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Office of Proceedings

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AUG 4 2005

Part of
Public Record

August 3, 2005

Via Overnight Mail

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-001



Re: Finance Docket No. 34734
Northeast Interchange Railway LLC - Petition of Village of Croton-on-Hudson
To Reject the Notice of Exemption Or, In The Alternative, For A Stay Of
Effectiveness

Dear Secretary Williams:

On behalf of my client, the Village of Croton-on-Hudson, New York (the "Village"), I enclose an original and ten copies of the Village's Petition To Reject the Notice of Exemption Or, In The Alternative, For A Stay Of Effectiveness. I also enclose a disk containing a scanned pdf version of the original Petition together with the exhibits and a word version of the Petition itself.

If you have any questions, please give me a call.

Sincerely,

A handwritten signature in black ink, appearing to read 'Michael B. Gerrard'.

Michael B. Gerrard

Enclosures

cc: Rick Herbek, Village Manager
James E. Howard, Esq. (via Facsimile and U.S. Mail)

EXPEDITED CONSIDERATION REQUESTED

BEFORE THE SURFACE TRANSPORTATION BOARD

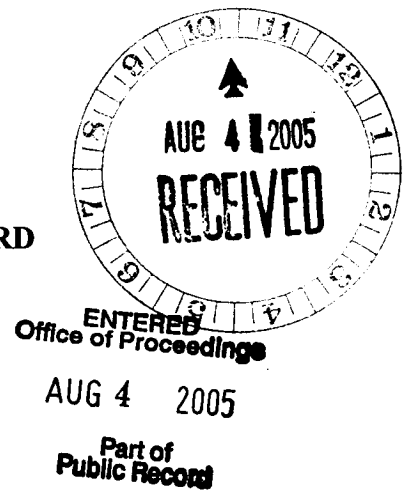
FINANCE DOCKET No. 34734

**NORTHEAST INTERCHANGE RAILWAY, LLC – LEASE AND OPERATION
EXEMPTION – LINE IN CROTON-ON-HUDSON, NEW YORK**

**PETITION OF THE VILLAGE OF CROTON-ON-HUDSON TO REJECT NOTICE OF
EXEMPTION OR, IN THE ALTERNATIVE, FOR STAY OF EFFECTIVENESS**

Pursuant to the provisions of 49 C.F.R. §§ 1117.1 and 1150.32(c), the Village of Croton-on-Hudson, New York (the “Village”) requests that the Board reject the Notice of Exemption (“Notice”) filed in this docket by Northeast Interchange Railway, LLC (“NIR”) before it becomes effective because the Notice contains false information and is otherwise defective. In the alternative, the Board should stay the effectiveness of the Notice, because NIR is attempting to improperly invoke the jurisdiction of the Board to allow NIR to continue to operate a waste transfer station (the “Facility”) that the New York Court of Appeals has found that the Village may close because it poses a threat to public health and the environment. NIR is seeking to disguise itself as a railroad, when it is actually seeking to become a processor of construction waste.

The very same processing activity has been undertaken by the current operator, Metro Enviro Transfer LLC (“Metro”) for around five years pursuant to local permits. Metro has never claimed to be a railroad or an integral part of a railroad. NIR’s proposed operation would be



similar to Metro's, except that it would operate with less regulatory oversight. Like Metro, the proposed operation would process waste and ship it via rail. Because waste processing is neither a railroad activity nor integrally related to a railroad activity,¹ the processing facility is beyond the jurisdiction of the Board. Unless stayed by the Board, the Notice of Exemption will become effective on August 8, 2005.

I. The Notice Is Void *Ab Initio*

The Notice is void *ab initio* because it contains false information and a number of misleading statements, and is falsely verified. 49 C.F.R. § 1150.32(c). In addition, the Notice does not contain sufficient information about NIR's proposals and fails to provide sufficient environmental analysis.

