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216902

June 30, 2006



Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Room 700
Washington, D.C. 20423

Re: Formal Complaint, *Village of Croton-on-Hudson, New York v. Buffalo Southern Railroad, Inc., et. al*

Dear Secretary Williams:

Enclosed are the original and 10 copies of a Formal Complaint in the above-entitled proceeding and a computer diskette containing the Formal Complaint in Word format.

Please time and date stamp the additional copy of this letter and the Formal Complaint and return them with our messenger. Thank you for your assistance.

If you have any questions please call or email me.

FILED

JUN 30 2006

OFFICE OF
PROCEDINGS
SURFACE
TRANSPORTATION BOARD

Sincerely yours,

Mary Gabrielle Sprague

Mary Gabrielle Sprague
Attorney for the Village of Croton-on-Hudson

FEE RECEIVED

JUN 30 2006

SURFACE
TRANSPORTATION BOARD

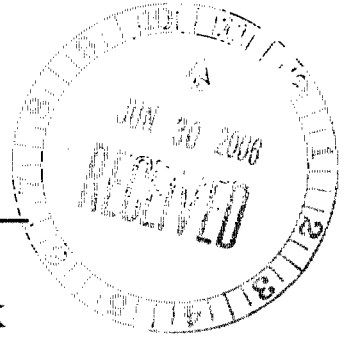
Enclosures

ENTERED
Office of Proceedings

JUN 30 2006

Part of
Public Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



VILLAGE OF CROTON-ON-HUDSON, NEW YORK

v.

**BUFFALO SOUTHERN RAILROAD, INC.; GREENTREE REALTY, LLC; RS
ACQUISITION CO., LLC; and NORTHEAST INTERCHANGE RAILWAY, LLC**

Docket No. FD-34905

FORMAL COMPLAINT

Michael B. Gerrard
ARNOLD & PORTER LLP
399 Park Avenue
New York, New York 10022-4690
(212) 715-1000
Attorney for the Village of Croton-on-Hudson

Dated: June 29, 2006

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

VILLAGE OF CROTON-ON-HUDSON, NEW YORK

v.

**BUFFALO SOUTHERN RAILROAD, INC.; GREENTREE REALTY, LLC; RS
ACQUISITION CO., LLC; and NORTHEAST INTERCHANGE RAILWAY, LLC**

Docket No. FD-34905

FORMAL COMPLAINT

The Village of Croton-on-Hudson, New York (the “Village”) respectfully submits this Formal Complaint against Buffalo Southern Railroad, Inc. (“BSOR”), Greentree Realty, LLC (“Greentree”); RS Acquisition Co., LLC (“RSA”); and Northeast Interchange Railway, LLC (“NIR”) pursuant to 49 U.S.C. § 11701(b) and 49 C.F.R. § 1111.1 *et seq.*¹ The Village complains that BSOR has not received authority from the Surface Transportation Board (the “Board”) under 49 U.S.C. § 10902 to operate as a common carrier at 1A Croton Point Avenue in the Village (the “Property”) over a 1,600-foot track (the “Track”) and that BSOR has therefore

¹ The Village is a local government entity. Pursuant to 49 C.F.R. §1002.2(e)(1) filing fees are waived for a “proceeding which is filed by a ... local government entity.” Therefore, the Village has not paid the filing fee typically required to accompany the filing of a complaint.

unlawfully held itself out as a common carrier over the Track. The Village further complains that (1) Greentree, the owner of the Property and Track, (2) RSA, the present lessee from Greentree of the Property and Track, and (3) NIR the former lessee from Greentree of the Property and Track, have knowingly authorized, consented to, and permitted this violation of section 10902. The Village respectfully requests the Board to order BSOR, Greentree, RSA and NIR to cease and desist from their unlawful operations under 49 U.S.C. §721(b)(4), to fine BSOR, Greentree, RSA and NIR to the maximum extent permitted by law under 49 U.S.C. §11901, to require BSOR to file an application under 49 U.S.C. §10902 if BSOR seeks lawful authority for its operations in the Village, and to afford the Village such other relief as the Board deems appropriate.

The Parties

1. The Village of Croton-on-Hudson is a New York municipal corporation, with offices located at the Stanley H. Kellerhouse Municipal Building, 1 Van Wyck Street, Croton-on-Hudson, New York 10520.

2. Buffalo Southern Railroad, Inc. is a New York corporation, headquartered at 8600 Depot Street, Eden, New York 14057. On information and belief, BSOR is a Class III rail common carrier that operates over approximately 32 miles of rail line between Buffalo, New York and Gowanda, New York and provides industrial switching services at Tonawanda, New York.

3. Greentree Realty, LLC is a New York limited liability company. On information and belief, its principal place of business is at 1A Croton Point Avenue, Croton-on-Hudson, New York 10520. In a prior proceeding, the Board was informed that the address of Greentree is c/o

Kenneth Gunshor, Esq., 100 South Bedford Road, Suite 150, Mount Kisco, NY 10549. *See* Verified Notice of Exempt Transaction, *Northeast Interchange Railway, LLC-Lease and Operation Exemption-Line in Croton-on-Hudson, New York*, Finance Docket No. 34734 (filed July 29, 2005), at 2. Greentree owns the Property and the Track.

4. RS Acquisition Co., LLC is a New York limited liability company. RSA's Chief Executive Officer is Andreas Y. Gruson. On information and belief, its principal place of business is 2730 Transit Road, West Seneca, NY 14224. RSA is the present lessee of the Property and Track.

5. Northeast Interchange Railway, LLC is a New York limited liability company. NIR's Chief Executive Officer is Andreas Y. Gruson. On information and belief, its principal place of business is 2730 Transit Road, West Seneca, NY 14224. In a prior proceeding, the Board was informed that NIR should receive correspondence through James E. Howard, One Thompson Square, Suite 201, Charlestown, MA 02129. *See* Verified Notice of Exempt Transaction, *Northeast Interchange Railway, LLC-Lease and Operation Exemption-Line in Croton-on-Hudson, New York*, Finance Docket No. 34734 (filed July 29, 2005), at 1. NIR is the former lessee of the Property and Track. RSA and NIR are under the common ownership of Regus Industries LLC.

The Facts

6. On May 17, 2006, BSOR filed a Complaint in the United States District Court for the Southern District of New York against the Village and sixteen members of its elective and appointive Boards seeking a declaratory judgment that the Village may not apply its local zoning and land use laws and the state eminent domain law against BSOR's operations at the Property.

Buffalo Southern Railroad, Inc. v. Village of Croton-on-Hudson et al., Case No. 06 Civ. 3755 (CM) (S.D.N.Y.). BSOR argued that such application is preempted by the Interstate Commerce Commission Termination Act (“ICCTA”), 49 U.S.C. § 10501, and violates the Commerce Clause of the United States Constitution. BSOR also sought a temporary, preliminary and permanent injunction against such application. The Complaint was accompanied by (1) Plaintiff’s Application for a Temporary Restraining Order, (2) Memorandum of Law in Support of Plaintiff’s Application for a Temporary Restraining Order and Motion for a Preliminary Injunction, and (3) Affidavits of Albert Feasley, John T. McManus, Daniel M. Meehan, and Joseph Rutigliano. A copy of the May 17, 2006 filing is attached as Exhibit 1.

7. The Village received telephonic and written notice of this impending filing on May 16, 2006 from BSOR’s counsel. This is the first time that Village representatives learned that BSOR was operating, or intended to operate, in the Village.

8. BSOR’s Complaint reveals that on March 3, 2006, BSOR entered into a lease for the Property. Complaint ¶ 28; Feasley Affidavit ¶10 and Ex. B.

9. The Property is approximately ten acres in size. It is bounded on the west by a rail line owned by Metro-North Commuter Railroad. CSX Transportation, Inc. (“CSXT”) operates freight rail service over that line. The Property includes the Track, an approximately 1,600-foot track over which rail service has been, and can be, provided. Complaint ¶¶ 21 and 22; Feasley Affidavit ¶¶ 5 and 6 and Ex. A.

10. Greentree apparently transferred the lease of the Property and Track from NIR to RSA sometime between the Board’s November 17, 2005 decision in Finance Docket No. 34734

and March 3, 2006. RSA in turn subleased the Property and Track to BSOR on March 3, 2006.

Feasley Affidavit ¶ 10 and Ex. B.

11. On information and belief, Greentree, NIR and RSA all worked together to restructure the lease arrangements at the Property, recruit and induce BSOR to come onto the Property, and work out an arrangement for BSOR to claim common carrier status, in a way that purports to circumvent state and local regulation, for the financial benefit of Greentree, NIR and RSA. In doing so, Greentree, NIR and RSA had knowledge that BSOR had not obtained necessary authorizations from the Board under 49 U.S.C. Subtitle IV, Part A.

12. BSOR represented to the District Court that it is offering common carrier rail service over the Track:

Now, BSOR holds itself out to the public generally to provide common carrier rail service at the BSOR Croton yard, including transloading and switching services to rail customers delivering or receiving various commodities by truck at the BSOR Croton Yard, transferring containers and bulk commodities between trucks and rail cars, and providing other rail transportation services involving the exchange of empty and loaded rail cars for various commodities with CSX.

Complaint ¶ 28. Feasley Affidavit ¶ 11 is identical, except that the words “and bulk commodities” are omitted.

13. Joseph Rutigliano of Coastal Distribution, LLC stated in his affidavit that “Coastal arranged for BSOR to transport sand, aggregate, wallboard and other building materials and products by rail to the Transload Facility in Croton” and that “BSOR is beginning to provide such service to Coastal.” Rutigliano Affidavit ¶¶ 7 and 8.

14. BSOR represented to the District Court that it is offering common carrier rail freight service over the Track to more than one shipper.

15. The Track is over 300 miles from BSOR's rail line in western New York.

16. The Village and the individually named representatives filed Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Preliminary Injunction on May 23, 2006. That Memorandum was supported by the Affidavits of Louis E. Gitomer, Charles A. Kane, and Marianne Stecich. A copy of the May 23, 2006 filing is attached as Exhibit 2.

17. Ms. Stecich, the Village Attorney, described the proceedings related to Metro Enviro's operation of a waste transfer station on the Property from 1997 to 2005. She also described the subsequent efforts of Northeast Interchange Railway, LLC to commence common carrier operations over the Track for the transportation of construction waste and other commodities (of which the Board is aware). *See Northeast Interchange Railway-LLC-Lease and Operation Exemption-Line in Croton-on-Hudson, New York*, STB Finance Docket No. 34734 (filed Aug. 1, 2005).

18. Mr. Kane, a Supervisor of Metro North Commuter Railroad and a Village Trustee, stated that he had not observed any activity by BSOR at the Property.

19. Mr. Gitomer, a regular practitioner before the Interstate Commerce Commission and this Board, explained in his affidavit that BSOR appeared to be seeking to convert the Track from an excepted "spur, industrial, team, switching, or side" track to a line of railroad. Mr. Gitomer further stated that, prior to holding itself out as a common carrier over this additional line of railroad far from its own territory and in the territory of CSXT, BSOR should have obtained Board approval under 49 U.S.C. §§ 10901 or 10902(a).

20. On May 25, 2006, BSOR filed a Memorandum of Law in Further Support of Plaintiff's Motion for a Preliminary Injunction along with a May 24, 2006 Affidavit from Albert Feasley. A copy of the May 25, 2006 filing is attached as Exhibit 3.

21. Mr. Feasley contended that BSOR had been holding itself out as a common carrier over the Track since March 2006, and had in fact operated over the Track. Second Feasley Affidavit ¶¶ 8 and 9. Apparently acknowledging that lawful operation over an additional line of railroad would require Board approval, Mr. Feasley contended that the track was excepted spur track and not a line of railroad.

22. By letter to the District Court dated May 31, 2006, Paul T. Hitchcock, Associate General Counsel-Regulatory for CSXT, informed the Court of its position on the delivery of cars to the Track. A copy of the May 31, 2006 letter is attached as Exhibit 4.

23. Following a June 1, 2006 hearing on BSOR's motion for preliminary injunction, the District Court granted the motion, conditioned on BSOR's "continued refusal to accept solid waste as defined by New York State regulations." Decision and Order Granting Plaintiff's Motion for a Preliminary Injunction, Case No. 06 Civ. 3755 (CM) (June 12, 2006), attached as Exhibit 5. The District Court concluded that "BSOR is likely to prevail on the issue of whether ICCTA preemption applies, because the question about the legality of its operation does not affect the STB's exclusive jurisdiction over the site under § 10501 of the ICCTA." Decision at 14.

24. The District Court, however, invited BSOR and/or the Village to present to the Board the question whether BSOR's operations on the Track require Board approval:

Certainly someone should look into whether BSOR's Westchester operation requires a certificate of authority, and under the doctrine

of “primary jurisdiction” articulated by the Supreme Court in U.S. v. Western Pac. R. Co., 352 U.S. 59, 64 (1956), that someone ought to be the Surface Transportation Board. Determining whether BSOR requires a license to operate in the proposed fashion involves far more than simply interpreting the statute. The reviewing authority must decide whether an existing common carrier by rail may expand its base of operations to a new area (which is what BSOR says that it wants to do) without first obtaining a license from the STB by (1) first acquiring track that would ordinarily be excepted from STB authority because it is “switch” or “spur” track, and then (2) contracting with other carriers for interchange rights over trackage outside its licensed operating area. This involves analysis, not only of the “intended use” of trackage, see Nicholson v. Interstate Comm. Comm’n, 711 F.2d 364, 367 (D.C. Cir. 1983); but also of the “purpose and effect” of the proposed arrangement. Texas & Pac. Ry. Co. v. Gulf, Colo. & Santa Fe Ry. Co., 270 U.S. 266, 46 S. Ct. 263 (1926); Brotherhood of Locomotive Engineers v. U.S., 101 F.3d 718, 728 (D.C. Cir. 1996). As I learned when I delved (more deeply than proved necessary) into these matters, these are complicated and arcane questions, on which the ICC and STB have spoken in the past (albeit not on these precise facts). Clearly, such matters should be resolved as a matter of national rail policy, not in a piecemeal fashion by unspecialized district courts.

Decision at 17-18.

25. As BSOR has not presented this question to the Board since the District Court’s June 12 Decision, the Village is accepting the District Court’s invitation to do so. The District Court set forth the procedure for doing so:

If BSOR, a Class III rail carrier, is conducting unauthorized common carrier operations from Westchester County, in violation of Chapter 109 of the ICCTA, the statute itself provides remedies: a fine of up to \$5,000 per violation per day. 49 U.S.C. § 11701(a) The procedure for enforcing such violations, which is set forth in Chapter 117, is for “any person,” (which would include the Village of Croton-on-Hudson) to file a complaint with the Surface Transportation Board. 49 U.S.C. § 11701(a) (2000).

Decision at 19.

Issues Presented

The Village presents three issues in this Formal Complaint:

(1) Whether BSOR may operate the Track as a common carrier by rail only with Board approval (because it would constitute the operation of an additional or extended line of rail under the authority of the Board under 49 U.S.C. § 10902).

(2) Whether BSOR violated 49 U.S.C. § 10902 by holding itself out as a common carrier and/or by operating as a common carrier at the Property without Board approval.

(3) Whether Greentree, RSA or NIR knowingly authorized, consented to, or permitted BSOR's violation of 49 U.S.C. § 10902, or any other provision of 49 U.S.C. Subtitle IV, Part A.

Relief Sought and Procedure

The Village respectfully requests:

(1) that the Board initiate a proceeding to determine the issues presented above;

(2) in the event the Board determines that BSOR violated 49 U.S.C. § 10902, or any other provision of 49 U.S.C. Subtitle IV, Part A, by holding itself out as a common carrier and/or by operating as a common carrier over the Track without Board approval,

(a) that the Board, pursuant to 49 U.S.C. § 721(b)(4), order BSOR to cease and desist from operating over the Track in violation of 49 U.S.C. § 10902 or any other provision of 49 U.S.C. Subtitle IV, Part A,

(b) that the Board initiate proceedings to fine BSOR for its violation under 49 U.S.C. § 11901(a), and

(c) that the Board order BSOR to file an application under 49 U.S.C. § 10902 if BSOR seeks lawful authority for its operations in the Village;

(3) in the event the Board determines that Greentree, RSA and/or NIR knowingly authorized, consented to, or permitted BSOR's violation of section 10902 or any other persons' violations of any provision of 49 U.S.C. Subtitle IV, Part A,

(a) that the Board, pursuant to 49 U.S.C. § 721(b)(4), order Greentree, RSA and/or NIR to cease and desist from authorizing, consenting to, or permitting BSOR or any other rail carrier from operating over the Track without prior Board approval under 49 U.S.C. § 10902, and

(b) that the Board initiate proceedings to fine Greentree, RSA and/or NIR for their violation under 49 U.S.C. § 11901(c); and

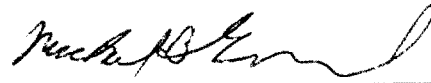
(4) that the Board order such other relief as the Board deems appropriate.

The Village submits that the public interest would be served by fining BSOR, Greentree, RSA and NIR the maximum amount permitted by statute. The record reflects that BSOR, Greentree, RSA and NIR deliberately sought to evade Board authority, and a maximum penalty would deter others from similarly attempting such an end run around the Board's authority.

Attached to this Formal Complaint is the verification of Gregory J. Schmidt, Mayor of the Village of Croton-on-Hudson, attesting that the foregoing facts are true and correct.

Neither this proceeding nor the granting of the relief requested herein will constitute a major federal action significantly affecting the environment or the conservation of energy resources.

Respectfully submitted,

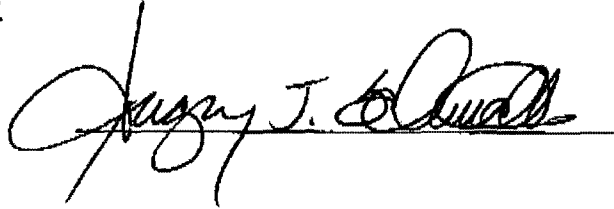
A handwritten signature in black ink, appearing to read "Michael B. Gerrard", written over a horizontal line.

Michael B. Gerrard
ARNOLD & PORTER LLP
399 Park Avenue
New York, New York 10022-4690
(212) 715-1000
Attorney for the Village of Croton-on-Hudson

Dated: June 29, 2006

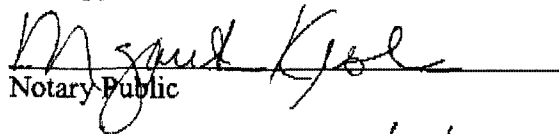
VERIFICATION

I, Gregory J. Schmidt, depose and state that I am Mayor of the Village of Croton-on-Hudson, that I am authorized to make this Verification, and that I have read the foregoing Formal Complaint, and know that the facts asserted therein are true and accurate as stated to the best of my knowledge, information and belief.



Subscribed and sworn to before me on
this 29th day of June, 2006, by

Gregory J. Schmidt, personally
known to me or proved to me on the basis
of satisfactory evidence to be the person
who appeared before me.


Notary Public

My commission expires: 10/23/2009

MARGARET KEESLER
Notary Public, State of New York
No. 01KE5050950
Qualified in Westchester County
Commission Expires October 23, 20 09

CERTIFICATE OF SERVICE

I certify that on this 30th day of June, 2006, I served a copy of the foregoing document upon the respondents, Buffalo Southern Railroad, Inc., Greentree Realty, LLC, RS Acquisition Co., LLC, and Northeast Interchange Railway, LLC by overnight courier (Formal Complaint and Exhibits) and facsimile (Formal Complaint only), at the following addresses and facsimile numbers:

Counsel to BSOR, NIR and RSA:

John T. McManus
Crane, Parente, Cherubin & Murray
90 State Street
Albany, NY 12207
518-432-8000

and

James E. Howard LLC
One Thompson Square
Suite 201
Charlestown, MA 02129
617-886-9322

Counsel to Greentree:

David S. Steinmetz
Zarin & Steinmetz
81 Main Street, Suite 415
White Plains, NY 10601
914-682-7800

The envelope containing such copy and the cover page of the facsimile transmitting such copy bear the legend, "Service of STB Formal Complaint."

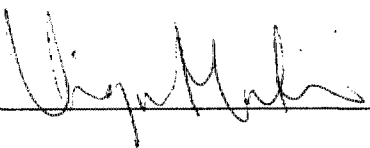


EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

06 CIV. 3755
Judge McMahon

BUFFALO SOUTHERN RAILROAD, INC.,

Plaintiff,

- against -

ORIGINAL
COMPLAINT

CIVIL ACTION No.:

VILLAGE OF CROTON-ON-HUDSON; GREGORY J. SCHMIDT, as Mayor of the Village of Croton-on-Hudson; DANIEL O'CONNOR, P.E., as Engineer and Building Inspector for the Village of Croton-on-Hudson; RICHARD F. HERBEK, as Manager of the Village of Croton-on-Hudson; THOMAS P. BRENNAN, as Trustee on the Village Board of Trustees; CHARLES A. KANE, as Trustee on the Village Board of Trustees; ANN GALLELLI, as Trustee on the Village Board of Trustees; LEO A. W. WIEGMAN, as Trustee on the Village Board of Trustees; CHRIS KEHOE, as member of the Village Planning Board; VINCENT ANDREWS, as member of the Village Planning Board; FRANCES ALLEN, as member of the Village Planning Board; ROBERT LUNTZ, as member of the Village Planning Board; KATHLEEN RIEDY, as member of the Village Zoning Board of Appeals; RHODA STEPHENS, as member of the Village Zoning Board of Appeals; RUTH WAITKINS, as member of the Village Zoning Board of Appeals; WITT BARLOW, as member of the Village Zoning Board of Appeals; and PAUL ROLNICK, as member of the Village Zoning Board of Appeals,

Defendants.

Plaintiff Buffalo Southern Railroad, Inc. ("BSOR"), by its attorneys and for its complaint against Defendants Village of Croton-on-Hudson; Gregory J. Schmidt, as Mayor of the Village of Croton-on-Hudson; Daniel O'Connor, P.E., as Engineer and Building Inspector for the Village of Croton-on-Hudson; Richard F. Herbek, as Manager of the Village of Croton-on-Hudson; Thomas P. Brennan, as Trustee on the Village Board of Trustees; Charles A. Kane, as Trustee on the Village Board of Trustees; Ann Gallelli, as Trustee on the Village Board of Trustees; Leo A.

W. Wiegman, as Trustee on the Village Board of Trustees; Chris Kehoe, as member of the Village Planning Board; Vincent Andrews, as member of the Village Planning Board; Frances Allen, as member of the Village Planning Board; Robert Luntz, as member of the Village Planning Board; Kathleen Riedy, as member of the Village Zoning Board of Appeals; Rhoda Stephens, as member of the Village Zoning Board of Appeals; Ruth Waitkins, as member of the Village Zoning Board of Appeals; Witt Barlow, as member of the Village Zoning Board of Appeals; and Paul Rolnick, as member of the Village Zoning Board of Appeals (collectively, the "Village Defendants"), states as follows:

JURISDICTION

1. Jurisdiction concerning BSOR's claims exists pursuant to 28 U.S.C. §§ 1331, 1337, 1343, 2201, and 2202. More particularly, this Court has jurisdiction over this case pursuant to 28 U.S.C. § 1331 in that it involves an action arising under the Constitution and laws of the United States. This Court also has jurisdiction pursuant to 28 U.S.C. § 1337 in that it involves an action arising under an Act of Congress regulating commerce, namely, the Interstate Commerce Commission Termination Act (the "ICCTA"), 49 U.S.C. § 10101, et seq. This Court also has jurisdiction pursuant to 28 U.S.C. § 1343.

VENUE

2. Pursuant to 28 U.S.C. § 1391(b), the Southern District of New York is an appropriate venue as the Village Defendants are within this District. Further, a substantial part of the events giving rise to BSOR's claims occurred in this District, and the property that is the subject of this action is within this District.

PARTIES

3. Plaintiff BSOR is a corporation organized under the laws of the State of New York, with its principal place of business in Eden, New York. BSOR is a Class III rail common carrier that operates approximately 32 miles of rail line between Buffalo, New York and Gowanda, New York; provides switching services at Tonawanda, New York; interchanges rail traffic with five railroads; and offers common carrier service at Croton-on-Hudson, New York, as described below.

4. Defendant Village of Croton-on-Hudson (the "Village" or "Croton") is, upon information and belief, a municipal corporation organized under and by virtue of the laws of the State of New York, with municipal offices at the Stanley H. Kellerhouse Municipal Building at 1 Van Wyck Street, Croton-on-Hudson, New York 10520.

5. Defendant Gregory J. Schmidt is, upon information and belief, the Mayor of the Village and a member of the Village Board of Trustees, with an office at the Stanley H. Kellerhouse Municipal Building at 1 Van Wyck Street, Croton-on-Hudson, New York 10520.

6. Defendant Daniel O'Connor, P.E. is, upon information and belief, the Engineer and Building Inspector for the Village, with an office at the Stanley H. Kellerhouse Municipal Building at 1 Van Wyck Street, Croton-on-Hudson, New York 10520.

7. Defendant Richard F. Herbek is, upon information and belief, the Manager of the Village, with an office at the Stanley H. Kellerhouse Municipal Building at 1 Van Wyck Street, Croton-on-Hudson, New York 10520.

8. Defendant Thomas P. Brennan is, upon information and belief, a Trustee on the Village Board of Trustees, which has an office at the Stanley H. Kellerhouse Municipal Building at 1 Van Wyck Street, Croton-on-Hudson, New York 10520.

9. Defendant Charles A. Kane is, upon information and belief, a Trustee on the Village Board of Trustees, which has an office at the Stanley H. Kellerhouse Municipal Building at 1 Van Wyck Street, Croton-on-Hudson, New York 10520.

10. Defendant Ann Gallelli is, upon information and belief, a Trustee on the Village Board of Trustees, which has an office at the Stanley H. Kellerhouse Municipal Building at 1 Van Wyck Street, Croton-on-Hudson, New York 10520.

11. Defendant Leo A. W. Wiegman is, upon information and belief, a Trustee on the Village Board of Trustees, which has an office at the Stanley H. Kellerhouse Municipal Building at 1 Van Wyck Street, Croton-on-Hudson, New York 10520.

12. Defendant Chris Kehoe is, upon information and belief, a member of the Village Planning Board, which is a municipal body organized under the laws of the State of New York and makes land use determinations within the Village, with an office at the Stanley H. Kellerhouse Municipal Building at 1 Van Wyck Street, Croton-on-Hudson, New York 10520.

13. Defendant Vincent Andrews is, upon information and belief, a member of the Village Planning Board, which is a municipal body organized under the laws of the State of New York and makes land use determinations within the Village, with an office at the Stanley H. Kellerhouse Municipal Building at 1 Van Wyck Street, Croton-on-Hudson, New York 10520.

14. Defendant Frances Allen is, upon information and belief, a member of the Village Planning Board, which is a municipal body organized under the laws of the State of New York and makes land use determinations within the Village, with an office at the Stanley H. Kellerhouse Municipal Building at 1 Van Wyck Street, Croton-on-Hudson, New York 10520.

15. Defendant Robert Luntz is, upon information and belief, a member of the Village Planning Board, which is a municipal body organized under the laws of the State of New York

and makes land use determinations within the Village, with an office at the Stanley H. Kellerhouse Municipal Building at 1 Van Wyck Street, Croton-on-Hudson, New York 10520.

16. Defendant Kathleen Riedy is, upon information and belief, a member of Village Zoning Board of Appeals, which is a municipal body organized under the laws of the State of New York and makes land use determinations within the Village, with an office at the Stanley H. Kellerhouse Municipal Building at 1 Van Wyck Street, Croton-on-Hudson, New York 10520.

17. Defendant Rhoda Stephens is, upon information and belief, a member of Village Zoning Board of Appeals, which is a municipal body organized under the laws of the State of New York and makes land use determinations within the Village, with an office at the Stanley H. Kellerhouse Municipal Building at 1 Van Wyck Street, Croton-on-Hudson, New York 10520.

18. Defendant Ruth Waitkins is, upon information and belief, a member of Village Zoning Board of Appeals, which is a municipal body organized under the laws of the State of New York and makes land use determinations within the Village, with an office at the Stanley H. Kellerhouse Municipal Building at 1 Van Wyck Street, Croton-on-Hudson, New York 10520.

19. Defendant Witt Barlow is, upon information and belief, a member of Village Zoning Board of Appeals, which is a municipal body organized under the laws of the State of New York and makes land use determinations within the Village, with an office at the Stanley H. Kellerhouse Municipal Building at 1 Van Wyck Street, Croton-on-Hudson, New York 10520.

20. Defendant Paul Rolnick is, upon information and belief, a member of Village Zoning Board of Appeals, which is a municipal body organized under the laws of the State of New York and makes land use determinations within the Village, with an office at the Stanley H. Kellerhouse Municipal Building at 1 Van Wyck Street, Croton-on-Hudson, New York 10520.

FACTS

21. BSOR leases and provides rail transportation service at an approximately 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").

22. The Property includes approximately 1,600 feet of track that connects with the Hudson line of CSX Transportation, Inc. ("CSX") at approximately milepost QC 25 in the Village (the "Croton Track").

23. There is also an existing building on the Property used for transloading commodities between rail cars and trucks (the "Transload Facility"). Generally, a transload facility is a facility that is used to transfer commodities from one mode of transportation (e.g., truck) to another mode of transportation (e.g., rail). When used in connection with rail transportation, transload facilities allow shippers or consignees, not served directly by rail carrier and otherwise solely dependent on truck transportation, to have access to rail transportation service and the national rail network. As a result, transload facilities are an integral part of rail transportation (collectively, the "Croton Track," "Transload Facility," and "Property" constitute the "BSOR Croton Yard").

24. The BSOR Croton Yard is located in the most industrially developed section of the Village. 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, is immediately to the East of the BSOR Croton Yard. A commuter railroad parking lot is located to the South of the BSOR Croton Yard, a massive rail equipment maintenance facility to the Southwest, and a commercial warehouse building currently storing tires, to the North. To the

West is the Croton-Harmon Rail Yard, which is a large rail-industrial complex containing numerous tracks and switches for both commuter and freight trains.

25. Upon information and belief, the Property has long been utilized for commercial purposes -- in particular, for the storage and transfer of various products and materials, such as rocks, stone, soil, and sand -- since at least the early 1960s.

26. More recently, from 1997-2005, a prior entity utilized the Croton Track and the Transload Facility to transfer construction and demolition debris ("CD&D") from trucks to rail cars for interstate shipment and, ultimately, disposal.

27. During the last several years, BSOR has sought to provide rail common carrier transportation services at additional locations, both in western New York and elsewhere.

28. As a result of BSOR's efforts to increase the locations of its services, on March 3, 2006, BSOR leased the BSOR Croton Yard. Now, BSOR holds itself out to the public generally to provide common carrier rail service at the BSOR Croton Yard, including transloading and switching services to rail customers delivering or receiving various commodities by truck at the BSOR Croton Yard, transferring containers and bulk commodities between trucks and rail cars, and providing other rail transportation services involving the exchange of empty and loaded rail cars for various commodities with CSX.

29. BSOR's rail transportation operations at the BSOR Croton Yard provide coordination between rail carriers and motor carriers and allow BSOR to provide rail transportation service economically and efficiently for shippers and consignees, thereby enabling them to have access to the national rail network by means of interchange with CSX.

30. As a result, BSOR's rail transportation operations promote and have a beneficial effect on interstate commerce.

31. Furthermore, without this important rail link at the BSOR Croton Yard, the already overburdened roads in Westchester County will be further inundated with even more long-haul truck traffic.

32. Transload facilities like BSOR's are of great interest and value to businesses because they provide companies with an additional option for cost effective transportation and distribution of their materials and products in interstate commerce.

33. Upon information and belief, many businesses outside of the area are unable to viably serve the Westchester County market given the huge cost associated with truck transportation.

34. BSOR's Transload Facility is of particular interest to businesses because, in many cases, they can transport their products to the lucrative Westchester County market more easily and cheaply by rail, rather than by truck. Further, the BSOR Croton Yard is unique in that it is the only viable link to the national rail network in Westchester County for transloading bulk products.

