

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
VILLAGE OF CROTON-ON-HUDSON, NEW YORK,

Plaintiff,

Index No. 05-22176

- against -

Assigned Justice:
Hon. Francis A. Nicolai, J.S.C.

NORTHEAST INTERCHANGE RAILWAY, LLC,
and GREENTREE REALTY, LLC,

Defendants.

-----X

**MEMORANDUM OF LAW OF THE VILLAGE
OF CROTON-ON-HUDSON IN FURTHER SUPPORT
OF ITS APPLICATION FOR A PRELIMINARY INJUNCTION**

Statement of the Case

Use of the Property

The property that is the subject of this action is located at 1A Croton Point Avenue, Croton-on-Hudson, New York. As shown in the affidavits of Louis Milano, the son of one of the prior owners of the property, and Richard Herbek, the Village Manager since 1981, submitted along with this memorandum of law, the property was owned by the Milano family from the early 1960s until 1984. In the 1970s, the property was used principally as a construction yard for the Milanos' construction business, and also for repair of the trucks used in the Milanos' own business. The Milanos never used the site for waste disposal, waste transfer, a landfill, or any other type of waste handling.

As part of their construction business, the Milanos had a contract with Westchester County to provide clean sand for the Croton Point Landfill, which was located a little less than a mile from 1A Croton Point Avenue. They sometimes stored this clean sand at their site, along with rocks, stones and bricks used in their construction business. They would bring the sand to the landfill to cover the waste. Again, the property itself was never used as a landfill or for waste handling of any kind. (Milano Affidavit, Herbek Affidavit, ¶ 4)

Around 1978, shortly after the Milanos' contract with the County terminated, the family closed the construction business, sold their trucks, and began using the site as a repair facility for other companies' trucks. (Milano Affidavit, Herbek Affidavit, ¶ 4) In 1984, the Milanos sold the site to Robert Liguori, who, in the mid-1980s, sought to change the use of the property to a wood waste recycling facility. The Village required Liguori to apply for a nonconforming use special permit to change from one nonconforming use to another. (Herkbek Affidavit, Exhibit 5) Liguori received the special permit, which was regularly renewed through 1997. (Herkbek Affidavit, ¶ 5)

In 1997, Liguori sold the property to Greentree Realty. Greentree leased it to Metro Enviro, which requested renewal and transfer of the special permit, in order to operate a construction and demolition debris transfer station. The Village determined that the permit could not be transferred because Metro proposed to handle more than wood waste and required Metro to apply for nonconforming use special permit under § 230-53 of the Croton-on-Hudson Zoning Code. (Herkbek Affidavit, Exhibit 6) In 1998, Metro

Enviro received a special permit, which was to expire in three years. As the Court is aware, the Village determined not to renew the special permit on the grounds that Metro Enviro repeatedly violated substantial conditions of the special permit. Metro Enviro challenged the determination, and, ultimately, the Court of Appeals upheld the Village's right to terminate the special permit. Metro Enviro Transfer, LLC v. Village of Croton-on-Hudson, 5 N.Y.3d 236, 800 N.Y.S.2d 535 (2005).

Zoning of the Property

1A Croton Point Avenue is now located in the Village's Light Industry LI Zoning District. Until 1979, the district was known as the Manufacturing M District. As described in detail in Point II of this memorandum of law, waste transfer stations, landfills, and other solid waste facilities have not been a permitted use in the Village – either as-of-right or by special permit – since at least the 1979 amendments to the Zoning Code. Both Liguori's wood waste recycling facility and Metro Enviro's C&D debris transfer station were permitted at the site by virtue of nonconforming use special permits.

Summary of Litigation

In July 2005, after the Court of Appeals upheld the termination of Metro Enviro's special permit, Greentree Realty and Metro Enviro commenced a suit against the Village of Croton-on-Hudson, entitled Greentree Realty, LLC v. Village of Croton-on-Hudson, which sought, inter alia, a declaration that the use of 1A Croton Point Avenue for solid

waste management activities was a pre-existing legal nonconforming use, which could be continued indefinitely. In connection with that proceeding, Greentree and Metro sought a preliminary injunction, which this Court granted only to Greentree, to enjoin the Village from interfering with Greentree's right to lease or operate the property for solid waste purposes. In its decision on the preliminary injunction, the Court indicated that any new operator of a solid waste facility would have to apply to the Village for "required permits and/or approvals." Decision of Justice Nicolai, dated August 25, 2005, at page 4.

Some months later, after Northeast Interchange Railway, LLC ("NIR") had applied to the Westchester County Solid Waste Commission for a hauler's license and to the New York State Department of Environmental Conservation for a permit to operate a construction and demolition debris transfer station at 1A Croton Point Avenue, Andreas Gruson, the principal of NIR, telephoned the Village Manager and informed him that, according to Justice Nicolai's August 25, 2005 decision, NIR did not have to apply to the Village for a special permit or any other approval. Therefore, as soon as the Solid Waste Commission granted a license to NIR to operate at 1A Croton Point Avenue, the Village commenced an action against NIR for a temporary restraining order and preliminary injunction to prevent it from commencing waste transfer operations in the Village without obtaining a special permit or a use variance. Because NIR was not a party to Greentree's pending action against the Village, the Village commenced the instant action against NIR.

Argument

POINT I

IT CANNOT BE PRESUMED FOR PURPOSES OF
THIS ACTION THAT A CONSTRUCTION AND
DEMOLITION DEBRIS TRANSFER STATION IS A
PRE-EXISTING LEGAL NONCONFORMING USE.

