

To Be Argued By:
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Time Requested: 20 Minutes

Appellate Division—Second Department Docket No. 2003-02335
Westchester County Clerk's Index No. 1788/03

Court of Appeals

STATE OF NEW YORK

—♦♦♦—
METRO ENVIRO TRANSFER, LLC,

Petitioner-Appellant,

—against—

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

Respondents-Respondents.

BRIEF FOR PETITIONER-APPELLANT

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Date Completed: February 11, 2005

CORPORATE DISCLOSURE STATEMENT

Pursuant to 22 N.Y.C.R.R. Section 500.1, Petitioner-Appellant Metro Enviro Transfer, LLC makes the following Corporate Disclosure Statement:

Metro is a limited liability company duly organized and existing under the laws of the State of Delaware, and authorized to do business in the State of New York. It is a wholly owned subsidiary of Allied Waste North America, Inc., which is a wholly owned subsidiary of Allied Waste Industries, Inc. (collectively, "Allied").

Dated: White Plains, New York
February 11, 2004

Respectfully Submitted,

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Petitioner-Appellant Metro Enviro Transfer, LLC ("Metro" or "Appellant")

respectfully submits this Memorandum of Law in Support of its Appeal to this

Court for an Order:

(a) reversing the May 10, 2004 Decision and Order of the Appellate Division, Second Department (the "Appellate Division Decision"), and reinstating the Order of the Supreme Court, Westchester County, Hon. Francis A. Nicolai presiding, entered February 20, 2003 (the "Supreme Court Order"), which annulled Respondents-Respondents the Village Board of Trustees of the Village of Croton-on-Hudson's (the "Board") and the Village of Croton-on-Hudson's (collectively, with the Board, "Respondents" or the "Village") Resolution, dated January 27, 2003 (the "January 27, 2003 Resolution"), which:

(i) declined to grant any further extensions of Metro's local special use permit (the "Special Permit") in connection with Metro's solid waste transfer station located in the Village (the "Facility");

(ii) declined to grant Metro's application for renewal of the Special Permit; and

(iii) ordered Metro to cease accepting waste and commence closing of its Facility at midnight on February 17, 2003;

(b) directing Respondents to renew the Special Permit; and

(c) granting such other and further relief as the Court may deem just and proper.

QUESTIONS PRESENTED

1. Do violations of conditions imposed in a special use permit constitute per se substantial evidence that a genuine potential threat to the public health, safety, or general welfare exists such that permit renewal may be denied? (See, e.g., Joint Appendix ("A.") A7, A8, A9, A4713. This issue was fully briefed before the Appellate Division).

2. Does substantial justice require that, prior to closing an existing highly regulated environmental facility, a municipality must have clear, objective, or empirical proof that operation of the facility poses a genuine potential threat to the public health, safety, or general welfare? (See, e.g., A. A7, A8, A76, A77, A89, A4713. This issue was fully briefed before the Appellate Division).

3. Is a higher quality or greater quantity of evidence required to deny permit renewal and effectively terminate a land use, particularly when the business involved is a complex, State regulated, environmental facility, operating in a volatile political environment? (See, e.g., A. A8, A9, A44, A72, A85, A86. This issue was fully briefed before the Appellate Division).

4. In land use administration and enforcement, must the punishment imposed by a local municipality be proportionate to the offense or violation committed? (See, e.g., A. A7, A40. This issue was fully briefed before the Appellate Division).

STATEMENT OF JURISDICTION

This Court has jurisdiction to entertain the instant Appeal and to review the questions of law raised, as the Decision and Order on appeal finally determined the action below as required by the New York Constitution, Article 6 Section 3(b)(6) and New York State Civil Practice Laws and Rules Section 5602(a)(1)(i). In addition, this Court granted leave to hear the appeal by Order dated December 16, 2004. (See A. A4950).

PRELIMINARY STATEMENT

Every community in this State depends on critical facilities such as power plants, wireless communication facilities, sewage treatment plants, incinerators, landfills, and solid waste transfer stations. As suburban sprawl increases throughout the State and industrially zoned areas shrink, however, these types of facilities have come under intense pressure from communities that rely on these services but do not want them in their backyards. Consequently, these essential uses of real property have increasingly become entangled in contentious local zoning and purported environmental disputes, often having little or nothing to do with actual or potential environmental impacts.

The law in this State should clearly acknowledge that land use administration and enforcement must rise above highly charged local politics and be governed by an appropriate and well-defined standard of review that facilitates

meaningful judicial oversight in order to maintain the critical services every community needs, protect property rights, and still safeguard the public from harm.

An existing facility, no matter how unpopular, should only be closed when convincing empirical evidence is presented demonstrating that such use of the land has either resulted in actual injury or has created a genuine potential to cause harm to the health, safety and welfare of the community. The courts must provide a necessary backstop to ensure that proof remains the premise of municipal decisionmaking and that evidentiary shortcuts are not allowed.

After years of highly publicized and much politicized debate, this case comes before the Court of Appeals to correct a substantial injustice resulting from the denial of an application for the renewal of a special use permit. That decision threatens to result in the permanent closure of an existing, multi-million dollar, solid waste transfer station. The Facility is located on industrial property in the Village, sandwiched between a State Highway, a major regional railroad maintenance and repair yard, an extensive array of commercial rail tracks, and other industrial buildings. It is hard to envision a more perfect place for a transfer station, since its sole purpose is transportation – small loads come in by truck and leave by rail car. If such facilities are not allowed to operate in this sort of area, it is difficult to imagine where they could ever be located.

This Facility has never caused actual harm or threatened the public health, safety, or welfare. Instead, at great expense, the Facility has evolved into a state-of-the-art transfer station that is one of the better operated public or private facilities, and is a model for the industry. It is no coincidence that just ten days after the Village refused to renew Metro's Special Permit and determined to close its business, the New York State Department of Environmental Conservation (the "DEC"), the primary regulatory agency for public and private solid waste transfer stations in the State, both renewed the Facility's New York State Solid Waste Management Permit and expanded its allowable capacity. Yet, that salient detail was disregarded by the Village, and curiously ignored by the Appellate Division.

Metro does not deny that violations of the Facility's local Special Permit occurred. They included 21 days in which there were minor exceedances of the Facility's capacity limitations, acceptance of 42 loads of unauthorized waste, and a few technical violations of the Facility's Operation and Maintenance Manual. The critical point here is that none of these violations ever caused actual harm or threatened the public welfare in any way. The cap placed on the amount of solid waste the Facility could accept daily, for example, is linked by the Village to concerns with traffic impacts. The Record shows, however, that even on those days more than four and a half (4 ½) years ago when there were capacity exceedances, the Facility generated less traffic than Respondents contemplated

when they issued the Facility its initial Special Permit in 1998. Although capacity was admittedly exceeded, the Record reveals no adverse consequences, let alone any traffic issues.

Likewise, the Metro Facility did receive unauthorized waste nearly three (3) years ago from one customer. Respondents, however, mischaracterized the nature of this violation in order to inflame public passions. Violations involving unauthorized "industrial waste," for example, were allowed to morph in the public mind into hazardous waste, which it clearly was not. In fact, "industrial waste" is a regulatory term of art that refers to where the waste is generated, not its physical characteristics. In this case, the term refers to items such as film scraps and extruded plastic, some of which is used as filler in Easter baskets, and pigment residue, some of which is used in shampoo. Again, there simply was no factual connection between these violations and a genuine potential threat of harm.

Metro has long ago cured all of the violations and become – and is committed to remain – a law abiding and necessary member of the community. Significantly, the Facility has not received any notices of violation for more than two (2) years, substantial management and operational changes have been implemented, and all fines levied have been paid. Respondents, however, as the Supreme Court recognized, simply disregarded Metro's corrective actions. Ignoring the fundamental equitable principle that the punishment imposed must

match the offense committed in a measured and appropriate fashion, the Village used past violations as a pretext to eliminate an unpopular land use.

Municipalities, however, are not entitled to automatic deference from the judiciary. Instead, a municipal board should only be accorded deference where it has amassed "substantial evidence" to support its land use determinations. Accordingly, as this Court held long ago, there must be actual proof in the record of such quality and quantity that an objective fact finder could reasonably, probatively and logically be persuaded on a particular issue. The substantial evidence test does not allow municipalities to use evidentiary shortcuts, such as the per se rule effectively created by the Appellate Division here, particularly where it results in substantial injustice to an existing entity. Unfortunately, the instant case presents an example of a situation where judicial deference to local government replaced any meaningful scrutiny of whether the municipality met its "substantial evidence" burden.

Both the Village and the Appellate Division made an irrational and illogical leap in finding that evidence of violations of the conditions to a special use permit constitutes automatic proof of a threat to the public and/or the environment warranting the permanent closure of Metro's Facility. The Record is barren of any factual connection between the violations at issue and any genuine threat to the community or the environment. Rather, the legal fiction underpinning

the Second Department's Decision – that permit violations constitute per se substantial evidence warranting closure – is the only link between the violations at issue and a finding of a threat to the public welfare. Such precarious logic is unsubstantiated and finds no support in the facts, case law, policy or pragmatism.

As already noted, the DEC saw fit to renew Metro's Solid Waste Management Permit within a matter of days after the Village issued its highly politicized determination not to renew the Special Permit. Could it have been because the Executive Branch has a cavalier attitude toward regulatory compliance and public safety – doubtful. It is far more likely that, devoid of the influence of local pressure, the State agency with the necessary expertise concluded that the evidence of permit violations simply did not add up to Facility closure. This Court must require municipalities to connect the dots between permit violations and an actual threat of harm before they can shut down an existing business – let alone one operating in a highly regulated field.

The Supreme Court agreed with Metro – and the DEC – concluding that Respondents lacked “sufficient and substantial evidence supporting the denial of the permit renewal [since Respondents] failed to recognize that the violations have been cured, penalties have been assessed and paid and [Metro] has implemented measures to assure ongoing permit compliance.” (Supreme Court Order at 3, A. A8). The Supreme Court acknowledged that it could not ignore the

DEC. (Id.). Thus, the Facility, though it had admittedly experienced problems and committed several violations of its permit, simply did not warrant closure.

Solid waste is, quite simply, a fact of life. Transfer stations are a necessary reality in modern society, and the few remaining ones that can handle construction and demolition debris, such as the Metro Facility, are essential to continued growth and economic development. For all the benefits they provide society, however, transfer stations are not popular. And because they are so susceptible to public misunderstanding and disdain, transfer stations, like other crucial but undesirable land uses, are particularly in need of the objective intervention and watchful eye of the judiciary to ensure that they are treated rationally and fairly.

The Courts must not abandon, in the name of municipal deference, their still critical oversight role in ensuring that municipalities meet their “substantial evidence” burden, especially where permit renewals for existing controversial environmental facilities are involved. The Courts must continue to ensure that controversial land use decisions meet the demanding standard of “clear and objective” and “empirical evidence” of actual and/or genuine potential for harm before municipalities, as in this case, close unpopular environmental businesses and wipe out millions of dollars of legitimately invested resources.

This is a case where the Appellate Division unduly deferred to the municipality's administrative review process, which resulted in an unwarranted determination unfairly influenced by local political controversy. Judge Nicolai, on the other hand, after conducting the required scrutiny of the Record, saw through the generalized community opposition fueling the fires of closure. Metro respectfully moves this Court to do the same.

Accordingly, this Court should reverse the Appellate Division, Second Department's Decision, and reinstate the Order of the Supreme Court, Westchester County.

STATEMENT OF FACTS

The Facility Is Uniquely Located To Serve As A Transfer Station

It is hard to imagine a more ideal location for a solid waste transfer station. The Facility at issue is situated on a ten (10) acre parcel of property, located at 1A Croton Point Avenue, Croton-on-Hudson, New York, also known and designated on the Village Tax Map as Section 78.16, Block 2, Lots 1 and 2 (the "Property"). (A. A42). The Property is located in the largest, most industrially developed section of the Village and has both state highway and rail access. (A. A42, A103).

As illustrated in the aerial photograph, submitted herewith pursuant to 22 N.Y.C.R.R. Section 500.13, there is a commuter railroad parking lot to the

South of the Property, a massive rail equipment maintenance facility to the Southwest, and a commercial warehouse building currently storing tires, to the North. (See Figure 1, annexed at the end of this Memorandum). To the West of the Property is the Croton-Harmon Rail Yard, which is a large industrial complex containing no fewer than nine sets of tracks and switches for both commuter and freight trains. (Id.). To the East, the Property is bounded by New York State Route 9, a four lane divided highway, which is the main North/South artery through the Village and for the Western portion of Westchester County. (Id.).¹

From a location and transportation standpoint, a better place for a transfer station cannot be found in the County.