35. As a result, Coastal Distribution, LLC ("Coastal") has arranged with BSOR for it to transport sand and other building materials and products by rail to the BSOR Croton Yard for transfer to trucks for distribution throughout the Westchester County market.

36. BSOR has begun to provide such service to Coastal.

37. Coastal has informed BSOR that it would like to enter into a long-term agreement to transport and transload sand, aggregate, and other building materials and products, but it is unwilling to do so given the uncertainty created by the Village's attempts to condemn and/or interfere with the BSOR Croton Yard, as described below.

38. In addition, a number of other businesses have expressed an interest in using BSOR's transportation and transloading services at the BSOR Croton Yard. They have refrained from arranging for shipments to or entering into agreements with BSOR due to the Village's conduct.

39. Recently, the Village Board of Trustees held a public hearing "[t]o determine the Village's need for the Property . . . [at] 1A Croton Point Avenue, Section 78.16 Block 2 Lots 1 and 2 as the first step in the process of acquiring the property by eminent domain."

40. That night, in furtherance of the Village's attempt at exercising eminent domain to take the Property, the Board of Trustees adopted a full environmental assessment form as part of the New York State Environmental Quality Review Act ("SEQRA") process.

41. A few weeks ago, an appraiser hired by the Village inspected the Property to provide a valuation as part of the condemnation proceeding. Although the Village has so far refused to make it public, upon information and belief, the appraiser's report is complete.

42. On April 3, 2006, the Village held a "scoping session" concerning the purported condemnation in advance of preparing a Draft Environmental Impact Statement pursuant to SEQRA.

43. Additionally, on several occasions over the last year, some of the Defendants have contended that any activities at the Property are subject to and regulated by the 1979 Village of Croton-on-Hudson Zoning Law (the "Zoning Code").

44. Further, some of the Defendants have threatened that, if activity was commenced at the Property without the Village's prior approval, it would issue stop work orders and/or seek to halt any activity by other means.

45. As demonstrated by the above conduct, unless enjoined by this Court, the Village Defendants will take further actions to attempt to stop, regulate, and/or interfere with BSOR's rail transportation operations, including condemning the Property.

46. If the Property is condemned, BSOR's relationships with its existing customer will necessarily be terminated, thereby adversely and irreparably affecting BSOR.

47. The result is the same if the Village attempts to or actually halts or disrupts the operations at the BSOR Croton Yard, even for a short period of time, pursuant to some provision in the Zoning Code or other local regulation(s) or ordinance(s).

48. Further, those businesses that have expressed an interest in using BSOR's transportation and transloading services are sure to look elsewhere if there is a threat that the BSOR Croton Yard will be condemned or closed or that service will be disrupted by the Village's actions.

THE ICCTA

49. In 1995, Congress enacted the ICCTA, which took effect on January 1, 1996. Among other things, the ICCTA amended and recodified the Interstate Commerce Act—the statute pursuant to which rail carriers have been regulated by the federal government for over 100 years.

50. As amended by the ICCTA, 49 U.S.C. § 10501(b) gives the Surface Transportation Board (the "STB") exclusive jurisdiction over transportation by rail carriers and the facilities used by such carriers in providing rail transportation service, including transload facilities, and over the acquisition and operation of spur, industrial, team, switching or sidetracks or facilities, even if located entirely within one state.

51. The ICCTA also includes a broad and strengthened express preemption provision in 49 U.S.C. § 10501(b) that provides for preemption of state and local regulation of rail carriers such as BSOR, as well as the facilities used by such carriers in providing rail transportation service.

52. Since the ICCTA became effective in 1996, the preemption provision contained in section 10501(b) has consistently been construed by courts and the STB as preempting state and local regulation of rail transportation and the facilities used in providing rail transportation including, but not limited to, all state and local permitting and approval requirements and other laws or regulations -- such as zoning and eminent domain laws -- that have the effect of precluding and/or impeding rail transportation.

THE COMMERCE CLAUSE

53. Article I, Section 8 of the United States Constitution gives to the Congress the exclusive power to regulate interstate commerce.

54. The Commerce Clause has consistently been construed as precluding any state or local government from engaging in any regulation if it imposes an undue and unnecessary burden on interstate commerce.

COUNT I

55. Pursuant to Federal Rule of Civil Procedure 10(c), BSOR realleges and incorporates by reference Paragraphs "1" through "54" of this Complaint.

56. A controversy has arisen between the parties concerning the application of certain laws to and enforcement of such laws against BSOR in connection with its rail transportation operations at the BSOR Croton Yard. The Village Defendants contend that they have a right to enforce, among other things, the Zoning Code and the New York Eminent Domain Procedure

Law, while BSOR maintains that these laws are preempted by the ICCTA and their enforcement does and will continue to violate the Supremacy Clause of the United States Constitution. Declaratory relief pursuant to 28 U.S.C. § 2201 is appropriate in order to resolve this controversy.

57. The BSOR Croton Yard and its attendant buildings and equipment fall within the definitions of the terms "railroad" and "transportation." 49 U.S.C. § 10102(6) and (9).

58. Further, "transportation" is provided at the BSOR Croton Yard by a "rail carrier," BSOR, within the meaning of the ICCTA. 49 U.S.C. § 10102(5) and (9).

59. It follows that, pursuant to the Constitution and laws of the United States, including 49 U.S.C. § 10501, the Village Defendants have no authority to require BSOR to seek any approval(s) and/or permit(s) from the Village Defendants concerning BSOR's activities, operations, and/or land usage occurring at the BSOR Croton Yard as the local zoning and land use provisions are preempted.

60. Similarly, the Village Defendants have no authority to condemn the Property as the eminent domain statutes are preempted.

61. As a result, BSOR is entitled to a declaratory judgment that the above statutes and provisions are preempted by the ICCTA to the extent that the Village Defendants seek to enforce these requirements with respect to BSOR's rail transportation operations at the BSOR Croton Yard.

62. In order to protect BSOR's rights as described above, it is necessary that a temporary, preliminary, and permanent injunction be issued prohibiting the Village Defendants, or any of their boards, agencies, departments, officers, agents, representatives, servants, employees, and persons in active concert or participation with them, from applying or enforcing

against BSOR any laws, ordinances, rules, regulations, or other requirements that seek or purport to regulate, license, or otherwise interfere with the activities, operations, and/or land usage occurring at the BSOR Croton Yard, and otherwise prohibiting the Village Defendants from any interference with BSOR's use of the BSOR Croton Yard.

63. Unless so enjoined by this Court, BSOR will suffer imminent, permanent, and irreparable harm for which there is no adequate remedy at law.

64. The balancing of the equities favors BSOR rather than the Village Defendants.

65. BSOR has not made any prior application for the relief herein requested.

COUNT II

66. Pursuant to Federal Rule of Civil Procedure 10(c), BSOR realleges and incorporates by reference Paragraphs "1" through "65" of this Complaint.

67. A controversy has arisen between the parties concerning the application of certain laws to and enforcement of such laws against BSOR in connection with its rail transportation operations at the BSOR Croton Yard. The Village Defendants contend that they have a right to enforce, among other things, the Zoning Code and the New York Eminent Domain Procedure Law, while BSOR maintains that the enforcement of these statutes and provisions violates and will continue to violate the Commerce Clause of the United States Constitution. Declaratory relief pursuant to 28 U.S.C. § 2201 is appropriate in order to resolve this controversy.

68. Enforcement of these statutes and provisions with respect to BSOR's rail transportation operations at the Property impose on BSOR significant economic and operational burdens that are both unnecessary and unwarranted. It also imposes an undue and unnecessary burden on interstate commerce.

69. BSOR is entitled to a judgment declaring that enforcement of these statutes and provisions with respect to BSOR's rail transportation operations at the BSOR Croton Yard is unconstitutional because it imposes an impermissible burden on interstate commerce in violation of the Commerce Clause of the United States Constitution.

70. In order to protect BSOR's rights as described above, it is necessary that a temporary, preliminary, and permanent injunction be issued prohibiting the Village Defendants, or any of their boards, agencies, departments, officers, agents, representatives, servants, employees, and persons in active concert or participation with them, from applying or enforcing against BSOR any laws, ordinances, rules, regulations, or other requirements that seek or purport to regulate, license, or otherwise interfere with the activities, operations, and/or land usage occurring at the BSOR Croton Yard, and otherwise prohibiting the Village Defendants from any interference with BSOR's use of the BSOR Croton Yard.

71. Unless so enjoined by this Court, BSOR will suffer imminent, permanent, and irreparable harm for which there is no adequate remedy at law.

COUNT III

72. Pursuant to Federal Rule of Civil Procedure 10(c), BSOR realleges and incorporates by reference Paragraphs "1" through "71" of this Complaint.

73. BSOR is entitled to a judgment declaring that the Village Defendants' enforcement of the New York Eminent Domain Procedure Law or zoning and land use provisions with respect to BSOR's rail transportation operations at the BSOR Croton Yard constitutes a deprivation of BSOR's rights secured by the United States Constitution in violation of 42 U.S.C. § 1983 since the Village Defendants' enforcement imposes an impermissible

burden on interstate commerce in violation of Article I, Section 8 of the United States Constitution (the Commerce Clause).

74. BSOR lacks an adequate remedy at law.

75. Unless enjoined by this Court, the Village Defendants' actions with respect to BSOR's rail transportation operations at the Property have caused and will continue to cause irreparable injury to BSOR.

76. Pursuant to 42 U.S.C. § 1988, BSOR is entitled to recover its attorneys fees in bringing this action from the Village Defendants.

WHEREFORE, BSOR prays for entry of judgment in its favor against the Village Defendants, awarding BSOR:

a. a declaration that BSOR's operations at the BSOR Croton Yard fall within the definition of "transportation by rail carrier" under the ICCTA;

b. a declaration that the Village Defendants, or any of their boards, agencies, departments, officers, agents, representatives, servants, employees, and persons in active concert or participation with them, are without authority or jurisdiction in, and preempted from, applying or enforcing against BSOR any laws, ordinances, rules, regulations, or other requirements that seek or purport to regulate, license, or otherwise interfere with the activities, operations, and/or land usage occurring at the BSOR Croton Yard;

c. a declaration that all of the Village Defendants' efforts to do so heretofore are null and void;

d. a declaration that the Village Defendants' application and enforcement against BSOR of the above laws, ordinances, rules, regulations, or other requirements that seek or purport to regulate, license, or otherwise interfere with the activities, operations, and/or land usage occurring at the BSOR Croton Yard is unconstitutional and in violation of Article I, Section 8 of the United States Constitution;

e. a declaration that the Village Defendants' application and enforcement against BSOR of the above laws, ordinances, rules, regulations, or other requirements that seek or purport to regulate, license, or otherwise interfere with the activities, operations, and/or land usage occurring at the BSOR Croton Yard is in violation of 42 U.S.C. § 1983;

f. a temporary, preliminary, and permanent injunction prohibiting the Village Defendants, or any of their boards, agencies, departments, officers, agents, representatives,

servants, employees, and persons in active concert or participation with them, from applying or enforcing against BSOR any laws, ordinances, rules, regulations, or other requirements that seek or purport to regulate, license, or otherwise interfere with the activities, operations, and/or land usage occurring at the BSOR Croton Yard, and otherwise prohibiting the Village Defendants from any interference with BSOR's use of the BSOR Croton Yard;

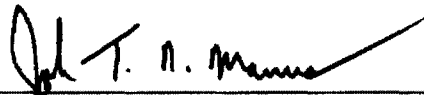
g. an award of BSOR's attorneys fees in bringing this action pursuant to 42 U.S.C. § 1988; and

h. such other relief to which BSOR may be entitled at law or in equity.

Dated: May 16, 2006

Respectfully submitted,

CRANE, PARENTE, CHERUBIN & MURRAY

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COPY

BUFFALO SOUTHERN RAILROAD, INC.,

Plaintiff,

- against -

VILLAGE OF CROTON-ON-HUDSON; GREGORY J. SCHMIDT, as Mayor of the Village of Croton-on-Hudson; DANIEL O'CONNOR, P.E., as Engineer and Building Inspector for the Village of Croton-on-Hudson; RICHARD F. HERBEK, as Manager of the Village of Croton-on-Hudson; THOMAS P. BRENNAN, as Trustee on the Village Board of Trustees; CHARLES A. KANE, as Trustee on the Village Board of Trustees; ANN GALLELLI, as Trustee on the Village Board of Trustees; LEO A. W. WIEGMAN, as Trustee on the Village Board of Trustees; CHRIS KEHOE, as member of the Village Planning Board; VINCENT ANDREWS, as member of the Village Planning Board; FRANCES ALLEN, as member of the Village Planning Board; ROBERT LUNTZ, as member of the Village Planning Board; KATHLEEN RIEDY, as member of the Village Zoning Board of Appeals; RHODA STEPHENS, as member of the Village Zoning Board of Appeals; RUTH WAITKINS, as member of the Village Zoning Board of Appeals; WITT BARLOW, as member of the Village Zoning Board of Appeals; and PAUL ROLNICK, as member of the Village Zoning Board of Appeals,

Defendants.

CIVIL ACTION No.:

Judge McMahon

06 CIV. 3755

PLAINTIFF'S APPLICATION FOR A TEMPORARY RESTRAINING ORDER

Plaintiff Buffalo Southern Railroad, Inc. ("BSOR"), by its attorneys and pursuant to Federal Rule of Civil Procedure 65, applies to this Court to enter a temporary restraining order and a preliminary injunction restraining Defendant Village of Croton-on-Hudson (the "Village" or "Croton") and the above-named Village officials or employees (collectively, the "Village Defendants") from enforcing against BSOR and its track and transload facility in the Village (the

“BSOR Croton Yard”) eminent domain statutes, zoning laws, permitting and preclearance requirements, and other local ordinances and regulations. In support of its application, BSOR has filed the affidavits of John T. McManus, Esq., Albert Feasley, Joseph Rutigliano, and Daniel M. Meehan and a supporting memorandum of law. As further support, BSOR states as follows:

1. BSOR is a Class III rail common carrier that operates approximately 32 miles of rail line between Buffalo, New York and Gowanda, New York; provides switching services at Tonawanda, New York; interchanges rail traffic with five railroads; and offers common carrier service at Croton.

2. Since January 21, 1982, BSOR has engaged in the business of transportation of property by rail for compensation, offering its services to the public generally. For example, BSOR has been transporting commodities such as scrap metal, liquid propane, feed, fertilizer, and lumber and other building materials for numerous businesses for compensation for many years in western New York.

3. Since March 2006, BSOR has held itself out to the public generally to provide common carrier rail service at the BSOR Croton Yard, including transloading and switching services to rail customers delivering or receiving various commodities by truck at the BSOR Croton Yard, transferring containers and bulk commodities between trucks and rail cars, and providing other rail transportation services involving the exchange of empty and loaded rail cars for various commodities with CSX Transportation, Inc. (“CSX”), a major rail carrier that has a line that connects with BSOR in the Village.

4. The Village Defendants are in the process of condemning the BSOR Croton Yard.

5. With condemnation not yet complete, however, on several occasions over the last year, some of the Village Defendants have contended that any activities at the Property are

subject to and regulated by the 1979 Village of Croton-on-Hudson Zoning Law (the “Zoning Code”). Further, some of the Village Defendants have threatened that, if the Property is utilized for any purpose without the Village’s prior approval, it would issue stop work orders and/or seek to halt any activity by other means.

6. BSOR has filed the accompanying complaint with this Court, naming Croton and relevant Village officials and employees as defendants. BSOR seeks declaratory and injunctive relief, among other grounds, on the basis that the various state and local statutes and regulations that the Village Defendants seek to enforce against BSOR and the BSOR Croton Yard are preempted by the Interstate Commerce Commission Termination Act of 1995 (the “ICCTA”). See, e.g., Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638 (2d Cir), cert. denied, 126 S. Ct. 547 (2005).

7. BSOR is entitled to the injunctive relief requested because: 1) BSOR will suffer substantial irreparable injury if no temporary relief is granted, including a loss of business opportunities and relationships with existing and prospective customers, injury to goodwill and reputation, and the loss of the opportunity to enter a new market for BSOR’s rail transportation service; 2) there is a strong likelihood that BSOR will prevail on its claims that the statutes and regulations that the Village Defendants seek to enforce are preempted by the ICCTA; 3) the Village will not suffer any harm if enforcement of the statutes and regulations at issue is temporarily restrained; and 4) the public interest will be served by issuing the relief requested.

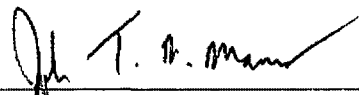
8. Given BSOR’s strong likelihood of success on the merits of its claims, and the lack of any proof of likelihood of harm should a temporary restraining order be granted, this Court should dispense with or set a minimal bond.

WHEREFORE, BSOR respectfully requests that this Court: 1) enter a temporary restraining order enjoining and prohibiting the Village Defendants, and any of their boards, officers, agents, servants, employees, and persons in active concert or participation with them, from applying or enforcing against BSOR eminent domain statutes and zoning and land use provisions, or any other laws, ordinances, rules, regulations or other requirements that seek or purport to regulate, approve, delay, disrupt or otherwise interfere with BSOR's rail transportation activities at the BSOR Croton Yard; 2) set a return date for BSOR's motion for a preliminary injunction, with the temporary restraining order remaining in effect until a decision is rendered as to that motion; and 3) order that the giving of security pursuant to Federal Rule of Civil Procedure 65(c) is neither necessary nor required and, therefore is not imposed in connection with the issuance of the temporary restraining order.

Dated: May 16, 2006
Albany, New York

Respectfully submitted,

CRANE, PARENTE, CHERUBIN & MURRAY

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Judge McMahon
06 CIV. 3755

BUFFALO SOUTHERN RAILROAD, INC.,

Plaintiff,

- against -

VILLAGE OF CROTON-ON-HUDSON; GREGORY J. SCHMIDT, as Mayor of the Village of Croton-on-Hudson; DANIEL O'CONNOR, P.E., as Engineer and Building Inspector for the Village of Croton-on-Hudson; RICHARD F. HERBEK, as Manager of the Village of Croton-on-Hudson; THOMAS P. BRENNAN, as Trustee on the Village Board of Trustees; CHARLES A. KANE, as Trustee on the Village Board of Trustees; ANN GALLELLI, as Trustee on the Village Board of Trustees; LEO A. W. WIEGMAN, as Trustee on the Village Board of Trustees; CHRIS KEHOE, as member of the Village Planning Board; VINCENT ANDREWS, as member of the Village Planning Board; FRANCES ALLEN, as member of the Village Planning Board; ROBERT LUNTZ, as member of the Village Planning Board; KATHLEEN RIEDY, as member of the Village Zoning Board of Appeals; RHODA STEPHENS, as member of the Village Zoning Board of Appeals; RUTH WAITKINS, as member of the Village Zoning Board of Appeals; WITT BARLOW, as member of the Village Zoning Board of Appeals; and PAUL ROLNICK, as member of the Village Zoning Board of Appeals,

Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S APPLICATION FOR A TEMPORARY RESTRAINING ORDER
AND MOTION FOR A PRELIMINARY INJUNCTION**

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PRELIMINARY STATEMENT

Plaintiff Buffalo Southern Railroad, Inc. ("BSOR") respectfully submits this memorandum of law in support of its application for a temporary restraining order and motion for a preliminary injunction to enjoin Defendant Village of Croton-on-Hudson (the "Village" or "Croton")¹ from condemning the property and the related track and facilities used in BSOR's rail transportation operations in Westchester County and from applying and enforcing against BSOR zoning ordinances, permitting and pre-clearance requirements, and other local regulations.

BSOR is a rail carrier operating a track (the "Croton Track"), which includes a building used for transloading commodities between rail cars and trucks (the "Transload Facility"),² and offering common carrier service in the Village. The Croton Track and the Transload Facility are located on a ten-acre parcel (the "Property") in the most industrially developed section of the Village (collectively, the "Croton Track," "Transload Facility," and "Property" constitute the "BSOR Croton Yard"). In fact, the BSOR Croton Yard is bracketed by a highway and freight and commuter rail lines and yards. BSOR uses the BSOR Croton Yard to transfer commodities that are being shipped in interstate commerce from rail cars to trucks, or vice versa.

¹ In the interest of brevity, the term "Village" includes all of the Defendants in this action, specifically the Village of Croton-on-Hudson; Gregory J. Schmidt, as Mayor of the Village and member of the Village Board of Trustees; Daniel O'Connor, P.E., as Engineer and Building Inspector for the Village; Richard F. Herbek, as Manager of the Village; Thomas P. Brennan, as Trustee on the Village Board of Trustees; Charles A. Kane, as Trustee on the Village Board of Trustees; Ann Gallelli, as Trustee on the Village Board of Trustees; Leo A. W. Wiegman, as Trustee on the Village Board of Trustees; Chris Kehoc, as member of the Village Planning Board; Vincent Andrews, as member of the Village Planning Board; Frances Allen, as member of the Village Planning Board; Robert Luntz, as member of the Village Planning Board; Kathleen Riedy, as member of the Village Zoning Board of Appeals; Rhoda Stephens, as member of the Village Zoning Board of Appeals; Ruth Waitkins, as member of the Village Zoning Board of Appeals; Witt Barlow, as member of the Village Zoning Board of Appeals; and Paul Rolnick, as member of the Village Zoning Board of Appeals.

² Generally, a transload facility is a facility that is used to transfer commodities from one mode of transportation (e.g., truck) to another mode of transportation (e.g., rail). When used in connection with rail transportation, transload facilities allow shippers or consignees, not served directly by rail carrier and otherwise solely dependent on truck transportation, to have access to rail transportation service and the national rail network. As a result, transload facilities are an integral part of rail transportation. Feasley Aff. at ¶¶ 11-13.

Unfortunately, BSOR's rail transportation operations are being thwarted by the Village's ongoing condemnation of the Property and threats to enforce certain zoning and land use provisions against BSOR. As a result of the Village's conduct -- which is of the type expressly preempted by federal law and the United States Constitution according to the Second Circuit's recent decision in Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638 (2d Cir), cert. denied, 126 S. Ct. 547 (2005), among other judicial and administrative precedent -- BSOR was forced to commence this action seeking a declaratory judgment and temporary, preliminary, and permanent injunctive relief against the Village.

Because BSOR will suffer irreparable harm in the absence of an injunction and it has a likelihood of success on the merits of its claims that the Village cannot apply and enforce its eminent domain laws and zoning and land use provisions to BSOR and the BSOR Croton Yard, this Court should grant the instant application for temporary injunctive relief and motion for a preliminary injunction.

STATEMENT OF FACTS

A. BSOR's Rail Operations

BSOR is a Class III rail common carrier³ that operates approximately 32 miles of rail line between Buffalo, New York and Gowanda, New York; provides switching services at Tonawanda, New York; interchanges rail traffic with five railroads; and offers common carrier service at Croton-on-Hudson, New York, as described below. Feasley Aff. ¶ 2.

Since January 21, 1982, BSOR has engaged in the business of transportation of property by rail for compensation, offering its services to the public generally. *Id.* at ¶ 3. For example, BSOR has been transporting commodities such as scrap metal, liquid propane, feed, fertilizer, and lumber and other building materials for numerous businesses for compensation for many years in western New York. *Id.* at ¶ 4.

B. The BSOR Croton Yard

The BSOR Croton Yard consists of a ten-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. There are approximately 1,600 feet of track in the BSOR Croton Yard that connects with the Hudson line of CSX Transportation, Inc. ("CSX") at approximately milepost QC 25 in the Village. *Id.* at ¶ 5.

The BSOR Croton Yard is located in the most industrially developed section of the Village. 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, is immediately adjacent to and East of the BSOR Croton Yard. A commuter railroad parking lot is located to the South of the BSOR Croton Yard, a massive rail equipment maintenance facility to the West

³ A rail carrier is classified a "Class III" when it has annual revenues of \$20,000,000 or less. 49 C.F.R. Part 1201 1-1. Class III carriers are generally referred to as "shortlines."

and Southwest, and a commercial warehouse building currently storing tires, to the North. Just past this warehouse to the North is a major freight rail yard. To the West is the Croton-Harmon Rail Yard, which is a large rail-industrial complex containing numerous tracks and switches for both commuter and freight trains. Id. at ¶ 6 and Exhibit “A.”

The Property has long been utilized for commercial purposes -- in particular, for the storage and transfer of various products and materials, such as rocks, stone, soil, and sand -- since at least the early 1960s. More recently, from 1997-2005, another entity used the Croton Track and the Transload Facility to transfer construction and demolition debris (“CD&D”) from trucks to rail cars for interstate shipment and, ultimately, disposal. Id. at ¶¶ 7-8.

C. BSOR’s Rail Transportation Activities At The BSOR Croton Yard

During the last several years, BSOR has sought to provide rail common carrier transportation services at additional locations, both in western New York and elsewhere. As a result of BSOR’s efforts to increase the locations of its services, on March 3, 2006, BSOR leased the BSOR Croton Yard. Now, BSOR holds itself out to the public generally to provide common carrier rail service at the BSOR Croton Yard, including transloading and switching services to rail customers delivering or receiving various commodities by truck at the BSOR Croton Yard, transferring containers and bulk commodities between trucks and rail cars, and providing other rail transportation services involving the exchange of empty and loaded rail cars for various commodities with CSX. Id. at ¶¶ 9-11 and Exhibit “B.”

BSOR’s ongoing rail transportation operations at the BSOR Croton Yard provide coordination between rail carriers and motor carriers and allow BSOR to provide rail transportation service economically and efficiently for shippers and consignees, thereby enabling them to have access to the national rail network by means of interchange with CSX. As a result,

BSOR's rail transportation operations promote and have a beneficial effect on interstate commerce. Furthermore, without this important rail link at the BSOR Croton Yard, the already overburdened roads in Westchester County will be further inundated with even more long-haul truck traffic. Id. at ¶¶ 12-14.

D. The Interstate Commerce Commission Termination Act of 1995

In 1995, Congress enacted the Interstate Commerce Commission Termination Act of 1995 (the "ICCTA"), which became effective on January 1, 1996. The ICCTA, among other things, amended and recodified the Interstate Commerce Act (the "ICA"), 49 U.S.C. §§ 10101 et seq., the statute pursuant to which rail carriers have been regulated by the federal government for over 100 years. As amended by the ICCTA, 49 U.S.C. § 10501(b) gives the Surface Transportation Board (the "STB" or "Board") exclusive jurisdiction over transportation by rail common carriers and the facilities used by such carriers in providing rail transportation service, including transload facilities. The ICCTA also supplemented a broad express preemption provision in 49 U.S.C. § 10501(b), which preempts state and local regulation of rail carriers, such as BSOR, as well as the facilities used by such carriers in providing rail transportation service.

As discussed in detail below, since the ICCTA became effective, Section 10501(b)'s express preemption provision has been consistently construed as preempting state and local regulation of rail transportation and the facilities used in providing rail transportation, including state and local permitting requirements, eminent domain laws, and other regulations and ordinances that have the effect of impeding and/or precluding rail transportation.

E. The Village's Conduct

Recently, the Board of Trustees for the Village (the "Board of Trustees") held a public hearing "[t]o determine the Village's need for the Property . . . [at] 1A Croton Point Avenue, Section 78.16 Block 2 Lots 1 and 2 as the first step in the process of acquiring the property by eminent domain." McManus Aff. at Exhibit "A." That night, in furtherance of the Village's attempt at exercising eminent domain to take the Property, the Board of Trustees adopted a full environmental assessment form as part of the New York State Environmental Quality Review Act ("SEQRA") process. McManus Aff. at Exhibit "B." A few weeks ago, an appraiser hired by the Village inspected the Property to provide a valuation as part of the condemnation proceeding. Although the Village has so far refused to make it public, the appraiser's report is apparently complete. McManus Aff. at Exhibit "C." On April 3, 2006, the Village held a "scoping session" concerning the purported condemnation in advance of preparing a Draft Environmental Impact Statement pursuant to SEQRA. McManus Aff. at Exhibit "D." In sum, the Village has taken several major steps to condemn the Property. See Feasley Aff. ¶¶ 15-18.

With condemnation not yet complete, however, on several occasions over the last year, some of the Defendants have contended that any activities at the Property are subject to and regulated by the 1979 Village of Croton-on-Hudson Zoning Law (the "Zoning Code"). Further, some of the Defendants have threatened that, if the Property is utilized for any purpose without prior approval, the Village would issue stop work orders and/or seek to halt any activity by other means. Id. at ¶ 19. These statements and threats were made without any knowledge of what activity, if any, was being contemplated at the Property and whether it might be subject to the Zoning Code. Consistent with this overzealousness, the Village commenced an action in state

court -- purportedly under the Zoning Code -- against a company, not only before it began any activity on the Property, but even before the company had any legal right to occupy the Property. Village of Croton-on-Hudson v. Northeast Interchange Ry., No. 22176/05 (N.Y. Sup. Ct. filed December 21, 2005).

Clearly, condemnation of the Property would terminate BSOR's rail transportation activities in Westchester County. Further, application of the Village's zoning and land use provisions would unduly interfere with interstate commerce by giving the Village the ability to deny BSOR the right to conduct operations and would be time consuming, allowing the Village to delay or interfere with BSOR's rail transportation activities almost indefinitely. As a result, BSOR was forced to commence this action seeking declaratory and injunctive relief against the Village. Id. at ¶¶ 20-21.

BSOR now moves for a temporary restraining order and a preliminary injunction to prohibit the Village from condemning the Property and from enforcing against BSOR certain zoning and land use provisions. Because BSOR will suffer irreparable harm in the absence of an injunction and it has a strong likelihood of success on the merits of its claims concerning the ICCTA's express preemption provision and the Commerce Clause, this Court should grant BSOR the relief it seeks.

ARGUMENT

A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION SHOULD BE ISSUED PROHIBITING THE VILLAGE FROM APPLYING OR ENFORCING EMINENT DOMAIN LAWS AND ZONING AND LAND USE PROVISIONS AGAINST BSOR AND THE BSOR CROTON YARD

Where, as here, a party moves for a preliminary injunction against governmental action taken pursuant to a statutory or regulatory scheme, the movant must show “(i) irreparable harm absent the injunction and (ii) a likelihood of success on the merits.” Freedom Holdings, Inc. v. Spitzer, 408 F.3d 112, 114 (2d Cir. 2005); see also Coastal Distrib., LLC v. Town of Babylon, No. 05-CV-2032, 2006 U.S. Dist. LEXIS 8400, at *7 (E.D.N.Y. Jan. 31, 2006).⁴ Because irreparable harm is “the single most important prerequisite” before a preliminary injunction will issue, a movant must show first that the injury is “likely” before demonstrating any other requirements. Freedom Holdings, 408 F.3d at 114 (internal quotations omitted); see also Coastal, 2006 U.S. Dist. LEXIS 8400, at *7.

Here, BSOR readily satisfies the twin requirements for the issuance of a preliminary injunction: BSOR will suffer irreparable harm in the absence of an injunction and it has a likelihood of success on the merits of its claims that the Village cannot apply and enforce its eminent domain statutes and zoning and land use provisions to BSOR and the BSOR Croton Yard.

A. BSOR Will Suffer Irreparable Harm In The Absence Of A Preliminary Injunction

The irreparable harm that BSOR will suffer in the absence of a preliminary injunction is established in a number of different ways.

⁴ In this Circuit, “[t]he standard for a TRO is similar to that applicable to a preliminary injunction.” Towers Fin. Corp. v. Dun & Bradstreet, Inc., 803 F. Supp. 820, 822 (S.D.N.Y. 1992). Thus, this memorandum also serves to support BSOR’s application for a temporary restraining order against the Village.

Courts in this Circuit have long held that the irreparable injury prong is satisfied where the wrong cannot be compensated monetarily. Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 404 (2d Cir. 2004); Coastal, 2006 U.S. Dist. LEXIS 8400, at *7-8. For example, “[l]oss of goodwill and injury to reputation are injuries that are difficult to measure in dollars, and thus, these types of injuries are irreparable harm.” Coastal, 2006 U.S. Dist. LEXIS 8400, at *8. Likewise, “loss of business opportunities and relationships with clients who could ‘produce an indeterminate amount of business over years to come’ are also hard to measure in dollars and are properly considered irreparable harm.” Id. (quoting Register.com, 356 F.3d at 404). Here, BSOR has suffered and will continue to suffer noncompensable, irreparable harm at the hands of the Village absent a preliminary injunction.

