

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION: SECOND DEPARTMENT

-----X  
GREENTREE REALTY, LLC,

Petitioner-Respondent,

- 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-Appellants.

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

Docket No.  
2006-8417

Plaintiff-Appellant,

- against -

NORTHEAST INTERCHANGE RAILWAY, LLC  
and GREENTREE REALTY, LLC,

Defendants-Respondents.

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Preliminary Statement

The difference between Greentree’s position and the Village’s in this appeal boils down to one issue: whether Greentree’s finding itself in the position of having to go through the special permit application process in

less than two months was a result of the Village's interference with the processing of NIR's application, or whether it was a result of either Greentree's and/or NIR's dilatoriness or their strategic decision not to seek a special permit until less than two months before the expiration of the discontinuance period. As the record in this appeal shows, what made it virtually impossible to get a special permit before the statutory discontinuance period lapsed – *i.e.*, August 31, 2006 – was that Greentree (or NIR, its tenant) did not apply for one until July 5, 2006, even though NIR had reached an agreement a year earlier to lease the property for which it sought the special permit.

#### Factual Corrections

Greentree's Brief is permeated with misleading references to the Village's injunction against Greentree and NIR's operating a waste transfer facility at 1A Croton Point Avenue. (Greentree Brief<sup>1</sup> at 1, 2, 3, 29) The only injunction the Village has ever sought or obtained was to require Greentree and/or NIR to obtain a special permit before commencing waste

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1. The complete title of the brief is Brief for Petitioner-Respondent in Action No. 1 and Defendant-Respondent in Action No. 2 Greentree Realty, LLC.

transfer operations in the Village. (R.35) The Village never brought an action or made an application to enjoin NIR and Greentree from operating a waste transfer station altogether.

Less significant from a legal perspective, but typical of its hyperbolic and disingenuous response to the Village's argument in this appeal, is Greentree's twice criticizing as "blatantly false" the Village's statement that Northeast Interchange Railway ("NIR") is not a railroad. (Greentree Brief at 10 n.2, 29) The Village's statement is confirmed by two reported decisions of the United States Surface Transportation Board, which expressly state that NIR is not a rail carrier. Surface Transportation Board Decisions, Finance Docket No. 34734 (August 5, 2005 and November 17, 2005).

Finally, it is important to understand that the "millions of dollars of investment" in the waste transfer facility at 1A Croton Point Avenue (Greentree Brief at 3) was not made by Greentree. The investment in the facility was made by Metro Enviro (see Greentree Brief at 7), which lost its right to operate at the site because of persistent substantial violations of its special permit. Metro Enviro Transfer, LLC v. Village of Croton-on-Hudson, 5 N.Y.3d 236, 800 N.Y.S.2d 535 (2005), affirming, 7 A.D.3d 625,

777 N.Y.S.2d 170 (2d Dep't 2004). Those assets were subsequently purchased by NIR (or one of its related companies) (R.26), which is no longer a tenant at the site and has not filed a brief in this appeal.

Argument

REPLY POINT I

NOTHING THE VILLAGE DID –  
INCLUDING ITS APPLICATION FOR A  
PRELIMINARY INJUNCTION –  
INTERFERED IN ANY WAY WITH  
NIR'S SEEKING A SPECIAL PERMIT.

Greentree's repeated characterizations of the Village's application for a preliminary injunction as a "sword and a shield," and a "ploy" to prevent Greentree from getting a special permit (Greentree Brief at 1, 2, 3, 29) are semantic distortions that bear no semblance to reality. It is perfectly clear from the record in this case that the Village did absolutely nothing to prevent Greentree or its tenant from applying for and obtaining a special permit to operate a nonconforming transfer station at 1A Croton Point Avenue. Indeed, as shown at page 76 of the Record on Appeal, the Village went out of its way to expedite the handling of NIR's application, once it was finally

made.

The injunction obtained by the Village in no way frustrated Greentree's or NIR's attempts to seek a special permit. Rather, the entire object of the injunction was to compel NIR and/or Greentree *to apply for* a special permit. The Village was forced to seek the injunction by NIR's Chief Executive Officer, who, in November 2005, informed the Village Manager that NIR intended to start operating a construction and demolition debris transfer station at 1A Croton Point Avenue once it secured its Westchester County Solid Waste License and New York State DEC permit, and that it was not going to apply to the Village for a special permit. (R.75, 111) For Greentree to insist that this injunction interfered with its getting a special permit makes no sense.