History Of Solid Waste Uses On The Property

The Property has been used continuously as an outdoor waste storage and processing facility since at least the early 1960s. (A. A44). Previous transfer station operations conducted on the Property by others produced exposed piles of refuse and debris up to 50 feet wide and 15 feet high, and were conducted without

¹ The residential uses on the other side of Route 9 are separated from the industrial area by thick vegetative buffers on both sides of the highway. There is another residential development on the other side of the rail yard, bordering the Hudson River, which was constructed long after the Property became an outdoor waste storage and processing facility. Portions of this development were built before Appellant's predecessor took over and cleaned up the Property, while other portions were only recently developed and sold while the Facility was in operation.

any environmental safeguards. (A. A159-4161, A2363, A3540-A3554).

In or around 1984, Robert V. Liguori purchased the Property for use as a wood processing, material storage and recycling facility. (A. A44). In 1988, the Village issued a special use permit to Liguori's company, Industrial Recycling Systems, Inc. ("IRS"), authorizing it to operate a wood processing and recycling transfer station on the Property, and the DEC issued a Solid Waste Management Permit (the "DEC Permit"). (A. A44-A45). This facility operated without any odor, dust, noise, stormwater or leachate control mechanisms, and did not have a scale, engineered concrete processing pad or rail siding connection. (A. A159-A161, A2363, A3540-A3554). Fire was a persistent concern. (A. A2435-A2438).

In 1994, IRS applied for a modification of its DEC Permit to expand the types of construction and demolition ("C&D") materials that it could accept. (A. A45, A232-A233). IRS also applied to the Village for a modification of its Site Plan to increase the amount of material that it could process. (A. A45, A232-A233). In July 1995, after public hearings and environmental analysis pursuant to the New York State Environmental Quality Review Act ("SEQRA"), the Village of Croton-on-Hudson Planning Board (the "Planning Board") determined that there would be no significant adverse impact from the operation and issued a Negative Declaration pursuant to 6 N.Y.C.R.R. Section 617.6, and approved the modified Site Plan. (A. A45, A4488-A4491).

Thereafter, in February 1996, due to the accumulation of tremendous amounts of materials on-site in violation of the DEC Permit, IRS entered into a DEC Consent Order requiring on-site remediation, removal of large quantities of stockpiled materials, and payment of a \$35,000 fine. (A. A45, A3540-A3554). The DEC did not close the transfer station, rather it exercised enforcement authority to bring the site into compliance and to keep the facility a functional part of Westchester County's solid waste network.²

Substantial Investments Are Made To
The Facility To Ensure Safe Operation

In early 1997, Metro Enviro, LLC ("Metro Enviro," an entity distinct from Appellant Metro Enviro Transfer, LLC), agreed to purchase the operation, remedy the existing violations, bring the Facility into compliance with applicable solid waste management regulations, and apply for a DEC Permit. (A. A47, A232-A233). The Village encouraged Metro Enviro to engage in expensive cleanup at the Property. Thereafter, during 1997, Metro Enviro spent between approximately \$1.0 and \$1.5 Million cleaning up and remediating the mountain of waste on the Property, and spent approximately \$2.0 Million on new site improvements. (A. A48-A49, A218). This investment was made in good faith with the expectation

² At about that time, the DEC issued a modified Permit to Liguori. (A. A46, A232-A233). In May 1996, the Planning Board approved a Site Plan Amendment (together with another Negative Declaration under SEQRA) authorizing the construction of a concrete retention pad in accordance with the DEC Consent Order. (A. A46, A232-A233).

that, upon its rehabilitation, the Facility would be allowed to operate as a modernized, environmentally sound transfer station.³ (A. A175-A226).

In August 1997, Metro Enviro requested a renewal and transfer of the pre-existing Special Permit held by IRS, and filed the necessary applications with the DEC to transfer the DEC Permit. (A. A47). In November 1997, the DEC issued a Part 360 Solid Waste Management Permit to Metro Enviro, LLC, to operate a C&D transfer station on the Property and imposed a number of conditions on the issuance of the permit. (A. A48). The permit set capacity limitations for the Facility and required, inter alia, the comprehensive monitoring of the Facility by trained DEC personnel at the operator's expense. (A. A48).

The 1998 Request To Renew The Facility's Special Permit Is Subject To Intense Scrutiny From The Board, A Citizens Advisory Committee, And Professional Consultants Retained To Review The Application And Operation

In early 1998, the Board formed a local Citizens Advisory Committee (the "Committee") to assist in its review and deliberation with regard to Metro Enviro's request to renew the Special Permit.⁴ According to Seth Davis, Esq.,

³ As illustrated in Figure 2, submitted herewith pursuant to 22 N.Y.C.R.R. Section 500.13 and annexed at the end of this Memorandum, the Facility is comprised of two scales (inbound and outbound), a scale house, a C&D processing building, a leachate collection system, and a stormwater management system. (See Site Plan, Figure 2, infra).

⁴ Shortly thereafter, the Board retained an environmental consulting firm, Allee King Rosen & Fleming ("AKRF"), to work with the Committee, to advise the Board, and to conduct a technical review. (A. A51, A229-A248). Metro Enviro continued to utilize the services of Sterling Environmental Engineering, P.C. and its principal, Mark Millsbaugh, P.E., who had been working on the Property for a considerable period of time as a consultant. (A. A51).

Committee Chairman, at the beginning of the process, "there wasn't a single person on that committee who was in favor of the application."⁵ (A. A179).

Unquestionably, the single largest issue that was discussed and debated by the Committee, members of the general public at large, and the Board and its technical consultants was traffic. (A. A25, A51, A258, A1672-A1688, A1695-A1696, A1760, A1796, A1805-A1806).⁶ A persistent concern was that there would be an abundance of trucks coming into the Village, and along Croton Point Avenue, generating intolerable traffic conditions in and around the Facility, particularly during peak traffic flows into and out of the Croton Train Station. (A. A51, A1673). That legitimate concern warranted an expert review and analysis.

Accordingly, in response to the Village's concern regarding truck traffic, Metro Enviro retained Adler Consulting Transportation Planning & Traffic Engineering, PLLC ("Adler Consulting"), a highly regarded traffic engineering firm in Westchester County, to perform a comprehensive traffic analysis. (A. A51, A828-A926). Adler Consulting established, and AKRF (the Village's expert) later confirmed, that the operation of the Facility within the proposed permitted capacity

⁵ Metro Enviro initially opposed the proposed Committee as a potentially improper delegation of authority by the Board, but ultimately determined that such an open and deliberative review with the local citizenry would be legally and politically appropriate, and consistent with the type of environmental review process espoused by this Court in Merson v. McNally, 90 N.Y.2d 742, 665 N.Y.S.2d 605 (1997). (A. A51).

⁶ This fact was confirmed by former Committee Chairman Davis in his September 9, 2002 letter to the Board. (A. A2533).

limitations would not have an adverse impact on traffic in the Village generally, or in and around the Facility's intersection with the train station on Croton Point Avenue. (A. A862-A926; see also Figure 1, *infra*).⁷

It was understood by Metro Enviro that any Special Permit would need to contain adequate environmental safeguards to protect the Village from and against, *inter alia*, the traffic problems, noise, dust, odors, contaminated stormwater, and massive stockpiling of debris persistent during the IRS operation. (A. A52). During the Spring of 1998, representatives of Metro Enviro met personally with the Committee and AKRF on no fewer than ten (10) occasions.⁸ (A. A52).

The Board's Consultants And The Citizens
Committee Support The 1998 Renewal Application

On May 4, 1998, the Board convened a public hearing on the proposed issuance of a Special Permit to Metro Enviro. (A. A53). The Board received a 20-page report from its consultant, AKRF, dated April 16, 1998, which

⁷ As will be explained in further detail below, even on the days the Facility accepted waste beyond its capacity limitations, the traffic levels were well within the limits found acceptable in this 1998 review.

⁸ Metro Enviro also met separately with the Committee Chairman, Village Attorney Seymour Waldman, Esq. and Village Manager Richard Herbek, to identify and examine all relevant issues regarding the Facility, and to formulate conditions that would be acceptable to the Village and consistent with the DEC Permit. (A. A52).

found that based upon Metro Enviro's proposed design and intended protocols, there would be:

- "no significant adverse impacts from dust or other airborne contaminants;"
- no "potential odors from on-site operations;"
- "no adverse public health impacts on the surrounding community with the proposed design for the facility;"
- "no significant adverse impacts on water quality;"
- no "significant vibrational impacts from the processing operations;"
- no "adverse noise impacts from on-site operations;" and that
- "the applicant's Traffic Study provides a reasonable approach for assessing the potential traffic impacts from the proposed operations."

(A. A229-A248).

Moreover, the Chairman of the Committee established by the Board to assist in its review and deliberation with regard to Metro Enviro, stated that the Committee's comprehensive and objective analysis of the proposed Facility culminated in a "clear consensus" that "this facility be allowed to proceed." (A. A180).

Board Grants Special Permit With Conditions

After an exhaustive Public Hearing that lasted until 2:30 A.M., the Board approved the issuance of the Special Permit for the Facility, together with yet another Negative Declaration pursuant to SEQRA.⁹ (A. A53-A54, A249, A1688-A1689). The Special Permit was issued for a three-year period, and set forth 42 conditions addressing a wide range of issues concerning the day-to-day operation of the Facility. (A. A54, A249-A263). Most importantly, the Special Permit set capacity limitations – 750 tons per day once the rail spur became operational, with an increase to 850 tons per day for the second year of the permit – which were designed to control the potential amount of truck traffic. (A. A54, A243-A244, A256-A257).¹⁰

In addition, the Special Permit and the controlling Operation and Maintenance Manual (the "O&M Manual") identified "non-acceptable materials" that could not be brought onto the Property, while specifically recognizing the virtual inevitability of such materials' inadvertent entrance to the Facility. As

⁹ Again, the Board's issuance of a Negative Declaration reflects the Board's determination that the "action as proposed will not result in any significant adverse environmental impacts." 6 N.Y.C.R.R. § 617.2(y).

¹⁰ The Special Permit also allowed for an increase to 1,000 tons per day. (A. A257). To provide for a conservative analysis, all empirical studies, including traffic, were predicated upon a capacity of 1,200 tons per day. (A. A115, A868).

such, a detailed protocol was established to deal with such reasonably anticipated occurrences. (A. A249-A251, A327-A328).

The Village was indisputably aware that, in an operation of this size, unauthorized waste would inevitably enter the Facility, and that it could be properly disposed of without in any way endangering the public welfare or the environment. Recognizing that it would be unfair to treat the inevitable technical exceedances of the Special Permit as violations, the Village's Special Permit set a high bar before a violation would be found, establishing that "[a]ny material additional activities beyond those permitted hereby shall be deemed a violation of the conditions and terms of this special permit." (A. A252 (emphasis added)).

Furthermore, the Special Permit clearly contemplated that Metro Enviro would be provided the opportunity to remedy any technical violations, providing that "[i]f any governmental agency has found the operation of the site to be in violation of any law or regulation, the operator must confirm that it has corrected the violation or is taking steps to eliminate the problem as expeditiously as possible." (A. A255 (emphasis added)). Thus, curative measures were to be allowed.

At no time prior to January 27, 2003, did the Village issue a stop-work order or initiate proceedings to revoke the Special Permit, despite its

authority to do so under certain circumstances pursuant to the Special Permit. (A. A261-A262).

**Metro Acquires The Facility At Great Expense
And Makes Additional Costly Improvements**

In March 2000, Appellant Metro acquired the assets of Metro Enviro, including the Facility, equipment, contracts, permits, and goodwill, for in excess of \$10,000,000. (A. A60, A82-A83). The Facility was highly valued in the Metropolitan region because of the scarcity of sites where transfer stations can be located as the result of community opposition and the conversion of industrial zones to residential zoning. Moreover, its direct proximity to a State Highway and connection to a rail line made it truly unique and extraordinarily functional.

Metro made further important and costly improvements to the Facility, including installing fast-sealing doors on the truck entrance to, and the exit from, the enclosed processing area, and repairs to the highly-engineered, concrete reinforced tipping floor in the processing area. (A. A56, A83-A85; see generally Site Plan, Figure 2, infra). The Facility is now a state-of-the-art transfer station with paved driveways providing access to the processing area, computerized scales, a camera that monitors trucks entering the facility, and even a radiation detection device. (A. A43, A56, A81, A82). The Court is respectfully referred to A. A281-A283 for photographs of the modernized facility, and A.

A284-A287 for comparison photographs, showing the vast difference between the Facility now (bottom) and during previous operations at the Property (top).