Coastal Distribution, LLC (“Coastal”) has arranged to have BSOR transport sand and other building materials and products by rail to the BSOR Croton Yard for transfer to trucks for distribution throughout the Westchester County market. BSOR has begun to provide such service to Coastal. Coastal has informed BSOR that it would like to enter into a long-term agreement to transport and transload sand, aggregate, and other building materials and products, but Coastal is unwilling to do so given the uncertainty created by the Village’s attempts to condemn and/or interfere with rail operations at the BSOR Croton Yard. Feasley Aff. ¶¶ 25-27; Rutigliano Aff. ¶¶ 7-11. In addition, a number of other businesses have expressed an interest in using BSOR’s transportation and transloading services at the BSOR Croton Yard. They have refrained from arranging for shipments to or entering into agreements with BSOR due to the Village’s conduct. Meehan Aff. ¶¶ 3-13; Feasley Aff. ¶ 28.

If the Property is condemned, BSOR’s relationships with Coastal will necessarily be terminated, thereby adversely and irreparably affecting BSOR. The result is the same if the

Village attempts to or actually halts or disrupts the operations at the BSOR Croton Yard, even for a short period of time, pursuant to some provision in the Zoning Code or other local regulation(s) or ordinance(s). Feasley Aff. ¶¶ 29-30; Rutigliano Aff. ¶¶ 12-16.

For example, if the Property is condemned or BSOR cannot otherwise operate, Coastal will lose the ability to use BSOR and the BSOR Croton Yard. Feasley Aff. ¶ 34; Rutigliano Aff. ¶ 15. Coastal needs to have certainty and regularity in the shipment of its products in order to plan its operations efficiently and remain profitable.⁵ Rutigliano Aff. ¶ 12. It is difficult logistically for customers such as Coastal to switch back and forth between rail-truck intermodal and all-truck movements. *Id.* at ¶ 16. If BSOR cannot guarantee dependable and consistent service, it will be viewed as being too unreliable and therefore not a viable option, *Id.* at ¶ 14; Meehan Aff. ¶ 10, which severely harms BSOR's reputation and goodwill. Feasley Aff. ¶¶ 31-33. As a result, Coastal will have to cancel its arrangements with BSOR and ship its materials and products via other carriers -- most likely truck carriers. Feasley Aff. ¶ 34; Rutigliano Aff. ¶ 15. Given the competitive nature of the shipping market, BSOR will likely lose this important customer for good. Feasley Aff. ¶ 34; Rutigliano Aff. ¶ 16. Further, those businesses that have expressed an interest in using BSOR's transportation and transloading services are sure to look elsewhere if there is a threat that the BSOR Croton Yard will be condemned or closed or that service will be disrupted by the Village's actions. Meehan Aff. ¶¶ 9-13; Feasley Aff. ¶ 35.

This loss of existing and prospective customers and business opportunities, as well as the accompanying damage to BSOR's goodwill and reputation, are injuries that are widely recognized as irreparable. *See, e.g. Register.com*, 356 F.3d at 404 (holding that loss of business opportunities and relationships with clients who could "produce an indeterminate amount of

⁵ Likewise, Coastal's customers depend on certainty and regularity in the availability of Coastal's building products and materials for their businesses. Rutigliano Aff. ¶ 13.

business over years to come” are hard to measure in dollars and are properly considered irreparable harm); Coastal, 2006 U.S. Dist. LEXIS 8400, at *8 (holding, under analogous facts, that loss of business opportunities, goodwill, and reputation are irreparable harm); Natsource LLC v. Paribello, 151 F. Supp.2d 465, 469 (S.D.N.Y. 2001) (recognizing that a loss of prospective customers is an irreparable harm as it is “very difficult to calculate monetary damages that would successfully redress the loss of a relationship with a client that would produce an indeterminate amount of business in years to come”); Towers Fin. Corp. v. Dun & Bradstreet, Inc., 803 F. Supp. 820, 823 (S.D.N.Y. 1992) (collecting cases and holding that damage to reputation and goodwill constitutes irreparable harm); Canadian Nat’l Ry. Co. v. City of Rockwood, No. 04-40323, 2005 U.S. Dist. LEXIS 40131, at *25-26 (E.D. Mich. June 1, 2005) (holding, under analogous facts, that loss of goodwill, future contracts, and market opportunities are irreparable harm).

Further, the loss of these customers will effectively preclude BSOR from entering and competing in the lucrative Westchester County market for the transloading and transportation of materials and products. Feasley Aff. ¶ 36. This lost opportunity is also a well-recognized form of irreparable injury. Tom Doherty Assocs., Inc. v. Saban Entm’t, Inc., 60 F.3d 27, 38 (2d Cir. 1995) (“If preliminary relief is not available [the plaintiff] will lose an opportunity to become a major publisher of children’s books - that is to say, it will lose an opportunity to become a sufficiently well-known publisher of children’s books to attract additional authors and owners of characters.”); City of Rockwood, 2005 U.S. Dist. LEXIS 40131, at *26 (holding, under analogous facts, that loss of opportunity to enter a market is irreparable harm); Sambo’s of Ohio, Inc. v. City Council of Toledo, 466 F. Supp. 177, 181 (N.D. Ohio 1979) (“The loss the plaintiffs suffered here is an irreparable and incalculable one, for it is the loss of the right to open a new

business and strive to make it successful.”); Garth v. Steck Tech Corp., 876 S.W.2d 545, 549 (Tex. App. 1994) (holding that the “[l]ost opportunity to create or gain control of a new market may result in unquantifiable losses for which there is no adequate remedy at law”).

Finally, the Second Circuit has long held that “[w]hen an alleged deprivation of a constitutional right is involved, . . . no further showing of irreparable injury is necessary.” Mitchell v. Cuomo, 748 F.2d 804, 806 (2d Cir. 1984). Specifically, deprivation of the rights guaranteed under the Commerce Clause constitutes irreparable injury. American Library Assoc. v. Pataki, 969 F. Supp. 160, 168 (S.D.N.Y. 1997); see also C & A Carbone, Inc. v. Town of Clarkstown, 770 F. Supp. 848, 854 (S.D.N.Y. 1991) (holding that a local waste disposal law caused irreparable injury to the plaintiffs’ rights under the Commerce Clause). Here, the Village’s application and enforcement of eminent domain statutes and zoning and land use laws deprives BSOR of its constitutional rights under the Commerce Clause.

The Commerce Clause provides that “[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several states.” U.S. Const. art. I, § 8, cl. 3. “[A]lthough phrased as a grant of regulatory power to Congress, the [Commerce] Clause has long been understood to have a ‘negative’ aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce.” Oregon Waste Sys., Inc. v. Department of Env’tl. Quality, 511 U.S. 93, 98 (1994). For example, “[t]he Clause prohibits discrimination aimed directly at interstate commerce, and bars state regulations that, although facially nondiscriminatory, unduly burden interstate commerce. Moreover, courts have long held that state regulation of those aspects of commerce that by their unique nature demand cohesive national treatment is offensive to the Commerce Clause.” American Library, 969 F. Supp. at 169.

Here, the burdens on interstate commerce (i.e., delaying, disrupting, or completely halting the flow of goods by rail in interstate commerce to and from the BSOR Croton Yard, especially in light of its proximity to New York City) resulting from the Village's application and enforcement of eminent domain statutes and zoning and land use provisions to BSOR exceed any local benefit derived from the application and enforcement of such statutes and provisions.⁶ Further, the transportation of property by rail has long been recognized as one of those aspects of commerce that by its unique nature demands cohesive national treatment. See, e.g., Wabash, St. L. & P. Ry. Co. v. Illinois, 118 U.S. 557, 565-77 (1886). Consequently, the Village's actions deprive BSOR of its rights under the Commerce Clause. Thus, in the absence of a preliminary injunction, BSOR will suffer irreparable harm as a result of the Village's actions, which deprive BSOR of its constitutionally protected rights. See, e.g., Mitchell, 748 F.2d at 806; American Library, 969 F. Supp. at 169; C & A Carbone, 770 F. Supp. at 854-55.⁷

B. BSOR Has A Likelihood Of Success On The Merits Of Its Preemption Claim In This Action

The second prong that a movant must meet for a court to issue a preliminary injunction is likelihood of success on the merits. See, e.g., Coastal, 2006 U.S. Dist. LEXIS 8400, at *12. "A movant . . . need not show that success is an absolute certainty. He [or she] need only make a showing that the probability of his [or her] prevailing is better than fifty percent. There may remain considerable room for doubt." Wali v. Coughlin, 754 F.2d 1015, 1025 (2d Cir. 1984). Thus, a finding that a movant has more than a "fifty-fifty chance" of succeeding on the merits of his or her claim would warrant a finding of a likelihood of success on the merits. Coastal, 2006 U.S. Dist. LEXIS 8400, at *12-13.

⁶ In fact, as demonstrated below, there are public benefits to granting the injunctive relief sought so as to allow the BSOR Croton Yard to remain operational. See Point C infra.

⁷ For these reasons, BSOR also has a likelihood of success on the merits of this claim.

BSOR is likely to succeed on the merits. Under the ICCTA, the federal government, through the STB, has exclusive jurisdiction over “transportation by rail carriers.” 49 U.S.C. § 10501(b). As demonstrated below, federal courts and the STB have uniformly held that state and local laws or regulations that intrude upon this jurisdiction are preempted by the ICCTA. Here, BSOR’s activities at the BSOR Croton Yard meet the definition of “transportation by rail carrier;” thus, the Village’s statutes and regulations that interfere with and/or seek to halt BSOR’s rail transportation operations at the BSOR Croton Yard are preempted by the ICCTA.

Bolstering the already broad federal regulatory authority over railroad operations under the ICA, Congress enacted the ICCTA, which provides for complete authority over rail operations and vests that authority in the STB. See Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318 (1981) (noting, even before passage of the ICCTA, that the ICA is “among the most pervasive and comprehensive of federal regulatory schemes”). Specifically, the ICCTA provides, in relevant part:

The jurisdiction of the [Surface Transportation] Board over –

- 1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
- 2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. . . . [T]he remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b) (emphasis added).

“Every court that has examined the statutory language has concluded that the preemptive effect of section 10501(b) is broad and sweeping.” City of Creede, CO – Petition for Declaratory

Order, STB Fin. Document No. 34376, 2005 STB LEXIS 486, at *10-11 (served May 3, 2005). Indeed, in its recent analysis of Section 10501(b), the Second Circuit opined that “[i]t is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations.” Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638, 645 (2d Cir.) (internal quotation omitted), cert. denied, 126 S. Ct. 547 (2005); see also City of Auburn v. United States, 154 F.3d 1025, 1029 (9th Cir. 1998) (holding that the ICCTA is “among the most pervasive and comprehensive of federal regulatory schemes” (internal quotation omitted)); Wisconsin Cent. Ltd. v. City of Marshfield, 160 F. Supp.2d 1009, 1013 (W.D. Wis. 2000) (“It is clear that the ICCTA has preempted all state efforts to regulate rail transportation.” (emphasis added)).⁸ As a result, the Second Circuit, numerous other federal Circuit and District Courts, and the STB have all consistently held that state and local laws that do or would affect and/or conflict with rail operations -- including, as relevant here, eminent domain statutes and zoning and permitting ordinances, among others -- are categorically preempted. See, e.g., Green Mountain, 404 F.3d at 642-45 (holding that preconstruction permitting of railroad transload facility preempted); Railroad Ventures, Inc. v. Surface Transp. Bd., 299 F.3d 523, 561 (6th Cir. 2002) (holding that the ICCTA preempts certain Ohio state statutes “to the extent that they intrude upon the jurisdiction of the STB with regard to the regulation of rail transportation under § 10501(b)”); Friberg v. Kansas City S. Ry. Co., 267 F.3d 439, 443 (5th Cir. 2001) (holding that the ICCTA’s language “could not be more precise, and it is beyond peradventure that regulation of [a railroad’s] train operations, as well as the construction and operation of the [railroad’s] side tracks, is under the exclusive jurisdiction of the STB unless some other provision in the ICCTA

⁸ In the interest of brevity, BSOR limits its discussion to express preemption as Section 10501(b) clearly preempts the statutes and regulations that the Village seeks to enforce. These statutes and regulations, however, are also preempted under field preemption and conflict preemption. See, e.g., Guckenberg v. Wisconsin Cent. Ltd., 178 F. Supp.2d 954, 960 n.1 (E.D. Wisc. 2001); Wisconsin Cent., 160 F. Supp.2d at 1014-15; Burlington N. Santa Fe Corp. v. Anderson, 959 F. Supp. 1288, 1295-96 (D. Mont. 1997).

provides otherwise;” thus, Texas statute and plaintiffs’ common law claim are preempted by the ICCTA); City of Auburn, 154 F.3d at 1033 (“State and local permitting laws regarding railroad operations are preempted by the plain language of the ICCTA, and the statutory framework surrounding it.”); Coastal Distrib., 2006 U.S. Dist. LEXIS 8400, at *7 (holding that municipality’s attempts to enforce a stop work order and certain zoning regulations against rail carrier’s transload facility was preempted by the ICCTA); Maynard v. CSX Transp., Inc., 360 F. Supp.2d 836, 840-42 (E.D. Ky. 2004) (noting that “Federal courts have also consistently held that state and local statutes, regulations and ordinances which involve railway matters do not survive ICCTA preemption challenges” and holding that “the ICCTA preempts state common law claims with respect to railroad operations”); Dakota, Minn. & E. R.R. Corp. v. South Dakota, 236 F. Supp.2d 989, 1005-1008 (D. S.D. 2002) (holding that revisions to state eminent domain law are preempted where revisions added new burdensome qualifying requirements to the railroad eminent domain power that would have the effect of state regulation of railroads), aff’d on other grounds, 362 F.3d 512 (8th Cir. 2004); Wisconsin Cent., 160 F. Supp.2d at 1013 (holding that ICCTA’s “clear and broad” preemption clause precludes “all state efforts to regulate rail transportation,” including an attempt by a municipality to use Wisconsin’s general eminent domain law to condemn a portion of a railroad passing track); Burlington N. Santa Fe Corp. v. Anderson, 959 F. Supp. 1288, 1295 (D. Mont. 1997) (holding that the ICCTA “reserves no area of regulation for the individual states”); Norfolk S. Ry. Co. v. City of Austell, No. 1:97-cv-1018, 1997 U.S. Dist. LEXIS 17236, at *24 (N.D. Ga. 1997) (holding that municipal zoning ordinance and land-use permitting requirement used to prevent railroads from constructing, developing, and operating an intermodal facility are expressly preempted by the ICCTA); City of Creede, 2005 STB LEXIS 486, at *11 (“[S]tate or local permitting or preclearance requirements

of any kind that would affect rail operations (including building permits, zoning ordinances, and environmental and land use permitting requirements) are categorically preempted.”); Borough of Riverdale – Petition for Declaratory Order – New York Susquehanna and Western Railway Corp., STB Fin. Docket No. 33466, 1999 STB LEXIS 531, at *19 (served Sept. 10, 1999) (holding that “state or local laws that would impose a local permitting or environmental process as a prerequisite to the railroad’s maintenance, use, or upgrading of its facilities are preempted because they would, of necessity, impinge upon the federal regulation of interstate commerce.”).

Because ICCTA preemption applies to all “transportation by rail carriers,” 49 U.S.C. § 10501(b)(1), the Village’s statutes and regulations are preempted if (1) BSOR is a “rail carrier” and (2) its transloading and switching activities are “transportation.” City of Creede, 2005 STB LEXIS 486, at *18-19.⁹

1. BSOR Is A “Rail Carrier”

The term “rail carrier” is defined as “a person providing common carrier railroad¹⁰ transportation for compensation.” 49 U.S.C. § 10102(5). It is beyond dispute that BSOR meets this definition.

⁹ As an initial matter, BSOR did not require STB approval to begin rail transportation operations at the BSOR Croton Yard. This is because, under the ICCTA, the STB “does not have authority” over “construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.” 49 U.S.C. § 10906. Given the BSOR Croton Yard’s characteristics, it comes within this statutory provision. Despite the STB’s lack of authority over this type of track, there is no question that the Board nevertheless has jurisdiction of the Croton Track pursuant to Section 10501(b)(2), which unambiguously gives the STB “exclusive” jurisdiction over the “construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State.” 49 U.S.C. § 10501(b)(2); see also United Transp. Union-III. Legislative Bd. v. Surface Transp. Bd., 183 F.3d 606, 612 (7th Cir. 1999) (“The § 10906 no-authority language means no authority, not no jurisdiction. These sorts of transactions involving spur track do not call for the [Surface Transportation] Board authorization which is required for construction, acquisition, or operation of extended or additional rail line under § 10901 and § 10902, but the Board nonetheless retains exclusive jurisdiction under § 10501(b)(2).” (emphasis in original)).

¹⁰ Included in the definition of “railroad” are:

- (A) a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad;
- (B) the road used by a rail carrier and owned by it or operated under an agreement; and

Since January 21, 1982, BSOR has held itself out to the public as engaged in the business of transportation of property by rail for compensation, offering its services to the public generally. For example, BSOR has been transporting commodities such as scrap metal, liquid propane, feed, fertilizer, lumber and other building materials for numerous businesses for compensation for many years in western New York. Feasley Aff. ¶¶ 2-4.

BSOR has done the same in Croton. As discussed above, Coastal has arranged with BSOR for it to transport sand and other building materials and products by rail to the BSOR Croton Yard for transfer to trucks. Feasley Aff. ¶¶ 11-13, 25; Rutigliano Aff. ¶ 7. BSOR has begun to provide such service to Coastal. Feasley Aff. ¶ 26; Rutigliano Aff. ¶ 8. Coastal has informed BSOR that it would like to enter into a long-term agreement to transport and transload sand, aggregate, and other building materials and products, but it is unwilling to do so given the uncertainty created by the Village's attempts to condemn and/or interfere with the BSOR Croton Yard. Feasley Aff. ¶ 27; Rutigliano Aff. ¶ 11. In addition, a number of other businesses have expressed an interest in using BSOR's transportation and transloading services at the BSOR Croton Yard. They have refrained from arranging for shipments to or entering into agreements with BSOR due to the Village's conduct. Meehan Aff. ¶¶ 3-13; Feasley Aff. ¶ 28.

2. BSOR's Transloading And Switching Operations At The BSOR Croton Yard Are "Transportation"

The ICCTA broadly defines the term "transportation" as including:

(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and

(C) a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation.
49 U.S.C. § 10102(6).

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

49 U.S.C. § 10102(9) (emphasis added).

Under this expansive definition, the STB (and the ICC before it) has held that transloading is “transportation” under the ICCTA. See, e.g., Borough of Riverdale, 1999 STB LEXIS 531, at *17-22.¹¹ Likewise, federal courts, including the Second Circuit, have consistently held that transloading is “transportation” under the ICCTA and, therefore, state and local laws and regulations that attempt to regulate a rail carrier’s transportation activities are preempted. See, e.g., Green Mountain, 404 F.3d at 644 (“[The Railroad] serves industries that rely on trucks to transport goods from the rail site for processing; so the proposed transloading and storage facilities are integral to the railroad’s operation and are easily encompassed within the [Surface] Transportation Board’s exclusive jurisdiction over ‘rail transportation.’”); Coastal, 2006 U.S. Dist. LEXIS 8400, at *15 (“Constructing facilities designed for transloading and storage of materials to be shipped by rail falls within the exclusive jurisdiction of the STB. . . . Thus, ICCTA preempts state and town law, and the Town cannot prohibit Plaintiffs from constructing its storage shed.”); City of Rockwood, 2005 U.S. Dist. LEXIS 40131, at *10-20 (holding that the ICCTA preempts local construction permit and environmental permit regulations at construction and demolition debris transload facility); Soo Line R.R. Co. v. City of Minneapolis, 38 F. Supp.2d 1096, 1101 (D. Minn. 1998) (holding that municipality’s “demolition permitting process upon which [Municipal] Defendants have relied to prevent [the railroad] from demolishing five buildings at Shoreham Yard that are related to the movement of

¹¹ Since the STB is the agency charged by Congress with administering the ICCTA, its opinion concerning the scope of preemption provided by Section 10501(b) is entitled to great weight. CSX Transp., Inc. v. Georgia Pub. Serv. Comm’n, 944 F. Supp. 1573, 1584 (N.D. Ga. 1996) (“As the agency with authority delegated from Congress to implement the provision of the ICC Termination Act, the STB is uniquely qualified to determine whether state law . . . should be preempted.” (internal quotation omitted)).

property by rail is expressly preempted by the ICCTA. The language of the Act expresses Congress' clear intent to preempt state and local regulatory authority over the construction, development, and operation of railroad facilities in general, and intermodal facilities in particular."); City of Austell, 1997 U.S. Dist. LEXIS 17236, at *19 ("Based upon the clear and unambiguous language of the ICCTA, the court concludes that the instant intermodal facility comes within the ICCTA's definition of 'transportation by rail carriers' over which the STB is given exclusive jurisdiction under 49 U.S.C. § 10501(b)(1). It is uncontroverted that intermodal facilities are facilities that are operated in order to transfer containers or trailers of cargo being shipped in interstate and foreign commerce between trains and tractor-trailer trucks in a manner which permits and promotes effective competition and coordination between rail and motor carriers.").

Here, the BSOR Croton Yard is a rail "facility" that constitutes "transportation" under the ICCTA. 49 U.S.C. § 10501(b)(1). The BSOR Croton Yard is used to transfer commodities and/or containers of cargo moving in interstate commerce between trains and trucks. Feasley Aff. ¶¶ 11-13, 23-28. As such, the BSOR Croton Yard is plainly a "facility . . . related to the movement of . . . property . . . by rail." 49 U.S.C. § 10102(9)(A). Further, BSOR's services related to that movement include "receipt, delivery, . . . storage, handling, and interchange of . . . property." 49 U.S.C. § 10102(9)(B); see also Feasley Aff. ¶¶ 11-13, 23-28.

In sum, BSOR is a "rail carrier" and the BSOR Croton Yard constitutes "transportation" under the ICCTA; thus, the STB has exclusive jurisdiction. The Village's statutes and regulations intrude upon this jurisdiction as they seek to control and/or halt BSOR's rail transportation activities at the BSOR Croton Yard. Thus, the statutes and regulations the Village has attempted to exercise against BSOR are preempted by the ICCTA. See, e.g., Green

Mountain, 404 F.3d at 643-644 (holding that state environmental permitting process is preempted by the ICCTA because “it unduly interferes with interstate commerce by giving the local body the ability to deny the carrier the right to construct facilities or conduct operations” and “it can be time-consuming, allowing a local body to delay construction of railroad facilities almost indefinitely”) (internal quotation omitted); Coastal, 2006 U.S. Dist LEXIS 8400, at *1-2 (granting preliminary injunction to enjoin municipality from enforcing its “Stop Work Order” and certain zoning regulations against railroad and its transload facility); City of Rockwood, 2005 U.S. Dist. LEXIS 40131, at *1-2 (holding same under analogous facts); New York, Susquehanna & W. Ry. Corp. v. City of Paterson, No. 05-2338 (D. N.J. Mar. 14, 2006) (granting permanent injunction to railroad and prohibiting municipality from, among other things, “stopping and/or interfering with the construction and/or operation of Plaintiff’s transload facility on River Street within the City of Paterson”) (attached to McManus Aff. at Exhibit “E”); Wisconsin Cent., 160 F. Supp.2d at 1013 (holding that ICCTA’s “clear and broad” preemption clause precludes “all state efforts to regulate rail transportation,” including an attempt by a municipality to use Wisconsin’s general eminent domain law to condemn a portion of a railroad passing track); City of Austell, 1997 U.S. Dist. LEXIS 17236, at *24 (holding that municipal zoning ordinance and land-use permitting requirement used to prevent railroads from constructing, developing, and operating an intermodal facility are expressly preempted by the ICCTA); Borough of Riverdale, 1999 STB LEXIS 531, at *19 (holding that “state or local laws that would impose a local permitting or environmental process as a prerequisite to the railroad’s maintenance, use, or upgrading of its facilities are preempted because they would, of necessity, impinge upon the federal regulation of interstate commerce.”).

C. A Preliminary Injunction Benefits The Public Interest

“Although this Circuit’s settled preliminary injunction standard does not explicitly mention the public interest, as do other Circuits’ standards,” the Second Circuit has recognized that, as a court of equity, a District Court “may” consider this factor. Standard & Poor’s Corp., Inc. v. Commodity Exch., Inc., 683 F.2d 704, 711 (2d Cir. 1982). In the event that this Court considers this factor in connection with the instant motion, preliminary injunctive relief in this action furthers the public interest.

The public interest will be served if a preliminary injunction is granted. First, the continued operation of the BSOR Croton Yard has a beneficial effect on interstate commerce. For example, the BSOR Croton Yard provides businesses with an additional option for transportation of their materials and products in interstate commerce. *Feasley Aff.* ¶ 38; *Rutigliano Aff.* ¶¶ 4-6; *Meehan Aff.* ¶ 3. Second, Congress made it clear that federal policy is to promote competition and coordination among different modes of transportation. *See, e.g.*, 49 U.S.C. § 10101 (“In regulating the railroad industry, it is the policy of the United States Government -- . . . (5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes.”); 49 U.S.C. § 302(e) (“Intermodal transportation. It is the policy of the United States Government to encourage and promote development of a national intermodal transportation system in the United States to move people and goods in an energy-efficient manner, provide the foundation for improved productivity growth, strengthen the Nation’s ability to compete in the global economy, and obtain the optimum yield from the Nation’s transportation resources.”). The continued operation of the BSOR Croton Yard furthers this policy in that it allows BSOR to compete with trucks for long-haul transportation of materials and products, thereby promoting economic and

efficient rates for interstate transportation, while at the same time permitting coordination between rail and truck in the form of the operation of an intermodal facility. Feasley Aff. ¶ 38; Meehan Aff. ¶¶ 3-4; see also Waste Mgmt. Holdings, Inc. v. Gilmore, 64 F. Supp.2d 523, 536 (E.D. Va. 1999) (holding that public interest “supports the granting of a preliminary injunction in order to protect the free flow of interstate commerce from unconstitutional interference.”). Third, the roads and highways in Westchester County suffer from congestion, much of it due to trucks carrying materials and products that could move by rail. Feasley Aff. ¶ 39. In competing with trucks, the operation of the BSOR Croton Yard benefits the public interest by reducing the number of and distance traveled by long-haul trucks on the crowded highways and roads in the County. See Coastal, 2006 U.S. Dist. LEXIS 8400, at *10-12 (stating that “the sole public interest at issue here is the highway and road congestion that would dramatically increase if this Court did not enjoin the Town” from enforcing a Stop Work Order against rail carriers who were transloading C&DD). Fourth, the operation of the BSOR Croton Yard promotes economic development in Westchester County. For example, a number of jobs have been and will be created for individuals who work and will work at the BSOR Croton Yard. Feasley Aff. ¶ 40. Further, the transportation of materials and products from new market entrants -- such as Coastal -- may assist the economic development of the region. Feasley Aff. ¶¶ 23-28; Rutigliano Aff. ¶¶ 3-6; Meehan Aff. ¶ 4. Finally, the public has an interest in preventing enforcement of laws and regulations that are unconstitutional. See, e.g., Michigan Bell Tel. Co. v. Engler, 257 F.3d 587, 600 (6th Cir. 2001) (holding that preliminary injunction should issue against a state where public interest would be served by enjoinder of unconstitutional statutes). Since the statutes and provisions that the Village seeks to enforce against BSOR and the BSOR Croton Yard are

preempted by the ICCTA under the Supremacy Clause and run afoul of the Commerce Clause, granting a preliminary injunction will serve this interest. See, e.g., id.

Nor will the requested preliminary injunctive relief harm the public interest. First, there will be no harm to the public resulting from the operations at the BSOR Croton Yard. For example, Coastal's commodities handled at the BSOR Croton Yard will simply be transloaded between rail and trucks and then moved to offsite destinations. Feasley Aff. ¶ 42; Rutigliano Aff. ¶ 9; Meehan Aff. ¶ 6. There will be no processing of these commodities on the Property, and the commodities are not hazardous materials. Feasley Aff. ¶ 42; Rutigliano Aff. ¶ 10; Meehan Aff. ¶ 7. Thus, the operation of the BSOR Croton Yard will not harm the public interest. Second, BSOR's operations at the BSOR Croton Yard are subject to numerous federal statutes and regulations governing environmental matters, as well as safety and maintenance of track and equipment. City of Rockwood, 2005 U.S. Dist. LEXIS 40131, at *26-27 (holding that issuing preliminary injunction under analogous facts would not cause substantial harm to others where, among other things, "[f]ederal environmental statutes and regulations will still be in force to address continuing environmental concerns"). Third, BSOR's lease of the BSOR Croton Yard provides additional protections. See City of Rockwood, 2005 U.S. Dist. LEXIS 40131, at *27 ("Moreover, the services agreement between CN and IWG provides additional protection."). For example, the lease mandates that BSOR "shall inspect and maintain the Croton Track and related rail facilities and the Croton Property to a condition that permits safe and efficient rail operation and in accordance with any applicable regulations, including regulations of the [Federal Railroad Administration]." Feasley Aff. ¶ 44 and Exhibit "B." Fourth, the Property has long been utilized for commercial purposes, including as a transloading facility for decades. In the 1960s, the Property was used as a repair garage and for the storage and transfer of various products and

materials, such as rocks, stone, soil, sand, and other debris. Id. at ¶ 45. More recently, the Property housed a transloading facility, specifically, a C&DD transfer station and processing facility, of which the Croton Track has been an integral part. Id. at ¶ 46. Thus, BSOR's present operations are consistent with the Property's prior long-term use, which has not harmed the public. Indeed, as demonstrated above, BSOR's operations promote the public interest. Finally, BSOR's operations are in keeping with and ideally suited to the industrial nature of the surrounding area, which is heavily rail-oriented. Id. at ¶ 47.

D. Any Security That BSOR Is Required To Post Should Be Nominal

This Court has broad discretion under Fed. R. Civ. P. 65(c) to set the bond amount or to dispense with the requirement. Doctor's Assocs., Inc. v. DiStajo, 107 F.3d 126, 136 (2d Cir. 1997). Here, given BSOR's strong likelihood of success on the merits of its claim, and the lack of any proof of likelihood of harm should a preliminary injunction be granted,¹² this Court should dispense with or set a minimal bond. See id.

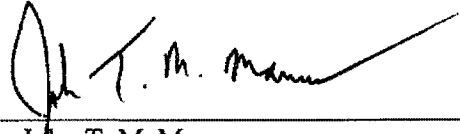
¹² The Village will not be able to proffer any legitimate proof of likelihood of harm should a preliminary injunction be granted. See Point C supra.

CONCLUSION

Accordingly, this Court should grant BSOR's application for a temporary restraining order and motion for a preliminary injunction and issue an order: (1) enjoining the Village, or any of its boards, agencies, departments, officers, agents, representatives, servants, employees, and persons in active concert or participation with it, from applying or enforcing against BSOR any laws, ordinances, rules, regulations, or other requirements that seek or purport to regulate, license, or otherwise interfere with the activities, operations, and/or land usage occurring at the BSOR Croton Yard, and otherwise prohibiting the Village from any interference with BSOR's occupation and use of the BSOR Croton Yard, and (2) granting such other and further relief to which BSOR may be entitled at law or in equity as this Court deems just and proper.

Dated: May 16, 2006
Albany, New York

CRANE, PARENTE, CHERUBIN & MURRAY

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COPY

BUFFALO SOUTHERN RAILROAD, INC.,

Plaintiff,

- against -

VILLAGE OF CROTON-ON-HUDSON; GREGORY J. SCHMIDT, as Mayor of the Village of Croton-on-Hudson; DANIEL O'CONNOR, P.E., as Engineer and Building Inspector for the Village of Croton-on-Hudson; RICHARD F. HERBEK, as Manager of the Village of Croton-on-Hudson; THOMAS P. BRENNAN, as Trustee on the Village Board of Trustees; CHARLES A. KANE, as Trustee on the Village Board of Trustees; ANN GALLELLI, as Trustee on the Village Board of Trustees; LEO A. W. WIEGMAN, as Trustee on the Village Board of Trustees; CHRIS KEHOE, as member of the Village Planning Board; VINCENT ANDREWS, as member of the Village Planning Board; FRANCES ALLEN, as member of the Village Planning Board; ROBERT LUNTZ, as member of the Village Planning Board; KATHLEEN RIEDY, as member of the Village Zoning Board of Appeals; RHODA STEPHENS, as member of the Village Zoning Board of Appeals; RUTH WAITKINS, as member of the Village Zoning Board of Appeals; WITT BARLOW, as member of the Village Zoning Board of Appeals; and PAUL ROLNICK, as member of the Village Zoning Board of Appeals,

Defendants.