Other than call it "laughable" (Greentree Brief at 31), Greentree has not attempted to show how the Village's opposition to NIR's application for a license from the Solid Waste Commission interfered in any way with Greentree's seeking a special permit from the Village. The Village's opposition involved no litigation; it consisted of several letters to the Solid Waste Commission, two meetings with Commission staff, and two

appearances at public hearings. Moreover, NIR had its Solid Waste license by December 15, 2005 (R.16), eight-and-one-half months before the discontinuance period was to lapse.

Finally, Greentree has not demonstrated how the Village's holding a public hearing to determine whether the Village had a public need for the 1A Croton Point Avenue property stood in the way of Greentree's applying for a special permit. The public hearing was a very preliminary step in the eminent domain process, and it was far from a foregone conclusion that the Village would decide to condemn the property.

Only one thing prevented Greentree and/or NIR from getting a special permit before the statutory discontinuance period lapsed: they did not apply for one until less than two months before the expiration date.

## REPLY POINT II

### THE LOWER COURT'S DECISIONS IN NO WAY PREVENTED A C&D FACILITY FROM REOPENING.

Greentree's assertion that "since the Facility's closure on September 1, 2005 . . . the Facility [has] been unable to open due to the Court's Decisions," (Greentree Brief at 29), is groundless. In every decision since this Court (and ultimately the Court of Appeals) reversed Judge Nicolai and upheld the Village's closure of Metro Enviro's waste transfer station, Judge Nicolai, who has been assigned to every state court case involving 1A Croton Point Avenue, granted Greentree virtually whatever relief it sought.

On July 18, 2005, twelve days after the Court of Appeals reinstated the Village Board's decision to terminate Metro Enviro's operations at 1A Croton Point Avenue, the Village directed Metro Enviro to close by July 25, 2005. Metro Enviro immediately brought an order to show cause before Judge Nicolai and, on July 21, 2005, he issued a temporary restraining order enjoining the closure. More than a month later, on August 25, 2005, Judge Nicolai granted Greentree's motion for a preliminary injunction and enjoined the Village from "prohibiting or interfering with Greentree's ability

to lease and or operate it's [sic] property for purposes of solid waste management." (R.71)

In his decision in April 2006 ruling that NIR needed a special permit, Judge Nicolai admonished the Village to "issue a determination within a reasonable time frame" and directed the Village to file an undertaking of \$25,000. (R.38)

The last of Judge Nicolai's decisions, the subject order tolling the statutory discontinuance period, was rendered without a word of reasoning nor citation to a single case or other source of law in its support. (R.5-6)

### REPLY POINT III

**IT IS NOT TRUE THAT GREENTREE  
"ACTED WITH ALL DUE DILIGENCE"  
TO SEEK A SPECIAL PERMIT BEFORE  
THE STATUTORY DISCONTINUANCE  
PERIOD EXPIRED.**

Despite all its rhetoric to the contrary, Greentree indeed did "s[i]t idly by" (Greentree Brief at 3) – at least with respect to the special permit – while the discontinuance period ran. Had Greentree applied for a special permit at the same time, or even after, it secured its county and state permits,

it would have had the better part of a year – more than adequate time – to process its special permit application.

It was clear to the Village from Judge Nicolai’s August 2005 decision that Greentree and/or its tenant had to apply for a special permit to operate a waste transfer facility at 1A Croton Point Avenue. And Greentree concedes that it knew this was the Village’s position. (Greentree Brief at 30 n.11) If Greentree decided to gamble about what Judge Nicolai meant by “[the Village’s] required permits and/or approvals,” (R.71), it must pay the consequences of its risky wager.