The Facility's Operations Are Heavily Monitored By Multiple Agencies And Individuals

This Facility is probably the most highly regulated and monitored solid waste transfer station in the Metropolitan region. It is regulated, monitored and inspected by the DEC, the Westchester Solid Waste Commission ("WSWC"), and the Village. (A. A44, A165-A173, A249-A263, A335-A339). The Facility, at times, is even monitored and inspected by Board members and local citizens. (A. A85). The Facility was also previously monitored by a federal monitor, Walter Mack, Esq. (the "Federal Monitor").¹¹

It is unlikely that any business subject to this intense level of scrutiny would be found completely clear of all technical violations. Indeed, the Record contains a large number of inspection reports from both the DEC and the Village, which indicate that inspections of the Metro Facility were conducted on an almost

¹¹ The monitorship of Metro by the Federal Monitor was not a result of any wrongdoing by Metro or its predecessor. (A. A86). It was the result of a 1997 guilty plea in a criminal proceeding involving a completely different facility, previously owned by Suburban Carting Corp. ("Suburban"). In February 2000, when subsidiaries of Allied purchased the stock of Suburban and purchased the stock and assets of certain other entities, Allied obtained the Court's approval of those purchases on the condition that Allied agree to have the acquired businesses monitored. (A. A86). In or about April 2000, Allied voluntarily agreed to have its previously unmonitored Westchester County operations, including Metro, come under the monitorship umbrella. (A. A86). The monitorship of the Metro Facility has since been terminated by an Order of the United States District Court for the Southern District of New York, signed by Judge Rakoff. (A. A86).

daily basis by one governmental entity or another.¹² Despite such extensive scrutiny, the Village has never come forward with any violations that would in any genuine way implicate the public health, safety, and welfare. (A. A56-A57).

Metro Timely Applies To Renew Its Special Permit

On March 23, 2001, Metro filed a timely written request with the Board requesting that the Special Permit, due to expire on May 5, 2001, be renewed. (A. A60, A2523-A2526). The Board was advised that the renewal Application was deemed a Type II Action under SEQRA requiring no further environmental studies.¹³ (A. A2520-A2526).

After filing the Renewal Application, Metro secured more than ten temporary extensions of the Special Permit, and appeared at numerous Board meetings to answer questions and provide information to the Board. (A. A61, A291; see generally A. A1694-A2357).

¹² (See, e.g., A. A266-A280, A814-A822, A932-A1055, A1465-A1466, A1565-A1573, A2557-A2566, A2686-A2702, A2705-A2719, A2732, A2734-A2742, A2744, A2746-A2769, A2772-A2776, A2778-A2831, A3236-A3250, A3282-A3410, A3413-A3416, A3456-A3487, A4522).

¹³ Significantly, the Board and its counsel agreed with that assessment and, to date, there has been no deviation from that position. In fact, upon information and belief, there is absolutely no documentation in the Village's records concerning the issuance of a positive declaration, or a dispute with regard to the classification of this action as a Type II Action under SEQRA. (A. A76).

Shifting Political Winds Lead Board To Amend Village Zoning Law To Prohibit Facilities Like Metro's

Only months after Metro filed its application to renew the Special Permit, on or about June 18, 2001, the Board somewhat suddenly and unexpectedly revised the permitted or as-of-right uses previously allowed under Village Code Section 230-18(B) in the LI District, and expressly declared that "solid and liquid waste transfer and storage stations and landfills (including construction and demolition materials) are prohibited." (A. A68-A69, A4570-A4572; Village Code § 230-18(E)).¹⁴

After the adoption of the amendments, the Village Manager and the Village Attorney advised Metro's counsel that the Facility would continue to operate as a nonconforming use; indeed, the Facility at that time had a valid Special Permit on extension from the Board.¹⁵ (A. A69, A1695).

The Board was well aware that the Facility was operating at that time in the LI District. Therefore, as of the effective date of this 2001 legislation, the

¹⁴ The amendment was being championed by former Trustee Deborah McCarthy – an admittedly staunch opponent of the Facility (who voted against it in 1998, and has consistently attempted to vilify the Facility and its operators ever since). (A. A68).

¹⁵ According to the Village Attorney, the primary motivation of the Board in adopting this particular change was to eliminate any possibility of another transfer station operating in the LI District – in particular it would eliminate any chance that the large tire warehouse property to the North (Figure 1, Property "D", infra) could ever be converted into a transfer station. (A. A69).

Village by its actions recognized Metro's constitutionally protected vested rights to a nonconforming use as a permit holder for the pre-existing use.¹⁶

Board Signals Predisposition To Deny Renewal Of Special Permit

The Board conducted extensive hearings on September 9, 2002, October 21, 2002, December 16, 2002, January 6, 2003, January 15, 2003 and January 27, 2003. At these public hearings, documents were produced, and various high-level representatives of Metro and expert witnesses made presentations to the Board regarding the Facility and its operation.¹⁷

The Board issued a draft Statement of Findings dated December 23, 2002 (the "Draft Statement"), which indicated the Board's inclination to deny Metro's application. (A. A61, A87). According to the Draft Statement, the Board appeared to be most concerned with Metro's acceptance of unauthorized industrial

¹⁶ Although neither of the lower Courts discussed the pre-existing, legal nonconforming status of the Metro Facility, which is uncontested, Metro argued to both Courts that such status is a significant and crucial factor militating in favor of renewal of the Special Permit. (See, e.g., A. A41, A69). Inasmuch as neither of the lower Courts addressed this issue, however, Metro does not believe that it can properly include this argument within its Appeal. Should the Court believe that such argument can be advanced in this Appeal, Metro respectfully requests the opportunity to amend its papers to include such argument. In any event, Metro certainly does not, and, indeed, cannot abandon the fact that a pre-existing, legal nonconforming status attaches to the Property, which allows for the operation of a transfer station thereon. Only the owner of the Property, who is not a party to this action, could abandon such status.

¹⁷ Attending the hearings on various occasions were: District Manger, Mark Saleski; General Manager, Eric Johnson; Regional Engineer, John DiNapoli, P.E.; Safety and Compliance Officer, Michael Altobelli; and Sales Manager, Christine Meket. Also, technical data and expert conclusions were submitted by traffic engineer John Canning, and solid waste engineer Robert D. Barber, P.E.

waste from Engelhard Corporation ("Engelhard"), and its acceptance of waste in excess of the permitted capacity. (A. A87). The Board also expressed concern with a number of other relatively minor issues. In response, Metro presented extensive sworn testimony at the hearings on January 15, 2003, and January 27, 2003, with fact and expert witnesses, evidentiary submissions and legal arguments, as discussed, infra. (A. A88, A368-A698, 4699-A813, A2329-A2344, A2350-A2357). The only submission from the Village was a last minute, conclusory Affidavit, as discussed in detail below and in Point I(A), infra.

**The Village Refuses To Renew Metro's Special Permit
Despite A Complete Absence Of Evidence Showing
That The Facility In Any Way Threatened The Public Welfare**

Despite Metro's presentation of direct, substantial, credible evidence refuting each of the apparent bases for the Board's previously expressed inclination to deny the renewal application, on January 27, 2003, the Board voted to deny Metro's application to renew the Special Permit. (A. A11-A12, A791-A801). There was no massive public outcry against the Facility, no packed public hearing; just the same regularly outspoken 5-10 individuals and the ever-pervasive political pressure to shut the Facility down.¹⁸ The Board issued a Statement of Findings in which it cited violations of the Special Permit, including mishandling of

¹⁸ (See, e.g., A. A776-A781, A1674-A1678, A1765-A1766, A1781-A1782, A1795, A1804, A1834-A1836, A1835-A1836, A1951-A2000, A2031-A2033, A2096-A2136, A2140-A2152, A2174-A2176, A2250, A2258-A2289, A2342-A2343).

unauthorized waste, exceedances of the maximum permitted tonnage, failure to collect leachate on one occasion, receipt of two refrigerators and a snow blower, and failure of certain training, reporting and record keeping requirements, as the basis for its decision. (A. A13-A26). These violations are described and discussed below.

Notably, the Board did not have before it any empirical evidence whatsoever that Metro had caused or was likely to cause any adverse impact to the health, safety or welfare of the Village residents or to the environment. In that regard, a review of documents obtained from the Village pursuant to a request under the Freedom of Information Law, Public Officers Law Section 84, et seq., established that the Board had no test results or other data of adverse traffic impacts, air emissions, noise, odor or aesthetics, and no other documentation evidencing any actual or genuine potential harm or adverse impact to the public welfare or the environment. (A. A76-A77).

In fact, documents obtained from the Village – upon which the lower Court focused, but the Appellate Division ignored – show that some Trustees actually rejected the idea of retaining an environmental and engineering consulting firm to assist the Board with its review because they believed that a “glowing report” on Metro would “make it more difficult for [the Board] to deny [Metro’s application for] renewal.” (A. A77-A78). One Trustee’s query eighteen (18)

months earlier in August 2001, that “[w]e may not be renewing the permit at all so why do the study?” strongly suggests that the Board had determined not to renew the Special Permit long before Metro even had an opportunity to present its case. (A. A77).

In any event, in a transparent, last-ditch effort to buttress its pre-ordained decision to deny Metro’s application for renewal of its Special Permit, the Village retained Richard P. Brownell, a Vice President of Malcolm Pirnie, Inc., and obtained a conclusory Affidavit from him, which was sworn to on January 27, 2003, the same day the Village voted to deny Metro’s application. (A. A1056-A1059). Mr. Brownell did not state that he reviewed any documents concerning Metro other than the Statement of Findings prepared by Special Counsel for the Board, or that he ever visited Metro. (A. A1056-A1059). Most importantly, Mr. Brownell did not even dispute the statement by Metro’s expert, Robert D. Barber, P.E., that Metro’s acceptance of unauthorized waste, exceedances of its permitted capacity, and failures with regard to training, reporting and record keeping never posed any actual or potential adverse impact on the health, welfare or safety of the Village residents or on the environment. (A. A1056-A1059).

Despite its lack of empirical support for its decision, on January 27, 2003, the Board resolved, among other things: (i) to decline to grant any further extensions of the Special Use Permit; (ii) to decline to grant the application for

renewal of the Special Use Permit; and (iii) to order Metro to cease accepting waste and commence closing the Facility at midnight on February 17, 2003. (A. A11-A12, A791-A793). Politics had prevailed over science.

The Violations At Issue Do Not Adversely Impact The Public Welfare,
And Certainly Do Not Warrant Permanent Closure Of An Existing Facility

Metro has never in these proceedings contested that violations of its Special Permit, DEC Permit, and its O&M Manual occurred. Indeed, Metro itself brought many of these violations to the attention of the DEC and the Village. Metro has been penalized severely for these violations, including monetary fines and, far more costly, the disallowance by the Village of a tonnage increase for incoming material, which had been otherwise anticipated under the Special Permit. (A. A306-A307).

The violations that were nevertheless relied on by the Board to shut down the Facility fall into three categories: capacity exceedances, acceptance of unauthorized waste, and miscellaneous violations. (A. A62).

1. Capacity Exceedances

Capacity limitations on a facility such as Metro's are designed to limit the flow of truck traffic in and out of the site. That is, capacity, in pragmatic terms, equates to the quantity of material and, accordingly, the number of trucks passing through the Facility during a specific period of time. Significantly, even on those days when there were exceedances, the Facility generated less traffic than the

Village found acceptable when it originally granted the Special Permit in 1998.¹⁹

The Facility is designed and constructed to handle 1,000 tons of waste per day, but, pursuant to its Special Permit, has a maximum daily permitted capacity of 850 tons. On approximately 21 separate occasions, between March 22, 2000 and August 21, 2000, the Facility accepted waste in excess of its 850-ton maximum permitted capacity. (A. 62).²⁰ Of these exceedances, only four exceeded the limit by 100 tons or more, and none was in excess of 200 tons over the 850-ton limitation. (A. A62-A63). The single largest exceedance occurred when 1,039.81 tons were accepted in one day, in a Facility designed and constructed to handle 1,000 tons per day, or 6,000 tons per week. (A. A63, A868). Importantly, despite these 21 daily exceedances, Metro never exceeded the anticipated maximum tonnage of 6,000 tons per week for which it was designed. (A. A93).

Since traffic is the primary concern related to capacity issues, Metro retained a traffic engineer to study and then report on the associated impacts of this admitted permit violation. Metro presented to the Board traffic counts,

¹⁹ Again, in 1998, the Board found under SEQRA that the Facility – including its potential traffic impacts – did not have even the potential to cause significant adverse impacts. (A. A4513-A4517).

²⁰ The Record reveals that on these limited occasions, at the end of these days, rather than turn away a few trucks that would put the facility over its daily capacity, the Facility's former scale operator manipulated the computer system to push the weights of those trucks into the next day's totals, thereby avoiding an apparent daily increase. The services of that individual have long since been terminated and the computer system revised to prevent such manipulation.

intersectional level of service analyses, and extensive testimony from Adler Consulting.