There is no merit to defendants’¹ argument that a waste transfer station can resume operation at 1A Croton Point Avenue without any Village approval because “it must be presumed that the Facility is a pre-existing, legal nonconforming use.” Defendant Greentree’s Memorandum of Law in Opposition to Plaintiff’s Motion for a Preliminary Injunction and in Support of Its Cross-Motion to Dismiss Plaintiff’s Complaint (“Greentree’s Memo of Law”), at 11-12. Accord, Defendant Northeast Interchange Railway, LLC’s Memorandum of Law in Opposition to Plaintiff’s Motion for a Preliminary Injunction (“NIR’s Memo of Law”), at 3. Defendants try to establish this erroneous “presumption” by overstating the significance of this Court’s August 25, 2005 decision granting Greentree a preliminary injunction, and by manipulating the Village’s pleadings in the present action.

What the Court may have implicitly determined on August 25, 2005 was that

¹ Since both Greentree Realty and Northeast Interchange Railway have joined in each other’s arguments, this Memorandum of Law will treat their arguments as one.

Greentree demonstrated a *likelihood* of succeeding on the merits of its claim that a waste transfer station was a pre-existing legal nonconforming use. It was certainly not an express determination, or a “binding determination,” as defendants claim. NIR Memo of Law, at 3 and 11. The August 25, 2005 decision was a *preliminary* decision, and it is well settled that a decision on a preliminary injunction does not constitute an adjudication on the merits. In the words of the Court of Appeals, “the granting of a temporary injunction serves only to hold the matter in *statu quo* until opportunity is afforded to decide on the merits. The granting or refusal of a temporary injunction does not constitute the law of the case or an adjudication on the merits, and the issues must be tried to the same extent *as though no temporary injunction had been applied for.*” J.A. Preston Corp. v. Fabrication Enterprises, Inc., 68 N.Y.2d 397, 402, 509 N.Y.S.2d 520, 522 (1986) (emphasis added). Accord, Icy Splash Food & Beverage, Inc. v. Henckel, 14 A.D.3d 595, 789 N.Y.S. 2d 505 (2d Dep’t 2005).

This Court’s August 25, 2005 decision also indicated that a special permit was required before a waste transfer station could re-open on the site, a “presumption” defendants choose to ignore. It was that portion of the decision that the Village relied on in seeking the immediate relief it needed to prevent NIR from starting up operations without seeking any Village approval. The Village’s complaint in the instant action expressly did not concede the correctness of the preliminary determination that defendants were likely to succeed in their prior nonconforming use argument.

The reality is that the issue of whether a waste transfer station is a prior legal nonconforming use has not been decided by this Court. If the Court determines that this question can be resolved most efficiently by consolidating the two actions, the Village would encourage the consolidation.

POINT II

A WASTE TRANSFER STATION WAS NOT AN AS OF RIGHT USE AT 1A CROTON POINT AVENUE PRIOR TO THE 2001 ZONING AMENDMENT.

Defendants' entire argument that a construction and demolition debris transfer station may continue indefinitely as a prior nonconforming use is based on their contention that a waste transfer station was an as-of-right use in the LI Zoning District in 1998, when Metro Enviro commenced operations at the site, and that it did not become nonconforming until 2001, when the Zoning Code was amended. This argument is completely undercut by both the literal language of the Zoning Code in effect in 1998 and by the actions of both Metro Enviro and Robert Liguori, the previous owner of the site.

Zoning Code Language

The Zoning Code in effect in 1998 had been adopted in 1990², and the LI District

² The same Code is currently in effect, but has been amended over the years.

use category that defendants argue permitted a transfer station as-of-right was:

Light manufacturing, assembling, converting, altering, finishing, cleaning or any other processing *of products*. [§ 230-18B(2)]

The identical use was permitted in the previous Code, the 1979 Zoning Code. Herbek Affidavit, Exhibit 2, § 3.10.2.b.

The Village’s position is – as it has been ever since the 1979 Code was enacted – that the quoted use does not encompass construction and demolition debris or other waste transfer stations. Defendants’ focus on the word “processing,” in making their argument that a C&D facility fits within this use category, is misplaced. The focus must be on the word “products” and the word “light.”

Significantly, the Zoning Code provision in effect prior to the 1979 Code described the permitted use as follows:

Manufacturing, assembly, converting, altering, finishing, cleaning
any other processing or storage of products *or materials*
[§ 3.10.1.g]

Whether or not that use encompassed waste transfer stations is immaterial to this case.

What is significant is that the 1979 amendments dropped the language “or materials” and added the word “light.” Those changes preclude waste transfer stations.

The word “products” is defined in Webster’s New World Dictionary as “something produced by nature or made by human industry or art.” Contrast this to the definition of “materials,” *i.e.*, “what a thing is, or may be, made of; elements, parts, or constituents;

something that occupies space.” The word “product” connotes usefulness, compared to “materials,” which includes anything that takes up space. “Materials” could include waste; “products” does not. Defendants’ argument, that because the materials they disposed of were once “produced by nature or human industry or art,” they continue to be products after their disposal, is not persuasive. The products, once sent for disposal, became waste.