Even if Judge Nicolai’s August 2005 directive were not so clear to Greentree, his April 2006 injunction was indisputable. (Not incidentally, that decision would have been rendered at least two months earlier, had NIR not sought more than two months of adjournments.) Had Greentree or NIR applied for the special permit in April 2006 – rather than wait an additional two months – the application could have been processed before the statutory discontinuance period expired. Although Metro Enviro’s 1998 special permit took “slightly less than eight months” to process, that was for the first issuance of a permit for a whole new operation. (R.77) In contrast, NIR

was claiming to continue the same operation Metro Enviro had conducted,  
*i.e.*,

The instant Application requests the re-issuance of the 1998 Special Permit. NIR stipulates that it intends to operate the Facility without any material change in the permit conditions or the scope of the permitted activities set forth therein. (R.41)

The time to process NIR's 2006 application would, therefore, be shorter.<sup>2</sup>

Greentree's argument that NIR could not apply for a special permit until March 2006 because a lease was not executed until that date is fallacious on at least four counts. First, Greentree could have applied for the special permit. See, e.g., Dennis v. Zoning Board of Appeals, 167 Misc. 2d

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2. The "staggering 22 months" Greentree refers to at several points in its brief (Greentree Brief at 8, 34), is irrelevant and deceptive. That was the time it took for the Village to decide on the renewal of Metro Enviro's special permit (which was ultimately denied and upheld by this Court and the Court of Appeals). It is important to understand that during that entire 22-month period, the Village continually granted short-term extensions to the special permit, so that throughout the period, Metro Enviro's transfer station was fully operational. (R.77)

555, 637 N.Y.S.2d 266 (Sup. Ct. Westchester County 1995). Second, NIR reached an agreement to buy the lease in July 2005, so at that point became a contract lessee. (R.75, 82-85) A contract lessee has standing to seek land use permits. See, e.g., Baldassare v. Planning Board, 200 A.D.2d 948, 607 N.Y.S.2d 459 (3d Dep't 1994). Third, NIR applied for the Solid Waste License from the County and for a transfer of the DEC permit in September 2005, six months before NIR and Greentree executed the lease. Fourth, if NIR applied for the special permit in March 2006, it would have had six months, more than enough time, to process the application.

Finally, Greentree's argument that it took substantial time to process the application is belied by the fact that all it submitted as its special permit application was a two-page letter, to which it attached the list of conditions to Metro Enviro's 1998 special permit, copies of the DEC permit and Solid Waste license, and Part I of the Environmental Assessment Form.

#### REPLY POINT IV

THE CASES RELIED ON BY  
GREENTREE DO NOT SUPPORT ITS  
ARGUMENT THAT JUDGE NICOLAI  
PROPERLY TOLLED THE STATUTORY

### DISCONTINUANCE PERIOD.

The cases Greentree relies on in making its argument that the lower court properly tolled the statutory discontinuance period fall into four categories, none of which applies to the Greentree/NIR situation.

The first set of cases, Bogey's Emporium v. City of White Plains, Incorporated Village of Ocean Beach v. Stein, and Two Wheel Corp. v. Fagiola, involved municipalities that thwarted – even illegally – property owners' attempts to get whatever permit or license would have allowed them to resume their discontinued nonconforming use before the statutory period expired. They are nothing like the instant case, in which the sole reason the discontinuance period was about to lapse was that Greentree and NIR did not apply for the special permit until the eleventh hour, or, more precisely, the eleventh month.

In Bogey's Emporium v. City of White Plains, 114 A.D.2d 363, 493 N.Y.S.2d 880 (2d Dep't 1985), the petitioner had applied for a cabaret license with enough time for the City Commissioner of Public Safety to conduct the necessary inspection and issue the license. The six month statutory discontinuance period lapsed, however, because the City did not

act promptly on Bogey's application for a cabaret license. Record on Appeal, Decision and Order, Westchester County Supreme Court (May 24, 1985) at 2-4. (Greentree's Brief incorrectly describes the facts of this case, which are not reported in the Appellate Division decision.)

In Bogey's Emporium, the subject premises was operated as a restaurant and bar and its owners possessed a cabaret license; the cabaret was a prior nonconforming use. On October 12, 1983, the bar was closed by the Bankruptcy Court, which, on November 15, 1983, sold the lease to Bogey's Emporium. Although the lease was not signed until April 1, 1984, Bogey's applied to the City of White Plains for a cabaret license on either January 31 or February 6, 1984. The City did not process the application until November 5, 1984, at which time it denied the license on the stated ground that the nonconforming use of the premises as a cabaret had lapsed for more than six months. The lower court found, and the Appellate Division affirmed, that: "Had [the City of White Plains] acted promptly on petitioner's application, petitioner could have operated the premises as a cabaret before [the six month period expired]." Record on Appeal, Decision and Order, Westchester County Supreme Court (May 24, 1985) at 2-3,

affirmed, 114 A.D.2d at 363, 493 N.Y.S.2d at 881.

