

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

GREENTREE REALTY, LLC and METRO ENVIRO
TRANSFER, LLC,

Petitioners/Plaintiffs,

-against-

THE VILLAGE OF CROTON-ON-HUDSON, THE
VILLAGE BOARD OF TRUSTEES OF THE VILLAGE
OF CROTON-ON-HUDSON, THE VILLAGE OF
CROTON-ON-HUDSON ZONING BOARD OF
APPEALS, and DANIEL O'CONNOR, in his official
capacity, as the VILLAGE BUILDING INSPECTOR,

Respondents/Defendants

Index No. 05-11872
(Justice Nicolai)

**MEMORANDUM OF LAW IN OPPOSITION TO PETITIONERS' MOTION FOR A
PRELIMINARY INJUNCTION AND IN SUPPORT OF RESPONDENTS' MOTION TO
DISMISS**

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PRELIMINARY STATEMENT

Respondents/Defendants the Village of Croton-on-Hudson ("Croton" or the "Village"), the Village Board of Trustees of the Village of Croton-on-Hudson (the "Village Board" or "Board"), the Village Of Croton-On-Hudson Zoning Board Of Appeals (the "ZBA"), and Daniel O'Connor, in his official capacity, as the Village Building Inspector (collectively, "Respondents" or the "Village") respectfully submit this Memorandum of Law in Opposition to Petitioners'/Plaintiffs' motion for issuance of a preliminary injunction and in support of Respondents' motion to dismiss.

There is currently in effect a temporary restraining order preventing enforcement of the Board's order of January 27, 2003, which was recently confirmed by the Court of Appeals on

July 6, 2005, and was reiterated by the Board on July 18, 2005. Every day that this TRO remains in effect, the explicit rulings of the Appellate Division and the Court of Appeals that the Village was well within its rights in closing down the transfer station are being frustrated. The TRO should be lifted, the preliminary injunction should be denied, and the case should be dismissed.

The Court of Appeals has recently reiterated the core principle of *res judicata* in New York: “a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter. The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation.” *In the Matter of Hunter*, 4 N.Y.3d 360, 269, 794 N.Y.S.2d 286, 291 (2005). After two and a half years of unsuccessful litigation trying to prevent the enforcement of the Village Board resolution closing its waste transfer station (the “Facility”), Metro Enviro Transfer LLC (“Metro Enviro”) together with its landlord, Greentree Realty, LLC (“Greentree”) (collectively “Petitioners”) are trying to persuade this Court to provide the relief that both the Second Department and the Court of Appeals found is not warranted. This is simply not permissible. Most of Petitioners’ claims are thin retreads of the claims Metro Enviro has made previously and ask for exactly the same relief. These claims were so lacking in merit that the first time they were raised by Metro Enviro, no court even mentioned them. All claims by Metro Enviro attempting to overturn the Board’s resolution of January 27, 2003 ordering the Facility to close are now barred by the doctrines of *res judicata* and collateral estoppel.

Because Greentree Realty is in privity with Metro Enviro, its claims are also barred by *res judicata* and collateral estoppel. Greentree Realty was fully aware of the ongoing litigation and should not be rewarded for hiding in the weeds. Furthermore, any claims that Greentree may have had regarding the January 27, 2003 closure order are now barred by the statute of

limitations. They are also barred by lack of ripeness and failure to exhaust administrative remedies; the Petitioners remarkably sued the Building Inspector for not granting an application that they filed the very day they sued, and (even more amazingly) they sued the Zoning Board of Appeals for not reversing a decision that the Building Inspector had not yet made.

The claims presented are not only barred by five separate fatal procedural defects, they are also completely devoid of merit. The Facility can only operate pursuant to a special permit, and the Court of Appeals has ruled that the special permit was rightly terminated.

Finally, the federal claims asserted in the complaint are just a weak attempt to federalize the state claims. The federal courts have routinely rejected this kind of tactic, as should this Court.

STATEMENT OF FACTS

The site at issue (the "Site") is located in an area classified as Light Industrial under Croton-on-Hudson's Village Zoning Code. Beginning in approximately 1977 a vehicle repair shop operated legally at the Site pursuant to an exception from the ZBA. Affirmation of Michael B. Gerrard, dated July 28, 2005 ("Gerrard Aff.") Ex. 1. Robert V. Ligouri purchased the Site and replaced this with a wood processing and recycling operation in approximately 1984. On December 23, 1986, the ZBA confirmed the Village Engineer's determination that Mr. Ligouri's operation constituted a change from one non-conforming use to another. Gerrard Aff. Ex. 1. The Village Board then required Ligouri to obtain a special use permit pursuant to what is now numbered Section 230-53(A)(2) of the Croton Village Code. Mr. Ligouri obtained a special use permit from the Village Board on June 20, 1988 for a period of one year. Gerrard Aff. Ex. 2. The permit only allowed for the processing of construction and demolition debris attached to wood waste.

In Spring 1997, Greentree Realty purchased the Site from Mr. Ligouri and in August 1997, its lessee Metro Enviro, LLC (“Metro”) requested renewal and transfer of the special use permit to itself. The Village Board referred the request to the Planning Board for review in September 1997. In November 1997, the New York State Department of Environmental Conservation (“DEC”) issued a permit to Metro to operate a construction and demolition debris processing facility on the Site. On November 25, 1997, the Planning Board recommended to the Village Board that a special use permit be granted for the use of the Site as a construction waste transfer facility, provided various new conditions were included in the special use permit.

After much deliberation, on May 4, 1998, the Village Board issued Metro a new three-year special use permit (the “Permit”), effective May 5, 1998, with many conditions attached, including that violations could result in closure. These conditions were the result of recommendations by the Planning Board of the Village of Croton-on-Hudson, a citizens review committee, and various experts, as well as comments received from the public and the applicant in several public hearings. The permit conditions were designed to prevent harm to the community and the environment.

The Permit was heavily negotiated with the applicant and it was issued in reliance on statements of counsel for the applicant that "if they [the applicant] do not comply with their permit, they will be closed. There are no ifs, ands or buts." Gerrard Aff. ¶ 9. The Board granted the Permit shortly after hearing this reassurance from Mr. Zarin, a partner in the law firm (Zarin & Steinmetz) that currently represents both Petitioners. The Village warned explicitly that “all 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 use permit). *Id.*

The Permit conditions defined 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 Permit also required that the Facility comply with all conditions, restrictions and limitations in the Facility's DEC permit, with the provisions of the operations and maintenance manual, and with the performance standards of the Village Code. The Permit also contained provisions for enforcement in the event of permit violations, and reserved all other Village enforcement powers under the Zoning Code, including the right to order a cessation of activities. Gerrard Aff. ¶ 10.

In January, 2000, counsel for Metro notified the Village Board of the contemplated sale of the Facility to Metro Enviro. In March 2000 the sale closed. Metro Enviro, a wholly owned subsidiary of Allied Waste Industries, Inc., has operated the Facility at the Site since March 2000. The Facility operated pursuant to a DEC permit as well as the Special Use Permit issued by the Village to Metro on May 5, 1998.

The Permit expired on May 5, 2001, but Metro Enviro timely applied to renew it. By this time Metro Enviro had already begun accumulating what would become a disgracefully long set of willful violations, including many that involved falsification of records. Gerrard Aff. ¶ 17. The Village Board extended the permit expiration thirteen times while it conducted an exhaustive set of hearings on the Facility's operations. Finally, on January 27, 2003, the Board decided not to renew the Permit and ordered the Facility to close. Gerrard Aff. Ex. 3. As explained by the 14-page, single-spaced Statement of Findings issued by the Board at that time, the closure decision was fully justified by the numerous, repeated, intentional violations of the permit and by the falsification of records to attempt to cover up the violations. Gerrard Aff. Ex. 4.

Metro Enviro was subsequently able to obtain temporary injunctions to allow it to remain open. However, it did not operate without violations. Much of the waste from Metro Enviro was sent to the CLD landfill in Ohio, but the Board learned in early 2005 that that landfill was not authorized to take construction waste of the sort that Metro Enviro disposed there. Gerrard Aff. ¶ 20. It was a violation of the DEC permit for Metro Enviro to send its waste to a facility that was not authorized to receive it, and that in turn was a violation of the Permit. The Village notified Metro Enviro of this violation on March 28, 2005. Gerrard Aff. Ex. 5.

In the same notice of violation, the Village provisionally identified a violation of New York's rules on receipt of pulverized construction waste. *Id.* The provisional notice informed Metro Enviro that it had one week to show that the source of this waste in Connecticut was approved by the DEC. After Metro Enviro failed to make such a showing, Special Counsel to the Village informed Metro Enviro's counsel that the provisional notice of violation had become final. Gerrard Aff. Ex. 6.