In the solid waste law context, the cases and regulations distinguish between “products” and “waste” and hold that products are not waste. See A&W Smelter and Refiners, Inc v. Clinton, 146 F.3d 1107, 1112 (9th Cir. 1998) (“Simply put, if the material at issue is ‘a useful product, then it [is] not waste and not subject to CERCLA.”); State of New York v. Solvent Chemical Co., 218 F. Supp. 2d 319 (W.D.N.Y. 2002) (“The parties sharply disagree as to whether the mixed dichlorobenzenes . . . constituted a commercially viable product, within accepted standards established in this industry, or whether the product constituted a waste stream. In CERCLA shorthand, this is described as the ‘product versus waste’ issue.”); United States v. American Cyanamid Co., 1997 U.S. Dist. LEXIS 4413 (S.D.W.Va. 1997) (determining “whether the substance had a productive use or was properly characterized as waste to be gotten rid of”).

The 1979 addition of the word “light” to the use category is a second indication that the permitted use did not include waste transfer facilities. The following two definitions of the term “light industry” from the American Planning Association’s

Glossary of Zoning, Development and Planning Terms demonstrate that C&D transfer

stations are not the type of use contemplated in a Light Industrial zoning district:

Research and development activities, the manufacturing, compounding, processing, packaging, storage, assembly, and/or treatment of finished or semi-finished products from previously prepared materials, which activities are conducted wholly within an enclosed building. Finished or semi-finished products may be temporarily stored outdoors pending shipment.

Enterprises engaged in the processing, manufacturing, compounding, assembly, packaging, treatment, or fabrication of materials and products, from processed or previously manufactured materials.

Light industry is capable of operation in such a manner as to control the external effects of the manufacturing process, such as smoke, noise, soot, dirt, vibration, odor, etc. A machine shop is included in this category. Also included is the manufacturing of apparel, electrical appliances, electronic equipment, camera and photographic equipment, ceramic products, cosmetics and toiletries, business machines, fish tanks and supplies, food, paper products (but not the manufacture of paper from pulpwood), musical instruments, medical appliances, tools or hardware, plastic products (but not the processing of raw materials), pharmaceuticals or optical goods, bicycles, any other product of a similar nature.

While a waste transfer station might have one or another of these elements, it is apparent that the use does not fit within these descriptions.

Liguori's and Metro Enviro's Nonconforming Use Special Permits

The Village's position that the "light ... processing of products" does not encompass waste transfer stations is confirmed by the Village's requiring Robert Liguori, in the mid-1980s, and Metro Enviro, about ten years later, to obtain nonconforming use special permits in order to operate waste processing facilities at 1A Croton Point Avenue.

In the mid-1980's, Robert Liguori (then the owner of 1A Croton Point Avenue) had a nonconforming use on the site and wanted to change it to a wood waste recycling facility, a different nonconforming use. The Croton-on-Hudson Zoning Board of Appeals determined that Liguori had to obtain a special permit, under § 7.1.1.2 of the Zoning Code (which permitted the change from one nonconforming use to another with a special permit). See Herbek Affidavit, Exhibit 5. On June 20, 1988, the Board of Trustees granted Liguori a nonconforming use special permit, which was regularly renewed until Liguori sold the property in 1997. See Herbek Affidavit, ¶ 5.

In 1997, when Greentree bought the site from Liguori and leased it to Metro Enviro, Metro requested renewal and transfer of the special permit. The Village determined that the special permit could not be renewed, however, because the special permit issued to Liguori permitted only wood waste, and Metro proposed to handle more than wood waste.

Metro applied to the Board of Trustees for a special permit, and on May 6, 1998, the Board of Trustees issued a special permit under § 230-53.A (the successor to § 7.1.1.2), to change from one nonconforming use to another. See Herbek Affidavit, Exhibit 6.

2001 Amendment

That the Village, in 2001, amidst the public outcry over the renewal of Metro Enviro's special permit, enacted a zoning amendment stating expressly that waste transfer and storage stations and landfills were prohibited throughout the Village does not undercut the fact that they were not a permitted use in the LI District since at least the 1979 Zoning Code. If the Village in 2006, for some reason, were to adopt an amendment to the Light Industrial LI District regulations stating "single-family dwellings are prohibited," that amendment would not mean that prior to 2006, single family dwellings were permitted in the LI District.

The Village had been consistent in its rulings, in 1986 and in 1997, that a transfer station, whether a wood waste recycling center or a construction and demolition debris transfer station, was not a conforming use and would be permitted only by a nonconforming use special permit. As stated in the Affidavit of Richard Herbek, the Village Manager, the Board of Trustees decided to amend the Zoning Code in 2001 to state expressly that transfer stations were a prohibited use, because both the Liguoris in 1986 and Metro Enviro in 1997 had argued – albeit unsuccessfully – that their transfer

stations were an as of right use in the LI District, and the Village wanted to make it “crystal clear” to any other potential applicant that such a use was not permitted in the Village. The Board also wanted to appease the residents of the Village, many of whom had raised a hue and cry over the extension of Metro Enviro’s special permit. It was, in essence, a “belt and suspenders” amendment. Herbek Affidavit, ¶ 6.

In short, a waste transfer station was not a permitted use in the LI District when Metro Enviro received its nonconforming use special permit in 1998.

POINT III

A WASTE TRANSFER STATION AT 1A CROTON POINT AVENUE WAS NOT A PREEXISTING LEGAL NONCONFORMING USE ENTITLED TO CONTINUE INDEFINITELY.