A. The Notice Contains False Information

The Notice falsely states on page 3 that the existing state permit for the Facility is assignable to NIR at NIR's election: "the NYSDEC permit could be assigned to NIR if NIR elects to do so." In fact, the New York State Department of Environmental Conservation ("DEC") does not allow permit holders to freely assign permits. Instead, permit transfers arising from change in facility ownership resulting in a new permittee, must be approved by the DEC. DEC, Program Policy Memorandum Regarding Transfers of Permits and Pending Applications, 4 (December 19, 2001) ("Permit Transfer Policy"). Under the Permit Transfer Policy, the Department may request information about the record of compliance of the proposed transferee and may treat a transfer request as an application for a new permit. *Id.* at 8. The relevant regulations also state that newly discovered information or the need to allow public comment can lead to a transfer application being treated like a new application. 6 N.Y.C.R.R. § 621.13(e).

¹ Even if the waste were shipped by other means to the final disposal site in Ohio, similar processing would be undertaken.

The Facility is also permitted by Westchester County. To operate in accordance with County laws, NIR would need to transfer that permit from Metro. Once again, that transfer cannot be accomplished at the election of the proposed transferee; the County reviews the qualifications of the proposed transferee before deciding whether or not to allow the transfer.

The Village has compiled substantial information about waste management companies that are affiliated with Regus Industries, LLC, which also controls NIR. It has found that certain of these operations have accumulated very poor operating records with numerous violations of environmental requirements and one finding of contempt. On July 22, 2005, the Village wrote to DEC requesting that the Department deny any application for transfer of the DEC permit to any company affiliated with Regus Industries. As yet, no response has been received from DEC. Thus, the statement that the DEC permit is assignable to NIR at NIR's election is false.

In addition, the relevant regulations require applicants to provide various information pursuant to 49 C.F.R. §§ 1150.33-1150.34. As an initial matter, 49 C.F.R. §§ 1150.33(g) requires a certificate that the applicant's projected revenues will not exceed \$5,000,000. Although on its face the Notice states that this is provided in Exhibit B to the Notice, Exhibit B is actually the caption summary required by 49 C.F.R. § 1150.34. The required certificate has been omitted from the Notice, but this may not be inadvertent. In an affidavit dated July 20, 2005, Perry Mitrano, the current general manager of the Facility, swore that the Facility has revenues of \$185,000 per week. Ex. 1 at ¶ 18. This means that the annual revenue of the Facility is over \$9,000,000, well in excess of the \$5,000,000 threshold.

Furthermore, Andreas Gruson, the Chief Executive of NIR, falsely swore on July 26, 2005 that he read a document that is dated July 29, 2005.

The Notice also states that the transaction will cause no significant changes. That is entirely false. In fact, the proposed transaction is designed to frustrate a ruling of the New York Court of Appeals allowing the Village to close the Facility. On July 6, 2005, the Court of Appeals unanimously affirmed the Village's right to close the Facility, upholding the Village Board's conclusion that the Facility was an unacceptable threat to health and environment, because the current operator, Metro, had repeatedly violated its Village permit:

Over the three-year period covered by the permit, Metro repeatedly and intentionally violated conditions of the permit. Metro not only exceeded capacity limitations at least 26 times, but also falsified records by rigging software to reallocate the dates of waste intake, deceptively giving the impression that there were no excesses. Further, on at least 42 occasions, the operators accepted prohibited types of industrial waste. Other violations included the inadequate training of facility personnel, insufficient record keeping and inappropriate storage of tires on the site . . . [T]he Board did not have to show substantial evidence of actual harm. It is enough that the Board found the violations potentially harmful. Here, Metro claims that none of the violations in question created a significant threat of harm. But even if no single violation was dangerous in itself, the Board was entitled to conclude that the history of repeated, willful violations created an unacceptable threat of future injury to health or the environment.

Metro Enviro Transfer, LLC v. Vill. Of Croton-on-Hudson, 2005 WL 1556709 (N.Y. 2005). Ex. 2. Despite a ruling by New York's highest court allowing the Village to close the Facility, the Village has been temporarily enjoined from carrying out this action because of certain arguments raised by Metro and the site owner; the Village is seeking a lifting of this temporary injunction. NIR's stated purpose is to continue Metro's construction waste processing operation in the guise of a railroad.