The empirical data presented by Adler Consulting, remains to date unrefuted by the Village. Adler Consulting established that the traffic volumes and conditions surrounding the Facility and generated by, or attributable to, Metro were within the 132 total vehicular trips considered acceptable by Respondents in 1998. This figure served as the predicate for the 1998 Negative Declaration and the initial issuance of the Special Permit. (A. A117, A711). In fact, even on those days when there were exceedances, the Facility generated less traffic than Respondents contemplated in 1998. (A. A116-A120). Out of the 21 days with exceedances, the evidence revealed the largest number of vehicle trips generated was 106. (A. A711). On the day with the largest capacity overage, only 85 vehicular trips were generated. (Id.). There is absolutely no proof in the Record that the capacity exceedances posed any actual or potential adverse impacts to public health safety, welfare or the environment. (A. A76-A77). Metro's traffic expert concluded that the operation of the Facility created "no adverse traffic impacts even on the days the Facility accepted waste in excess of 850 tons per day." (A. A120).

Metro voluntarily admitted these exceedances to the Village and the DEC. The DEC assessed a monetary penalty against Metro and imposed other corrective measures. (A. A1577). Metro has cured these violations and

implemented corrective measures to ensure that these exceedances cannot occur again, including installing a new computer system that cannot be manipulated. (A. A63). Consequently, no notice of violation for a tonnage exceedance has been issued in almost four and a half (4 ½) years – not since August 21, 2000. (A. A63).

2. Unauthorized Industrial Waste Received At The Facility

While the Village would try to mischaracterize “industrial waste” as something sinister that can harm the public, in fact, industrial waste is nothing of the sort. “Industrial waste” is defined by the DEC as “solid waste generated by manufacturing or industrial processes.” 6 N.Y.C.R.R. § 360-1.2(b)(88). In other words, the classification of waste as “industrial waste” is based upon where the waste is generated, not its physical characteristics. It is in no way synonymous with “hazardous waste.” (A. A64).

The industrial waste at issue here included film scraps and extruded plastic, some of which is used as filler in Easter baskets, and pigment residue, some of which is used in shampoo. (A. A90-A91). Metro admitted to both the Village and the DEC that it accepted a minimal amount of nonconforming so-called industrial waste, which was disposed of by Engelhard and transported to the Facility on 42 occasions between 2000 and 2002. (A. A22-A23, A64). Significantly, Metro’s records indicate that the total tonnage of waste received from Engelhard is less than five one hundredths of one percent (0.04259%) of

Metro's total tonnage received between March 2000 and the Village's denial of the Special Permit renewal. (A. A90).

In order to dispel the innuendo that the material disposed of by Engelhard at the Facility was "hazardous or toxic waste," Metro obtained the Affidavit of Scott W. Clearwater, the Director of Environment, Health, and Safety for Engelhard, who unequivocally stated that, "Engelhard did not provide Allied Waste Industries, Inc., or its subsidiaries ('Allied') with hazardous waste for transportation or disposal." (A. A64, A308-A310). More specifically, Mr. Clearwater attested to the fact that "[a]ll of [the] material was non-hazardous, solid and stable." (A. A309). The Village has never even attempted to rebut this statement.

In any event, as a result of these actions, Metro paid a fine of \$50,000 to the Village, and was assessed an additional \$20,000 fine by the DEC.²¹ (A. A89, A1588, A2542-A2544). In addition to paying the assessed penalties, Metro has implemented a series of curative and corrective measures, including a substantial management overhaul at the Facility and district locations, which have all been discussed with the Village. (A. A66, A80-A98, A423-A433).

Moreover, the individuals responsible for the improper acceptance of industrial waste from Engelhard (as well as the capacity exceedances) no longer

²¹ \$10,000 of the penalty was conditionally suspended by the DEC. (A. A1588).

work for Metro or Allied,²² and Metro has conducted extensive training of its current employees to ensure that they understand how to identify and handle unacceptable or unauthorized waste. (A. A92). Metro's customers are also now systematically audited to ensure that they are not delivering any improper waste to the Facility. (A. A92).

3. Miscellaneous Violations

The remaining miscellaneous violations included inadequate training and record keeping, the receipt of three household appliances (two refrigerators and a snow blower), one instance of leachate being found outside the processing building, and tires on site. Representatives of Metro testified before the Board, explained these incidents, demonstrated that they did not in any way endanger the public or the environment, identified remedial and corrective measures, and implemented the necessary steps to cure these technical violations in accordance with the DEC Permit and Special Permit. (A. A66, A80-A98, A423-A433).

a. Training And Record Keeping

While some training was not provided on the required schedule and documentation of each training session was not properly filed on-site, the training violations also did not implicate the public welfare. In fact, Metro had conducted

²² In fact, the employees responsible for these violations initially were employed by Metro's predecessor. When Metro took over the operation of the Facility, it left in place, at least temporarily for transitional purposes, the existing workers, as is customary in these of situations.

most of the required training and had remedied the reporting and record keeping issues, about which the Village purported to be concerned. (A. A67, A94). Metro's representative explained to the Board that regular training sessions of staff were being conducted on both safety and compliance issues. (A. A415-A417). Training was being performed in both English and Spanish. (A. A67).

Unfortunately, some training was not provided on the required schedule and documentation of each training session was not properly filed on-site confirming that the training had been done, and who was present. (A. A416, A1128-A1129). Metro's representatives advised the Board that corrective measures had been taken to ensure all training was timely completed and appropriate records maintained, including the hiring of a new safety and compliance manager, and the implementation of a new system in which all training is recorded in a single log, thereby simplifying the procedure to track who has received adequate training. (A. A486, A521). More importantly, no evidence was presented to attribute any actual or genuine potential for harm or adverse impact to the failure to maintain these records or perform appropriate training. (A. A76).

b. Household Appliances

It is true that two refrigerators and a snow blower passed the threshold of Metro's Facility, but the reality is that they were removed by their original hauler within 24 hours. These items never posed a potential threat to the public

welfare. The household appliances at issue were delivered to Metro incidental to loads of acceptable waste. (A. A91). It is not unusual for contractors at a job site to throw such appliances into the same dumpster containing C&D.

According to standard operating procedure, and in full compliance with the requirements of the O&M Manual and other legal requirements, the household appliances were detected when the load in which they were located was tipped and separated on the floor of the Facility; the Facility operators determined that the refrigerators were crushed and that one of them did not have a compressor or freon inside of it; they were placed to the side of the tipping floor; and they were removed by the hauler that had brought them to the Facility within 24 hours of their having been brought to the facility. (A. A91).

c. Leachate

With regard to the leachate, it is imperative to once again note that the Village has never alleged that this one incident posed a potentially hazardous condition. Leachate is simply "any solid waste in the form of a liquid, including any suspended components in the liquid, that results from contact with or passage through solid waste." 6 N.Y.C.R.R. § 360-1.2(b)(98). In other words, leachate is merely water that has come into contact with ordinary solid waste.

Metro representatives explained that on one particular occasion, a truck pulled forward outside the processing building while still tipping its waste.

Waste landed outside the building and because it was raining, leachate was not captured and collected inside the building in the leachate collection system. (A. A67, A93). Instead, it was captured in the on-site swales and ran into the stormwater collection system between the pavement and the nearby rail spur. (A. A67, A93). According to the plan set forth in the O&M Manual, water that runs into the ditch and into the stormwater collection system runs into a retention basin at the rear of the Facility. (A. A67, A93-A94). Subsequent surface water testing did not indicate any adverse effect on the storm water quality. (A. A67, A93-A94, A105). No contrary empirical data has ever been presented, which would support the Village's purported concern about this isolated incident.

d. Tires

With respect to vehicle tires, Metro volunteered to the Village that tires are sometimes delivered to Metro commingled with loads of acceptable waste. (A. A90). According to standard operating procedure, tires were separated from other waste deposited on the tipping floor, stored in a fully enclosed metal container, and removed from the Facility when the container was full. (A. A90-A91). The Village contends that this procedure technically violated the O&M, which requires that the tires be removed within 12 hours. (A. A90-A91). Metro has since corrected the situation, and tires are now promptly removed from the Property.

Somewhat ironically, the Board recently reviewed an application for the expansion of the wholesale tire storage operation within the adjacent industrial building. (A. 29; see Figure 1, Property "D," infra). Metro's small handful of tires enclosed within a metal container posed no health and safety risk, especially when compared with the thousands of tires stored on the property next door. As the Village is fully aware, Metro stored far fewer tires, and stored those tires for significantly less time, than the neighboring tire wholesaler. (A. A91).

Like the other issues, these miscellaneous and limited violations were all properly addressed and timely cured.

The DEC Permit Is Renewed With Capacity Increase

In keeping with the strict regulatory and enforcement regime in highly-regulated industries, the DEC routinely inspected the Property, assessed appropriate monetary penalties for violations where necessary, supervised the implementation of curative measures, and oversaw Metro's rehabilitation of the Facility. (A. A56, A72, A83-A85, A738, A1147-A1156). Yet, despite the violations at issue, subsequently and soon after the Village's action, on February 7, 2003, the DEC renewed Metro's DEC Permit with increased capacity limits – from 700 tons to 1000 tons per day. (A copy of the renewed DEC Permit is located at A. A1147).

The Lower Court Grants Injunctive Relief And Then Annuls
The Board's Determination To Deny Metro's Renewal Application

In response to the January 27, 2003 Resolution, and to avoid closure of the business in which it had invested millions of dollars, Metro filed an Article 78 Petition, dated January 31, 2003, and, by Order to Show Cause dated February 3, 2003, moved for a Stay pending a determination on the merits. (A. A27, A30). Judge Francis A. Nicolai, Chief Administrative Judge for the Ninth Judicial District and presiding Judge of its Environmental Claims Part, granted the Order to Show Cause on February 4, 2003, and issued a Stay, allowing the Facility to continue operation until a decision on the merits was issued. (A. A27).

The Supreme Court issued a decision on the merits, dated February 19, 2003, and entered on February 20, 2003, premised upon the well-settled legal premise that the Board needed substantial evidence to support its determination on Metro's application:

While the Village Board still retains some discretion to evaluate each application for a special use permit, to determine whether applicable criteria have been met and to make commonsense judgments in deciding whether a particular application should be granted, such determination must be supported by substantial evidence.

(Supreme Court Order at 3, citing Twin County Recycling Corp. v. Yevoli, 90 N.Y.2d 1000, 665 N.Y.S.2d 627 (1997), A. A8).

The Supreme Court specifically rejected the Village's contention that violations of conditions on Metro's Special Permit, standing alone, constituted substantial evidence warranting the Facility's closure:

While the Respondents maintain that the violations of the special use permit constitute sufficient and substantial evidence supporting the denial of the permit renewal, they failed to recognize that the violations have been cured, penalties have been assessed and paid and [Metro] has implemented measures to assure ongoing permit compliance.

(Id.). On the most critical of issues before the lower Court, and now before this Court, the Supreme Court noted that "Respondents and its expert have failed to point to any evidence that an adverse environmental condition has resulted from the almost five years of operation of the Metro Enviro Transfer's facility." (Id. (emphasis added)).

The Supreme Court further recognized that the DEC's renewal of Metro's Special Permit indicated that the Executive Branch had concluded that the Facility posed no threat to the general welfare or the environment:

Despite the cited violations, the DEC has taken into account Metro Enviro Transfer's history of cooperation with and responsiveness to the Village. In fact, on February 7, 2003, the DEC - the state agency with regulatory control and jurisdiction over this solid waste management facility - renewed [Metro]'s permit for five years and increased the maximum capacity of waste that the transfer station may accept to an average of 1,000 tons per day. While the Village is not bound by the DEC renewal, the issuance of the DEC permit indicates to this

Court that corrective action has been taken and that Metro Enviro Transfer's violations did not pose a threat to the health, safety and general welfare of the public or the environment.

(Id. at 3-4 (emphasis added); A. A8-A9). Accordingly, "[u]nder the totality of circumstances present herein, the Court [found] that the Board's denial of the permit is not supported by substantial evidence." (Id. at 4; A. A9).

The Supreme Court's decision was based on the Board's lack of substantial evidence, but the Court also recognized that "[t]he determination by the Village Board has been impermissibly based, in part, upon generalized opposition, which remains uncorroborated by any empirical data." (Id.). As a result, the Supreme Court granted Metro's Petition to annul Respondents' determination and remitted the matter "for the purpose of issuing a permit in accordance herewith, upon such reasonable conditions as it may deem appropriate." (Id.).

The Appellate Division's Decision

Following the Village's appeal of the Supreme Court Order, the Appellate Division, Second Department recognized that, "[g]enerally, 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." (Appellate Division Decision at 2, quoting Atlantic Cement Co. v. Williams, 129 A.D.2d 84, 88, 516 N.Y.S.2d 523, 525 (3d Dep't 1987), A. 4713). Of critical significance, the Appellate Division agreed with the Supreme Court that the determinative issue here was whether or

not the Board's decision was support by substantial evidence:

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.