The only way another waste facility operator could take advantage of the Zoning Code’s protection of pre-existing legal nonconforming uses is if the waste processing use existed in 1979, when the zoning amendment disallowing it was enacted. The defendants cannot show that a waste transfer station existed at 1A Croton Point Avenue in 1979. Under both the 1979 Zoning Code and the 1990 Zoning Code, only uses lawfully existing on the effective date of the Code that renders the uses nonconforming may continue indefinitely. The language in the 1979 Code, which is virtually identical to that in the 1990 Code, is as follows:

§7.1 NON-CONFORMING BUILDINGS AND USES

Subject to the provisions of § 7.1.6, the following provisions shall apply to all buildings and uses *existing on the effective date of this local law*, which buildings and uses do not conform to the requirements set forth in this local law; to all buildings and uses that become non-conforming by reason of any subsequent amendment to this local law and the zoning map which is a part thereof; and to all conforming buildings housing non-conforming uses:

7.1.1 Any non-conforming use, except those non-conforming uses specified in § 7.1.5, be [sic] continued indefinitely, but:

* * * *

7.1.1.2 Shall not be changed to another non-conforming use without a special permit from the Village Board of Trustees, and then only to a use which, in the opinion of said Board, is of the same or a more restricted nature

Herbek Affidavit, Exhibit 2 (emphasis supplied).

There are two critical and independent reasons that defendants cannot take advantage of this provision permitting prior nonconforming uses to continue indefinitely.

The first, as discussed in Point II, is that a waste transfer station was not a lawful use under the 1979 Zoning Code nor the 1990 Zoning Code.

The second – even more compelling – reason is that in 1979, a waste processing facility was *not* operating at 1A Croton Point Avenue. The protection for nonconforming uses extends only to “a use that was legally in place at the time the municipality enacted legislation prohibiting the use.” Valatie v. Smith, 83 N.Y.2d 396, 399, 610 N.Y.S.2d 941, 942-43(1994). Despite defendants’ tortuous argument to the contrary, the only fair

reading of §§ 7.1 (and its current counterpart, § 230-53) is that only lawful uses that existed on the effective date of the new Zoning Code or subsequent amendments may continue indefinitely.

Defendants' argument that a nonconforming use that did not exist when the zoning law was enacted, but subsequently began operating (necessarily unlawfully), could be allowed to continue under § 230-53's protection of "uses that become nonconforming by reason of any subsequent amendments" (Greentree's Memo of Law, at 17-18) is preposterous.³ That language merely extends the protection of nonconforming uses to *conforming* uses that become nonconforming by a subsequent amendment.

Because a waste processing facility did not exist at 1A Croton Point Avenue when the 1979 Zoning Code was enacted, a waste processing facility is not entitled to be "continued indefinitely." As stated in the Affidavit of Louis Milano, whose father was one of the owners of the site and who visited the site on a daily basis, in 1979, 1A Croton Point Avenue was used by the Milanos only as a truck repair facility. It was used for truck repairs from the late 1970s, and the use continued until 1984, when it was sold to Robert Liguori.

Even prior to its use as a truck repair facility, the site had not been used as a waste

³ It is this misunderstanding of the statute that prompted Greentree to accuse the Village of "creative editing" of the statutory language, an unfounded accusation. The language the Village eliminated by the ellipsis was irrelevant.

transfer station. Beginning in the 1960s, when the Milano family bought it, the site was used as a construction yard for the family business. As stated in the Affidavit of Angelo Milano, submitted by Greentree Realty, rock, stone, bricks, and soil used in the family's construction business were kept there. Significantly, the family business was construction, not construction and demolition.

According to Louis Milano, sand was also kept at 1A Croton Point Avenue for the purpose of filling the Croton Point Landfill, which was also located on Croton Point Avenue. In the 1970s, the Milanos had a contract with Westchester County to provide clean sand as cover material for the Croton Point Landfill, which was located approximately a mile northwest of the Milanos' site. Herbek Affidavit, ¶ 4. (In some of the Village documents, the shorthand description of this use was the "landfill operation.")

The Milanos had used the property at 1A Croton Point Avenue all along to do the repair work on their own trucks. When their contract with the County ended, in approximately 1978, they went out of the construction business and started a truck repair business, doing work on other customers' trucks. Herbek Affidavit, ¶ 4.

Although defendants drafted Angelo Milano's Affidavit in sufficiently vague terms to offer it as support for their argument that 1A Croton Point Avenue was used as "a solid waste operation" (Greentree's Memo of Law, at 18), even a cursory reading of his affidavit makes it clear that defendants' characterization of the property as being used for "a solid waste operation . . . at least as far back as 1977" stretches the facts so much as to

grossly distort them. Rocks, soil, and sand that have been extracted from the ground and hauled for a useful purpose do not constitute waste. Angelo Milano's Affidavit does not indicate that *waste* of any kind was ever stored or transferred there during his family's ownership of the site. Louis Milano's Affidavit, which is entirely consistent with Angelo's, states expressly that a waste transfer station never operated at the site.

The Milanos' affidavits are also consistent with the records of the Village of Croton-on-Hudson. The minutes of the Croton-on-Hudson Zoning Board of Appeals meeting of February 9, 1977, report Milanos' lawyer appearing on their behalf for "the continuance of a non-conforming use to permit repair and services [sic] of motor vehicles." He explained that the trucks were being repaired "as an adjunct to the supplying of sand for the landfill project." He further explained that the Milanos' contract with the County was "virtually terminated" and that they wanted to use the property to service and repair, in addition to their own trucks, "other trucks which come to the landfill." Herbek Affidavit, Exhibit 4.

The "landfill operation" referred to in the ZBA minutes was the operation of providing *clean* sand to the Croton Point Landfill, which was located roughly a mile to the northwest of 1A Croton Point Avenue. Herbek Affidavit, ¶ 4. It was not a "solid waste operation" like a transfer station or a landfill. In any event, that operation ended in 1978 and was not an existing use in 1979, when the new Zoning Code was adopted. Furthermore, as Louis Milano states in his affidavit, the property was never used as a

waste transfer station.