PRIOR LITIGATION

Following the Village Board's decision to deny the permit renewal application and close the Facility, Metro Enviro initiated an Article 78 proceeding by Order to Show Cause on February 3, 2003 seeking annulment of the Village Board's decision. On February 10, 2003, Appellants filed and served their Answer and Opposition to the Article 78 Petition, as well as the 15-volume record of decision. In its Petition, Metro Enviro alleged that it had a nonconforming use right to operate in the absence of a special permit: "Petitioner Metro Enviro's use of the subject property has also been a legal pre-existing nonconforming use, since at least 1998." Petition, dated January 31, 2003 at ¶ 27.

On February 19, 2003, the court 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. Thus, the trial court did not reach the nonconforming use issues because it granted Metro Enviro's Petition and annulled the Board's decision.

On May 10, 2004, the Appellate Division, Second Department, unanimously reversed the trial court's decision and dismissed the Petition. 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. 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.

Metro Enviro Transfer, LLC v. Vill. Of Croton-on-Hudson, 7 A.D.3d 625, 777 N.Y.S.2d 170, 171 (2004) (citations omitted), attached as Appendix 1.

The Court of Appeals granted leave to appeal on December 16, 2004. On July 6, 2005, the Court of Appeals unanimously affirmed the Appellate Division, stating:

Over the three-year period covered by the permit, Metro repeatedly and intentionally violated conditions of the permit. Metro not only exceeded capacity limitations at least 26 times, but also falsified records by rigging software to reallocate the dates of waste intake, deceptively giving the impression that there were no excesses. Further, on at least 42 occasions, the operators accepted prohibited types of industrial waste. Other violations included the inadequate training of facility personnel, insufficient record keeping and inappropriate storage of tires on the site . . . As the Appellate Division correctly explained, the Board did not have to show substantial evidence of actual harm. It is enough that the Board found the violations potentially harmful. Here, Metro claims that none of the violations in question created a significant threat of

harm. But even if no single violation was dangerous in itself, the Board was entitled to conclude that the history of repeated, willful violations created an unacceptable threat of future injury to health or the environment.

Metro Enviro Transfer, LLC v. Vill. Of Croton-on-Hudson, 2005 WL 1556709 (N.Y. 2005), attached as Appendix 2.

On the evening of July 11, 2005, the Village Board conferred with counsel, and later that evening counsel to the Village informed counsel to Metro Enviro that the Village Board expected to issue an order resetting the closure date from February 17, 2003 to July 23, 2005. The Village Board took its formal action on July 18 setting the closure date of July 23. On July 20, counsel to Metro Enviro informed counsel to the Village that it was instituting this new action, and that argument would be held on July 21. At the conclusion of that argument, the Court issued a temporary restraining order against the Village, allowing the Facility to remain open until determination of the preliminary injunction motion.

ARGUMENT

In evaluating whether to impose a preliminary injunction the Court should consider: 1) the likelihood of success on the merits; 2) irreparable injury in the absence of provisional relief; and 3) the balance of the equities. *Silver v. Koch*, 137 A.D.2d 467, 468, 525 N.Y.S.2d 186, 187 (1st Dep't 1988).

In general, a preliminary injunction is a drastic remedy that should not issue without compelling circumstances. See *Uniformed Firefighters Ass'n of Greater New York v. City of New York*, 79 N.Y.2d 236, 241, 581 N.Y.S.2d 734, 736–37 (1992) (preliminary injunctions should be issued cautiously and in accordance with appropriate procedural safeguards); *People v. Hatchamovitch*, 40 A.D.2d 556, 556–57, 334 N.Y.S.2d 565, 566 (2d Dep't 1972) (temporary injunctions should be granted, if at all, “with great caution and only when required by urgent

situations or grave necessity, and then only upon the clearest evidence”). Requests for preliminary injunctions must be supported by clear proof of an imminent threat of irreparable injury with evidentiary detail, and not mere unsupported speculation. *Faberge Internat’l Inc. v. Di Pino*, 109 A.D.2d 235, 491 N.Y.S.2d 345, 349 (1st Dep’t 1985).

I. Petitioners Will Not Succeed On The Merits

Having unsuccessfully challenged the Board’s resolution of January 27, 2003 once, Metro Enviro is barred by the doctrines of *res judicata* and collateral estoppel from relitigating the validity of this resolution again. Since Greentree is in privity with Metro Enviro, was fully aware of the prior proceedings, and chose to sit them out, it too is barred from raising these points, not only because of the prior decisions but also because it allowed the statute of limitations to run on asserting whatever rights it may have had. The claims are also barred by lack of ripeness and failure to exhaust administrative remedies. In any event, Petitioners’ nonconforming use right was conditional upon obtaining a valid special use permit. Now that it no longer possesses such a permit, Metro Enviro must cease its operations, as ordered by the Village Board. The federal claims, appended as an afterthought, have no substance.

A. Claims Are Barred By The Doctrines of Res Judicata and Collateral Estoppel

Having litigated the Village Board decision about which it now complains for two and half years all the way to the Court of Appeals, Metro Enviro now seeks to relitigate the same decision. Such attempts to frustrate the finality of legal determinations and burden the courts with claims that have already been decided are barred by the doctrines of *res judicata* and collateral estoppel. Furthermore, because Greentree’s interests were fully represented by Metro Enviro during the prior proceedings, the same doctrines also bar it from bringing any claims about the Board’s decision to close Metro Enviro.

1. Metro Enviro's Claims Are Precluded By The Doctrine of Res Judicata

The Court of Appeals has recently reiterated the core principle of *res judicata* in New York, as follows: "a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter. The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation." *In the Matter of Hunter*, 4 N.Y.3d 360, 269, 794 N.Y.S.2d 286, 291 (2005). The *Hunter* court further stated that a party that has been given a full and fair opportunity to litigate a claim should not get a second chance and "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." *Id.*, quoting *O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357, 445 N.Y.S.2d 687 (1981), citing *Matter of Reilly v. Reid*, 45 N.Y.2d 24, 29-30, 407 N.Y.S.2d 645 (1978). The policy rationale is that finality of resolution is necessary to be fair to prevailing parties and to relieve the burdens of the courts. *Hunter*, 4 N.Y.3d at 292, 794 N.Y.S.2d at 269-70.

The many cases applying these principles show that subsequent actions to challenge a decision that was unsuccessfully challenged in an Article 78 proceeding are barred. For example, the Court of Appeals gave preclusive effect to an Article 78 proceeding regarding an alleged *de facto* taking by a municipality and stated that no other claim could be predicated on the acts litigated in the Article 78 proceeding. *O'Brien*, 54 N.Y.2d at 357, 445 N.Y.S.2d at 688. The Second Department found that a party that had lost an Article 78 proceeding on statute of limitations grounds could not bring a second Article 78 claiming that the challenged decision was null and void for lack of jurisdiction. *Cold Spring Harbor Area Civic Assoc. v. Bd. Of Zoning Appeals of Town of Huntingdon*, 305 A.D.2d 444, 762 N.Y.S.2d 392 (2d Dep't 2003).

Similarly, where opponents of a development had previously challenged an environmental impact statement (“EIS”) and lost, they could not base a claim on a mistake in the EIS that they had not previously identified. *Miller v. Kozakiewicz*, 300 A.D.2d 399, 751 N.Y.S.2d 524 (2d Dep’t 2002). Likewise, where a party unsuccessfully challenged an administrative finding of contractual default in an Article 78 proceeding, that party was subsequently precluded from asserting contract claims regarding mistake. *Brooklyn Welding Corp. v. City of New York*, 198 A.D.2d 189, 604 N.Y.S.2d 87 (1st Dep’t 1993). The court stated “inasmuch as plaintiff’s mistake claims arose out of the same events . . . it was incumbent upon it to raise them in the Article 78 proceeding too, rather than take a piecemeal approach” *Id.* at 190, 604 N.Y.S.2d at 88.

Having already litigated the Board’s January 27, 2003 decision and delayed its effect for two and a half years, Metro Enviro finally lost at the Court of Appeals on July 6, 2005. The Board therefore ordered Metro Enviro to close on or before July 23, 2005, reinstating its original closure order and giving Metro Enviro time to effect an orderly closure. Any challenge to the Board’s decision is now precluded on *res judicata* grounds.

