

*To be Argued By:*  
MICHAEL B. GERRARD  
*Time Requested: 20 Minutes*

COURT OF APPEALS OF THE STATE OF NEW YORK

METRO ENVIRO TRANSFER, LLC,

Petitioner-Appellant,

-against-

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

Respondents-Respondents.

Appellate Division  
Index No. 2003-02335

**BRIEF FOR RESPONDENTS-RESPONDENTS**

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## **QUESTIONS PRESENTED**

1) When a special use permit has provisions designed to protect public health and the environment, are multiple violations of those provisions, directed or authorized by senior facility management, coupled with repeated concealment of these violations, sufficient evidence to deny renewal of that permit after extensive public hearings and factfinding, or must the permit nonetheless be renewed unless the municipality has additional proof that the violations actually caused or threatened injury to health or the environment?

2) Where, after extensive negotiations, a facility and its counsel consent to a special use permit that provides that the facility may be shut down if it violates the permit, is the municipality nonetheless precluded from closing the facility without additional proof that the violations actually caused or threatened injury to health or the environment?

## STATEMENT OF THE CASE

All agree that substantial evidence is needed to uphold a municipal decision to take a zoning enforcement action. The main question in this case is – substantial evidence of what? Here we have multiple intentional violations directed by high level officials of the company – violations of permit conditions that were designed to protect public health and the environment. These violations were practically continuous, from when Metro Enviro Transfer LLC (“Metro Enviro” or “Appellant”), took over the waste transfer station in Croton-on-Hudson (the “Facility”) in 2000 right up to when the Village Board of the Village of Croton-on-Hudson (the “Village Board”) rendered its decision in January 2003. Throughout this time Metro Enviro repeatedly concealed or misrepresented facts and withheld information. Most importantly, there were 42 instances of unlawfully accepting industrial waste (App. Br. at 31) and 26 instances of accepting waste in excess of tonnage limits. A. 1106-7<sup>1</sup>; A. 1110. In each instance Metro Enviro then created false records to cover up these violations. *Id.*

The Village Board denied Metro Enviro’s application for renewal of its special use permit (the “Permit” or “Special Permit”) on January 27, 2003 after a lengthy and deliberate process in which thirteen temporary extensions

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<sup>1</sup> Citation to documents in the Joint Appendix are noted herein as “A. \_\_\_” followed by the page number in the Joint Appendix. In the trial court, references to the Record of Decision were denoted by “R.” followed by the tab number. The table of contents at the start of the Joint Appendix gives the page numbers in the Joint Appendix of the original tabs in the Record of Decision.

of the permit were granted in order to allow for review of the Facility's compliance with applicable requirements. In addition, discussions of the application were held at numerous public meetings of the Village Board, which received and considered numerous submissions from Metro Enviro's representatives, consultants to the Village, and citizens. The Village prepared a detailed Statement of Findings, which – in a particular effort to be factually accurate – they circulated in draft form for comments and corrections to the Metro Enviro and the public. A. 1095-96.

The 15-volume record on which the Village Board relied in denying Metro Enviro's permit renewal application, as reflected in part in the Statement of Findings, demonstrated that Metro Enviro had repeatedly violated the Special Permit, the Facility's Operations and Maintenance ("O&M") Manual (incorporated into the Special Permit), the operating permit issued by the New York State Department of Environmental Conservation ("DEC"), and the governing DEC regulations. A. 1102-16. Metro Enviro admitted or failed to deny the facts concerning many of the violations, including, among others, the acceptance and processing, and in some cases stockpiling, of industrial and other unauthorized waste on multiple occasions, the failure to abide by the permit's tonnage limitations, and the failure to train Facility personnel, as required under the Special Permit and the O&M Manual, on the very procedures designed to prevent other violations. *Id.* In its 14-page Statement of Findings, the Village Board

meticulously documented how Metro Enviro repeatedly violated permit conditions that were meant to protect the public health and safety. A. 13-26.

Following the Village Board's decision to deny the permit renewal application, Metro Enviro initiated on February 3, 2003 the instant Article 78 proceeding seeking annulment of the Village Board's decision. On February 10, 2003, the Village filed and served their Answer and Opposition to the Article 78 Petition, as well as the 15-volume record. Included in the Village' papers before the trial court was an annotated version of the Statement of Findings supporting the denial of the permit renewal application, with citations to the documentary record for each and every factual statement on which the denial was based. A. 1102-16.

On February 19, 2003, Justice Nicolai issued a short form order holding that the Village Board's decision was not supported by substantial evidence and was impermissibly based in part upon generalized opposition that was uncorroborated by any empirical data. Justice Nicolai granted Metro Enviro's Article 78 Petition, annulled the decision of the Village Board denying the permit renewal application, and remitted the matter to the Village Board for issuance of the permit consistent with his order, subject to reasonable conditions as deemed by the Village Board.

Justice Nicolai's decision was unanimously reversed by the Appellate Division, Second Department, on May 10, 2004. The Appellate Division concluded that "[t]he Village did not need to wait for actual harm to occur because of the various permit violations committed by Metro in order to

deny renewal. It was sufficient that the conditions, established after a lengthy review process to address potential adverse impacts on the neighborhood, were violated, and there is substantial evidence in this record not only establishing the existence of the subject violations, but also that they posed a threat to the community and the environment.” A. 4713. The Court of Appeals granted leave to appeal on December 16, 2004.

### **STATEMENT OF RELEVANT FACTS**

Metro Enviro began operating the Facility in March 2000 when it obtained a lease to the property from Greentree Realty and purchased the transfer station from Metro Enviro L.L.C. *See* A. 1080. At that time, the Facility was governed by a three-year Special Permit for operation of a construction and demolition debris (“C&D” or “C&DD”) transfer station that was initially granted to Metro Enviro L.L.C. in 1998. A. 249-63.

The Special Permit contained a number of conditions defining the type and amount of waste that could be processed through the Facility, the operating hours, the permissible operations on site, and certain physical improvements on the site. The Special Permit also required that the Facility comply with all conditions, restrictions and limitations in the Facility’s DEC permit,<sup>2</sup> with the provisions of the O&M Manual, and with the performance

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<sup>2</sup> Specifically, the DEC permit in effect at that time prohibited acceptance of unauthorized waste, including industrial and municipal waste (Special Condition 10(a)), required proper disposal of all waste (Special Condition 10(c)), required DEC notification and prompt removal when unauthorized wastes were brought to the Facility (Special Condition 16), required proper collection and disposal of leachate from the site (Special Condition 19), required timely submission of accurate annual reports (Special Condition

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standards of the Village Zoning Code. The permit also contained provisions for enforcement in the event of violations, and reserved all other Village enforcement powers under the Zoning Code. A. 262. The Village Board issued the Special Permit considering recommendations by the Planning Board and by a citizens review committee, and the comments of the public and the applicant in several public hearings. The Permit was heavily negotiated with the applicant, many of whose requested changes were adopted, and it was issued in part in reliance on statements of counsel for the applicant that noncompliance with the Permit would lead to closure of the Facility. A. 1681-82; A. 1670-71.

In May 2000, Metro Enviro requested that the tonnage limit for the Facility be increased. That request was denied by the Village Board based on the Facility's prior violations of the permit's tonnage limits. A. 1460-61.

Aware that the Special Permit would expire in May 2001, Metro Enviro timely requested renewal in March 2001. The Village Board began the careful and considered process of reviewing the permit renewal request. A. 1080-81. In a June 2001 work session, the Village Board learned that since March 2000 the Facility had been subjected to the oversight of Walter Mack, Esq., a federal monitor appointed by the Honorable Jed S. Rakoff of the United States District Court, Southern District of New York, in

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5), required operations to comply with applicable regulations (Special Condition 13), and set tonnage limits (Special Condition 9). A. 165-73.

connection with the purchase by Metro Enviro's parent company, Allied Waste Industries, of certain solid waste management facilities in Westchester County. A. 1707-41. The Village Board was disturbed to learn that Allied had not thought it necessary to reveal that fact earlier. A. 1713-16.

Between Metro Enviro's renewal request and the Village Board's denial of that request on January 27, 2003, the Village Board issued thirteen temporary extensions of the permit in order to allow for full consideration of relevant information. The permit renewal request was considered at thirteen Village Board meetings. Metro Enviro's representatives spoke at twelve of these meetings. A. 1080-81.

During that consideration, the Village Board became aware of multiple permit violations. It learned of some of them because of the probing of the federal court monitor, some due to the disclosures of Metro Enviro or Allied Waste personnel (often because they knew that the federal monitor was about to reveal them), and some due to the investigations of representatives of the Board. In each instance, it was apparent that Metro Enviro's strong statements regarding the importance of permit compliance were not being carried out in practice, and indeed, had not been for most or all of the time in which Metro Enviro operated the Facility. Also of concern, Allied Waste's disclosure of many of Metro Enviro's permit violations came long after they occurred, and then apparently only as a result of facts learned through Mack's federal monitorship.

Specifically, in June 2001 Metro Enviro admitted to the Village Board that the tonnage limits set for the transfer station in the Special Use Permit and the DEC permit were violated on 25 occasions between March 22, 2000 and August 21, 2000. A. 1710. Metro Enviro also admitted that the Site Manager at the Facility falsified the daily tonnage reports given to the Village by manipulating the Facility's computer system to cover up the violations. A. 1732-33. These admissions appear to have been made at insistence of Mack. A. 1714.

At the Board meeting on February 4, 2002, counsel to Metro Enviro explained that the company would be entering into a consent order with DEC regarding recordkeeping errors, dust problems and tonnage overages. Counsel explained that the tonnage records kept at the loaders did not match the record of tonnage going into the Facility. A. 1084. On February 11, 2002, the Village Engineer issued a Notice of Violation for maintenance of inaccurate and unreliable tonnage records in 2000 and 2001 and inadequate supervision to prevent unacceptable recordkeeping in violation of Special Permit condition 34. A. 1123. A twenty-sixth violation of the capacity limit was disclosed on February 28, 2002. A. 2675-76. The exceedances of the tonnage limits violated the Special Permit (paragraphs 18, 26 and 34), the DEC permit (special condition 9), and DEC regulations (6 N.Y.C.R.R. § 360-1.7). An assurance that the tonnage limits would be obeyed was an important factor in the Village's initial decision to allow the Facility to operate. *See e.g.* Letter from Seth Davis (former head of the Citizens

Review Committee for the initial permit) to Mayor and Village Board of September 9, 2002, A. 2533 (“[w]hen my committee was discussing, four years ago, our concerns with Metro Enviro’s proposed operation, nothing was more important to us than adherence to the daily tonnage cap. It was through this mechanism that we were to control the amount of materials that would be brought to the site as well as the number of trucks using our roads.”)

Following the discussions regarding the tonnage exceedance violations, the Board received assurances from Allied Waste and Metro Enviro that they were operating the Facility in full compliance with the Special Permit. A. 1070. However, in June 2002 the Board became aware that Metro Enviro had been violating the terms of the permit concerning the acceptance of unauthorized waste, in that instance vehicle tires, which are barred under the Special Permit and if received are supposed to be removed from the site within 12 hours according to the O&M Manual. Metro Enviro admitted that it had not been following that procedure at least since November 2001, which was almost a year and a half after it began operating the Facility. At the Village Board meeting on June 10, 2002, Metro Enviro represented that its practice was to store tires on site in an outdoors container for weeks at a time until a container was full. That practice was inconsistent with the terms of the Special Permit and the O&M Manual. A. 1085. Vehicle tires can constitute a fire hazard and are notorious breeding grounds for mosquitoes and other pests, which can carry dangerous viruses

throughout a community. *Id.*<sup>3</sup> The stockpiling of tires constituted a violation of the Special Permit (paragraphs 1, 2, 3, 7 and 18), the DEC permit (Special Condition 16), and DEC regulations (6 N.Y.C.R.R. § 360-1.7). The Village issued a notice of violation.<sup>4</sup> A. 1124.