(Id.) The Appellate Division, however, diverged from the Supreme Court, particularly with respect to the quality of evidence required before a local board can shut down an existing business.

Initially, the Appellate Division mistakenly held that that lower Court had "erroneously substituted its own judgment for that of the Village, finding inaccurately that the determination on review was the sole product of generalized opposition to the facility." (Id. (emphasis added)). In fact, the Supreme Court did not hold that the Village acted solely on community opposition. Rather, the Supreme Court noted that the decision was "based, in part, upon generalized opposition, which remains uncorroborated by any empirical data." (Supreme Court Order at 4 (emphasis added), A. A9). Even a cursory review of the Record supports the finding that the Facility's Special Permit had become highly politicized and emotional.

Notwithstanding that Metro had shown that the violations at issue never posed either a genuine potential or actual threat of harm, the Appellate Division then held that "[t]he Village did not need to wait for actual harm to occur because of the various permit violations committed by Metro in order to deny

renewal.” (Appellate Division Decision at 2, A. A4713). Metro has never argued that the Village needed to await actual harm before it could act. Instead, Metro’s argument, which is the crux of the instant Appeal, is that the Board needed substantial evidence of actual and/or genuine threatened adverse impacts before it could permanently shut down the Facility.

At the heart of the instant Appeal is the Appellate Division’s holding that violations of Metro’s Special Permit, in and of themselves and regardless of the actual consequences, constituted substantial evidence warranting closure:

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 the record not only establishing the existence of the subject violations, but also that they posed a threat to the community and environment.

(Appellate Division Decision at 2, A. A4713). The Record, however, is barren of any showing that the violations posed any real or genuine threat to the community or the environment. Significantly, the Second Department did not, and simply could not, point to any fact in the Record to support a finding of “substantial evidence” of a “threat to the community and environment.” Nor does the legal fiction underpinning the Second Department’s Decision – that violations constitute per se substantial evidence warranting closure – make any attempt to establish any factual relation between the violations and a finding of a threat to the public welfare.

This Court Grants Leave To Appeal

On or about July 6, 2004, Metro moved by Order to Show Cause to this Court for leave to appeal and for a stay of the Appellate Division Decision, thus permitting the Facility to remain open until this Court rendered a decision on the Motion. On July 12, 2004, after hearing oral argument, Judge Robert S. Smith granted Metro's Motion for a stay pending this Court's determination on the Motion for leave to appeal (A. A4721), which was ultimately granted on December 16, 2004. (A. A4650).²³

Metro's Violations Have Been Cured, Penalties Paid And Corrective Measures Taken

Since Judge Nicolai granted Metro's initial application for a stay on February 17, 2003, Metro has not received a single Notice of Violation from the DEC. Quite to the contrary, the DEC renewed Metro's Solid Waste Management Permit with increased capacity limits. (A. A56, A72, A83-A85, A1147-A1156). Moreover, at no time since has the DEC in any way indicated that it has any desire to revoke its Permit or insist upon the closure of the Facility. (A. A72).

The Record amply supports Judge Nicolai's finding that "the violations have been cured, penalties have been assessed and paid and [Metro] has implemented measures to assure ongoing compliance." (Supreme Court Order at

²³ Metro initially requested leave to appeal to this Court from the Second Department; however, its Motion was denied. (A. A4718).

3, A. A8). Metro's efforts at remediation and cure designed to ensure a compliant Facility include the following:

- New computer system not susceptible to employee manipulation installed;
- New employees and management put in place by parent company;
- Strict adherence to training and corporate compliance plan;
- Management compensation directly tied to permit compliance;
- Customer audit program to eliminate unauthorized waste;
- Unannounced inspections by corporate officials;
- Assessment by the DEC of \$26,000 fine regarding capacity exceedances;²⁴
- Payment to Village of \$50,000 fine regarding unauthorized waste;
- Assessment by the DEC of \$20,000 fine regarding unauthorized waste;²⁵ and
- Offer to fund a skilled Village monitor.

(See, e.g., A. A83-A85, A89, A93, A426-A427, A429, A496, A532-A535, A1577, A1588, A2543-A2544).

In sum, the Board – and the Appellate Division – ignored the indisputable empirical evidence submitted by Metro that the Facility does not present – and never has presented – a risk to the environment or public health and safety.²⁶ The Board's decision was politically motivated, and the Board ignored

²⁴ \$16,000 was conditionally suspended by the DEC. (A. A1577).

²⁵ \$10,000 was conditionally suspended by the DEC. (A. A1588).

²⁶ To be clear, despite the Board's January 27, 2003 Resolution denying the Special Permit renewal and ordering the Facility to cease operations, Metro remains open today two (2) years after the Resolution was adopted in accordance with various stays of the Resolution – and more recently, stays of the Appellate Division Decision, granted by Judge Nicolai in the Environmental Claims Part of the Westchester County Supreme Court and this Court. This alone is evidence that the Facility poses no genuine threat to the public health, safety and welfare.

Metro's successful curative and remedial measures, while failing to generate its own competing analyses.

Because neither the law, substantial justice, sound public policy, nor straightforward fairness supports closing the Facility under the circumstances of this case, Metro respectfully requests that this Court reverse the Appellate Division, Second Department's Decision, and reinstate the Order of the Supreme Court, Westchester County.

ARGUMENT

POINT I.

SUBSTANTIAL EVIDENCE OF A GENUINE THREAT TO PUBLIC HEALTH, SAFETY AND WELFARE IS REQUIRED BEFORE A MUNICIPALITY CAN DENY THE RENEWAL OF A SPECIAL PERMIT AND PERMANENTLY CLOSE AN EXISTING BUSINESS

Standing alone, permit violations simply cannot constitute the "substantial evidence" required to enable a municipality to permanently close an existing business operation. Absent clear, objective, or empirical proof that the business poses a genuine potential threat to the public health, safety, or welfare, non-renewal of a permit is arbitrary, capricious and unjust. This is particularly true where the business is a controversial environmental facility and the DEC, the agency with primary regulatory control in the area, has never suggested that such business be closed, but, instead, renewed its Permit for the Facility with increased capacity. A municipality's decision to close an existing business must have a clear

and discernable nexus to its actual potential to adversely impact the community and the environment.

A. Municipalities Are Only Accorded Judicial Deference Where Their Decisions Are Supported By Substantial Evidence

This Court enunciated a rule in a trio of cases in 2002, which states that courts owe deference to municipal bodies where their land use and zoning decisions are supported by substantial evidence. See Retail Prop. Trust v. Bd. of Zoning Appeals of Town of Hempstead, 98 N.Y.2d 190, 746 N.Y.S.2d 662 (2002); Ifrah v. Utschig, 98 N.Y.2d 304, 746 N.Y.S.2d 667 (2002); P.M.S. Assets, LTD. v. Zoning Bd. of Appeals of Vill. of Pleasantville, 98 N.Y.2d 683, 746 N.Y.S.2d 440 (2002). Deference is not, however, owed to a municipal entity simply because it has made a decision. Instead, municipalities must earn judicial deference by assembling the requisite substantial evidence, especially where, as here, an existing unpopular but necessary environmental facility, which was the subject of bitter political debate, is at issue.

The trio of cases made it clear that substantial evidence consists not merely of the quantity of evidence upon which a municipal decision must be based, but there is also a qualitative standard requiring evidence of actual substance. In Retail Property Trust, for example, the only one of the trio involving a special

permit,²⁷ this Court “defin[ed] the quality of the evidence present” and found that “[t]hrough the reports of objectors’ traffic and air quality experts, the opposition presented valid scientific bases for rejecting the expansion plan.”²⁸ Retail Prop. Trust, 98 N.Y.2d at 196, 746 N.Y.S.2d at 666 (emphasis added). This Court further ruled that the “evidence in this case presented a close, fact-specific choice of the kind that local boards are uniquely suited to make.” Id. (emphasis added).

In Ifrac, this Court ruled that a zoning board’s determination to deny an area variance to allow construction of a new home on a substandard lot was supported by substantial evidence. Ifrac, 98 N.Y.2d at 308-09, 746 N.Y.S.2d at 669-70. This Court found that:

In this case, the Board’s determination is supported by more than the generalized objections of neighbors. The Board’s conclusion that the proposed variances would have a detrimental impact on the character of the neighborhood is supported by objective and largely undisputed factual evidence in the form of oral and written testimony by neighbors with actual knowledge of the conditions along Fenimore Drive,

²⁷ In Retail Property Trust, petitioner’s application for a special permit to expand its shopping mall and parking facilities was denied by the zoning board. The lower Court dismissed the petition, finding there was substantial evidence to support the board’s determination. The Appellate Division reversed, finding that the decision was based solely on community opposition. This Court held there was substantial evidence in the record to support the board’s decision and reversed the Appellate Division. Retail Prop. Trust, 98 N.Y.2d at 192, 196, 746 N.Y.S.2d at 663, 666.

²⁸ The objectors’ expert had “highlighted a number of concerns with [the petitioner’s] traffic study,” challenged the methodology used by the petitioner’s expert, and relied upon a traffic study authored by government and academic authorities analyzing traffic issues in Nassau County. Retail Prop. Trust, 98 N.Y.2d at 194, 746 N.Y.S.2d at 664-65.

corroborated by the documentary evidence [such as maps] supplied to the Board.

Id. 308, 746 N.Y.S.2d at 669 (emphasis added).²⁹

In P.M.S. Assets, this Court concluded that the denial of a use variance was supported by substantial evidence because the current use of the warehouse exceeded the scope of the prior nonconforming use. P.M.S. Assets, 98 N.Y.2d at 685, 746 N.Y.S.2d at 441. This Court held that the “Board could rationally find that the warehouse is no longer utilized for commercial moving and storage purposes because petitioner now uses the building in connection with the operation of its lighting design and installation business.” Id.

Thus, in the Retail Property Trust trio of cases, this Court stressed the deference owed to municipal boards only where there is substantial evidence in the record. None of those cases involved the non-renewal of a permit resulting in closure of a business and the termination of an important and necessary land use. It is consequently now more important than ever for this Court to clearly articulate what constitutes the requisite substantial evidence, particularly where vested property rights are at issue, and where the use at issue is a highly regulated, necessary and unpopular operation.

²⁹ The Court in Ifrac also found it critical that the “petitioner would not be denied the ability to make productive use of his property, which already contains a habitable single-family residence.” Id. at 309, 746 N.Y.S.2d at 670 (emphasis added).

This Court has previously set forth basic parameters for the substantial evidence test, to ensure that lower courts actively review decisions by administrative bodies:

In final analysis, substantial evidence consists of proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that, from that proof as a premise, a conclusion or ultimate fact may be extracted reasonably, probatively and logically. . . . Put a bit differently, 'the reviewing court should review the whole record to determine whether there is a rational basis in it for the findings of fact supporting the agency's decision.'

300 Gramatan Ave. Assocs. v. State Div. of Human Rights, 45 N.Y.2d 176, 181-82, 408 N.Y.S.2d 54, 56-57 (1978), quoting McCormick, Evidence 847 (2d ed. 1972) (emphasis added).³⁰ Courts must ensure that there is actual proof in the administrative record of such quality and quantity that an objective fact finder could reasonably and logically be persuaded as to a particular issue.

³⁰ It is uniform that the permitting authority bears the burden of supporting its findings by empirical data or expert opinion, particularly in the face of actual evidence proffered by an applicant. See Framike Realty Corp. v. Hinck, 220 A.D.2d 501, 502, 632 N.Y.S.2d 177, 178 (2d Dep't 1995), leave to appeal denied, 88 N.Y.2d 803, 645 N.Y.S.2d 446 (1996) (annulling denial of special permit; "generalized complaints about traffic from local residents describing existing conditions are insufficient to counter an expert opinion based on empirical studies that 'the existing street system could handle the projected increase in traffic'"); Markowitz v. Town Bd. of Town of Oyster Bay, 200 A.D.2d 673, 606 N.Y.S.2d 705 (2d Dep't 1994), leave to appeal denied, 84 N.Y.2d 802, 641 N.E.2d 157, 617 N.Y.S.2d 136 (1994) (denial of special use permit not supported by substantial evidence; neither testimonial nor documentary evidence supported findings; personal knowledge of board member insufficient); N.Y. Vill. Law § 7-725-b (2003), Practice Commentaries at 66 ("[T]he denial of an application will not be sustained unless the record factually substantiates that the impacts upon which the decision is based are greater than those associated with uses permitted by right. Because of this heightened standard, the denial of a special permit application is arbitrary unless it is based upon clear evidence demonstrating the nature and magnitude of the undesirable impacts") (emphasis added).

