enclosed building with fast-closing doors that seal on the bottom, and includes a highly engineered concrete reinforced tipping floor and push wall, a misting system to control dust, and a system for collection of leachate (or water that has come into contact with waste) that is pumped-out when necessary. (R.A. 81.) The surrounding area has separate containers for the collection and limited storage of unacceptable or unauthorized waste that is received incidental to loads of acceptable or authorized waste. (R.A. 81.) The property also has a stormwater drainage and management system that routes stormwater to one collection point that is routinely monitored, and screening

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<sup>15</sup> At the June 12, 2000 Board meeting, a representative of Metro appeared before the Board to announce the change of ownership. (R.A. 60.) The minutes of this meeting are not in the Record on Appeal.

<sup>16</sup> In general terms, the Facility receives C&D waste from haulers owned by Allied subsidiaries and from third-party haulers not affiliated with Allied, who deliver the waste to the Facility by small and large trucks. The haulers deposit the material onto a state-of-the-art and fully engineered concrete processing floor. If material that Metro is not permitted to accept is delivered to the facility incidental to otherwise acceptable loads, the unacceptable or unauthorized waste is separated and promptly removed from the facility by truck. Metro processes the remaining acceptable or authorized waste so that it is reduced to pieces that can be loaded onto rail cars. Metro then loads the waste onto rail cars, and ships it off the premises within a matter of days. The waste shipped off the premises by rail is disposed of at a landfill in Ohio. Waste is generally removed from the tipping floor the same day that it is received, and the tipping floor is emptied and cleaned at least every thirty days. Metro is not a landfill and does not store any type of waste on its property for more than a matter of days. (R.A. 82.)

berms to isolate the facility from part of the surrounding area. (R.A. 81.) Although DEC Regulations do not require that a processing pad be covered, Metro Enviro offered to construct a corrugated metal building to enclose the processing pad as part of its negotiations with the Village and the Committee. (R.A. 56.) Thus, the Village was able to ensure that there would be a reduction of noise, odor, leachate, aesthetic impact and dust.

### Oversight Of The Facility

The operation of the Facility is carefully regulated by the DEC, the Westchester Solid Waste Commission (“WSWC”), and the Village.<sup>17</sup> (R.A. 44; 171-79; 255-69; 341-45.) The Facility is routinely monitored and inspected by DEC, the Village, Metro employees, Board members and local citizens. (R.A. 85.) Metro pays the cost of the DEC monitor and has offered to pay at least part of the cost of the Village monitor. (R.A. 85; 435; 1972.) Indeed, the Record contains a large number of inspection reports from both DEC and the Village, which indicate that inspections of the Metro Facility were conducted on an almost daily basis by one governmental entity or another.<sup>18</sup> On behalf of the Village, Joseph Sperber, the Assistant Village Engineer and Code Enforcement Officer, and Frank Pusatere, the Village Fire Inspector, regularly inspected the Facility. (R.A. 965-1088.) The Facility also has been monitored by a federal monitor, Walter Mack, Esq. (the “Federal Monitor”), who was appointed to ensure that all of Allied’s operations in Westchester County are in compliance with applicable federal, state and local laws.<sup>19</sup> (R.A. 85.)

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<sup>17</sup> The DEC has jurisdiction over all solid waste management facilities in the state and issues solid waste management permits governed by Title 6, Part 360 of the New York Code of Rules and Regulations. The WSWC issues licenses to solid waste facilities in Westchester County. The Village has jurisdiction over local land use and zoning decisions within its community, and has historically issued special permits in connection with the operation of the industrial activities on the Property, and the changes from one type of operation to another. (R.A. 44.)

<sup>18</sup> (See, e.g., R.A. 272-86; 837-50; 965-1088; 1693-1701; 1591-92; 3566-74; 4101-17; 4216-30; 4243; 4248-4256; 4367; 4369-4392; 4395-99; 4401-54; 5205-5219; 5300-5434; 5441-5444; 5529-5566; 7096.)

<sup>19</sup> The monitorship of Metro is not a result of any wrongdoing by Metro or its predecessor. (R.A. 86.) In United States v. Suburban Carting Corp., 96 CR. 466, which is pending in the United States District Court for the

Despite such intensive scrutiny by multiple governmental agencies, as well as the public, the Village has come forward with no local or DEC violations for the excessive size of piles of debris, no claims of garbage and materials strewn throughout the Property, no uncontrolled flows of stormwater exiting the Property, no noise violations impacting neighboring properties, and no stacking of trucks on local roads interfering with safe vehicular access to the Train Station. (R.A. 56-57.)

#### Special Permit Renewal

On March 23, 2001, Metro filed a timely written request with the Board asking that the Special Permit, due to expire on May 5, 2001, be renewed. (R.A. 60; 2876-79.) The Board was advised that the renewal Application was deemed a Type II Action under SEQRA requiring no further environmental studies.<sup>20</sup> (R.A. 2873-79.) After filing the Renewal Application, Metro secured more than ten temporary extensions of the Special Permit, and appeared at numerous Board meetings to answer questions and provide information to the Board. (R.A. 61; 297; see generally R.A. 1834-2499.)

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Southern District of New York, Suburban Carting Corp. (“Suburban”) and certain other defendants pleaded guilty on September 30, 1997. (R.A. 86.) The pleading defendants entered into written plea agreements that provided that they would be subject to monitorship by the Federal Monitor for a five-year period. (R.A. 86.) In February 2000, when subsidiaries of Allied purchased the stock of Suburban and purchased the stock and assets of certain other entities, Allied obtained the Court’s approval of those purchases on the condition that Allied agree to have the acquired businesses monitored. (R.A. 86.) In or about April 2000, Allied voluntarily agreed to have its previously unmonitored Westchester County operations, including Metro, come under the monitorship umbrella. (R.A. 86.)

On November 15, 2002, Allied moved for termination of the monitorship, subject to limitations that would permit the Federal Monitor to complete certain ongoing investigations and reports on which he was working. (R.A. 86.) The Village (who is not a party to that proceeding) opposed Allied’s motion. (R.A. 86.) However, by Order dated December 12, 2002, Federal District Court Judge Rakoff granted the motion, with the exception of five areas concerning which the monitorship continues. (R.A. 86.) Significantly, the Court noted in the Order that “the Monitor confirms that the company has, albeit belatedly, taken the proper steps to bring itself into substantial compliance with the requirements of the monitorship.” (R.A. 86 (emphasis added).)

<sup>20</sup> Significantly, the Board and its counsel agreed with that assessment and, to date, there has been no deviation from that position. In fact, upon information and belief, there is absolutely no documentation in the Village’s records concerning the issuance of a positive declaration, or a dispute with regard to the classification of this action as a Type II Action under SEQRA. (R.A. 76.)

### Village Amends Zoning Law To Prohibit Facility

On or about June 18, 2001, the Board somewhat suddenly and unexpectedly adopted Local Law No. 8 of 2001, which revised the permitted or as-of-right uses previously allowed under Section 230-18(B) in the LI District, and expressly declared that “solid and liquid waste transfer and storage stations and landfills (including construction and demolition materials) are prohibited.” (R.A. 68; Village Code § 230-18(E).) The Board adopted this amendment only months after the Special Permit renewal application had been filed.<sup>21</sup> (R.A. 68-69.)

After the adoption of the amendments, the Village Manager and the Village Attorney advised Metro’s counsel that the Facility would continue to be a nonconforming use; indeed, the Facility at that time had a valid Special Permit on extension from the Board.<sup>22</sup> (R.A. 69; 1835.)<sup>23</sup> The Board was well aware that the Facility was operating at that time in the LI District. Therefore, as of the effective date of this legislative enactment in 2001, once again, the Village by its actions recognized the constitutionally protected vested rights to a nonconforming use held by Metro as a permit holder for the pre-existing use.

### Board Indicates Intent To Deny Renewal Of Special Permit

Subsequent to the disclosure of violations of the Special Permit (discussed in detail below), the Board conducted extensive hearings on September 9, 2002, October 21, 2002, December 16, 2002, January 6, 2003, January 15, 2003 and January 27, 2003. At these hearings, documents were

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<sup>21</sup> The amendment was being championed by Trustee Deborah McCarthy – an admittedly staunch opponent of the Facility (who voted against it in 1998, and has consistently attempted to vilify the Facility and its operators ever since). (R.A. 68.)

<sup>22</sup> The primary motivation of the Board in adopting this particular change, according to the Village Attorney, was to eliminate any possibility of another transfer station operating in the LI District – in particular it would eliminate any chance that the large Finkelstein Warehouse property to the north (the large tire wholesale storage facility also on the rail lines) could ever be converted into a transfer station. (R.A. 69.)

<sup>23</sup> The extension was actually granted at the April 23, 2001 meeting, however, those minutes are absent from the Record on Appeal.

produced, and various high-level representatives of Metro made presentations to the Board regarding the Facility and its operation.<sup>24</sup>

The Board consistently stated publicly that it would not vote on the actual renewal of the Special Permit until after the filing of Federal Monitor Mack's report. (See, e.g., R.A. 294-311.) Nevertheless, prior to the release of the report, the Board issued a draft Statement of Findings dated December 23, 2002 (the "Draft Statement"), which indicated the Board's inclination to deny Metro's application. (R.A. 61; 87.) According to the Draft Statement, the Board appeared to be most concerned with Metro's acceptance of unauthorized waste from Engelhard Corporation ("Engelhard"), and its acceptance of waste in excess of the permitted capacity. (R.A. 87.) The Board also expressed concern with a number of other relatively minor issues. In response, Metro presented extensive sworn testimony at the hearings on January 15, 2003, and January 27, 2003, with fact and expert witnesses, evidentiary submissions and legal arguments, as discussed, *infra*. (R.A. 88; 374-704; 705-819; 2472-86; 2492-99.)

#### The Village Issues Findings And Denies Special Permit

Despite Metro's presentation of direct, substantial, credible evidence refuting each of the apparent bases for the Board's previously expressed inclination to deny the renewal application, on January 27, 2003, the Board voted to deny Metro's application to renew the Special Permit. (R.A. 159-160; 797-807.) There was no massive public outcry against the Facility, no packed public hearing; just the regularly outspoken 5-10 individuals and the ever-pervasive political pressure to shut the Facility down. The Board issued a Statement of Findings in which it cited violations of the Special Permit, including mishandling of unauthorized waste, exceedances of the maximum permitted tonnage, failure

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<sup>24</sup> Attending the hearings on various occasions were District Manger, Mark Saleski; General Manager, Eric Johnson; Regional Engineer, John DiNapoli, PE; Safety and Compliance Officer, Michael Altobelli; and Sales Manager, Christine Meket.

to collect leachate on one occasion, receipt of two refrigerators and failure of certain training, reporting and record-keeping requirements, as the basis for its decision. (R.A. 1139-1152.)

Notably, the Board did not have before it any empirical evidence whatsoever that Metro had caused or was likely to cause any adverse impact to the health, safety or welfare of the Village residents or to the environment. In that regard, a review of documents obtained from the Village pursuant to a request under the Freedom of Information Law, Public Officers Law § 84, et seq., establishes that the Board had no test results or other data of adverse traffic impacts, air emissions, noise, odor or aesthetics, and no other documentation evidencing any actual or genuine potential harm or adverse impact to the public welfare or the environment. (R.A. 76-77.)<sup>25</sup>

In a transparent, last-ditch effort to obtain support for denying Metro's application for renewal of its Special Permit, the Village retained Richard P. Brownell, a Vice President of Malcolm Pirnie, Inc., and obtained a conclusory Affidavit from him, which was sworn to on January 27, 2003, the same day the Village voted to deny Metro's application. (R.A. 1089-1092; 1230-1233.) Mr. Brownell does not state that he reviewed any documents concerning Metro other than the Statement of Findings prepared by Special Counsel for the Board, or that he ever visited Metro. (R.A. 1089-1092; 1230-1233.) Most importantly, Mr. Brownell does not even dispute the statement by Metro's expert, Robert D. Barber, that Metro's acceptance of unauthorized waste, exceedances of its permitted capacity, and failures with regard to training, reporting and record-keeping had not had any actual or potential adverse impact on the health, welfare or safety of the Village residents or on the environment. (R.A. 1089-1092, 1230-1233.)

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<sup>25</sup> Interestingly, documents obtained from the Village show that some Trustees rejected the idea of retaining an environmental and engineering consulting firm to assist the Village with its review of Metro's application for renewal of its Special Permit because the Board believed that a "glowing report" on Metro would "make it more difficult for [the Board] to deny [Metro's application for] renewal." (R.A. 77-78.) One Trustee's query in August 2001, that "[w]e may not be renewing the permit at all so why do the study?," strongly suggests that the Board had determined not to renew the Special Permit long before Metro had had an opportunity to present its case. (R.A. 77.)

On January 27, 2003, the Board resolved, among other things, (i) to decline to grant any further extensions of the Special Use Permit; (ii) to decline to grant the application for renewal of the Special Use Permit; and (iii) to order Metro to cease accepting waste and commence closing the Facility at midnight on February 17, 2003. (R.A. 159-160, 797-799.)

### Discussion Of The Violations

Violations of Metro's local Special Permit, DEC Permit, and its O&M Manual admittedly have occurred. Indeed, Metro itself brought many of these violations to the attention of DEC and the Village. Metro has been penalized severely for these violations, including monetary fines and, far more costly, the disallowance by the Village of the increase in tonnage of incoming material, which was anticipated to occur in May 2000 under the Special Permit.<sup>26</sup> (R.A. 312-313.)

After operating quite successfully for several years with only some minor operational incidents, and only after political pressures mounted between and among Board members and a small but vocal and persistent group of residents, did the renewal of this Special Permit begin to morph into an entirely new process. (R.A. 62.)<sup>27</sup> The non-renewal vote took place less than two months before fiercely contested Village elections, and, significantly, the Mayor and one Trustee who voted for the Facility originally seemingly changed votes in large part to hold onto their elected positions. (R.A. 62.) The violations that provided the cover for the Board's actions fall into three categories: capacity exceedances, acceptance of unauthorized waste, and miscellaneous violations. (R.A. 62.)

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<sup>26</sup> In denying Metro's request for a capacity increase, Mayor Elliot stated that a proportional response was warranted, explaining that "[t]he remedy appropriate at this time – and the remedy prescribed by Paragraph 33 of the permit – is disallowance of the tonnage increase that might have gone into effect for the third and final year of the permit." (R.A. 313 (emphasis added).)

<sup>27</sup> (See, supra, note 11; see also, R.A. 1974; 2102; 2104-05; 2124; 2137; 2314.)

1. Capacity Exceedances

On approximately 21 separate occasions between March 22, 2000, and August 21, 2000, the Facility accepted waste in excess of its permitted capacity. (R.A. 62.) Four of the violations were 3 tons or less over the 850-ton maximum; 9 violations were 25 tons or less over the limit; 4 exceeded the limit by 100 tons or more; and none were in excess of 200 tons over the 850-ton limitation. (R.A. 62-63.) The single largest exceedance involved was 1,039.81 tons accepted in one day -- in a Facility that was clearly designed and constructed to handle 1,000 tons per day, or 6,000 tons per week. (R.A. 63.) Indeed, the Board's own 1998 Special Use Permit expressly provided for a step up to 1,000 tons per day in year three of the Permit. (R.A. 63; 263.) Importantly, despite these "daily exceedances," Metro never exceeded the anticipated maximum tonnage of 6,000 tons per week for which it was designed.<sup>28</sup> (R.A. 93.)