On August 7, 2002, Metro Enviro informed the Village that Facility personnel knowingly directed industrial waste from the Engelhard Corporation's Peekskill Films Plant to the Facility, and that the Facility accepted and processed this waste on at least 18 occasions between February 2, 2001 and March 19, 2001. A. 1463. Metro Enviro admitted that Allied supervisory personnel knew that industrial waste was being accepted at the Facility. A. 1479-80. On December 2, 2002, Metro Enviro admitted that on at least 24 other occasions, including four times in 2002, mixed industrial and municipal waste from various locations of the Engelhard Corporation was processed at the Facility. A. 1486-88. The Village issued Metro Enviro a Notice of Violation regarding the 18 loads on August 9, 2002 and imposed a \$50,000 fine, reserving its rights to take further action. A. 1125; A. 1468-69. The Village issued a Notice of Violation regarding the subsequent 24

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<sup>3</sup> In 2003 the Legislature enacted a law on waste tires setting waste tire management priorities in the interest of public health, safety and welfare. Waste Tire Management and Recycling Act of 2003. Session L. 2003 ch. 62. The Board's finding that tires can create a hazard was also based on information from New York State and Westchester County that waste used tires create mosquito breeding grounds with an associated risk of disease. A. 1620-32. This information relates exclusively to used tires, not new tires.

<sup>4</sup> Metro Enviro misleadingly compares the number of used tires improperly stored outside the Facility in a dumpster to those held by a nearby tire wholesaler. App. Br. at 37. This comparison is inappropriate because the new tires are stored inside a building equipped with a sprinkler system. This effectively eliminates the hazards of fire and mosquito breeding.

loads of industrial waste on December 11, 2002. A. 1127. Metro Enviro did not challenge either Notice of Violation and paid the \$50,000 fine. A. 2544.

Grant of the initial permit had been recommended in 1998 on the assumption that no industrial waste was ever to be processed at the Metro Enviro transfer station. A. 2533. If any exceptions to this rule had been contemplated, they would have been totally unacceptable to the citizens' committee reviewing the permit application. *Id.*

The Statement of Findings details additional facts found by the Village Board with regard to the industrial waste violations, including a series of inaccurate and unreliable communications from Metro Enviro to the Board regarding the industrial waste shipments; information gathered by the Board regarding Engelhard Corporation which casts doubt on Metro Enviro's representations regarding the nonhazardous nature of the industrial waste; and Metro Enviro's admission that the Ohio facility to which it shipped the industrial waste was not authorized to receive it (a violation of Special Permit paragraph 18 and DEC permit Special Conditions 10(c) and 16).<sup>5</sup> A. 1102-16; A. 1090-94. The Board issued a Notice of Violation regarding Metro Enviro's shipment of waste to a facility not authorized to receive it on January 27, 2003. A. 1126. Metro Enviro's acceptance and processing of unauthorized waste was in violation of the Special Permit

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<sup>5</sup> Metro Enviro criticizes the Village for not sampling or testing the industrial waste. App. Br. of 62. That would be impossible; the last known receipt of industrial waste occurred on March 19, 2002, A. 3564, while the Village did not become aware that such waste was passing through the Facility until August 7, 2002. A. 1463.

(paragraphs 1, 2, 3, 7 and 18), the DEC permit Special Conditions 10(a) and (b), and DEC regulations (6 N.Y.C.R.R. § 360-1.7).

The Board was especially concerned about the 20-month period during Metro Enviro's ownership in which unauthorized industrial waste was received, and found that the nature of construction and demolition debris – which the Facility is designed to accept – would make the receipt of certain kinds of unauthorized wastes especially problematic. *See generally* A. 1102-16. On at least two occasions, the waste received at the Facility included pieces of equipment that caught fire on the tipping floor (a snow blower on September 23, 2002 and a small motor on January 16, 2003). A. 1473-75, A. 3558. The Croton Volunteer Fire Department extinguished the snow blower fire. If unauthorized highly flammable waste materials had been present on the floor, it is not clear whether the firefighting efforts would have gone so smoothly. Indeed, one of the major kinds of unauthorized waste that Metro Enviro accepted from Engelhard was plastic film that might have combusted if it had been there at the same time as the snow blower or the motor. (Metro Enviro's brief trivialized this plastic as the sort of material that is found in Easter baskets, App. Br. 31, but industrial quantities of Easter basket plastic and burning equipment are not a good combination. A. 1110.) Though Metro Enviro says it cannot be certain just what was included in all of the loads of industrial waste that the Facility accepted from Engelhard, one of their counsel admitted that some of the loads included test tubes with pigment residue. A. 747-48.

The O&M Manual emphasizes the importance of employee training as a means of insuring Facility compliance with permit requirements. *See* O&M Manual, Section 4.1 (“Training is essential to the safe operation and maintenance of this Facility ... The program is designed to minimize to the greatest extent possible the potential for receiving unacceptable waste”), A. 323. Concerned with the seemingly never-ending revelations of permit violations, on November 26, 2002 the Village reviewed the training records that are required to be maintained on site pursuant to the O&M Manual, which is incorporated into the Special Permit, and pursuant to the DEC permit. This inspection revealed numerous further violations. A. 2553-55. Specifically: i) no documentation of initial training was maintained at the Facility; ii) monthly safety meetings were not held in 20 of the 32 months that Allied had owned the Facility up to that time; iii) not all employees attended the monthly meetings that were held; iv) quarterly compliance training had only been held once in the 10 quarters that Allied had owned the Facility up to that time; and v) no training had been conducted by a New York certified asbestos inspector regarding recognition of waste potentially containing asbestos and contaminated soils. *Id.* The Village issued a Notice of Violation covering these training violations on December 13, 2002. A. 1128-29.

In addition to the violations noted above, the DEC Monitor for the Facility noted three additional violations. *First*, the Facility was cited for processing and mishandling two refrigerators, which are unauthorized waste,

on the side of the tipping floor. A. 1112. This conduct violated the Special Permit (paragraphs 1, 2, 3, and 7), the DEC permit (Special Condition 10(b)) and DEC regulations (6 N.Y.C.R.R. § 360-1.7). *Second*, the Facility was cited for failure to collect leachate when rainwater was observed coming into contact with material that was outside the building and then running to the railroad tracks without being collected in the leachate collection tank. A. 1112. This violated the Special Permit (paragraphs 18 and 26), the DEC permit (special condition 19), and DEC regulations (6 N.Y.C.R.R. § 360-1.7). *Third*, Metro Enviro was cited by the DEC Monitor for filing its annual report for 2000 29 days late in violation of Part 360 regulations. A. 1112. This violated the Special Permit (paragraphs 18 and 26), the DEC permit (special conditions 5 and 13), and DEC regulations (6 N.Y.C.R.R. §§ 360-1.7, 360-16.4(i)(1)).

Of additional concern to the Village Board was the apparent delay in reporting to the Village violations of which Metro Enviro's employees and management were aware. Metro Enviro's employees were on site and aware of the violations through the entire time that they were occurring. The Village only became aware of the violations well after they occurred, following the investigations undertaken by Mack, the federal court monitor, and by special counsel to the Village Board. *See* A. 1122.

Based on all of the above and on the other information in the Record, the Village Board issued a draft Statement of Findings for public notice and comment on December 23, 2002, specifically inviting Metro Enviro to make

comments and corrections. A. 1095-96. On January 15, 2003, representatives from Metro Enviro made a presentation in response to the draft Statement of Findings, and members of the public spoke. The Board also considered the affidavit of Richard Brownell, an expert in solid waste management retained by the Village. A. 1596-99. On January 6, 2003, all parties were notified that the Board would make its final decision on the matter at a special meeting to be held on January 27, 2003. A. 2298-2300.

In addition to the testimony provided by Metro Enviro, the Village sought supplemental information relevant to the permit compliance issues from Metro Enviro. Counsel to the Village made requests for information on the record at the Village Board meetings,<sup>6</sup> and sent various letter requests for information to counsel for Metro Enviro. A. 1090-91. While Metro Enviro provided some of the requested information, it entirely failed to respond to some of the requests and delayed unnecessarily in providing much of the information. A. 444; A. 1092-93; A. 1098-99. Unfortunately, even as of the date of the argument before the trial court, Metro Enviro still had left unanswered many of the Village's questions and had refused to turn over to the Village full transcripts (or transcripts from which only legitimately proprietary and confidential information has been redacted) of the depositions taken by the federal monitor concerning the operations at the Facility, even though it appeared that such transcripts would have been

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<sup>6</sup> See *e.g.* Transcript of September 9, 2002 meeting, A. 1019-20; Transcript of January 15, 2003 meeting, A. 447-55; Transcript of January 27, 2003 meeting, A. 745-55.

pertinent to the issue of permit renewal. A. 1098-99. Although the Village had reason to believe, based on the comments of Mack at a hearing before Judge Rakoff on December 5, 2002, that certain of the requested depositions address specifically the industrial waste violations and the question of whether additional intentional violations were committed by Metro Enviro's employees, counsel to Metro Enviro refused to provide copies of the requested depositions, while admitting that the company was free to provide them if it so desired. *Id.*

At the January 27, 2003 meeting Metro Enviro made another presentation and members of the public also expressed their views. A. 1099. All the information supplied by Metro Enviro, both orally and in writing, was considered by the Board in making its decision. The Board considered all of the testimony offered and the credibility of the witnesses, and drew the conclusions reflected in the Statement of Findings.

In deciding to deny the permit renewal application, in the Statement of Findings the Village Board provided a well-reasoned and factually based explanation for its decision. Among the Board's conclusions were the following:

- “The Board is particularly concerned with the knowing acceptance and processing of industrial and municipal waste. The Facility was sited, designed, built and operated as a transfer station for construction and demolition debris. C&DD is primarily solid material such as wood, pipes, bricks, cement, rebar, and the like. Because it is chemically and physically stable, and tends to have physically recognizable forms, it is less heavily regulated than municipal solid waste, hazardous waste or radioactive waste. The

environmental laws impose less onerous controls on the handling, transfer and disposal of C&DD than that of these other materials.” A. 1114.