2. Metro Enviro’s Claims Are Precluded By The Doctrine of Collateral Estoppel

Even where a previous Article 78 claim did not have preclusive effect because the relief sought in the second suit was not incidental to the original relief sought, the Court of Appeals dismissed the suit on collateral estoppel grounds. *Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 690 N.Y.S.2d 478 (1999). Collateral estoppel precludes a party from relitigating an issue that was raised in a previous proceeding and was decided against that party. *Id.* at 349, 690 N.Y.S.2d at 482. This doctrine applies if the issue was raised, was material, was necessarily decided, and the party had a full and fair opportunity to litigate the issue. *Id.* Thus, the Court of

Appeals decided that a firefighter who lost an Article 78 claim regarding his dismissal could not raise the same issues as had been previously litigated in a § 1983 action. *Id.* at 350, 690 N.Y.S.2d at 483.

Turning to the procedural history of this case, in its Petition, Metro Enviro candidly admits that “Metro Enviro consistently raised its pre-existing nonconforming use status at each stage of the litigation, and expressly maintained that it did not, and, indeed, could not abandon the fact that a pre-existing, legal nonconforming status attached to the Property, which allows for the operation of a transfer station thereon.” Petition ¶ 73. This is hardly surprising. Its original Petition (¶ 27) alleged that it had a protected nonconforming use right since “at least 1998.”

During its appeal to the Second Department, Metro Enviro continued to protest that the Board did not have enough empirical evidence to extinguish its nonconforming use right and “deny the special permit renewal, *thereby putting it out business.*” Pet. Br. to Second Dep’t at 68 (emphasis added). It also devoted six pages of its brief to arguing that its vested nonconforming use right that arose in 1998 was constitutionally protected. *Id.* at 63-69. The Village responded as follows:

The Answering Brief contains a whole section that purports to show that Metro Enviro Transfer has a constitutionally protected vested right to operate. Br. of Pet’r-Resp’t at 63-69. This is incorrect, as the Answering Brief concedes when it states “[t]he special permit was originally issued for the change from one nonconforming use to another in 1998. The right to *that* nonconforming use transferred to Metro [Enviro Transfer] when it took possession of the Facility.” Br. of Pet’r-Resp’t at 69 (emphasis added). Thus, Metro Enviro Transfer obtained the right to operate the facility under the terms of the special permit. The Village recognized that right, but that recognition did not preclude enforcement action pursuant to the terms of the permit.

Resp. Reply Br. to Second Dep’t at 19.

While the Second Department did not directly address the vested right issue in its opinion, it decided to dismiss Metro Enviro's prior Petition in its entirety and uphold the decision of the Board ordering the closure of the Facility. Thus, the Second Department rejected Metro Enviro's arguments regarding the nonconforming use right.

At the Court of Appeals, Metro Enviro argued vigorously that it should not be forced to close as a result of the past violations. The lead heading in its argument section was "substantial evidence of a genuine threat of public health, safety and welfare is required before a municipality can deny the renewal of a special permit and permanently close an existing business." Pet. Br. to Court of Appeals at iii (emphasis added). The Court of Appeals rejected this argument and affirmed the Appellate Division. Thus, there can be no question that the issue of whether the Board could order closure of the Facility despite its status as a nonconforming use was actually previously litigated and won by the Village. Therefore, Metro Enviro is precluded from relitigating this issue by the doctrines of *res judicata* and collateral estoppel. The line between the two doctrines is not always clear, but even if one does not apply here, the other surely does.

Furthermore, Metro Enviro told the courts at every level that if it lost its special permit, it would have to shut down. It obtained a judgment at the trial level on this basis and preliminary relief from the trial court and the Court of Appeals. It should be held to that representation. Indeed, Metro Enviro is now barred by the doctrine of judicial estoppel from saying otherwise. *Ford Motor Credit Co. v. Colonial Funding Corp.*, 215 A.D.2d 435, 626 N.Y.S.2d 527 (2d Dep't 1995).

3. Greentree Is Also Barred From Challenging The Closure Order

Res judicata and collateral estoppel apply not only to parties that actually litigated the prior case; they also apply to parties that were in privity with the litigants. There is no fixed formula for determining privity. Instead privity issues should be resolved through a practical

inquiry into the realities of the prior litigation. *Slocum v. Joseph "B"*, 183 A.D.2d 102, 588 N.Y.S.2d 930 (3d Dep't 1992). The cases have set out a number of factors that must be considered. One important consideration is whether the interests litigated in the prior action are similar to those in the subsequent action, such that the non-party was "virtually represented," because its interests were effectively protected by a prior party. See *Matter of Oswego County Dept. of Social Servs.*, 267 A.D.2d 1063, 701 N.Y.S.2d 582 (4th Dep't 1999) (where a New York child protection agency had similar interests to a Florida child protection agency its interests were fully represented in the prior hearing and it was therefore bound by the determination of that hearing). A second important consideration is whether the prior party litigated the claim in the similar way the non-party thought it should be litigated. *Watts v. Swiss Bank Corp.*, 27 N.Y.2d 270, 278, 317 N.Y.S.2d 315, 321 (1970). In this respect, appearance of the same attorneys in both actions is "of singular significance" in determining privity. *Id.*; *Ferris v. Cuevas*, 118 F.3d 122, 127 (2d Cir. 1997) (applying New York law). A third important factor is the nature of the relationship between the parties. Privity may arise from relationships such as customer-provider, partnerships, and familial ties. *Id.* at 128.

While courts have not found that a landlord/tenant relationship necessarily gives rise to privity, at least one New York court has found that where a landlord was participating in an action contesting the application of a zoning law on behalf of its tenant, the two were in privity. *Dezer Entm't Concepts, Inc. v. City of New York*, 2002 WL 31748584 (N.Y. Sup. Ct. New York Co.), *aff'd as modified* 8 A.D.3d 37, 778 N.Y.S.2d 18 (1st Dep't 2004). Almost directly on point in this respect is a decision from the Supreme Court of Arkansas that holds that "a tenant is in privity with his or her landlord such that a judgment that determines interests in real property against the landlord will bar relitigation of the matter by the tenant." *Bruns Foods of Morrilton*

v. *Hawkins*, 328 Ark. 416, 944 S.W.2d 509 (1997). Here Metro Enviro and Greentree are landlord and tenant, and the landlord is putting forward zoning claims regarding real property that Metro Enviro previously advanced and lost. Thus, the landlord/tenant cases, while few and far between, point toward a finding of privity.

Supporting this indication, Greentree has engaged the same attorney in this action, Mr. Steinmetz, which a factor that is of “singular significance” in determining privity. *Watts*, 27 N.Y.2d at 278, 317 N.Y.S.2d at 321. Also indicative that Greentree was content with Metro Enviro’s conduct of the prior litigation is that it did not feel the need appear to protect its rights even though the prior proceeding was protracted and well-publicized. In arguing vigorously that it could stay open in the prior action, Metro Enviro even put forward the very argument that Petitioners now advance regarding nonconforming use rights. Thus, Greentree’s interests were fully represented in the prior proceeding. Indeed, it is hard to imagine how the addition of Greentree as a party to the prior action could have had any practical effect on the outcome. Even though Metro Enviro had a meritless claim, it used that claim to delay implementation of the Board’s decision for over two and half years. Greentree now seeks the same result that Metro Enviro has repeatedly requested – the continued operation of Metro Enviro, even though the Court of Appeals has upheld the Village’s finding that the operation is a threat to health and the environment.

Thus, taking a practical view, the combination of the three important factors of relationship, commonality of interest, and representation shows that Greentree is barred by *res judicata* and collateral estoppel from bringing claims regarding the Board’s determination to close Metro Enviro. Moreover, even if Greentree’s claims somehow survived the Court of

Appeals decision, they are absolutely barred by the statute of limitations, as is shown in the next Section.

B. Petitioners Are Barred By the Statute of Limitations

The statute of limitations in an Article 78 proceeding is four months. C.P.L.R. § 217. It is well settled that the statute of limitations begins to run from the date the agency reaches a definitive position on the issue that inflicts actual, concrete injury. *Best Payphones, Inc. v. Dep't of Information Technology and Telecomm. Of City of New York*, 2005 WL 1262232 (N.Y. June 9, 2005); *Stop-The-Barge v. Cahill*, 1 N.Y.3d 218, 771 N.Y.S.2d 40 (2003). As the Court of Appeals stated just last month, “[a] strong public policy underlies the abbreviated timeframe: the operation of government agencies should not be unnecessarily clouded by potential litigation.” *Best Payphones*. Subsequent implementation of the initial decision does not serve to revive the statute of limitations and enable a challenge to the earlier action to be brought. *See Young v. Board of Trustees of the Village of Blasdell*, 89 N.Y.2d 846, 652 N.Y.S.2d 729 (1996) (limitations period on an Article 78 action commenced when a village board committed itself to a definite course of future decisions. Subsequent decisions implementing the original decision did not cause the limitations period to recommence); *Sierra Club, Inc. v. Power Authority of the State of New York*, 203 A.D.2d 15, 16, 609 N.Y.S.2d 599, 600 (1st Dep’t 1994) (limitations period on an Article 78 action began to run when the initial decision regarding a contract to purchase power from Canada was taken, not when the contract was signed); *Bonar v. Shaffer*, 140 A.D.2d 153, 156, 527 N.Y.S.2d 412, 415 (1st Dep’t 1988), *appeal denied* 73 N.Y.2d 702 (limitations period on an Article 78 action commences when the underlying decision is taken; the limitations period is not tolled or reset by subsequent correspondence).