There is absolutely no empirical data or information in the Record that the capacity exceedances had any actual or potential adverse impacts to public health safety, welfare or the environment. (R.A. 76-77.) Notably, the Village's expert did not even specifically address, let alone analyze, the capacity exceedances, leaving the Village to rely solely on Brownell's conclusory statement in his Affidavit that "[v]iolations of the solid waste regulations have the potential to result in damage to health and the environment and must be dealt with seriously particularly when they are repetitive." (R.A. 1090.)

Since traffic -- which is directly connected with capacity -- was such a critical environmental concern, Metro retained Adler Consulting to verify the accuracy of its 1998 traffic report

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<sup>28</sup> The Special Permit allows the Facility to accept a maximum of 850 tons of waste per day (except on Saturdays, when the tonnage limit is 300 tons per day). (R.A. 92; 262-263.) Metro's DEC Permit allowed the Facility to accept an average of 700 tons per day, and a maximum of 4,200 tons per week. (R.A. 92; 174.) The Special Permit, the DEC Permit, and the O&M Manual all anticipate that Metro would be allowed to accept up to 1,000 tons per day: the DEC Permit provides that Metro would be allowed to accept up to a maximum of 6,000 tons per week. (R.A. 92; 174.) The O&M Manual specifically provides that "[t]he Facility is designed to process up to 6,000 tons weekly." (R.A. 92; 321.)

1711). Metro has cured the violations, and has implemented corrective measures to ensure that these exceedances cannot occur once again, including installing a new computer system that cannot be manipulated. (R.A. 63.) Consequently, no notice of violation for tonnage exceedance has been issued in over 3 years -- not since August 21, 2000. (R.A. 63.)

2. Unauthorized Industrial Waste Received At The Facility

Metro has admitted to both the Village and the DEC that it accepted industrial waste, including certain plastic film and associated materials that was disposed of by Engelhard and transported to the Facility. (R.A. 64.) This technical violation of the Special Permit and DEC Permit by accepting "industrial waste" occurred on forty-two separate occasions, with the last such delivery occurring in March 2002. (R.A. 64; 1329; 1331.)

In order to dispel the exaggerated innuendos that the material disposed of by Engelhard at the Facility was "hazardous or toxic waste," Metro obtained an Affidavit of Scott W. Clearwater, the Director of Environment, Health, and Safety for Engelhard.<sup>30</sup> (R.A. 64; 314-316.) That Affidavit sworn to on the January 10, 2003, states unequivocally that, "Engelhard did not provide Allied Waste Industries, Inc., or its subsidiaries ('Allied') with hazardous waste for transportation or disposal." (R.A. 314-315.) Clearwater further states that, "the waste Allied handled for Engelhard was non-hazardous industrial waste and other non-hazardous solid waste. These wastes may have included film and

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<sup>30</sup> DEC regulations define industrial waste as any waste by-product generated as a result of the manufacturing process; it in no way means that the waste is hazardous. (R.A. 64.) Here, the industrial waste included film scraps and extruded plastic, some of which is used as filler in Easter baskets, from one location, and pigment residue, some of which is used in shampoo, from other locations. (R.A. 90-91.) The loads that contained industrial waste also contained municipal solid waste ("MSW") and recyclables, thereby reducing the total amount of industrial waste in each load. (R.A. 91.) Metro's professional expert testified that MSW and recyclables "generally present a substantially lower risk to human health and the environment than industrial or other forms of anticipated unacceptable waste." (R.A. 104.)

equipment used in the manufacturing process. All of that material was non-hazardous, solid and stable.”<sup>31</sup> (R.A. 315.)

Significantly, Metro’s records indicate that the total tonnage of waste received from Engelhard is less than five one hundredths of one percent (0.0004259) of Metro’s total tonnage received since March 2000. (R.A. 90.) A mistake, yes; a violation, yes; a basis for permit non-renewal or revocation, no.

Metro’s representatives clearly acknowledge that the industrial waste should not have been received by the Facility. (R.A. 65; 521.) Metro also has explained to the Village two very important facts. First, a certain amount of unauthorized or non-acceptable waste is inevitably going to be received at any transfer station because – despite all measures and attempts to avoid it – waste does get commingled by waste generators. (R.A. 67; 89; 416-17.) Metro’s expert, Robert D. Barber, P.E., an engineer for more than 30 years with nine years of experience in municipal engineering and substantial experience reviewing and inspecting solid waste transfer stations, acknowledged that “[d]uring the course of operating any transfer station, unacceptable waste will be received incidental to loads of acceptable waste.” (R.A. 104-105.) The Village’s own expert does not appear to disagree. (R.A. 104; 1089-1092.) In fact, the Environmental Conservation Law, Part 360 of the DEC Regulations, the local Special Use Permit and Metro’s O&M Manual itself (Conditions Nos. 2 and 7) all expressly acknowledge and contemplate that a certain amount of unauthorized waste will enter a facility. (R.A. 104; 255, 257; 334-35.)

Second, there is absolutely no empirical evidence that confirms to the Village or Metro that there were any adverse impacts to public health, safety and general welfare or the environment

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<sup>31</sup> Croton’s own Special Counsel created this red herring issue of hazardous waste by assuming that the waste Engelhard provided to Metro was “hazardous”, only engendering community fear and bolstering opposition without any substantiation. None of the waste, however, was manifested as hazardous, and Engelhard has presented a sworn affidavit eliminating that issue. (R.A. 314-15.)

associated with such violations. (R.A. 76-77.) The Village's expert even admits that, "there does not appear to have been any immediate impact at the [Facility] or at other locations."<sup>32</sup> (R.A. 1091.)

Based on his extensive documentary review and site visits, Barber testified before the Board and attested in his Affidavit submitted to the court below that "acceptance of waste from Engelhard that contained industrial waste and [municipal solid waste] did not result in any adverse impact on the health, safety and welfare of the Village residents or the environment." (R.A. 104-105.) To the contrary, Barber found empirical evidence in the form of "the results of stormwater testing that Metro has conducted since it acquired the facility in March 2000 [that] support [his] conclusion that the acceptance of unacceptable waste has not had any adverse effect on the community."<sup>33</sup> (R.A. 105.)

Nonetheless, as a result of these actions, Metro paid a fine of \$50,000 to the Village, and was assessed an additional \$20,000 fine to the DEC. (R.A. 89; 1722; 3175-77.)<sup>34</sup> In addition to paying the assessed penalties, Metro has implemented a series of curative and corrective measures, including a substantial management overhaul at the Facility and district locations, all of which have

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<sup>32</sup> Without any relevance, Brownell speculates that "there could have been increased potential for significant impact" had entirely different categories of waste, "such as asbestos and medical wastes or highly flammable wastes," been processed at the Facility. (R.A. 1091.)

<sup>33</sup> Indeed, Barber opined that Metro "compares favorably to other transfer stations that [he] ha[s] observed throughout the nation that are well situated, well designed and well run." (R.A. 103.) Barber found that "the transfer station has many significant features that serve to protect the health, safety and welfare of the community and the environment." (R.A. 101-02.) Based upon Barber's experience nationwide, "the facility has better physical characteristics than most construction and demolition ('C&D') transfer stations." In addition, he explained that

[t]he most significant operational characteristics of the facility that serve to protect the health, safety and welfare of the community and the environment include: the segregation and prompt removal of unacceptable or unauthorized waste; the removal of most waste from the tipping floor on the day that it is received; the emptying and cleaning of the tipping floor every 30 days; the regular monitoring and pumping out of the leachate tank when full; routine reporting of tonnage and storm water analyses; regular and comprehensive training with regard to the proper handling of waste, including unacceptable or unauthorized waste; and regular inspections by Metro Enviro, the Village and the DEC.

(R.A. 102.) Barber also opined that the Facility is ideally situated. (R.A. 103.)

<sup>34</sup> \$10,000 of the penalty was conditionally suspended by the DEC. (R.A. at 1722.)

been discussed with and explained to the Village.<sup>35</sup> (R.A. 66; 80-98; 429-39.) Moreover, the individuals responsible for the improper acceptance of industrial waste from Engelhard (as well as the capacity exceedances) no longer work for Metro or Allied, and Metro has conducted extensive training of its current employees to ensure that they understand how to identify and handle unacceptable or unauthorized waste. (R.A. 92.) Importantly, Metro's customers are now systematically audited to ensure that they are not delivering such waste to the Facility. (R.A. 92.) Once again, empirical data and substantial evidence dispelled speculation and conjecture, and revealed satisfactory curative measures.

### 3. Miscellaneous

The remaining miscellaneous violations included inadequate training and record keeping,<sup>36</sup> the receipt of household appliances such as two refrigerators and a snowblower,<sup>37</sup> leachate outside the processing building,<sup>38</sup> and tires on site.<sup>39</sup> Again, representatives of Metro testified before the

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<sup>35</sup> District Manager Saleski explained that Allied currently has in place a compensation system for District Managers and General Managers whereby bonuses (of up to 50% of salary) can be withheld in the event of the issuance of Notices of Violation at these types of facilities. (R.A. 66; 541.) Therefore, clearly management personnel have their own personal financial incentives to ensure regulatory compliance.

<sup>36</sup> Metro had conducted most of the required training and had remedied the reporting and recordkeeping issues, which the Village purported to be concerned about. (R.A. 67; 94.) Metro's representative explained to the Board that regular training sessions of staff were being conducted on both safety and compliance issues. (R.A. 421-23.) Training was being performed in both English and Spanish. (R.A. 67.) Unfortunately, some training was not provided on the required schedule and documentation of each training session was not properly filed on-site confirming that the training had been done, and who was present. (R.A. 422; 1224-25.) Metro's representatives advised the Board that corrective measures had been taken. More importantly, no evidence was presented to attribute any actual harm or adverse impact to the failure to maintain these records or perform appropriate training. (R.A. 76.)

<sup>37</sup> The two refrigerators were delivered to Metro incidental to loads of acceptable waste. (R.A. 91.) According to standard operating procedure, and in full compliance with the requirements of the O&M Manual and other legal requirements, they were detected when the load in which they were located was tipped on the floor of the Facility; the Facility operators determined that the refrigerators were crushed and that one of them did not have a compressor or freon inside of it; they were placed to the side of the tipping floor; and they were removed by the hauler that had brought them to the facility within 24 hours of their having been brought to the facility. (R.A. 91.) The Village would have the Court support their untenable position that an "acceptance" of unauthorized waste exists when such material merely crosses the threshold of the Facility.

<sup>38</sup> Metro representatives explained that on one particular occasion, a truck pulled forward and outside the processing building while still tipping its waste. Waste landed outside the building and because it was raining, leachate – the liquid that runs off of solid waste when mixed with water – was not captured and collected inside the building in the leachate collection system. (R.A. 67; 93.) Instead, it was captured in the on-site swales and ran into

Board, explained these incidents, identified remedial and corrective measures, and implemented the necessary steps to “cure” these technical violations in accordance with the DEC Permit and Special Use Permit. (R.A. 66; 80-98; 429-39.) That Metro’s improvements at the site were successful in mitigating environmental impacts is evidenced by professional, empirical studies and surveys that have been performed at the Property. For instance, a report by Sterling Environmental Engineering, dated May 11, 2001, concluded that “[e]very noise survey performed demonstrates that Metro operates in compliance with State noise regulations for this type of facility and with noise level requirements of the Village Special Use Permit.” (R.A. 273.) Sterling also reported on October 30, 2002 that “the stormwater sample meets applicable surface water standards for the Hudson River.” (R.A. 277.)

Ultimately, a review of the Record reveals that, “there are no test results or other objective criteria suggesting that the operation of the facility had a negative impact on the health, welfare or safety of the Village residents or the environment.” (R.A. 103.) Metro presented

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the stormwater collection system between the pavement and the nearby rail spur. (R.A. 67; 93.) According to the plan set forth in the O&M Manual, water that runs into the ditch and into the stormwater collection system runs into a retention basin at the rear of the facility. (R.A. 67; 93-94.) The surface water testing results referred to above did not indicate any adverse effect on the storm water quality. (R.A. 67; 93-94; 105.) No contrary empirical data has ever been presented, which would support the Village’s purported concern about this isolated incident.

<sup>39</sup> With respect to vehicle tires, Metro volunteered to the Village that tires are sometimes delivered to Metro incidental to loads of acceptable waste. (R.A. 90.) According to standard operating procedure, tires were separated from other waste deposited on the tipping floor, stored in a fully enclosed metal container, and removed from the Facility when the container was full. (R.A. 90-91.) The Village contends that this procedure technically violated the O&M, which requires that the tires be removed within 12 hours. (R.A. 90-91.) The Village refers to a provision in the O&M Manual that describes vehicle tires as hazardous and industrial unauthorized waste and states that such waste may remain on site for a maximum of 12 hours. (R.A. 90.) However, the O&M Manual also describes vehicle tires as non-hazardous unauthorized waste, which may remain on site for up to 24 hours. (R.A. 90.) The description in the O&M Manual of vehicle tires as “hazardous and industrial” waste was, as Metro explained to the Village, an inadvertent mistake, because vehicle tires are generally accepted by the industry and DEC as neither hazardous nor industrial. (R.A. 90.) Metro has since corrected the situation.

Somewhat ironically, the Board recently reviewed an application for the expansion of the wholesale tire storage operation within the adjacent Finkelstein industrial building. (R.A. 29.) Metro’s small handful of tires enclosed within a metal container posed no health and safety risk, especially when compared with the thousands of tires stored on the property next door. As the Village is fully aware, Metro likely stored far fewer tires, and stored those tires for significantly less time, than the neighboring tire wholesaler. (R.A. 91.)

comprehensive and substantial factual and expert testimony and evidence that no adverse impacts have resulted from the Facility's five years of operation under the management of Metro and its predecessor Metro Enviro, LLC. (R.A. 88.) In sum, the violations were not sufficient cause for DEC to revoke its Permit or close down the Facility, nor did the violations provide a legitimate justification for the Village to deny renewal of the Special Permit.

#### Metro Obtains Injunctive Relief By Order To Show Cause

To avoid closure of its business, in which it had just recently invested millions of dollars, Metro filed a Verified Article 78 Petition dated January 31, 2003, and a Motion for a Stay dated February 3, 2003 by Order to Show Cause. (R.A. 27, 30.) Judge Nicolai granted the Order to Show Cause on February 4, 2003, allowing the Facility to continue operation until a decision on the merits of the Petition was issued. (R.A. 27.) Prior to the determination of the Article 78 Petition, the Village submitted a 15 volume record upon which the court's decision was predicated.

#### DEC Permit Renewed With Capacity Increase

Of particular importance, DEC, the state agency with regulatory expertise, control and jurisdiction over the Facility and all solid waste management facilities, has not revoked the DEC Permit, or insisted upon the closure of the Facility. (R.A. 72.) In keeping with the typical regulatory and enforcement regime in the arena of highly-regulated industries, DEC has routinely inspected the Property, assessed appropriate monetary penalties for violations, supervised the implementation of curative measures, overseen Metro's rehabilitation of the Facility, and ultimately deemed it appropriate on February 7, 2003 to renew the DEC Permit with increased capacity limits.<sup>40</sup> (R.A. 56; 72; 83-85; 1268-77.)

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<sup>40</sup> The DEC Permit originally permitted a 700 ton daily capacity, which was increased upon renewal to 1,000 tons. (R.A. 174; 1273.)