- “[Metro Enviro’s expert, Robert D. Barber] testified orally (he did not submit a written report) that the permit violations at Metro Enviro Transfer did not cause injury to health, safety and the environment, and that the Facility has built-in safeguards to prevent such injury in the case of such violations. The Village subsequently retained the services of a leading environmental consulting firm, Malcolm Pirnie Inc. of White Plains, New York to evaluate Barber’s statement and to render an independent opinion. Richard Brownell of Malcolm Pirnie has submitted an affidavit differing with Barber’s assessment, and stating that the kinds of regulations that Metro Enviro Transfer violated were designed to protect health, safety and the environment, and that the integrity of the regulatory process depends on enforcement of these regulations without respect to whether damage to health, safety or the environment has occurred or can be proven to have occurred. The Board finds Brownell to be the more credible witness.” A. 1114.
- “Metro Enviro Transfer has claimed that the unauthorized receipt of industrial and municipal waste at the Facility from Engelhard was caused by Matt Hickey,<sup>7</sup> whose employment with Allied affiliates was terminated for cause in October 2001. Metro Enviro Transfer also stated its belief that five later loads from the same source were not industrial or municipal waste. Despite this, these five later loads were recently acknowledged by Metro Enviro Transfer to be industrial and municipal waste, and 19 other loads of suspected industrial and municipal waste were identified, including some that were shipped in 2002 – well after Hickey left the company. Several of the plants that are generating the waste loads are known generators of hazardous waste, but Metro Enviro Transfer states it does not know whether the industrial and

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<sup>7</sup> Hickey was a General Manager with Allied Waste who supervised operations at Metro Enviro and another Allied subsidiary. A. 1480. In addition, Charles Marino, the Metro Enviro Site Manager, knew the shipments were not C&D. *Id.* Furthermore, at least four other Allied personnel either knew the shipments were industrial waste, or knew they were not C&D. *Id.*

municipal waste it accepted from these plants contained hazardous waste. *The health and safety of residents of the Village of Croton-on-Hudson was placed in jeopardy by these multiple violations of the special use permit and of the DEC permit at a facility that is designed to accept only C&DD.*” A. 1114-15 (emphasis added).

- “The Board is also concerned that Allied deliberately diverted this industrial and municipal waste to another transfer station (in Mount Kisco) that was not permitted to accept it, and disposed of it at a landfill (in Ohio) that was not authorized to take it, all in contravention of permit conditions and the laws of two states and at least two municipalities. *Such deliberate serial disregard of permit conditions and governing law is intolerable.*” A. 1115 (emphasis added).
- “The violations relating to lack of training are not merely technical transgressions. The training was designed, among other things, to ensure that Facility personnel would exclude unauthorized waste, and would otherwise fully comply with the special use permit.” A. 1115.
- “The deliberate misreporting of daily tonnage figures in 2000 and the inability of the applicant to reconcile tonnage figures in 2001 is also a major issue. The capacity limit relates to the size of the Facility and to the volume of truck traffic that will travel to the Facility. Thus it is designed to protect the health and safety of the community.” A. 1115.
- “At the January 15, 2003 hearing, Metro Enviro Transfer officials made a major point of saying that the compensation of top company officials was tied to permit compliance. However, they also admitted that they are not aware that anyone at Allied or at Metro Enviro Transfer has been penalized because of any of the violations that occurred at Croton.” A. 1115.
- “This Board finds that since March 2000, when Metro Enviro Transfer took over the Facility, the terms and conditions of the special use permit have been violated on multiple occasions and in numerous ways. Metro Enviro Transfer has repeatedly offered words of assurance to this Board that, while the Facility did not comply in the past, it will comply in the future. *Further violations*

*have all too frequently negated the effect of those assurances. The Board has reached the point where it can no longer rely on the present assurances of Metro Enviro Transfer that things will improve in the future. A constant stream of violations – some of them disclosed only because of the ongoing investigation of the federal court monitor – establish that, after almost three years, Metro Enviro Transfer and its parent company, Allied, have not established either the mechanisms or the culture required for environmental compliance. At the January 15, 2003 hearing, the latest in a series of general managers for the Facility – brought on just a month earlier – testified that he had been hired “to create a culture of safe environmentally compliant and healthy and efficient operations.” While that is a laudable goal, it is too late. Allied has had nearly three years to create such a culture, and, as the string of violations demonstrates, it has failed. The time has come for the Village Board to take decisive action to fulfill its duty to protect the health and safety of the community. Metro Enviro Transfer should not be able to postpone the day of reckoning by delaying the production of requested materials or by pledging to do what it has repeatedly promised and failed to do in the past.” A. 1115-6 (emphasis added).*

- “None of the applicable sections of the Zoning Code or the Special Use Permit provide that a showing of damage to health, safety or the environment is necessary before the Village may revoke or refuse to renew the Special Use Permit.” A. 1106.

An annotated version of the Findings Statement, showing the documentary support for all the statements above and all other facts set forth in the Findings Statements, is in the Record at A. 1102-16.

During the same time that the special use permit renewal application was pending before the Village Board, Metro Enviro’s DEC operating permit was up for renewal as well. On February 7, 2003, only after the Village Board had denied the special use permit renewal and after the Article 78 Petition had been filed, DEC granted Metro Enviro’s DEC

operating permit renewal. Clearly, the DEC permit renewal was not before the Village Board at the time of the Village Board's decision.

As detailed in the Statement of the Case, above, these events were followed by Metro Enviro's Article 78 Petition, Justice Nicolai's decision, and its reversal by the Appellate Division.

### **THE DECISION BELOW**

On May 10, 2004, the Appellate Division, Second Department, unanimously reversed the trial court's decision. Addressing the standard of review, the Appellate Division held:

The determination of a municipality whether or not to renew a special use permit to operate a facility like that at issue here, will be upheld where it is supported by substantial evidence (*see Matter of Twin County Recycling Corp. v. Yevoli*, 90 NY2d 1000). "Where substantial evidence exists, a court may not substitute its own judgment for that of the board, even if such a contrary determination is itself supported by the record" (*Matter of Retail Prop. Trust v. Board of Zoning Appeals of Town of Hempstead*, 98 NY2d 190, 196).

A. 4713. Applying that standard, the Appellate Division held:

Here, the Supreme Court erroneously substituted its own judgment for that of the Village and held that the determination on review was the sole product of generalized opposition to the facility (*see Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead, supra*). The Village did not need to wait for actual harm to occur because of the various permit violations committed by Metro in order to deny renewal. It was sufficient that the conditions, established after a lengthy review process to address potential adverse impacts on the neighborhood, were violated, and there is substantial evidence

in this record not only establishing the existence of the subject violations, but also that they posed a threat to the community and environment (*see Matter of Persico v Incorporated Vil. Of Mineola*, 261 A.D.2d 407; *Matter of Bell v Szmigel*, 171 AD2d 1032, 1033; *cf. Matter of Twin County Recycling Corp. v. Yevoli, supra*).

*Id.* The Court of Appeals granted leave to appeal on December 16, 2004.

A. 4951.

## **GOVERNING LAW**

### **Village Code Provisions**

Section 230-56 of the Croton-on-Hudson Village Code governs renewal of special use permits issued by the Village Board of Trustees. It provides:

The grant of a special use permit for the use indicated therein may be conditioned on periodic renewal, which renewal may be granted only following upon public notice and hearing. *Such renewal shall be withheld* or granted subject to terms and conditions additional to or different from those in the original grant *only upon a determination that:*

A. The factors which justified the original grant no longer exist or have changed sufficiently to require additional or different terms and conditions; or

B. *The terms and conditions of the original special permit have not been or are not being complied with, wholly or in part.* A notice of violation pursuant to § 230-81 shall be prima facie

evidence of lack of conformity with such terms and conditions.

(Emphasis added). A. 4658-59.

### **Special Permit Enforcement Provisions**

Paragraph 40 of the Special Permit for the Facility, A. 260-61, defines a procedure for revoking the permit if there is even a single violation of any permit condition. Under the sub-paragraph on stop work orders, generally the permittee has five days to cure violations before work can be stopped, but no notice is required where “there are imminent hazards posed to the public health, welfare and the environment, such as acceptance by the applicant of toxic or hazardous waste or garbage or, . . . the applicant has received three notices to remedy violation under this permit.” The next sub-paragraph, on suspension and revocation, states, “[t]he Village Board may suspend or revoke this permit after a public hearing . . . where it finds that the permittee has not complied with any or all terms of this permit.”<sup>8</sup>

Paragraph 41 of the Special Permit (under which the Village Board proceeded) states that the Village “will retain all powers of enforcement available under paragraph 40 and the Village Code, including, but not limited to, the right to order cessation of operations in the event of repeated or uncured violations, as well as the right to assess monetary penalties.”

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<sup>8</sup> Although the Board elected to deny the renewal request, it could also have proceeded pursuant to the revocation provisions of Paragraph 40 since more than three notices of violation were issued under the permit, notice and opportunity to be heard at a public hearing were afforded Respondent, and the Board duly considered all of the information available to it during the thirteen temporary extensions of the permit over the 20 months in which it considered the permit renewal application.

### **Relevant Statutory Authority**

The power to attach reasonable conditions to special use permits and enforce such conditions is granted to villages by Section 7-725-b(4) of the N.Y. Village Law (“[t]he authorized board shall have the authority to impose such reasonable conditions and restrictions as are directly related to and incidental to the proposed special use permit”). In addition, the Village’s authority with respect to special use permits is grounded in the grant to local municipalities of the police power in Section 10(1)(ii)(a)(12) of the N.Y. Municipal Home Rule Law (Villages may make laws regarding “government, protection, order, conduct, safety, health and well-being of persons or property”); the grant of powers to village boards in Section 4-412(1) of the Village Law (“the board of trustees of a village . . . may take all measures and do all acts, . . . , which shall be deemed expedient or desirable for the good government of the village, its management and business, the protection of its property, the safety, health, comfort, and general welfare of its inhabitants”); the grant of zoning power generally in N.Y. Village Law Section 7-700 (“[f]or the purpose of promoting the health, safety, morals, or the general welfare of the community, the board of trustees of a village is hereby empowered, by local law, to regulate and restrict the . . . use of buildings, structures and land for trade, [and] industry”); the specification of the legitimate purposes of zoning in N.Y. Village Law Section 7-704 (“[zoning] regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to

secure safety from fire ... and other dangers; to promote health and the general welfare”); and the intent of the legislature stated in Section 8-0103(6) of the N.Y. Environmental Conservation Law (“to the fullest extent possible the policies, statutes, regulations, and ordinances of the state and its political subdivisions should be interpreted and administered in accordance with” the need to maintain a high quality environment).

## **ARGUMENT**

### **I. THE VILLAGE BOARD’S DECISION WAS ENTITLED TO GREAT DEFERENCE**

#### **A. The Appellate Division Applied the Correct Standard in Upholding the Findings That Metro Enviro’s Permit Violations Endangered Public Health and the Environment**

The Appellate Division held, “Where substantial evidence exists, a court may not substitute its own judgment for that of the board, even if such a contrary determination is itself supported by the record’ (*Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead*, 98 NY2d 190, 196).” A. 4713. Applying this standard and further citing *Retail Property Trust*, the Appellate Division found that “the Supreme Court erroneously substituted its own judgment for that of the Village . . . .” *Id.* The Appellate Division thus faithfully followed the directions of this Court.

When 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 Property*

*Trust; 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 Village of Pleasantville*, 98 N.Y.2d 683, 746 N.Y.S.2d 440 (2002). Each of these decisions reversed a ruling of the Appellate Division, Second Department that had granted an Article 78 petition challenging a zoning denial. In *Retail Property Trust*, the Court of Appeals overturned a Second Department decision that misapplied the “substantial evidence” test by improperly substituting its own judgment for that of the Zoning Board of Appeals. 98 N.Y.2d at 196. There, the Appellate Division had reversed the lower court decision in favor of the Zoning Board of Appeals’ denial of a special exception for a shopping mall expansion, finding that expert opinions supporting the board’s decision lacked empirical data sufficient to rebut the applicant’s traffic and air quality analyses, and that the board was influenced by strong community opposition. *Id.* at 195.

The Court of Appeals held that the Appellate Department erred in disregarding the decision of the Zoning Board of Appeals where substantial evidence supporting the decision existed.