Artful pleading of a request for judicial review of an administrative decision as a mandamus or a declaratory judgment does not allow a petitioner to avoid the four month statute

of limitations. The nature of the action, rather than the form in which it is brought, controls the nature of actions before a court. *Save the Pine Bush, Inc. v. City of Albany*, 70 N.Y.2d 193, 202, 518 N.Y.S.2d 943, 946 (1987). New York courts have consistently rejected attempts to revive time-barred actions by contriving to plead them as a mandamus to compel or an action for declaratory relief. *See Sierra Club*, 203 A.D.2d at 16, 609 N.Y.S.2d at 600 (1st Dep't 1994) (petition asking for declaratory ruling was for review of initial determination so was time-barred); *Connell v. Town Bd. of Wilmington*, 113 A.D.2d 359, 496 N.Y.S.2d 106 (3d Dep't 1985), *aff'd* 67 N.Y.2d 896, 501 N.Y.S.2d 813 (1986) (mandamus demand to compel review of decision did not affect running of four-month statute of limitations so was time-barred); *Metropolitan Museum Historic District Coalition v. De Montebello*, 796 N.Y.S.2d 64 (1st Dep't 2005) ("We reject petitioners' attempt to circumvent the four-month statutory period by characterizing this proceeding as one in the nature of mandamus, as the statute of limitations begins to run from the time of the agency's determination").

Approaches like that taken by Petitioners in this case, requesting a declaratory judgment regarding an administrative decision, have been described as "subterfuges to revive time-barred claims when the challenge is actually to the prior administrative action," *Sierra Club*, 203 A.D.2d at 16, 609 N.Y.S.2d at 600, and as "subterfuges to revive the limitations period for the purpose of maintaining an Article 78 proceeding." *Bonar*, 140 A.D.2d at 156, 527 N.Y.S.2d at 415.

Here, all the actions that Petitioners complain of occurred two or more years ago. The ZBA ruled that a special permit was needed to go from one nonconforming use to another in 1986. The nonconforming use right at issue arose in 1998, when the Special Permit was granted on the basis that the use was changing from the nonconforming use permitted in 1988 to another.

In 2001, the Board amended the Village's zoning law and made waste transfer stations a prohibited use in the light industrial district. Finally, on January 27, 2003, the Board decided not to renew the Special Permit and ordered Metro Enviro to close. Gerrard Aff. Exs. 3 and 4.

Metro Enviro challenged the Board's decision regarding Metro Enviro within the limitations period, but Greentree did not. Eventually, on July 6, 2005, the Court of Appeals dismissed Metro Enviro's petition. The present action is brought as a declaratory judgment suit, but Metro Enviro is transparently attempting once again to challenge the resolution of the Board taken in January 2003, and now at last Greentree has joined the fray. Even Petitioners seem to believe that they are bringing an Article 78 proceeding. In their notice of verified petition they demand a certified copy of the proceedings pursuant to CPLR 7804(c). Thus, the nature of the lawsuit is an Article 78 review. The Board has made no new decisions regarding Metro Enviro since January 2003. It has merely implemented its original decision after it finally prevailed at the Court of Appeals and the stay of implementation imposed by that court was lifted. Thus, the current action is barred by the statute of limitations.

C. Claim Is Not Ripe And Petitioners Have Not Exhausted Their Administrative Remedies

Petitioners admitted that they requested a determination from the Building Inspector that the transfer station is a pre-existing non-conforming use *on the very same day* that they brought this proceeding against the Building Inspector. Petition ¶ 76. Obviously, no determination on this request has yet been made. By attempting to sue based on a claim regarding a determination that has not been made, Petitioners flagrantly violate the doctrine of ripeness. "It is fundamental that the 'function of the courts is to determine controversies between litigants They do not give advisory opinions. The giving of such opinions is not the exercise of the judicial function.' This is not merely a question of judicial prudence or restraint; it is a constitutional command

defining the proper role of the courts under a common-law system.” *New York Public Interest Group v. Carey*, 42 N.Y.2d 527, 529-30, 399 N.Y.S.2d 621, 623 (1977) (quoting *Self-Insurer's Ass'n v. State Indus. Comm'n*, 224 N.Y. 13, 16 (1918) (Cardozo, J.)). See also *Village of Brockport v. Calandra*, 191 Misc. 2d 718, 722, 745 N.Y.S.2d 662, 666 (Sup. Ct. Monroe County 2002), *aff'd*, 305 A.D.2d 1030, 758 N.Y.S.2d 877 (4th Dep't 2003) (refusing to rule on whether plaintiff's proposed responses to FOIL requests were proper, because “[a]n actual dispute is required and [a] declaratory judgment action may not be used to secure an advisory opinion.”); *Carlisle v. Spatola*, 232 A.D.2d 444, 445, 648 N.Y.S.2d 466, 467 (2d Dep't 1996) (“It is inappropriate for the courts to issue advisory opinions where there is no justiciable controversy.”) (citations omitted) (nullifying lower court's declaration that a restrictive covenant prohibited condominium development plans that had not yet even been proposed); *Employers' Fire Ins. Co. v. Klemons*, 229 A.D.2d 513, 514, 645 N.Y.S.2d 849, 851 (2d Dep't 1996) (because “there was no justiciable controversy to justify commencement of a declaratory judgment action,” reversing declaration regarding coverage under an insurance policy, when defendants had not yet brought action to recover).

Moreover, Article 78 proceedings may only be brought after a final determination has been reached. CPLR 7801(1). And they may not be brought before the aggrieved party exhausts its administrative remedies. *Aldrich v. Pattison*, 107 A.D.2d 258, 268, 486 N.Y.S.2d 23, 31 (2d Dep't 1985) (“Where environmental matters are involved . . . it is particularly important to allow the administrative agency possessing the requisite expertise to exercise its authority to hear the evidence on the issues, make findings and state the reasons for its action on the record prior to judicial review of the determination.”). See also *Hays v. Walrath*, 271 A.D.2d 744, 705 N.Y.S.2d 441 (3d Dep't 2000) (affirming lower court's refusal to consider an Article 78 petition,

because the petitioners had not appealed to the town zoning board of appeals regarding the permitting decisions at issue); *Dune Road Ass'n of Westhampton v. Jorling*, 158 A.D.2d 448, 551 N.Y.S.2d 45 (2d Dep't 1990) (affirming dismissal of villages' complaint contesting the inclusion of property in a coastal erosion hazard area, where villages failed to avail themselves of administrative appeal procedure); *Engert v. Phillips*, 150 A.D.2d 752, 542 N.Y.S.2d 202 (2d Dep't 1989) (ruling that lower court properly dismissed plaintiffs' complaint concerning a zoning-related decision; the decision was appealable to the local zoning board of appeals, and plaintiffs had failed to seek administrative review of the decision); *Jonas v. Town of Colonie*, 110 A.D.2d 945, 946, 488 N.Y.S.2d 263, 265 (3d Dep't 1985) (affirming dismissal of Article 78 petition, where "petitioners were barred from challenging [zoning-related] decision by their failure to exhaust their administrative remedies, i.e., to seek review by the Zoning Board of Appeals."). Thus far, Petitioners have only made a request for an initial determination, which they have not yet received. Thereafter, they may appeal that determination to the ZBA if it is not to their liking. Thus, they have obviously failed to exhaust their administrative remedies.

This is not a mere technicality. Petitioners' acknowledgement that there *is* an administrative remedy means this controversy is not properly before this Court. Metro Enviro and Greentree had plenty of advance notice that they might need administrative relief -- the Second Department issued its ruling in this case on May 10, 2004 -- and (at the same time as pursuing their appeal to the Court of Appeals) they could have and should have exhausted their administrative remedies. The consequences of their unexcused failure to do so must fall on the Petitioners, not on the Village.