The Facility is currently operating pursuant to permits that require the operation to meet conditions which are designed to protect public health and the environment. These conditions are enforced by regular inspections by the Village and DEC. Even with these restrictive

conditions in place, the Court of Appeals has confirmed that the Village was justified in concluding that the Facility was a threat to public health and the environment. If the Facility were allowed to operate in derogation of these conditions and without regular enforcement inspections, it would pose an even greater threat.

The proposed transaction is designed to prevent the implementation of the decisions of the Village and the Court of Appeals. Thus, the Notice is intended to make a significant change – it is designed to allow a Facility that has been ordered to close because it has been found by the Village (and affirmed by the Court of Appeals) to be a threat to public health and the environment to remain open on far less restrictive terms. Thus, the environmental impacts of the proposed transaction should be evaluated from a baseline of no operations. The changes caused by the proposed transaction would therefore be highly significant and would need to be evaluated through an Environmental Impact Statement, if the Notice is not dismissed. *See* 49 C.F.R. § 1105.6(d).

Finally, NIR has falsely stated its address as 1A Croton Pointe Ave. Croton-on-Hudson, New York. In fact that location is the address of the Facility, which the spur track serves and which the Notice states that NIR will lease *after* the Notice becomes effective. The registered address for NIR is actually 2730 Transit Road, West Seneca, New York 14224. Ex. 3.

B. The Notice Contains Misleading Information

Like some other recent applicants for exemptions, NIR has misleadingly characterized the Facility as undertaking merely transloading operations, when in fact waste is *processed* on the site prior to loading. Ironically, the current operator of the Facility emphasized in a court filing dated July 20, 2005 that the Facility processes wastes. On arrival at the Facility, the waste is dumped onto the tipping floor, where (if required procedures are followed, which is not always the case) it is inspected for unacceptable and recyclable wastes. After these are removed the

waste is then crushed before it is loaded into a railcar. Once full, that railcar is moved onto the short siding outside the Facility to await pickup by the carrier. Thus, as the current operator recognized by obtaining DEC, County, and Village permits to operate, the Facility is not a transloading operation that is integral to the operation of a railroad. It is a waste processing operation that ships the processed waste by rail.

NIR has also misleadingly stated that through acquiring the Facility it will become a common carrier by rail, when it will actually be a *shipper* of waste by rail. In fact, the short rail spur serves only the Facility, and the current operator does not operate any locomotive on the spur. Thus, by acquiring the lease of the Facility, NIR will not become a common carrier, it will become a processor of construction waste, which is then shipped by rail.

C. The Notice is Inadequate

As noted above, an essential certification is missing from the Notice and it is falsely sworn. Even if these deficiencies were rectified, the Notice would still be entirely inadequate. At a minimum, the information submitted must allow the Board to discern the nature of the transaction and what activities are contemplated in what timetable. The Notice fails to do this. For instance, the Notice fails to mention that the Facility is the sole shipper served by the rail spur. NIR also provides no details on the nature of its lease with the owner of the rail spur. Although the Notice makes vague references to an intention of NIR to become a common carrier, it provides no time frame for the realization of that ambition. In addition, although NIR states that it intends to serve rail customers other than the Facility from the leased property, it provides no details on when and how this intention might be realized.

Contradicting its stated intention to build additional tracks on the leased property to serve shippers and receivers of containers, lumber, brick, road salt, steel, and bulk liquids, NIR states that none of the thresholds established in 49 C.F.R. § 1105.7(e)(4) or (5) will be exceeded. The

notice provides no basis for this statement. Even if the baseline is the current level of activity (and not zero as the Village believes) these thresholds will be exceeded. At present, around 150 rail cars per month are shipped from one spur that serves the Facility. If one additional spur were constructed, at least a doubling to around 300 cars per month would be expected. This would trigger the need for an environmental report because this would exceed the threshold given in 49 C.F.R. §§ 1105.7(e)(5)(B). In addition, if truck traffic increases by 10% or 50 vehicles per day an environmental report is needed. 49 C.F.R. §§ 1105.7(e)(5)(C). Although NIR has provided no basis whatsoever for its assertions that no thresholds would be exceeded, based on common sense, it appears that the large expansion supposedly intended by NIR would trigger these thresholds.