## ARGUMENT

### I.

#### **THE COURT BELOW CORRECTLY CONCLUDED THAT THE VILLAGE BOARD'S DETERMINATION TO DENY RENEWAL OF METRO'S SPECIAL PERMIT WAS NOT ENTITLED TO DEFERENCE BECAUSE IT WAS IRRATIONAL AND NOT SUPPORTED BY SUBSTANTIAL EVIDENCE**

##### A. The Board's Decision Was Not Supported By Substantial Evidence Because It Was Completely Devoid Of The Required Empirical Data, It Was Based Upon Generalized Community Opposition, And It Ignored Curative And Remedial Measures Implemented

Appellants assert that “the court failed to evaluate whether the Board acted rationally and with the support of substantial evidence of permit violations in denying the special use permit renewal application,” and that “the lower court impermissibly reached its own conclusions regarding the transfer station and failed to afford the Board the deference to which it was entitled.” (Appellants’ Brief (“App. Br.”) at 26-27.) To the contrary, the court below did evaluate the Record and correctly concluded that “[u]nder the totality of the circumstances present herein, . . . the Board’s denial of the permit is not supported by substantial evidence.” (R.A. 9.) Therefore, as discussed below, Judge Nicolai was not required to defer to the Board’s determination.

##### 1. The “Substantial Evidence” Standard of Review

It is axiomatic that “substantial evidence” is the standard of review of the Board’s decision to deny a Special Permit: “While the [Village] Board still retains some discretion to evaluate each application for a special use permit, to determine whether applicable criteria have been met and to make commonsense judgments in deciding whether a particular application should be granted, such determination must be supported by substantial evidence.” Twin County Recycling Corp. v. Yevoli, 90 N.Y.2d 1000, 665 N.Y.S.2d 627, 628 (1997).

The New York Court of Appeals has enunciated meaningful parameters for the substantial evidence test, ensuring that courts actively review decisions by administrative bodies. In

300 Gramatan Ave. Assocs. v. State Div. of Human Rights, 45 N.Y.2d 176, 408 N.Y.S.2d 54, 56-57

(1978), for instance, the Court of Appeals stated:

In final analysis, substantial evidence consists of proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that, from that proof as a premise, a conclusion or ultimate fact may be extracted reasonably, probatively and logically. . . . Put a bit differently, ‘the reviewing court should review the whole record to determine whether there is a rational basis in it for the findings of fact supporting the agency’s decision.’

Id., quoting McCormick, Evidence 847 (2d ed. 1972) (emphasis added). To make a showing of substantial evidence, courts regularly require analyses based on empirical data.<sup>41</sup> See, e.g., Retail Prop. Trust v. Bd. of Zoning Appeals of Town of Hempstead, 98 N.Y.2d 190, 746 N.Y.S.2d 662, 666 (2002) (expert reports provided “valid scientific bases” for rejecting the proposal at issue).

In articulating the appropriate review parameters, the Court of Appeals has stated that “[a]lthough scientific or expert testimony is surely not in every case required to support a zoning board determination, the board may not base its decision on generalized community objections.” Twin County Recycling, 90 N.Y.S.2d at 628 (emphasis added).<sup>42</sup>

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<sup>41</sup> Importantly, the permitting authority bears the burden of supporting its findings by empirical data or expert opinion, particularly in the face of pertinent evidence proffered by an applicant. See Framike Realty Corp. v. Hinck, 220 A.D.2d 501, 632 N.Y.S.2d 177, 178 (2d Dep’t 1995) (annulling denial of special permit; “generalized complaints about traffic from local residents describing existing conditions are insufficient to counter an expert opinion based on empirical studies that ‘the existing street system could handle the projected increase in traffic’”); Markowitz v. Town Bd. of Town of Oyster Bay, 200 A.D.2d 673, 606 N.Y.S.2d 705 (2d Dep’t 1994) (denial of special use permit not supported by substantial evidence; neither testimonial nor documentary evidence supported findings; personal knowledge of board member insufficient); N.Y. Vill. Law § 7-725-b (2003), Practice Commentaries at 66 (“[T]he denial of an application will not be sustained unless the record factually substantiates that the impacts upon which the decision is based are greater than those associated with uses permitted by right. Because of this heightened standard, the denial of a special permit application is arbitrary unless it is based upon clear evidence demonstrating the nature and magnitude of the undesirable impacts”) (emphasis added).

<sup>42</sup> See, e.g., Retail Prop. Trust, 746 N.Y.S.2d at 666 (“Moreover, expert opinion regarding traffic patterns, when presented, may not be disregarded in favor of generalized community opposition.”); Matter of Pleasant Valley Home Constr. v. Van Wagner, 41 N.Y.2d 1028, 395 N.Y.S.2d 631, 632 (1977) (holding that denial of special permit application to develop a mobile home complex was impermissible where it was denied “not because of any objection peculiar to the proposed development, but because of community pressure directed against allowing any additional mobile home development”); C.B.H. Props., Inc. v. Rose, 205 A.D.2d 686, 613 N.Y.S.2d 913, 915 (2d Dep’t 1994) (“it is impermissible to deny a special exception or permit solely on the basis of generalized objections

In Twin County Recycling, for instance, the Court of Appeals held that the Town Board's denial of an application for renewal of a special use permit to operate an asphalt recycling plant was not supported by substantial evidence. Id. The Court ruled that "the application was denied not because it failed to meet the applicable criteria but because of generalized community pressure." Id. (emphasis added). Similar to the case at bar, the petitioner in Twin County Recycling submitted expert traffic and land use testimony, and "[o]pposition to the application came mainly from residents of the bordering neighborhoods who objected to the operation of the plant. Despite complaints by these residents, there [was] no finding by [DEC] that petitioner's facility [was] in violation of any governmental regulation." Id. The Court concluded that "[t]he determination was, therefore, properly annulled." Id.

C & A Carbone, Inc. v. Holbrook, 188 A.D.2d 599, 591 N.Y.S.2d 493, 494-95 (2d Dep't 1992), is a case similar both procedurally and substantively to the instant case. There, the Second Department analyzed and then affirmed the Supreme Court's decision that annulled the Town Board's denial of a special permit to operate a solid waste recycling plant. Like the case at bar, C & A Carbone raised important issues of truck traffic that warranted expert review with empirical data. The Town Board requested that the applicant submit a traffic survey in response to concerns about traffic congestion raised at the public hearing by area residents. Id. at 494. Even though the applicant's traffic

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and concerns of the neighboring or adjoining community expressed by members thereof, which, in effect, amount to 'community pressure'").

Appellants correctly state that community opposition does not automatically invalidate a decision, but rather "[t]he question is whether there [is] substantial evidence to support the decision." (App. Br. at 38.) Unlike in the cases cited by Appellants, here there is no substantial evidence in addition to the strong community opposition. See Retail Prop. Trust, 98 N.Y.S.2d at 196 ("valid scientific bases" supported a finding of substantial evidence despite the presence of "strong community opposition"); Ifrah v. Utschig, 98 N.Y.2d 304, 746 N.Y.S.2d 667, 669 (2002) ("In this case, the Board's determination is supported by more than the generalized objections of neighbors.") (emphasis added); Dries v. Town Bd. of Town of Riverhead, 305 A.D.2d 596, 759 N.Y.S.2d 367, 367-68 (2d Dep't 2003) (substantial evidence found in addition to community opposition); Home Depot, USA, Inc. v. Town of Mount Pleasant, 293 A.D.2d 677, 741 N.Y.S.2d 274, 276 (2d Dep't 2002) (specific findings were supported by substantial evidence, and were not based on general objections or conclusory findings).

survey indicated that the area roads were being used substantially under their capacity and (like Croton's) would not be overburdened by the applicant's trucks, the Town Board (like the Croton Board) "found the traffic survey unpersuasive and, based on the testimony of the area residents and the Town Board's own knowledge, denied the permit due to anticipated traffic congestion." *Id.*

In upholding the Supreme Court's decision, the Second Department found that the traffic survey was "unrebutted by anything other than the conclusory statements of the area residents," which "were insufficient to sustain a denial of the special permit even if supported by the personal knowledge of the members of the Town Board." *Id.* at 495 (emphasis added). In addition, there was no evidence supporting the Town's contentions that neighboring property values would be diminished, and rather significantly this Department noted that the DEC "reported no environmental impact." *Id.* Thus, lack of reliance upon empirical data and at least partial deference to DEC is relevant here.

Further, in PDH Props., LLC v. Planning Bd. of the Town of Milton, 298 A.D.2d 684, 748 N.Y.S.2d 193, 194-95 (3d Dep't 2002), a recent case cited by Appellants for the substantial evidence standard, the Third Department held that substantial evidence did not support the Planning Board's decision to deny the petitioner's application for a special use permit to construct two 10-unit apartment buildings. (App. Br. at 23.) In support of its application, the petitioner submitted an environmental assessment, engineering site plans and drawings of the proposed buildings, as well as a real estate report and traffic study. The court ruled that the petitioner satisfied the conditions for a special use permit set forth in the Town Code, and determined that the permit should have been granted absent substantial evidence supporting a contrary conclusion. *See id.* at 195. The court found that the "Board members who voted against the application expressed a general distaste for apartments in the relevant area of the Town. No evidence was provided, other than conclusory comments, specifically establishing any factual base to find noncompliance with a pertinent condition." *Id.* (emphasis added).

For instance, a neighboring realtor wrote a letter to the Town Board “expressing concern about the impact on the value of surrounding homes, [but] the letter was totally conclusory with no reference to any substantiating empirical data.” *Id.* (emphasis added).<sup>43</sup>

In addition, in Oyster Bay Assocs. Ltd. P’ship v. Town Bd. of Town of Oyster Bay, 7/16/2002 N.Y.L.J. 26 (col. 5) (Sup. Ct. Suffolk Cty.), aff’d, 303 A.D.2d 410, 755 N.Y.S.2d 671 (2d Dep’t 2003), an Article 78 petition was granted vacating a denial of the petitioners’ special permit application to construct a retail mall. The Town Board denied the special permit application after the Town Environmental Quality Review Commission revised its original SEQRA Findings to conclude that the proposed project would result in significant adverse impacts in several areas, such as traffic and transportation.

Like Judge Nicolai, the court methodically reviewed each of the Town Board’s findings, and concluded that the denial of the special permit was not supported by substantial evidence. The Supreme Court found many of the Town Board’s findings regarding traffic to be “speculative” and made “without an analysis based upon empirical evidence.” *Id.* (emphasis added). The court opined that “there is no reason for the Town Board’s current position on land use and density as it ignores its own SEQRA results in favor of unsubstantiated community concern.” *Id.* (emphasis added). The court further ruled that “[r]aw traffic generation numbers alone are not proof of an adverse impact if not

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<sup>43</sup> As also demonstrated by C & B Realty Co. v. Town Bd. of the Town of Oyster Bay, 139 A.D.2d 510, 526 N.Y.S.2d 612, 612 (2d Dep’t 1988), courts will not uphold the denial of a special permit where “the stated grounds . . . are contrary to the undisputed evidence adduced at the public hearing held on [the] matter.” In C & B Realty, notwithstanding the testimony of the applicant’s expert and a prior environmental impact ruling that the proposed restaurant/bar was compatible with its surroundings, the board denied the application on the basis that the use would adversely affect, and was incompatible with, adjacent properties. *Id.* at 613. The court rejected the board’s determination as arbitrarily and capriciously predicated upon “generalized objections and concerns” of area residents, and found that the absence of rebuttal evidence was not salvaged by personal knowledge of board members. *Id.*

considered in light of the mitigation offered by the petitioners in the form of road improvements.” Id. (emphasis added).<sup>44</sup>

It is significant that the instant case deals with a special permit. The court below correctly noted that “a special permit is the authority to use property in a manner expressly permitted.” (R.A. 8 (citations omitted).) The classification of a particular “special use” as permitted in a zoning district, therefore, “is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood.” Twin County Recycling, 665 N.Y.S.2d at 628. As explained above, “[a]lthough there is no entitlement to a special permit or exception, once the [applicant] shows that the contemplated use is in conformance with the conditions imposed, the special permit or exception must be granted unless there are reasonable grounds for denying it that are supported by ‘substantial evidence’” in the record. C.B.H. Props., 613 N.Y.S.2d at 914.

Courts have acknowledged that permit renewal applications require an even lesser showing in light of the fact that a more detailed, exhaustive environmental and land use analysis must be performed prior to the initial issuance of a special permit.<sup>45</sup> For example, in Atlantic Cement Co. v. Williams, 129 A.D.2d 84, 516 N.Y.S.2d 523 (3d Dep’t 1987), the court reviewed an application for the renewal of a DEC mined land reclamation permit. Differentiating between permit renewals and initial permit applications, the Third Department explained as follows:

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<sup>44</sup> As in Oyster Bay Assocs., courts have ruled that a determination is not supported by substantial evidence where it does not consider mitigation efforts or the fact that certain problems may be remediable. See, e.g., Sullivan v. Town Bd. of Town of Riverhead, 102 A.D.2d 113, 476 N.Y.S.2d 578, 581 (2d Dep’t 1984) (“most of these problems appear to be remediable via proper enforcement of existing regulations”). Thus, Judge Nicolai properly considered Metro’s efforts to remedy conditions at the Facility.

<sup>45</sup> Here, the Village engaged in a very detailed and exhaustive analysis of the land use and environmental implications of the original Special Permit issuance in 1998. Not only was a Committee formed to review all aspects of the proposed Facility, but also a qualified expert consultant was retained to advise the Village. That process resulted in a resounding endorsement of the Facility. (See R.A. 182; 186; 235-252.)

Generally, in the absence of a material change in conditions or evidence of a violation of the terms of the permit, a renewal should be granted without unduly burdening the applicant . . . . To require burdensome information at each renewal, which occurs every one or three years, would create destabilizing uncertainty and additional expense upon the mining industry.

Id. at 525 (emphasis added).<sup>46</sup>

Thus, the law does not grant the permitting authority unfettered discretion, but instead affords permit holders a greater level of protection for their property rights. As discussed infra, Point I.A.2, with only a conclusory affidavit and generalized community opposition to support the Village's findings, the court below correctly ruled that the substantial evidence standard for a special permit renewal application was not met here.

a. The Court Below Correctly Required Substantial Evidence Of Adverse Impacts

Taking issue with Judge Nicolai's finding that "[the] Village and its expert have failed to point to any evidence that an adverse environmental condition has resulted from the almost five years of operation of the Metro Enviro Transfer's facility," the Village asserts that "proof of noncompliance [alone] is sufficient ground to deny a permit renewal." (App. Br. at 33.) The Village contends further that the court below erred "[b]ecause it was not necessary for the Board to prove that injury has already occurred before taking preventative action."<sup>47</sup> (App. Br. at 33.)

The Village's desire to ignore the issue of impacts is belied by its concession that "the very purpose of the permit conditions that were imposed consistent with Village Code Section 230-62

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<sup>46</sup> The level of stability afforded permitted activities is also reflected in the fact that applications for permit renewal are deemed Type II actions pursuant to SEQRA, which do not require further environmental review. See 6 NYCRR § 617.5(c)(26). Accordingly, the Third Department rejected a challenge to the DEC's classification of an application for the renewal of a coal mining permit as a Type II action. See Stephentown Concerned Citizens v. Herrick, 280 A.D.2d 801, 720 N.Y.S.2d 597, 600-01 (3d Dep't 2001) (upholding DEC's Type II determination since there were no material changes in circumstances and where "[t]he remaining activities which petitioner allege warrant type I classification . . . were specifically contemplated at the time the [original] 1990 permit was issued and, therefore, DEC is not required to reconsider the environmental impacts of those activities").

<sup>47</sup> As discussed infra, Point II, sound policy and common sense dictates that "preventative action" does not reasonably or justifiably translate into shutting the Facility down.