AFFIDAVIT OF
ALBERT FEASLEY
CIVIL ACTION No.:

Judge McMahon

06 CIV. 3755

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

Albert Feasley, being duly sworn, deposes and says:

1. I am the Vice President of Operations for BSOR,¹ and I submit this affidavit in support of BSOR's application for a temporary restraining order and motion for a preliminary injunction.

¹ In the interest of brevity, the terms used herein are as defined in BSOR's accompanying memorandum of law, except where specifically noted.

BSOR's Rail Operations

2. BSOR is a Class III rail carrier² that operates approximately 32 track miles in Erie County and the Croton Track and Transload Facility in Westchester County, provides switching services in Tonawanda, New York, and interchanges rail traffic with a number of other railroads.

3. Since January 21, 1982, BSOR has held itself out to the public as engaged in the business of transportation of property by rail for compensation, offering its services to the public generally.

4. For example, BSOR has been transporting commodities such as scrap metal, liquid propane, feed, fertilizer, and lumber and other building materials for numerous businesses for compensation for many years in western New York.

The BSOR Croton Yard

5. The BSOR Croton Yard consists of a ten-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. There are approximately 1,600 feet of track on the Property that connects with the Hudson line of CSX at approximately milepost QC 25 in the Village.

6. The BSOR Croton Yard is located in the most industrially developed section of the Village. 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, is immediately adjacent to and East of the BSOR Croton Yard. A commuter railroad parking lot is located to the South of the BSOR Croton Yard, a massive rail equipment maintenance facility to the West and Southwest, and a commercial warehouse building currently storing tires, to the

² A rail carrier is classified by federal regulations as "Class III" when the carrier has annual revenues of \$20,000,000 or less. 49 C.F.R. Part 1201 1-1. Class III carriers are generally referred to as "shortlines."

North. Just past this warehouse to the North is a major freight rail yard. To the West is the Croton-Harmon Rail Yard, which is a large rail-industrial complex containing numerous tracks and switches for both commuter and freight trains. See Exhibit "A."

7. The Property has, upon information and belief, long been utilized for commercial purposes -- in particular, for the storage and transfer of various products and materials, such as rocks, stone, soil, sand, and other debris -- since at least the early 1960s.

8. More recently, from 1997-2005, the Croton Track and the Transload Facility were used by a prior entity to transfer CD&D from trucks to rail cars for interstate shipment and, ultimately, disposal.

BSOR's Rail Transportation Activities At The BSOR Croton Yard

9. During the last several years, BSOR has sought to provide rail common carrier transportation services at additional locations, both in western New York and elsewhere.

10. As a result of BSOR's efforts to increase the locations of its services, on March 3, 2006, BSOR leased the BSOR Croton Yard. See Exhibit "B."

11. Now, BSOR holds itself out to the public generally to provide common carrier rail service at the BSOR Croton Yard, including transloading and switching services to rail customers delivering or receiving various commodities by truck at the BSOR Croton Yard, transferring containers between trucks and rail cars, and providing other rail transportation services involving the exchange of empty and loaded rail cars for various commodities with CSX.

12. BSOR's ongoing rail transportation operations at the BSOR Croton Yard provide coordination between rail carriers and motor carriers and allow BSOR to provide rail

transportation service economically and efficiently for shippers and consignees, thereby enabling them to have access to the national rail network by means of interchange with CSX.

13. As a result, BSOR's rail transportation operations promote and have a beneficial effect on interstate commerce.

14. Furthermore, without this important rail link at the BSOR Croton Yard, the already overburdened roads in Westchester County will be further inundated with even more long-haul truck traffic.

The Village's Conduct

15. Upon information and belief, the Village Board of Trustees recently held a public hearing "[t]o determine the Village's need for the Property . . . [at] 1A Croton Point Avenue, Section 78.16 Block 2 Lots 1 and 2 as the first step in the process of acquiring the property by eminent domain."

16. Upon information and belief, that night, in furtherance of the Village's attempt at exercising eminent domain to take the Property, the Board of Trustees adopted a full environmental assessment form (the "EAF") as part of the New York State Environmental Quality Review Act ("SEQRA") process.

17. Upon information and belief, a few weeks ago, an appraiser hired by the Village inspected the Property to provide a valuation as part of the condemnation proceeding. Although the Village has so far refused to make it public, the appraiser's report is apparently complete.

18. Upon information and belief, on April 3, 2006, the Village held a "scoping session" concerning the purported condemnation in advance of preparing a Draft Environmental Impact Statement ("DEIS") pursuant to SEQRA.

19. Additionally, upon information and belief, on several occasions over the last year, some of the Defendants have contended that any activities at the Property are subject to and regulated by the Village Zoning Code. Further, some of the Defendants have threatened that, if activity was commenced at the Property without prior approval under the Zoning Code, the Village would issue stop work orders and/or seek some other form of relief.

20. Clearly, condemnation of the Property would cease BSOR's rail transportation activities in Westchester County. Further, application of the Village's zoning and land use provisions would unduly interfere with interstate commerce by giving the Village the ability to deny BSOR the right to conduct operations and would be time consuming, allowing the Village to delay or interfere with BSOR's rail transportation activities almost indefinitely.

21. As a result, BSOR was forced to commence this action seeking declaratory and injunctive relief against the Village.

22. BSOR now moves for a temporary restraining order and a preliminary injunction to prohibit the Village from condemning the Property and from enforcing certain zoning and land use provisions against BSOR.

Irreparable Harm To BSOR

23. Transload facilities like BSOR's are of great interest and value to businesses because they provide companies with an additional option for transportation of their materials and products in interstate commerce.

24. BSOR's Transload Facility is of particular interest to businesses because, in many cases, they can transport their products to the lucrative Westchester County market more easily and inexpensively by rail, rather than by truck.

25. As a result, Coastal has arranged with BSOR for it to transport sand and other building materials and products by rail to the Property for transfer to trucks for distribution throughout the Westchester County market.

26. BSOR has begun to provide such service to Coastal.

27. Coastal has informed me that it would like to enter into a long-term agreement to transport and transload aggregate and other building materials, but it is unwilling to do so given the uncertainty created by the Village's attempts to condemn and/or interfere with the BSOR Croton Yard.

28. In addition, a number of other businesses have expressed an interest in using BSOR's transportation and transloading services at the BSOR Croton Yard. They have refrained from arranging for shipments to or entering into agreements with BSOR due to the Village's conduct.

29. If the Property is condemned, BSOR's relationships with its existing customer will necessarily be terminated, thereby adversely and irreparably affecting BSOR.

30. The result is the same if the Village attempts to or actually halts the operations at the BSOR Croton Yard, even for a short period of time, pursuant to some provision in the Zoning Code or other local regulation(s) or ordinance(s).

31. Coastal needs to have certainty and regularity in the shipment of its products so that it can efficiently control its inventory, coordinate its sales and marketing efforts, and remain profitable.

32. Further, it is difficult logistically for customers such as Coastal to switch back and forth between rail-truck intermodal and all-truck movements.

33. If BSOR cannot guarantee dependable and consistent service, it will be viewed as being too unreliable and therefore not a viable option. In short, BSOR's reputation and goodwill will be severely harmed.

34. If the Property is condemned or BSOR cannot otherwise operate, Coastal will lose the ability to use BSOR and the BSOR Croton Yard. As a result, Coastal will have to cancel its arrangements with BSOR and ship its materials and products via other carriers -- most likely truck carriers. Given the competitive nature of the shipping market, BSOR will likely lose this customer for good.

35. Further, those businesses that have expressed an interest in using BSOR's transportation and transloading services are sure to look elsewhere if there is a threat that the BSOR Croton Yard will be condemned or closed.

36. Additionally, the loss of these customers will effectively preclude BSOR from entering and competing in the Westchester County market for the transloading and transportation of materials and products.

A Preliminary Injunction Benefits The Public Interest

37. The public interest will be served if a preliminary injunction is granted.

38. The continued operation of the BSOR Croton Yard has a beneficial effect on interstate commerce. For example, the BSOR Croton Yard provides businesses with an additional option for transportation of their materials and products in interstate commerce. The continued operation of the BSOR Croton Yard allows BSOR to compete with trucks for long-haul transportation of materials and products, thereby promoting economic and efficient rates for interstate transportation, while at the same time permitting coordination between rail and truck in the form of the operation of an intermodal facility.

39. Further, the roads and highways in Westchester County suffer from congestion, much of it due to long-haul trucking traffic of materials and products. In competing with trucks, the operation of the Transload Facility benefits the public interest by reducing the number of and distance traveled by trucks on the crowded highways and roads in the County. For example, a single railcar loaded with aggregate (i.e., rock) is the equivalent of approximately five tractor trailers. As a result, rail transportation is also recognized as being more fuel efficient and less polluting than motor carriers.

40. Additionally, the operation of the BSOR Croton Yard promotes economic development in Westchester County. A number of jobs have been and will be created for individuals who work and will work at the BSOR Croton Yard.

41. Nor will the requested preliminary injunctive relief harm the public interest.

42. First, there will be no harm to the public resulting from the operations at the BSOR Croton Yard. For example, Coastal's commodities handled at the BSOR Croton Yard will simply be transloaded between rail and trucks and then moved to offsite destinations. There will be no processing of these commodities on the Property, and the commodities are not hazardous materials. Thus, the operation of the BSOR Croton Yard will not harm the public interest.

43. Second, BSOR's operations at the BSOR Croton Yard are subject to numerous federal statutes and regulations governing environmental matters, as well as safety and maintenance of track and equipment.

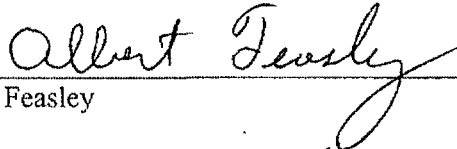
44. Third, BSOR's lease of the BSOR Croton Yard provides additional protections. For example, the lease mandates that BSOR "shall inspect and maintain the Croton Track and related rail facilities and the Croton Property to a condition that permits safe and efficient rail

operation and in accordance with any applicable regulations, including regulations of the [Federal Railroad Administration].”

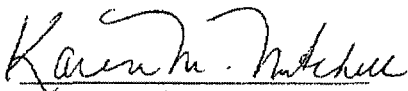
45. Fourth, upon information and belief, the Property has long been utilized for commercial purposes, including as a transloading facility for decades. In the 1960s, the Property was used as a repair garage and for the storage and transfer of various products and materials, such as rocks, stone, soil, sand, and other debris.

46. More recently, the Property has housed a transloading facility, specifically, a C&DD transfer station and processing facility, of which the Croton Track has been an integral part. Thus, BSOR’s present operations are consistent with the Property’s prior long-term use, which has not harmed the public.

47. Finally, BSOR’s operations are in keeping with and ideally suited to the industrial nature of the surrounding area, which is heavily rail-oriented.

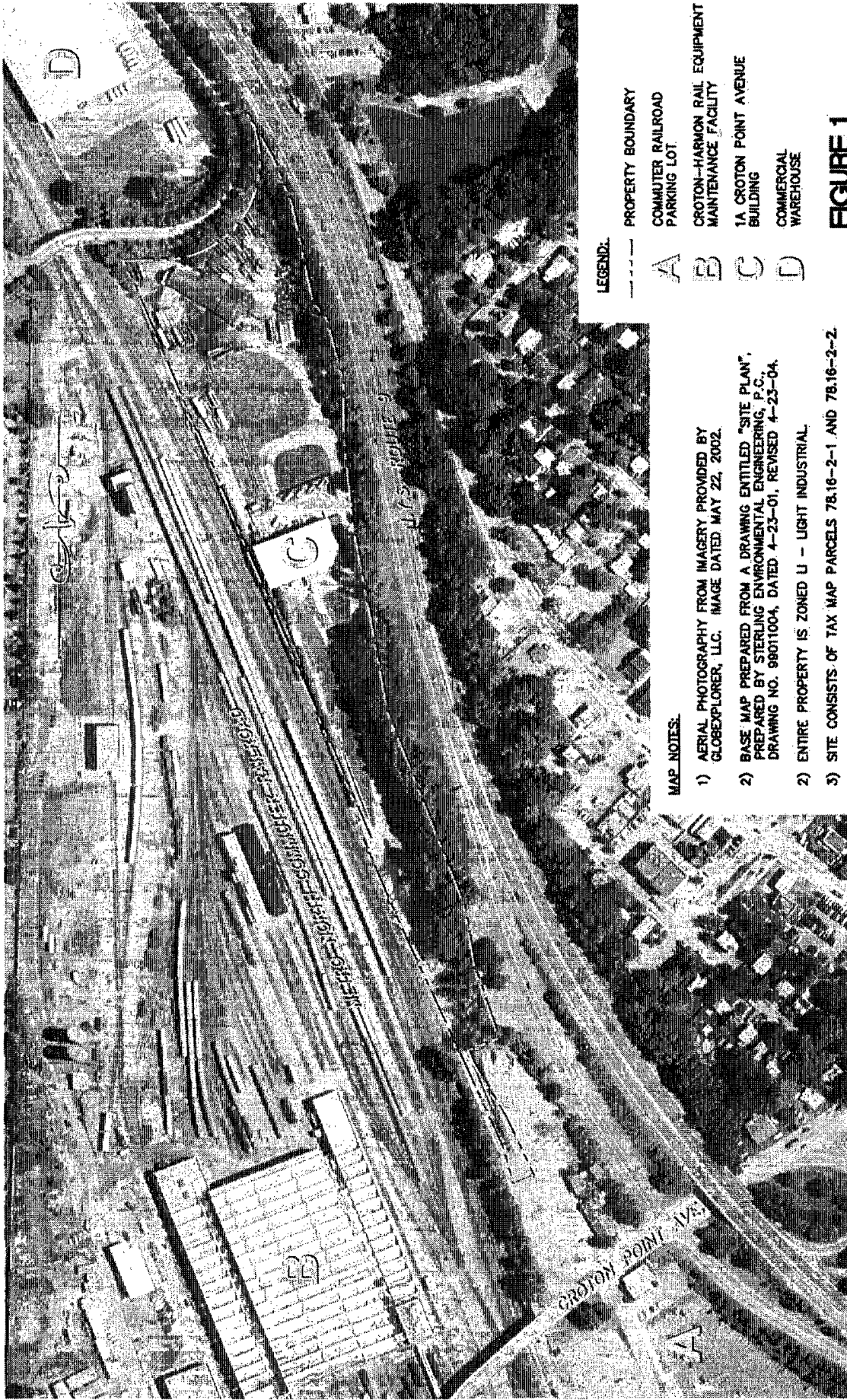

Albert Feasley

Sworn to before me this 9th
day of May, 2006


Notary Public

KAREN M. MITCHELL
No. 01M8138824
Notary Public, State of New York
Qualified in Erie County
My Commission Expires Dec. 27, 09

EXHIBIT "A"



LEGEND:

--- PROPERTY BOUNDARY

--- COMMUTER RAILROAD

--- PARKING LOT

--- CROTON-HARMON RAIL EQUIPMENT MAINTENANCE FACILITY

--- 1A CROTON POINT AVENUE

--- COMMERCIAL WAREHOUSE

FIGURE 1

MAP NOTES:

- 1) AERIAL PHOTOGRAPHY FROM IMAGERY PROVIDED BY GLOBEXPLORE, LLC. IMAGE DATED MAY 22, 2002.
- 2) BASE MAP PREPARED FROM A DRAWING ENTITLED "SITE PLAN", PREPARED BY STERLING ENVIRONMENTAL ENGINEERING, P.C., DRAWING NO. 99011004, DATED 4-23-01, REVISED 4-23-04.
- 2) ENTIRE PROPERTY IS ZONED U - LIGHT INDUSTRIAL.
- 3) SITE CONSISTS OF TAX MAP PARCELS 78.16-2-1 AND 78.16-2-2.

STERLING

Sterling Environmental Engineering, P.C.
24 Wade Road • Latham, New York 12110

SITE AERIAL
WITH OVERLAY

1A CROTON POINT AVENUE

V. OF CROTON-ON-HUDSON

WESTCHESTER CO., N.Y.

PROJ. No.:

99011

DATE:

5-8-06

SCALE:

1" = 300'

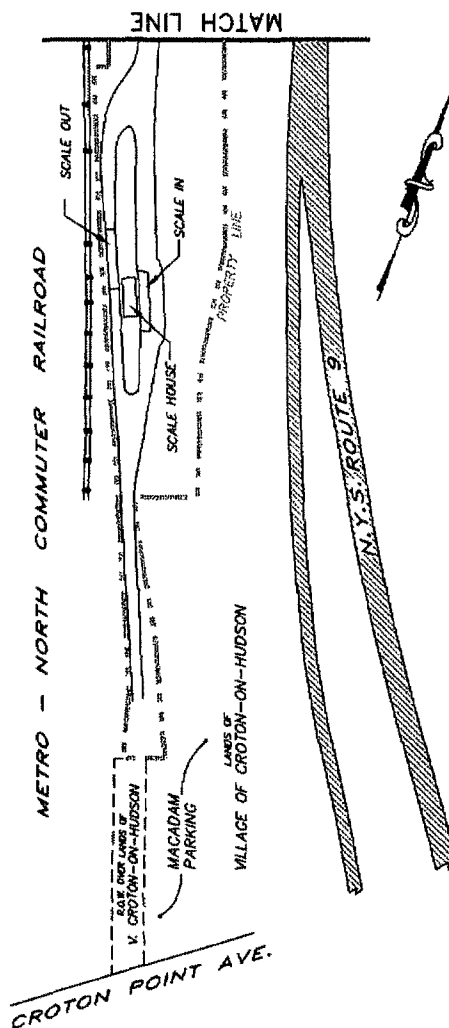
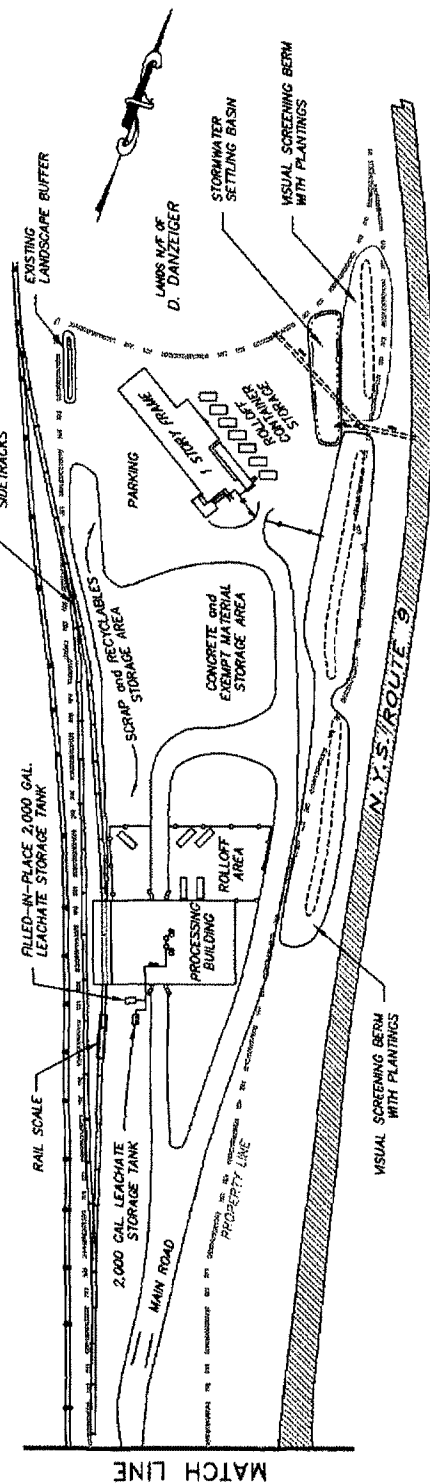
DWG. NO.

99011011

FIGURE

1

METRO - NORTH COMMUTER RAILROAD



DRAWING NOTES:

- 1) BASE MAP FROM A DRAWING ENTITLED "SITE PLAN", PREPARED BY STERLING ENVIRONMENTAL ENGINEERING, P.C., DRAWING NO. 99011004, DATED 4-23-01, REVISED 4-23-04.
- 2) ENTIRE PROPERTY IS ZONED U - LIGHT INDUSTRIAL.
- 3) SITE CONSISTS OF TAX MAP PARCELS 78.16-2-1 AND 78.16-2-2.

FIGURE 2

SITE PLAN

1A CROTON POINT AVENUE

STERLING

Sterling Environmental Engineering, P.C.
24 Wade Road • Latham, New York 12110

V. OF CROTON-ON-HUDSON

WESTCHESTER CO., N.Y.

PROJ. No.:

99011

DATE:

5-8-06

SCALE:

1" = 200'

DWG. NO.

99011012

FIGURE

2

EXHIBIT "B"

LEASE AGREEMENT

This Lease Agreement (the "Agreement") is made as of this 3rd day of March, 2006 by and between RS Acquisition Co., LLC. ("RSA") and Buffalo Southern Railroad, Inc. ("Buffalo Southern") (each a "Party" or together the "Parties").

WHEREAS, Buffalo Southern is a Class III rail common carrier that operates approximately 32 miles of line between Buffalo, New York and Gowanda, New York and provides industrial switching services at Tonawanda, New York; and

WHEREAS, Buffalo Southern desires to provide common carrier and industrial switching services at other locations; and

WHEREAS, Greentree Realty LLC ("Greentree") is the owner and lessor, and RSA, a noncarrier, is the lessee, of an approximately 10 acre parcel of real property located in Croton-on-Hudson, New York, as more specifically described in Exhibit A attached hereto (the "Croton Property"), that includes approximately 1,600 feet of track that connects with the Hudson line of CSX Transportation, Inc. ("CSX") at approximately milepost QC 25 in Croton (the "Croton Track"); and

WHEREAS, the Parties desire to enter into an arrangement pursuant to which (1) RSA will lease the Croton Property, including the Croton Track, to Buffalo Southern and (2) Buffalo Southern will provide common carrier rail service at the Croton Property and on the Croton Track, including transloading and switching services to rail customers delivering or receiving various commodities by truck at the Croton Property, transferring containers between trucks and rail cars and providing other rail transportation services involving the exchange of empty and loaded rail cars for various commodities with CSX.

NOW, THEREFORE, the Parties, intending to be legally bound and in consideration of the foregoing premises and the mutual covenants set forth below, hereby agree as follows:

1. Lease. RSA hereby leases to Buffalo Southern the Croton Property and the Croton Track for purposes of possession, use and occupation by Buffalo Southern in order to provide common carrier and industrial switching services, as described more fully below. Unless terminated earlier upon the mutual written agreement of the Parties or in accordance with Section 8 of this Agreement, the initial term of this Agreement shall be two (2) years. This Agreement shall terminate on the date that is two (2) years after the date of this Agreement; provided, however, that this Agreement shall continue in full force and effect after such date, and may then be terminated upon no less than 180 days' written notice of the intention to terminate by either Party. Notwithstanding any provision to the contrary in this Agreement, a non-defaulting Party may terminate this Agreement in the event of a Default, as defined in section 8 below, by the other Party.

2. Rent.

3. Rail Common Carrier Operations. Buffalo Southern shall at all times during the term of this Agreement have the exclusive right to provide common carrier rail transportation service on the Croton Track and at the Croton Property to rail customers that wish to ship or receive containers or other commodities that may be reasonably handled at the Croton Property and on the Croton Track; provided, however, that Buffalo Southern shall not, without the prior written consent of RSA, handle any hazardous commodities or construction and demolition debris. As described more fully below, the rights and obligations of Buffalo Southern shall include, without limitation, providing employees or agents and equipment necessary to provide such common carrier rail service, establishing and maintaining operating and commercial relationships with CSX and other rail carriers or entities as appropriate, switching and exchanging with CSX loaded and empty rail cars, marketing the rail transportation services of Buffalo Southern to rail customers, determining, except as otherwise provided above, the commodities and rail traffic to be handled at the Croton Property, establishing and maintaining relationships with rail customers, negotiating transportation rates with rail customers, billing and collecting from rail customers, preparing and maintaining railroad accounting records, including without limitation car accounting records, bills of lading, waybills, car hire reports and interchange reports, coordinating day-to-day interactions with CSX and maintaining the Croton Track and related rail facilities in a condition that is adequate for the provision of such common carrier rail transportation service and in accordance with applicable standards, including without limitation standards of the Federal Railroad Administration ("FRA").

4. Maintenance. Buffalo Southern shall inspect and maintain the Croton Track and related rail facilities and the Croton Property to a condition that permits safe and efficient rail operation and in accordance with any applicable regulations, including regulations of the FRA. Buffalo Southern shall not, without the prior written consent of RSA, alter or remove any part of the Croton Track or related rail facilities or construct any additional track or related rail facilities. Buffalo Southern shall maintain any locomotives or other equipment that is necessary or appropriate for its operations on the Croton Track in accordance with any applicable regulations, including without limitation regulations of the FRA.

5. Books and Records. Each Party shall maintain accurate and complete books and records with respect to their respective responsibilities and the activities relating to the performance of this Agreement. Each Party shall have the right, upon reasonable notice to the other and during normal business hours, to inspect such records of the other Party.

6. Indemnification. Buffalo Southern shall indemnify and save harmless RSA and Greentree from and against any claims or liabilities for personal injury, property damage or regulatory fines or claims arising from or in connection with the rail transportation service provided by Buffalo Southern on the Croton Track or the Croton Property. In the event that Buffalo Southern is obligated to indemnify RSA or Greentree, Buffalo Southern shall defend any such claim at its expense with counsel of its choice, which

counsel shall be reasonably acceptable to RSA or Greentree, and with discretion to settle or defend such claims as it deems appropriate.

7. Insurance. During the term of this Agreement, Buffalo Southern shall provide and maintain in effect a policy of comprehensive general liability insurance, including contractual liability assumed by Buffalo Southern under the provisions of this Agreement and coverage for employees subject to the provisions of the Federal Employers Liability Act, covering the liability of Buffalo Southern, RSA and Greentree for any and all property damage, personal injury, or death arising out of any cause whatsoever, regardless of degree of fault, in the exercise by Buffalo Southern of its rights or the performance of its responsibilities pursuant to this Agreement. Such policy shall name RSA and Greentree as additional insureds and provide for a minimum of 30 days' advance notice before any changes or cancellation may become effective. Such insurance shall have policy limits of not less than \$3,000,000 per occurrence and \$3,000,000 in the aggregate with deductible amounts not in excess of \$25,000 and shall be with insurers and in form acceptable to RSA and Greentree. Buffalo Southern shall provide to RSA and Greentree written evidence of the amount of such insurance and its effectiveness and shall promptly notify RSA and Greentree of any termination, decrease, lapse or other adverse change in coverage. In the event that such insurance provides coverage only on a claims-made basis, Buffalo Southern shall, upon any termination of such coverage, purchase an extended reporting option satisfactory to RSA and Greentree.

8. Default and Remedies. The following occurrences or events shall constitute events of default: (a) the failure of either Party to make payment of any amount due hereunder continuing for 5 business days after the date when such payment was due; (b) the failure of either Party to perform any material covenant, obligation or condition on its part to be performed under this Agreement and the continuance of such failure for 10 days after notice from the other Party; (c) the insolvency of either Party or failure to pay its debts as they come due, the appointment of a receiver or trustee for either Party or for any substantial part of its property or the filing of an involuntary case against either Party under the Bankruptcy Code and which is not dismissed within 30 days; or (d) the filing by either Party of a voluntary case under the Bankruptcy Code or any other law relating to the liquidation or reorganization of debts or making a general assignment for the benefit of creditors. The occurrence of any such event prior to the giving of any required notice or the expiration of any applicable grace period shall constitute an "Event of Default", and after the giving of any required notice or the expiration of any applicable grace period shall constitute a "Default". Upon the occurrence of any Default, the non-defaulting Party may, at its option, terminate this Agreement by giving the defaulting Party written notice of such termination. In addition, the nondefaulting Party may exercise any other remedy at law or in equity that may be available. The remedies set forth in this section 10 are cumulative, and the exercise by either Party of one or more of such remedies or the failure on the part of either Party to exercise any remedy provided for hereunder shall not prejudice the right of any such Party to exercise any remedy from time to time and as often as it may deem necessary.

9. Dispute Resolution. The Parties shall attempt in good faith to resolve any issues, claims or disputes relating to or arising under this Agreement through informal discussions. Each Party shall designate a person to represent it in all such discussions. In

the event that either Party raises an issue, claim or dispute, the other Party shall promptly, and no later than 5 days after notice of an issue, claim or dispute, engage in such informal discussions. If any such issue, claim or dispute cannot be satisfactorily resolved within 15 days after any such notice, either Party may initiate legal proceedings, but no such proceedings may be initiated prior to the expiration of such 15 day period.

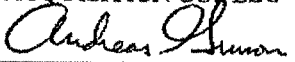
10. Confidentiality and Nondisclosure. Neither of the Parties shall, without the prior written consent of the other Party, disclose or communicate to third persons or use for any purpose other than the implementation of this Agreement any information obtained from the other Party unless (a) disclosure is compelled by judicial process or (b) such information is otherwise legally in the public domain. Neither of the Parties, nor its counsel or any agent, shall, except as may be necessary to implement this Agreement or, in the opinion of counsel to a Party, to comply with the requirements of applicable law, rule or regulation, disclose to any third person the fact of or any of the terms of this Agreement without the prior written consent of the other Party.

11. Assignment. The operational rights and duties under this Agreement shall not be assigned by Buffalo Southern without the prior written consent of RSA, which consent shall not be unreasonably delayed, conditioned or withheld.

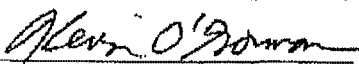
12. Other. This Agreement is subject and subordinate to the terms and conditions of the lease of the Croton Property from Greentree to RSA, as such lease may be amended from time to time. Buffalo Southern shall not assign or sublet any interest in the Croton Property. In the event of a condemnation or a taking of the Croton Property by eminent domain, whether whole or partial, Buffalo Southern shall have no right to, or interest in, and shall make no claim for, any compensation awarded for such taking.

IN WITNESS WHEREOF, THE PARTIES HAVE EXECUTED THIS AGREEMENT
AS OF THE DATE FIRST WRITTEN ABOVE.

RS ACQUISITION CO., LLC


By: Andrew Y. Gruson
Its: CEO

BUFFALO SOUTHERN RAILROAD, INC.


By: KEVIN O'GORMAN
Its: CEO

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COPY

BUFFALO SOUTHERN RAILROAD, INC.,

Plaintiff,

- against -

VILLAGE OF CROTON-ON-HUDSON; GREGORY J. SCHMIDT, as Mayor of the Village of Croton-on-Hudson; DANIEL O'CONNOR, P.E., as Engineer and Building Inspector for the Village of Croton-on-Hudson; RICHARD F. HERBEK, as Manager of the Village of Croton-on-Hudson; THOMAS P. BRENNAN, as Trustee on the Village Board of Trustees; CHARLES A. KANE, as Trustee on the Village Board of Trustees; ANN GALLELLI, as Trustee on the Village Board of Trustees; LEO A. W. WIEGMAN, as Trustee on the Village Board of Trustees; CHRIS KEHOE, as member of the Village Planning Board; VINCENT ANDREWS, as member of the Village Planning Board; FRANCES ALLEN, as member of the Village Planning Board; ROBERT LUNTZ, as member of the Village Planning Board; KATHLEEN RIEDY, as member of the Village Zoning Board of Appeals; RHODA STEPHENS, as member of the Village Zoning Board of Appeals; RUTH WAITKINS, as member of the Village Zoning Board of Appeals; WITT BARLOW, as member of the Village Zoning Board of Appeals; and PAUL ROLNICK, as member of the Village Zoning Board of Appeals,

Defendants.