In accordance with 49 C.F.R. §§ 1105.6, if any of the thresholds established by 49 C.F.R. § 1105.7(e)(4) or (5) are exceeded, at least an Environmental Assessment is required. As discussed above, in this case the potentially significant nature of the impacts would justify a full Environmental Impact Statement. Thus, the Notice is inadequate because it provides no environmental documentation, and the National Environmental Policy Act bars the Board from acting favorably without adequate environmental review.

II. The Board Has No Authority Over Spur Track

The only rail track included in the proposed transaction is a single 1,600 ft spur that runs from the main line to the Facility. This track does not serve any other shippers and only goes just beyond the boundary of the leased property to connect with the rail road.

According to statute, “[t]he Board does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.” 42 U.S.C. § 10906. As explained by a number of recent cases the Board may not regulate spur track. *United Transp. Union v. Surface Transp. Bd.*, 183 F.3d 606,

612 (7th Cir.1999); *Flynn v. Burlington Northern Santa Fe Corp.*, 98 F.Supp.2d 1186, 1189-90 (E.D. Wash. 2000). Thus, the Notice should be rejected because it seeks to have the Board step beyond its statutory powers and regulate a spur.

III. The Facility is Not Subject to Board Jurisdiction

If NIR acquires the Facility and the associated spur track it would not be a railroad, because the spur serves only the Facility and NIR has no firm plans to change this. In any event, even if NIR were a railroad, manufacturing activities and other facilities owned by railroads which are not integrally related to the railroad's provision of interstate rail service, i.e., non-transportation facilities, are not subject to STB jurisdiction or entitled to federal preemption. *Borough of Riverdale--Petition for Declaratory Order--The New York Susquehanna & Western Railway Corp.*, 1999 WL 715272, STB Finance Docket No. 33466 at 10 (September 9, 1999). Such facilities, like other non-railroad property, are subject to state and local regulation. *Id.*

Recently, the State of New Jersey sought to control a waste transfer facility which did not process waste and was sited on land leased from a railroad. The Third Circuit found that the transfer facility was outside the Board's jurisdiction, because it merely shipped waste to a rail carrier and was not an integral part of that carrier. *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295, 308-09 (3d Cir. 2004). Thus, the State of New Jersey gained authority over that waste transfer facility.

Here the situation is even more compelling. The Facility is designed to process waste to prepare it for shipping, and then load the waste onto rail cars. The Facility has already been subject to both state and local regulation and has been shipping waste using a rail carrier for over five years. It adds value by removing unacceptable waste and recyclables, and then crushing the waste to reduce its volume. Like a quarry that produces sand which is then shipped by rail, and like the operation considered in *Hi Tech Trans*, the Facility is not "integrally related to the

provision of interstate rail services," it is a customer of interstate rail services. It is therefore beyond the jurisdiction of the Board.

NIR's quest for federal preemption is conceptually no different than an electric power plant that receives its coal and ships its ash for disposal by rail – or for that matter just about any industrial shipper with a dedicated rail spur – arranging for a "railroad" to take over the operation of the spur and the activity that utilizes the spur and then claiming that it has relieved itself of the need to meet pesky state and local environmental and land use regulations. As the Third Circuit noted in *Hi Tech Trans*, Congress did not intend the Board's jurisdiction to sweep so broadly. The Board should not allow itself to be used as a tool to allow NIR to accomplish such an inappropriate purpose.

IV. Similar Relief Has Been Granted in Similar Circumstances

Recently there has been an accelerating trend of waste facilities trying to disguise themselves as railroads in order to avoid state and local laws. To its credit, in these circumstances the Board has not hesitated to seek additional information, or to reject filings when they are inadequate. For example, in a recent factually similar case, a day after an entity filed an objection, the Board allowed a notice of exemption to be held in abeyance pending further discussions between the interested parties. *New Haven National Rail Terminal Transportation Company, L.L.C.--Lease And Operation Exemption--3.5 Miles Of Track In The Former Cedar Hill Yard, New Haven And North Haven, Ct*, 2005 WL 1396281, STB Finance Docket No. 34690 (June 14, 2005).