Additional proof that “a solid waste operation” did not lawfully exist at the site “at least as far back as 1977” is that there was no DEC permit for the alleged solid waste operation. In 1973, New York State adopted Environmental Conservation Law § 27-0703, which required all waste operations to have a DEC permit effective December 1, 1973. This requirement applied even to preexisting solid waste facilities. Town of Junius v. Flacke, 53 N.Y.2d 616, 438 N.Y.S.2d 786 (1981). As shown in the permitting history of the site, prepared as part of the SEQRA review of Metro Enviro’s 1998 application for a special permit, the first DEC permit issued for the site was in 1992, for Liguori’s wood waste recycling facility. Herbek Affidavit, Exhibit 3, at 3.

In sum, as shown in Points II and III, the use of 1A Croton Point Avenue was not an as-of-right use when Metro began its construction and demolition debris operations in 1998, and it was not a lawful pre-existing nonconforming use entitled to continue indefinitely. Rather, it was a use that was allowed to operate at 1A Croton Point Avenue only by virtue of the nonconforming use special permit granted to Metro Enviro in 1998. The only issue remaining is whether the revocation of the special permit terminated the right of anyone to operate the nonconforming use, or whether another business that intends to conduct the same or a more restricted business can apply for a nonconforming use special permit.

POINT IV

BECAUSE METRO ENVIRO’S WASTE TRANSFER
STATION EXISTED ONLY BY VIRTUE OF A
NONCONFORMING USE SPECIAL PERMIT,
ONCE THE PERMIT WAS LOST, THE RIGHT TO
CONTINUE THE NONCONFORMING USE WAS
LOST.

In obtaining a special permit to change from one nonconforming use to another, presumably to a use of “a more restricted nature,” Metro Enviro submitted to making its use conditional upon compliance with the special permit conditions, as well as subject to its termination if the conditions were not met. The Zoning Code provides that renewal of a special permit “shall be withheld” if “[t]he terms and conditions of the original special permit have not been or are not being complied with.” Croton-on-Hudson Zoning Code § 230-56. When Metro Enviro – through its own actions – repeatedly violated substantial conditions of the special permit, the Board of Trustees “withheld” the special permit and the right to continue the nonconforming use. This termination of the special permit was upheld by the Court of Appeals in Metro Enviro Transfer, LLC v. Village of Croton-on-Hudson, 5 N.Y.3d 236, 800 N.Y.S.2d 535 (2005).

Because the nonconforming use special permit no longer exists, there is no longer any right to the use that a subsequent operator can succeed to. Metro Enviro’s special

permit expired and was not renewed. Therefore, the right to operate the nonconforming use expired as well.

It is well settled that statutory provisions relating to nonconforming uses are to be construed in favor of eliminating the nonconforming use. As the Court of Appeals stated in Rudolf Steiner Fellowship Foundation v. DeLuccia: ““The law . . . generally views nonconforming uses as detrimental to a zoning scheme, and the overriding public policy of zoning in New York State and elsewhere is aimed at their reasonable restriction and eventual elimination.”” 90 N.Y.2d 453, 458, 662 N.Y.S.2d 411, 413 (1997). Recently, the Court of Appeals affirmed that principle: “While nonconforming uses of property are tolerated, the overriding policy of zoning is aimed at their eventual elimination.” P.M.S. Assets, Ltd. v. Zoning Board of Appeals of the Village of Pleasantville, 98 N.Y.2d 683, 685, 746 N.Y.S.2d 440, 441 (2002). Accord, Albert v. Board of Standards and Appeals, 89 A.D.2d 960, 454 N.Y.S.2d 108, 110 (2d Dep’t 1982); Franmor Realty Corp. v. LeBoeuf, 201 Misc. 220, 224, 104 N.Y.S.2d 247, 251 (Sup. Ct. Nassau County 1951), citing 8 McQuillin on Municipal Corporations [3d ed.], § 25.189, affirmed, 279 A.D. 795, 109 N.Y.S.2d 525 (2d Dep’t 1952) (“[T]he policy of the law is the gradual elimination of nonconforming uses and, accordingly, ordinances should not be given an interpretation which would permit an indefinite continuation of the nonconforming use.”).

It would violate this well-settled rule of statutory construction to construe the Zoning Code’s provision for a nonconforming use special permit as allowing the special

permit to continue indefinitely. That would completely undermine the Village's control of – and right to eliminate – nonconforming uses. “Disallowing the perpetuation of nonconforming uses at an appropriate time and under reasonable regulatory circumstances comports with the law's grudging tolerance of them in the first instance.” Pelham Esplanade Inc. v. Board of Trustees of Village of Pelham Manor, 77 N.Y.2d 66, 71, 563 N.Y.S.2d 759, 761 (1990).

Unless revocation of the special permit terminates the non-conforming use, the Village could be burdened with an endless series of transfer stations on this site, each of which violates the conditions of the special permit, has its permit revoked, is replaced by another C&D facility that violates its special permit, has it revoked, and so on. It cost the Village four years of time and roughly \$700,000 to terminate Metro Enviro's special permit. To have to repeat this process indefinitely – even once more – would fly in the face of the policy of the law on nonconforming uses.