In Incorporated Village of Ocean Beach v. Stein, a contract lessee of a restaurant and bar was forced by village officials – in what the Court found to be an improper campaign to prevent him from getting a liquor license – to waive his right to have dancing at his new bar. (Dancing had been allowed at the previous establishment.) When the lessee subsequently sought to have dancing, the village ruled that dancing was a nonconforming use that was discontinued for longer than the statutory period. Under these circumstances, the Court refused to include in the statutory discontinuance period time lost “because [of] the ‘*unlawful* acts of the \* \* \* village taken to frustrate such timely resumption’ of a nonconforming use.” 110 A.D.2d 820, 822, 488 N.Y.S.2d 239, 241 (2d Dep’t 1985)(emphasis added).

In Two Wheel Corp. v. Fagiola, the Court denied summary judgment because there was a question of fact as to whether the property owner’s “failure to resume its nonconforming use of the subject premises within the six-month period . . . was caused by *unlawful* acts of the defendant village taken to frustrate such timely resumption.” 96 A.D.2d 1098, 1098, 467 N.Y.S.2d 66, 67 (2d Dep’t 1983).

As shown in the Village's principal brief in this appeal and in Reply Point I above, no action of the Village, let alone any unlawful action, frustrated Greentree's and NIR's belated attempt to secure a special permit.

The second category of non-supportive cases, 149 Fifth Avenue Corp. v. Chin and Hoffman v. Board of Zoning and Appeals, were cases in which the nonconforming use was forced to lapse for reasons beyond the property owner's control and the property owner promptly and diligently attempted to remedy the situation. Neither element exists in the case at bar.

In 149 Fifth Avenue, the City mandated repairs on a building facade, which required the removal of a nonconforming sign. The building owner “diligently completed” the repairs, but it took 27 months to finish them, and the nonconforming discontinuance period was 24 months. The Court ruled that where “interruption of a protected nonconforming use is compelled by legally mandated, duly permitted and diligently completed repairs, the nonconforming use may not be deemed to have ‘discontinued.’” 305 A.D.2d 194, 194-95, 759 N.Y.S.2d 455, 455 (1<sup>st</sup> Dep’t 2003). The Greentree/NIR situation is critically distinguishable in two important respects. First, Greentree’s nonconforming use was terminated on the basis of “overwhelming proof” of persistent substantial violations of the special permit by Greentree’s lessee, not because of any action by the Village. Metro Enviro Transfer, LLC v. Village of Croton-on-Hudson, 5 N.Y.3d 236,

239-40, 800 N.Y.S.2d 535, 536-37 (2005). Second, as shown above, Greentree and its new tenant did not “diligently” seek a special permit.

In Hoffman v. Board of Zoning and Appeals, a nonconforming restaurant was partially destroyed by fire, and the property owner obtained a building permit and began reconstruction immediately. It completed the work within the time required by the building permit, and the Village issued a certificate of occupancy. Neighboring property owners sought to vacate the C of O, but both the Village Zoning Board and the Appellate Division ruled that:

Where, as here, the Village specifically authorized and issued a building permit to reconstruct the fire-damaged existing building, and there is no contention that the reconstruction was not completed within the time required by the building permit, the mere closing of the restaurant to the general public while the reconstruction was being completed did not constitute, as a matter of law, a discontinuance of the nonconforming use within the meaning of [the Village Code].

155 A.D.2d 600, 600, 547 N.Y.S.2d 657, 658 (2d Dep’t 1990). Greentree cannot rely on Hoffman because, by Greentree’s own admission, the nonconforming waste processing facility ceased (R.13), and because Greentree and/or its tenant did not apply for a special permit promptly.

The third category of cases Greentree relies on involve tolling statutory time frames in non-zoning contexts, such as tenant evictions, statutes of limitation, and liens during bankruptcy proceedings. Greentree Brief at 24. Those cases and the statutes upon which they are decided are irrelevant to, and have never been relied on in, cases applying a nonconforming use discontinuance statute.