Even more pertinently, the Board recently dismissed a notice of exception partially because the applicant would be conducting waste processing as part of its proposed operations and partially because the applicant was vague about its proposals. *New England Transrail, LLC, d/b/a Wilmington and Woburn Terminal Railroad Co. – Construction, Acquisition and Operation*

Exemption – In Wilmington and Woburn, MA, 2005 WL 1024489. STB Finance Docket No. 34391 (May 3, 2005). Stays of consideration have also been granted where significant concerns were raised that the proposed operations were really that of an intermodal transfer facility rather than a *bona fide* railroad. *New Jersey Rail Carrier LLC – Acquisition and Operation Exemption – Former Columbia Terminals, Kearny, NJ*, STB Finance Docket 34393 (August 13, 2003).

Here in a desperate effort to avoid the consequences of serious violations of its former permit, a waste processing facility that is about to close is seeking to abuse the exemption process by disguising its waste processing operations as those of a railroad. At minimum, the Board should stay consideration of the Notice to allow interested parties, to whom NIR did not send the Notice, to provide their input and fully brief the issues. In addition to the Village, the State of New York and Westchester County, whose previously unquestioned authority over the Facility would also be displaced by this scheme, should also be given notice and the opportunity to participate in this proceeding, should it continue. Furthermore, the ongoing saga regarding the Facility has been the subject of considerable public interest. If the Notice is not dismissed, NIR should be required to provide notice to the public of its proposal, and a hearing should be held locally to hear the views of members of the public.

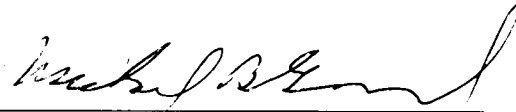
V. Conclusion

If the Notice had been carefully prepared, the Board might have needed to issue a stay while all interested parties had an opportunity to evaluate the application and participate in the evaluation process. However, because the Notice contains false and misleading statements, is not properly verified, and contains vague and inadequate information, it is void *ab initio* and should be dismissed. In the event that the Board decides not to dismiss the Notice, the Village requests that its effectiveness be stayed and that NIR be required to serve the Notice on all interested regulatory bodies and provide notice to citizens of the Village. The Village, other

interested bodies, and members of the public, should then be afforded the opportunity to fully brief the issues raised, and the Board should hold a local hearing to evaluate those issues.

DATED: New York, New York
August 3, 2005

Respectfully Submitted,

A handwritten signature in dark ink, appearing to read "Michael B. Gerrard", is written over a horizontal line.

MURPHY, STECICH & POWELL, LLP
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(914) 674-4100

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Attorneys for the Village of Croton-on-Hudson

EXHIBIT 1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----- x

GREENTREE REALTY, LLC and METRO ENVIRO :
TRANSFER, LLC, :

Petitioners/Plaintiffs, :

- against - :

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

Respondents/Defendants. :

----- x

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

PERRY MITRANO, being duly sworn, deposes and says as follows:

1. I am the General Manger of Petitioner/Plaintiff Metro Enviro Transfer, LLC (“Metro Enviro”). Prior to holding this position, I had over twenty (20) years of experience in the waste management industry. As General Manager, I am responsible for, among other things, safety and compliance, and oversight of the various site personnel, including the Site Manager.
2. I submit this Affidavit in support of Petitioners’ Motion by Order to Show Cause for a Temporary Restraining Order and Preliminary Injunction enjoining the Village of Croton-on-Hudson (the “Village” or “Croton”) and the Village Board of the Trustees (the “Village Board”) from prohibiting Petitioners’ operation of a construction and demolition (“C&D”) debris

**AFFIDAVIT OF
PERRY MITRANO**

receiving waste for just a short time, Metro Enviro risks going out of business altogether. Essentially, once the waste and the customers are turned away, they simply may never return after making the necessary alternate arrangements.

18. Just one week of closure of the Transfer Station would cause Metro Enviro to lose approximately \$185,000.00 in gross revenue. A month of closure would cause Metro Enviro to lose approximately \$800,000.00 in gross revenue.

19. In addition, closure of Metro Enviro's transfer station, even on a temporary basis, will cause irreparable harm to Metro Enviro that cannot be compensated with money damages. Metro Enviro would suffer permanent damage to its reputation as a reliable transfer station and its customer good will, and would risk going out of business altogether based upon these factors alone.