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

John T. McManus, being duly sworn deposes and says:

1. I am an attorney at law duly admitted to practice in the United States District Court for the Southern District of New York, and I am associated with the law firm of Crane,

AFFIDAVIT OF JOHN
T. McMANUS

CIVIL ACTION No.:

Judge McMahon

06 CIV. 3755

Parente, Cherubin & Murray, attorneys for Plaintiff Buffalo Southern Railroad, Inc. ("BSOR"). As such, I am fully familiar with the facts and circumstances of this action.

2. I respectfully submit this affidavit in support of BSOR's application for a temporary restraining order and motion for a preliminary injunction to enjoin Defendant Village of Croton-on-Hudson (the "Village" or "Croton")¹ from condemning the property and the related track and facilities (collectively, the "BSOR Croton Yard") used in BSOR's rail transportation operations in Westchester County and from applying and enforcing against BSOR zoning ordinances, permitting and pre-clearance requirements, and other local ordinances and regulations.

3. Under the Interstate Commerce Commission Termination Act of 1995 (the "ICCTA"), the federal government, through the Surface Transportation Board (the "STB" or "Board"), has exclusive jurisdiction over "transportation by rail carriers." 49 U.S.C. § 10501(b). As demonstrated by the accompanying memorandum of law, which is incorporated herein by reference, federal courts and the STB have uniformly held that state and local laws or regulations that intrude upon this jurisdiction are preempted by the ICCTA. Here, BSOR's activities at the BSOR Croton Yard meet the definition of "transportation by rail carrier," thus the Village's statutes and regulations that interfere with and/or seek to halt BSOR's rail transportation operations at the BSOR Croton Yard are preempted by the ICCTA.

¹ In the interest of brevity, the term "Village" includes all of the Defendants in this action, specifically the Village of Croton-on-Hudson; Gregory J. Schmidt, as Mayor of the Village and member of the Village Board of Trustees; Daniel O'Connor, P.E., as Engineer and Building Inspector for the Village; Richard F. Herbek, as Manager of the Village; Thomas P. Brennan, as Trustee on the Village Board of Trustees; Charles A. Kane, as Trustee on the Village Board of Trustees; Ann Gallelli, as Trustee on the Village Board of Trustees; Leo A. W. Wiegman, as Trustee on the Village Board of Trustees; Chris Kehoe, as member of the Village Planning Board; Vincent Andrews, as member of the Village Planning Board; Frances Allen, as member of the Village Planning Board; Robert Luntz, as member of the Village Planning Board; Kathleen Riedy, as member of the Village Zoning Board of Appeals; Rhoda Stephens, as member of the Village Zoning Board of Appeals; Ruth Waitkins, as member of the Village Zoning Board of Appeals; Witt Barlow, as member of the Village Zoning Board of Appeals; and Paul Rolnick, as member of the Village Zoning Board of Appeals.

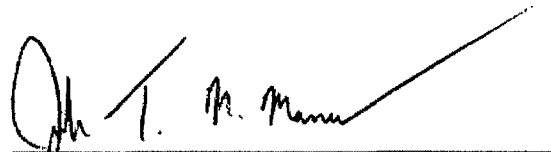
4. Attached hereto as Exhibit "A" is a copy of the agenda for the February 6, 2006 Village Board of Trustees meeting concerning the purported condemnation of the BSOR Croton Yard.

5. Attached hereto as Exhibit "B" is a copy of the full environmental assessment form the Village adopted as part of its New York State Environmental Quality Review Act review for the purported condemnation of the BSOR Croton Yard.

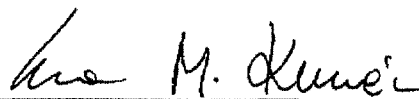
6. Attached hereto as Exhibit "C" is a copy of an article from The Journal News dated April 18, 2006, concerning the purported condemnation of the BSOR Croton Yard.

7. Attached hereto as Exhibit "D" is a copy of the "Legal Notice" of the Village's "scoping session" that was held on April 3, 2006, concerning the purported condemnation of the BSOR Croton Yard.

8. Attached hereto as Exhibit "E" is a copy of an Order dated March 14, 2006, in the action styled as New York, Susquehanna & W. Ry. Corp. v. City of Paterson, No. 05-2338 (D. N.J. Mar. 14, 2006) (order granting summary judgment and permanent injunction to plaintiff).


John T. McManus
JM5473

Sworn to before me this 12th
day of May, 2006


Notary Public

EWA M. KRAWIEC
Notary Public State of New York
Qualified in Saratoga County
No. 01KR6050386
Commission Expires November 6, 2006

EXHIBIT "A"



Stanley H. Kellerhouse Municipal Building
One Van Wyck Street
Croton-on-Hudson, NY 10520-2501

Mayor
Dr. Gregory J. Schmidt

Trustees
Thomas P. Brennan
Charles A. Kane
James M. Steinberg
Leo A. W. Wiegman

Manager
Richard F. Herbek

Treasurer
Abraham J. Zambrano

Clerk
Margaret Keesler

Engineer
Daniel F. O'Connor, P.E.

AGENDA FOR REGULAR MEETING OF MONDAY, FEBRUARY 6, 2006

Present/Absent	Mayor Schmidt	Trustee Brennan
	Trustee Kane	Trustee Steinberg
	Trustee Wiegman	Manager Herbek
	Attorney Stecich	Treasurer Zambrano

1. Call to order at _____. Pledge of Allegiance.

2. Approval of Vouchers:

General Fund
Water Fund
Capital Acct.
Trust & Agency

3. PUBLIC HEARING

To determine the Village's need for the property owned by Greentree Realty, LLC, 1A Croton Point Avenue, Section 78.16 Block 2 Lots 1 and 2 as the first step in the process of acquiring the property by eminent domain

4. CORRESPONDENCE

- Anthony Amato, Green Power Partnership Account Manager, re: Green Power Leadership Club
- Craig Kominski, NYS Office of Real Property Services, re: Residential Assessment Ratio
- Donald DeWitt, NYS Board of Real Property Services, re: Certificate of Final Railroad Ceiling
- Croton Senior Citizens Club, re: Closing of the Village Skate Park
- Thomas Belfiore, Commissioner of Public Safety, re: Countywide Dangerous Dog Registry

- f. Joseph Ferone, Ferone & Feone, re: 21 Cook Lane
- g. Ann Gallelli, Planning Board Chair, re: Twindominiums
- h. Andrew Spano, County Executive, re: Eminent Domain Legislation
- i. Andrew Spano, County Executive, re: Wine Cellars at Croton Point Park

5. CITIZEN PARTICIPATION – AGENDA ITEMS

6. RESOLUTIONS

- a. Appointment of election inspectors
- b. Declaring the Village Board of Trustees' intent to act as lead agency for the SEQRA review of the acquisition of the property at 1A Croton Point Avenue and the construction of a new facility for DPW and other village uses and authorizing the circulation of the Environmental Assessment form to all interested and involved agencies.

7. CITIZEN PARTICIPATION – NON-AGENDA ITEMS

8. APPROVAL OF MINUTES: January 17, 2006

9. REPORTS

EXHIBIT "B"

617.20
Appendix A
State Environmental Quality Review
FULL ENVIRONMENTAL ASSESSMENT FORM

Purpose: The full EAF is designed to help applicants and agencies determine, in an orderly manner, whether a project or action may be significant. The question of whether an action may be significant is not always easy to answer. Frequently, there are aspects of a project that are subjective or unmeasurable. It is also understood that those who determine significance may have little or no formal knowledge of the environment or may not be technically expert in environmental analysis. In addition, many who have knowledge in one particular area may not be aware of the broader concerns affecting the question of significance.

The full EAF is intended to provide a method whereby applicants and agencies can be assured that the determination process has been orderly, comprehensive in nature, yet flexible enough to allow introduction of information to fit a project or action.

Full EAF Components: The full EAF is comprised of three parts:

- Part 1:** Provides objective data and information about a given project and its site. By identifying basic project data, it assists a reviewer in the analysis that takes place in Parts 2 and 3.
- Part 2:** Focuses on identifying the range of possible impacts that may occur from a project or action. It provides guidance as to whether an impact is likely to be considered small to moderate or whether it is a potentially-large impact. The form also identifies whether an impact can be mitigated or reduced.
- Part 3:** If any impact in Part 2 is identified as potentially-large, then Part 3 is used to evaluate whether or not the impact is actually important.

THIS AREA FOR LEAD AGENCY USE ONLY

DETERMINATION OF SIGNIFICANCE -- Type 1 and Unlisted Actions

Identify the Portions of EAF completed for this project:



Part 1



Part 2



Part 3

Upon review of the information recorded on this EAF (Parts 1 and 2 and 3 if appropriate), and any other supporting information, and considering both the magnitude and importance of each impact, it is reasonably determined by the lead agency that:

- ☐ A. The project will not result in any large and important impact(s) and, therefore, is one which **will not** have a significant impact on the environment, therefore **a negative declaration will be prepared.**
- ☐ B. Although the project could have a significant effect on the environment, there will not be a significant effect for this Unlisted Action because the mitigation measures described in PART 3 have been required, therefore **a CONDITIONED negative declaration will be prepared.***
- ☐ C. The project may result in one or more large and important impacts that may have a significant impact on the environment, therefore **a positive declaration will be prepared.**

*A Conditioned Negative Declaration is only valid for Unlisted Actions

Condemnation of property at 1A Croton Pt Ave through eminent domain and construction of facility for DPW and other Village uses at site

Name of Action

Board of Trustees

Name of Lead Agency

Richard F. Herbek

Village Manager

Print or Type Name of Responsible Officer in Lead Agency

Title of Responsible Officer

Signature of Responsible Officer in Lead Agency

Signature of Preparer (If different from responsible officer)

2-6-06

Date

PART 1--PROJECT INFORMATION

Prepared by Project Sponsor

NOTICE: This document is designed to assist in determining whether the action proposed may have a significant effect on the environment. Please complete the entire form, Parts A through E. Answers to these questions will be considered as part of the application for approval and may be subject to further verification and public review. Provide any additional information you believe will be needed to complete Parts 2 and 3.

It is expected that completion of the full EAF will be dependent on information currently available and will not involve new studies, research or investigation. If information requiring such additional work is unavailable, so indicate and specify each instance.

Name of Action Condemnation of property at 1A Croton Pt Ave through eminent domain and construction of facility for DPW and other Village uses at site

Location of Action (include Street Address, Municipality and County) _____

1 A Croton Point Avenue, Croton on Hudson, Westchester County

Name of Applicant/Sponsor Village of Croton Board of Trustees

Address 1 Van Wyck Street

City / PO Croton on Hudson State NY Zip Code 10520

Business Telephone 914 271-4848

Name of Owner (if different) Greentree Realty, LLC

Address 100 South Bedford Road, Suite 150

City / PO Mt Kisco State NY Zip Code 10549

Business Telephone _____

Description of Action:

The Village intends to acquire the property at 1A Croton Point Avenue through eminent domain and utilize this site for its Department of Public Works facility and other public uses. This site will be used to unify the public works facility, office and storage areas. The Village will house all of its public works equipment and vehicles here as well as store its new materials including: sand, clay, item 4, concrete, salt, dirt, wood chips; and excavated and waste materials and leaves. The new facility will include offices for DPW staff, Water Department staff, and Parks Department staff, locker rooms, conference and training room, indoor equipment storage (for DPW and Parks departments) and a separate central garage repair and parts storage area. The site will support all DPW operations as well as provide a staging area for future construction contracts. Compost and wood chips will be stored here and made available to the public. In addition approximately 100 parking spaces will be constructed to be used as overflow parking for the Croton-Harmon train station.

Please Complete Each Question--Indicate N.A. if not applicable

A. SITE DESCRIPTION

Physical setting of overall project, both developed and undeveloped areas.

1. Present Land Use: ☐ Urban ☒ Industrial ☐ Commercial ☐ Residential (suburban) ☐ Rural (non-farm)
☐ Forest ☐ Agriculture ☐ Other _____

2. Total acreage of project area: 9.8 acres.

APPROXIMATE ACREAGE	PRESENTLY	AFTER COMPLETION
Meadow or Brushland (Non-agricultural)	_____ acres	_____ acres
Forested <u>existing berms/buffer on east and north side of site</u>	<u>1.0</u> acres	<u>1.0</u> acres
Agricultural (Includes orchards, cropland, pasture, etc.)	_____ acres	_____ acres
Wetland (Freshwater or tidal as per Articles 24,25 of ECL)	_____ acres	_____ acres
Water Surface Area	_____ acres	_____ acres
Unvegetated (Rock, earth or fill)	<u>7.3</u> acres	<u>5.0</u> acres
Roads, buildings and other paved surfaces	<u>0.3</u> acres	<u>3.7</u> acres
Other (Indicate type) <u>presently-rail spur/after-screening buffer and lawn</u>	<u>1.2</u> acres	<u>0.1</u> acres

3. What is predominant soil type(s) on project site?
- a. Soil drainage: ☒ Well drained 100 % of site ☐ Moderately well drained _____ % of site.
☐ Poorly drained _____ % of site
- b. If any agricultural land is involved, how many acres of soil are classified within soil group 1 through 4 of the NYS Land Classification System? _____ acres (see 1 NYCRR 370).
4. Are there bedrock outcroppings on project site? ☐ Yes ☒ No
- a. What is depth to bedrock ≤ 6 _____ (in feet)
5. Approximate percentage of proposed project site with slopes:
☒ 0-10% 83 % ☒ 10- 15% 9 % ☒ 15% or greater 8 %
6. Is project substantially contiguous to, or contain a building, site, or district, listed on the State or National Registers of Historic Places? ☐ Yes ☒ No
7. Is project substantially contiguous to a site listed on the Register of National Natural Landmarks? ☐ Yes ☒ No
8. What is the depth of the water table? 7 to 12 (in feet)
9. Is site located over a primary, principal, or sole source aquifer? ☐ Yes ☒ No
10. Do hunting, fishing or shell fishing opportunities presently exist in the project area? ☐ Yes ☒ No

11. Does project site contain any species of plant or animal life that is identified as threatened or endangered? ☐ Yes ☒ No

According to:

Site visit by Village Staff

Identify each species:

12. Are there any unique or unusual land forms on the project site? (i.e., cliffs, dunes, other geological formations?)

☐ Yes ☒ No

Describe:

13. Is the project site presently used by the community or neighborhood as an open space or recreation area?

☐ Yes ☒ No

If yes, explain:

14. Does the present site include scenic views known to be important to the community? ☐ Yes ☒ No

15. Streams within or contiguous to project area:

N/A

a. Name of Stream and name of River to which it is tributary

16. Lakes, ponds, wetland areas within or contiguous to project area:

N/A

b. Size (in acres):

17. Is the site served by existing public utilities? ☒ Yes ☐ No
- a. If YES, does sufficient capacity exist to allow connection? ☒ Yes ☐ No
- b. If YES, will improvements be necessary to allow connection? ☒ Yes ☐ No
18. Is the site located in an agricultural district certified pursuant to Agriculture and Markets Law, Article 25-AA, Section 303 and 304? ☐ Yes ☒ No
19. Is the site located in or substantially contiguous to a Critical Environmental Area designated pursuant to Article 8 of the ECL, and 6 NYCRR 617? ☒ Yes ☐ No

20. Has the site ever been used for the disposal of solid or hazardous wastes? ☐ Yes ☒ No

B. Project Description

1. Physical dimensions and scale of project (fill in dimensions as appropriate).

- a. Total contiguous acreage owned or controlled by project sponsor: 0 acres.
- b. Project acreage to be developed: 8.8 acres initially; 8.8 acres ultimately.
- c. Project acreage to remain undeveloped: 1.0 acres.
- d. Length of project, in miles: N/A (if appropriate)
- e. If the project is an expansion, indicate percent of expansion proposed. N/A %
- f. Number of off-street parking spaces existing 3; proposed ~150
- g. Maximum vehicular trips generated per hour: 30 (upon completion of project)?
- h. If residential: Number and type of housing units:

	One Family	Two Family	Multiple Family	Condominium
Initially	<u>N/A</u>	<u>N/A</u>	<u>N/A</u>	<u>N/A</u>
Ultimately	<u>N/A</u>	<u>N/A</u>	<u>N/A</u>	<u>N/A</u>

- i. Dimensions (in feet) of largest proposed structure: 24 height; 100 width; 300 length.
- j. Linear feet of frontage along a public thoroughfare project will occupy is? 40 ft.

2. How much natural material (i.e. rock, earth, etc.) will be removed from the site? 0 tons/cubic yards.

3. Will disturbed areas be reclaimed ☒ Yes ☐ No ☐ N/A

a. If yes, for what intended purpose is the site being reclaimed?

lawn and screening buffer

b. Will topsoil be stockpiled for reclamation? ☒ Yes ☐ No

c. Will upper subsoil be stockpiled for reclamation? ☒ Yes ☐ No

4. How many acres of vegetation (trees, shrubs, ground covers) will be removed from site? < 1 acres.

5. Will any mature forest (over 100 years old) or other locally-important vegetation be removed by this project?

☐ Yes ☒ No

6. If single phase project: Anticipated period of construction: _____ months, (including demolition)

7. If multi-phased:

a. Total number of phases anticipated 2 (number)

b. Anticipated date of commencement phase 1: Feb month 2006 year, (including demolition)

c. Approximate completion date of final phase: Feb month 2009 year.

d. Is phase 1 functionally dependent on subsequent phases? ☐ Yes ☒ No

8. Will blasting occur during construction? ☐ Yes ☒ No

9. Number of jobs generated: during construction 25; after project is complete 0 (30 employees will be relocated to site)

10. Number of jobs eliminated by this project 1.

11. Will project require relocation of any projects or facilities? ☒ Yes ☐ No

If yes, explain:

The Public Works facility currently located at the Croton-Harmon Train Station and the DPW and Parks and Recreation storage areas currently located at Municipal Place, the Metro-North East Yard, the Wellfields, Black Rock Park, and the Municipal Building will be relocated to this property.

12. Is surface liquid waste disposal involved? ☐ Yes ☒ No

a. If yes, indicate type of waste (sewage, industrial, etc) and amount _____

b. Name of water body into which effluent will be discharged _____

13. Is subsurface liquid waste disposal involved? ☐ Yes ☒ No Type _____

14. Will surface area of an existing water body increase or decrease by proposal? ☐ Yes ☒ No

If yes, explain:

15. Is project or any portion of project located in a 100 year flood plain? ☐ Yes ☒ No

16. Will the project generate solid waste? ☒ Yes ☐ No

a. If yes, what is the amount per month? < 1 tons

b. If yes, will an existing solid waste facility be used? ☒ Yes ☐ No

c. If yes, give name Charles Pt Recourse Recovery Facility; location Peekskill

d. Will any wastes not go into a sewage disposal system or into a sanitary landfill? ☒ Yes ☐ No

e. If yes, explain:

Recyclables, used vehicle fluids including motor oil, transmission, antifreeze, hydraulic oil, batteries, tires. These materials will be recycled at an off-site location.

17. Will the project involve the disposal of solid waste? ☐ Yes ☒ No

a. If yes, what is the anticipated rate of disposal? _____ tons/month.

b. If yes, what is the anticipated site life? _____ years.

18. Will project use herbicides or pesticides? ☐ Yes ☒ No

19. Will project routinely produce odors (more than one hour per day)? ☐ Yes ☒ No

20. Will project produce operating noise exceeding the local ambient noise levels? ☐ Yes ☒ No

21. Will project result in an increase in energy use? ☒ Yes ☐ No

If yes, indicate type(s)

Electric, oil - any increase will be minor since this is a relocation of a presently existing facility

22. If water supply is from wells, indicate pumping capacity N/A gallons/minute.

23. Total anticipated water usage per day 2000 gallons/day.

24. Does project involve Local, State or Federal funding? ☒ Yes ☐ No

If yes, explain:

Local Village funds will be used to pay for property and for construction of new facility

25. Approvals Required:

		Type	Submittal Date
City, Town, Village Board	☒ Yes ☐ No	<u>Resolution to proceed</u>	_____
		<u>with eminent domain</u>	_____
		<u>Resolution to borrow funds</u>	_____
City, Town, Village Planning Board	☐ Yes ☒ No	_____	_____
		_____	_____
		_____	_____
City, Town Zoning Board	☐ Yes ☒ No	_____	_____
		_____	_____
		_____	_____
City, County Health Department	☒ Yes ☐ No	<u>Backflow prevention device</u>	_____
		_____	_____
		_____	_____
Other Local Agencies	☒ Yes ☐ No	<u>WAC-consistency review</u>	_____
		_____	_____
		_____	_____
Other Regional Agencies	☒ Yes ☐ No	<u>Metro-North</u>	_____
		_____	_____
		_____	_____
State Agencies	☒ Yes ☐ No	<u>New York State Dept of</u>	_____
		<u>State</u>	_____
		_____	_____
Federal Agencies	☐ Yes ☐ No	_____	_____
		_____	_____
		_____	_____

C. Zoning and Planning Information

1. Does proposed action involve a planning or zoning decision? ☐ Yes ☒ No

If Yes, indicate decision required:

☐ Zoning amendment	☐ Zoning variance	☐ New/revision of master plan	☐ Subdivision
☐ Site plan	☐ Special use permit	☐ Resource management plan	☐ Other

2. What is the zoning classification(s) of the site?

Light Industrial

3. What is the maximum potential development of the site if developed as permitted by the present zoning?

several warehouse buildings up to 213,00 sq feet in total based on floor/area ratio in zoning code

4. What is the proposed zoning of the site?

N/A

5. What is the maximum potential development of the site if developed as permitted by the proposed zoning?

N/A

6. Is the proposed action consistent with the recommended uses in adopted local land use plans? ☒ Yes ☐ No

7. What are the predominant land use(s) and zoning classifications within a ¼ mile radius of proposed action?

Light Industrial, Waterfront Development, Commercial C-2, Residential RA-5, Limited Office O-1, Residential RB

8. Is the proposed action compatible with adjoining/surrounding land uses with a ¼ mile? ☒ Yes ☐ No

9. If the proposed action is the subdivision of land, how many lots are proposed? N/A

- a. What is the minimum lot size proposed? _____

10. Will proposed action require any authorization(s) for the formation of sewer or water districts? ☐ Yes ☒ No

11. Will the proposed action create a demand for any community provided services (recreation, education, police, fire protection)?

☒ Yes

☐ No

Fire protection of new
building

a. If yes, is existing capacity sufficient to handle projected demand?

☒ Yes

☐ No

12. Will the proposed action result in the generation of traffic significantly above present levels?

☐ Yes

☒ No

a. If yes, is the existing road network adequate to handle the additional traffic.

☐ Yes

☐ No

D. Informational Details

Attach any additional information as may be needed to clarify your project. If there are or may be any adverse impacts associated with your proposal, please discuss such impacts and the measures which you propose to mitigate or avoid them.

E. Verification

I certify that the information provided above is true to the best of my knowledge.

Applicant/Sponsor Name Richard F. Herbek

Date 2-6-06

Signature _____

Title Village Manager

If the action is in the Coastal Area, and you are a state agency, complete the Coastal Assessment Form before proceeding with this assessment.

PART 2 - PROJECT IMPACTS AND THEIR MAGNITUDE

Responsibility of Lead Agency

General Information (Read Carefully)

- ! In completing the form the reviewer should be guided by the question: Have my responses and determinations been **reasonable?** The reviewer is not expected to be an expert environmental analyst.
- ! The **Examples** provided are to assist the reviewer by showing types of impacts and wherever possible the threshold of magnitude that would trigger a response in column 2. The examples are generally applicable throughout the State and for most situations. But, for any specific project or site other examples and/or lower thresholds may be appropriate for a Potential Large Impact response, thus requiring evaluation in Part 3.
- ! The impacts of each project, on each site, in each locality, will vary. Therefore, the examples are illustrative and have been offered as guidance. They do not constitute an exhaustive list of impacts and thresholds to answer each question.
- ! The number of examples per question does not indicate the importance of each question.
- ! In identifying impacts, consider long term, short term and cumulative effects.

Instructions (Read carefully)

- a. Answer each of the 20 questions in PART 2. Answer **Yes** if there will be any impact.
- b. **Maybe** answers should be considered as **Yes** answers.
- c. If answering **Yes** to a question then check the appropriate box(column 1 or 2)to indicate the potential size of the impact. If impact threshold equals or exceeds any example provided, check column 2. If impact will occur but threshold is lower than example, check column 1.
- d. Identifying that an Impact will be potentially large (column 2) does not mean that it is also necessarily **significant**. Any large impact must be evaluated in PART 3 to determine significance. Identifying an impact in column 2 simply asks that it be looked at further.
- e. If reviewer has doubt about size of the impact then consider the impact as potentially large and proceed to PART 3.
- f. If a potentially large impact checked in column 2 can be mitigated by change(s) in the project to a small to moderate impact, also check the **Yes** box in column 3. A **No** response indicates that such a reduction is not possible. This must be explained in Part 3.

1	2	3
Small to Moderate Impact	Potential Large Impact	Can Impact Be Mitigated by Project Change

Impact on Land

1. Will the Proposed Action result in a physical change to the project site?

NO ☐ YES ☒

Examples that would apply to column 2

- | | | | | |
|--|-------------------------------------|--------------------------|------------------------------|-----------------------------|
| • Any construction on slopes of 15% or greater, (15 foot rise per 100 foot of length), or where the general slopes in the project area exceed 10%. | ☐ | ☐ | ☐ Yes | ☐ No |
| • Construction on land where the depth to the water table is less than 3 feet. | ☐ | ☐ | ☐ Yes | ☐ No |
| • Construction of paved parking area for 1,000 or more vehicles. | ☐ | ☐ | ☐ Yes | ☐ No |
| • Construction on land where bedrock is exposed or generally within 3 feet of existing ground surface. | ☐ | ☐ | ☐ Yes | ☐ No |
| • Construction that will continue for more than 1 year or involve more than one phase or stage. | ☒ | ☐ | ☐ Yes | ☐ No |
| • Excavation for mining purposes that would remove more than 1,000 tons of natural material (i.e., rock or soil) per year. | ☐ | ☐ | ☐ Yes | ☐ No |

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Can Impact Be
Mitigated by
Project Change |
|---|-------------------------------------|-----------------------------------|--|
| • Construction or expansion of a sanitary landfill. | ☐ | ☐ | ☐ Yes ☐ No |
| • Construction in a designated floodway. | ☐ | ☐ | ☐ Yes ☐ No |
| • Other impacts: | ☐ | ☐ | ☐ Yes ☐ No |

2. Will there be an effect to any unique or unusual land forms found on the site? (i.e., cliffs, dunes, geological formations, etc.)

☒ NO ☐ YES

- | | 1
Small to
Moderate
Impact | 2
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Impact | 3
Can Impact Be
Mitigated by
Project Change |
|------------------------|-------------------------------------|-----------------------------------|--|
| • Specific land forms: | ☐ | ☐ | ☐ Yes ☐ No |

Impact on Water

3. Will Proposed Action affect any water body designated as protected? (Under Articles 15, 24, 25 of the Environmental Conservation Law, ECL)

☒ NO ☐ YES

Examples that would apply to column 2

- | | | | |
|--|--------------------------|--------------------------|--|
| • Developable area of site contains a protected water body. | ☐ | ☐ | ☐ Yes ☐ No |
| • Dredging more than 100 cubic yards of material from channel of a protected stream. | ☐ | ☐ | ☐ Yes ☐ No |
| • Extension of utility distribution facilities through a protected water body. | ☐ | ☐ | ☐ Yes ☐ No |
| • Construction in a designated freshwater or tidal wetland. | ☐ | ☐ | ☐ Yes ☐ No |
| • Other impacts: | ☐ | ☐ | ☐ Yes ☐ No |

4. Will Proposed Action affect any non-protected existing or new body of water?

☒ NO ☐ YES

Examples that would apply to column 2

- | | | | |
|--|--------------------------|--------------------------|--|
| • A 10% increase or decrease in the surface area of any body of water or more than a 10 acre increase or decrease. | ☐ | ☐ | ☐ Yes ☐ No |
| • Construction of a body of water that exceeds 10 acres of surface area. | ☐ | ☐ | ☐ Yes ☐ No |
| • Other impacts: | ☐ | ☐ | ☐ Yes ☐ No |

1	2	3
Small to Moderate Impact	Potential Large Impact	Can Impact Be Mitigated by Project Change

5. Will Proposed Action affect surface or groundwater quality or quantity?

☐ NO ☒ YES

Examples that would apply to column 2

- | | | | |
|--|--------------------------|-------------------------------------|---|
| • Proposed Action will require a discharge permit. | ☐ | ☐ | ☐ Yes ☐ No |
| • Proposed Action requires use of a source of water that does not have approval to serve proposed (project) action. | ☐ | ☐ | ☐ Yes ☐ No |
| • Proposed Action requires water supply from wells with greater than 45 gallons per minute pumping capacity. | ☐ | ☐ | ☐ Yes ☐ No |
| • Construction or operation causing any contamination of a water supply system. | ☐ | ☐ | ☐ Yes ☐ No |
| • Proposed Action will adversely affect groundwater. | ☐ | ☐ | ☐ Yes ☐ No |
| • Liquid effluent will be conveyed off the site to facilities which presently do not exist or have inadequate capacity. | ☐ | ☐ | ☐ Yes ☐ No |
| • Proposed Action would use water in excess of 20,000 gallons per day. | ☐ | ☐ | ☐ Yes ☐ No |
| • Proposed Action will likely cause siltation or other discharge into an existing body of water to the extent that there will be an obvious visual contrast to natural conditions. | ☐ | ☐ | ☐ Yes ☐ No |
| • Proposed Action will require the storage of petroleum or chemical products greater than 1,100 gallons. | ☐ | ☒ | ☒ Yes ☐ No |
| • Proposed Action will allow residential uses in areas without water and/or sewer services. | ☐ | ☐ | ☐ Yes ☐ No |
| • Proposed Action locates commercial and/or industrial uses which may require new or expansion of existing waste treatment and/or storage facilities. | ☐ | ☐ | ☐ Yes ☐ No |
| • Other impacts: | ☐ | ☐ | ☐ Yes ☐ No |

1 Small to Moderate Impact	2 Potential Large Impact	3 Can Impact Be Mitigated by Project Change
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6. Will Proposed Action alter drainage flow or patterns, or surface water runoff?