D. Nonconforming Use Claim Is Without Merit

Petitioners now argue that Metro Enviro has a nonconforming use right to continue operating under the terms of the special permit that it no longer possesses, but Metro Enviro's

predecessor explicitly waived this claim by making express representations to the Board just prior to its decision to issue the Permit that violations of the Permit would lead to closure of the Facility. In addition, by litigating the Board's closure order to the Court of Appeals, where the Board prevailed, Metro Enviro has lost any ability to make this claim. In any event, this claim is self-defeating, because the terms of the former Special Permit allowed the Board to order closure of the Facility when repeated violations occur, as they did here. Finally, the courts did not include this claim in their previous opinions on this matter because it lacks any substance.

1. The Terms of the Special Use Permit Allowed for Closure

The Board issued the Special Permit in May 1998 in reliance upon an assurance by Metro that Permit violations would lead to closure. Mr. Zarin, a partner in the law firm (Zarin & Steinmetz) that currently represents both Petitioners, stated "if they [Metro] do not comply with their permit, they will be closed. There are no ifs, ands or buts." Thus Metro understood in 1998 that the Special Permit was required for it to commence and continue operations.

This is hardly surprising. The terms of the Special Use Permit for the Facility ("the Permit") made it plain that violations of the Permit could lead to closure of the Facility. Paragraph 41 of the Permit stated 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."

Petitioners are now attempting to that the Facility does not need a special permit to operate, but that it must abide by the terms of the Permit that it held until it lost it as a result of its own misconduct.¹ This claim is self-defeating because the Village had the right to close the

¹ Pet. Mem. Of Law at 25.

Facility under the terms of the Special Permit. As discussed above, Paragraph 41 of the Special Permit allowed for closure of the Facility in the event of repeated violations. Here, as the Court of Appeals noted, there were repeated violations. Thus, the terms under which Petitioners concede they were operating -- i.e., the Special Permit -- empowered the Board to close the Facility.

After two and a years of litigation, Petitioners have now argued themselves into a blind alley. Even though their current nonconforming use claim contradicts the verified Petition in the prior litigation (which stated that the nonconforming use right arose in 1998 as opposed to 2001), it is equally unpersuasive. This Court need not delve deeper into the legal fiction presented by Petitioners to dismiss their claim that their status as a nonconforming use somehow makes them immune from a closure order issued by the Board.

2. Waste Transfer Use Requires A Special Permit

In general, nonconforming uses are disfavored. One of the objectives of the Village code is the gradual elimination of nonconforming uses. Village Code § 230-2(E). At the time that the Special Use Permit was granted, the Village code strictly regulated nonconforming uses as follows:

Subject to the provisions of § 230-54, the following provisions shall apply to all buildings and uses existing on the effective date of this chapter, which buildings and uses do not conform to the requirements set forth in this chapter, to all buildings and uses that become nonconforming by reason of any subsequent amendment to this chapter and the Zoning Map which is a part thereof and to all conforming buildings housing nonconforming uses:

(1) Shall not be enlarged, extended, reconstructed, or placed on a different portion of the lot or parcel of land occupied by such uses on the effective date of this Chapter, nor shall any external evidence of such use be increased by an means whatsoever.

(2) Shall not be changed to another nonconforming 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.

(3) Shall not be reestablished if such use has been discontinued for any reason for a period of one year or more or has been changed to or replaced by a conforming use. Intent to resume a nonconforming use shall not confer the right to do so.

Village Code § 230-53.

Attempts to challenge similar discontinuance provisions have been unsuccessful. For instance, where an owner abandoned a non-conforming use right by assuming a legal use, the subsequent owner could not validly claim that the continued use of the premises for purposes beyond the zoning code was a lawful non-conforming use. *Boardwalk Management Corp. v. Town of Southampton Zoning Bd. of Appeals*, 226 A.D. 717, 641 N.Y.S.2d 710 (2d Dep't 1996). Under discontinuance provisions, which deem non-conforming use rights to be lost after they are not exercised for a specified period of time, the ownership of the premises is not relevant to the issue of whether the right expired. *See Spicer v. Holihan*, 158 A.D.2d 459, 550 N.Y.S.2d 943 (2d Dep't 1990) (intent to abandon is irrelevant under such provisions); *Sapakoff v. Town of Hague Zoning Bd. of Appeals*, 211 A.D.2d 874, 875, 621 N.Y.S.2d 215, 216 (3d Dep't 1995) (transfer of ownership to the government under forfeiture laws did not toll the discontinuance period).

By allowing nonconforming uses to change, but requiring them to obtain special permits before a change, the Village gains much greater control over those activities. 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.

Thus, by changing from the original nonconforming use, the site owner gives up considerable rights and makes its use right conditional upon periodic renewal of a special permit. This is completely consistent with the desire to eliminate nonconforming uses over time. Of course, the loss of rights is voluntary, so there can be no question of a taking.

The requirement for a special permit to operate on this Site has been in place since 1986, when the ZBA determined that the use of the Site had changed from one nonconforming use to another. The ZBA decision found that the nonconforming use right was for vehicle repair, and that any waste transfer activities that had been occurring at the Site had been beyond the scope of the legal nonconforming use. Therefore the change in use of the Site to wood processing and recycling triggered the need for a special permit pursuant to what is now codified as Village Code § 230-53(A)(2). The Site operator at that time duly obtained a special permit in 1988. After a year of operating under that special permit Mr. Ligouri, the Site owner, lost the right to revert to an unconditional nonconforming use because that use was discontinued pursuant to Village Code § 230-53(A)(3).

Thus, by the time Greentree Realty bought the site in 1997, any right to operate a nonconforming use without a special permit had long since been abandoned. To change the use from wood processing and recycling to waste transfer, a new special permit was required. Metro

acknowledged this, and did not seek to commence operations before a special permit authorizing the use was issued.

Although Metro made a claim during the Permit application process² that it had a right to operate under light industrial zoning, it chose to accept the Permit rather than pursue this claim. By accepting the Permit and promising to abide by its terms or be closed, Metro Enviro waived any right to challenge the Board's determination that a special permit was necessary for the transfer station to commence operations in 1998. Furthermore, Metro Enviro applied for a renewal of the Special Use Permit before it expired, and asked for a temporary extension of the Permit if the final decision on the Permit could not be made before it expired to "cover any lag time." Letter from Steinmetz to Elliot dated March 23, 2001. These actions made it clear that Metro Enviro regarded the Permit as essential to operate. Since Greentree acquired the Site in 1997, all of this happened under its watch.

On June 18, 2001, the Village Board passed an amendment to the Village Code making waste transfer stations a prohibited use in the light industrial districts. No one challenged this enactment. Because Metro Enviro was already a nonconforming use, albeit one that required a special permit to operate, this change in the zoning law did not make any practical difference to Metro Enviro's status so long as Metro Enviro obeyed the Permit. Metro Enviro now appears to be arguing that this amendment prohibiting waste transfer use actually gave it *more* rights than it previously possessed. This argument does not make sense. The 2001 amendment did not affect Metro Enviro, because the Board did not consider this amendment during the decision-making process in 2003-2004 about the Special Permit renewal. The 2001 amendment may affect Greentree at some point, but the time to launch a *facial* challenge has expired, and because the

² Letter from Steinmetz to Elliot dated February 11, 1998 at 10.

Village has not yet taken any decisions applying the amended law to the Site, an *as-applied* challenge is not ripe.

The cases that Petitioners cited in support of the notion that waste transfer use can occur without a special use permit, Pet. Mem. Of Law. at 23-24, are all inapposite because they concern situations where a permit requirement was imposed *after* the nonconforming use was established without a permit. In contrast, here, lawful waste transfer activities have never taken place in the absence of a special permit. Generally, when the law changes, existing uses have a vested right to be treated as though the zoning laws had not been amended. *See Michalak v. Zoning Bd. of Appeals of Town of Pomfret*, 286 A.D.2d 906, 731 N.Y.S.2d 129 (4th Dep't 2001) (zoning board had jurisdiction to grant special use permit, where the use was permitted by such permit prior to amendment of the zoning law). Thus, the 2001 ordinance made no difference to Metro Enviro's nonconforming use right, which was always restricted to operation pursuant to a special permit.