Accordingly, courts must remain cognizant of their roles as necessary backstops against arbitrary municipal behavior, or Article 78 review will degenerate into a meaningless exercise. In Oyster Bay Associates, for example, the court rightly pointed out that reviewing courts should not be mere “rubber-stamps” of municipal actions:

It is the obligation of this Court to review and analyze the Town Board’s Decision in conjunction with the record in this case to determine whether its determination is arbitrary and/or capricious, or based upon substantial evidence. This review necessarily involves deciding whether the Town Board took a sufficiently ‘hard look’ at the project and set forth a reasoned elaboration for its determination. Such judicial review must consider the record as incorporated by the Town Board into its Decision in order to determine whether the Board actually relied upon substantial evidence of record. To do otherwise would render the Court’s obligations under C.P.L.R. Article 78 toothless, as the Town Board would enjoy a blanket immunity from judicial review.³¹

³¹ Similarly, in Daniels v. Zoning Bd. of Appeals of Vill. of Montebello, 5/14/2003 N.Y.L.J. 25 (col. 2) (Sup. Ct. Rockland Cty.), which concerned a decision denying a variance, the court cited Ifrac for the “substantial evidence” standard and set forth the appropriate standard of judicial review, directly on point here:

The Court must give deference to the findings of the board. . . . That is not to say that the Court is a rubber stamp for the zoning board. The Court must carefully examine the substantiality of the evidence in the record and to ‘exercise a genuine judicial function and not to confirm a determination merely because it was made by such an agency.’ If substantial evidence supporting the board’s decision does not appear in the record, it is the duty of the Court to annul the determination of the board.

Id. (citations omitted) (emphasis added). Substantial evidence remains the sine qua non of municipal decisionmaking.

Oyster Bay Assocs. Ltd. P'ship v. Town Bd. of Oyster Bay, 7/16/2002 N.Y.L.J. 26 (col. 5) (Sup. Ct. Suffolk Co.), aff'd, 303 A.D.2d 410, 755 N.Y.S.2d 671 (2d Dep't 2003), leave to appeal dismissed, 100 N.Y. 606, 766 N.Y.S.2d 160 (2003) (citations omitted) (emphasis added). Judicial intervention is required to ensure that administrative decisions are grounded in substantial evidence – i.e., administrative decisions must be based on actual proof – and that facilities that are critical to our society are not at the whim of often easily influenced boards.

In the case at bar, aside from the permit violations, the only thing that the Village can cite in support of its determination to shut down the Facility is a conclusory Affidavit solicited at the eleventh hour. In a transparent, last-ditch effort to beef up its determination to deny Metro's Special Permit renewal application, the Village retained Richard P. Brownell, a Vice President of Malcolm Pirnie, Inc., to provide an Affidavit sworn to on January 27, 2003 – i.e., the same day the Village voted to deny Metro's application.³²

According to Brownell's own sworn statement:

- He never visited the Facility.
- He never reviewed any documents other than the Findings Statement prepared by the Board's attorney.

³² Despite the fact that the renewal proceedings lasted approximately eighteen (18) months, Brownell was hired immediately before the Board issued its decision, and he never attended a Board meeting or presented himself to the applicant, Board or public for questioning.

- He never interviewed Metro employees or officials.
- He never conferred with Metro's traffic or solid waste experts.
- He never conducted a traffic analysis.
- He never conducted any air monitoring.
- He never contacted the DEC.
- He never tested the industrial waste material or sought a sample.

(See generally A. A1056-A1065).

Most importantly, Mr. Brownell does not even dispute or contradict the statement by Metro's expert, Robert D. Barber, P.E., that Metro's violations had not had any actual or genuine potential adverse impact on the public health, safety, or welfare or the environment. (A. A1056-A1059). Instead, Brownell's entire argument is premised upon his blanket and somewhat hysterical assertion that "the public was fortunate that, on the multiple occasions when Metro Enviro Transfer disregarded its permit conditions, there does not appear to have been any immediate impact." (A. A1058).

Brownell's unsupported assertion is precisely the illogical leap of faith that is at the center of the instant Appeal – i.e., that because the permit conditions were intended to protect the public and the environment, a fortiori, any violation, regardless of how short-lived or minor, must adversely impact the public and the environment. (A. A1057). As such, the Brownell Affidavit provides no

probative support for the Village's action, much less the substantial evidence that requires deference to be accorded to a municipal board.³³

Frankly, there is nothing in the Record supporting the Board's determination. Absent clear, objective evidence that these violations posed a genuine potential to endanger the public health, safety, or welfare or the environment, it is unreasonable to contend that a single or even several violations of a special permit alone can justify the denial of a Special Permit renewal application, particularly given the significant economic investment made in reliance on that permit. The actual and/or threatened adverse impacts of violations are critical and essential considerations in determining whether to close an existing business.

³³ Additionally, although the Board issued its January 27, 2003 determination prior to the issuance of the Federal Monitor's Report regarding the Facility, it is quite telling that the reports ultimately issued (one directly referring to Metro's Facility, another pertaining to an entirely different facility) never recommended closure.

In fact, one of the Reports expressly stated that Allied, Metro's parent corporation, is "overseeing a high-integrity, compliant business enterprise:"

I do believe that Allied has drawn some valuable lessons from this experience for the ongoing management of its Westchester operations and elsewhere and I am optimistic that current management is overseeing a high-integrity, compliant business enterprise.

(A. A4882).

This statement, which recognizes that Allied and Metro have undertaken substantial efforts to ensure compliance, flatly contradicts the Village's refusal to renew the Special Permit.

B. The "Substantial Evidence" Standard In The Context Of The Renewal Of A Special Use Permit

Metro further submits that the quality and quantity of evidence sufficient to constitute "substantial evidence" should be heightened in the context of the instant case because:

- (i) a special permit is at issue;
- (ii) this is a renewal application for an existing facility, which has had millions of dollars invested in it, rather than an initial permit application for a conceptual project; and
- (iii) the land use at issue is an unpopular, but unquestionably necessary, highly regulated environmental Facility.

Both the legislative presumption that special uses "will not adversely affect the neighborhood" as well as the "degree of finality and stability" which the law accords permitted activities warrant a higher degree of proof. See, e.g., Atlantic Cement Co. v. Williams, 129 A.D.2d 84, 516 N.Y.S.2d 523 (3d Dep't 1987). At a minimum, these considerations made the evidentiary shortcuts here particularly inappropriate.

Both lower Courts recognized that the classification of a particular "special use" as permitted in a zoning district "is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood." Twin County Recycling Corp. v. Yevoli, 90 N.Y.2d 1000, 1002, 665 N.Y.S.2d 627, 628 (1997). (Supreme Court Order at 3,

A. A8; Appellate Division Decision at 2, A. A4713). As such, to reject and effectively terminate a special use, a local board needs evidence of sufficient quality and quantity to overcome that legislative presumption.³⁴

Additionally, considerations of finality and stability justify a higher burden before a board rejects permit renewal applications. For example, in Atlantic Cement Co., the Court differentiated between permit renewals and initial permit applications in its consideration of an application to renew a DEC mined land reclamation permit:

Generally, in the absence of a material change in conditions or evidence of a violation of the terms of the permit, a renewal should be granted without unduly burdening the applicant. To require burdensome information at each renewal, which occurs every one or three years, would create destabilizing uncertainty and additional expense upon the mining industry.

Atlantic Cement Co., 129 A.D.2d at 88, 516 N.Y.S.2d at 525 (emphasis added).

Similarly, "[a] degree of finality and stability is properly created once a permitted activity has successfully met the initial SEQRA requirements." Vill. of Hudson Falls v. DEC, 158 A.D.2d 24, 30, 557 N.Y.S.2d 702, 705 (3d Dep't 1990), aff'd, 77 N.Y.2d 983, 571 N.Y.S.2d 908 (1991); accord Scenic Hudson, Inc. v. Jorling,

³⁴ Of particular relevance here, Metro has maintained throughout this proceeding that its Special Permit is a unique situation, in that it was granted as a change of use permit pursuant to Section 230-53(A)(2) of the Village Code, as opposed to a typical special use permit. (A. A4655-A4556). Also of note is the fact that although the Village has taken the position that the Special Permit was required in 1998 due to a change from one nonconforming use to another nonconforming use, Metro's counsel has maintained that the Facility was actually an as-of-right use until the 2001 zoning amendment. (A. A50, A214).

183 A.D.2d 258, 263, 589 N.Y.S.2d 700, 703 (3d Dep't 1992).³⁵ Thus, the law does not grant the permitting authority unfettered discretion in permit renewals, but instead affords permit holders a greater level of protection for their already existing property rights.

In sharp contrast, however, the Appellate Division's Decision sets forth an inflexible standard that allows a permitting authority to refuse to renew a permit on the basis of any violations, without appropriate consideration of the magnitude or impact of those violations or responsive remedial measures. Such a standard does not comport with either the legislative presumption that the special use "will not adversely affect the neighborhood" or the "degree of finality and stability" that the law accords permitted activities.

Respondents have previously relied upon Bell v. Szmigel, 171 A.D.2d 1032, 1033, 569 N.Y.S.2d 36, 37 (4th Dep't 1991), for example, for the proposition that permit violations provide an automatic basis for non-renewal or closure. That case involved renewal of a temporary special use permit that had been granted to petitioners for a period of six months for a bicycle ramp. It is so factually disparate from this case and so lacking in analysis, that it also cannot provide support for the

³⁵ The level of stability afforded permitted activities is also reflected in the fact that applications for permit renewal are deemed Type II actions pursuant to SEQRA, which do not require further environmental review. See 6 N.Y.C.R.R. § 617.5(c)(26). Indeed, as noted above, the instant renewal application was determined to be a Type II action, a classification that the Town has never questioned. (A. A2520-A2526).

unsubstantiated per se rule Respondents favor and the Appellate Division upheld. It would be incredibly unjust and inequitable to mandate the closure of a multi-million dollar, state-of-the-art Facility based on a case that concerns a temporary permit for a bicycle ramp.

Moreover, the summary two-paragraph decision from the Fourth Department in Bell gives no indication of the nature of the violations at issue, and, in particular, whether the violations at issue caused a genuine threat to the public or the environment. The Second Department's conclusion in the instant case that the mere violations, regardless of their impact or potential impacts, constitute a sufficient basis for denying a permit renewal cannot be drawn from this cursory decision, which never discusses the magnitude or impact of the alleged violations.³⁶

Every community produces solid waste, but most communities would prefer to avoid responsibility for their waste by making it difficult for transfer

³⁶ Other cases Respondents have previously cited throughout these proceedings to support their contention that permit renewals may be denied where there are violations did not even involve violations. See, e.g., Vill. of Hudson Falls v. DEC, 158 A.D.2d at 30, 557 N.Y.S.2d at 705 (error to annul permit renewal, emphasizing distinction in review between initial and renewal applications); Atlantic Cement Co., 129 A.D.2d at 88-91, 516 N.Y.S.2d at 525-28 (holding that the DEC improperly subjected renewal application to SEQRA review, emphasizing distinction in review between initial and renewal applications); Northside Salvage Yard, Inc. v. Bd. of Appeals of Pittsford, 199 A.D.2d 1001, 608 N.Y.S.2d 13 (4th Dep't 1993) (error for town to revoke special permit where permit was not violated). That these Courts noted that renewal applications generally should be granted without unduly burdening an applicant "in the absence of a material change in conditions or evidence of a violation of the terms of the permit" does not support a sharp, per se rule that evidence of any permit violations warrants closure of an existing business.

stations, and other so-called undesirable uses or facilities, to operate within their boundaries. If this Court sends the message that the judiciary in this State sanctions the closure of unpopular environmental facilities on the basis of any type of violation of an environmental and/or land use permit, absent any showing of actual and or genuine threatened adverse impact, the result is foreseeable: communities will try to close businesses that are unwanted uses, thereby gaining political capital. In turn, elected municipal boards, like the Village Board, will simply require such uses to obtain a special use permit with onerous conditions, monitor the facility extensively, and then close it down at the first sign of any infraction.³⁷

C. Permit Violations Do Not Provide Automatic Evidence Of Potential Threats To The Public Health, Safety And Welfare

The only connection between the violations at issue here and a finding of substantial evidence supporting closure of the Facility is a legal fiction advocated by Respondents and adopted by the Appellate Division. In reality, the Village did not, and cannot, show that the substance underlying the findings of

³⁷ To illustrate the absurdity of a per se rule, which would allow a municipality to close an existing business for any violation, Metro would arguably be in danger of closure for violating its Special Permit if, for example: (a) its exempt materials were stored at a height of 10 feet 1 inch (A. A251 (materials "shall not exceed 10 feet in height")); (b) the Facility operated until 5:05 P.M. on a Tuesday (A. A256 (operating hours "shall be 8:00 A.M. to 5:00 P.M.")); or (c) a soda can is inadvertently accepted and not removed from the Property within 24 hours (A. A249 (defining "household recyclables" as non-acceptable material), A250-A251 (requiring removal of inadvertently accepted unauthorized material as set forth in the O&M Manual), A1241 (requiring removal of unauthorized waste within 24 hours)).

violations to Metro's Special Permit affected, or threatened to affect, the public health or the environment. The Appellate Division was not able to point to any support in the Record either.