☒ NO ☐ YES

Examples that would apply to column 2

- | | | | | |
|--|--------------------------|--------------------------|------------------------------|-----------------------------|
| • Proposed Action would change flood water flows | ☐ | ☐ | ☐ Yes | ☐ No |
| • Proposed Action may cause substantial erosion. | ☐ | ☐ | ☐ Yes | ☐ No |
| • Proposed Action is incompatible with existing drainage patterns. | ☐ | ☐ | ☐ Yes | ☐ No |
| • Proposed Action will allow development in a designated floodway. | ☐ | ☐ | ☐ Yes | ☐ No |
| • Other impacts: | ☐ | ☐ | ☐ Yes | ☐ No |

IMPACT ON AIR

7. Will Proposed Action affect air quality?

☒ NO ☐ YES

Examples that would apply to column 2

- | | | | | |
|---|--------------------------|--------------------------|------------------------------|-----------------------------|
| • Proposed Action will induce 1,000 or more vehicle trips in any given hour. | ☐ | ☐ | ☐ Yes | ☐ No |
| • Proposed Action will result in the incineration of more than 1 ton of refuse per hour. | ☐ | ☐ | ☐ Yes | ☐ No |
| • Emission rate of total contaminants will exceed 5 lbs. per hour or a heat source producing more than 10 million BTU's per hour. | ☐ | ☐ | ☐ Yes | ☐ No |
| • Proposed Action will allow an increase in the amount of land committed to industrial use. | ☐ | ☐ | ☐ Yes | ☐ No |
| • Proposed Action will allow an increase in the density of industrial development within existing industrial areas. | ☐ | ☐ | ☐ Yes | ☐ No |
| • Other impacts: | ☐ | ☐ | ☐ Yes | ☐ No |

IMPACT ON PLANTS AND ANIMALS

8. Will Proposed Action affect any threatened or endangered species?

☒ NO ☐ YES

Examples that would apply to column 2

- | | | | | |
|---|--------------------------|--------------------------|------------------------------|-----------------------------|
| • Reduction of one or more species listed on the New York or Federal list, using the site, over or near the site, or found on the site. | ☐ | ☐ | ☐ Yes | ☐ No |
|---|--------------------------|--------------------------|------------------------------|-----------------------------|

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Can Impact Be
Mitigated by
Project Change |
|---|-------------------------------------|-----------------------------------|--|
| • Removal of any portion of a critical or significant wildlife habitat. | ☐ | ☐ | ☐ Yes ☐ No |
| • Application of pesticide or herbicide more than twice a year, other than for agricultural purposes. | ☐ | ☐ | ☐ Yes ☐ No |
| • Other impacts: | ☐ | ☐ | ☐ Yes ☐ No |

9. Will Proposed Action substantially affect non-threatened or non-endangered species?

☒ NO ☐ YES

Examples that would apply to column 2

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Can Impact Be
Mitigated by
Project Change |
|--|-------------------------------------|-----------------------------------|--|
| • Proposed Action would substantially interfere with any resident or migratory fish, shellfish or wildlife species. | ☐ | ☐ | ☐ Yes ☐ No |
| • Proposed Action requires the removal of more than 10 acres of mature forest (over 100 years of age) or other locally important vegetation. | ☐ | ☐ | ☐ Yes ☐ No |
| • Other impacts: | ☐ | ☐ | ☐ Yes ☐ No |

IMPACT ON AGRICULTURAL LAND RESOURCES

10. Will Proposed Action affect agricultural land resources?

☒ NO ☐ YES

Examples that would apply to column 2

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Project Change |
|--|-------------------------------------|-----------------------------------|--|
| • The Proposed Action would sever, cross or limit access to agricultural land (includes cropland, hayfields, pasture, vineyard, orchard, etc.) | ☐ | ☐ | ☐ Yes ☐ No |
| • Construction activity would excavate or compact the soil profile of agricultural land. | ☐ | ☐ | ☐ Yes ☐ No |
| • The Proposed Action would irreversibly convert more than 10 acres of agricultural land or, if located in an Agricultural District, more than 2.5 acres of agricultural land. | ☐ | ☐ | ☐ Yes ☐ No |

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Can Impact Be
Mitigated by
Project Change |
|---|-------------------------------------|-----------------------------------|--|
| • The Proposed Action would disrupt or prevent installation of agricultural land management systems (e.g., subsurface drain lines, outlet ditches, strip cropping); or create a need for such measures (e.g. cause a farm field to drain poorly due to increased runoff). | ☐ | ☐ | ☐ Yes ☐ No |
| • Other impacts: | ☐ | ☐ | ☐ Yes ☐ No |

IMPACT ON AESTHETIC RESOURCES

11. Will Proposed Action affect aesthetic resources? (if necessary, use the Visual EAF Addendum in Section 617.20, Appendix B.)

☒ NO ☐ YES

Examples that would apply to column 2

- | | | | |
|---|--------------------------|--------------------------|--|
| • Proposed land uses, or project components obviously different from or in sharp contrast to current surrounding land use patterns, whether man-made or natural. | ☐ | ☐ | ☐ Yes ☐ No |
| • Proposed land uses, or project components visible to users of aesthetic resources which will eliminate or significantly reduce their enjoyment of the aesthetic qualities of that resource. | ☐ | ☐ | ☐ Yes ☐ No |
| • Project components that will result in the elimination or significant screening of scenic views known to be important to the area. | ☐ | ☐ | ☐ Yes ☐ No |
| • Other impacts: | ☐ | ☐ | ☐ Yes ☐ No |

IMPACT ON HISTORIC AND ARCHAEOLOGICAL RESOURCES

12. Will Proposed Action impact any site or structure of historic, prehistoric or paleontological importance?

☒ NO ☐ YES

Examples that would apply to column 2

- | | | | |
|---|--------------------------|--------------------------|--|
| • Proposed Action occurring wholly or partially within or substantially contiguous to any facility or site listed on the State or National Register of historic places. | ☐ | ☐ | ☐ Yes ☐ No |
| • Any impact to an archaeological site or fossil bed located within the project site. | ☐ | ☐ | ☐ Yes ☐ No |
| • Proposed Action will occur in an area designated as sensitive for archaeological sites on the NYS Site Inventory. | ☐ | ☐ | ☐ Yes ☐ No |

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Project Change |
|------------------|-------------------------------------|-----------------------------------|--|
| • Other impacts: | ☐ | ☐ | ☐ Yes ☐ No |

IMPACT ON OPEN SPACE AND RECREATION

13. Will proposed Action affect the quantity or quality of existing or future open spaces or recreational opportunities?

☒ NO ☐ YES

Examples that would apply to column 2

- | | | | |
|---|--------------------------|--------------------------|--|
| • The permanent foreclosure of a future recreational opportunity. | ☐ | ☐ | ☐ Yes ☐ No |
| • A major reduction of an open space important to the community. | ☐ | ☐ | ☐ Yes ☐ No |
| • Other impacts: | ☐ | ☐ | ☐ Yes ☐ No |

IMPACT ON CRITICAL ENVIRONMENTAL AREAS

14. Will Proposed Action impact the exceptional or unique characteristics of a critical environmental area (CEA) established pursuant to subdivision 6NYCRR 617.14(g)?

☒ NO ☐ YES

List the environmental characteristics that caused the designation of the CEA.

The project area lies within the CEA designated by Westchester County (Hudson River Shoreline) because it lies between the Hudson River shoreline and Route 9. However, the project area lies east of the Half Moon Bay condominium complex and east of the Metro North train tracks and west of Route 9. Construction of the DPW facility and the proposed uses will have little or no impact to the Hudson River.

Examples that would apply to column 2

- | | | | |
|---|--------------------------|--------------------------|--|
| • Proposed Action to locate within the CEA? | ☐ | ☐ | ☐ Yes ☐ No |
| • Proposed Action will result in a reduction in the quantity of the resource? | ☐ | ☐ | ☐ Yes ☐ No |
| • Proposed Action will result in a reduction in the quality of the resource? | ☐ | ☐ | ☐ Yes ☐ No |
| • Proposed Action will impact the use, function or enjoyment of the resource? | ☐ | ☐ | ☐ Yes ☐ No |
| • Other impacts: | ☐ | ☐ | ☐ Yes ☐ No |

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Can Impact Be
Mitigated by
Project Change

IMPACT ON TRANSPORTATION

15. Will there be an effect to existing transportation systems?

☒ NO ☐ YES

Examples that would apply to column 2

- Alteration of present patterns of movement of people and/or goods. ☐ ☐ ☐ Yes ☐ No
- Proposed Action will result in major traffic problems. ☐ ☐ ☐ Yes ☐ No
- Other impacts: ☐ ☐ ☐ Yes ☐ No

IMPACT ON ENERGY

16. Will Proposed Action affect the community's sources of fuel or energy supply?

☒ NO ☐ YES

Examples that would apply to column 2

- Proposed Action will cause a greater than 5% increase in the use of any form of energy in the municipality. ☐ ☐ ☐ Yes ☐ No
- Proposed Action will require the creation or extension of an energy transmission or supply system to serve more than 50 single or two family residences or to serve a major commercial or industrial use. ☐ ☐ ☐ Yes ☐ No
- Other impacts: ☐ ☐ ☐ Yes ☐ No

NOISE AND ODOR IMPACT

17. Will there be objectionable odors, noise, or vibration as a result of the Proposed Action?

☒ NO ☐ YES

Examples that would apply to column 2

- Blasting within 1,500 feet of a hospital, school or other sensitive facility. ☐ ☐ ☐ Yes ☐ No
- Odors will occur routinely (more than one hour per day). ☐ ☐ ☐ Yes ☐ No
- Proposed Action will produce operating noise exceeding the local ambient noise levels for noise outside of structures. ☐ ☐ ☐ Yes ☐ No
- Proposed Action will remove natural barriers that would act as a noise screen. ☐ ☐ ☐ Yes ☐ No
- Other impacts: ☐ ☐ ☐ Yes ☐ No

1	2	3
Small to Moderate Impact	Potential Large Impact	Can Impact Be Mitigated by Project Change

IMPACT ON PUBLIC HEALTH

18. Will Proposed Action affect public health and safety?

☒ NO ☐ YES

- | | | | |
|--|--------------------------|--------------------------|--|
| • Proposed Action may cause a risk of explosion or release of hazardous substances (i.e. oil, pesticides, chemicals, radiation, etc.) in the event of accident or upset conditions, or there may be a chronic low level discharge or emission. | ☐ | ☐ | ☐ Yes ☐ No |
| • Proposed Action may result in the burial of "hazardous wastes" in any form (i.e. toxic, poisonous, highly reactive, radioactive, irritating, infectious, etc.) | ☐ | ☐ | ☐ Yes ☐ No |
| • Storage facilities for one million or more gallons of liquefied natural gas or other flammable liquids. | ☐ | ☐ | ☐ Yes ☐ No |
| • Proposed Action may result in the excavation or other disturbance within 2,000 feet of a site used for the disposal of solid or hazardous waste. | ☐ | ☐ | ☐ Yes ☐ No |
| • Other impacts: | ☐ | ☐ | ☐ Yes ☐ No |

IMPACT ON GROWTH AND CHARACTER OF COMMUNITY OR NEIGHBORHOOD

19. Will Proposed Action affect the character of the existing community?

☒ NO ☐ YES

Examples that would apply to column 2

- | | | | |
|---|--------------------------|--------------------------|--|
| • The permanent population of the city, town or village in which the project is located is likely to grow by more than 5%. | ☐ | ☐ | ☐ Yes ☐ No |
| • The municipal budget for capital expenditures or operating services will increase by more than 5% per year as a result of this project. | ☐ | ☐ | ☐ Yes ☐ No |
| • Proposed Action will conflict with officially adopted plans or goals. | ☐ | ☐ | ☐ Yes ☐ No |
| • Proposed Action will cause a change in the density of land use. | ☐ | ☐ | ☐ Yes ☐ No |
| • Proposed Action will replace or eliminate existing facilities, structures or areas of historic importance to the community. | ☐ | ☐ | ☐ Yes ☐ No |
| • Development will create a demand for additional community services (e.g. schools, police and fire, etc.) | ☐ | ☐ | ☐ Yes ☐ No |

	1 Small to Moderate Impact	2 Potential Large Impact	3 Can Impact Be Mitigated by Project Change
• Proposed Action will set an important precedent for future projects.	☐	☐	☐ Yes ☐ No
• Proposed Action will create or eliminate employment.	☐	☐	☐ Yes ☐ No
• Other impacts:	☐	☐	☐ Yes ☐ No

20. Is there, or is there likely to be, public controversy related to potential adverse environment impacts?

☒ NO ☐ YES

If Any Action in Part 2 Is Identified as a Potential Large Impact or If you Cannot Determine the Magnitude of Impact, Proceed to Part 3

Part 3 - EVALUATION OF THE IMPORTANCE OF IMPACTS

Responsibility of Lead Agency

Part 3 must be prepared if one or more impact(s) is considered to be potentially large, even if the impact(s) may be mitigated.

Instructions (If you need more space, attach additional sheets)

Discuss the following for each impact identified in Column 2 of Part 2:

1. Briefly describe the impact.
2. Describe (if applicable) how the impact could be mitigated or reduced to a small to moderate impact by project change(s).
3. Based on the information available, decide if it is reasonable to conclude that this impact is **important**.

To answer the question of importance, consider:

- ! The probability of the impact occurring
- ! The duration of the impact
- ! Its irreversibility, including permanently lost resources of value
- ! Whether the impact can or will be controlled
- ! The regional consequence of the impact
- ! Its potential divergence from local needs and goals
- ! Whether known objections to the project relate to this impact.

Question 5 - Will proposed action affect surface or groundwater quality or quantity.
The DPW facility will require the storage of petroleum. The Village will comply with all New York State and Westchester County regulations regarding the construction of petroleum storage tanks.

Village of Croton-on-Hudson

COASTAL ASSESSMENT FORM

A. INSTRUCTIONS (Please print or type all answers)

1. Applicants, or in the case of direct actions (city, town, village) agencies, shall complete this CAF for proposed actions which are subject to the consistency review law. This assessment is intended to supplement other information used by a (city, town, village) agency in making a determination of consistency.
2. Before answering the questions in Section C, the preparer of this form should review the policies and explanations of policy contained in the Local Waterfront Revitalization Program (LWRP), a copy of which is on file in the (city, town, village) clerk's office. A proposed action should be evaluated as to its significant beneficial and adverse effects upon the coastal area.
3. If any question in Section C on this form is answered "yes", then the proposed action may affect the achievement of the LWRP policy standards and conditions contained in the consistency review law. Thus, the action should be analyzed in more detail and, if necessary, modified prior to making a determination that it is consistent to the maximum extent practicable with the LWRP policy standards and conditions. If an action cannot be certified as consistent with the LWRP policy standards and conditions, it shall not be undertaken.

B. DESCRIPTION OF SITE AND PROPOSED ACTION

1. Type of (city, town, village) agency action (check appropriate response):
 - (a) Directly undertaken (e.g. capital construction, planning activity, agency regulation, land transaction) ☒
 - (b) Financial assistance (e.g. grant, loan, subsidy) _____
 - (c) Permit, approval, license, certification _____
 - (d) Agency undertaking action: _____
2. Describe nature and extent of action: Condemnation of property at 1A Croton Point
Avenue through eminent domain and construction of facility for DPW and other
Village uses at site

3. Location of action: 1A Croton Point Avenue
Street or Site Description _____
4. Size of site: 9.8 acres
5. Present land use: Former site of waste transfer station
6. Present zoning classification: Light Industrial
7. Describe any unique or unusual land forms on the project site (i.e. bluffs, dunes, swales, ground depression, other geological formations): none
none

8. Percent of site which contains slopes of 15% or greater: 8%
9. Streams, lakes, ponds or wetlands existing within or contiguous to the project area:

- (1) Name _____
Size (in acres) _____
10. If an application for the proposed action has been filed with the (city, town, village) agency, the following information shall be provided:
- (a) Name of applicant: Village of Croton on Hudson _____
(b) Mailing address: 1 Van Wyck Street _____
(c) Telephone number: Area Code (914-271) 4848 _____
(d) Application number, if any: _____
11. Will the action be directly undertaken, require funding, or approval by a state or federal agency?
Yes _____ No ☒ If yes, which state or federal agency? _____

C. COASTAL ASSESSMENT (Check either "Yes" or "No" for each of the following questions)

- | | YES | NO |
|---|-------|-------------------------------------|
| 1. Will the proposed action be located in, or contiguous to, or have a potentially adverse effect upon any of the resource areas identified on the coastal area map:.....
If yes, answer a-d | _____ | ☒ |
| (a) Significant fish or wildlife habitats?..... | _____ | _____ |
| (b) Scenic resources of local or statewide significance?..... | _____ | _____ |
| (c) Important agricultural lands?..... | _____ | _____ |
| (d) Natural protective features in an erosion hazard area?..... | _____ | _____ |
| If the answer to any question above is yes, please explain in Section D any measures which will be undertaken to mitigate any adverse effects. | | |
| | YES | NO |
| 2. Will the proposed action have a significant effect upon: | | |
| (a) Commercial or recreational use of fish and wildlife resources?... | _____ | ☒ |
| (b) Scenic quality of the coastal environment?..... | _____ | ☒ |
| (c) Development of future, or existing water dependent uses?..... | _____ | ☒ |
| (d) Operation of the State's major ports?..... | _____ | ☒ |
| (e) Land or water uses within a small harbor area?..... | _____ | ☒ |
| (f) Stability of the shoreline?..... | _____ | ☒ |
| (g) Surface or groundwater quality?..... | _____ | ☒ |
| (h) Existing or potential public recreation opportunities?..... | _____ | ☒ |
| (i) Structures, sites, or districts of historic, archeological or cultural significance to the (city, town, village), State or nation?..... | _____ | ☒ |
| | YES | NO |
| 3. Will the proposed action involve or result in any of the following: | | |
| (a) Physical alteration of land along the shoreline, land under water or coastal waters?..... | _____ | ☒ |
| (b) Physical alteration of two (2) acres or more of land located elsewhere in the coastal area?..... | _____ | ☒ |
| (c) Expansion of existing public services or infrastructure in undeveloped or low density areas of the coastal area?..... | _____ | ☒ |
| (d) Energy facility not subject to Article VII or VIII of the Public Service Law?..... | _____ | ☒ |
| (e) Mining, excavation, filling or dredging in coastal waters?..... | _____ | ☒ |

		YES	NO
	(f) Reduction of existing or potential public access to or along the shore?.....	_____	✓
	(g) Sale or change in use of publicly-owned lands located on the shoreline or under water?.....	_____	✓
	(h) Development within a designated flood or erosion hazard area?.....	_____	✓
	(i) Development on a beach, dune, barrier island or other natural feature that provides protection against flooding or erosion?.....	_____	✓
	(j) Construction or reconstruction of erosion protective structures?.....	_____	✓
	(k) Diminished surface or groundwater quality?.....	_____	✓
	(l) Removal of ground cover from the site?.....	_____	✓
		YES	NO
4.	Project		
	(a) Is project to be located adjacent to shore, if yes answer 1-7:		✓
	1 Will water-related recreation be provided?.....	_____	_____
	2 Will public access to the foreshore be provided?.....	_____	_____
	3 Does the project require a waterfront site?.....	_____	_____
	4 Will it supplant a recreational or maritime use?.....	_____	_____
	5 Do essential public services and facilities presently exist at or near the site?.....	_____	_____
	6 Is it located in a flood prone area?.....	_____	_____
	7 Is it located in an area of high erosion?.....	_____	_____
	(b) If the project site is publicly owned:		
	1 Will the project adversely affect the level and types of public access to water-related recreation resources and facilities?.....	_____	✓
	2 If located in the foreshore, will access to those and adjacent lands be provided?.....	_____	_____
	3 Will it involve the siting and construction of major energy facilities?.....	_____	✓
	4 Will it involve the discharge of effluent from major steam electric generating and industrial facilities into coastal facilities?.....	_____	✓
	(c) Is the project site presently used by the community neighborhood as an open space or recreation area?.....	_____	✓
	(d) Does the present site offer or include scenic views or vistas known to be important to the community?.....	_____	✓
	(e) Is the project site presently used for commercial fishing or fish processing?.....	_____	✓
	(f) Will the surface area of any waterways or wetland area be increased or decreased by the proposals?.....	_____	✓
	(g) Does any mature forest (over 100 years old) or other locally important vegetation exist on this site which will be removed by the project?.....	_____	✓
	(h) Will the project involve any waste discharges into coastal waters?.....	_____	✓
	(i) Does the project involve surface or subsurface liquid waste disposal?.....	_____	✓
	(j) Does the project involve transport, storage, treatment or disposal of solid waste or hazardous materials?.....	_____	✓

	YES	NO
(k) Does the project involve shipment or storage of petroleum products?.....	✓	
(l) Does the project involve discharge of toxic, hazardous substances or other pollutants into coastal waters?.....		✓
(m) Does the project involve or change existing ice management practices?.....		✓
(n) Will the project affect any area designated as a tidal or freshwater wetland?.....		✓
(o) Will the project alter drainage flow, patterns or surface water runoff on or from the site?.....		✓
(p) Will best management practices be utilized to control storm water runoff into coastal waters?.....	✓	
(q) Will the project utilize or affect the quality or quantity of sole source or surface water supplies?.....		✓
(r) Will the project cause emissions which exceed federal or state air quality standards or generate significant amounts of nitrates or sulfates?.....		✓

D. REMARKS OR ADDITIONAL INFORMATION (Add any additional sheets necessary to complete this form.)

Part C

Question 4 Letter (b) number 2. The project is not located in the foreshore.

Question 4 Letter (k) - Although the proposed DPW facility will require the storage of petroleum the Village will comply with all New York State and Westchester County regulations regarding the construction of petroleum storage tanks.

Question 4 Letter (p) Best management practices will be utilized to control storm water runoff into coastal waters. Answering yes to this question should not trigger further review.

If assistance or further information is needed to complete this form, please contact the Village Engineer at (914) 271-4783.

Preparer's Name: Janine King Telephone Number: (914) 271-4848
 Title: Assistant to Village Manager Agency: Croton on Hudson Date 2-6-06

EXHIBIT "C"



This is a printer friendly version of an article from the **The Journal News**.
To print this article open the file menu and choose Print.

Buyout of Croton waste facility estimated to cost \$5M

By **ROBERT MARCHANT**
THE JOURNAL NEWS

(Original Publication: April 18, 2006)

CROTON-ON-HUDSON — The village is moving ahead with plans to buy an old waste-transfer facility after an appraisal showed the property could be acquired for roughly \$5 million — far lower than numbers circulated during the recent election campaign.

"Five million is a doable number," said Mayor Greg Schmidt, and the village Board of Trustees has agreed to hire a special attorney who can work out a plan to condemn the old Metro-Enviro site north of the village train station and acquire it with public funding. Village Attorney Marianne Stecich recently told the village board a qualified appraisal put the value of the land "very comfortably under five million dollars."

The waste-transfer facility, which has been mired in controversy for the past five years as community efforts to permanently close it have intensified, was again the source of rancor during the past election season. The Democratic candidates running for office, incumbent Charles Kane and Ann Gallelli, a former trustee, said public acquisition could cost tens of millions of dollars. Democrats swept the election, and the Republican candidates felt their opponents claim that the process would cost \$30 million or more was unfair. Campaign mailers sent out by the Democrats discussed the possibility of "bankruptcy" related to the eminent-domain proceedings.

"I think people succumbed to scare tactics," said Jim Steinberg, a Republican who lost his seat in the election.

Schmidt, who led a Republican majority on the board until the recent election, agreed. "I think the public was misinformed," he said.

But Kane defended the Democratic message.

"It was valid," he said. "I don't feel there were any scare tactics at all. We brought out the uncertainty that can arise in the process. The initial appraisal will not be the final number. It's still early in the process."

Kane said different appraisals using different methods of evaluation would likely yield other estimates for the value of the 10-acre site during the eminent-domain proceedings, and it was difficult to say which one would be selected by a court. He said it was important for residents to know what the process could entail.

The village board could hire an eminent-domain specialist in about a month.

EXHIBIT "D"

LEGAL NOTICE
VILLAGE OF CROTON-ON -HUDSON, NEW YORK

A scoping session will be held on April 3, 2006 at 8:00 p.m. at the Stanley H. Kellerhouse Municipal Building, One Van Wyck Street, Croton-on-Hudson, New York, to determine which issues should be studied in the environmental review, pursuant to the State Environmental Quality Review Act, of the possible (1) acquisition by the Village, through eminent domain, of 1A Croton Point Avenue, (2) relocation of the Department of Public Works facility to said site, and (3) use of said site for DPW and other municipal purposes.

Margaret Keesler
Village Clerk
271-4848

Dated: 3/14/06

EXHIBIT "E"

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

THE NEW YORK, SUSQUEHANNA
AND WESTERN RAILWAY CORP.,

Plaintiff,

v.

THE CITY OF PATERSON,

Defendant.

CIVIL ACTION NO. 05-2338 (JAP)

ORDER

Before the Court is a Motion for Summary Judgment and for a Permanent Injunction filed by Plaintiff, the New York, Susquehanna and Western Railway Corp., on or about January 30, 2006. Defendant, the City of Paterson, filed a letter in response to this Motion but did not substantively oppose Plaintiff's motion. Accordingly, the Court having reviewed the parties' written submissions and for good cause having been shown, **IT IS**

ON this 14th day of March, 2006,

ORDERED that Plaintiff's Motion for Summary Judgment is **GRANTED**; and

FURTHER ORDERED that Plaintiff's Motion for a Permanent Injunction is **GRANTED**. Defendant is hereby (1) prohibited from stopping and/or interfering with the construction and/or operation of Plaintiff's transload facility on River Street within the City of Paterson; (2) enjoined from requiring Plaintiff to appear before its planning or zoning boards regarding this facility; (3) enjoined from demanding any fees from Plaintiff with regard to the

transload facility; and (4) enjoined from bringing further legal or administrative actions to impede or stop the construction and operation of the transload facility; and

FURTHER ORDERED that nothing contained herein shall impede the ability of Defendant, the City of Paterson, to enforce its rights in accordance with all applicable statutes, regulations, and controlling case law; and

FURTHER ORDERED that this matter is hereby closed.

SO ORDERED.

/s/ JOEL A. PISANO

United States District Judge

Original: Clerk
cc: Judge Arleo
All Parties
File

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COPY

BUFFALO SOUTHERN RAILROAD, INC.,

Plaintiff,

- against -

VILLAGE OF CROTON-ON-HUDSON; GREGORY J. SCHMIDT, as Mayor of the Village of Croton-on-Hudson; DANIEL O'CONNOR, P.E., as Engineer and Building Inspector for the Village of Croton-on-Hudson; RICHARD F. HERBEK, as Manager of the Village of Croton-on-Hudson; THOMAS P. BRENNAN, as Trustee on the Village Board of Trustees; CHARLES A. KANE, as Trustee on the Village Board of Trustees; ANN GALLELLI, as Trustee on the Village Board of Trustees; LEO A. W. WIEGMAN, as Trustee on the Village Board of Trustees; CHRIS KEHOE, as member of the Village Planning Board; VINCENT ANDREWS, as member of the Village Planning Board; FRANCES ALLEN, as member of the Village Planning Board; ROBERT LUNTZ, as member of the Village Planning Board; KATHLEEN RIEDY, as member of the Village Zoning Board of Appeals; RHODA STEPHENS, as member of the Village Zoning Board of Appeals; RUTH WAITKINS, as member of the Village Zoning Board of Appeals; WITT BARLOW, as member of the Village Zoning Board of Appeals; and PAUL ROLNICK, as member of the Village Zoning Board of Appeals,

Defendants.

AFFIDAVIT OF
DANIEL M. MEEHAN
CIVIL ACTION No.:

Judge McMahon

06 CIV. 3755

STATE OF NEW YORK)
COUNTY OF ~~ONONDAGA~~) ss.:
CAYUGA

Daniel M. Meehan, being duly sworn, deposes and says:

1. I am the Vice President of Hanson Aggregates New York, Inc. ("Hanson Aggregates") and I submit this affidavit in support of Buffalo Southern Railroad, Inc.'s ("BSOR") application for a temporary restraining order and motion for a preliminary injunction.

2. I am familiar with this matter because I am aware of BSOR's track and transload facility (the "Transload Facility") in the Village of Croton-on-Hudson (the "Village" or "Croton").

3. Transload facilities like BSOR's are of great interest and value to businesses like Hanson Aggregates because they provide companies with an additional option for transportation and distribution of their materials and products in interstate commerce. Hanson Aggregates has been looking for a rail transportation option into the lucrative Westchester County market for quite some time.

4. BSOR's Transload is of particular interest to Hanson Aggregates because it can transport its typically bulky and heavy products to the Westchester County market more easily and cheaply by rail, rather than by truck.

5. As a result, Hanson Aggregates and BSOR have discussed the possibility of it shipping commodities by rail to the Transload Facility in Croton.

6. Hanson Aggregates' commodities that would be handled at the Transload Facility would simply be transferred between rail and trucks and then moved to an offsite destination(s).

7. There would be no processing of Hanson Aggregates' commodities at the Property.

8. I have informed Albert Feasley, the Vice President of Operations for BSOR, that Hanson Aggregates is interested in a possible arrangement and/or a long-term agreement to transport and transload aggregates to the Transload Facility, but that Hanson Aggregates is unwilling to consider such an agreement given the uncertainty created by the Village's public attempts to condemn and/or shut down the Transload Facility.

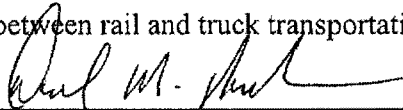
9. Hanson Aggregates needs to have certainty and regularity in the shipment of its products in order to service its customers, and thus sustain its livelihood.

10. If BSOR cannot guarantee reliable and consistent service, it will be too unreliable to be a viable transportation option for Hanson Aggregates and other businesses.

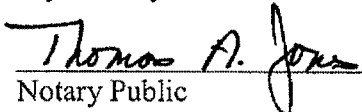
11. Also, Hanson Aggregates would have to make significant capital expenditures in order to utilize the Transload Facility; therefore, certainty and regularity in the shipment of products is crucial.

12. If Hanson Aggregates were to enter into an agreement with BSOR to ship commodities to the Transload Facility and the Village condemned or shut down the Transload Facility, Hanson Aggregates would lose the ability to use BSOR and its Transload Facility. As a result, Hanson Aggregates would have to cancel its transportation arrangements with BSOR and use other carriers instead—most likely truck carriers. Hanson Aggregates would also lose the capital expenditure it made in utilizing the Transload Facility in the first instance.

13. If that occurred, regardless of whether the Transload Facility reopened at some point in the future, Hanson Aggregates would be unlikely to return to BSOR as it is costly and difficult logistically to switch back and forth between rail and truck transportation.


Daniel M. Meehan

Sworn to before me this 11th
day of May 2006


Notary Public

THOMAS A. JONES
Notary Public in the State of New York
No. 4638648
Qualified in Cayuga County
Commission Expires Nov. 30 2006

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COPY

BUFFALO SOUTHERN RAILROAD, INC.,

Plaintiff,

- against -

VILLAGE OF CROTON-ON-HUDSON; GREGORY J. SCHMIDT, as Mayor of the Village of Croton-on-Hudson; DANIEL O'CONNOR, P.E., as Engineer and Building Inspector for the Village of Croton-on-Hudson; RICHARD F. HERBEK, as Manager of the Village of Croton-on-Hudson; THOMAS P. BRENNAN, as Trustee on the Village Board of Trustees; CHARLES A. KANE, as Trustee on the Village Board of Trustees; ANN GALLELLI, as Trustee on the Village Board of Trustees; LEO A. W. WIEGMAN, as Trustee on the Village Board of Trustees; CHRIS KEHOE, as member of the Village Planning Board; VINCENT ANDREWS, as member of the Village Planning Board; FRANCES ALLEN, as member of the Village Planning Board; ROBERT LUNTZ, as member of the Village Planning Board; KATHLEEN RIEDY, as member of the Village Zoning Board of Appeals; RHODA STEPHENS, as member of the Village Zoning Board of Appeals; RUTH WAITKINS, as member of the Village Zoning Board of Appeals; WITT BARLOW, as member of the Village Zoning Board of Appeals; and PAUL ROLNICK, as member of the Village Zoning Board of Appeals,

Defendants.

AFFIDAVIT OF
JOSEPH RUTIGLIANO
CIVIL ACTION No.:

Judge McMahon

06 CIV. 3755

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

Joseph Rutigliano, being duly sworn, deposes and says:

1. I am a member of Coastal Distribution, LLC ("Coastal") and I submit this affidavit in support of Buffalo Southern Railroad, Inc.'s ("BSOR") application for a temporary restraining order and motion for a preliminary injunction.

2. I am familiar with this matter because I am aware of BSOR's track and transload facility (the "Transload Facility") in the Village of Croton-on-Hudson (the "Village" or "Croton").

3. Coastal transports and distributes essential building materials and products to customers throughout the Northeast.

4. Transload facilities like BSOR's are of great interest and value to businesses like Coastal because they provide companies with an additional option for cost effective transportation and distribution of their materials and products in interstate commerce.

5. Coastal has been unable to viably serve the Westchester County market given the huge cost associated with truck transportation.

6. BSOR's Transload Facility is of particular interest to Coastal because it can transport its bulk products to the lucrative Westchester County market more easily and cheaply by rail rather than by truck. BSOR's Transload Facility is unique in that it is the only viable link to the national rail network in Westchester County for transloading bulk products.

7. As a result, Coastal arranged for BSOR to transport sand, aggregate, wallboard and other building materials and products by rail to the Transload Facility in Croton.

8. BSOR is beginning to provide such service to Coastal.

9. Coastal's commodities handled at the Transload Facility will simply be transferred between rail and trucks and then moved to offsite destinations.