Finally, Greentree relies on general “equitable principles” as authority for refusing to apply Croton-on-Hudson’s statutory discontinuance statute. As stated expressly in the cases quoted in Greentree’s Brief, the courts look to general principles of equity when “there is no precedent for the precise relief sought.” London v. Joslovitz, 279 A.D. 280, 282, 110 N.Y.S.2d 58, 60 (3d Dep’t 1952). “Equity will adapt established rules to any situations and grant relief even though a case is novel and there is no precise precedent for the relief to be granted.” New York & Brooklyn Suburban Investment Co. v. Leeds, 100 Misc. 2d 1079, 1091, 420 N.Y.S.2d 639, 647 (Sup. Ct. Suffolk County 1979). Because, as discussed above and in the Village’s principal brief in this appeal,<sup>3</sup> there is a substantial body of Court of Appeals and

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3. Greentree attempts to distinguish the cases relied on by the Village on the

Appellate Division case law upholding and enforcing nonconforming use discontinuance statutes, this Court need not look to equity to supply relief for the instant case.

#### REPLY POINT V

#### GREENTREE URGES THE WRONG STANDARDS OF REVIEW FOR THIS APPEAL.

Greentree is mistaken in arguing that “[i]t is beyond cavil that . . . this Court’s ‘review is limited to whether or not there has been an abuse of discretion.’” Greentree Brief at 19. The cases it cites in support of this erroneous statement of the law are all cases involving preliminary

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grounds that in those cases the nonconforming uses had lapsed, whereas in the case at bar Greentree ran into court “to stop the clock” before the statutory discontinuance period expired. That may be a distinction, but it is a distinction without a difference and has not been recognized as significant in the cases dealing with discontinuance of nonconforming use statutes. The issue of whether a statutory discontinuance period is effective in a certain situation is the same whether the issue is raised before or after the statutory discontinuance period lapsed.

injunctions – not cases involving a final injunction, as in the decision under appeal. Whether or not a permanent injunction lies within the discretion of the court below is immaterial, because it is firmly established that the Appellate Division’s “scope of review of a discretionary matter is coextensive with that of [Supreme Court] . . . . In other words, we are not limited to determining whether [Supreme Court] abused its discretion. We may exercise discretion independently.” Broida v. Bancroft, 103 A.D.2d 88, 93, 478 N.Y.S.2d 333, 337 (2d Dep’t 1984) (citations omitted). Accord, State of New York v. Ford Motor Co., 74 N.Y.2d 495, 501, 549 N.Y.S.2d 368, 371 (1989).

Greentree is also mistaken in urging the Court to apply the presumption that zoning restrictions should be strictly construed in favor of the property owner. (Greentree Brief at 25) 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) (citations omitted). Recently, the Court 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.”).

### Conclusion

For these reasons and the reasons stated in the Village’s principal brief in this appeal, the Village of Croton-on-Hudson respectfully requests this Court to reverse the lower court’s order, and to award it such other relief as the Court

deems just and proper, including costs.

Dated: Tarrytown, New York  
May 17, 2007

Marianne Stecich  
Stecich Murphy & Lammers, LLP  
Attorneys for Appellants, The Village of  
Croton-on-Hudson, The Village  
Board of Trustees of the Village of  
Croton-on-Hudson, The Village  
Zoning Board of Appeals, and  
Daniel O'Connor, as the Village  
Building Inspector

828 South Broadway, Suite 201  
Tarrytown, New York 10591  
(914) 674-4100

Certification of Compliance

I, Marianne Stecich, attorney for Appellants, The Village of Croton-on-Hudson, The Village Board of Trustees of the Village of Croton-on-Hudson, The Village Zoning Board of Appeals, and Daniel O'Connor, as the Village Building Inspector, do hereby certify, pursuant to Rule § 670.10.3 of the Rules of the Appellate Division, Second Department, as follows:

1. This brief was prepared on a computer word processor.
2. The type face used is Times New Roman, 14 point.
3. The margins are at least one inch.
4. Except for point headings, long quotations, and tables, the brief is double-spaced.
5. This brief, excluding tables, includes a total of 3,840 words.

Dated: Tarrytown, New York  
May 17, 2007

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Marianne Stecich