As with board determinations on variances, a reviewing court [on a special exception] is bound to examine only whether substantial evidence supports the determination of the board. *Where substantial evidence exists, a court may not substitute its own judgment for that of the board, even if such a contrary determination is itself supported by the record.* In this case, it appears that the Appellate Division substituted its own

judgment for the contrary but equally reasonable determination of the Board of Zoning Appeals. *That action was an incursion on the discretion of the Board and cannot be justified where substantial evidence in the record supports the Board's determination.*

98 N.Y.2d at 196 (emphasis added).<sup>9</sup> See also *P.M.S. Assets, Ltd. v. Zoning Bd. of Appeals of Village of Pleasantville*, 98 N.Y.2d 683, 685, 746 N.Y.S.2d 440, 441 (2002) (“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, even if the reviewing court would have reached a different result”).

Where community opposition is apparent on the record, the reviewing court must still evaluate whether the local board acted rationally based upon substantial evidence. Thus, the existence of community opposition does not negate the effect of other substantial evidence supporting the decision.

*Although there was strong community opposition to the proposed expansion, that fact merely provides the backdrop for the dispute; it does not define the quality of the evidence presented.*

Through the reports of objectors' traffic and air quality experts, the opposition presented valid scientific bases for rejecting the expansion plan, which the Board in its discretion was authorized to

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<sup>9</sup> In a commentary about Justice Nicolai's decision herein, Professor Sterk discussed *Retail Property Trust* and said, “Despite the lack of concrete proof of harm, the [*Retail Property Trust*] court deferred to the board's conclusion, concluding that the board's determination had been supported by substantial evidence.” Turning to the instant case, he stated, “It is not clear whether Metro Enviro Transfer is consistent with the new deferential approach articulated in *Retail Property Trust*.” *Denial of Special Use Permit Renewal*, N.Y. Real Estate L. Rep., Vol. XVII, No. 6, 3 (April 2003).

credit. *The evidence in this case presented a close, fact-specific choice of the kind that local boards are uniquely suited to make.* Giving the Board of Zoning Appeals the deference to which it is entitled under such circumstances, we conclude that it acted rationally and with the support of substantial evidence in denying petitioner's application for a special exception permit.'

*Retail Property*, 98 N.Y.2d at 196 (emphasis added). *See also Ifrah v. Utschig*, 98 N.Y.2d at 308, 746 N.Y.S.2d at 669 (2002) (finding board's determination supported by "objective and largely undisputed factual evidence in the form of written and oral testimony ... corroborated by the documentary evidence supplied to the Board," in addition to generalized objections by neighbors).

Last year this Court reviewed an Appellate Division decision that affirmed the annulment of a town's decision to refuse to grant an area variance. *Pecoraro v. Bd. of Appeals of Town of Hempstead*, 2 N.Y.3d 608, 781 N.Y.S.2d 234 (2004). This Court stated that although no empirical data or expert testimony had been introduced before the Board to refute evidence by the applicant that the variance would not adversely affect the character of the neighborhood, the town board permissibly relied on evidence showing that a 200 foot radius around the property conformed to zoning requirements. 2 N.Y.3d at 612-14, 781 N.Y.S.2d at 236-37. This Court warned courts once more not to substitute their own judgments for those of municipal boards, as follows:

A reviewing court should refrain from substituting its own [judgment] for the reasoned judgment of the zoning board. ‘It matters not whether, in close cases, a court would have, or should have decided the matter differently. The judicial responsibility is to review zoning decisions but not, absent proof of arbitrary and unreasonable action, to make them.

2 N.Y.3d at 613, 781 N.Y.S.2d at 237 (citation omitted). This Court further noted that although generalized community opposition was present, this was not relevant where the Board reasonably weighed all the interests. 2 N.Y.3d at 613, 781 N.Y.S.2d at 237.

**B. Even Greater Deference is Due the Village’s Decision Not to Renew the Special Permit**

New York law is even more deferential to the decisions of administrative bodies regarding sanctions than it is to their factfinding. Under CPLR 7803(3), in an Article 78 proceeding a question may be raised about whether there was “abuse of discretion as to the measure or mode of penalty or discipline imposed.”

This Court has explained that, while findings of facts are reviewable under the substantial evidence standard, “where the finding of guilt is confirmed and punishment has been imposed, the test is whether such punishment is so disproportionate to the offense, in the light of all circumstances, as to be shocking to one’s sense of fairness.” *Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 233, 365 N.Y.S.2d 833, 841 (1974). The *Pell* Court went on to acknowledge that this test is somewhat subjective, and clarified

that a decision “is shocking to one's sense of fairness if the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct, incompetence, failure or turpitude of the individual, or to the harm or risk of harm to the agency or institution, or to the public generally visited or threatened by the derelictions of the individuals.” The *Pell* Court then noted that deterrence was also a valid consideration, and more serious penalties would be appropriate for intentional violations rather than pure carelessness. *Id.* at 234, 356 N.Y.S.2d at 842.

Using this standard the *Pell* Court, ruling on several cases heard together, found that a teacher who falsely certified on seven occasions that he was ill was reasonably dismissed because he violated his professional obligations; a police officer who shot his gun out of a window but did not hit anyone was reasonably dismissed because the Chief of Police must protect the community from reasonably foreseen dangers; and a building inspector who took a bribe was reasonably dismissed, because he was guilty of a breach of trust. *Id.* at 235-39.

Although *Pell* dealt with dismissals from public service, the court suggested the discussion was relevant to cases where administrative agencies imposed discipline on regulated entities. *Id.* at 241. Other courts have followed this lead. In *All-Weather Carting Corp. v. Town Bd. of the Town of Islip*, 137 Misc.2d 843, 522 N.Y.S.2d 425 (Sup. Co. Suffolk Co. 1987), the town revoked the solid waste disposal permit of a carting company that had

been convicted of illegally conspiring with town officials to deprive the town of revenue. The court quoted from one of the cases decided in the *Pell* decision as follows: “[t]he question is not whether [the court] might have imposed another or different penalty, but whether the agency charged with disciplinary responsibility reasonably acted within the scope of its powers.” *Chilson v. Bd. of Educ.*, 34 N.Y.2d 222, 238, 356 N.Y.S.2d 833, 845 (1974). Applying the *Pell* “shock to one’s sense of fairness” standard, the *All-Weather* court refused to overturn the revocation of the permit, despite the company’s five year unblemished record before the offense cited. *Id.* at 846-67, 522 N.Y.S.2d at 428.

More recently this Court reviewed a decision by a public housing authority to terminate a tenancy and once more applied the framework established by *Pell*. *Featherstone v. Franco*, 95 N.Y.2d 550, 720 N.Y.S.2d 93 (2000). This Court first noted that the housing authority had substantial evidence that the tenant’s son was violent and represented a potential danger to the safety of other residents in the housing project. 95 N.Y.2d at 555, 720 N.Y.S.2d at 96. It then applied the *Pell* “shock to one’s sense of fairness” standard to determine if the termination of the tenancy based on this factual finding was shockingly unfair and found that it was not. 95 N.Y.2d at 555, 720 N.Y.S.2d at 96-97.

As Metro Enviro now appears to concede, there is no need for a finding of actual harm to the public. The issues in these cases were of integrity and *risk* of harm. Regarding integrity, the *Pell* court found that

dismissal of a teacher was appropriate when he had made false certifications, without any additional evidence that this caused a risk to his pupils. In addition, the dismissal of a building inspector who had accepted a bribe was appropriate. Similarly, the court in *All Weather Carting*, following *Pell*, found that a five year unblemished operating record was insufficient to deprive a town of the discretion to close a waste hauling business when the business operator illegally conspired with town officials.

Regarding *risk* of harm, the *Pell* court found that the dismissal of the police officer who shot his gun without apparently harming anyone was justified by the need to *prevent reasonably foreseeable dangers*. There was no need in that case for any evidence of danger in addition to the violation itself in order to dismiss the officer from the force. Lastly, *Featherstone* allowed the termination of a tenancy, based on a factual finding of a *risk* of danger to other residents.

Here, the Village Board has already made undisputed factual findings that Metro Enviro violated its permit on numerous occasions and falsified records. The only factual dispute concerns the risk of harm to the public or the environment. Thus, it is this issue, and this issue alone, that should be reviewed under the substantial evidence standard. Carrying out such a review, the Appellate Division found that the Board had substantial evidence that the violations caused a threat of harm to the community and the environment. A. 4713.

Following *Pell* and *Featherstone*, the Board's decision not to renew Metro Enviro's permit because of the violations should be reviewed under the even more deferential "shock to one's sense of fairness" standard. Because Metro Enviro deliberately disregarded permit conditions designed to prevent reasonably foreseeable dangers on numerous occasions *and* intentionally falsified records, it appears to fall into both of the identified classes that allow severe sanctions to be imposed. Therefore, it does not "shock one's sense of fairness" that the Village Board refused to renew its permit.

Metro Enviro continues its habit of disregarding inconvenient facts by not even mentioning the *Pell* standard in its Brief. Instead it cites a range of authorities on proportionality of punishment that relate primarily to punishment for criminal violations and constitutional challenges to such punishments. These authorities are largely inapposite because this case is about administrative sanctions and the Eighth Amendment does not apply. To the extent that they are relevant, the articles cited by Metro Enviro confirm that the goals of prevention of further offenses and deterrence are legitimate. For example, an article cited by Metro Enviro on proportionality of sentencing concludes "[h]abitual offenders, or recidivists, are not likely to succeed in such a [proportionality] challenge, unless all prior offenses are minor." Kathi A. Drew & R. K. Weaver, *Disproportionate Or Excessive Punishments: Is There A Method For Successful Constitutional Challenges?*, 2 Tex. Wesleyan L. Rev. 1, 42 (1995).

Metro Enviro's treatment of the DEC Record of Compliance Memorandum ("RoC Memo") is similarly incomplete. The RoC Memo states that "courts have recognized that the environmental compliance history is a relevant history regarding qualification for permitting." RoC Memo Section III.<sup>10</sup> DEC states that it has the discretion to deny a permit if either of the following have occurred:

i) violation of a permit condition that posed a significant potential threat to the environment or human health *or* is part of a pattern of noncompliance; or

ii) a permittee made materially false or inaccurate statements in conducting the permitted activity.

RoC Memo Section IV. Metro Enviro quotes the RoC Memo as stating that where a violator demonstrates rehabilitation, a permit may be issued.

However, a stream of violations was discovered in the two months before the Board's decision and the admission of the last violation came only three days before that decision. Thus, Metro Enviro failed to use its many extensions of the Permit to demonstrate rehabilitation. Instead it demonstrated a continued inability to comply and a continued tendency to make inaccurate statements. Under the RoC Memo, this conduct justifies non-renewal of the Permit.

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<sup>10</sup> Metro Enviro provided the RoC Memo in the Unreported Sources attached to its Brief.

Metro Enviro devotes several pages to an administrative decision, *In re Republic Env'tl. Sys. (N.Y.), Inc.*, 1993 WL 546499 (N.Y. Dep't Env'tl. Conserv.). App. Br. 72-74. However, that case involved an application for summary revocation of a permit *without* a hearing. The DEC Commissioner merely found that a hearing was required to determine some factual issues before such revocation could occur. *Id.* at \*2. Neither the administrative law judge nor the Commissioner found that such a revocation would have been inappropriate under the circumstances. Ultimately, it appears that the facility at issue in *Republic* shut down before the hearing took place.

In contrast to the procedural posture in *Republic*, here the Board held numerous hearings and closely examined the facts before reaching a final determination. Metro Enviro suggests that the Board should have balanced all the relevant factors in deciding whether to deny renewal of the permit. App. Br. 76. As is apparent from the Village's Statement of Findings, that is exactly what the Board did. Thus, there was no process failure here. Instead, the Board bent over backwards to provide a full and open decision process.