The vast discordance between the assumptions underpinning the per se rule at issue and the facts of this case demonstrates the substantial injustice it would render not only to Metro if that holding is allowed to stand, but also to the owners and users of other highly regulated facilities, their customers, and, ultimately, the public at large.

The violations that were relied upon by the Board for its attempted closure of the Facility essentially fall into three categories: capacity exceedances, acceptance of unauthorized waste, and miscellaneous violations. (A. A62).

1. Capacity Exceedances

As set forth in greater detail in the Statement of Facts, supra, there is absolutely no empirical data or information in the Record that the capacity exceedances caused traffic in excess of the levels contemplated by the Village when it first granted the Special Permit in 1998, let alone ever caused a problem on the 21 days in question. Capacity limitations are meant to limit the amount of truck traffic to and from a transfer station during a specific period of time. The unrefuted expert traffic analysis in the Record shows that the public welfare was never at risk because of excessive traffic.

In fact, even on those days when there were exceedances, the Facility generated less traffic than Respondents contemplated in 1998. (A. A116-A120). Out of the 21 days with exceedances, the largest number of vehicle trips generated was 106. (A. A711). On the day with the largest capacity overage, only 85 vehicular trips were generated. (Id.). The empirical data rings resoundingly: no adverse traffic impacts even remotely resulted from the capacity exceedances.³⁸

2. Unauthorized Industrial Waste Received At The Facility

There is also no proof that the industrial waste that got into the Facility ever compromised the public welfare in any way. Notwithstanding Respondents' innuendo, industrial waste is in no way synonymous with hazardous waste. Instead, "industrial waste" is simply "solid waste generated by manufacturing or industrial processes." 6 N.Y.C.R.R. § 360-1.2(b)(88) (emphasis added). It is the locus in quo that has definitional significance.

The industrial waste included film scraps and extruded plastic, some of which is used as filler in Easter baskets, and pigment residue, some of which is used in shampoo. (A. A90-A91). To put the magnitude of this violation in

³⁸ Metro voluntarily admitted these capacity exceedances to the Village and the DEC. It has paid fines, cured these violations, and implemented corrective measures to ensure that these exceedances cannot occur again, including installing a new computer system that cannot be manipulated. (A. A63). Consequently, no notice of violation for tonnage exceedance has been issued in almost four and a half years – not since August 21, 2000. (A. A63). To put it in context, since March 22, 2000, exceedances were found at the Facility only 21 out of almost 1,800 days.

context, Metro's records indicate that the total tonnage of waste received from Engelhard is less than five one hundredths of one percent (0.04259%) of Metro's total tonnage received between March 2000 and the January 27, 2003 Resolution denying Metro's Special Permit renewal. (A. A90, A4926).

Metro's representatives clearly acknowledge that the industrial waste should not have been received by the Facility (A. A65, A515), but Metro has also explained to the Village two very important facts.

First, certain amounts of unauthorized or non-acceptable waste are inevitably received at every known public or private solid waste transfer station – it is inherent to the industry. Despite all measures taken to avoid it, waste does on occasion get commingled by waste generators, and is non-detectable by the station operator no matter how well their monitoring procedures are functioning. (A. A67, A89, A410-A411).³⁹

Second, there was absolutely no empirical evidence proffered by the Village or offered to the Court, and certainly no discussion in the Appellate

³⁹ Metro's expert, Robert D. Barber, P.E., an engineer with substantial experience involving solid waste transfer stations, testified in his Affidavit in support of Metro's Article 78 Petition that "[d]uring the course of operating any transfer station, unacceptable waste will be received incidental to loads of acceptable waste," (A. A104), and the Village's own expert did not disagree. (A. A104, A1056-A1059). In fact, the DEC Regulations, the local Special Permit, and Metro's O&M Manual, all consented to by the Village, expressly acknowledge that a certain amount of unauthorized waste would enter the Facility. (A. A104, A249, A251, A328-A329). Thus, the mere presence of such waste is not so shocking or abhorrent as to justify closure of the Facility.

Division's Decision, that there were any genuine potential or actual adverse impacts to public welfare or the environment from such violations. (A. A76-A77). As discussed, supra, the Director of Environment, Health, and Safety for Engelhard unequivocally stated that, "Engelhard did not provide Allied Waste Industries, Inc., or its subsidiaries ('Allied') with hazardous waste for transportation or disposal." (A. A64, A308-A309). He further explained that the "material was non-hazardous, solid and stable." (A. A309). The Village has never even attempted to rebut this statement. How could it: no samples were requested, no testing was done, no interviews of Engelhard were conducted, and no data was analyzed.

Facilities are not ordinarily closed for these types of violations. Instead, Metro paid a fines to the Village of \$50,000, and was assessed an additional \$20,000 fine by the DEC. Metro also implemented curative and corrective measures, including a substantial management overhaul at the Facility and district locations, which have all been discussed with the Village. (A. A66, A80-A98, A423-A433).

The individuals responsible for the improper acceptance of industrial waste from Engelhard (as well as the capacity exceedances) no longer work for

Metro or Allied, and Metro has conducted extensive training of its current employees to ensure that they understand how to identify and handle unacceptable or unauthorized waste. (A. A92). Metro's customers are also now systematically audited to ensure that they are not delivering any improper waste to the Facility. (A. A92).

3. Miscellaneous Violations

The remaining miscellaneous violations, which are discussed in greater detail in the Statement of Facts, supra, included inadequate training and record keeping, the receipt of three household appliances (two refrigerators and a snow blower), leachate outside the processing building, and the storage of some tires on site. Representatives of Metro testified before the Board, explained these incidents, identified remedial and corrective measures, and implemented the necessary steps to cure these technical violations in accordance with the DEC Permit and Special Permit. (A. A66, A80-A98, A423-A433). Metro's success in mitigating any potential environmental impacts is evidenced by professional, empirical studies and surveys that have been performed at the Property.

Ultimately, a review of the Record reveals that, "there are no test results or other objective criteria suggesting that the operation of the facility had a

negative impact on the health, welfare of safety of the Village residents or the environment.” (A. A103 (Affidavit of Robert D. Barber, P.E.)). Metro presented comprehensive and substantial factual and expert testimony and evidence that no adverse impacts have resulted from the Facility’s more than seven (7) years of operation under the management of Metro and its predecessor Metro Enviro, LLC. (A. A88).⁴⁰ In sum, the violations never posed a genuine potential threat to the public health, safety and welfare and did not provide per se substantial evidence to support the Village’s decision to deny renewal of the Special Permit.

D. Municipalities Must Have Clear, Objective Proof That A Business Poses A Threat To The Public Health, Safety And Welfare Before It Can Permanently Close That Business

There is no dispute that a municipality must be able to shut down a business that causes actual harm or poses a genuine threat to the public health, safety, welfare or the environment. Closure of an existing facility would therefore be warranted where there is clear, objective proof based on observation, testing or empirical data showing that a facility’s operations pose such a threat. The public interest in maintaining stability in the solid waste industry (as well as other highly

⁴⁰ Again, Metro has not received a notice of violation in over two (2) years.

regulated land uses) and a respect for property rights, however, allows no room for evidentiary shortcuts.

Respondents have argued in the past that “it is not clear how the Board could obtain empirical data about potential threats to public welfare.” (See, e.g., Respondents’ Memorandum In Opposition To Motion For A Stay And For Leave To Appeal To The Court Of Appeals, dated June 21, 2004 at 15). According to Respondents, “[e]mpirical data normally takes the form of direct measurements, but a threat of harm is not something that is simple to measure directly,” but instead is in “an area where the judgment of experts and the common sense judgment of the Board are required.” (Id.).

Initially, as Respondents have recognized, “the judgment of experts” is an obvious starting point for evaluating the potential threat posed by a particular facility. Depending upon the nature of operations at issue, there are a wide range of experts available for consultation in New York State, who can explain to municipalities what evidence they would need to assess the potential harm posed by a particular facility. Municipalities need not incur extreme expense to retain experts since it is not unusual for a permit condition to require an applicant to reimburse the locality for monitoring or assessment costs.⁴¹

⁴¹ Many regulatory schemes establish applicant responsibility for costs incurred by a reviewing agency. See, e.g., 6 N.Y.C.R.R. § 617.13 (SEQRA regulation governing fee reimbursement).

The Board not only had an opportunity, but actually considered retaining an environmental and engineering consulting firm to assist the Village with its review of Metro's application for renewal of its Special Permit. Instead, the Board chose to forego an attempt to acquire any expert evidence about the Facility's operation and whether it posed a genuine threat to the public health, safety and welfare. (A. A74-A79).

In fact, some Board members had foreclosed renewing the Special Permit before all the information was before them. Email correspondence between two Trustees and Village Manager Richard F. Herbek evidences that at least some members of the Board were concerned that the results of an empirical analysis would conflict with their, by now transparent, political agenda of shutting down the Facility – good news for the Facility would portend bad news for its opponents. As already stated, one Trustee openly worried whether a professional environmental study that resulted in a “glowing report” for the Facility would “make it more difficult for [the opponents on the Board] to deny the [Special Permit] renewal.” (A. A928-A930). Moreover, speculation was raised whether paying for a professional study might be futile: “We may not be renewing the permit at all so why do the study?” (A. A929 (emphasis added)). This question evinces a fundamental misunderstanding of the Board's duty with respect to reviewing the renewal Application, namely to gather substantial, probative

evidence before determining whether reasonable grounds exist to support their (apparently pre-ordained) determination to deny the renewal of the Special Permit.

Had the Village discharged its duties in a rational manner, it would have found that the Facility was fully compliant during the overwhelming majority of its operation, and never created or threatened to create any adverse impact, let alone actual harm, to the public or the environment. The Record is replete with empirical evidence and expert testimony to that effect. In every relevant area where an adverse impact to public health and/or the environment could occur – and possibly justify non-renewal – the Facility passed inspection.⁴²

In order to obtain substantial evidence to support a determination that would close an existing business, the Board was obligated to retain an expert who, at minimum, would:

- Visit the Facility in order to garner first-hand knowledge of the Facility.
- Interview employees and company officials.
- Contact and confer with the DEC.
- Review the entire Record, not just the Findings Statement prepared by the Board's attorney.

⁴² Significantly, the fact that the Board's determination was contrary to the Record is illustrated in a statement in a memorandum from Village Manager Herbek to the Board dated January 17, 2001 that an Environmental Engineer of the DEC "characterized the Metro Enviro operation as one, which is very well run, with few problems that need to be taken care of or followed up." (A. A931).

- Confer with Metro's traffic or solid waste experts, or at least review the data provided by Metro's experts.
- Conduct independent analyses, including a traffic analysis and air sampling.
- Test the Engelhard waste material or at least seek a sample to verify the fact that it did not pose a threat to the public

Although "common sense" is important to certain local land use decisions, where a highly regulated and unpopular industry is at issue, a local Board's intuition may be colored by hysteria or popular misconceptions that bear no relation to risks at hand.⁴³ Similarly, to the extent Respondents would argue that "common sense" dictates that permit violations are per se evidence of a threat to the public welfare, as this case shows, such argument is premised on a fallacy that has worked a substantial injustice in this case.

This is not an issue of differing expert opinions; the Village has no expert opinion on which to hang its proverbial hat. Accordingly, before a municipality can permanently close a multi-million dollar, state-of-the-art, highly

⁴³ A local board's "common sense" is particularly suspect in the face of countervailing, unrefuted empirical proof. In C & A Carbone, Inc. v. Holbrook, 188 A.D.2d 599, 600, 591 N.Y.S.2d 493, 494-95 (2d Dep't 1992), for example, an applicant for a special permit to operate a solid waste recycling plant submitted a traffic survey indicating that area roads were being used substantially under their capacity. The Town Board, however, "based on the testimony of the area residents and the Town Board's own knowledge, denied the permit due to anticipated traffic congestion." Id. at 494. The Second Department, like the lower Court in that case, held that "the conclusory statements of the area residents . . . were insufficient to sustain a denial of the special permit even if supported by the personal knowledge of the members of the Town Board." Id. at 600, 591 N.Y.S.2d at 495 (emphasis added).

regulated business and land use, justice requires clear, objective proof based on observation, testing or empirical data showing that a facility's operations genuinely pose a threat to the public welfare. Too much is at stake to allow evidentiary shortcuts of the sort at issue here.