Since a transfer station existed at 1A Croton Point Avenue only by virtue of the nonconforming use special permit, once the permit terminated, the right to operate the use terminated. The termination of the nonconforming use special permit terminated the right *of anyone* to continue the nonconforming use. As the Court of Appeals stated in Pelham Esplanade Inc. v. Board of Trustees of Village of Pelham Manor, in refusing to allow a nonconforming apartment building destroyed by fire to be rebuilt, “The public interest preferring the elimination of nonconforming uses, having been postponed, ripens into

actuation.” 77 N.Y.2d at 70, 563 N.Y.S.2d at 761.

At least in this respect, the Village agrees with the constant refrain in both defendants’ memoranda of law that there is no authority in the Croton-on-Hudson Zoning Code for the *continuation* of a nonconforming use.

POINT V

IF THIS COURT WERE TO RULE THAT A C&D TRANSFER STATION COULD CONTINUE AS A NONCONFORMING USE, A NEW OPERATOR OF THE FACILITY WOULD HAVE TO OBTAIN A SPECIAL PERMIT FROM THE VILLAGE.

If the Court were to disagree with the Village’s position that the right to operate the nonconforming use terminated with Metro Enviro’s loss of the nonconforming use special permit, at a minimum, it must require any new operator of a waste transfer station to obtain a new nonconforming use special permit. As argued above, Metro Enviro’s right to operate a transfer station existed only by virtue of the nonconforming use special permit. The special permit expired in 2001 and was revoked in 2003, and the revocation was upheld by the Court of Appeals. A new operator cannot revive this defunct permit simply by moving in to the site without even applying for a permit. See Elwood Properties v. Bohrer, 216 A.D.2d 562, 564, 628 N.Y.S.2d 799, 801 (2d Dep’t 1995) (upholding the denial of a use variance that had expired, to a subsequent owner of the property, reasoning: “Since the prior use variance had expired, the petitioner was not

automatically entitled to a renewal thereof but, rather, had to demonstrate its own circumstances entitling it to a variance.”).

If this Court were to rule that another operator could merely succeed to Metro Enviro’s permit, it would be granting the new operator a greater right than Metro Enviro had; even Metro Enviro had to apply for a renewal of the special permit. Indisputably, the Village could require Metro Enviro to apply for a renewal of its special permit, and, in considering the renewal application, the Board could “make commonsense judgments in deciding whether [the] application should be granted.” Twin County Recycling Corp. v. Yevoli, 90 N.Y.2d 1000, 1002, 665 N.Y.S.2d 627, 628 (1997).

The renewal of the special permit would not be automatic. In a case closely analogous to the case at bar, the Second Department Appellate Division ruled that the Town of Islip’s Board of Appeals could refuse to renew a special permit when there were changed circumstances. The applicant had operated a transit mix plant by special permit at a certain location. The Islip zoning code permitted such plants only in undeveloped areas. The applicant first received the permit in 1961 for a five-year period, and it was renewed several times. In 1989, when the applicant applied for another extension of the special permit, it was denied, on the ground that the area was no longer undeveloped. 4900 Vets Corp. v. Scheyer, 198 A.D.2d 277, 603 N.Y.S.2d 544 (2d Dep’t 1993). If that renewal could be denied because of a change in the neighborhood, the Village must be permitted to consider changes in circumstances, including a change in the companies

running the waste transfer station operation.

In considering whether to renew a special permit, a board may consider the operating history of the applicant. For example, in Aprile v. LoGrande, the Court of Appeals upheld a town board's refusal to renew a special permit for a discotheque because of proof that, during the period of the initial special permit, music from within the disco could be heard by nearby residents, the premises had been used as a rock concert hall, and patrons of the discotheque had been involved in numerous incidents of criminal conduct, "thereby creating a hazard and nuisance as to the public in general." 59 N.Y.2d 886, 466 N.Y.S.2d 316 (1983), affirming 89 A.D.2d 563, 452 N.Y.S.2d 104 (2d Dep't 1982). The result should not be different merely because the troublesome operating history occurred at a different business run by the applicant.

If this Court were to rule that a subsequent operator does not have to apply for a special permit, it would be depriving the Village of its obligation to insure that any entity operating a waste facility in the Village is capable of doing so without harming the environment and/or the people of the Village. It is settled law that, in deciding whether or not to grant a special permit, a board of trustees (as opposed to a zoning board of appeals or planning board) may consider *any* factors relevant to the proposed use. "Where the legislative body that enacts an ordinance has reserved to itself the dispensing power to grant a permit for a particular purpose, it need not set forth in the ordinance any standards at all with respect to the issuance of such permit. . . . [T]he question of whether

it should issue a permit is left to its untrammelled discretion, so long as the discretion is not exercised capriciously.” Shell Oil Co. v. Farrington, 19 A.D.2d 555, 555, 241 N.Y.S.2d 152, 154 (2d Dep’t 1963). Accord, Snake Hill Corp. v. Town Board, 304 A.D.2d 670, 757 N.Y.S.2d 484 (2d Dep’t 2003).

Defendants are wrong in arguing that, in deciding whether to grant a special permit, the Board may not consider the particular applicant, because zoning regulates the use, not the user. NIR Memo of Law, at 8. The cases cited by NIR in making that argument are distinguishable in two important respects. First, they arose in the context of permitted uses, non nonconforming uses, and were governed by a different rule of construction. As discussed above, “While it is customary for a zoning ordinance to be strictly construed in favor of the property owner, there are countervailing considerations when the ordinance limits the extension of nonconforming uses, because such uses detract from the effectiveness of the comprehensive zoning plan. . . . Thus the judiciary does not hesitate to give effect to restrictions on nonconforming uses due to the strong policy favoring the eventual elimination of these uses.” Albert v. Board of Standards and Appeals, 89 A.D.2d at 960, 454 N.Y.S.2d at 110.