Furthermore, instead of discussing the relevant decisions of this Court, Metro Enviro quotes Cicero, ancient Rome's most famous defense attorney, as stating: "Let the punishment be equal with the offence." *De Legibus* (bk. III, 20). However, Cicero also said "It is the act of a bad man to deceive by falsehood," *Oratio Pro Murena* (XXX), and "The hope of

impunity is the greatest inducement to do wrong.” *Oratio Pro Animo Milone (XVI)*.

C. **The Trial Court Did Not Accord the Village Board the Deference to Which It Was Entitled**

In granting the Article 78 Petition here, Justice Nicolai wrote:

While the [Village and Village Board] maintain that the violations of the special use permit constitute sufficient and substantial evidence supporting the denial of the permit renewal, they failed to recognize that the violations have been cured, penalties have been assessed and paid, and [Metro Enviro] has implemented measures to assure ongoing permit compliance. Moreover, [the Village and Village Board] 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 [sic] facility. In fact, on February 7, 2003, the DEC – the state agency with regulatory control and jurisdiction over this solid waste management facility – renewed [Metro Enviro’s] permit for five years and increased the maximum capacity of waste that the transfer station may accept to an average of 1,000 tons per day. While the Village is not bound by the DEC renewal, the issuance of the DEC permit indicates to this Court 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.

Under the totality of circumstances present herein, the Court finds that the Board’s denial of the permit is not supported by substantial evidence. The determination by the Village Board has been impermissibly based, in part, upon generalized

opposition, which remains uncorroborated by any empirical data.

*Metro Enviro Transfer LLC v. Village of Croton-on-Hudson*, Index No. 03/1788 (Sup. Ct. Westchester Co. Feb. 19, 2003) at A. 8-9.

The trial court (i) applied the wrong test by insisting on evidence of adverse environmental impact from the permit violations; (ii) substituted its own judgment for that of the Village Board; and (iii) went beyond the record on which the Village Board's decision was based by considering action taken by DEC *after* the decision of the Village Board. As detailed below, in so doing, the court failed to evaluate whether the Village Board acted rationally and with the support of substantial evidence of permit violations in denying the special use permit renewal application. Rather, the trial court impermissibly reached its own conclusions regarding the transfer station and failed to afford the Village Board the deference to which it was entitled. The Appellate Division acted properly in reversing.

## **II. THE VILLAGE BOARD'S REFUSAL TO RENEW METRO ENVIRO'S EXPIRED PERMIT WAS RATIONAL AND BASED ON SUBSTANTIAL EVIDENCE**

### **A. The Record Contained Ample Evidence Showing Violations of Permit Rules Designed to Protect Public Health and Safety**

The Village Board based its denial of the permit renewal application on its consideration of the operating history of the transfer station, the record of permit violations, the presentations of Metro Enviro and its representatives, the opinions of experts, and the comments of the public. As

shown above, the record is replete with documentation of the numerous and repeated permit violations committed by Metro Enviro, including tonnage exceedances, falsified daily tonnage reports, receipt of unpermitted industrial and municipal waste, prohibited stockpiling of tires, and the failure to carry out required training of facility personnel that is designed to prevent permit violations. *See* Annotated Statement of Findings, A. 1106-13. Metro Enviro either admitted or failed to deny the facts underlying all of the permit violations noted in the Village Board's Statement of Findings.

The permit conditions limiting the materials the facility can accept are grounded in public health concerns. The record contains the SEQRA determination issued by the Village Planning Board in 1995 when it was considering an application by another entity to establish an operation similar to that later established by Metro Enviro. A. 2411-17. The limitations on materials are discussed under the heading "Public Health", and it is stated that "[a]ll employees will be trained in the identification and handling and removal of unauthorized materials which arrive on site. Likewise, all employees will be trained concerning safety, spill contingency and emergency evacuation." A. 2414. The Planning Board's resolution stated, "Due to the special and potentially hazardous nature of the operations proposed by the applicant, the applicant has consented to permit a representative of the Village on site ... to assure compliance with the conditions of this site plan approval and any DEC permit." A. 2415 at ¶17.

The record also contained the affidavit of Richard P. Brownell, Vice President of Malcolm Pirnie, Inc., an expert with over 20 years of experience in solid and hazardous waste projects who was retained by the Village Board to evaluate the record of violations at the Facility. The Village Board was entitled to consider and rely on the conclusions of Brownell, including the following:

- Because environmental regulations at the federal, state and local levels are developed with the express purpose of creating standards that are protective of human health and the environment, violations of such regulations and requirements have the potential to result in damage to health and the environment and must be dealt with seriously, particularly where they are repetitive. A. 1056-57.
- Permitting entities such as the Village Board have a responsibility when issuing or renewing permits to minimize the likelihood of impact to the environment and public, including by reviewing the facility's compliance history as an indicator of the permittee's ability to comply with environmental regulations and permits and be a partner with the Village Board in fulfilling its obligations to the public and to overall environmental protection. A. 1057.
- Brownell disagreed with Metro Enviro's consultant's statements to the effect that the permit violations were not significant, concluding instead that "the known violations signify a facility that continually promises to improve but nonetheless persistently violates regulations that are designed to protect health and the environment." A. 1059.
- With regard to the industrial waste violations, Brownell concluded that Metro Enviro's "disregard for environmental regulation, permits and permit conditions of multiple facilities and the regulations of two states significantly weakens the credibility of Metro Enviro Transfer to be a partner with the permitting bodies in fulfilling its obligations," and that "the public was fortunate that, on the multiple occasions when Metro Enviro Transfer disregarded

permit conditions, there does not appear to have been any immediate impact ... Compliance with permit conditions is not an option that becomes applicable only after an adverse impact has occurred.” A. 1057-58.

- Similarly, the industrial waste violations “suggest[] that the facility personnel were not adequately trained to recognize and react to the potential dangers to themselves and the community associated with mishandling unauthorized waste. This lack of attention to training employees on the important matter of unauthorized wastes surely does not demonstrate any commitment to fulfilling its obligations to the permitting entity, to the public and to the protection of the environment.” A. 1058-59.

Unable to deny the violations, Metro Enviro argued to the trial court that the Village Board could not deny the permit renewal request without evidence of adverse environmental impact and in light of Metro Enviro’s efforts to remedy the violations. The trial court erred by largely adopting Metro Enviro’s argument. It disregarded the rational basis for the Village Board’s decision – the substantial evidence of repeated permit violations that posed a threat to public health and safety.

Even Metro Enviro’s own witness, Robert Barber, failed to support their point. Their brief suggests that Barber said there was no threat caused by the violations (e.g., App. Br. at 64, 68 n. 43) and that the Village’s expert Brownell did not contradict him (e.g., App. Br. at 52). In reality, both Barber and Brownell agree that there was no actual harm caused by the violations, but Brownell found that there was a risk of harm, A. 1056-9, whereas Barber just put in a conclusory statement in the last paragraph of his affidavit that the manner in which Metro Enviro operates poses no threat. A.

110. This latter statement is carefully worded to avoid commenting on whether the violations caused a risk of harm. The rest of his affidavit actually shows that there was such a risk.

In his introduction Barber states "the most significant operational characteristics of the facility that serve to protect the health, safety, and welfare of the community include: the segregation and prompt removal of unacceptable or unauthorized waste . . . , regular and comprehensive training with regard to the proper handling of waste . . ." A. 102. Thus the industrial waste and training violations relate directly to the operational characteristics that Barber thinks are the most significant in terms of health, safety, and welfare.

Barber then says that the risk from processing industrial waste was lower than if it had been hazardous waste or medical waste. A. 104. He further states that "MSW [municipal solid waste] is generally viewed as presenting less of a risk than industrial waste". *Id.* He therefore acknowledges that industrial waste presents more risk than MSW. Since MSW is also unacceptable waste under both the Special Permit, A. 249, and the DEC permit, A. 168, we may infer that MSW presents more risk than just construction and demolition debris. Therefore, Barber effectively acknowledges that processing industrial waste increased the risk of harm from the facility.

The Village Board 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 Brownell confirming the threat to public health and safety raised by the types of permit violations repeatedly committed by Metro Enviro. In addition, the Village Board was intimately aware of its own history in dealing with Metro Enviro and its predecessor operators at the Facility. Perhaps most telling was the change of heart expressed by Trustee Georgianna Grant, who had voted in favor of the special use permit for the Facility in 1998. After yet another revelation of permit violations by Metro Enviro at a Village Board meeting on September 9, 2002, she expressed the lack of trust caused by Metro Enviro's repeated violations.

It's no question that I have been an acceptor of Metro Enviro over the years. I made the vote three years ago to grant the first permit and I did it knowingly, however, over much community opposition. I did it because I felt it was the best thing to do for the Village of Croton. I felt they had a right to be there. Some people disagreed. I felt they had a right to be there and the least we could do was give Metro Enviro an opportunity to operate and become a good neighbor. I believed that it would be done....

Did it work out the way I hoped it would? The way I believed it would? No. Obviously there have been violations there. These last ones being the most serious.

[To Steinmetz]: The time has come for you to go back to your client and to tell your client for me, and they know my name because I have been down there 40 or 50 times, that my trust has been betrayed and I resent that and I do not want that to

happen. They betrayed my trust. No amount of money, no fine could ever pay for the damage done by a betrayal of trust.

. . . I am sick and tired of having my trust betrayed. Corporate responsibility falls over onto Allied as well.

I was willing to take the first excuse that it was a rogue employee who had fudged the numbers for the tonnage. I was willing to take the second excuse that you didn't know you were not supposed to take tires. I am not willing to take this third excuse [regarding the industrial waste violations]. The damage has been done, and I think it will be clear to you and you will understand why the questions have been so pointed tonight, why we will insist upon proof positive, no longer your word.

A. 2014-16.

**B. Permit Renewals May Be Denied For Permit Violations**

The trial court erred in annulling the Village Board's decision, which was based on substantial evidence of permit violations, by failing to distinguish between the criteria governing the granting versus the renewal of a special use permit. Once a special use permit is granted, a permitting authority such as the Village Board is entitled to expect compliance with the permit conditions, and to exercise its enforcement power – including the right to deny permit renewal. Indeed, numerous courts have recognized that permit renewals may be denied as a result of permit violations. *See Bell v. Szmigel*, 171 A.D.2d 1032, 1033, 569 N.Y.S.2d 36, 37 (4<sup>th</sup> Dep't 1991) (zoning board was justified in denying an application for a renewal of a

special use permit because of violations of the conditions imposed on temporary permit); *Village of Hudson Falls v. DEC*, 158 A.D.2d 24, 29, 557 N.Y.S.2d 702, 705 (3d Dep't 1990), *aff'd*, 77 N.Y.2d 983, 571 N.Y.S.2d 908 (1991) ("In the absence of a material change in conditions *or a violation of the terms of a permit*, a renewal should be granted without undue burdens imposed upon the applicant" (emphasis added)); *Atlantic Cement Co., Inc. v. Williams*, 129 A.D.2d 84, 88, 516 N.Y.S.2d 523 (3d Dep't 1987) ("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.") (emphasis added). Noncompliance is also a valid basis for refusing to renew a consent order under which a solid waste transfer station has been operating. *Eastern Transfer of New York Inc. v. Cahill*, 268 A.D.2d 131, 136, 707 N.Y.S.2d 521, 525 (3d Dep't 2000). Similarly, permit revocation decisions may be based on permit noncompliance. *See e.g. Aprile v. LoGrande*, 89 A.D.2d 563, 565-66, 452 N.Y.S.2d 104, 107 (2d Dep't 1982), *aff'd*, 59 N.Y.2d 886, 466 N.Y.S.2d 316 (1983); *Persico v. Incorporated Village of Mineola*, Index No. 33781/96 (Sup. Ct. Nassau Co. June 10, 1998) (A. 1133-43), *aff'd*, 261 A.D.2d 407, 687 N.Y.S.2d 291 (2d Dep't 1999) (upholding revocation of a special use permit where permittee found to have violated permit conditions). Courts have specifically upheld the closure of solid waste facilities based on violations. *All Weather Carting Corp. v. Town Board of the Town of Islip*, 137 Misc.2d 843, 522 N.Y.S.2d 425 (Sup. Ct. Suffolk Co. 1987) (upholding

decision by town to revoke solid waste removal and disposal permit upon receipt of information about permit holder's criminal activity); *B. Manzo & Son, Inc. v. DEC*, 285 A.D.2d 504, 505, 727 N.Y.S.2d 173, 174 (2d Dep't 2001) (upholding closure of transfer station in light of violations of conditions of consent order).