In its prior petition, Metro Enviro stated that its "use of the subject property has also been a legal pre-existing nonconforming use, since at least 1998." Petition, dated January 31, 2003 at ¶ 27. In its November 2004 letter to the Village, Greentree stated that transfer station use was consistent with "the decades-long" nonconforming use at the Site. Gerrard Aff. Ex. 7. Contradicting Metro Enviro's verified Petition and Greentree's letter, Petitioners now argue that the Facility actually was operating as of right when the zoning change took place in 2001. Pet. Mem. Of Law at 21. This 2005 claim flies in the face of the facts that Metro Enviro itself swore to in 2003 and Greentree stated in its communication to the Village on this issue. In addition, Metro Enviro continued to seek renewal of its Permit, admitted that it had to comply with the terms of that Permit throughout the period that it now claims it was operating as of right, and

paid a substantial fine in the fall of 2002 for violations of the Permit. Thus, any claim possessed by Petitioners that transfer station activity was an as of right use prior to June 2001 has been repeatedly waived.

In any event, the claim that waste transfer was an an-as-of-right use would have been without merit, even if it had not been waived. As Petitioners correctly state, the Village Code allowed “Light manufacturing, assembling, converting, altering, finishing, cleaning or any other processing of *products*” in the light industrial district. Village Code (old) § 230-18(B)(2) (emphasis added), Pet. Exhibit D. However, Petitioners focus on the wrong term in this provision, because while they may have been processing waste, they were not processing “products.”

Solid waste laws generally exclude marketable product from the definition of solid waste. Therefore a facility that converted trees into wood chips and mulch did not need a DEC permit, because it was not a solid waste facility. *Steck v. Jorling*, 219 A.D.2d 727, 631 N.Y.S.2d 377 (2d Dep’t 1995). The current definition of solid waste in New York excludes many products that can be manufactured into commercially valuable materials. 6 N.Y.C.R.R. § 360-1.2(a)(4)(viii). Recyclable wastes form a special category because they can be converted from waste into products. *See* 40 C.F.R. § 266.20(b) (hazardous waste that is processed into products is generally no longer regulated as hazardous waste); *Amstel Recycling v. City of New York*, 7 A.D.3d 326, 776 N.Y.S.2d 272 (1st Dep’t 2004) (facility that crushed concrete for sale was a waste transfer station that dealt with recyclable materials, which was defined as “waste that may be . . . returned to the economy in the form of raw material or products”).

Just like the authorities discussed above, the use of the word “products” in the Village Code showed that the law allowed processing of discrete articles or specific types of materials

for sale. This view was confirmed by the Village in 1986 when it decided that Ligouri's operation was a change in nonconforming use on the Site. Gerrard Aff. Ex. 1. It is now far too late for this decision to be challenged.

Even if it could be challenged, this decision is also consistent with the dictionary definition of "product." According to the Oxford English Dictionary "product" is "That which is produced by any action, operation, or work; a production; the result. Now freq. that which is produced commercially for sale." Thus, an amorphous stream of construction waste, which by its nature is a mixture of many different kinds of materials and cannot be sold, is not "products." This even more clear when read in conjunction with the first part of the provision which refers to "Light manufacturing, assembling, converting, altering, finishing, cleaning." Unlike a waste transfer station, these operations all involve generating products that may be sold. "Materials" is a broader term that subsumes both wastes and products, but the Village Code uses the narrower word "products."

E. Exclusionary Zoning Claim Is Without Merit

Plaintiffs' contention in its Petition regarding exclusionary zoning (which it failed to brief) is also meritless. Zoning of residential housing has been invalidated on the grounds that it is exclusionary in certain circumstances; however, the concept of exclusionary zoning has never been held to apply to commercial or industrial use. *Gernatt Asphalt Products, Inc. v. Town of Sardinia*, 87 N.Y.2d 668, 684, 642 N.Y.S.2d 164, 173 (1996); see also *Great Atlantic & Pacific Tea Co., Inc. v. Town of East Hampton*, 997 F.Supp. 340, 349 (E.D.N.Y. 1998). Moreover, even under the test applicable to exclusionary zoning that courts have applied in the context of exclusion of lower to middle income housing, a zoning ordinance is valid if it is designed to achieve "a legitimate public purpose." *Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville*, 51 N.Y.2d 338, 343, 434 N.Y.S.2d 180, 182 (1980). In the present case, the Board

used its experience with waste transfer uses to rationally decide that this use should no longer be permissible in light industrial zones. The claim of exclusionary zoning is therefore inapplicable to this finding.

F. Section 1983 Claims Are Without Merit

Grasping at straws, Plaintiffs attempt to make due process and takings claims, despite their failure to assert these claims in their initial failed challenge, and in the face of explicit judicial wariness about plaintiffs using § 1983 claims to seek remedy for adverse zoning decisions. This hostility was unambiguously expressed in a Second Circuit opinion dealing with the 42 U.S.C. § 1983 claims of an aggrieved applicant for a special use permit against a village board, as follows: “Litigants do themselves a disservice when they attempt to clothe state causes of action in the garb of a federal claim while ignoring available state remedies.” *Harlen Assoc. v. Inc. Vill. of Mineola*, 273 F.3d 494, 505 (2d Cir. 2001).

The due process claims are entirely invalid. A *procedural* due process claim is not viable when permit decisions are made after a hearing, which was preceded by adequate notice and followed by written explanations. *Natale v. Town of Ridgefield*, 170 F.3d 258, 262 (2d Cir. 1999). The Village of Croton-on-Hudson held thirteen hearings and other comment periods; Metro Enviro attended almost all of them; and the Village Board issued a fifteen-page, single-spaced findings statement explaining its decision. For a *substantive* due process claim, plaintiffs must show that they had a “clear entitlement” to the requested decision and the conduct of the board was outrageously arbitrary. *Natale*, 170 F.3d at 262; *Harlen*, 273 F.3d at 505. A clear entitlement can only be found where the issuing authority lacks discretion to deny the permit and there is no uncertainty about the law regarding the degree of discretion. *Natale*, 170 F.3d at 263. As the Court of Appeals has found, the Board’s conduct here was fully justified. Thus, both due process claims border on the frivolous.

The takings claim is equally unavailing. When deciding takings claims, the Court of Appeals 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). To establish a taking, a property owner has to show that either the ordinance does not substantially advance legitimate state interests; or the ordinance denies an owner an economically viable use of its property. *Id.* at 105, 699 N.Y.S.2d at 724. Here the Court of Appeals has already found that closing Metro Enviro was justifiable because of the threat it caused to the community, showing that legitimate Village interests were at stake. In addition, permitted uses allowed in this zone include: light manufacturing, research laboratories, hotels, inns and restaurants, warehousing, wholesaling, freight terminal, business and professional offices, motor vehicle parking structures and parking lots, and utilities. Thus, the ordinance did not deny Greentree an economically viable use of its property. There are plenty of other potential users of the Site, but Greentree does not seem to have done so much as placed an ad in the classifieds to try to rent it.

In any event, no property was taken here. The previous owner voluntarily surrendered the right to operate without a special permit when it changed the lawful use of the property from one nonconforming use to another in 1988. Thus, nothing was taken from the property owner at that stage. The Board subsequently refused to renew the Special Permit for good cause, but the Appellate Division has found that an applicant for a permit renewal does not have any property interest, as follows:

Even if the consent order could be characterized as a license or permit as petitioner argues, petitioner would not have been entitled to commence or continue construction of the new facility, or to operate the existing transfer station, pending a hearing to determine the appropriateness of DEC's denial. An applicant for a license or

permit renewal has no inherent property interest in renewal and therefore has no due process right to demand a hearing.

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). Thus, a special permit and the privilege to operate that it confers is not property, so its nonrenewal is outside of constitutional protection. Therefore, neither the zoning amendment in 2001, nor the denial of the Special Permit renewal and the order to close in 2003, nor the resetting of the closure date in 2005, were takings of property.

II. No Irreparable Harm to Greentree

As discussed above, if a nonconforming use ceases for a year it is terminated. Thus, any nonconforming use right that is retained by Greentree Realty LLC will not be affected in the short term by Metro Enviro ceasing operations. At most, depending on the terms of its lease agreement with Metro Enviro (which the Village has not seen), Greentree Realty might suffer some loss of income. Therefore, Greentree will not experience irreparable harm pending the final resolution of this lawsuit.

Even after Metro Enviro closes, Greentree will still have valuable property. As noted above, there are numerous uses allowed in this zone. Greentree has not alleged that it has attempted to lease or sell the property but has had no takers. The Site's excellent access to highway and rail make it an eminently marketable location.

Furthermore, Greentree has already asserted that it has a remedy. It wrote to the Village Board last November,³ stating that if Metro Enviro is ultimately unsuccessful in the pending litigation, it intends to use the property as a transfer station and would, if necessary, seek a special permit to do so. It is not at all clear that such an application would succeed, but

³ Letter from Wekstein to Elliot, dated November 15, 2004. Gerrard Aff. Ex. 7.