Because of that distinction, the Court of Appeals specifically held, in Valatie v. Smith, 83 N.Y.2d 396, 610 N.Y.S.2d 941 (1994), that the use-versus-user concern is not applicable when a nonconforming use is at issue. In Valatie, the Court considered the issue of whether a village could terminate the nonconforming use of a mobile home upon

the transfer of ownership of either the mobile home or the land on which it sat. The Supreme Court had ruled that the termination of the use was unconstitutional on the grounds that “the right to continue a nonconforming use runs with the land,” and the Appellate Division affirmed. 83 N.Y.2d at 399, 610 N.Y.S.2d at 943.

The Court of Appeals reversed and upheld the provision allowing for termination of the nonconforming use upon change in ownership. The Court recognized: “In light of the problems presented by continuing nonconforming uses, this Court has characterized the law’s allowance of such uses as a ‘grudging tolerance’, and we have recognized the right of municipalities to take reasonable measures to eliminate them.” 83 N.Y.2d at 400, 610 N.Y.S.2d at 943. The Court rejected the trailer owner’s argument – the same argument defendants make in the case at bar – that it is a “fundamental rule that zoning deals basically with land use and not with the person who owns or occupies it.” 83 N.Y.2d at 403, 610 N.Y.S.2d at 945. The Court reasoned: “Defendant misconstrues the nature of the prohibition against *ad hominem* zoning. The hallmark of cases like [the cases relied on by defendant] is that an identifiable individual is singled out for special treatment in land use regulation. No such individualized treatment is involved in the present case. All similarly situated owners are treated identically.” 83 N.Y.2d at 403, 610 N.Y.S.2d at 945.

NIR’s “use v. user” argument is also not persuasive because in each of the cases NIR relies on, the Court ruled that the ownership condition was “unrelated to the

purposes of zoning.” St. Onge v. Donovan, 71 N.Y.2d 507, 516, 527 N.Y.S.2d 721, 725 (1988). In none of the cases did the Court hold that a municipal board, in considering whether to grant an application, cannot consider the qualifications or operating history of an applicant, so long as those matters are related to the purposes of zoning.

Surely, if an applicant wanted to open a gas station in the Village, and that company had a history of fires or gas leaks at gas stations it operated elsewhere, the Village would be obligated to take that history into consideration in deciding whether to issue a special permit. Or, to use the Court’s example of a restaurant that changed hands, if the new applicants ran a restaurant in another Village which had been closed down for permitting loud, rowdy parties that resulted in crimes in the neighborhood, the Village should be able to take that experience into account in deciding whether to grant a special permit or what conditions to impose on the special permit.

In Holy Spirit Association for the Unification of World Christianity v. Rosenfeld, the Second Department Appellate Division upheld a Zoning Board of Appeals’ denial of a special permit on the grounds that the applicant made misrepresentations about the operation of its use that justified the board in concluding that “it would not comply with conditions imposed on its proposed use.” 91 A.D.2d 190, 201, 458 N.Y.S.2d 920, 928 (1983). Given the Village’s experience with the prior transfer station operator – which, in the words of the Court of Appeals, “repeatedly and intentionally violated conditions of the permit;” repeatedly offered the Village assurances that, although it did not comply in

the past, it would comply in the future; and repeatedly went on to defy those assurances – the Village would be irresponsible in not examining the operating history of any new company seeking to operate a waste transfer station in the Village, in order to ensure it would comply with conditions imposed on its proposed use.

The Village’s need to investigate NIR’s operational history is not merely theoretical. Over the last seven months, the Village has learned that several waste facilities in the Northeast owned and/or operated by NIR’s parent company, Regus Industries, LLC (“Regus”),⁴ have been the subject of governmental enforcement actions, or have been investigated, for violating federal, state, and local permitting requirements and conditions.

Regus operated the Warren Hills C&D Landfill in Ohio at the time the Ohio Attorney General commenced an action for a series of violations in operating the landfill.

This action resulted in a consent order between the State and Warren Hills, which continued to violate the consent order, causing the State of Ohio to commence a contempt proceeding. Additionally, while Regus was operating the Warren Hills Landfill, the federal Agency for Toxic Substances and Disease Registry warned of an “urgent public health hazard” posed by high concentrations of hydrogen sulfide at the landfill.

⁴ NIR is a wholly owned subsidiary of Regus, apparently created for the purpose of operating the proposed transfer station in Croton-on-Hudson.

Subsequently, the Emergency Response Branch of the United States Environmental Protection Agency determined that a substantial public health threat was posed by the site. Herbek Affidavit, Exhibits 7 and 8.

In addition, the Village learned from two officials in the Ohio Environmental Protection Agency that there was a “series of serious violations” by the Sunny Farms Landfill, another Regus operation. The Village reviewed hundreds of documents related to the site and uncovered a host of violations, including accepting unauthorized waste, inadequate and falsified record keeping, repeated leachate outbreaks, exceeding permit limits, and other substantive environmental violations. The documents also revealed that Andreas Gruson, the principal of NIR, had some involvement with the Sunny Farms operation. Herbek Affidavit, Exhibit 10.

Finally, residents of Brockton and Avon, Massachusetts, the site of another Regus C&D transfer station, Champion City, have contacted the Village about 750 violations of conditions the Town had imposed on the transfer station there, including violations of the hours of operation, rules requiring that trucks and train cars containing debris be covered, dust spreading beyond the site, and train cars leaking dirty fluids into the public water supply.⁵ Herbek Affidavit, Exhibits 9 and 11.