The key permit violations (accepting tonnage in excess of the permit's maximum, accepting prohibited industrial waste, and accepting and storing waste tires) share four common characteristics, as shown by the foregoing Statement of Facts:

1. They were not isolated incidents. Each of the three types of violations occurred repeatedly and over an extended period of time.
2. They were not mere technical, minor violations. They went to the heart of the permit conditions, which were designed to minimize the impacts and risks that the Facility causes to its community.
3. They were not accidents. They were all deliberate, knowing acts.
4. They were not the actions of low-level employees who might not be expected to be aware of the permit conditions. They were all directed or authorized by the facility manager or his superior.

Overlain on all of this is a persistent failure to carry out the training that should have prevented these violations from occurring. In the face of such a record, surely the Village was not powerless to exercise its judgment in refusing to renew the permit; and once Metro Enviro received its special

permit, it did not acquire an irrevocable right to violate that permit into perpetuity.

Despite the long list of serious permit violations in this case, Metro Enviro has attempted to set up a straw man -- that the Appellate Division decision would allow a municipality to revoke a permit based on a single violation, even a trivial one. App. Br. pp. 53, 56, 56 n. 36, and 58 n. 37. This proposition is not at issue in this case, because Metro Enviro has such an intensive history of violations. Even if there were only one violation, however, the proposition would be incorrect. It is within the discretion of a municipal board to decide whether the violation history is so serious as to justify a closure order. The exercise of that discretion is subject to review under the “shock to one’s conscience” standard. Thus if there were but one violation, it would initially be up to the board to determine what sanction would be appropriate.

C. **The Permit Conditions Were Rational, Were Written After Much Deliberation, Were Supported by Experts, and Were Consented to By Metro Enviro**

It is far too late in the day for Metro Enviro to complain that the conditions contained in the 1998 Permit are too onerous. The statute of limitations on any such a claim has long since expired. The permit conditions (including the one saying the Facility can be shut after any noncompliance) were prepared after an extensive process of study and

analysis, and were heavily negotiated with Metro Enviro's predecessor, which consented to them.

Before the Special Permit for the Metro Enviro facility was issued in 1998, there were at least two comprehensive reviews of potential environmental effects by experts, as well as close scrutiny by a citizens committee that was itself expert. As far back as 1995, the Village Planning Board asked an expert from Roy F. Weston Inc., a well-known engineering firm, to review the potential environmental impacts of a proposed construction waste transfer facility at the site in issue. A. 2402-10. In 1998, Allee King Rosen & Fleming Inc. ("AKRF"), a leading environmental consulting firm, completed a report for the Village Board on the application for the Special Permit that is at issue in this case. A. 229-48. In addition, the Special Permit application was scrutinized by a citizens committee which was actively involved in developing and recommending appropriate permit conditions. A. 4524-28. Several members of the citizens committee had expertise that was relevant to the application.<sup>11</sup> In addition, the committee had frequent meetings with AKRF. A. 1671.

The first expert to report on the potential impacts of a construction waste transfer operation at the Metro Enviro site, John C. Ryan of Roy F. Weston Inc., stated that "during a site visit with the Board, the issue of

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<sup>11</sup> The chair was an environmental lawyer, one member was a former project manager for the EPA, one was a real estate appraiser, two were former Planning Board members, and one was an ex-trustee. A. 1670.

potential impacts offsite from processing of unacceptable waste . . . was brought up” and that “there is good reason to take every measure to prevent these materials from coming onsite.” A. 2409-10 (emphasis in original). He identified the most important deficiency of the permit application at that time as lack of an Operations and Maintenance Manual (“O&M Manual”) “dealing with requirements for staff training and specifically with the identification and handling of unacceptable waste.” A. 2408. He also discussed other potential impacts such as traffic, air quality, noise and odor.

The report prepared by AKRF referred back to Ryan’s concern about “public health (including issue of handling contaminated waste).” A. 240. Under the heading “Public Health,” AKRF reported that the O&M Manual’s limits on acceptable waste and the requirements for training of employees to identify unacceptable waste had been greatly expanded based on comments from the citizens committee. A. 247. The report also dealt with traffic, community character, odor, and air quality.

The report of the citizens committee recommended a capacity limit, changes to the O&M Manual (which were partially about exclusion of unacceptable waste and training to recognize such waste) and a requirement that “in the event of significant non-compliance, the Village shall be entitled to assess monetary penalties, and to order cessation of operations in the event of repeated violations.” A. 4527.

Lastly, the Planning Board’s resolution stated, “Due to the special and potentially hazardous nature of the operations proposed by the applicant, the

applicant has consented to permit a representative of the Village on site ... to assure compliance with the conditions of this site plan approval and any DEC permit.” A. 2416 at ¶17.

Thus, careful analysis led to development of detailed permit conditions that were based on rational and permissible considerations of health, safety and welfare. More recently, the Board had before it the affidavit of Richard S. Brownell, P.E., of Malcolm Pirnie, Inc. who confirmed that the conditions in the DEC permit, which were also incorporated into the Special Permit, were designed to protect health and the environment. A. 1056. In all, the Board had four expert organizations – Roy F. Weston, AKRF, Malcolm Pirnie and the citizens committee – all agreeing that the permit conditions were necessary to protect health and the environment. A board is entitled to rely on the testimony of competent experts, even if experts for other government agencies disagree. *Albany-Greene 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); *see also, Toys "r" Us v Silva*, 89 N.Y.2d 411, 424, 654 N.Y.S.2d 100, 107 (1996), *quoting, Stork Rest. v. Boland*, 282 N.Y. 256, 267 (1940) (“[T]he duty of weighing the evidence and making the choice rests solely upon the [administrative agency]. The courts may not weigh the evidence or reject the choice made by [such agency] where the evidence is conflicting and room for choice exists.”).

The permit was heavily negotiated, with Metro Enviro L.L.C., the predecessor to Metro Enviro, promising improved compliance in return for a change of use. Before the Special Permit was issued, Metro Enviro L.L.C. embraced its terms and understood that violation of its conditions would lead to closure. No challenge to the validity of the permit conditions was ever mounted; to the contrary, the applicant promised to abide by the conditions or be shut down. Metro Enviro accepted these conditions when it purchased the facility.

The Facility's operators had for years acknowledged that violations of its Special Permit could lead to a shutdown. According to the minutes of the Village Board hearing on May 4, 1998, during his presentation urging the Board to grant the permit, Michael Zarin, Esq., counsel to Metro Enviro L.L.C., stated "if they [Metro Enviro L.L.C.] do not comply with their permit, they will be closed. There are no ifs, ands or buts" and "[t]here is no comparison between this site and the Karta facility. If they look like Karta, they will be shut down immediately." (The reference was to the Karta C&DD disposal facility in Peekskill.) *See* A. 1681-82. The Board granted the permit shortly after hearing this reassurance from Zarin, a partner in the law firm (Zarin & Steinmetz) that represented Metro Enviro L.L.C. and, subsequently, Metro Enviro in the proceedings before the Village Board, and is now representing them before the Court of Appeals. The consequences of violations were confirmed in the Village Manager's letter transmitting the Special Permit to Zarin, in which he wrote, "All of the various conditions

must be followed very carefully, as a failure to observe each and every condition is grounds for a stop work order and revocation of this permit.” Letter from Richard Herbek to Michael Zarin, Esq. of May 15, 1998 (attaching the Special Permit), A. 1182; *see also* May 4, 1998 Minutes, A. 1681-82. A similar statement that violations would lead to the shutdown of the Facility is contained in Section 5.3 of the O&M Manual. A. 1242.

Thus, the Village bargained for a responsible operator that complies with permit conditions that were expressly designed to protect public health and the environment. The Village did not get what it bargained for; it got an irresponsible operator who repeatedly and intentionally violated the terms of its Permit, and misled the Board to cover up or minimize these violations. The Board is now merely trying to enforce the terms of its agreement with Metro Enviro. In contrast, Metro Enviro is now trying to go back on a critical assurance upon which the Board relied – that the Facility would have to close in the event of significant non-compliance or repeated violations.

**D. Repeated Concealment and Deception Are An Independent Basis for Denying Permit Renewal**

Wholly apart from the permit violations, Metro Enviro’s repeated concealment of material information from the Village Board, its deceptions, and its dissembling provided ample basis for refusal to renew the special permit.

The integrity of a government regulatory scheme depends on honesty and candor by the regulated; that is one reason why it is a crime under both

federal and state law to lie to the government. *E.g.*, 18 U.S.C. § 1001; N.Y. Penal L. § 175.35. Similarly, courts routinely affirm the dismissal of public employees who display dishonesty. *See Kelly v. Safir*, 96 N.Y.2d 32, 39, 724 N.Y.S.2d 680, 684 (2001) (police commissioner had the power to dismiss police officer who sold false certificates); *Pell*, 34 N.Y.2d at 235, 356 N.Y.S.2d at 843 (teacher who lied about absences could be dismissed).

Metro Enviro created false records, repeatedly provided misleading assurances and incomplete information to the Village Board, and has been less than candid in its brief to this Court. Most surprisingly, its brief fails to mention (except in a cryptic footnote on page 29) that Metro Enviro officials deliberately created false records to conceal Metro Enviro's Permit violations from Village inspectors (*supra* at 2, 8). This admitted conduct was one of the most serious issues before the Board and cannot be ignored.

Metro Enviro's brief also makes use of a highly selective quotation from a report by the federal monitor, Mack, even though the report was not available to the Board when the challenged decision was made. Metro Enviro uses this quotation to imply that Mack did not find any major problems at the Facility. App. Br. at 53 n. 33. This is completely incorrect. Mack originally discovered the capacity violations, the falsification of the tonnage records, and the industrial waste violations, and made sure that Metro Enviro informed the Village. A. 1639-40. In December 2002, Mack revealed that he had found evidence of intent to violate environmental law by management-level employees. A. 1643. He also indicated that the only

reason that the industrial waste stopped going to Metro Enviro was that it gummed up the machines used at the site. *Id.* This was at variance with statements to the Board made by Metro Enviro’s counsel, who indicated (falsely, it turned out) that the waste was eventually rejected because a diligent employee repeatedly tried to prevent industrial waste being accepted. A. 1866-70. Indeed, Mack’s report on Metro Enviro states that “Allied was less than forthcoming in explaining” how the industrial waste violations occurred and incorrectly put the entire blame on Matt Hickey. A. 4835. Mack also stated that counsel for Metro Enviro made a “disingenuous statement” to the Board, when he stated that Charles Marino, Metro Enviro’s site manager at the time, had repeatedly insisted that the industrial waste stop coming into the Facility. A. 4836.