POINT II.

SUBSTANTIAL INJUSTICE IS INFLICTED WHERE A BUSINESS IS CLOSED AND A LAND USE IS TERMINATED, EVEN THOUGH PERMIT VIOLATIONS ARE CURED, FINES ARE PAID CORRECTIVE MEASURES ARE IMPLEMENTED

Reversal of the Appellate Division Decision is necessary here "in the interest of substantial justice."⁴⁴ N.Y. Const. art. VI, § 3(b)(6). As opposed to, for example, the Retail Property Trust trio of cases, which involved the initial grant of property rights, here a municipality is attempting to strip away existing and vested property rights. It is important to note that Metro does not argue it cannot be punished for its violations, only that its conduct, particularly in light of the fact

⁴⁴ It is important to note that not only will the disproportionate response of closure of the Facility decimate Metro's business, but it would also severely impact the entire construction and demolition solid waste stream in Westchester County, and endanger the businesses of third-party haulers. (A. A4941). Third-party haulers who utilize the Facility, for example, have indicated that their companies' ability to dispose of construction and demolition debris in Westchester County will be severely hindered if Metro's Facility were to close. (A. A4758-A4772). In addition, the increased distance that their trucks will have to travel will not only cause an increase in truck traffic throughout the County, but will also raise the cost of doing business for the third-party hauling companies, exposing them to a substantial risk of going out of business themselves. (See id.).

that it has been corrected, does not warrant the most drastic of punishments, i.e., the closure of its business.

Municipalities cannot be allowed to refuse to renew permits based solely on purported violations without any reference to the magnitude or potential impact of such violations. Here, the Board imposed a punishment that tipped the scales of justice so drastically against Metro, that it blatantly cast aside well established jurisprudential principles. "For at least two thousand years, it has been an accepted tenet of jurisprudential writing that the punishment . . . should be proportional to the offense committed."⁴⁵ Kathi A. Drew & R.K. Weaver, "Disproportionate or Excessive Punishments: Is There A Method For Successful Constitutional Challenges?," 2 Tex. Wesleyan L. Rev. 1 (1995). As stated by Marcus Tullius Cicero, "Let the punishment be equal with the offence." Cicero,

⁴⁵ In Rummel v. Estelle, 445 U.S. 263, 100 S. Ct. 1133 (1980), for example, the Supreme Court addressed a life sentence under a recidivist statute given to a defendant for obtaining \$120.75 by false pretenses. Justice Powell, discussing the "disproportionality analysis" under the Eighth Amendment, stated in his dissent:

Disproportionality analysis measures the relationship between the nature and number of offenses committed and the severity of the punishment inflicted upon the offender. The inquiry focuses on whether, [sic] a person deserves such punishment, not simply on whether punishment would serve a utilitarian goal. A statute that levied a mandatory life sentence for overtime parking might well deter vehicular lawlessness, but it would offend our felt sense of justice.

"Disproportionate or Excessive Punishments: Is There A Method For Successful Constitutional Challenges?," 2 Tex. Wesleyan L. Rev. at 7, quoting Rummel, 445 U.S. at 288, 100 S. Ct. at 1146 (Powell, J., dissenting) (emphasis added).

De Legibus (bk. III, 20). Metro submits that what the Village has sought to do here by denying permit renewal offends that quintessential sense of justice and fair play.

The DEC's enforcement policy regarding violations by permittees of the terms and conditions of their permits is instructive here: "If a permit is issued to a prior violator, it may be appropriate to impose strict reporting or monitoring conditions within such permits or to require an environmental monitor." DEC Record of Compliance Enforcement Guidance Memorandum, Section II (March 5, 1993), available at <http://www.dec.state.ny.us/website/ogc/egm/roc.html>. Furthermore, "[t]he Department also recognizes that a prior violator can demonstrate that rehabilitation has occurred such that, with or without more stringent oversight, as the specific circumstances warrant, the entity can carry out activities in a responsible manner." Id. (emphasis added).

In analogous situations, the DEC has not found that closure of an existing facility is warranted, unless there is sufficient and substantial evidence that the violations either caused actual harm, or posed a genuine potential threat to the public and/or the environment. It is thus apparent that the DEC recognizes a "hierarchy" of violations - i.e., certain offenses, though clearly technical violations, do not rise to the same level as more serious environmental violations

threatening the public health, safety and welfare, for which closure is a possible and perhaps necessary remedy.

In a DEC enforcement matter involving a solid waste facility that violated its permit, for example, an Administrative Law Judge ("ALJ") refused to close an existing facility on the sole basis of the very existence of violations, but instead looked at the seriousness of the violations before rendering a decision. In re Republic Env'tl. Sys. (N.Y.), Inc. ("Republic Env'tl. Systems"), 1993 WL 546499 (N.Y. Dep't Env'tl. Conserv.).

In Republic Env'tl. Systems, the DEC Staff sought to revoke a Long Island facility's hazardous waste management permit for numerous violations, including, inter alia, exceeding the permitted number of drums (capacity) and types of waste to be stored at the facility (unauthorized waste), submission of inadequate quarterly reports (record keeping), cracked and peeling coating on parts of the facility's concrete secondary containment barriers, and failure to properly label waste. One more serious violation stemmed from a chlorine gas release. Id. at *16. As a result of the release, residents in the surrounding residential neighborhood were actually evacuated, and indicative of the serious nature of the incident, one employee was hospitalized. The ALJ found that this violation "created a significant threat of environmental harm in the surrounding area." Id. In addition, the ALJ found this particular violation was "relatively serious

compared to the other violations Respondent has been found to have committed.”

Id.

Another serious category of violations involved “72 instances of apparent exceedances of the limitations for various parameters in Respondent’s industrial wastewater discharge permit” over a seven year period. Id. In particular, there was an incident involving a “purple effluent discharge” which was “obviously more serious than the typical permit limit exceedance.” Id. (emphasis added). The ALJ reserved a determination on this issue until an adjudicatory hearing to determine the “severity of the violations,” as there was no indication regarding “the severity of any of these exceedances, and [the motion papers] do not allege [the exceedances] had any adverse effect on the environment.” 1993 WL 546499, at *16.

Despite the relative seriousness of the violations involved there, the ALJ refused to close the facility without first examining the actual risks posed by the violations, and rejected the DEC’s summary judgment motion and reserved its decision regarding permit revocation. It held that “in light of Respondent’s largely undisputed recitation of mitigating factors, [the DEC] Staff’s affidavits are not sufficient to support the drastic relief sought” – i.e., revocation of the facility’s

permit. Id. at *12.⁴⁶

Notably, the violations most similar to those in the instant case – exceeding the permitted number of drums (capacity exceedances) and types of waste to be stored at the facility (unauthorized waste) – were all treated by the DEC as being relatively insignificant as compared to the chlorine release that resulted in actual harm and a genuine threat to the public, and the serious wastewater discharge violations. There is absolutely no evidence that Metro's violations rise to the level of those offenses requiring closure.

Ensuring compliance without “draconian” harshness is standard practice in determining the appropriateness of penalties in environmental administrative hearings. In In re Michael Don Vito, Sr., 1991 WL 94079 (N.Y. Dep't Env'tl. Conserv.), for example, the ALJ balanced the goal of providing “a significant incentive” for compliance without imposing a “draconian” penalty that would force an owner to abandon his facility. That case involved what was described as a violation with “the significant potential for environmental harm.” In particular, the owner of petroleum bulk storage tanks failed to perform required

⁴⁶ Though it is not clear from the decision whether the permit was revoked, an inquiry with the DEC revealed that due to the severity of the chlorine release necessitating the evacuation of the adjoining neighborhood, as well as the unauthorized discharge into the sewer system, the facility was in fact ultimately shut down. What is relevant here is that the ALJ did not support the most drastic punishment in the face of serious violations, without first making a determination upon substantial evidence that such a result was necessary for the protection of the public health, safety and welfare.

tightness testing. Respondent there alleged a financial difficulty in complying with testing requirements. There, the ALJ expressly recognized that the punishment must fit the offense:

In order to provide a significant incentive to a violator to come into compliance as rapidly as possible, the penalty, while not close to the maximum which could be assessed . . . provides incentives to earlier, rather than later, compliance. On the other hand, the penalty requested is not so draconian as to cause a [sic] owner faced with a [proceeding in connection with its violation] to simply abandon his facility.

Id. 1991 WL 94079 at *7.

A similar balancing of the equities was used in the administrative hearing of In re Joseph R. Wunderlich, Inc., 1985 WL 20883 (N.Y. Dep't Envtl. Conserv.), which involved a mining operation that had failed to timely renew its permit. The DEC Staff determined that due to the lapse, respondent was in violation of Environmental Conservation Law for mining without a permit for two years, and sought to prohibit any mining until such time as a new permit was issued. The ALJ there held that "the Commissioner's decision whether to exercise the power to direct a cessation of the violation should be based on a consideration or balancing of the relevant factors in each case, such as the seriousness and nature of the violation, the extent of any resulting adverse environmental impacts, and the attitude of the Respondent." Id. at *7

The Commissioner of the DEC concurred with the ALJ's findings and determined that it would be inappropriate to shut down a business that was not harming the environment simply because of a technical violation:

Respondent's mining operations are not causing damage to the environment and that Respondent has been cooperating with the Department in the . . . renewal application process. Under these circumstances, it would not be appropriate to close down Respondent's business in the interim, although a suitable civil penalty should be assessed for Respondent's failure to apply for renewal of its mining permits in a timely fashion.

Id. at *1.

The Village similarly should have balanced all of the relevant factors to ensure a fair and just penalty before opting to inflict the most draconian punishment available. It is undisputed that Metro has gone to great lengths and made tremendous investments to convert the Facility into a state-of-the-art and compliant transfer station. As a result of Metro's efforts, its Facility has become a critical component in the safe and efficient disposal of solid waste, which has enabled construction and development to proceed apace in the Metropolitan area.

Metro has not only paid substantial fines for the violations, but has successfully implemented curative measures to ensure that violations will no longer occur. Thus, if, as Respondents have argued, the refusal to renew the Special Permit was intended to deter Metro and others from violating their permits, then deterrence has already been achieved. If Metro has already been deterred

from violating its permit, why should it be punished any further by imposing the most draconian outcome? Consequently, it seems the only message that might be sent to all highly regulated industries by closing down the Metro Facility would be that it may not be worth curing violations or paying applicable fines and penalties, since your facility may well be shut down anyway.

The Executive Branch, through the DEC, recognizes that alternative enforcement measures, besides denial or revocation of a permit and the accompanying closing of the business or activity, might be more fitting under the circumstances. Indeed, the DEC has taken precisely that approach here with the Facility – citing it for violations, imposing monetary penalties, and diligently monitoring operations, while allowing the Facility to continue operation in recognition of the enormous cost and effort Metro put into remediating the site and cooperating with the Village. As evidenced by the absence of any notices of violation for over two years, this approach has worked.

Proportionality is an imperative consideration to ensure fairness and justice in punishment. Closing a vital transfer station is not a proportional response to tonnage exceedances at a Facility designed to handle that excess amount, and where the Facility has established a record of compliance for over two years. Shutting down a business is not a measured response to a few instances of training and record keeping violations. Refusing to renew a permit is not a

reasonable enforcement measure to address the acceptance of unauthorized waste, where corrective measures have been implemented.

CONCLUSION

With the reduction in the number of available landfills and the distance to such landfills increasing precipitously, often there are no legitimate economical alternatives for transportation to landfills other than by rail car. The few transfer stations in the Metropolitan area that accommodate construction and demolition waste are essential to the area's continuing growth and economic development; those connected to a rail line become even more critical to the efficient flow of materials through the solid waste network. Metro has shown that a transfer station can be operated without posing any threat to the public welfare or the environment.

Facilities such as Metro cannot always rely on local governments – let alone the public – to dispassionately assess their merits, much less their safety, in the face of an environmental smear campaign such as took place in the Village. The Courts are required to act as a stopgap to ensure that these types of facilities are dealt with rationally on the local level. Judge Nicolai correctly served that purpose and performed that role.

Closure of Metro's Facility on this Record is unwarranted and unjustified. Moreover, the rule ostensibly articulated by the Second Department authorizing denial of a permit renewal for any violation is inappropriate and unworkable. This Court must address this issue, articulate a clear and coherent test for closure of a highly regulated Facility that has not caused, or had a genuine potential to cause, any harm to the community or environment.

For the foregoing reasons, Appellant respectfully requests that this Court reverse the Appellate Division, Second Department's Decision, and reinstate the Order of the Supreme Court, Westchester County, directing Respondents to renew the Special Permit.

Dated: White Plains, New York
February 11, 2005

Respectfully Submitted,

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