

July 24, 2006

**MEMORANDUM**

To: Richard Herbek  
From: Michael B. Gerrard  
Re: Status of Litigation Over 1A Croton Point Avenue

This memo summarizes the status of the litigations and other proceedings relating to 1A Croton Point Avenue.

State Court

Greentree has moved for a preliminary injunction that would prevent the Village from enforcing the one-year period for discontinuance of a nonconforming use, which expires on approximately August 31, 2006. Both sides have submitted papers to Judge Nicolai, who has indicated that he does not require oral argument.

NIR and Greentree have filed a notice of appeal with the Appellate Division from Judge Nicolai's decision that they require a special permit before they may resume solid waste operations. The Village has filed a notice of cross-appeal from Judge Nicolai's decision to preserve its argument that once Metro Enviro lost its nonconforming use special permit, the right to operate the nonconforming use (i.e., construction and demolition debris transfer station) at the site was lost altogether. No briefing schedule has been established.

Federal Court

In accordance with the suggestion of Judge McMahon, we have filed a complaint with the Surface Transportation Board (described below). We have answered BSOR's complaint.

Otherwise, this case is largely on hold until the STB acts. Counsel to the Village have decided, for a variety of legal reasons, not to file a notice of appeal with the U.S. Court of Appeals for the Second Circuit.

#### Surface Transportation Board

We filed a complaint with the STB against BSOR, NIR, RSA and Greentree on June 30, 2006. The complaint asks the STB to find that BSOR is operating illegally; to fine BSOR for this; to fine NIR, RSA and Greentree for cooperating and assisting in this illegal action; and to require BSOR to go through a formal application process with the STB before operating.

BSOR filed a Verified Notice of Exempt Transaction with the STB on June 29, arguing that it needed no STB approvals. We filed a petition opposing this notice on June 30. On July 3, the STB issued a “housekeeping stay” that prevents BSOR’s notice from going into effect before the STB considers the matter. On July 6 BSOR filed its opposition to our petition. We have filed a formal response. Numerous other submissions have been made to the STB. We expect that the STB will establish a process for consideration of the various matters, including the opportunity for public comment.

We have served interrogatories and document demands upon BSOR, Greentree, NIR and RSA. BSOR has moved for a protective order.

#### Village Planning Board

On July 5, 2006, NIR, with the support of Greentree, filed an application for a special permit with the Village. As required by law, on July 10 the Village Board of Trustees referred this matter to the Village Planning Board for a recommendation. The Planning Board will discuss this application at its next meeting, which is scheduled for July 25.

### NYS DEC

The New York State Department of Environmental Conservation has circulated proposed amendments to its solid waste regulations (the “Part 360” regulations). One of the proposed amendments would exempt activities conducted in conjunction with railroads from the Part 360 regulations. We have sent a comment to DEC objecting to this exemption.

### Congress

The Subcommittee on Railroads of the Committee on Interstate Commerce and Transportation of the U.S. House of Representatives has held a public hearing on legislation that would clarify or limit the railroad exemption for solid waste activities.

### Eminent Domain

The Village’s eminent domain efforts at 1A Croton Point Avenue have been preliminarily enjoined by Judge McMahon’s order.