In the same report Mack also made the following observations:

- “I conclude that my ability to oversee and to attempt ensuring [sic] good compliance with federal, state and local law was undermined by Allied’s unwillingness to share relevant information on a timely basis.” A. 4832.
- “[T]here are several categories of records, required by DEC regulation to be maintained at the site, that are either incomplete or missing entirely.” *Id.*
- “I also think that my investigation and this resulting report demonstrate that judgment, honesty and ethics were in short supply

in the period following Allied's acquisition of Metro Enviro."

A. 4839.

- "Beginning with its due diligence of the Metro Enviro acquisition . . . Allied's management's bottom-line orientation got in the way of legal, regulatory, and ethical concerns and . . . there were a series of violations of the law." A. 4840.

Metro Enviro's quotation is actually extracted from a later report on Valley Carting (another Allied subsidiary and the employer of Matt Hickey), dated January 13, 2004, just two weeks before the Board's decision. In the same paragraph from which Metro Enviro drew its quotation, Mack stated "it pains me to report that although Allied's management of Valley Carting improved to some degree over the course of my monitorship, on the whole the Company evidenced indifference to the need to operate this facility in conformity with . . . regulatory requirements and basic ethical precepts until not long before the monitorship ended." A. 4881-82. Unsurprisingly, Metro Enviro did not provide either of these Mack Reports to the Board. It cannot now use selective quotations from Mack to support its position.

Metro Enviro's tendency to minimize and mislead is demonstrated by its current brief. For example, on page 33, footnote 22, Metro Enviro states that the employees responsible for the industrial waste violations were held over from the previous owner of the Facility. This is not correct. Metro Enviro accepted and processed four loads of industrial waste in 2002, the last on March 19, 2002, around two years after Metro Enviro took over the

facility. A. 3564. Metro Enviro was unable to identify who was responsible for directing the last four loads of industrial waste to the Facility. A. 587-90. To date, Metro Enviro has not supplied any further information on this issue.

To minimize the industrial waste issue, Metro Enviro suggests that “it is inevitable that small amounts of unacceptable waste will be received.” App. Br. at 61 n. 39. Metro fails to note that where unacceptable waste is received, it is supposed to be rejected. A. 327 (“the goal of the control program is to assure that only authorized waste will be accepted at the Facility”). In contrast, here Facility personnel knowingly received and processed industrial waste in violation of the Special Permit, and then falsely described it as C&D to dispose of it to a landfill in Ohio that was not authorized to accept it. Thus, the procedures that should have applied to any unacceptable waste that was received were deliberately disregarded.

Furthermore, on page 67 footnote 42 Metro Enviro seeks to suggest that the Village Manager’s view in January 17, 2001 about violations having been rectified somehow undercuts the decision of the Board made over two years later after numerous further violations had been admitted. What this communication actually shows is that initially the Village Manager took Metro Enviro’s assurances regarding future compliance at face value. Only after two further years in which these assurances proved valueless time and time again did the Village realize it must disregard such assurances.

In addition, on page 69 note 44, Metro Enviro seeks to suggest that closure of Metro Enviro would “severely impact” disposal of C&D waste in

Westchester County. Metro Enviro omits to mention that Brownell provided an affidavit stating that this is incorrect and that adequate capacity would be available even without Metro Enviro. A. 4954-55.<sup>12</sup> Moreover, none of the evidence regarding the effect of a shut down of the Facility was put to the Board before it made its decision.

Most importantly, despite a 25-page statement of facts, Metro Enviro's Brief omits any mention of the intentional falsification of the tonnage records (except for one cryptic footnote, App. Br. 29 n. 20), or the falsification of the shipment documents for the industrial waste, or the disposal of industrial waste to a landfill in Ohio that was only authorized to take C&D waste. A. 1107. Thus, even at this late stage, Metro Enviro appears not to recognize the full extent of the violations that the Board considered before deciding not to renew the Permit.

Taken as a whole the record shows that Metro Enviro was a serial intentional violator of the Permit and it repeatedly attempted to minimize the severity of the violations by providing incorrect or misleading assurances to the Board. In addition, Metro Enviro personnel deliberately falsified records on at least 67 occasions to cover up Permit violations. A. 1106-07; A. 1110. Board members repeatedly felt their trust was betrayed and eventually concluded that Metro Enviro's cavalier approach to Permit conditions, long record of violations, and dubious record of disclosure represented a potential

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<sup>12</sup> This affidavit is included in the Supplement to the Joint Appendix.

threat to health and the environment, which they could not allow to continue operating.

That Metro Enviro's credibility was an issue before the Board is shown by the statement of findings:

Metro Enviro Transfer has repeatedly offered words of assurance to this Board that, while the Facility did not comply in the past, it will comply in the future. Further violations have all too frequently negated the effect of those assurances. The Board has reached the point where it can no longer rely on the present assurances of Metro Enviro Transfer that things will improve in the future.

A. 1115-16. In addition, Trustees felt "betrayed" and "personally violated" on at least two separate occasions, and uncovered many mis-statements, half-truths or evasions made during consideration of the Permit renewal application. A. 1739; A. 2015-16. Thus, the Board could have no assurance Metro Enviro was being completely candid at the time of the decision, and subsequent events proved that in fact Metro Enviro chose not to supply certain relevant information, such as the Mack reports discussed above.

### **III. METRO ENVIRO'S APPEAL RELIES ON SEVERAL INVALID GROUNDS**

#### **A. It Is Not Necessary To Prove That Injury Has Already Occurred Before Taking Preventive Action**

The trial court based its holding in part on the assertion 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," A. 8. Metro Enviro initially made the same argument, but now, apparently recognizing its error, frames the questions presented in terms of threat to the public, rather than actual harm. App. Br. at 2. This change is not surprising because neither the trial court nor Metro Enviro cited any legal authority for the requirement that an adverse environmental condition be proven before a permit renewal application can be denied. Because it was not necessary for the Village Board to prove that injury has already occurred before taking preventative action, the trial court erred. This is especially so where Metro Enviro had a practice of failing to disclose its violations for long periods of time.

The standards for issuance of a special use permit no longer govern once the permit has been repeatedly violated. As seen above, proof of permit noncompliance is sufficient ground to deny a permit renewal. Neither the relevant case law, the governing statutes nor the Village Code contain the requirement that the Village Board prove actual environmental harm in order to deny the renewal application. Indeed, the imposition of such a requirement would eviscerate the very purpose of the permit conditions that were imposed consistent with Village Code Section 230-62 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. Brownell explained the importance of enforcing the permit conditions in the affidavit he prepared for the Village Board.

Enforcement of environmental regulations and associated permit conditions is the obligation of the permitting entities as stewards of the environment. In addition, enforcement serves the purpose of assuring the public that their health is being protected through adherence to environmental regulations and permit conditions. Effective enforcement would be crippled if government authorities could not act against facilities that violated their permits without proof of adverse environmental impact; if small to modest financial penalties (on the order of tens of thousands of dollars) were the only available remedy, then noncompliance could be seen as just another cost of doing business.

A. 1597.

It is not a defense to a driving under the influence charge or a speeding ticket that no accident occurred. These and many other kinds of laws aim at endangerment. They seek to prevent injury – they do not require the government to wait until injury has occurred or harm has been narrowly avoided before taking action. Further, where traffic rules are broken, no separate evidence is needed to show that the violations cause a risk of harm. DUI is not excused if the offense occurred late at night on a deserted road. Metro Enviro's entire defense is based on a similar fallacy. Metro Enviro asks for additional evidence of actual environmental damage or a threat of such damage, but the Village does not need to show any more than repeated violations of laws and permit conditions *designed* to protect against injury to health and the environment.

In any event, there is ample evidence that the violations at issue actually increased the risks to the community. The experts agree that processing industrial waste carries more risk to the environment than processing C&D. *See supra* at 40, 46-48. This is especially true when, as here, the industrial waste originates at a generator of hazardous waste. A. 1108-09. The experts also agreed that training workers to recognize unacceptable waste was an important safety requirement. *E.g.* A. 102; A. 323; A. 2408. In addition, it did not take an expert to recognize that processing full loads of flammable plastic film clippings heightened the risk of a major fire at the Facility, where two small fires had already been reported. The other violations similarly led to reductions in safety and thus to increased risk to public health and the environment.

Furthermore, numerous courts have recognized that solid waste facilities pose risks to health and the environment if not properly controlled. *E.g.*, *Wiggins v. Town of Somers*, 4 N.Y.2d 215, 173 N.Y.S.2d 579 (1958); *Town of Islip v. Zalak*, 165 A.D.2d 83, 566 N.Y.S.2d 306 (2d Dep't 1991); *Town of LaGrange v. Giovenetti Enterprises, Inc.*, 123 A.D.2d 688, 507 N.Y.S.2d 54 (2d Dep't 1986); *New York Coalition of Recycling Enterprises, Inc. v. City of New York*, 158 Misc.2d 1, 598 N.Y.S.2d 649 (Sup. Ct. N.Y. Co. 1992). Thus the Village's concerns about the risks caused by Metro Enviro's violations have a solid basis in law as well as in fact.

Moreover, courts have not imposed on municipalities in zoning enforcement contexts the requirement that a board must demonstrate actual

harm before enforcing zoning laws. *See e.g. 4M Holding Co. v. Town Bd. of the Town of Islip*, 185 A.D.2d 317, 586 N.Y.S.2d 286 (2d Dep’t 1992), *aff’d*, 81 N.Y.2d 1053, 601 N.Y.S.2d 458 (1993) (municipality can take action to remove danger to the public upon a reasonable finding that there is a danger to health and safety); *Town of Islip v. Clark*, 90 A.D.2d 500, 454 N.Y.S.2d 893 (2d Dep’t 1982) (no showing of special damage or injury to the public is required before a town can enforce its zoning ordinances); *State of New York v. Brookhaven Aggregates, Ltd.*, 121 A.D.2d 440, 503 N.Y.S.2d 413 (2d Dep’t 1986) (court ordered landfill to cease operations pursuant to ECL § 71-0301 without any showing of harm to the public); *Inc. Vill. of Freeport v. Jefferson Indoor Marina, Inc.*, 162 A.D.2d 434, 556 N.Y.S.2d 150 (2d Dep’t 1990) (under Village Law § 7-714, “damage to the public” need not be alleged for a municipality to obtain injunctive relief to enforce its zoning ordinances).

Had actual injury occurred, Metro Enviro might have been guilty of the crime of endangering public health, safety or the environment in the second degree under N.Y. Environmental Conservation Law § 71-2713.1,<sup>13</sup> which is a Class D felony. The Village did not accuse Metro Enviro of a felony, and it did not have to do so in order to exercise its powers to refuse to renew the special permit. Whether or not the Village “lucked out” and did

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<sup>13</sup> Under this provision, a person is guilty of this crime if he or she “knowingly engages in conduct which causes the release of a substance hazardous to the public health, safety or the environment and such release causes physical injury to any person who is not a participant in the crime.”

not suffer environmental damage from violations of conditions that were clearly designed to protect health, safety, and the environment is not, and cannot be, the test for whether it can take action.

**B. There Was No Assurance That All Violations Had Been Cured And Resolved**

The trial court erred in concluding that the Village Board “failed to recognize that the violations have been cured, penalties have been assessed and paid and [Metro Enviro] has implemented measures to assure ongoing permit compliance.” A. 8. To the contrary, a review of the factual record before the Village Board at the time that it denied the permit renewal application reveals that the Village Board took account of all of those factors but justifiably derived little comfort from them.