10. There will be no processing of Coastal's commodities at the Property.

11. I have informed Albert Feasley, the Vice President of Operations for BSOR, that Coastal would like to enter into a long-term agreement to transport and transload sand, aggregate, wallboard and other building materials to the Transload Facility, but that Coastal is

unwilling to do so given the uncertainty created by the Village's public attempts to condemn and/or shut down the Transload Facility.

12. Coastal needs to have certainty and regularity in the shipment of its products in order to plan its operations efficiently and remain profitable.

13. Coastal's customers depend on certainty and regularity in the availability of Coastal's building products and materials for their businesses.

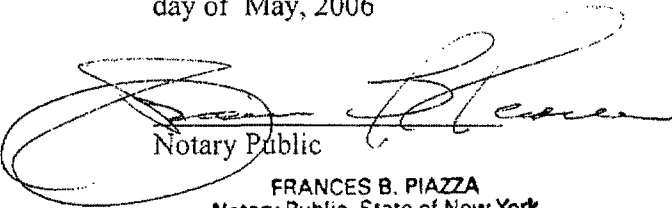
14. If BSOR cannot guarantee reliable and consistent service, it will be too unreliable to be a viable transportation option for Coastal and other businesses.

15. If the Village condemns or shuts down the Transload Facility, Coastal will lose the ability to use BSOR and its Transload Facility. As a result, Coastal will have to cancel its transportation arrangements with BSOR and use other carriers instead—most likely truck carriers.

16. If that occurs, regardless of whether the Transload Facility reopens at some point in the future, Coastal is unlikely to return to BSOR as it is costly and difficult logistically to switch back and forth between rail and truck transportation.


Joseph Rutigliano

Sworn to before me this 11th
day of May, 2006


Notary Public

FRANCES B. PIAZZA
Notary Public, State of New York
No. 24-4960396
Qualified in Kings County
Commission Expires 8.7.2009

EXHIBIT 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
BUFFALO SOUTHERN RAILROAD, INC.,

Plaintiff,

- against -

VILLAGE OF CROTON-ON-HUDSON; GREGORY J. SCHMIDT, as Mayor of the Village of Croton-on-Hudson; DANIEL O'CONNOR, P.E., as Engineer and Building Inspector for the Village of Croton-on-Hudson; RICHARD F. HERBEK, as Manager of the Village of Croton-on-Hudson; THOMAS P. BRENNAN, as Trustee on the Village Board of Trustees; CHARLES A. KANE, as Trustee on the Village Board of Trustees; ANN GALLELLI, as Trustee on the Village Board of Trustees; LEO A.W. WIEGMAN, as Trustee on the Village Board of Trustees; CHRIS KEHOE, as member of the Village Planning Board; VINCENT ANDREWS, as member of the Village Planning Board; FRANCES ALLEN, as member of the Village Planning Board; ROBERT LUNTZ, as member of the Village Planning Board; KATHLEEN RIEDY, as member of the Village Zoning Board of Appeals; RHODA STEPHENS, as member of the Village Zoning Board of Appeals; RUTH WATKINS, as member of the Village Zoning Board of Appeals; WITT BARLOW, as member of the Village of Zoning Board of Appeals; and PAUL ROLNICK, as member of the Village Zoning Board of Appeals,

Civil Action No.
06 CIV 3755 (CM)

Defendants.
-----X

**DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION
TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

ARNOLD & PORTER LLP
Michael B. Gerrard
399 Park Avenue
New York, New York 10022
Phone: (212) 715-1000
Counsel for Defendants

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**DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S
MOTION FOR PRELIMINARY INJUNCTION**

Preliminary Statement

Plaintiff Buffalo Southern Railroad, Inc. ("BSOR") is attempting to perpetrate a hoax on this Court. It submitted papers indicating that it has an ongoing rail operation in Croton-on-Hudson, which the Village is attempting to disrupt. In fact:

- There are currently no rail operations at all over the 1,600-foot track at 1A Croton Point Avenue (the "Site"), so far as the Village has been able to observe.
- In order for rail cars to enter or leave the Site, BSOR would need an interchange agreement with CSX Transportation, Inc. to switch cars to CSX trains operating over the main line through Croton-on-Hudson. BSOR has no such agreement.
- In order to operate as a common carrier on the Site, as BSOR seeks to do, BSOR would need approval from the Surface Transportation Board ("STB"). BSOR has not applied for, much less obtained, such approval.
- The Village, until being told that it was being sued and should appear in court the next morning for a TRO hearing, had never heard of BSOR, much less attempted to enforce laws against it.

A solid waste transfer station at the Site was shut down in 2005 after the New York Court of Appeals upheld the Village's finding that its operators were repeatedly and intentionally violating the environmental laws. The Site's owner, Greentree Realty, has since made numerous attempts to resume a flow of rent payments from someone. It asked the New York Supreme Court, Westchester County, to find that the Village had no permitting authority over the Site, but Justice Nicolai rejected this claim and ruled that a special permit was needed from the Village. No application for this permit has been filed. Then Greentree apparently consented to the sale of

its lessee's leasehold to another entity, a solid waste company misleadingly named the Northeast Interchange Railway ("NIR"). NIR filed a notice of exemption with the STB claiming it needed no further approvals. The STB rejected this notice, and directed NIR to file either a petition for exemption or a formal application to operate over the track as a common carrier. No such petition or application has been filed.

Greentree and NIR would rather file emergency applications to various courts than file required applications with the relevant government agencies. Thus NIR's affiliate RS Acquisition Co., LLC ("RSA") has entered into a short-term sublease with BSOR, which is now attempting an end-run around the rulings of both Justice Nicolai and the STB.

BSOR does not have a railroad operation in Croton-on-Hudson. It merely aspires to start one. It speculates that it will be able to obtain an agreement with CSX for interchange of rail cars, and that the STB will allow it to operate as desired. That is hardly enough to obtain a preliminary injunction to preempt state and local law, especially against a municipality's exercise of its traditional police and eminent domain powers.

Factual Background

The factual background is detailed in the accompanying affidavit of Marianne Stecich ("Stecich Aff.") and its exhibits. The following highlights the most important facts.

The approximately ten-acre parcel at the Site has been used for various materials handling operations for many years. From 2000 through the summer of 2005, Greentree Realty leased it to Metro Enviro Transfer, LLC for use as a construction and demolition ("C&D") debris transfer station. This company accumulated an appalling compliance record, and in July 2005 the New York Court of Appeals upheld the Village's 2003 decision to shut it down. *Metro Enviro Transfer, LLC v. Village of Croton-on-Hudson*, 5 N.Y.3d 236, 800 N.Y.S.2d 535 (2005).

Now that Metro Enviro Transfer, LLC could no longer operate at the site, Greentree granted a lease to an entity that it thought could -- NIR. Litigation ensued among the Village, Greentree and NIR. On April 25, 2006, Justice Nicolai issued a preliminary injunction barring NIR and its affiliate RSA from operating a waste transfer station at the Site without first obtaining a special permit from the Village. He ruled that "the Village has the right to impose conditions necessary to prevent harm to the community and the environment." *Village of Croton-on-Hudson v. Northeast Interchange Railway, LLC*, Index No. 22176/05 (N.Y. Sup.Ct., Westchester Co., April 25, 2006) (Stecich Aff. Ex. 9).

Since the mid-1980s the Village had been looking, without success, for a new site for its public works facility, where road and sewer maintenance trucks, salt and sand piles, and other such items are kept. It now consumes land at the Croton-Harmon railroad station that could be used for commuter parking. The Village held a public hearing on February 6, 2006 on the possibility of taking the Site by eminent domain so that it could build the public works facility there. The Village also began work on an environmental impact statement so that it could reach an informed decision on the proposal.

Meanwhile, NIR filed with the STB on August 1, 2005 a Notice of Exempt Transaction under the STB's expedited "summary class exemption procedures," stating that it planned to become a common carrier by rail and to lease and operate its 1,600-foot "rail line"¹ for the transloading of C&D waste and other materials (Stecich Aff. Ex. 5). Describing its track as a "rail line," NIR thus determined that it needed STB approval. As explained below, STB

¹ NIR explained that "its entire rail line will initially consist of the 1,600 foot track" and that it "expects to enter into an interchange agreement with CSX, as well as other commercial arrangements with CSX and other rail carriers, in order to handle both existing and new rail traffic to and from the line of NIR." Verified Notice of Exempt Transaction (filed Aug. 1, 2005) at 3.

approval is required to lease and operate as a common carrier over a "rail line," whether the applicant seeks to become a common carrier or is already a common carrier over other rail lines. The Village demonstrated that NIR had not shown it was practically or legally able to transform the 1,600-foot private spur track at issue into a rail line operated by a common carrier. *Petition of the Village of Croton-on-Hudson to Reject Notice of Exemption or, in the Alternative, for Stay of Effectiveness*, F.D. No. 34734 (filed Aug. 4, 2005) at 7-8. The STB, noting that this was not a "routine transaction" because "NIR has expressed an intent to convert this previously private construction waste transfer operation into what could turn out to be a more extensive for-hire common carrier operation involving commodities in addition to construction waste," rejected the notice and ruled that NIR would have to make a full filing with the STB. (Stecich Aff. Ex. 7).

Thus two tribunals -- the New York State Supreme Court and the STB -- have ruled that NIR must file applications in order to operate at the Site.

The Village expected to see these applications, but never did. Instead, late the afternoon of May 16, 2006, the Village Attorney received a call, and shortly thereafter a fax, from counsel for BSOR (the same lawyer who had been representing NIR and RSA) informing her of the instant lawsuit, and of the temporary restraining order hearing to be held the next morning.

Prior to this telephone call, no Village official had ever heard of BSOR. (Stecich Aff. ¶ 5) The faxed papers revealed that RSA had entered into a two-year lease with BSOR, and that BSOR was claiming that Village authority over the site had been preempted by the Interstate Commerce Commission Termination Act ("ICCTA") of 1995, 49 U.S.C. §§ 10101 *et seq.*

This Court issued a temporary restraining order in a brief hearing on May 17, and scheduled argument of BSOR's preliminary injunction motion for May 26, 2006.

BSOR's Deceptions

Into a relatively compact set of papers, BSOR has packed a remarkably long set of misleading and deceptive statements. We will list seven.

Deception 1: Claim That BSOR is Currently Operating on the Site

BSOR's papers repeatedly claim that the company is currently operating a transload facility on the Site, and they imply that these operations have been going on for some time. E.g., Complaint ¶21 ("BSOR leases and provides rail transportation service at ... 1A Croton Point Avenue"); Memorandum of Law at 1 (same); Complaint ¶ 29 ("BSOR's rail transportation operations at the BSOR Croton Yard provide coordination between rail carriers and motor carriers"); Feasley Aff. ¶12 (same); Feasley Aff. ¶ 20 ("condemnation of the Property would cease BSOR's rail transportation activities in Westchester County"); Memorandum of Law at 20 ("The BSOR Croton Yard is used to transfer commodities and/or containers of cargo ... Further, BSORs services related to that movement include 'receipt, delivery, ... storage, handling, and interchange of ... property.'"). Additionally, BSOR's papers include an affidavit from Joseph Rutigliano of Coastal Distribution LLC, who writes (¶8), "BSOR is beginning to provide such service to Coastal." (Coastal Distribution LLC also operates C&D waste facilities.) This sentence (repeated in the complaint, ¶36, the Memorandum of Law at 9 and 18, and in Feasley Aff. ¶25) has an ambiguous tense, and appears to be a way of concealing true state of affairs.

This depiction of an established operation is shown to be untrue by the accompanying affidavit of Charles A. Kane, a Supervisor of Metro North Commuter Railroad, who works at the Harmon Shop directly across the tracks from the Site. From his workplace Mr. Kane has a clear view of the property and its 1600-foot track, and (as a Village Trustee who is keenly interested in

what happens on the Site) he pays close attention to what happens there. His affidavit states that between the closure of the Metro Enviro facility in the summer of 2005 and the time the BSOR lawsuit was filed, "I have not seen any train cars at all on the 1600 foot piece of railroad track. I have not seen train cars coming onto the track nor departing from the track. In addition, during that same period, I have not seen any trucks coming onto or leaving 1A Croton Point Avenue." He adds that, "[s]ince Metro Enviro left the site, I have not seen any activity at all at the site, other than, on a daily basis, a single automobile parked at the weigh station gate and one person, who appears to be guarding the site."

For operations to escape Mr. Kane's observation, CSX trains would have to deliver rail cars carrying materials to the property at night after he leaves work, other CSX trains would have to pick up the empty rail cars later the same night, and trucks would have to pick up the unloaded materials the same night. This scenario is utterly implausible.

Deception 2: Claim That BSOR is Publicly Offering Service at the Site

BSOR's papers say, "Now, BSOR holds itself out to the public generally to provide common carrier service at the BSOR Croton Yard." Complaint ¶ 28; Feasley Aff. ¶ 11. Plaintiff's Application for a TRO (¶3) states, "Since March 2006, BSOR has held itself out to the public generally to provide common carrier rail service at the BSOR Croton Yard."

The deception here begins with the terminology "BSOR Croton Yard." There is no sign visible anywhere with that name. Since the recent removal of the Metro Enviro Transfer sign, there has been no sign at all at the Site. (Stecich Aff. ¶ 3) No Village official had ever heard Plaintiff's name or of anything called "BSOR Croton Yard" before the lawsuit arrived. (Stecich Aff. ¶ 5) No advertisements, notices, or other evidence of this name have been found, except for BSOR's own web site.

That web site is very telling. The home page (members.aol.com/buffalosouthern/) speaks exclusively of operations in the Buffalo area. However, it has a link to a page of announcements, and the first announcement -- dated May 17, 2006 -- states, "The BSOR announces that they are now offering common carrier transportation services at its new Transload Facility in Croton-on-Hudson, New York. This facility serves Westchester County and New York City markets."

(Stecich Aff. Ex. 1)

May 17 is the day after the Village was told of the instant lawsuit, and the day that BSOR came to this Court for a TRO.

In a similar bit of linguistic legerdemain, BSOR's papers refer to a building on the Site as the "Transload Facility." Complaint ¶ 23. This is the structure where Metro Enviro Transfer processed C&D debris being transferred from trucks onto rail cars; before the lawsuit was filed, it had never been known as the "Transload Facility." Indeed, the site plan that BSOR's Albert Feasley attached to his affidavit as Exhibit A labeled it "Processing Building."

Deception 3: Claim That BSOR Interchanges Traffic With CSX Tracks

BSOR's complaint states, at ¶22, that its 1,600 feet of track "connects with the Hudson line of CSX Transportation, Inc." Similarly, Feasley Aff. ¶¶5, 11, 12. However, while there is a physical connection between this 1,600-foot track and the Hudson line, there is presently no legal interchange between BSOR and CSX at Croton-on-Hudson. CSX was apparently providing rail service to Metro Enviro Transfer over the Hudson line in a carrier-shipper relationship. But, as explained in the accompanying affidavit of Louis Gitomer, a former high official of the Interstate Commerce Commission (STB's predecessor), BSOR seeks a carrier-carrier relationship with CSX (Gitomer Aff. ¶¶15-20). Rail cars are transferred between carriers at points of interchange pursuant to interchange agreements. The only published point of interchange between CSX and

BSOR is near Buffalo, New York. Before BSOR can offer common carrier services to and from its "BSOR Croton Yard," it must enter into an interchange agreement with CSX for that new point of interchange and notify the Association of American Railroads to publish notice in "Rail Link," a database maintained for the industry. BSOR has not explained how it could interchange traffic with CSX at its "BSOR Croton Yard" without an interchange agreement with CSX and/or providing notice through Rail Link. Absent the right to interchange with CSX, all BSOR can do is push rail cars back and forth uselessly on its 1,600 feet of track. BSOR has given no evidence that it is likely to achieve an agreement with CSX.

Deception 4: Claim That BSOR Does Not Need STB Approval

As explained in detail below under Point I of the Argument, BSOR in fact requires STB approval before it may begin operating in Croton-on-Hudson.

BSOR does its best to avoid mention of what it must or must not do with the STB. However, in its Memorandum of Law, page 17, tucked into the fine print of Footnote 9, is this statement: "BSOR did not require STB approval to begin rail transportation operations at the BSOR Croton Yard. This is because, under the ICCTA, the STB 'does not have authority' over 'construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.' 49 U.S.C. § 10906. Given the BSOR Croton Yard's characteristics, it comes within this statutory provision."

This footnote wildly misstates the law. As shown by the Affidavit of Louis Gitomer, the 1,600 foot length of track in Croton-on-Hudson is not governed by § 10906, and BSOR must obtain approval or exemption from the STB before it may operate as a common carrier from Croton-on-Hudson. As noted above, the STB has already ruled that NIR must file an application of some sort before it may operate the Site. BSOR cannot circumvent this requirement by

obtaining at two-year lease from NIR's affiliate RSA. Operation without the necessary STB authorization subjects BSOR to a fine of \$5,000 per day of violation. 49 U.S.C. §11901.

Deception 5: Claim That the Village Is Taking Enforcement Action Against BSOR

Complaint ¶56 states, "A controversy has arisen between the parties concerning the application of certain laws to and enforcement of such laws against BSOR in connection with its rail transportation operations at the BSOR Croton Yard." Complaint ¶68 states, "Enforcement of [the Village's] statutes and provisions with respect to BSOR's rail transportation operations at the Property impose on BSOR significant economic and operational burdens that are both unnecessary and unwarranted." The complaint's Prayer for Relief seeks:

- b. a declaration that the Village Defendants ... are without authority or jurisdiction in, and preempted from, applying or enforcing against BSOR any laws ... that seek or purport to regulate ... the activities ... occurring at the BSOR Croton Yard,
- c. a declaration that all of the Village Defendants' efforts to do so heretofore are null and void,
- d. a declaration that the Village Defendants' application and enforcement against BSOR of the above laws ... at the BSOR Croton Yard is unconstitutional, and
- e. a declaration that the Village Defendants' application and enforcement against BSOR of the above laws ... is in violation of 42 U.S.C. §1983.

It came as a great surprise to the Village to be sued for taking enforcement action against BSOR, because, until the lawsuit, the Village had never heard of BSOR, and was not taking enforcement action against it. *Stecich Aff.* ¶ 5. The Village has stated that a *solid waste* facility requires Village permits (and Justice Nicolai agreed), but prior to the instant litigation the Village has not taken any action to inhibit a rail transfer operation for non-waste goods at the Site.

The Village had begun exploration of acquiring the Site for use as a public works facility. Had BSOR picked up the phone and called the Village before suing, it might have asked whether it would be possible to reach an accommodation whereby part of the Site might be used for the

public works facility and part for rail operations. Such discussions might still be worthwhile (notwithstanding the fact that BSOR got its relationship with the Village off to a difficult start by introducing itself through a lawsuit).

Deception 6: Claim That Village Approval Would Be Very Time-Consuming

Complaint ¶7 states that “application of the Village’s zoning and land use provisions would unduly interfere with interstate commerce by giving the Village the ability to deny BSOR the right to conduct operations and would be time consuming, allowing the Village to delay or interfere with BSOR’s rail transportation activities almost indefinitely. As a result, BSOR was forced to commence this action seeking declaratory and injunctive relief against the Village.”

There is no basis for this assertion. The best indication of how long it would take the Village to process a BSOR permit application -- should one ever arrive -- is the handling of a special permit needed for the expansion of the Max Finkelstein Tire Warehouse on a parcel just north of the Site. The permit application was filed on November 12, 2002, and granted by the Village Board on January 21, 2003 (Stecich Aff. Ex. 12) -- hardly an unreasonable delay.

Deception 7: Claim That Denying Injunction Would Have Negative Environmental Impact

Complaint ¶31 declares that “without this important rail link at the BSOR Croton Yard, the already overburdened roads in Westchester County will be further inundated with even more long-haul truck traffic.” Similarly, Feasley Aff. ¶14.

Of course, BSOR has contributed nothing to alleviating traffic congestion in Westchester County because it is not operating. However, were it to operate, it might transfer some freight traffic from truck to rail, which could have a positive environmental impact statewide, but a negative impact locally because of the additional truck traffic. If the public works facility is built

at the Site, so that the space it now occupies can be converted to commuter parking, many people who now drive to work could instead take Metro North. Without a full analysis it is not possible to assess the environmental effects. The environmental impact statement now being prepared will study this. BSOR had no basis for claiming that its facility would be better for the environment than using the Site for public works purposes.

ARGUMENT

POINT I

ICCTA Does Not Preempt Village Action

The STB has jurisdiction over “transportation by rail carrier,” 49 U.S.C. § 10501(a)(1), and ICCTA preempts state and local “regulation” of rail transportation, 49 U.S.C. § 10501(b). However, not every state or local law that incidentally touches upon rail transportation is preempted. ICCTA preemption “does not reach local regulation of activities not integrally related to rail service.” *CFNR Operating Co. v. City of American Canyon*, 282 F.Supp.2d 1114, 1118 (N.D. Cal. 2003) (refusing to strike down a municipal resolution that “is in the nature of a generally applicable exercise of the City’s police powers to safeguard the health and safety of its citizens”).

Innumerable facilities throughout the country with rail service are routinely subjected to state and local regulation. That includes shippers (those who send materials by rail) and consignees (those who receive materials by rail). ICCTA preemption is not routinely asserted because regulation of shippers and consignees is not regulation of “transportation by rail carrier.” Rather, these facilities involve “transportation ‘to rail carrier.’” *High Tech Tran., LLC v. New Jersey*, 382 F.3d 295, 305 (3d Cir. 2004) (citation omitted) (emphasis in original); *see also J.P. Rail, Inc. v. N.J. Pinelands Commission*, 404 F.Supp.2d 636, 650-52 (D.N.J. 2005). Otherwise,

“any nonrail carrier’s operations would come under the exclusive jurisdiction of the STB if, at some point in a chain of distribution, it handles products that are eventually shipped by rail by a rail carrier,” 382 F.3d at 309, a proposition the Third Circuit could not accept. Metro Enviro Transfer never suggested that ICCTA preemption had any relevance to the Village’s regulation of the C&D transfer station, even though waste left the Site by rail.

In its enactment of the ICCTA in 1995, Congress granted the STB exclusive *jurisdiction* over “the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,” 49 U.S.C. § 10501(b)(2), while limiting STB *authority* over the construction, acquisition, operation, abandonment, or discontinuance of these tracks, 49 U.S.C. § 10906 (Gitomer Aff. §8). But the mere fact that a freight shipper’s or receiver’s facility is served through a “spur, industrial, team, switching, or side track[],” as they almost always are (the alternative being to unload a car while it is stopped on a main line), does not alter the scope of ICCTA preemption. *Id.* Through July 2005, the spur track used by the shipper on the Greentree facility, Metro Enviro Transfer, was not viewed by anyone as having any bearing on the Village’s exercise of police power over the waste processing operations on the property.

With the New York Court of Appeals’ ruling adverse to Metro Enviro Transfer in July 2005, Greentree grasped for ICCTA preemption as its lifesaver. It realized that to do so, it needed to introduce a “rail carrier” into the picture. One approach might have been to contract with CSX, the rail carrier serving the facility, to operate a transload facility on behalf of CSX.²

² While not endorsing the decision in *Coastal Distrib., LLC v. Town of Babylon*, No. 05-CV-2032, 2006 U.S. Dist. LEXIS 8400 (E.D.N.Y. Jan. 31, 2006), the Village notes that this approach worked for Coastal Distribution, LLC (which appears in this proceeding as a freight receiver) in Babylon where it entered into a contract with the New York and Atlantic Railway Company (“NYA”) to operate a transload facility along the NYA’s line. In *Green Mountain R.R. Corp. v.*

Footnote continued on next page

But instead, NIR was created, purportedly to serve as an independent common carrier by rail over the 1,600-foot track. NIR advised the STB in its Notice of Exempt Transaction, filed August 1, 2005, that it planned to transform this spur, which had served only one shipper, into a “line of rail” available to many shippers (Stecich Aff. Ex. 5). NIR correctly recognized that both the creation of a common carrier by rail and the transformation in a track’s use from spur track to line of rail requires STB approval. As explained above, the STB concluded that the expedited procedure NIR had invoked was not appropriate where, as here, there are intertwined questions about whether NIR would assume the rights and obligations of a common carrier, and the spur track would be converted into a line of rail (Stecich Aff. Ex. 7). The STB, therefore, directed NIR to file a more detailed petition for exemption or a formal application. If the STB ultimately concluded that NIR would in fact be acting as a bona fide common carrier over a line of rail, ICCTA preemption would come into play. But the scope of ICCTA preemption would have to be determined, and the STB has broad authority to impose its own conditions (environmental and otherwise) when it grants operating licenses.

Presumably, the specter of STB-imposed conditions caused NIR to question its strategy of seeking STB approval. Now NIR had to come up with an end-run around the STB. Enter BSOR. NIR’s counsel has embarked on a *completely novel* strategy for attempting to convert a noncarrier’s facility with a spur track – as to which there is plainly no ICCTA preemption – into a facility as to which there is at least some argument in favor of ICCTA preemption: bring in an authorized common carrier with a rail line hundreds of miles away to operate over the track. But this stratagem has a fatal flaw. While BSOR could commence operations over a spur track from

Footnote continued from previous page

Vermont, 404 F.3d 638 (2d Cir.), *cert. denied*, 126 S. Ct. 547 (2005), on which BSOR relies, the railroad owning the line of rail itself owned and operated the transload facility.

its already authorized rail line in the Buffalo area without STB approval, it cannot enter a new territory served by another carrier (CSX) and justify its operations as “spur” operations. While the 1,600-foot track at issue was a “spur” with respect to CSX’s rail line, it is not a “spur” with respect to BSOR’s rail line in Buffalo. BSOR could provide private switching services to the owner/lessee of the property at issue without STB approval, but that would constitute transportation *to* a rail carrier (CSX) and not transportation *by* a rail carrier (even though BSOR acts as a rail carrier in another context). Only by operating as a common carrier can ICCTA preemption be triggered, but that operation then would convert the spur into a “line of rail,” which can only be done with Board approval. BSOR cannot have it both ways.

BSOR cannot contend that ICCTA preempts Village police and eminent domain powers, since it is illegally holding itself out as a common carrier. ICCTA provides that BSOR can extend its operations only with STB approval. 49 U.S.C. §10901 provides:

“(a) *A person may --*

- (1) construct an extension to any of its railroad lines;
- (2) construct an additional railroad line;
- (3) *provide transportation over*, or by means of, an extended or *additional railroad line*; or
- (4) in the case of a person other than a rail carrier, acquire a railroad line or acquire or operate an extended or additional railroad line,

only if the Board issues a certificate authorizing such activity under subsection (c).”

Similarly, 49 U.S.C. § 10902 states:

“(a) A Class II or *Class III rail carrier* providing transportation subject to the jurisdiction of the Board under this part *may acquire or operate* an extended or *additional rail line* under this section *only if the Board issues a certificate* authorizing such activity under subsection (c).

(b) A proceeding to grant authority under subsection (a) of this section begins when an application is filed. On receiving the application, the Board shall give reasonable public notice of the beginning of such proceeding.”

Note that Complaint ¶3 and Feasley Aff. ¶ 2 state that BSOR is a Class III rail carrier.

BSOR's existing operations are entirely in the Buffalo area. The track in Croton-on-Hudson would thus be an "additional" rail line needing STB approval. The only case relied upon by BSOR in its footnote 9, where it asserts that no STB approval is required because the 1,600-foot track is a "spur," is *United Transportation Union-Illinois Legislative Board v. Surface Transportation Board*, 183 F.3d 606 (7th Cir. 1999). In that case, however, the court explained that, under the test of *Nicholson v. Interstate Commerce Comm'n*, 711 F.2d 364, 367 (D.C. Cir. 1983), "track is railroad line if it extends into new territory not served by the carrier or already served by another carrier." *Id.* at 613. The court affirmed the STB's decision that one of the tracks at issue – the beer track – was properly classified as a "railroad line" based on its current proposed use even though the former carrier had used it as a siding. *Id.*

The Village submits that this Court should refer the question whether BSOR must obtain STB approval to conduct the operations it proposes to conduct to the STB for its determination. If the STB concludes that BSOR needs its approval, that ends this matter unless and until BSOR seeks and obtains that approval from the STB. The Village also respectfully requests that this Court include in its reference to the STB the question of the scope of any ICCTA preemption in the circumstances presented here. BSOR should not object to this reference. *See* its Memorandum of Law at 19 n.11 ("Since the STB is the agency charged by Congress with administering the ICCTA, its opinion concerning the scope of preemption provided by Section 10501(b) is entitled to great weight.")

Preemption is not automatic. To the contrary, "Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Building & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 224 (1993) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)).

In rejecting a claim that ICCTA preempted local zoning control over a railroad, the Eleventh Circuit declared:

Express pre-emption applies only to state laws “with respect to *regulation* of rail transportation.” 49 U.S.C. § 10501(b) (emphasis added). This necessarily means something qualitatively different from laws “with respect to rail transportation.”.. Congress narrowly tailored the ICCTA pre-emption provision to displace only “regulation,” i.e., those state laws that may reasonably be said to have the effect of “manag[ing]” or “govern[ing]” rail transportation, Black’s Law Dictionary 1286 (6th ed. 1990), while permitting the continued application of laws having a more remote or incidental effect on rail transportation....[E]xisting zoning ordinances of general applicability, which are enforced against a private entity leasing property from a railroad for non-rail transportation purposes, are not sufficiently linked to rules governing the operation of the railroad so as to constitute laws “with respect to regulation of rail transportation.”

Florida East Coast Railway Co. v. City of West Palm Beach, 266 F.3d 1324, 1331 (11th Cir. 2001) (citations omitted). A “preemption analysis should be “tempered by the conviction that the proper approach is to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted.”” *High Tech*, 382 F.3d at 302, citing *Merrill Lynch v. Ware*, 414 US 117, 127 (1973).

BSOR cites numerous cases upholding ICCTA preemption of state and local regulation over railroads. But ICCTA preemption is a very fact-specific inquiry, and all of the cited cases presented very different factual circumstances. *See, e.g., Maumee & Western R.R. Corp. and RMW Ventures, LLC -- Petition for Declaratory Order*, STB Finance Docket No. 34534 (served Mar. 3, 2004), 2004 WL 395835 (S.T.B.) at *2 (“neither the court cases, nor the Board’s precedent, suggest a blanket rule that any eminent domain action against railroad property is impermissible”). Contrary to BSOR’s argument, Memorandum of Law at 15, none of the cited cases hold that all exercise of a local government’s eminent domain power is “categorically preempted.” For example, in *Dakota, Minn. & E. R.R. Corp. v. South Dakota*, 236 F.Supp.2d 989, 1005 (D.S.D. 2002), *aff’d on other grounds*, 362 F.3d 512 (8th Cir. 2004), the district court

acknowledged that 49 U.S.C. §10501(b) provides that all state efforts to “regulate railroads” are preempted, but undertook a very fact-specific inquiry into whether, in this situation, “South Dakota’s eminent domain statutes regulate[d] the DM & E railroad.” In another factual context, however, the U.S. District Court for the District of Columbia rejected a claim that ICCTA preempted an eminent domain proceeding against railroad property. *District of Columbia v. 109,205.5 Square Feet of Land*, 2005 U.S. Dist. Lexis 7990 (D.D.C. 2005). Affirming that “eminent domain presents an important state interest, *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 26-27, 3 L.Ed.2d 1058, 79 S. Ct. 1070 (1959),” *id.* at **15-16, the court declared that “the court’s inquiry is whether the District’s intended use of the defendant’s property would unreasonably interfere with railroad operations.” *Id.* at **11. As noted above, BSOR’s direct resort to litigation in this case -- without so much as contacting the Village to see if the interests could be reconciled -- prevents an answer to this inquiry.

POINT II

The Village May Subject the Greentree Property, and BSOR’s Proposed Operations thereon, to Applicable Laws Without Violating the Dormant Commerce Clause

BSOR argues that it would violate the dormant Commerce Clause for the Village to apply “any laws, ordinances, rules, regulations or other requirements” (including its zoning code and the New York Eminent Domain Procedure Law) (collectively “laws”) to the Greentree property, and its proposed operations thereon. Complaint ¶¶ 66-71. To establish a violation of the dormant Commerce Clause, BSOR must prove that application of these laws would either (1) discriminate against interstate commerce; or (2) place a disparate burden on interstate commerce that is clearly excessive in relation to local benefits. *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgt. Auth.*, 438 F.3d 150, 156-57 (2d Cir. 2006), *petition for certiorari*

filed, 74 U.S.L.W. 3618 (April 21, 2006) (“United Haulers II”). For the reasons that follow, BSOR falls far short of meeting this standard.