⁵ The Village submitted the information described above to the Westchester County Solid Waste Commission in its proceedings to grant a hauler’s license to NIR. The County issued the license nonetheless. Throughout the proceedings, it appeared that the Commission’s focus was on whether the applicant had a criminal history.

In light of the Village's well-documented problems with waste within its borders, see The New York Times, Westchester Section, April 9, 2006, at 5, it must be given the opportunity to conduct a thorough investigation into Regus's (or any applicant's) operation of waste facilities in other locations. Without requiring a new operator to submit its record for review by the Village, the Court could allow a company with an even worse compliance record than Metro to do business in the Village. Such a possibility would mean that the Village might have to spend another four years and almost three-quarters of a million dollars in litigation, if the new operator turned out to be problematic.

POINT VI

A PRELIMINARY INJUNCTION MUST BE ISSUED TO THE VILLAGE BECAUSE IT IS LIKELY TO SUCCEED ON THE MERITS OF THIS ACTION AND BECAUSE THE EQUITIES WEIGH HEAVILY IN THE VILLAGE'S FAVOR.

Village Law §§ 7-714 and 20-2006 entitle the Village to obtain an injunction to enforce its zoning law. The operation of a C&D transfer station at 1A Croton Point Avenue, without obtaining either a use variance or, at a minimum, a special permit, from the Village would violate § 230-8 of the Croton-on-Hudson Zoning Code. As shown in Points I through V, the Village is likely to succeed on the merits of its claim that a construction and demolition waste transfer station may not operate at 1A Croton Point Avenue without either a use variance or, at a minimum, a special use permit.

In addition, a weighing of the equities tips decidedly in the Village's favor. The Village must be given the opportunity to ensure that any entity operating a transfer station in a small residential village is likely to run it in an environmentally safe manner. It is not sufficient for defendants to argue that the Village will be afforded adequate protection by the State DEC permit and the County Solid Waste Commission license. Those permits do not address all the issues that a Village special permit would address, which is why the Village issued 15 pages of conditions to the Metro Enviro special permit.

Nor would it be sufficient protection to the Village to make NIR's operation subject to the Metro Enviro conditions. Eight years have elapsed since the special permit was issued to Metro Enviro and conditions may have changed. The Village's experience with Metro Enviro may lead it to impose additional conditions or require more careful monitoring. Most importantly, the Village must be able to assure its citizens that a new operator will manage a waste facility in such a way that it will not harm their health, safety, and welfare.

Any harm to defendants of having to secure Village approval is of their own making. Greentree could have rented the property for one of the many permitted uses in the district, or it could have required its potential tenant to apply for a special permit seven months ago, upon reading this Court's August 25, 2005 decision. Greentree's claim that it is suffering irreparable harm because the one year discontinuance period is running, must be taken with a grain of salt. It was Greentree that requested the several

extensions of the return date of this application, which was originally submitted December 21, 2005. Finally, had Greentree Realty supervised its tenant, Metro Enviro, to make sure, as the lease no doubt required, that Metro Enviro observed all applicable laws in its use of the site, Metro Enviro's permit would have been renewed, and none of the present controversy would have occurred.

As to NIR, it could have applied for the special permit seven months ago. Its claim of losing good will and customers (NIR's Memo of Law, at 9) is specious. Since NIR has not yet commenced operations, it has no good will or customers to lose.

Neither of the defendants can claim losing an investment in the improvements on the property, because, according to an affirmation of David Steinmetz, dated February 3, 2003, submitted to this Court in Metro Enviro Transfer v. Croton-on-Hudson, the improvements were made at Metro Enviro's "sole substantial cost and expense."

Finally, defendants' claim of harm to Westchester County rings hollow. Not only is Andreas Gruson's claim unsupported by any facts; it is contradicted by a recent conversation the Village's Special Environmental Counsel had with the Executive Director of the County Solid Waste Commission. As described in the Affirmation of Michael Gerrard, a copy of which is submitted along with this memorandum of law, the Executive Director told him that he had not heard of any problems nor received any complaints about the disposition of construction and demolition debris in the County

since the Metro Enviro facility was closed this past summer.

POINT VII

DEFENDANTS STATE NO GROUNDS FOR DISMISSING THIS ACTION.

Defendants state no grounds for a 3211(a)(4) motion because the two actions do not involve the same parties. NIR was not a party to Greentree's suit against the Village, so the Village could not have sought relief against NIR, without moving to add NIR as a party.

Nor do defendants state a valid claim for dismissing the case for failing to state a cause of action. The Village's basis for bringing the action is Village Law §§ 7-714 and 20-2006, which entitle the Village to obtain an injunction to enforce its zoning law. As shown above, the operation of a C&D transfer station at 1A Croton Point Avenue, without obtaining either a use variance or, at a minimum, a special permit, from the Village would violate § 230-8 of the Croton-on-Hudson Zoning Code.

There is absolutely no grounds for dismissing the Village's action, but, as stated earlier in this memorandum of law, the Village has no objection to consolidating the actions.

Conclusion

For all of these reasons and the reasons stated in the Village's previous

submissions on this application, the Village of Croton-on-Hudson respectfully urges this Court to issue a preliminary injunction and a permanent injunction enjoining Northeast Interchange Railway from commencing transfer station operations at 1A Croton Point Avenue without obtaining from the Village either a use variance or a nonconforming use special permit, and to award the Village such other relief as the Court deems appropriate, including costs.

Dated: Tarrytown, New York
April 11, 2006

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