Greentree has set forth the path it could take following Metro Enviro's closure -- seeking a special permit.

III. Balance of the Equities Favors the Village

When deciding the prior litigation in the Village's favor, the Court of Appeals stated: "even if no single violation was dangerous in itself, the Board was entitled to conclude that the history of repeated, willful violations created an unacceptable threat of future injury to health or the environment." Before that, the Appellate Division stated: "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 the environment."

Metro Enviro has assiduously used the judicial process to prevent the Village from implementing its January 27, 2003 decision to close Metro Enviro for over two and half years, even though the Village's action was entirely lawful. This latest lawsuit is merely another attempt to delay. This Court should see through the flimsy arguments put forward by Petitioners to the underlying realities.

The balance is between, on the one hand, a Village that has been lawfully attempting to remove a threat to the public health and the environment, and on the other, a solid waste company that is guilty of numerous willful violations of its Permit, and its landlord, which has been notably absent while all this happened. The balance of the equities therefore strongly favors the Village.

To date the Village's longstanding effort to remove the threat to the public health and the environment presented by Metro Enviro has been frustrated by legal delaying tactics. In a last

ditch effort to save its operations, Metro Enviro has brought a new action asserting old claims and added another nominal party, its landlord. This makes no difference to the balance of the equities, which are now squarely in favor of the Village.

CONCLUSION

For the reasons stated herein, Respondents respectfully urge the Court to deny the Petitioners' motion for a preliminary injunction and dismiss Petitioners' claims.

DATED: New York, New York
 July 28, 2005

Respectfully Submitted,



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Supreme Court, Appellate Division, Second
Department, New York.
In the Matter of **METRO ENVIRO TRANSFER,**
LLC, respondent,
v.
VILLAGE OF CROTON-ON-HUDSON, et al.,
appellants.

May 10, 2004.

Background: Applicant for renewal of a special use permit to operate a construction and demolition debris waste transfer station brought Article 78 proceeding to review determination of village board of trustees which denied the application. The Supreme Court, Westchester County, Nicolai, J., granted the petition, and respondents appealed.

Holding: The Supreme Court, Appellate Division, held that substantial evidence of permit violations supported determination of village board of trustees not to renew permit.
Reversed.

West Headnotes

[1] Environmental Law  **685**
149Ek685 Most Cited Cases

The determination of a municipality whether or not to renew a special use permit to operate a waste transfer facility will be upheld where it is supported by substantial evidence.

[2] Environmental Law  **369**
149Ek369 Most Cited Cases

Substantial evidence of permit violations supported determination of village board of trustees not to renew special permit to operate waste transfer facility, notwithstanding operator's claim that violations caused no actual harm, as village did not need to wait for actual harm to occur because of the violations in order to deny renewal.

****170** Arnold & Porter, New York, N.Y. (Michael B. Gerrard, Kerry A. Dziubek, and Richard Webster of counsel), for appellants.

Zarin & Steinmetz, White Plains, N.Y. (David S. Steinmetz of counsel), for respondent.

FRED T. SANTUCCI, J.P., ANITA R. FLORIO,
ROBERT W. SCHMIDT, and REINALDO E.
RIVERA, JJ.

***626** In a proceeding pursuant to CPLR article 78 to review a determination of the Village Board of Trustees of the Village of Croton-on-Hudson, dated January 27, 2003, which denied the petitioner's application for renewal of a special use permit to operate a construction and demolition debris waste transfer station, the Village of Croton-on-Hudson and the Village Board of Trustees appeal, as limited by their brief, from so much of a judgment of the Supreme Court, Westchester County (Nicolai, J.), entered February 20, 2003, as granted the petition, annulled the determination, and remitted the matter to the Village of Croton-on-Hudson to renew the special permit upon such reasonable conditions as it may deem appropriate.

ORDERED that the judgment is reversed insofar as appealed from, on the law and the facts, with costs, the determination is confirmed, and the proceeding is dismissed on the merits.

In 1998 the petitioner, **Metro Enviro Transfer, LLC** (hereafter Metro), obtained a special use permit to operate a waste transfer facility in the appellant Village of Croton-on-Hudson from the appellant Village Board of Trustees (hereinafter collectively referred to as the Village). The special use permit was issued after an extensive environmental review process. A number of conditions, limitations, and ****171** restrictions were incorporated into the permit as a result of that review process. The permit also provided that if any of the conditions, limitations, or restrictions contained therein were violated, the Village had the right to revoke the permit. In 2001 Metro sought to renew the permit. However, the Village ultimately denied renewal on January 27, 2003, on the ground that on numerous occasions Metro had violated a number of the permit conditions, limitations, and restrictions. Those violations included accepting waste in excess of that allowed in the permit, acceptance of unauthorized waste, the failure to train personnel, and the failure to maintain accurate records. Relying on, among other things, an expert affidavit, the Village found that the violations posed a threat to the safety of the community and the environment, since the various

conditions, limitations, and restrictions that were violated were established to address those concerns.

Metro commenced this proceeding, claiming, inter alia, that there was un rebutted evidence that, despite the subject violations, there was no actual harm to the community or environment. Thus, Metro contended, the Village's determination was arbitrary and capricious, and not supported by substantial evidence. *627 The Supreme Court agreed, and annulled the Village's determination. We reverse.

[1] "The classification of a 'special permit' or 'special exception' is tantamount to a legislative finding that, if the special permit or exception conditions are met, the use will not adversely affect the neighborhood and the surrounding areas" (Matter of C.B.H. Props. v. Rose, 205 A.D.2d 686, 613 N.Y.S.2d 913). "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" (Matter of Atlantic Cement Co. v. Williams, 129 A.D.2d 84, 88, 516 N.Y.S.2d 523). 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 N.Y.2d 1000, 665 N.Y.S.2d 627, 688 N.E.2d 501). "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 N.Y.2d 190, 196, 746 N.Y.S.2d 662, 774 N.E.2d 727).

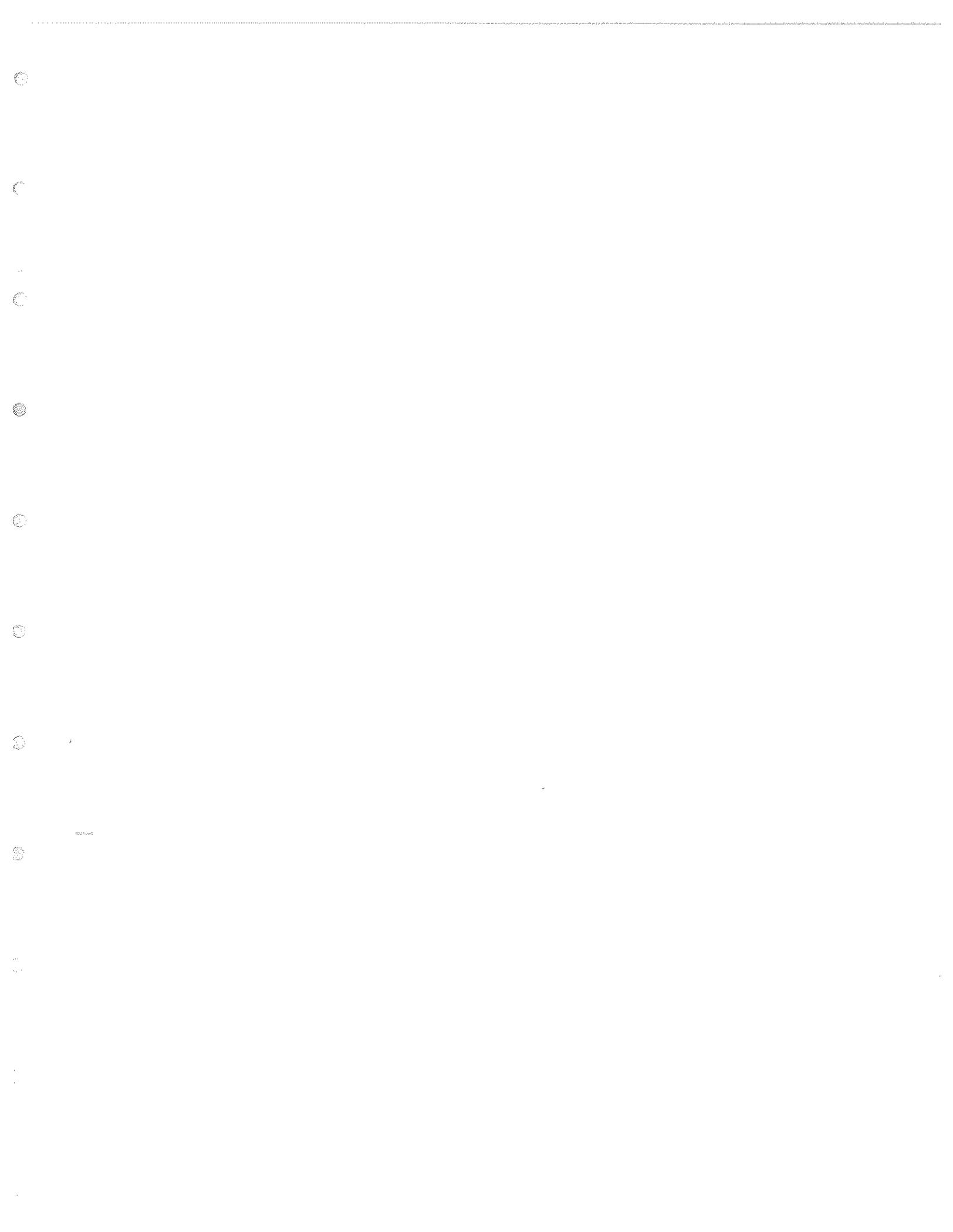
[2] Here, the Supreme Court erroneously substituted its own judgment for that of the Village and held that the determination on review was the sole product of generalized opposition to the facility (see Matter of Retail Prop. Trust v. Board of Zoning Appeals of Town of Hempstead, supra). The Village 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, 687 N.Y.S.2d 291; Matter of Bell v. Szmigel, 171 A.D.2d 1032, 1033, 569 N.Y.S.2d 36; cf. Matter of Twin County Recycling