[was] to prevent the risk of harm to the health, safety and welfare of the Village residents or the environment in advance of the harm actually occurring.” (App. Br. at 33 (emphasis in original).) Thus, if the Village’s legal authority to impose permit conditions is grounded in its general police power to protect the public health, safety and welfare and the environment, how then is it not arbitrary and capricious for the Village now to deny Metro’s Special Permit renewal without any evidence or consideration of any risk of harm to the health, safety and welfare of the Village or the environment?

The Village would seemingly have this Court establish precedent, which would allow a permitting authority to shut down an existing business upon a showing that it violated, in whole or in part, any condition of its special permit without reference to the impacts of such violations. The Village mistakenly reasons that because “permit conditions limiting [, among other things,] the materials the facility can accept are grounded in public health concerns,” Metro’s violation of some permit conditions, caused harm to the public and the environment, and as a result, the Transfer Station should be shut down.<sup>48</sup>

However appealing this tidy syllogism might appear on the surface, it ultimately assumes too much, and administers justice too little. Moreover, case law, public policy and common sense do not support a standard of permit review -- let alone renewal -- that deliberately ignores the actual impacts (or, more appropriately, a lack thereof) of the violations from a highly regulated activity. Indeed, there is an entire line of cases where courts have annulled the determinations of permitting boards denying permits and/or permit renewals because of an absence of empirical evidence or expert testimony supporting their findings of adverse impacts.<sup>49</sup>

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<sup>48</sup> The Village’s expert, Richard P. Brownell, merely reiterates this careless logic, without providing any empirical data or evidence of adverse impact to the public or the environment. (R.A. 1089-1092.)

<sup>49</sup> See, e.g., C & A Carbone, 591 N.Y.S.2d at 495 (holding that expert traffic survey “was un rebutted by anything other than conclusory statements of area residents . . . [which] were insufficient to sustain a denial of the special permit); Texaco Refining & Mktg., Inc. v. Valente, 174 A.D.2d 674, 571 N.Y.S.2d 328 (2d Dep’t 1991) (holding permit denial impermissibly based upon the generalized objections and concerns of the community where

Appellants claim that “courts have not imposed on municipalities in zoning enforcement contexts the requirement that a board must demonstrate actual harm before enforcing zoning laws.” (App. Br. at 34.) Appellants cite State v. Brookhaven Aggregates, Ltd., 121 A.D.2d 440, 503 N.Y.S.2d 413 (2d Dep’t 1986), which is not a zoning enforcement case at all, but one in which DEC successfully obtained an injunction suspending a landfill operator’s right to accept waste until it demonstrated full compliance with the consent order. In fact, contrary to Appellants’ claims, the factual situation of Brookhaven Aggregates supports Metro’s position that the nature of the purported violations is highly relevant in the selection of the appropriate enforcement remedy. In a subsequent administrative proceeding, the DEC Commissioner determined that:

Respondent has created an odor nuisance to adjacent residents, has landfilled impermissible [sic] materials, and has not adhered to the lift height and daily cover requirements for landfills. These violations were of such a massive scope and magnitude that I am compelled to note that the Respondent has by such actions shown a complete disregard for the restrictions imposed by the Department’s statutes and regulations. Although it is apparent that a landfill for inert materials (i.e. C&D) could be operated on this Site, this Respondent’s past acts do not indicate any likelihood of acceptable operation in the future, and therefore a permit for a C&D Site should not be issued to this Respondent

Matter of Brookhaven Aggregates, Ltd., 1986 WL 26334 \*1 (N.Y. Dep’t Env’tl. Conserv. 1988) (emphasis added). The landfill owner ignored this ruling, as well as an order of suspension of operation, and the landfill continued to operate. Metro’s history of cooperation with and responsiveness to the Village and the DEC bears no resemblance to the “massive disregard” for regulatory enforcement present in Brookhaven Aggregates, which involved an unwillingness or

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there was no evidence in the record supporting material findings of Board); C & B Realty, 526 N.Y.S.2d at 613 (refusing to sustain denial of special use permit where “the stated grounds . . . are contrary to the undisputed evidence adduced at the public hearing held on [the matter]”); Eddy v. Niefer, 297 A.D.2d 410, 745 N.Y.S.2d 631 (3d Dep’t 2002) (annulling denial of special use permit for mining where ZBA findings based upon noise and traffic contradicted evidence in the record and were based on comments of citizens and speculation of ZBA chairperson); PDH Props., 748 N.Y.S.2d at 195 (conclusory findings “with no reference to any substantiating empirical data” were insufficient basis to deny special use permit application).

inability to operate a C&D debris facility in compliance with the statutory and regulatory requirements.<sup>50</sup>

Appellants finally cite Inc. Vill. of Freeport v. Jefferson, 162 A.D.2d 434, 556 N.Y.S.2d 150, 152 (2d Dep't 1990), for the proposition that “[a] municipality has authority to obtain a temporary restraining order and preliminary injunction strictly enforcing its zoning ordinances without application of the three-pronged test for injunctive relief.” (App. Br. at 34.) That general statutory principle of law is not at issue here. Rather, the issue before the Village of Croton, and this Court, is the denial of a renewal application, not an enforcement action to enjoin the operation of the Facility for operating without a legally issued permit.<sup>51</sup>

The Village contends that “numerous courts have recognized that permit renewals may be denied as a result of permit violations.” (App. Br. at 31.) Beyond offering out-of-context sound bites, however, the string cite of cases offered by the Village does not support its proposition that regulatory agencies can refuse to renew permits for any permit violations, regardless of their magnitude or actual impact.

Vill. of Hudson Falls v. DEC, 158 A.D.2d 24, 557 N.Y.S.2d 702 (3d Dep't 1990), aff'd, 77 N.Y.2d 983, 571 N.Y.S.2d 908 (1991), is not even a case where permit violations are at issue. (App. Br. at 31.) The case turns on whether permit renewals for the construction of a solid waste management facility should be annulled on the basis of material changes in the operation of the facility, not violations, and whether DEC failed to take a hard look at those changes. While the court states that “[i]n the absence of a material change in conditions or a violation of the terms of a permit, a renewal

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<sup>50</sup> One can only imagine that the disaster the Commissioner commented on in Brookhaven Aggregates was akin to the similar condition cleaned up by Metro's predecessor, as evidenced by the photographs supplied by Metro. (R.A. 165; 166; 167; 233; 234.)

<sup>51</sup> Notably, where the court below did apply the test for an injunction, Judge Nicolai granted injunctive relief allowing the Facility to remain open, and rejected the Village's attempt to close it down. (R.A. 27; 30.)

should be granted without undue burdens imposed upon the applicant,” it recognizes that renewal application procedures are not the proper forum for unduly burdening an existing business by essentially reopening an earlier decision to permit a particular activity, as the Village did here. Id. at 705.<sup>52</sup>

In Bell v. Szmigel, 171 A.D.2d 1032, 596 N.Y.S.2d 36, 37 (4<sup>th</sup> Dep’t 1991), the Fourth Department upheld the ZBA’s denial of petitioners’ application for renewal of a special use permit for a bicycle ramp on their property based upon petitioners’ violations of some of the conditions of the permit. The factual disparity between a bicycle ramp and the highly monitored and regulated industrial activity at issue here is striking, making Bell of limited analytical utility. Moreover, the Village’s conclusion -- that the mere occurrence of violations, regardless of their impact or potential impacts, constitutes a sufficient basis for denying a permit renewal -- simply cannot be drawn from the court’s cursory decision, which never discusses the magnitude or impact of the alleged violations.

Northside Salvage Yard, Inc. v. Bd. of Appeals of the Town of Pittsford, 199 A.D.2d 1001, 608 N.Y.S.2d 13 (4<sup>th</sup> Dep’t 1993), is similarly distinguishable from the present case. In Northside Salvage, the Fourth Department held that the town board’s “determination to revoke the special use permit to operate a used car lot was not supported by substantial evidence inasmuch as there was no showing that petitioner violated the condition of the permit by displaying more than 10 vehicles for sale.” Id. at 13. Thus, the only condition of the special permit was violated -- i.e., the permittee violated its permit 100%. This is far from the case here.

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<sup>52</sup> In Atlantic Cement, a case also cited by Appellants, the Third Department recites the same statement in distinguishing a mining permit renewal from an initial application. Atlantic Cement, 516 N.Y.S.2d at 525. There is no holding, let alone discussion, in that case, however, to support the Village’s contention that the nature of the subject violations is irrelevant to justify non-renewal of a permit for going concern, which has recently invested millions in cleanup and curative measures.

Accordingly, the actual and/or threatened adverse impacts of violations are appropriate and necessary considerations in determining whether to close an existing business. Absent empirical evidence that the issues of purported concern to the Village were material and unresolved, it is unreasonable to contend that a single or even several immaterial violations of a special permit can justify the denial of a renewal application, particularly given the significant economic investment made in reliance on that permit. Any inference that this Court must overturn the decision of the court below solely because of the occurrence of some permit violations by Metro would be improper.

b. Consideration And Acknowledgement Of The Expertise  
Of The Department Of Environmental Conservation Is An  
Appropriate And Rational Exercise Of Local Land Use Authority

The Village incorrectly claims that that the court below erred by considering DEC's issuance of a renewed and expanded Solid Waste Management Permit since "the law is clear that neither DEC action nor inaction constrains the Board's authority over the Special Use Permit or relieves the Board of its obligations under the Village Code." (App. Br. at 39; R.A. 1268-77.) While it is true that, as stated by the court below, the Board is not bound by DEC's determination to renew Metro's permit, it is simply not rational for the Board -- or the court below -- to completely ignore the analysis and determination of the state agency charged with regulatory jurisdiction over the Facility and all solid waste facilities. (R.A. 8-9.)<sup>53</sup> Indeed, Appellants' cavalier attitude toward the DEC evinces the important role that local politics has truly played in this highly suspect determination.

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<sup>53</sup> Appellants' citation to Niagara Recycling v. Town of Niagara, 83 A.D.2d 316, 443 N.Y.S.2d 939 (4<sup>th</sup> Dep't 1981) for the premise that local governments are not preempted by N.Y. Environmental Conservation Law section 27-0711 is entirely irrelevant. (App. Br. at 40.) At no time has Metro argued that the Village is preempted by the DEC, or that the Village may not regulate solid waste within its borders. Rather, Metro maintains that it is appropriate and rational for the Village to consider DEC's actions for enforcement, especially where the Village has consistently deferred to DEC in the past. (See, e.g., R.A. 5574.)

Significantly, DEC issued its Permit pursuant to 6 NYCRR Part 360, which establishes a complex regulatory scheme pertaining to the permitting, inspection, and reporting of, and enforcement against, solid waste management facilities. Accordingly, DEC is the State agency charged with the expertise in regulating this highly complex industry. Courts “are constrained to give deference and not substitute [their] judgment for that of the agency if such ‘judgment involves factual evaluations in the area of the agency’s expertise and [its determination] is supported by the record.’” City of Rensselaer v. Duncan, 266 A.D.2d 657, 698 N.Y.S.2d 113, 115-16 (3d Dep’t 1999) (holding that rational basis supported determinations by Commissioner granting application for permit allowing construction and operation of landfill for construction and demolition debris); see also Plante v. New York State Dep’t of Env’t. Conserv., 277 A.D.2d 639, 716 N.Y.S.2d 439, 442 (3d Dep’t 2000) (holding that DEC had a rational basis supporting its decision to grant a renewal permit for the operation of a solid waste transfer station; “We also must give deference to, and not substitute our judgment for, factual evaluations within an agency’s area of expertise”).

As the lower court observed, the issuance of the DEC Permit is indicative of the fact that “corrective action has been taken and that Metro Enviro Transfer’s violations did not pose a threat to the health, safety and general welfare of the public or the environment.” (R.A. 9.) DEC’s actions support Metro’s position that the Village acted irrationally and in absence of substantial evidence. Simply because Metro entered into two Orders on Consent with DEC to address violations is not conclusive evidence that the Facility poses a threat to the health, safety and welfare of the community. (App. Br. at 39.) Rather, the fact that DEC chose to allow the Facility to continue to operate, and expand its capacity, is substantial evidence precisely to the contrary.

Appellants cite Albany-Green Sanitation Inc. v. Town of New Baltimore Zoning Bd. of Appeals, 263 A.D.2d 644, 692 N.Y.S.2d 831 (3d Dep’t 1999), for the proposition that the Board is not

bound by DEC's approval of a waste transfer station permit. (App. Br. at 41.) There, DEC rejected expert reports and granted a permit, whereas the ZBA found the same reports compelling and denied the special permit based on the opinions contained therein.<sup>54</sup> The Supreme Court annulled the ZBA determination, finding that the expert opinions were "insufficient, inapplicable or irrelevant" and that public sentiment was "fraught with emotion and with little foundation in fact or professional expertise." *Id.* at 832. The Third Department reversed, holding that the lower court invaded "the province of the Zoning Board in evaluating expert evidence." *Id.* (emphasis added). Reliance on Albany-Green Sanitation Inc. is misplaced. That case involved a dispute between experts, who offered competing opinions of empirical data. By dramatic contrast, the Board's decision here to deny Metro's permit renewal was not based on its consideration of expert evidence at all, much less expert evidence rejected or accepted by DEC. Rather, the Board chose to simply disregard expert testimony on solid waste facilities presented by Robert Barber, PE, and expert traffic analysis presented by Adler Consulting, and presented no basis whatsoever for the determination other than the apparent speculation and conclusory guesswork of Richard Brownell.

The Board has not rationally explained why it considers DEC expertise irrelevant here, especially in light of the fact that the Board repeatedly looked toward DEC's expertise in the past in both granting the original Special Permit, as well as in its enforcement of the same. (R.A. 5573-5574). The Board incorporated the DEC Permit by reference in the Special Permit. (R.A. 259.) In its Findings, the Board even refers to violation of the DEC Permit as a reason for its denial to renew. (R.A. 13-26.) At the very least, the Board should show some deference to DEC to be consistent with

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<sup>54</sup> DEC rejected the expert reports regarding adverse impacts "as having been 'generated as a result of [the experts'] examination of a similar operation and . . . not tak[ing] into consideration the measures which apply to the [subject] operation.'" 692 N.Y.S.2d at 832 (alteration in original). The ZBA, basing its findings on the same reports, denied the special permit finding that "noise, odor and traffic impacts would be injurious to the district and the historic home [the only surviving example of Georgian architecture in Greene County]." *Id.*

its own prior course of conduct, particularly when determining the remedy for the permit violations.<sup>55</sup> Indeed, just the fact that the DEC renewed the permit quite well aware of the litigation pending before Judge Nicolai indicates its confidence in the lawful and appropriate operation of the Facility, and its awareness of the unwarranted decisions being predicated on pure local politics. (R.A. 1268-77.)

Appellants' citation to B. Manzo & Son, Inc. v. DEC, 285 A.D.2d 504, 727 N.Y.S.2d 173 (2d Dep't 2001) is equally inapplicable to the Metro situation. (App. Br. at 41.) In its very short decision, the Second Department held that the DEC was justified in ordering the closure of a facility due not only to the repeated failure to comply with the terms of a DEC consent decree, but also because of the continued operation of the facility even after being notified of the DEC determination not to renew its temporary permit. See 727 N.Y.S.2d at 174. The temporary permit was issued originally only after DEC confronted the operator of the facility for operating without a permit. The operator then proceeded to employ delay tactics to drag out the permitting process over a decade. See id. The Second Department clearly recognized that "the petitioner's conduct [had] been egregious." Id. Considering that DEC has renewed Metro's Permit, this case hardly has any bearing on the instant case.<sup>56</sup>

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<sup>55</sup> The recent renewal of the DEC Permit indicates that corrective action has been adequately taken, that Metro has successfully implemented curative measures, and that the consent orders entered into with DEC have not been violated. This is hardly comparable to the disagreement between the ZBA and DEC in Albany-Green Sanitation Inc. on whether expert testimony is compelling or not. Therefore, the Board's decision to completely ignore the rehabilitation of Metro, as indicated through its dealings with DEC and the renewal of the DEC Permit, in favor of instituting the most drastic remedy available to it, i.e., shutting down the Facility due to violations that did not adversely impact the health or safety of the community or the environment, is irrational and should not be upheld.