*First*, the permit violations spanned virtually the entire time period in which Metro Enviro has owned and operated the Facility. However, the violations were only disclosed well after they occurred – with the tonnage violations and the industrial waste violations discovered by the federal monitor, and the training violations uncovered by the Village Board’s special counsel. *See* Time Line for Metro Enviro and Graphic Representation thereof, A. 1117-22; Statement of Findings, A. 1102-16. At the time that the Village Board denied the Special Permit renewal, it had no assurances that Metro Enviro had a system in place to detect and report violations – other than the familiar representations heard all too often from Metro Enviro that it had hired new personnel to create a culture of

compliance. A. 1116. There was an established pattern that violations did not come to light for months or even years after they occurred.<sup>14</sup> The emergence of the unauthorized disposal violations three days before the final decision of the Board is further proof that the Board was rational in its skepticism that no other violations had occurred or would occur.

*Second*, the training violations found by the Village Board were not mere technical transgressions. The O&M Manual emphasized the importance of employee training as a means of ensuring Facility compliance with permit requirements. A. 323-24; A. 1094.<sup>15</sup> The training failures continued at least until December 2002, when the Village issued a notice of violation and Metro Enviro made belated offers to remedy what it argued was not a violation at all. *See*, A. 1120; A. 1128-29; A. 2546-47. Thus, even at that late date the Village Board could take little comfort that Metro Enviro appreciated the importance of permit compliance.

*Third*, in each instance where the Village issued a notice of violation to or imposed a penalty on Metro Enviro, such action was taken with a

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<sup>14</sup> The industrial waste violations began in June 2000 but were not fully disclosed until December 2002. A. 1122. The tire violations began in November 2001 but were not disclosed until June 2002. *Id.* The tonnage violations began in March 2000 but were not fully disclosed until February 2002. *Id.* The training violations occurred throughout the Facility's operation but some were not discovered until November 2002. *Id.*

<sup>15</sup> A court deciding on penalties for lack of training found a moderate potential for harm being caused by these violations. *Titan Wheel Corp. of Iowa v. U.S. Env'l Protection Agency*, 291 F.Supp.2d 899, 925 (S.D. Iowa 2003), *aff'd*, 2004 WL 2676434 (8th Cir.). The court explained that the violations produced a risk of harm in three ways: i) direct risk caused by untrained workers; ii) lack of training may lead to directly risky violations that could have been avoided; and iii) harm to the regulatory process. *Id.* at 925-28.

reservation of the Village Board's rights to take further action in accordance with the terms of the permit and the Village Code as the situation warranted. *See* A. 1123-29. There is no merit to the suggestion that the fact that penalties were paid would mean the end of the Village Board's enforcement reach; Metro Enviro did not buy the right to continue to violate its permit by paying fines.

Not only is Metro Enviro's quotation from the Mack report misleading (*see supra* at 51-53), it is also irrelevant, because the report only became available to the Board *after* the Board took its decision. Judicial review of decisions of administrative bodies must be "confined to the 'facts and record adduced before the agency'" at the time the decision was taken. *Featherstone v. Franco*, 95 N.Y.2d 550, 554, 720 N.Y.S.2d 93, 96 (2000), quoting, *Matter of Yarbough v. Franco*, 95 N.Y.2d 342, 347, 717 N.Y.S.2d 79 (2000). Thus, the *Featherstone* court refused to consider evidence submitted after the administrative determination was made. *Id.* The *Featherstone* decision also stated that certain cases to the contrary are not to be followed. 95 N.Y.2d at 555, 720 N.Y.S.2d at 93.

In direct contravention of this rule, Metro Enviro repeatedly suggests that it has operated without any problems since the Board's decision. App. Br. at 6, 31, 43, 44 n.26. No such assertion is possible because the record of decision closed with the Board's decision of January 27, 2003. It is entirely inappropriate for a number of reasons for Metro Enviro to say that it has operated without violations into 2005. Counsel are prepared to elaborate if

so requested during oral argument. In any event, events that may or may not have occurred since the Village Board made its decision on January 27, 2003 are irrelevant to whether that decision was supported by substantial evidence or was shockingly unfair.

C. **The Presence Of Generalized Public Opposition Does Not Invalidate A Decision Where Substantial Evidence Is Present**

The trial court based its decision in part on the presence of community opposition, without citing to any specific concerns in the record. “Under the totality of circumstances present herein, the Court finds that the Board’s denial of the permit is not supported by substantial evidence. The determination by the Village Board has been impermissibly based, in part, upon generalized opposition, which remains uncorroborated by any empirical data.” A. 9.

Community opposition was certainly present, but that does not invalidate the decision. The question is whether there was substantial evidence to support the decision. *See generally Retail Property*, 98 N.Y.2d at 196 (“Although there was strong community opposition to the proposed expansion, that fact merely provides the backdrop for the dispute; it does not define the quality of the evidence presented. ...[T]he opposition presented valid scientific bases for rejecting the expansion plan, which the Board in its discretion was authorized to credit. The evidence in this case presented a close, fact-specific choice of the kind that local boards are uniquely suited to

make.”); *see also Ifrah v. Utschig*, 98 N.Y.2d 304, 308, 746 N.Y.S.2d 667, 669 (2002) (finding board’s determination supported by “objective and largely undisputed factual evidence in the form of written and oral testimony ... corroborated by the documentary evidence supplied to the Board,” in addition to generalized objections by neighbors); *Dries v. Town Bd. of Town of Riverhead*, 305 A.D.2d 596, 759 N.Y.S.2d 367 (2d Dep’t 2003) (upholding town board’s denial of special exception permit where sufficient grounds appear in the record, in spite of presence of community opposition). The decision by the Village Board (as embodied in the Statement of Findings, A. 1102-16) was solidly grounded in the long stream of violations and the dangers they posed.

**D. DEC’s Decision, Made After The Challenged Village Board Action, Does Not Preempt That Action**

The trial court erred in basing its annulment of the Village Board’s decision in part on action taken by the DEC *after* the Village Board decision (and thus outside the record before the Board), and which in any event did not control the Village Board’s options with respect to the Facility. The law is clear that neither DEC action nor inaction constrains the Village Board’s authority over the Special Permit or relieves the Village Board of its obligations under the Village Code. The Village’s permit is independent of DEC’s, and the Village is entitled to determine the consequences of its permit holder’s massive noncompliance with the Village’s permit,

irrespective of DEC's determination under DEC's own separate permitting authority.

Certainly, DEC did not make – and lacks any authority to make – any fact determinations regarding Metro Enviro's compliance with the terms of the Special Permit. Accordingly, the Village Board's independent rational decision regarding renewal of the Special Permit based on the substantial evidence before it was not bound by the DEC action. To the contrary, as a result of its violations of DEC regulations, Metro Enviro entered into two Orders on Consent with DEC addressing the record falsification and certain of the tonnage exceedances, as well as the industrial waste shipments. The first Order on Consent, dated March 26, 2002, recites the following findings in the Whereas clause:

4. The Department Staff has determined ... that the Respondents [violated DEC regulations] ... by failing to take adequate measures to prevent and control dust at the facility during cold months, (i.e., during the period in which the sprinkler system cannot be used, from approximately mid-November through mid-April). ...

5. In addition, the Department Staff has determined by correspondence received from the Respondent Allied, that said Respondent Allied violated Special Condition #9 of the operating permit by accepting more than 4,200 tons of waste per week on five occasions in the year 2000.

6. In addition, the Department Staff has determined ... that the Respondents violated [DEC regulations] by failing to keep daily receipts on the facility premises, and ... by failing to maintain

facility records for all materials handled at the facility. Specifically, the Respondent Allied failed to maintain records, categorized by date, which would account for discrepancies in tonnage figures for incoming and outgoing wastes.

A. 1576-80. The second Order on Consent, dated December 19, 2002, acknowledged that the receipt of unauthorized industrial waste at three Allied-owned facilities – Metro Enviro in Croton-on-Hudson and the Suburban Carting transfer stations in Mount Kisco and Mamaroneck – and the failure to report the unauthorized wastes in the facilities’ annual reports violated the facilities’ DEC permits and DEC regulations. A. 1587-94. Both consent orders required Metro Enviro to undertake corrective action. A. 1084-85; A. 1088-89.

Moreover, DEC does not enjoy exclusive jurisdiction over the regulation of solid waste facilities, and its actions do not preempt the Village Board’s decision regarding the special use permit. To the contrary, N.Y. Environmental Conservation Law § 27-0711 is a non-preemption provision that explicitly says that local governments may regulate solid waste facilities more stringently than DEC. *See Niagara Recycling v. Town of Niagara*, 83 A.D.2d 316, 330, 443 N.Y.S.2d 939 (4<sup>th</sup> Dep’t 1981) (ECL § 27-0711 “expressly preserves the rights of local municipalities to adopt local laws pertaining to solid waste facilities not inconsistent with any provision in title 7 of Article 27”). In *Albany-Greene 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), the Third Department upheld a zoning board decision denying

a solid waste transfer station a special use permit where the decision was based on substantial evidence, and even though the solid waste transfer station had obtained a SEQRA negative declaration and a DEC permit. “Because local land use matters are within the exclusive responsibility of the Zoning Board . . . DEC’s negative declaration was in no way binding on the Zoning Board’s determination[.]” *Id.*, 263 A.D.2d at 646. “[W]hile the zoning board may consider DEC’s approval of petitioner’s proposed waste transfer station, it is not bound by it.” *Id.*

E. **There Is No Reason to Fundamentally Change New York Administrative Law and Create a New Standard of Review**

Never bashful, Metro Enviro suggests that “the quality and quantity of evidence sufficient to constitute ‘substantial evidence’ should be heightened where i) a special permit is at issue, ii) an existing facility where millions of dollars have been invested seeks to renew its permit, and iii) “the land use at issue is an unpopular, but unquestionably necessary, highly regulated environmental Facility.” App. Br. 54.

The attempt to customize a standard of review just for this case need not detain us for long. The New York law on judicial review of administrative decisions is not broken and does not need to be fixed. Many litigants would like special rules for themselves, but crafting one-off exceptions like this is not just a slippery slope – it is a vertical wall.

The essence of Metro Enviro’s plea for a new standard seems to be that where a facility owner has made a large investment in a highly regulated

facility that has received a special permit, the facility deserves some insulation from enforcement. There are at least three fatal flaws with this argument, aside from its lack of any precedent:

- 1) Its focus on the owner's investment smacks of a regulatory takings claim. However, in the face of such claims, this Court has been very deferential to municipal actions taken after extensive fact-finding. *E.g., Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 94 N.Y.2d 96, 699 N.Y.S.2d 721 (1999), *cert. denied*, 529 U.S. 1094, 120 S. Ct. 1735 (2000).
- 2) The essence of a special permit is the permit conditions; the holder of the permit loses those protections when it violates the conditions.
- 3) Highly regulated facilities attain that status because they pose real risks; that hardly entitles them to special protections from administrative action.

Even if the Court were somehow to adopt Metro Enviro's proposed new standard, the Village Board's decision would be upheld. The record amply supports the Village Board's finding that knowing, deliberate and repeated violations of the permit conditions caused a threat to public health and the environment.

**CONCLUSION**

For the foregoing reasons, the Village respectfully requests that this Court affirm the decision of the Appellate Division, Second Department.

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Respectfully Submitted,

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