20. Even temporary closure of Metro Enviro would lead third-party haulers that require an outlet for their C&D to conclude that Metro Enviro is not a reliable outlet. Such haulers would attempt to make arrangements with competing transfer stations.

21. Furthermore, even though customers prefer to do business with Metro Enviro now, because it is less expensive than many other facilities, once the Facility actually closes, the customers would likely view the Facility as unreliable. Logistically, a hauler needs a reliable disposal point as well as a low rate. The cost to a customer of having to move its disposal facility is high enough that haulers would prefer a higher disposal rate in exchange for a dependable location.

22. Moreover, to the extent alternative transfer stations are permitted to accept C&D, have the capacity to accept additional C&D, and actually choose to accept additional C&D, it is likely that such transfer stations will require haulers to sign long-term contracts mandating haulers to continue bringing their C&D to the alternative transfer station even if the pre-existing

quo is maintained. Since the Village denied Metro Enviro's application for renewal of the Special Permit, the Facility has been operating in compliance and without incident.

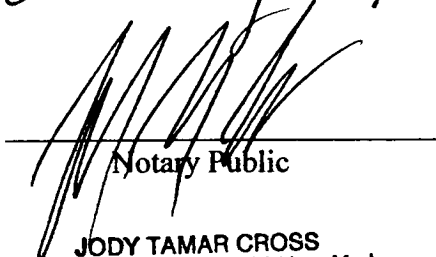
CONCLUSION

36. In light of the foregoing, Petitioners respectfully request that this Court grant immediate injunctive relief enjoining the Village from prohibiting the operation of the Facility until such time as Petitions receives a decision on the merits with regard to their claim that the Facility is a pre-existing, legal, nonconforming use, or in the alternative, until such time as Petitioners can obtain the opinion of the Building Inspector and the ZBA as to their claim.


PERRY MITRANO

Sworn to before me this

20th day of July, 2004



Notary Public

JODY TAMAR CROSS
Notary Public, State Of New York
No. 02CR6078789
Qualified In Putnam County
Commission Expires 8/5/06

EXHIBIT 2

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

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

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

July 6, 2005.

David S. Steinmetz, for appellant.

Michael B. Gerrard, for respondents.

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

ROSENBLATT, J.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[FN4. See *e.g. Atlantic Cement Co. v. Williams*, 129 A.D.2d 84, 88 (3d Dept 1987) ("Generally, in the absence of a material change in conditions or evidence of a violation of the terms of the permit, a renewal should be granted").

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

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

* * *

Order affirmed, with costs.

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

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

END OF DOCUMENT

EXHIBIT 3

NYS Department of State

Division of Corporations

Entity Information

Selected Entity Name: NORTHEAST INTERCHANGE RAILWAY, LLC

Selected Entity Status Information

Current Entity Name: NORTHEAST INTERCHANGE RAILWAY, LLC

Initial DOS Filing Date: FEBRUARY 23, 2005

County: ERIE

Jurisdiction: NEW YORK

Entity Type: DOMESTIC LIMITED LIABILITY COMPANY

Current Entity Status: ACTIVE

Selected Entity Address Information

DOS Process (Address to which DOS will mail process if accepted on behalf of the entity)

NORTHEAST INTERCHANGE RAILWAY, LLC
2730 TRANSIT ROAD
WEST SENECA, NEW YORK, 14224

Registered Agent

NONE

NOTE: New York State does not issue organizational identification numbers.

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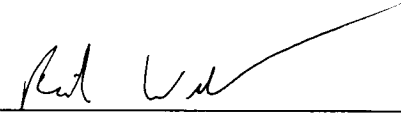
CERTIFICATE OF SERVICE

**PETITION TO REJECT THE NOTICE OF EXEMPTION OR,
IN THE ALTERNATIVE, FOR A STAY OF EFFECTIVENESS**

The undersigned hereby certifies that I caused a copy of the foregoing to be served via facsimile and U.S. mail on August 3, 2005 to the following:

James E. Howard, Esq.
One Thompson Square
Suite 201
Charlestown, MA 02129

DATED: August 3, 2005



Richard Webster