<sup>56</sup> All Weather Carting Corp. v. Town Bd. of Town of Islip, 137 Misc. 2d 843, 522 N.Y.S.2d 425 (Sup. Ct. Suffolk Cty. 1987), also cited by Appellants, is irrelevant as well. (App. Br. at 41.) The issue surrounding agency involvement there was a procedural one, regarding the Town Department of Environmental Control, and a town resolution stating that the Town Attorney "shall arrange for a hearing . . . to revoke the Solid Waste Permit" upon receiving a report from the Town Department of Environmental Control of a violation. Id. at 427. The court merely held that the town's interpretation of the ordinance -- indicating that a report from the Town Department of Environmental Control was not the only trigger for a hearing on a violation -- was valid. See id. at 428.

Metro does not now, nor has it ever argued that the Village cannot enforce the Special Permit. Likewise, Metro does not argue that the Village is inextricably bound by any decision by DEC. Rather, in light of the Village's historical deference to DEC's regulation of the Facility, and DEC's expertise in regulating this industry, it is inappropriate and irrational to now ignore that Metro's violations "did not pose a threat to the health, safety and general welfare of the public or the environment" as being wholly irrelevant. (R.A. 9.)

c. In Contrast To The Case At Bar, The Cases Cited By The Village Upheld Determinations That Were Based On Substantial Evidence

The facts of the cases cited by the Village for demonstrating where local board decisions were supported by substantial evidence are readily distinguishable from the totality of the circumstances present in the current case. (App. Br. at 24-25.) Appellants place much emphasis on the "trio of cases issued by the Court of Appeals on July 1, 2002 – Retail Prop. Trust v. Bd. of Zoning Appeals of Town of Hempstead, 98 N.Y.2d 190, 746 N.Y.S.2d 662 (2002); Ifrah v. Utschig, 98 N.Y.2d 304, 746 N.Y.S.2d 667 (2002); and P.M.S. Assets, LTD. v. Zoning Bd. of Appeals of Vill. of Pleasantville, 98 N.Y.2d 683, 746 N.Y.S.2d 440 (2002)." (App. Br. at 21.)

In Retail Prop. Trust, the only one of the trio involving a special permit, the Court of Appeals "defin[ed] the quality of the evidence present" and found that "[t]hrough the reports of objectors' traffic and air quality experts, the opposition presented valid scientific bases for rejecting the expansion plan."<sup>57</sup> Retail Prop. Trust, 746 N.Y.S.2d at 666 (emphasis added). The Court further ruled that the "evidence in this case presented a close, fact-specific choice of the kind that local boards are uniquely suited to make." Id. (emphasis added).

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<sup>57</sup> The objectors' expert had "highlighted a number of concerns with [the petitioner's] traffic study," challenged the methodology used by the petitioner's expert, and relied upon a traffic study authored by government and academic authorities analyzing traffic issues in Nassau County. Retail Prop. Trust, at 664-65.

In Ifrac, the Court ruled that a zoning board's determination to deny an area variance was supported by substantial evidence. Ifrac, 746 N.Y.S.2d at 669-70. The Court found that:

In this case, the Board's determination is supported by more than the generalized objections of neighbors. The Board's conclusion that the proposed variances would have a detrimental impact on the character of the neighborhood is supported by objective and largely undisputed factual evidence in the form of oral and written testimony by neighbors with actual knowledge of the conditions along Fenimore Drive, corroborated by the documentary evidence [such as maps] supplied to the Board.

Id. at 669 (emphasis added).<sup>58</sup>

In P.M.S. Assets, the Court concluded that the denial of a use variance was supported by substantial evidence because the current use of the warehouse exceeded the scope of the prior nonconforming use. P.M.S. Assets, 746 N.Y.S.2d at 441. The Court held that the "Board could rationally find that the warehouse is no longer utilized for commercial moving and storage purposes because petitioner now uses the building in connection with the operation of its lighting design and installation business." Id.

Unlike in the trio of Court of Appeals cases, here the objectors had no expert opinions based on scientific studies, and no objective and undisputed factual evidence was presented to refute Metro's submissions. Appellants also cite to "numerous appellate decisions [that] have similarly given local boards due deference where substantial evidence supporting the decision exists on the record" and which were decided "[s]ince the Court of Appeals issued its decisions in Retail Prop., Ifrac, and PMS Assets." (App. Br. at 24-25.) The appellate cases cited by Appellants are similarly distinguishable from the case at bar because the records in those cases, unlike the Record here, supported a finding of

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<sup>58</sup> The Court in Ifrac also found it critical that the "petitioner would not be denied the ability to make productive use of his property, which already contains a habitable single-family residence." Id. at 670 (emphasis added).

substantial evidence.<sup>59</sup> In addition, none of those cases concerns an application for special permit renewal, or the closure of an important, highly regulated business.

In contrast to the cases cited by Appellants, the circumstances in the instant matter mandate a finding of no substantial evidence to support the Village's decision. It is well-documented that the Board failed to rely on empirical evidence, and never engaged an expert of its own to analyze Metro's data or the methodology of its experts. The Board did not have any "reports" or other "valid scientific bases" for not renewing the Special Permit. Instead, the Board's decision was based on generalized community opposition and the political advantage gained from opposing the Facility. Metro's Facility must not be shut down and its investment disregarded on such a scant Record. It is noteworthy that none of the Court of Appeals cases involved closing an operating business!

2. The Record Does Not Contain Substantial Evidence To Support The Board's Decision

The court below correctly found that the Village "failed to recognize that the violations have been cured, penalties have been assessed and paid and [Metro] has implemented measures to

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<sup>59</sup> See Dries, 759 N.Y.S.2d at 367-68 (finding substantial evidence supporting the denial of the petitioners' application for a special use permit where "the Town Board's determination was based on evidence submitted by the petitioners' experts, a report pursuant to [SEQRA], and knowledge of the Town Board and community members about the traffic flow in the vicinity."); Wickes v. Kaplan, 304 A.D.2d 769, 758 N.Y.S.2d 383, 384-85 (2d Dep't 2003) (Town site plan approval did not specifically permit "arborist" activities at the time of inception, and thus the ZBA's determination that the arborist business constituted an illegal non-conforming use of the property was supported by substantial evidence); Snake Hill Corp. v. Town Bd. of the Town of Clarkstown, 304 A.D.2d 670, 757 N.Y.S.2d 484, 484-85 (2d Dep't 2003) (holding, without any explanation, that "[u]nder the circumstances of this case, we cannot conclude that the determination of the [Board denying the petitioner's application for a special use permit] lacks a rational basis in the record"). See also Francis Dev. & Mgmt. Co. v. Town of Clarence, 306 A.D.2d 880, 761 N.Y.S.2d 760, 761-62 (4<sup>th</sup> Dep't 2003) (holding that the Town Board properly denied the application for a special exception use permit where the proposed use as a mini-storage conflicted with the Town's Master Plan); Feinberg v. Bd. of Appeals of the Town of Sanford, 306 A.D.2d 593, 759 N.Y.S.2d 706, 706-07 (3d Dep't 2003) (finding that the petitioner did establish compliance with the legislative conditions attached to the granting of a special use permit where there was no affidavit from the architect); Homeyer v. Town of Skaneateles Zoning Bd. of Appeals, 302 A.D.2d 941, 754 N.Y.S.2d 611, 612 (4<sup>th</sup> Dep't 2003) (concluding, without elaboration, that "the determination of respondent is rationally based on the record"); Partition St. Corp. v. Zoning Bd. of Appeals of City of Rensselaer, 302 A.D.2d 65, 752 N.Y.S.2d 749, 750-51 (3d Dep't 2002) (holding that the Board's finding that the access road was a use appurtenant to the landfill was supported by evidence that DEC authorized up to 70 truckloads per day upon the road to transport solid waste and other materials).

assure ongoing permit compliance. Moreover, [the Village] and its experts have failed to point to any evidence that an adverse environmental condition has resulted from the almost five years of operation of the Metro Enviro Transfer's facility." (R.A. 8.)

a. There Is No Empirical Evidence In The Record Demonstrating Adverse Impacts To The Environment Or Public Health And Safety To Support Denial Of The Renewal Application

Not only did the Village fail to point to any evidence that a genuine risk to the environment or public health and safety was created by operation of the Facility, but, incredibly, the Village affirmatively chose not to gather any empirical data regarding the Facility's impacts.<sup>60</sup> The Record reveals that in 2001 the Village issued a request for proposals from professional environmental and engineering consulting firms to assist them with its review of Metro's Special Permit renewal Application, and even drafted a Resolution authorizing the Board to retain Chazen Engineering and Land Surveying, Inc. to review the operations and site conditions of the Facility, including visual character, noise, dust control, truck circulation, drainage and the O&M Manual. (R.A. 77; 960.) The Village, however, never retained Chazen or any other consulting firm to perform this review, which would have provided empirical data regarding the impact of the Facility on the surrounding community and the environment. (R.A. 77.)

Some Board members had seemingly foreclosed renewing the Special Permit before all the information was before them. Email correspondence between two Trustees and Manager Herbek

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<sup>60</sup> Consideration of the nature of the violations and their actual and/or threatened adverse impacts are proper and necessary before a business is shut down. Although the Village contends that "proof of permit noncompliance [alone] is sufficient ground to deny a permit renewal," at every turn they claim the violations implicate public health, safety, welfare and the environment. The Village contends, for example, that it "was entitled to rely on the substantial evidence of permit violations, its knowledge of the public health and safety rationales for imposition of the permit conditions, and the sworn testimony of Mr. Brownell confirming the threat to public health and safety raised by the types of permit violations repeatedly committed by Metro Enviro Transfer." (App. Br. at 29 (emphasis added).) The Village concedes that its legal authority to impose conditions on the Special Permit derive from "its duty to protect the health and safety of the community." (R.A. 26.) In fact, the actual "rational basis" upon which the Village defends its determination is "the substantial evidence of repeated permit violations that posed a threat to public health and safety." (App. Br. at 29.) The Village's argument is untenable; concerns of adverse impacts cannot at once be irrelevant and also the fundamental basis for its authority to deny renewal of the Special Permit.

evidences that at least some members of the Board were concerned that the results of an empirical analysis would conflict with their, by now transparent, political agenda of shutting down the Facility -- good news for the Facility would portend bad news for its opponents. In fact, one Trustee openly worried whether a professional environmental study that resulted in a "glowing report" for the Facility would "make it more difficult for [the opponents on the Board] to deny the [Special Permit] renewal." (R.A. 960-961.) Moreover, speculation was raised whether paying for a professional study might be futile: "We may not be renewing the permit at all so why do the study?" (R.A. 960-961.) This question evinces a fundamental misunderstanding of the Board's duty with respect to reviewing the renewal Application, namely to gather substantial, probative evidence before determining whether reasonable grounds exist to support their (apparently pre-ordained) determination to deny the renewal of the Special Permit.

Had the Village discharged its duties in a rational manner, it would have found that the Facility was fully compliant during the overwhelming majority of its operation, and never created or threatened to create any adverse impact, let alone actual harm, to the public or the environment. The Record is replete with empirical evidence and expert testimony to that effect. In every relevant area where an adverse impact to public health and/or the environment could occur -- and possibly justify non-renewal -- the Transfer Station passed inspection.<sup>61</sup>

With respect to the particularly sensitive topic of truck traffic, Metro's traffic engineer concluded, among other things, that: (i) the current traffic volumes and conditions located in the Village

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<sup>61</sup> The Facility's clean record with respect to impacting public health and the environment is in keeping with the comprehensive study and report prepared by the Village's consultant, AKRF dated April 16, 1998, in support of the Village's SEQRA review of Metro Enviro, LLC's original Special Permit Application. (R.A. 235.) This report concluded, among other things, that "there should be no adverse public health impacts on the surrounding community," "no significant adverse impacts from dust or other airborne contaminants," "we do not think that there will be significant vibrational impacts," "no significant adverse impacts on water quality are anticipated," "the applicant's Traffic Study provides a reasonable approach for assessing the potential traffic impacts for the proposed operation," and no anticipated impacts on energy, open space and recreation. (R.A. 248-254.)

and in the immediate vicinity of the Facility are well within the acceptable range projected by Adler Consulting when it performed a Traffic Impact Study in connection with the Facility in 1998 (R.A. 116-120); (ii) the current traffic volumes and conditions generated by, or attributable to, Metro are well within the total number of vehicular trips contemplated and considered acceptable by the Board in 1998 (R.A. 116-120); and (iii) even on those days when the Facility accepted waste in excess of its permitted capacity of 850 tons (including the one date that it accepted 1,039.81 tons), the Facility generated less traffic than contemplated in 1998, and the impact of the additional trips attributable to those “capacity exceedances” would not have resulted in an adverse impact to public health, safety and general welfare; nor would it have created adverse traffic impacts along Croton Point Avenue or at the six critical intersections previously identified and studied by the Village and its consultants. (R.A. 116-120; 856-954.) This information was presented to the Village at the January 27, 2003 hearing and, once again, seemingly disregarded without any rebuttal evidence presented.

With respect to stormwater quality and control, monthly sampling and expert analysis concluded that for the three (3) years between April 2000 and January 2003, “[t]he results from these sampling events show that the incoming storm water has always met applicable surface water standards for the Hudson River.” (R.A. 837; see also R.A. 277-286.)

With respect to noise, “[e]very noise survey performed demonstrates that Metro operates in compliance with State noise regulations for this type of facility and with noise level requirements of the Village Special Use Permit.” (R.A. 273.) The consultant felt that “[i]t is also appropriate to note that Metro has not received any complaints regarding noise from the facility.” (R.A. 273.)

In addition, there is not a shred of evidence that the Facility created, or threatened to create, adverse air quality impacts, or that complaints were registered in that regard. After an extensive

documentary review and visits to the Facility, Metro's solid waste expert stated that he "[d]id not believe that the manner in which Metro Enviro operates its transfer station poses any threat to the well-being of the Village residents or the environment." (R.A. 110.)

Only the Affidavit of Richard P. Brownell, the engineering expert the Village retained to submit an eleventh hour opinion, stands in contrast to this overwhelming amount of empirical evidence and expert testimony. According to Brownell's Affidavit, however, he never reviewed any documents concerning Metro other than the Statement of Findings prepared by the Board's attorney. Tellingly, he never personally visited the Facility. As a result, Brownell's Affidavit is conclusory, speculative, and of little or no probative value.

Most importantly, Brownell does not dispute Barber's statement that Metro's violations have not had any actual adverse impact on the health, welfare or safety of the Village residents or the environment. Instead, Brownell's entire argument amounts to a logical leap of faith: because the permit conditions were intended to protect the public and the environment, by necessity their violation would adversely impact the public and the environment. An existing business, which recently invested millions to upgrade its Facility and which serves the needs of individuals and numerous small businesses in the region, should not be shut down on such grounds. (R.A. 122-158.)