Corp. v. Yevoli, supra).

Accordingly, the Supreme Court erred in granting Metro's petition.

7 A.D.3d 625, 777 N.Y.S.2d 170, 2004 N.Y. Slip Op. 03822

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(Publication page references are not available for this document.)

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THIS DECISION IS UNCORRECTED AND
SUBJECT TO REVISION BEFORE
PUBLICATION IN THE NEW YORK REPORTS.

Court of Appeals of New York.
In the Matter of METRO ENVIRO TRANSFER,
LLC, Appellant,
v.
VILLAGE OF CROTON-ON-HUDSON, et al.,
Respondents.

July 6, 2005.

David S. Steinmetz, for appellant.

Michael B. Gerrard, for respondents.

New York Conference of Mayors and Municipal
Officials, amicus curiae.

ROSENBLATT, J.

The question in this appeal is whether a village board's decision not to renew a special use permit was supported by substantial evidence. We hold that it was.

In 1998, Croton-on-Hudson's Village Board of Trustees approved a three-year special permit for a solid waste transfer facility operated by Metro Enviro, LLC. [FN1] The permit contained 42 special conditions, including capacity limitations. Other conditions included delineating types of waste that were not allowed in the facility and specifying training required of facility personnel.

FN1. Metro Enviro, LLC is an entity distinct from appellant Metro Enviro Transfer, LLC. Metro Enviro Transfer acquired Metro Enviro's assets in March 2000.

Over the three-year period covered by the permit, Metro repeatedly and intentionally violated conditions of the permit. Metro not only exceeded capacity limitations at least 26 times, but also falsified records by rigging software to reallocate the dates of waste intake, deceptively giving the impression that there were no excesses. Further, on at least 42 occasions, the operators accepted prohibited types of industrial waste. Other violations included

the inadequate training of facility personnel, insufficient record keeping and inappropriate storage of tires on the site.

Undeniably, there is overwhelming proof of these violations. Indeed, Metro admitted them. It paid fines in connection with several violations and, as a direct result of its capacity excesses, lost its bid to increase the facility's capacity.

In March 2001, Metro applied to renew the permit, due to expire in May 2001. The Board granted more than ten temporary extensions and held extensive hearings in which it heard evidence and opinion testimony for and against renewal. Metro presented extensive sworn expert testimony and submitted additional written evidence and legal arguments. On January 27, 2003, the Board voted not to renew the permit.

The Board released a 15-page statement of findings detailing its rationale, including a three-page chart summarizing Metro's violations. In its statement, the Board credits the report of the Village's consultant, in whose opinion the violations were substantial. He concluded they "signify a facility that continually promises to improve but nonetheless persistently violates regulations that are designed to protect health and the environment." The Board's statement reflects its doubts about Metro's credibility and its concern that Metro had not been forthright in its dealings with the Village. The Board expressed a belief that, but for a federal monitor's presence, Metro might have concealed information about its operations.

Seeking to annul the Board's decision, Metro brought this article 78 proceeding. Supreme Court granted the petition, reasoning that the Board's decision was "impermissibly based, in part, upon generalized opposition, which remains uncorroborated by any empirical data." The Appellate Division reversed and dismissed Metro's petition, concluding that Supreme Court "erroneously substituted its own judgment for that of the Village" (7 AD3d 625, 627 [2d Dept 2004]). We granted Metro leave to appeal to this Court, and now affirm.

Metro argues that because it has admitted its violations, paid fines and taken action to conform with the permit conditions in the future, the Board was wrong in denying renewal of the special permit.

--- N.E.2d ---

(Publication page references are not available for this document.)

In essence, Metro asserts that to justify non-renewal, the Board must show substantial evidence not only of violations, but of violations that actually harmed or endangered health or the environment. We disagree. Although inconsequential violations would not justify non-renewal, the many violations here, and their wilful nature, sufficiently support the Board's decision.

In Twin County Recycling Corp. v. Yevoli (90 N.Y.2d 1000, 1002 [1997]), we recognized that a board is not without discretion in deciding whether to grant a special use permit. [FN2] Scientific or expert evidence is not necessary, but a board may not base its determination on "generalized community objections" (*id.*). In Market Square Properties, Ltd. v. Town of Guilderland Zoning Bd of Appeals (66 N.Y.2d 893, 895 [1985]), we held that "expert opinion ... may not be disregarded in favor of generalized community objections," but nevertheless affirmed the board's denial of a special use permit because there were other grounds in the record. [FN3] The same principle applies to renewal of a special use permit. This is not to say that denials and non-renewals may always be based on identical grounds. Where a facility is already in operation and its owner has made an investment, the board should take those facts into account. That said, the board's decision remains a discretionary one that will not be overturned if it has a proper basis.

[FN2. See also Anderson, New York Zoning Law and Practice, § 24.15, at 294 (3d ed 1984) (Boards apply "common-sense judgments" to resolve special use permit disputes).

[FN3. In this realm, board determinations are not popularity contests and will be set aside on judicial review when based solely on generalized community opposition. Conversely, if a board determination is based on substantial evidence, it would be perverse for a court to vacate it merely because the community opposed the proposal. Here, where the Board had substantial evidence for its determination, the courts need not look to the role of community opposition to (or support for) the permit renewal.

As the Appellate Division correctly explained, the Board did not have to show substantial evidence of actual harm. It is enough that the Board found the violations potentially harmful. [FN4] Here, Metro

claims that none of the violations in question created a significant threat of harm. But even if no single violation was dangerous in itself, the Board was entitled to conclude that the history of repeated, wilful violations created an unacceptable threat of future injury to health or the environment.

[FN4. See *e.g.* Atlantic Cement Co. v. Williams, 129 A.D.2d 84, 88 (3d Dept 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").

There may, of course, be instances in which an applicant's violation is so trifling or de minimis that denying renewal would be arbitrary and capricious. In this case, however, the Board reviewed volumes of evidence and opinions from both Metro's expert and its own. Metro's expert said the violations were inconsequential. The Board's expert, however, stated, and the Board was entitled to conclude, that despite Metro's assurances that it would comply, the facility persistently violated permit conditions designed to protect health and the environment. The Board weighed the evidence and concluded it "could no longer rely" on Metro's assurances of future compliance. A reviewing court "may not substitute its own judgment for that of the board, even if such a contrary determination is itself supported by the record" (Retail Prop. Trust v. Bd of Zoning Appeals of Town of Hempstead, 98 N.Y.2d 190, 196 [2002]). Here, the quantity and character of Metro's violations would have constituted sufficient grounds to deny Metro's renewal application on their own, with or without expert testimony.

Accordingly, the Appellate Division's order should be affirmed, with costs.

Order affirmed, with costs.

Chief Judge KAYE and Judges G.B. SMITH, CIPARICK, GRAFFEO, READ and R.S. SMITH concur.

2005 WL 1556709 (N.Y.), 2005 N.Y. Slip Op. 05750

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