In sum, despite the Village's strident attempt to claim that Metro argues for a license to violate its permit absent evidence of physical injury, that illogical and preposterous conclusion is misplaced. (App. Br. at 32.) Instead, Metro simply contends that the regulatory line is clearly drawn -- non-renewal or closure is not an appropriate remedy where no empirical evidence is gathered, contrary expert opinion derived from empirical data is ignored, no adverse impacts are present, and the only apparent basis for governmental action is fiercely contentious local politics and a conclusory affidavit.

Moreover, glaringly absent from the Record in this case is any suggestion, let alone a requirement, by DEC to close this clean, modern and necessary Facility.<sup>62</sup>

b. The Board's Decision Was Unlawfully Based Upon  
General Community Opposition And Political Agendas

The Record, in particular the minutes and transcripts of the Board of Trustees' meetings, thoroughly supports the fact that the Village's determination was unlawfully based on generalized community opposition. (See, e.g., R.A. 782-87; 1814-18; 1974-76; 1907-08; 1921-22; 1935; 1944; 1975-76; 2091-2140; 2171-73; 2236-76; 2280-92; 2314-16; 2392; 2400-31; 2484-85.) The ever-present small, but very vocal group of residents continually "dogged" this Facility, performed amateur investigations, raised red herring issues, and exerted political pressure at every turn, particularly at public hearings. In short, the Board's decision was a classic example of a local land use determination being improperly driven by local partisan politics. (See, e.g., R.A. 1974; 2102, 2104-05, 2124; 2137; 2314.)

The Village finds the "change of heart expressed by Trustee Georgiana Grant, who had voted in favor of the special permit for the Facility in 1998" particularly compelling evidence of the Facility's wrongdoing. (App. Br. at 30.) Certainly, her personal feelings and "lack of trust" are no substitute for the empirical evidence and critical expert testimony presented by Metro conclusively demonstrating that the violations were not material, were cured, and did not even threaten, let alone cause, harm to public health, safety, welfare or the environment. Indeed, such expressions of personal bias against the Facility strongly indicate that the Board's decision was irrational, unsupported by

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<sup>62</sup> In fact, the record before the Board is quite to the contrary insofar as it includes a statement in a memorandum from Village Manager Richard F. Herbek to the Board dated January 17, 2001 that an Environmental Engineer of the DEC "characterized the Metro Enviro operation as one, which is very well run, with few problems that need to be taken care of or followed up . . . ." (R.A. 964.)

substantial evidence in the Record, and grounded instead on a subjective “change of heart,” at best, or on blatant local politics, at worst. (App. Br. 30.)

These renewal proceedings were painfully charged with partisan politics fueled by a small band of extremely vocal critics. Throughout the proceedings, Trustee McCarthy was never a dispassionate arbiter of the objective evidence whether to renew the Special Permit, but instead revealed herself repeatedly as an “ardent critic of [Metro’s] operation.” (R.A. 271 (emphasis added).) At the Special Meeting of the Board on January 27, 2003, Trustee McCarthy described the Board’s dealings with the Facility as a “five year odyssey into a black hole of no leadership and a failure to exercise good judgment by certain members of this Board.” (R.A. 800.) Trustee Grant responded by stating that, “Trustee McCarthy, your statements trouble me . . . for you to still continue to place blame and politicize is just wrong. You’d think you were running for election . . . You should not be politicizing an issue that is so important to this village.” (R.A. 804.)

McCarthy’s uncompromising position against the Transfer Station colored all matters involving Metro and, somewhat unfortunately, all issues within the Village.<sup>63</sup> With the encouragement of the same individuals speaking repeatedly at each public hearing,<sup>64</sup> McCarthy vigorously pushed her political agenda of closing the Facility. The Record contains ample evidence to support Justice Nicolai’s finding that the Board’s decision was inappropriately based upon this otherwise unsubstantiated community opposition.

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<sup>63</sup> For example, Manager Herbek “considered seeking to rent a suitably sized area on the grounds of [the] . . . transfer station on Croton Point Avenue” for a Department of Public Works storage area. (R.A. 271.) Understanding the potential benefits of such an arrangement, Trustee Grant was “willing to investigate such a possibility.” (R.A. 271.) Trustee McCarthy rejected even the notion of the Village associating with Metro, stating that “there was ‘no way’ she would support such a business arrangement with that company,” regardless of any potential benefit to the Village. (R.A. 271.)

<sup>64</sup> (See, e.g., R.A. 782-87; 1814-18; 1974-76; 1907-08; 1921-22; 1935; 1944; 1975-76; 2091-2140; 2171-73; 2236-76; 2280-92; 2314-16; 2392; 2400-31; 2484-85.)

c. Metro's Violations Have Been Cured,  
Penalties Paid And Corrective Measures Taken

The Record also amply supports Judge Nicolai's finding that "the violations have been cured, penalties have been assessed and paid and [Metro] has implemented measures to assure ongoing compliance." (R.A. 8.) District Manager Mark Saleski detailed Metro's efforts at remediation and cure designed to ensure a compliant Facility:

- New computer system not susceptible to employee manipulation installed;
- New employees and management put in place by parent company;
- Strict adherence to training and corporate compliance plan;
- Management compensation directly tied to permit compliance;
- Customer audit program to eliminate unauthorized waste;
- Unannounced inspections by corporate officials;
- Assessment by DEC of \$26,000 fine regarding capacity exceedances;<sup>65</sup>
- Payment to Village of \$50,000 fine regarding unauthorized waste;
- Assessment by DEC of \$ 20,000 fine regarding unauthorized waste;<sup>66</sup> and
- Offer to fund a skilled Village monitor.

(See, e.g., R.A.. 83-85; 89; 93; 432-33; 435; 500; 538-41; 1711; 1722; 3176-77.)

The fact that there has not been a notice of violation issued for capacity exceedance since August 21, 2000, and that the Facility has operated within its permitted capacity is compelling evidence of the success of such measures, and that Metro has successfully rehabilitated its operations and corporate culture. (R.A. 93.) Tellingly, DEC was sufficiently satisfied with these measures that it renewed Metro's Permit with an increase in allowable capacity. (R.A. 1268-77.)

In sum, the Village Board's determination denying renewal of Metro's Permit was not supported by substantial evidence. The Board ignored the indisputable empirical evidence submitted by Metro that the Facility, which operates pursuant to the oversight of multiple governmental agencies,

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<sup>65</sup> \$16,000 was conditionally suspended by DEC. (R.A. 1711.)

<sup>66</sup> \$10,000 was conditionally suspended by DEC. (R.A. 1722.)

does not present a risk to the environment or public health and safety, while failing to generate its own competing analyses. The Board's decision was politically motivated, and the Board ignored Metro's successful curative and remedial measures. The court below rightly concluded that such a decision cannot be said to be rational and supported by substantial evidence.

B. Recent Decisions Of The Court of Appeals Do Not Convert Reviewing Courts Into Mere "Rubber Stamps" of Municipal Action

Appellants wrongfully contend that "the lower court . . . failed to afford the Board the deference to which it was entitled." (App. Br. at 26-27.) In support of their claim, Appellants argue that "[w]hen evaluating the decision of a local board regarding land use determinations such as special use permits or zoning variances, a reviewing court is bound by the narrowed standard of review articulated in a trio of cases issued by the Court of Appeals on July 1, 2002 – [Retail Prop. Trust, Ifrah, and P.M.S. Assets]." (Id. at 21.)<sup>67</sup>

Appellants overstate the impact of these three Court of Appeals cases and their progeny by seemingly suggesting that local boards are now entitled to unfettered discretion in making land use decisions, free from any meaningful judicial oversight. Contrary to Appellants' view, the Retail Prop. Trust trilogy did not "articulate" a "narrowed standard of review" for "land use determinations" or in any way modify the established jurisprudence concerning judicial review of zoning decisions. Instead, a survey of case law issued both before and after these opinions reveals that they simply reinforce long-standing precepts under New York law, which have been scrupulously followed by the Second Department, relating to the scope of judicial review of land use determinations by municipal bodies. In short, the law has been and still remains that a reviewing court is not required to defer to a local board where the board's determination is not supported by substantial evidence, as in the instant matter.

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<sup>67</sup> Appellants also cite to secondary sources that purport to back their erroneous argument that the Board's decision denying the Special Permit is entitled to great deference. (Id. at 21-22.)

1. New York Courts Have Applied The Concepts of “Substantial Evidence” and “Deference” Long Before The Recent Court of Appeals Decisions

Even prior to the decisions in Retail Prop. Trust, Ifrah, and P.M.S. Assets, it was settled law that determinations by administrative bodies were judged by the substantial evidence standard.<sup>68</sup> In deciding the substantial evidence question, courts have always exercised a vital judicial function to ensure that land use decisions, which are often politically driven at the local level, are not made for unlawful and improper reasons. The Second Department has declared that:

[t]he limited review function of a court does not mean, of course, that the court must confirm a determination simply because it has been made by an administrative body. On the contrary, the court has a genuine judicial function to exercise when it reviews the sufficiency and the substantiality of the evidence upon which an agency has acted. As a matter of fact, a court would be remiss were it not to assess the rationality of a determination and guard against potentially arbitrary and capricious decisions.

Furey v. Suffolk County, 105 A.D.2d 41, 482 N.Y.S.2d 788, 790 (2d Dep’t 1984), citing 300 Gramatan Ave., 408 N.Y.S.2d at 54 (emphasis added). Similarly, “[i]n an Article 78 proceeding, the reviewing court does not act as a rubber stamp, but, rather, exercises a genuine judicial function and does not confirm a determination simply because it was rendered by an administrative agency.” SoHo Cmty. Council v. New York State Liquor Auth., 173 Misc. 2d 632, 661 N.Y.S.2d 696 (Sup. Ct. N.Y. Cty. 1997) (emphasis added).

Historically, the New York Court of Appeals and the Second Department have not hesitated to, among other things, invalidate a local board’s denial of an application for initial issuance

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<sup>68</sup> See, e.g., Fuhst v. Foley, 45 N.Y.2d 441, 410 N.Y.S.2d 56 (1978) (“[T]he determination of responsible local officials in the affected community will be sustained if it has a rational basis and is supported by substantial evidence.”); Action Redi-Mix Corp. v. Davison, 292 A.D.2d 448, 739 N.Y.S.2d 411, 413 (2d Dep’t 2002) (“The determination of a zoning board of appeals is entitled to deference and should be upheld where it has a rational basis and is supported by substantial evidence.”).

or renewal of a special permit that was irrational and not supported by substantial evidence.<sup>69</sup> In those cases issued prior to the Retail Prop. Trust trilogy, the local boards were not afforded deference because the Courts conducted a fact based inquiry and found that the determinations at issue were not supported by substantial evidence in the record.

2. The Recent Decisions Do Not Alter The  
Judiciary's Role In Reviewing Municipal Actions

In Retail Prop. Trust, the Court cited Twin County Recycling for the familiar proposition that “[w]hile a zoning board of appeals retains discretion to deny a special exception for failure to comply with a legislative condition, such a determination must nonetheless be supported by substantial evidence.” Retail Prop. Trust, 746 N.Y.S.2d at 666.<sup>70</sup> In Retail Prop. Trust, the Court further stated that while a local board may not deny a special exception based solely on community objection, “where there are other grounds in the record on which to base denial, such as contrary expert opinion regarding traffic conditions, deference must be given to the discretion and commonsense judgment of the board.” Id. (emphasis added). After finding “valid scientific bases” for the Board’s decision, the Court stated that “[g]iving the Board of Zoning Appeals the deference to which it is

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<sup>69</sup> See, e.g., Twin County Recycling, 665 N.Y.S.2d at 628 (affirming the Appellate Division and Supreme Court decisions finding that, on the record, the Town Board’s denial of a special permit renewal application filed by an operator of an asphalt recycling plant was not supported by substantial evidence); 7-Eleven, Inc. v. Bd. of Trustees of the Inc. Vill. of Mineola, 289 A.D.2d 250, 733 N.Y.S.2d 729, 730 (2d Dep’t 2001) (affirming Supreme Court’s decision granting the Article 78 petition where the Board’s denial of the petitioner’s application for a special use permit to operate a convenience store was arbitrary and capricious and an abuse of discretion); C.B.H. Props., Inc. v. Rose, 205 A.D.2d 686, 613 N.Y.S.2d 913, 915 (2d Dep’t 1994) (reversing Supreme Court’s decision dismissing the Article 78 proceeding concerning an application for a special permit renewal to operate a cabaret where the testimony and evidence submitted was insufficient to sustain a determination denying the permit); C & A Carbone, Inc. v. Holbrook, 188 A.D.2d 599, 591 N.Y.S.2d 493, 494-95 (2d Dep’t 1992) (affirming Supreme Court’s decision annulling the Town Board’s denial of a special permit to operate a recycling plant where the grounds for denial were unsupported by substantial evidence); C & B Realty Co. v. Town Bd. of Town of Oyster Bay, 139 A.D.2d 510, 526 N.Y.S.2d 612, 613-14 (2d Dep’t 1988) (affirming Supreme Court’s decision annulling the Town Board’s denial of a special use permit to construct and operate a restaurant where the Board’s denial was arbitrary and capricious in light of the lack of evidence in the record supporting the Board’s determinations).

<sup>70</sup> See Ifrah, 746 N.Y.S.2d at 669 (“Thus, a determination of a zoning board should be sustained upon judicial review if it has a rational basis and is supported by substantial evidence.”); P.M.S. Assets, 746 N.Y.S.2d at 441 (“the determination of a zoning board regarding the continuation of a preexisting nonconforming use must be sustained if it is rational and supported by substantial evidence.”).

entitled under such circumstances, we conclude that it acted rationally and with the support of substantial evidence.” Id. (emphasis added).

As such, Retail Prop. Trust, Ifrac, and P.M.S. Assets merely reiterate the fundamental principle that deference is afforded only where a local board’s determination is supported by substantial evidence. None of these opinions mentions anything about articulating a “narrowed standard of review.” (App. Br. at 21.) Quite the opposite, all three opinions cite to venerable New York cases issued pre-2002, such as Twin County Recycling, when setting forth the substantial evidence standard. If there was something novel about this standard, or if a greater level of deference truly is now required, the Court of Appeals would have stated as much. Appellants make a futile attempt to read a new standard into these decisions, rather than acknowledge that the cases turn instead on records where there was substantial evidence to support the municipal action, unlike the Record in the current case.

A number of decisions issued since the Court of Appeals decided the Retail Prop. Trust trilogy confirm that reviewing courts are not mere “rubber-stamps” of municipal action, as Article 78 petitions were granted in those cases, thereby invalidating municipal action. In Oyster Bay Assocs., for instance, a New York Supreme Court decision affirmed by the Second Department on March 3, 2003 (post-Retail Prop. Trust) and discussed supra, pp. 30-31, the Supreme Court stressed that it would not act as a “rubber-stamp” of the Town Board’s decision:

It is the obligation of this Court to review and analyze the Town Board’s Decision in conjunction with the record in this case to determine whether its determination is arbitrary and/or capricious, or based upon substantial evidence. This review necessarily involves deciding whether the Town Board took a sufficiently ‘hard look’ at the project and set forth a reasoned elaboration for its determination. Such judicial review must consider the record as incorporated by the Town Board into its Decision in order to determine whether the Board actually relied upon substantial evidence of record. To do otherwise would render the Court’s obligations under C.P.L.R. Article 78 toothless, as the Town Board would enjoy a blanket immunity from judicial review.

7/16/2002 N.Y.L.J. 26 (col. 5) (citations omitted) (emphasis added),

The Supreme Court then addressed the Retail Prop. Trust trilogy in footnote 3:

This Court is cognizant of the recent holdings by the Court of Appeals in Matter of Ifrah v. Utschig, Matter of Retail Prop. Trust v. Zoning Board of Appeals of the Town of Hempstead, and Matter of P.M.S. Assets Ltd. v. Zoning Board of Appeals of the Village of Pleasantville. In these cases, and in Retail Prop. Trust in particular, the Court could not have meant by its holdings that the mere inclusion of evidence in the record is sufficient to support a Board of Zoning Appeals' determination in an Article 78 proceeding when such evidence is not explicitly used as a basis for a particular finding. Such an interpretation of the above cases would render moot any meaningful judicial review. If mere inclusion of evidence in the record were enough to sustain a determination, a Board of Zoning Appeals could speak in broad generalities or merely one word affirmative or negative answers. This would hardly satisfy the requirements of providing a reasoned elaboration for a finding or determination and supporting that finding or determination with substantial evidence. Indeed, such an interpretation would effectively result in a grant of unbridled power to the Town Board to make decisions on political grounds rather than evidence of record.

Id. (emphasis added).

Furthermore, the lower court in Oyster Bay Assocs., as if clairvoyant of the case at bar, elaborated upon the key role for the judiciary in ensuring that politics do not unduly influence the determinations of local boards, as was unlawfully accomplished in the instant matter:

Almost a century ago, Ambrose Bierce in The Devil's Dictionary (1911) defined politics as: 'a strife of interests masquerading as a contests of principles. The conduct of public affairs for private advantage.' Judicial review in the context of C.P.L.R. Article 78 is the surest method of preventing the encroachment of such politics into the municipal decision making process.

Id. (emphasis added).

Numerous other decisions post-Retail Prop. Trust, Ifrah, and P.M.S. Assets that annulled various land use determinations by local boards also stand for the general rule that reviewing

courts are not to be mere “rubber-stamps” of municipal action, but must instead invalidate municipal action where not supported by substantial evidence.<sup>71</sup>

In Daniels v. Zoning Bd. of Appeals of Vill. of Montebello, 5/14/2003 N.Y.L.J. 25 (col. 2) (Sup. Ct. Rockland Cty.), a recent lower court case where petitioners’ Article 78 petition sought review of a decision denying a variance, the court cited Ifrah for the “substantial evidence” standard and set forth the appropriate standard of judicial review, directly on point here:

The Court must give deference to the findings of the board. . . . That is not to say that the Court is a rubber stamp for the zoning board. The Court must carefully examine the substantiality of the evidence in the record and to ‘exercise a genuine judicial function and not to confirm a determination merely because it was made by such an agency.’ If substantial evidence supporting the board’s decision does not appear in the record, it is the duty of the Court to annul the determination of the board.

(citations omitted) (emphasis added).

The quoted language from the secondary sources cited by Appellants in support of their argument that deference to the Board is required is misleading. (App. Br. at 21-22.) Stewart E. Sterk’s article containing the statement that “[d]ecisions by local zoning boards generally should be entitled to great deference, and second guessing of those decisions should be kept to a minimum,” was published a mere two months after the Court of Appeals decisions were issued and before the Second Department

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<sup>71</sup> See, e.g., Crystal Pond Homes, Inc. v. Prior, 305 A.D.2d 595, 759 N.Y.S.2d 366, 366 (2d Dep’t 2003) (upholding lower court’s decision and holding that “the denial of the area variance was arbitrary and capricious and was not supported by substantial evidence”); Pecoraro v. Bd. of Appeals of Town of Hempstead, 304 A.D.2d 761, 757 N.Y.S.2d 787, 788 (2d Dep’t 2003) (affirming Supreme Court’s decision and holding that “the denial of the area variance was arbitrary and capricious, and not supported by substantial evidence”); Kreye v. Bordino, 302 A.D.2d 465, 754 N.Y.S.2d 584, 585 (2d Dep’t 2003) (holding that the Supreme Court properly vacated the decision by the Zoning Board of Appeals to deny an application for an area variance where the Board’s determination was not supported by substantial evidence in the record); PDH Properties, 748 N.Y.S.2d at 686-87 (holding that substantial evidence did not support Planning Board’s denial of special use permit application); Eddy, 745 N.Y.S.2d at 633-34 (citing Retail Prop. Trust and annulling denial of special use permit for mining where ZBA findings based upon noise and traffic contradicted evidence in the record and were based on comments of citizens and speculation of ZBA chairperson); Cortland LLC v. Zoning Bd. of Appeals of Vill. of Roslyn Estates, 8/13/2003 N.Y.L.J. 24 (col. 1) (Sup. Ct. Nassau Cty.) (holding that the Zoning Board’s determination denying the petitioner’s application for an area variance of the minimum lot size requirement to construct a single family residence was arbitrary and capricious).

and other courts had an opportunity to apply these holdings. Next, John M. Armentano's reference to "extreme deference" in his article is an overstatement (if not a misstatement) of the judiciary function, as explained above.

Also problematic is Appellants' use of John R. Nolon's statement that "[i]f the highest court affords these quasi-judicial and administrative review boards such deference, imagine what it does when the local land use decision challenged is made by the local legislature: the town board, Board of trustees, or city council." Notwithstanding Prof. Nolon's point that legislative bodies are entitled to greater deference when enacting laws, here, by contrast, the Board of Trustees, a legislative body, was acting in a administrative capacity when it denied the Special Permit renewal. See, e.g., Highpoint Enter., Inc. v. Bd. of Estimate of the City of New York, 67 A.D.2d 914, 915, 413 N.Y.S.2d 155, 157 (2d Dep't 1979) ("Although the Board of Estimate may be a legislative body, the review of an application for a special permit is an administrative function. As such, the Board of Estimate is limited to the traditional standard of substantial evidence in reviewing the grant or denial of a special permit."). Thus, the Board's decision to deny renewal of the Special Permit is subject to the same standards as determinations by any other or administrative body, which, again, is afforded deference only where supported by substantial evidence.

Finally, Appellants cite another article by Stewart E. Sterk that first discusses Retail Prop. Trust, and then states, with respect to Judge Nicolai's decision in the current action, "[i]t is not clear whether Metro Enviro Transfer is consistent with the new deferential approach articulated in Retail Prop. Trust." (App. Br. at 33 n.7.) As an initial matter, and as already discussed, Retail Prop. Trust did not articulate a "new" standard. Further, in response to Mr. Sterk's question, Judge Nicolai's decision is indeed consistent with Retail Prop. Trust insofar as the standards reiterated and applied in

Retail Prop. Trust mandate invalidation of the Board's decision here, where it was not supported by substantial evidence.

In sum, contrary to Appellants' view, the Retail Prop. Trust trilogy and their progeny did not divest a reviewing court of any key functions in ensuring that municipal actions are not made for politically charged or other unlawful reasons. Instead, the three Court of Appeals cases merely reinforce established principles of judicial review in Article 78 proceedings. Put simply, reviewing courts are not "rubber stamps," but are to make fact based inquiries to determine whether, under the totality of the circumstances, substantial evidence exists in the record to support a municipal action. Reviewing courts are not required to afford deference where the record on review, such as the Record here, is devoid of substantial evidence. Under such circumstances, reviewing courts, like the court below, are to invalidate the municipal action being challenged.

## II.

### **THE VILLAGE'S DRASTIC ACTIONS OF NON-RENEWAL AND CLOSURE DO NOT REPRESENT A MEASURED AND APPROPRIATE RESPONSE IN THIS CASE**

#### A. The Subject Violations Do Not Justify The Complete Closure Of The Facility

Public policy demands that regulatory authorities consider the totality of the circumstances and frame a proportional response when enforcing permit violations. Undeniably, the law of this State does not countenance cavalier disregard of property rights. The Village's argument for an enforcement standard which ignores any assessment of the relative materiality of the violations and the implementation of successful curative measures, and demands 100% compliance with each and every condition or risk being shut down, flies in the face of permit renewal law, public policy and common sense.

Of particular significance here, courts consistently assert that the governing law of permit renewals provides that “[t]o require burdensome information at each renewal . . . would create a destabilizing uncertainty and additional expense upon the . . . industry.” Atlantic Cement, 516 N.Y.S.2d at 525 (emphasis added). Furthermore, “[a] degree of finality and stability is properly created once a permitted activity has successfully met the initial SEQRA requirements.” Village of Hudson Falls, 557 N.Y.S.2d at 705 (citations omitted); accord Scenic Hudson, Inc. v. Jorling, 183 A.D.2d 258, 589 N.Y.S.2d 700, 703 (3d Dep’t 1992). These public policy statements stand as a cautionary reminder from New York courts that our industrialized society simply cannot exist in this era of regulatory enforcement unless government undertakes its oversight responsibility in an appropriate and proportional manner.

An inflexible standard that allows a permitting authority to refuse to renew a permit on the basis of any violations, without consideration of the magnitude or impact of those violations and responsive remedial measures, as the Village espouses, simply does not comport with the “degree of finality and stability” which the law accords permitted activities. What could be more destabilizing to the entire solid waste industry than Appellants’ notion that the Village is fully authorized to legally “revok[e] the permit if there is even a single violation of any permit condition”? (R.A. 1115.) Even if the language of the Special Permit and the Village Code technically allow denial of the renewal upon even a single violation, the Court should refrain from using this language to set the very dangerous and disruptive precedent that a single violation, regardless of its magnitude or impact under the circumstances, would be sufficient grounds for revoking environmental and/or land use permits.

Unquestionably, most communities are loathe to accept the siting of waste transfer stations or other so-called undesirable uses or facilities within their boundaries. Once these communities become aware that New York courts sanction the closure of such facilities on the basis of

any single violation of its environmental and/or land use permit, absent any showing of adverse impact, the result is foreseeable – in order to rid themselves of unwanted uses, and thereby gain political capital, municipalities could simply require such uses to obtain a special use permit with several onerous conditions, monitor the facility extensively, and then close it down at the first sign of any infraction. This is the inescapable logical outcome of Appellants’ otherwise illogical and unwise argument.

B. Well Established Jurisprudential Principles Reject A Punishment That Far Outweighs The Nature Of The Violations

The Board imposed a punishment that tipped the scales of justice so drastically against Metro, that it blatantly cast aside well established jurisprudential principles. “For at least two thousand years, it has been an accepted tenet of jurisprudential writing that the punishment . . . should be proportional to the offense committed.” Kathi A. Drew & R.K. Weaver, “Disproportionate or Excessive Punishments: Is There A Method For Successful Constitutional Challenges?,” 2 Tex. Wesleyan L. Rev. 1 (1995). As stated by Marcus Tullius Cicero, “Let the punishment be equal with the offence.” Cicero, De Legibus (bk. III, 20).

As acknowledged by Appellants, DEC, in exercising its enforcement authority, could have also chosen the draconian measure of shutting the Facility down and putting Metro out of business, but it did not. (App. Br. at 40.) Instead, DEC entered into Orders on Consent requiring Metro to undertake corrective measures to cure violations and ensure that they will not occur again. (Id.; see also 1710-18; 1721-28.)<sup>72</sup>

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<sup>72</sup> DEC’s enforcement policy regarding violations by permittees of the terms and conditions of their permits is instructive here: “If a permit is issued to a prior violator, it may be appropriate to impose strict reporting or monitoring conditions within such permits or to require an environmental monitor.” DEC Record of Compliance Enforcement Guidance Memorandum (March 5, 1993), Section II. Furthermore, “[t]he Department also recognizes that a prior violator can demonstrate that rehabilitation has occurred such that, with or without more stringent oversight, as the specific circumstances warrant, the entity can carry out activities in a responsible manner.” Id. (emphasis added). Accordingly, the DEC recognizes that alternative enforcement measures besides denial or revocation of a permit, and the accompanying termination of the business or activity, might be more fitting under the circumstances. DEC has taken precisely that approach with the Facility -- citing it for violations, imposing

The Board, however, chose to implement the most extreme punishment in its arsenal in response to minor violations to the Special Permit: non-renewal resulting in closure.<sup>73</sup> In doing so, it failed to consider basic notions of fundamental fairness and justice. While the Village claims that the violations of the Special Permit were “material violations,” the uncontroverted facts, along with the complete lack of evidence of even the possibility of harm to the community, illustrate the true nature of the violations at issue here -- they were inconsequential.

Proportionality is an imperative consideration to ensure fairness and justice in punishment.<sup>74</sup> Closing a vital transfer station is not a proportional response to tonnage exceedances at a Facility designed to handle that excess amount, and where the Facility has established a record of compliance for the last two years. Shutting down a business is not a measured response to a few instances of training and record keeping violations. Shutting down a business is not a reasonable enforcement measure to address the acceptance of unauthorized waste, where corrective measures have been implemented. On the other hand, assessment and payment of a \$50,000 fine from the Village

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monetary penalties, and diligently monitoring operations, while allowing the Facility to continue operation in recognition of the enormous cost and effort Metro put forth in remediating the site and cooperating with the Village.

<sup>73</sup> The Village cites Brownell’s Affidavit to support its position that Metro advocates a position, which would extinguish the Village’s enforcement power. Far from trying to avoid enforcement, Metro has willingly accepted onerous operational conditions and intensive governmental and citizen oversight, regulation, and inspection. What Metro advocates is enforcement proportional to the violations. (App. Br. at 33-34; R.A. 1090.)

<sup>74</sup> In Rummel v. Estelle, 445 U.S. 263 (1980), for example, the Supreme Court addressed a life sentence under a recidivist statute given to a defendant for obtaining \$120.75 by false pretenses. Justice Powell, discussing the “disproportionality analysis” under the Eighth Amendment, stated in his dissent:

Disproportionality analysis measures the relationship between the nature and number of offenses committed and the severity of the punishment inflicted upon the offender. The inquiry focuses on whether, [sic] a person deserves such punishment, not simply on whether punishment would serve a utilitarian goal. A statute that levied a mandatory life sentence for overtime parking might well deter vehicular lawlessness, but it would offend our felt sense of justice.

“Disproportionate or Excessive Punishments: Is There A Method For Successful Constitutional Challenges?,” 2 Tex. Wesleyan L. Rev. at 7, quoting Rummel, 445 U.S. 307-08 (Powell, J., dissenting) (emphasis added).

alone and the denial of an increase in the permitted daily tonnage are reasonable, measured and unquestionably appropriate.<sup>75</sup>

Prior to Metro's application for renewal of the Special Permit, punishment of violations took the form of monetary penalties and denial of its request for a capacity increase. (R.A. 313; 3175-77.) Based upon these actions, Metro undertook curative and preventative measures to curtail future violations. The punishments accomplished the Village's goals, as there has not been a notice of violation issued to Metro for a tonnage exceedance since August 21, 2000. (R.A. 63.)<sup>76</sup>

Moreover, the Village's disproportionate determination to close the Facility erroneously ignores the utility of the operations at the Facility for the entire Westchester County region. The detriment, not only to Metro, but also to the region as a whole (and possibly the solid waste industry), will be great if the Facility is closed down. (R.A. 94-97; 122-58; 437-39; 792-95.) The amount of C&D debris to be disposed of will not suddenly disappear, and there will likely be a greater impact on the surrounding facilities across the County. A balance of the utility versus the potential harm -- of which there is no evidence here -- is a recognized consideration when meting out punishment. For example, "[w]hen the balance tips far enough toward social utility, courts may not issue civil injunctions of violations of the environmental laws." Angus Macbeth, "Making the Punishment Fit The Crime: Problems in Sentencing Organizations for Environmental Offenses," 7

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<sup>75</sup> An analogy here can be made to situations in which punitive damages are disproportionate to the actual damages. "There is a point where punitive damages may overstate their purpose and serve to confiscate rather than to deter or punish." "Disproportionate or Excessive Punishments: Is There A Method For Successful Constitutional Challenges?," 2 Tex. Wesleyan L. Rev. at 37, citing Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768 (Tex. App. – Hous. [1<sup>st</sup> Dist.] 1987), cert. dismissed, 485 U.S. 994 (1988) (ordering a remittitur of \$2 billion where \$3 billion was rewarded). Here, while the Village is undeniably permitted to enforce its Special Permit to deter or punish Metro for violations, its decision to not renew the permit is confiscatory in that it infringes on Metro's constitutionally vested rights to continue its legal, pre-existing nonconforming use, absent a threat to the safety, health and general welfare of the community and the environment. (See Point III, infra.)

<sup>76</sup> Eighteenth century philosopher Cesare Beccaria's believed that "the purpose of punishment was to prevent the offender, and to deter others, from committing similar offenses. Hence under the Becarian model, any punishment beyond that necessary to accomplish these goals was tyranny." Hon. Richard Lowell Nygaard, "On the Philosophy of Sentencing: Or, Why Punish?," 5 Widener J. Pub. L. 237, 241 (1996). (citations omitted).

Toxics L. Rep. 1313, 1314 n.1 (1993). This example is certainly analogous to the closure of Metro's Facility.

The United States Supreme Court "cautioned that 'the question of excessive punishment cannot be considered in the abstract' and required taking into consideration all circumstances surrounding the offense." "Disproportionate or Excessive Punishments: Is There A Method For Successful Constitutional Challenges?," 2 Tex. Wesleyan L. Rev. at 70, citing Robinson v. California, 370 U.S. 660, 667 (1962) (holding a 90 day sentence for drug addiction excessive, comparing it punishing one for the crime/illness of a common cold). This is precisely the premise behind Judge Nicolai's holding that "[u]nder the totality of circumstances presented . . . the Board's denial of the permit is not supported by substantial evidence." (R.A. 9 (emphasis added).)

### III.

#### **THE VILLAGE MAY NOT DESTROY METRO'S CONSTITUTIONALLY PROTECTED PROPERTY RIGHTS TO A PRE-EXISTING, LEGAL NONCONFORMING USE ABSENT SUBSTANTIAL EMPIRICAL EVIDENCE OF ADVERSE ENVIRONMENTAL IMPACTS**

Although the court below did not need to reach the issue of the pre-existing, legal nonconforming status of the Metro Facility -- an issue fully briefed below -- Metro maintains that such status is a significant and crucial factor in determining whether the Special Permit should have been renewed. As discussed below, since the use of the Property as a transfer station constitutes a pre-existing, legal nonconforming use, Metro has a constitutionally vested right to continue that use, absent a threat to the safety, health and general welfare of the community and the environment. (R.A. at 23; 41, ¶ 6.)

It is important to note that unlike a typical special permit use that is clearly identified as such in a municipal zoning code, the Special Permit at issue here was granted in connection with a change from one legal nonconforming use to another, and is thus merely incidental to the

nonconforming use. See Village of Croton-on-Hudson Code (“Village Code”) § 230-53(A)(2). The essential function of the Special Permit was to enable the Village to determine the propriety of the change from one nonconforming use to another and regulate the use under applicable police powers.<sup>77</sup> Having issued not one, but a series of special permits for this Property so it could be utilized for materials storage and processing, the Village cannot now summarily eviscerate those property rights by refusing to renew Metro’s Special Permit.

Significantly, on June 18, 2001, the Board enacted an amendment to Section 230-18 of the Village Code concerning uses in the Light Industrial LI District. (R.A. 68, ¶ 103.)

E. Prohibited uses. Solid and liquid waste transfer and storage stations and landfills (including construction and demolition materials) are prohibited. For the purposes of this section, solid and liquid wastes are defined as follows: all putrescible and nonputrescible materials or substances that are discarded or rejected as being spent, useless, worthless or in excess to the owners at the time of such discard or rejection, including but not limited to liquids, garbage refuse, industrial, commercial and household waste, sludges from air or water treatment facilities, rubbish, tires, ashes, contained gaseous material, incinerator ash and residue and construction and demolition debris.

Village Code § 230-18(E) (emphasis added). Suddenly, for the first time in the Village, transfer stations such as Metro’s became “expressly prohibited.” (R.A. 68, ¶ 103.) Since the use was not only in existence on the date of that enactment in June 2001, but also legal and permitted,<sup>78</sup> it thereupon unquestionably became a pre-existing, legal nonconforming use at that time -- regardless of its ostensible legal status prior to that date.

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<sup>77</sup> The Court of Appeals has held that provisions requiring a special use permit when a nonconforming use is changed are constitutionally permissible. Moreover, as Chief Judge Breitel explained, the permit once issued in such a case shows “conformity with all the provisions of the ordinance whenever the use is changed.” Off Shore Rest. Corp. v. Linden, 30 N.Y.2d 160, 331 N.Y.S.2d 397, 402 (1972), quoting Harbison v. City of Buffalo, 4 N.Y.2d 553, 176 N.Y.S.2d 598 (1958).

<sup>78</sup> At its April 23, 2001 Special Meeting, the Board granted a sixty-day extension of the Special Use Permit. Thus, at the time of the enactment of the amendment to Section 230-18, the Facility became a legal, pre-existing nonconforming use.

Under New York law, “nonconforming uses or structures, in existence when a zoning ordinance is enacted, are, as a general rule, constitutionally protected and will be permitted to continue, notwithstanding the contrary provisions of the ordinance.” People v. Miller, 304 N.Y. 105, 107 (1952) (emphasis added).<sup>79</sup> This rule is applicable to the enactment of new zoning ordinances or, as in the instant case, to amendments to existing zoning ordinances as well.<sup>80</sup>

It is well recognized in a leading zoning treatise that “courts . . . are alert to the possibility that a municipal corporation may seek to terminate a nonconforming use by the imposition of regulations so onerous as to render further use impractical.” 1 Salkin, New York Zoning Law and Practice § 10:47. However, in order to protect constitutionally vested rights to pre-existing nonconforming uses, it is undisputed that “[t]he doctrine of nonconforming uses recognizes the implicit right of a property owner to continue to use his property as he has been doing in the past . . . even if [the use does] violence to the overall purpose and plan of zoning regulations.” 12 N.Y. Jur. 2d, Bldgs., Zoning, & Land Controls § 278. Thus, the owner of nonconforming property is entitled to undeniable legal protections, despite efforts by local governments to zone such a use out of existence.

In circumstances like those present here -- where a property owner will suffer a serious financial detriment upon termination of the nonconforming use (i.e., the loss of millions of dollars invested and future business) -- unsubstantiated denial of protected property rights will not be enforced

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<sup>79</sup> See also Syracuse Aggregate Corp. v. Weise, 51 N.Y.2d 278, 434 N.Y.S.2d 150, 153 (1980) (“a zoning ordinance cannot prohibit an existing use to which the property has been devoted at the time of the enactment of the ordinance”); Harbison v. City of Buffalo, 4 N.Y.2d 553, 176 N.Y.S.2d 598, 601-02 (1958) (“where the owner already has structures on the premises, he cannot be directed to cease using them, just as he has the right to continue a prior business carried on there”) (citations omitted); Somers v. Camarco, 308 N.Y. 537, 541 (1955) (holding the effect of the applicable prohibitive ordinance was to “unreasonably deprive the defendants of a ‘vested’ right and to relegate them to a position of seeking permission to do that which they had a legal right to do”).

<sup>80</sup> See Putnam Armonk, Inc. v. Town of Southeast, 52 A.D.2d 10, 382 N.Y.S.2d 538, 541 (2d Dep’t 1976) (where there is substantial construction and expenditures prior to the effective date, the construction of a nonconforming use will be permitted despite the enactment of a restrictive amendment to a zoning ordinance); Telimar Homes, Inc. v. Miller, 14 A.D.2d 586, 218 N.Y.S.2d 175, 177 (2d Dep’t 1961) (right to nonconforming subdivision vested due to substantial construction and expenditures prior to enactment of zoning amendment).

against a pre-existing nonconforming use.<sup>81</sup> There exist “due process limitations placed on all zoning regulations,” and with regard to pre-existing nonconforming uses, “the rule is fundamental that nonconforming uses in existence when a zoning ordinance is enacted are constitutionally protected and must be permitted to continue, despite the enactment of a prohibitory zoning ordinance if enforcement of the ordinance would cause the property owner serious financial harm.” Mt. Eden Cemetery Ass’n, Inc. v. Town Bd. of the Town of Mount Pleasant, 10/6/1993 N.Y.L.J. (col. 2) (2d Dep’t) (emphasis added). Those protections are not abrogated simply because a legislative board -- for political or any other reasons -- elects to rescind or not renew a permit. Metro will unquestionably suffer a substantial and serious financial harm if it is unable to continue the current nonconforming use. (R.A. 94-97; 437-39.)

In Mt. Eden, the Second Department held that “[t]o be reasonable, a police power regulation must be kept within the limits of necessity.” 10/6/1993 N.Y.L.J. (col. 2) (emphasis added). In order to measure “whether necessity limits have been exceeded to justify interference with the beneficial enjoyment of property,” this Court applied the three-pronged test established in Belle Harbor Realty Corp. v. Kerr, 35 N.Y.2d 507, 364 N.Y.S.2d 160, 163 (1974). Under that test, “[t]he municipality must establish (1) that it acted in response to dire necessity; (2) that its action is reasonably calculated to alleviate or prevent the crisis condition; and (3) that the municipality is presently taking steps to rectify the problem.” Id. The Court held that the town was unable to meet the standards, as it had “not even alleged that any empirical studies were conducted as to [adverse impact]” and “[w]ithout

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<sup>81</sup> Metro concedes that the cases cited herein are not directly on point because the classic nonconforming use dispute typically relates to subsequent legislative enactments that eliminate an otherwise pre-existing lawful use. Here, however, we submit that the same principles of law and inherent protections apply to the unique set of facts presented, whereby the lawful right to continue a nonconforming use is potentially terminated, not from a zoning amendment per se, but as a result of the non-renewal of a special permit.

such empirical data, the Town cannot begin to justify the amended ordinance as a proper police power regulation designed to abate a dangerous health hazard.” Id.

Metro does not deny that nonconforming uses are subject to a municipality’s valid exercise of its police powers. “The courts, in order to afford stability to property owners who do have existing nonconforming uses, have imposed the test of reasonableness upon such exercise of the police powers.” Somers v. Camarco, 308 N.Y. 537, 540 (1955). In Goldblatt v. Town of Hempstead, 369 U.S. 590, 82 S. Ct. 987 (1962), for example, the United States Supreme Court reviewed an ordinance in the Town of Hempstead regulating dredging and pit excavating, which effectively prohibited the pre-existing nonconforming use on the subject property. The town attempted to uphold the ordinance as a safety measure under its police power, not as a zoning measure.<sup>82</sup> The Court held that in order for such an ordinance to be sustained, its reasonableness must be evaluated in terms of “the nature of the menace against which it will protect, the availability and effectiveness of other less drastic protective steps, and the loss which appellants will suffer from the imposition of the ordinance.” Id. at 990 (emphasis added).

There is absolutely no empirical or other evidence that there will be a detrimental impact to the residents of the Village if Metro is permitted to continue to exercise its constitutionally protected vested rights in the nonconforming use on the Property. As opposed to the ordinance in Goldblatt, there is no indication that Section 230-18(E) was enacted as a safety regulation. Rather, it is clearly and unquestionably a zoning regulation. Considering that there is no empirical evidence that there will be any harm to the community if the Facility is left open, the benefits to the entire region,

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<sup>82</sup> It is imperative to note that as discussed by the lower court in Goldblatt, the property had originally been in a very sparsely populated area. Over the years, it had become extremely densely populated, and a large crater, as deep as 48 feet in some areas, had formed as a result of the excavation operations. There were 2,200 homes within 3,000 feet of the center of the sand pit, four public schools within a radius of 3,500 feet, and a church within a radius of 1,500 feet. Town of Hempstead v. Goldblatt, 19 Misc. 2d 176, 189 N.Y.S.2d 577, 581-82 (Sup. Ct. Nassau Cty. 1959). The Transfer Station, as described above, is well-guarded by other commercial properties and a screening berm.

which will continue to generate C&D waste with fewer options for disposal, to permitting the continuation of the nonconforming use far outweigh any possible detriment, though again, no such discernible or actual detriment has even been reported by the Board's own expert.

Furthermore, where the denial of a permit or approval would effectively terminate an owner's vested right to continue its pre-existing nonconforming use, simply being in technical violation is insufficient justification for deprivation of a vested interest in the pre-existing nonconforming use. In City of New York v. Victory Van Lines, 69 A.D.2d 605, 418 N.Y.S.2d 792 (2d Dep't 1979), for example, the city attempted to enjoin the owner of a moving and storage business from continuing its pre-existing, nonconforming use on the grounds that the use was not illegal because the owner failed to obtain a certificate of occupancy at a time when the use was permitted. Although the owner's failure in this regard made the entire subject use invalid from a zoning standpoint, the court deemed the situation a "technical irregularity which would not prevent the continuance of an otherwise lawful use." Id. at 795. The owner's violations of other local regulations did not change this Court's conclusions, since the City's "remedy is to charge defendants with such violation; it is not to put them out of business." Id. (emphasis added).<sup>83</sup>

Since Metro has a legal, pre-existing nonconforming use, and therefore a constitutionally vested interest in said use, minor or technical violations are not enough for the Village to deny the permit renewal, thereby putting it out of business. The Village has already fined and received penalties from Metro for violations of the permit, and it may continue to do so if they persist, but the Village cannot deny the permit renewal on these violations alone. (See, e.g., R.A. 3175-3177.)

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<sup>83</sup> The Court in Victory Van Lines cited City of Passaic v. H.B. Reed & Co., 70 N.J. Super. 542, 550, 176 A.2d 27, 32 (N.J. Super. Ct. Ch. Div. 1961), which held that despite the failure of an industrial plant to obtain a certificate of occupancy, the court there would "not permit slavish adherence to form...to override the merits of substance of the factual setting." Victory Van Lines, 418 N.Y.S.2d at 795.

While the Village is entitled to implement safeguards such as a monitoring provision, there is simply no legal basis to impose such a drastic remedy as the denial of the Special Permit renewal.

The Special Permit was originally issued for the change from one nonconforming use to another in 1998. The right to that nonconforming use transferred to Metro when it took possession of the Facility. The subsequent enactment of Village Code Section 230-18(E), which explicitly prohibits solid waste transfer and storage station and landfill use in the LI District, leaves no doubt that Metro is a pre-existing nonconforming use. At the time of the enactment in 2001, Metro was operating under a valid, duly issued permit from both the Village and DEC, and therefore was beyond doubt rendered a legal, pre-existing nonconforming use. Accordingly, Metro has a constitutionally vested right to use the Property as a C&D facility, and the Village may not strip away that right in this procedural context or upon this administrative record.

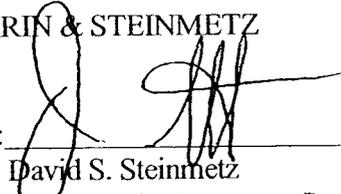
### CONCLUSION

Based on the foregoing, Petitioner-Respondent respectfully requests that this Court (i) affirm the Order of Chief Administrative Judge Francis A. Nicolai dated February 19, 2003, and (ii) award Petitioner-Respondent such other and further relief as the Court deems just and proper.

Dated: White Plains, New York  
October 21, 2003

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