A. The Village would not discriminate against interstate commerce by subjecting the Greentree Property, and BSOR’s proposed operations thereon, to applicable laws.

BSOR bears the burden of proving that the Village’s actions discriminate against interstate commerce. *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1281 (2d Cir. 1995). In the context of the dormant Commerce Clause, “discrimination” means protectionism in the form of “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter,” *Oregon Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 99 (1994), or the treatment of “articles of commerce coming from outside the State” differently from local articles of commerce for no “reason, apart from their origin.” *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978).

In the present case, there is no local or in-state economic interest benefited at the expense of an out-of-state economic interest. *See generally General Motors Corp. v. Tracy*, 519 U.S. 278, 300 (1997) (“[I]n the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market there can be no local preference, whether by express discrimination against interstate commerce or undue burden upon it, to which the dormant Commerce Clause may apply.”). First, the Village itself (for whose benefit the laws that BSOR seeks to exempt itself operate) is certainly not an “in-state economic interest” that can be improperly benefited at the expense of BSOR. *E.g., Freedom Holdings Inc. v. Spitzer*, 357 F.3d 205, 218 (2d Cir. 2004) (“For dormant Commerce Clause purposes, the relevant ‘economic interests,’ both in-state and out-of-state, are parties using the stream of commerce, not those of the state itself.”); *Norfolk S. Corp. v. Oberly*, 822 F.2d 388, 402 (3d Cir. 1987) (“A state’s choice

between competing land uses or between alternative environmental protection policies does not implicate the Commerce Clause simply because the alternative chosen may be in the best economic interests of the state so long as the state's choice does not discriminate between in-state and out-of-state competitors.").

Moreover, the entities identified by BSOR as potentially affected by the Village's application of applicable laws (BSOR, Coastal Distribution, LLC, Hanson Aggregates New York, Inc., and Greentree Realty LLC) are *all* New York corporations. See Stecich Aff. Ex. 11 (entity information from the NYS Department of State website). BSOR operates a rail line *within* New York, Complaint ¶ 3, and Greentree Realty LLC is a *local* business. Thus, application of the law to the Greentree property is neither designed to, nor will it, benefit an in-state commercial interest at the expense of an out-of-state commercial interest.

Nor would the Village's application of the law to the Greentree property solve a local problem solely at the expense of "articles of commerce coming from outside the State" for no "reason, apart from their origin." *City of Philadelphia*, 437 U.S. at 627. The Greentree property has been identified by the Village for possible condemnation under the New York Eminent Domain Procedure Law, and, as required by that law, the purpose for the condemnation is to satisfy local needs. However, there is no basis for asserting that the Village is targeting only interstate commercial interests or out-of-state goods to solve its local problems. First, any laws applied to the Greentree property, including condemnation, would equally affect all operations conducted there, and all goods shipped from there -- regardless of whether they involve local or interstate companies, and whether the goods involved are being transported in-state or out of state. Additionally, as described *supra* and set forth in Stecich Aff. Ex. 10, the Village has many

reasons to condemn the Greentree property that are *wholly unrelated* to the interstate character of any of the goods that might flow through the Greentree property.

Accordingly, BSOR made no showing that it is likely to meet its burden of proving that any application by the Village of its laws to the Greentree property would constitute *per se* discrimination under the dormant Commerce Clause.

B. The Village would not disparately burden interstate commerce by subjecting the Greentree property, and BSOR's proposed operations thereon, to applicable laws.

To show that non-discriminatory measures violate the dormant Commerce Clause, a plaintiff must first show that they cause "a special, disproportionate injury to interstate commerce" *Nat'l Elec. Mfr. Ass'n v. Sorrell*, 272 F.3d 104, 111 (2d Cir. 2001), *cert. denied*, 536 U.S. 905 (2002). The Second Circuit has recognized "three instances in which a non-discriminatory state or local regulation may impose a differential burden on interstate commerce: (1) when the regulation has a disparate impact on any non-local commercial entity; (2) when the statute regulates commercial activity that takes place wholly beyond the state's borders; and (3) when the challenged statute imposes a regulatory requirement inconsistent with those of other states." *United Haulers II*, 438 F.3d at 156-57 (citation omitted).

As noted above, the commercial entity that would be most directly affected by, for example, the condemnation is a *local* business -- Greentree Realty LLC, the owner of the property. The application of the law to one property that does not include any part of the main (CSX) through rail line and is wholly within the Village of Croton-on-Hudson does not regulate outside of New York's borders or conflict with the regulations of other states. Thus, none of the categories of activities identified by the Second Circuit as giving rise to a disparate burden is implicated. The absence of a disparate burden is fatal to BSOR's dormant Commerce Clause

claim. *Automated Salvage Transp. v. Wheelabrator Env'tl. Sys.*, 155 F.3d 59, 75 (2d Cir. 1998); see also *Freedom Holdings Inc. v. Spitzer*, 357 F.3d at 218.

In the context of transportation, inconsistent state regulations may give rise to a special burden on interstate commerce where they undermine the need for “national uniformity in the regulations for interstate travel.” *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 527 (1959) (citation omitted). “[S]tate restrictions on interstate transporters” may give rise to a “distinct interstate burden” where “[t]ransporters [would be] forced either to abide by state rules or avoid the state entirely [which] would necessarily . . . impede[], if they chose the latter course, . . . their efforts to conduct commerce with the surrounding states because they would be unable to pass through the regulating state.” *Nat’l Elec. Mfr. Ass’n*, 272 F.3d at 111-12. Nothing that the Village is doing with respect to the Site has any bearing on these interests.

C. To the extent that there is any disparate burden, it is not clearly excessive in light of the substantial local benefits.

If the plaintiff succeeds in showing that a measure imposes a disparate burden on interstate commerce, then the plaintiff must further show that the disparate burden is “clearly excessive in relation to the putative benefits” of the statute. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The “burden” to be weighed against the putative local benefits is limited to “the burden[] on interstate commerce that exceed[s] the burden[] on intrastate commerce,” *Automated Salvage Transp.*, 155 F.3d at 75 (citations omitted), and courts will not question a legislative body’s assessment of the need for a particular measure. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 92 (1987); *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 209 & 217 (2d Cir. 2003) (“This [Pike] balancing test, however, does not invite courts to second-guess legislatures by estimating the probable costs and benefits of the statute, nor is it within the competency of the courts to do so.”). Finally, where, as here, a measure does not

disturb “the right of businesses to compete on an equal footing,” or “undu[ly] interfere[]” with the ability of other states to exercise their police powers, the Second Circuit has held that “the burden imposed on interstate commerce must be regarded as insubstantial” such that even a “minimal showing of local benefit” will “compel a finding that th[e] burden is not ‘clearly excessive’ to the benefits that the ordinance[] provide[s].” *United Haulers II*, 438 F.3d at 161.

In the present case, there are clear and substantial local benefits. As described in Stecich Aff. Exs. 2 and 3, there is a long record of serious environmental violations involving the Greentree property. Additionally, condemnation would provide a much-needed public works facility, and would also allow more needed commuter parking. The Village has attempted and failed to find other locations for this facility, and has determined that a new public works facility would resolve the inefficiencies of having operations at different locations, prevent problems related to illegal dumping and aesthetic concerns regarding the storage of debris at the current public works facility, and satisfy a long term need for additional space. Stecich Aff. Ex. 10.

Moreover, any burden to interstate commerce that would be created by limiting the use of one property that is situated to obtain service from the main (CSX) through rail line is minimal. Any actions taken by the Village with regard to the Greentree property would not disrupt a necessarily interconnected, “national” route of interstate travel. This is not a case like *CSX Transportation, Inc. v. Williams*, 406 F.3d 667 (D.C. Cir. 2005), in which the Court of Appeals reversed the district court’s denial of a motion for preliminary injunction and enjoined a District of Columbia act prohibiting the transport of certain hazardous materials by rail over CSX’s main lines through the District of Columbia. The court explained that in “assessing the burden [on interstate commerce], it is appropriate for us to consider the practical and cumulative impact were other States to enact legislation similar to the D.C. Act.” *Id.* at 673. The Village has not

passed a general ban on rail or other related facilities -- BSOR challenges *only* the Village's actions with regard to one property, and thus the use of that particular property defines the extent of any disparate burden. As such, the Village's application of its laws to the Greentree property will not give rise to a disparate burden on interstate commerce that is clearly excessive in relation to local benefits. *See United Haulers II, supra.*

POINT III

In the Absence of Any Underlying Constitutional Violation, BSOR Has Not Stated a Claim Under 42 U.S.C. § 1983

BSOR alleges that "enforcement of the New York Eminent Domain Procedure Law or zoning and land use provisions with respect to BSOR's rail transportation operations at the BSOR Croton Yard constitutes a deprivation of BSOR's rights secured by the United States Constitution in violation of 42 U.S.C. § 1983 since the Village Defendants' enforcement imposes an impermissible burden on interstate commerce in violation of Article I, Section 8 of the United States Constitution (the Commerce clause)." Complaint ¶ 73. Section 1983 provides a civil claim for damages against any person who, acting under color of state law, deprives another of a right, privilege or immunity secured by the Constitution. 42 U.S.C. § 1983. Section 1983 itself creates no substantive rights; it provides only a procedure for redress for the deprivation of rights established elsewhere. Thus, in order to prevail on its section 1983 claim, BSOR must first show that the Village deprived it of a right secured by the dormant Commerce Clause. *E.g., Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986); *Rand v. Perales*, 737 F.2d 257, 260 (2d Cir.1984). As described above, BSOR has not shown a likelihood of success on the merits of its dormant Commerce Clause claim; absent this showing, BSRI's Section 1983 claim provides no independent basis for the issuance of a preliminary injunction.

Point IV
Plaintiff Will Not Suffer Irreparable Injury if a Preliminary Injunction Is Denied

The above discussion concerns plaintiff's low probability of success on the merits. The other prong in any preliminary injunction motion, of course, is whether plaintiff will suffer irreparable harm. Here, plaintiff can point to no such harm.

As one court has explicitly held in rejecting a claim of ICCTA preemption, where the relevant rail line has not been built, there can be no irreparable harm to plaintiff if an injunction is not issued in its favor. *J.P. Rail, Inc. v. New Jersey Pinelands Commission*, 404 F.Supp.2d 636, 647, 652 (D.N.J. 2005). There is no operation to be shut down. Operation of the line lacks essential authorizations from STB and CSX. And the two-year term of BSOR's lease does not denote an expectation of long-term operations, which is surely a part of "irreparable" injury.

Similarly, another court denying a claim of preemption under ICCTA found that "[c]laims about future contracts are speculative," and "claims of job losses are speculative and so do not rise to the level of irreparable harm." *CFNR Operating Co., Inc. v. City of American Canyon*, 282 F.Supp.2d 1114, 1119 (N.D.Cal. 2003).

An entity that is not yet operating has no goodwill to lose. BSOR cannot claim irreparable injury; the possibility that imagined customers will drop their hypothetical allegiance to nonexistent operation cannot be masqueraded as an "actual and imminent" harm. *See, e.g., Freedom Holdings*, 408 F.3d at 114-15. Even for *active* businesses, courts generally regard prospective losses of goodwill as too speculative to be cognizable absent an additional "clear showing" that the alleged injury is not only concrete and imminent, but also tied to a "wholly unique" and thus irreparable opportunity for the existing business. *Tom Doherty Associates, Inc. v. Saban Entertainment, Inc.*, 60 F.3d 27, 37-38 (2d. Cir. 1995). The fact that BSOR has yet to operate makes any prospective loss of goodwill doubly conjectural and beyond legal recognition.

The speculative nature of BSOR's prospective goodwill claim is not changed by its new business relationship with Coastal. Complaint ¶ 46 alleges that "[i]f the property is condemned, BSOR's relationships with its existing customer will necessarily be terminated, thereby adversely and irreparably affecting BSOR." However, this purported injury pertains to a lone customer for which BSOR has not yet moved a single load. BSOR has not begun to accrue the goodwill it purports to fear losing.

Furthermore, even if some goodwill with Coastal existed and could be lost, losses of goodwill are not inherently irreparable. *Penthouse Intern., Ltd. v. Playboy Enterprises, Inc.*, 392 F.Supp. 257, 261 (S.D.N.Y. 1974). BSOR provides no reason to believe the hypothetical loss it alleges would be beyond repair — that BSOR would be forever prevented from demonstrating its reliability.

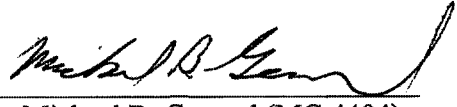
Conclusion

Plaintiff's motion for a preliminary injunction should be denied, and the temporary restraining order should be lifted.

Dated: New York, New York
May 23, 2006

Respectfully submitted,

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Attorneys for Defendants
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New York, New York 10022
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By: 
Michael B. Gerrard (MG 4404)

Of counsel:
Mary Gabrielle Sprague
Katrina F. Kuh

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
BUFFALO SOUTHERN RAILROAD, INC.,

Plaintiff,

- against -

VILLAGE OF CROTON-ON-HUDSON; GREGORY J. SCHMIDT, as Mayor of the Village of Croton-on-Hudson; DANIEL O'CONNOR, P.E., as Engineer and Building Inspector for the Village of Croton-on-Hudson; RICHARD F. HERBEK, as Manager of the Village of Croton-on-Hudson; THOMAS P. BRENNAN, as Trustee on the Village Board of Trustees; CHARLES A. KANE, as Trustee on the Village Board of Trustees; ANN GALLELLI, as Trustee on the Village Board of Trustees; LEO A.W. WIEGMAN, as Trustee on the Village Board of Trustees; CHRIS KEHOE, as member of the Village Planning Board; VINCENT ANDREWS, as member of the Village Planning Board; FRANCES ALLEN, as member of the Village Planning Board; ROBERT LUNTZ, as member of the Village Planning Board; KATHLEEN RIEDY, as member of the Village Zoning Board of Appeals; RHODA STEPHENS, as member of the Village Zoning Board of Appeals; RUTH WATKINS, as member of the Village Zoning Board of Appeals; WITT BARLOW, as member of the Village of Zoning Board of Appeals; and PAUL ROLNICK, as member of the Village Zoning Board of Appeals,

AFFIDAVIT
Civil Action No.
06 CIV 3755
Judge McMahon

Defendants.

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

LOUIS E. GITOMER, being duly sworn, deposes and says:

1. I am an attorney who was employed by the Interstate Commerce Commission (the "Commission") from on or about January 1, 1976 through

January 31, 1987. I served as an Attorney-Advisor, Supervisory Attorney, and then, as of December 1982, Deputy Director of the Section of Finance, the Rail Section and the Motor Section. As Deputy Director of the Section of Finance and the Rail Section, positions I held between December 1982 and May 1986, I supervised an office of up to 100 attorneys and was responsible for the preparation of the Commission's legal and policy decisions and rulemakings concerning railroad entry (49 U.S.C. §10901), exit (49 U.S.C. §10903, et seq.), consolidations (49 U.S.C. §11321, et seq.), rates (49 U.S.C. §10701, et seq.), operations (49 U.S.C. §11101), exemptions (49 U.S.C. §10502), and jurisdictional issues including questions of whether certain railroad property was a line of railroad or an excepted spur, industrial, team, switching, or side track (49 U.S.C. §10906). I wrote, reviewed and directed the preparation of thousands of decisions. Since 1987, I have regularly practiced before the Commission and its successor the Surface Transportation Board (the "Board").

2. I have been asked by the Village of Croton-on-Hudson to review the record in this matter concerning the claim by the Buffalo Southern Railroad, Inc. ("BSOR") that its purported operation of the site owned by Greentree Realty (improperly called the Croton Yard by BSOR) and including 1,600 feet of track (referred to herein as "Greentree Yard"), does not require Board approval or exemption because the track is properly classified as excepted spur track under 49 U.S.C. §10906.

The Northeast Interchange Railway, LLC proposal.

3. I have also reviewed the record before the Board in Northeast Interchange Railway, LLC-Lease and Operation Exemption-Line in Croton-on-Hudson, New York, STB Finance Docket No. 34734 ("FD 34734").

4. The Verified Notice of Exemption (the "Notice") filed by Northeast Interchange Railway, LLC ("NIR") with the Board on August 1, 2005, pursuant to 49 C.F.R. 1150.31 (See Exhibit 5 to the Affidavit of Marianne Stecich), sought an exemption to operate the Greentree Yard as a common carrier regulated line of railroad requiring Board approval or exemption prior to the start of operations under 49 U.S.C. §10901.

5. By decision served on November 18, 2005 (See Exhibit 7 to the Affidavit of Marianne Stecich), the Board rejected the Notice because "the factual and legal issues presented in the pleadings filed to date demonstrate that NIR's proposed transaction is controversial and raises important issues that make more scrutiny and the development of a more complete record necessary. The current construction and demolition waste operation at the site has attracted substantial opposition and local interest, including litigation in which the operations of NIR's predecessor were found to be a threat to the public health by the state court. Moreover, NIR has expressed an intent to convert this previously private construction waste transfer operation into what could turn out to be a more extensive for-hire common carrier operation involving commodities in addition to construction waste."

Board jurisdiction over the lease of track by a railroad.

6. Before a railroad is permitted to acquire another line of railroad, it must obtain approval from the Board pursuant to 49 U.S.C. §10902(a) or 49 U.S.C.

§11323. Before a railroad is permitted to acquire an excepted track, as defined in 49 U.S.C. §10906, which through use will become a line of railroad, it must obtain approval from the Board pursuant to 49 U.S.C. §10901.

7. The lease of a rail line is considered an acquisition of a rail line under 49 U.S.C. §10902 by the Board.

8. The Commission was created in 1887 to provide Federal regulation of the interstate railroad system and replace the ineffective patch work of state and local railroad regulation that was affecting interstate commerce. In addition to the lines of railroad, railroads operate over other track connected to their main lines in order to provide ancillary service to their customers, such as switching, pick-up, and delivery. These ancillary tracks are called spur, industrial, team, switching, or side tracks. Since the main line track to which these other tracks are connected, and the railroads that operated the main line track, were regulated by the Commission, it was thought appropriate for the minor transactions involving clearly auxiliary track to be excepted from the federal regulatory process. Prior to the ICC Termination Act of 1995 (which established the Board), spur, industrial, team, switching, or side track were subject to state and local regulation. In the ICC Termination Act, spur, industrial, team, switching, or side track were subjected to Board jurisdiction, for the limited purposes of construction,

acquisition, operation, abandonment or discontinuance (49 U.S.C. §10501(b)(2)), but then excepted from Board review (49 U.S.C. §10506). Provision of rail service over a spur, industrial, team, switching, or side track has never been interpreted as a blanket preemption of state and local law otherwise applicable to a facility.

9. The Board determines whether a track is a spur track or a line of railroad on a case-by-case basis. *CNW-Aban. Exemp.-In McHenry County, IL*, 3 I.C.C. 366 (1987), *rev'd on other grounds sub nom. Illinois Commerce Comm'n v. ICC*, 879 F.2d 917 (D.C. Cir. 1989).

10. To determine whether a track is a line of railroad or a spur track, the Board considers (a) whether the track extends into a territory not previously served by the railroad; (b) whether the track extends into territory already served by another railroad; (c) the use of the track; (d) the physical characteristics of the track; (e) the length of the track; (f) the number of shippers to be served; (g) whether the track is stub ended; (h) if there is regularly scheduled service on the track; (i) the owner of the track; and (j) who maintains the track. *The New York City Economic Development Corporation-Petition for Declaratory Order*, STB Finance Docket No. 34429 (STB served July 15, 2004).

11. The most important determinant used by the Board is whether the track is extending into a territory not previously served by the railroad. *Texas & Pacific Ry. v. Gulf, Colo. & S. F. Ry.*, 270 U.S. 266, 278 (1926); *Nicholson v. Interstate Commerce Comm'n*, 711 F.2d 364, 367 (D.C. Cir. 1983).

12. I am not familiar with any case in which the Board has concluded that it has no authority over the operation of a rail carrier providing common carrier services through the invasion of a new territory because the rail carrier claimed that it was only operating over a "spur." As explained above, a "spur" track is incidental to rail transportation. Where a rail carrier seeks to enter a new territory and offer common carrier services over what had formerly been a spur, Congress did not intend to preclude the Board's jurisdiction. *See United Transportation Union-Illinois Legislative Board v. Surface Transportation Board*, 183 F.3d 606 (7th Cir. 1999). This is precisely the kind of situation in which Congress intended the Board to exercise its authority.

BSOR's current and proposed operations.

13. Prior to commencing operation of the Greentree Yard, BSOR claims to have operated approximately 32 miles of track in Erie County, NY as a common carrier railroad and switching services in Tonawanda, NY. Feasley Affidavit, paragraph 2. Because BSOR's common carrier operation is hundreds of miles away from the Greentree Yard, BSOR must obtain approval or exemption from the Board to commence operations when it proposes to invade the territory of another railroad, as BSOR intends.

14. There is a freight yard to the north of the Greentree Yard. Feasley Affidavit, paragraph 6. The freight yard and the CSX Transportation, Inc. ("CSXT") line are the territory that BSOR is invading with a transload facility that could be located at either of those locations.

15. Although BSOR claims that it will interchange traffic with CSXT at its connection to the Greentree Yard (Feasley Affidavit, paragraph 12) the only points of interchange between BSOR and other railroads indicated by BSOR on its web site (members.aol/buffalosouthern/services.html) are BC [Buffalo Creek] Junction and Gowanda, both near Buffalo, NY. The only interchange with CSXT is at BC Junction. See also the CSXT web site at csx.com/?fuseaction=customers.sl_directory-detail&f=2154. In order to open an interchange, an Interchange Update Form must be executed by BSOR and CSXT and presented to the Rail Link, a subsidiary of the Association of American Railroads that processes all car movements. All industry and corporate reference files would have to be updated before an interchange could be opened. CSXT has established an Interchange Committee for the purpose of approving interchanges with other railroads. Upon information and belief, the CSXT Interchange Committee has not received a request to open an interchange with BSOR at Croton-on-Hudson or anywhere in that vicinity.

16. A rail carrier is only required to provide interchange with another rail carrier between their lines of railroad. 49 U.S.C. §10742. If BSOR is not operating as a rail carrier or is not operating over a line of railroad (such as over a spur track), then CSXT has no obligation under the law to interchange traffic with BSOR. On the other hand, if BSOR wishes to operate as a common carrier with a right to interchange traffic with CSXT, then it must first obtain authorization or exemption from the Board to lawfully operate the Greentree Yard.

17. Based on information and belief, BSOR has not entered an agreement to interchange rail traffic with CSXT onto the Greentree Yard.

18. BSOR proposes to provide common carrier service to the Greentree Yard. Feasley Affidavit, paragraph 11 and Exhibit A, paragraph 3.

19. BSOR proposes to provide common carrier service over Greentree Yard to Hanson Aggregates New York, Inc. (Meehan Affidavit), Coastal Distribution, LLC (Rutigliano Affidavit) and other businesses (Feasley Affidavit, paragraph 28).

20. Without an interchange agreement with CSXT, BSOR cannot undertake the common carrier services it has just begun to offer, because its customers' freight cars will not be able to enter or leave the site.

BSOR requires Board approval or exemption before it can lawfully commence the common carrier operation it proposes at Greentree Yard.

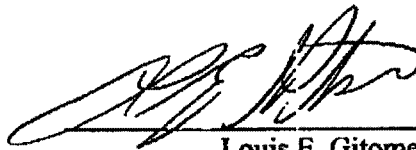
21. BSOR has not obtained approval or exemption to operate the Greentree Yard as a common carrier.

22. The Board has not determined whether the Greentree Yard is a line of railroad or a spur track. Because BSOR proposes to invade the territory served by CSXT and the rail yard north of Greentree Yard, it appears that BSOR will operate the Greentree Yard as a line of railroad and not as a spur track.

23. Prior to lawfully operating an additional line of railroad under a lease, BSOR must obtain approval or exemption from the Board under 49 U.S.C. §10901 or §10902. Anyone that operates an additional line of railroad without Board

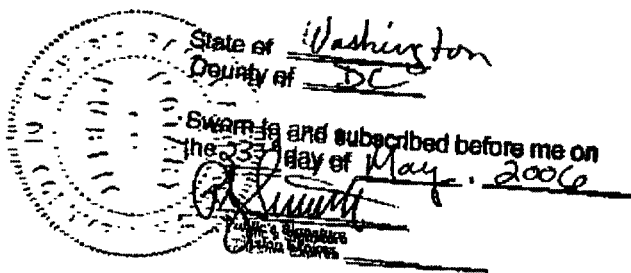
approval or exemption is subject to penalties of up to \$5,000 per day. See 49 U.S.C. §11901.

24. BSOR should thus halt its apparent unlawful operation until the Board determines (a) whether Greentree Yard is a line of railroad or spur track; and (b) whether to approve or exempt BSOR's lease and operation of Greentree Yard.



Louis E. Gitomer

Sworn to before me this 23rd day of May, 2006.



PAMELA J. SMITH
District of Columbia
My Commission Expires
January 14, 2011

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
BUFFALO SOUTHERN RAILROAD, INC.,

Plaintiff,

- against -

VILLAGE OF CROTON-ON-HUDSON; GREGORY J. SCHMIDT, as Mayor of the Village of Croton-on-Hudson; DANIEL O'CONNOR, P.E., as Engineer and Building Inspector for the Village of Croton-on-Hudson; RICHARD F. HERBEK, as Manager of the Village of Croton-on-Hudson; THOMAS P. BRENNAN, as Trustee on the Village Board of Trustees; CHARLES A. KANE, as Trustee on the Village Board of Trustees; ANN GALLELLI, as Trustee on the Village Board of Trustees; LEO A.W. WIEGMAN, as Trustee on the Village Board of Trustees; CHRIS KEHOE, as member of the Village Planning Board; VINCENT ANDREWS, as member of the Village Planning Board; FRANCES ALLEN, as member of the Village Planning Board; ROBERT LUNTZ, as member of the Village Planning Board; KATHLEEN RIEDY, as member of the Village Zoning Board of Appeals; RHODA STEPHENS, as member of the Village Zoning Board of Appeals; RUTH WAITKINS, as member of the Village Zoning Board of Appeals; WITT BARLOW, as member of the Village of Zoning Board of Appeals; and PAUL ROLNICK, as member of the Village Zoning Board of Appeals,

Defendants.
-----X

AFFIDAVIT

Civil Action No.
06 CIV 3755

Judge McMahon

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

CHARLES A. KANE, being duly sworn, deposes and says:

1. I am employed as a Supervisor of Metro North Commuter Railroad, and my

office is located at Harmon Shop, near the Croton-on-Hudson train station in Croton-on-Hudson, New York. In addition, since April 2004, I have served as a Trustee on the Croton-on-Hudson Village Board of Trustees. As such, I am a named defendant in this action.

2. I am submitting this affidavit in opposition to Buffalo Southern Railroad, Inc.'s application for a temporary restraining order and other injunctive relief. I am familiar with all matters stated in this affidavit from my personal knowledge and observations.

3. My Metro North office is located directly across the railroad tracks from 1A Croton Point Avenue, the property that is the subject of the above captioned action. From the Metro North office, I have a clear view of the property, including the 1600 foot piece of railroad track on the westerly border of the site.

4. At least twice a day, I pass the entrance to the 1A Croton Point Avenue facility. In addition, approximately twice a day, I cross the bridge on Croton Point Avenue and, from that vantage point, which is elevated, I have a clear overview of the entire 1A Croton Point Avenue site.

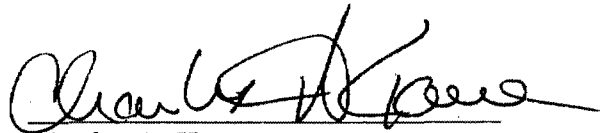
5. Because of the long-standing controversy over the use of 1A Croton Point Avenue as a waste transfer facility, since I became a trustee in 2004, I have always paid close attention to what is going on at the 1A Croton Point Avenue site.

6. Since Metro Enviro ceased operations and completed its clean up of the 1A Croton Point Avenue site in the summer of 2005, up until May 18, 2006, I have not seen any train cars at all on the 1600 foot piece of railroad track. I have not seen train cars

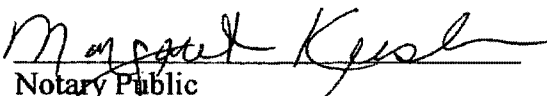
coming onto the track nor departing from the track. In addition, during that same period, I have not seen any trucks coming onto or leaving 1A Croton Point Avenue.

7. Since Metro Enviro left the site, I have not seen any activity at all at the site, other than, on a daily basis, a single automobile parked at the weigh station gate and one person, who appears to be guarding the site.

8. Finally, I have seen no signs marked "Buffalo Southern Railroad," or anything similar, at the site itself or at the road leading to the site.


Charles A. Kane

Sworn to before me this 19th
day of May, 2006


Notary Public

MARGARET KEESLER
Notary Public, State of New York
No. 01KE5050950
Qualified in Westchester County
Commission Expires October 23, 2009

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
BUFFALO SOUTHERN RAILROAD, INC.,

Plaintiff,

- against -

VILLAGE OF CROTON-ON-HUDSON; GREGORY J. SCHMIDT, as Mayor of the Village of Croton-on-Hudson; DANIEL O'CONNOR, P.E., as Engineer and Building Inspector for the Village of Croton-on-Hudson; RICHARD F. HERBEK, as Manager of the Village of Croton-on-Hudson; THOMAS P. BRENNAN, as Trustee on the Village Board of Trustees; CHARLES A. KANE, as Trustee on the Village Board of Trustees; ANN GALLELLI, as Trustee on the Village Board of Trustees; LEO A.W. WIEGMAN, as Trustee on the Village Board of Trustees; CHRIS KEHOE, as member of the Village Planning Board; VINCENT ANDREWS, as member of the Village Planning Board; FRANCES ALLEN, as member of the Village Planning Board; ROBERT LUNTZ, as member of the Village Planning Board; KATHLEEN RIEDY, as member of the Village Zoning Board of Appeals; RHODA STEPHENS, as member of the Village Zoning Board of Appeals; RUTH WATKINS, as member of the Village Zoning Board of Appeals; WITT BARLOW, as member of the Village of Zoning Board of Appeals; and PAUL ROLNICK, as member of the Village Zoning Board of Appeals,

AFFIDAVIT

Civil Action No.
06 CIV 3755

Judge McMahon

Defendants.

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

MARIANNE STECICH, being duly sworn, deposes and says:

1. I am the Village Attorney for the Village of Croton-on-Hudson and am familiar

with all matters stated in this affidavit, which I am submitting in opposition to the application of Buffalo Southern Railroad Inc. ("BSOR") for a preliminary injunction and other injunctive relief, and in support of the Village's application to lift the temporary restraining order issued by this Court on May 18, 2006.

2. At the outset, I must inform the Court that Plaintiff's description of its operations in Croton-on-Hudson is seriously misleading. As of the date of this affidavit, it is apparent that BSOR has not conducted any transloading operations at 1A Croton Point Avenue (also referred to as the "Site"). Its descriptions of the Site as the "BSOR Croton Yard," and of its putative operations as the "Transload Facility," are, at this point, pure fiction.

3. As stated in the affidavit of Charles A. Kane, a supervisor for Metro North Commuter Railroad, and one of the named defendants in this action, he works directly across from 1A Croton Point Avenue, has a clear view of the Site throughout the work day, and has seen no railroad or trucking activity at the Site since Metro Enviro vacated it and cleaned it up at the end of summer, 2005. In addition, Mr. Kane states that there are no signs marked "Buffalo Southern Railroad," or anything similar, at the Site or at the entrance to the Site. Since the recent removal of the "Metro Enviro Transfer" sign, there have been no signs at all at the Site indicating its name.

4. Annexed to this affidavit as Exhibit 1 are pages printed from the BSOR website on May 20, 2006. The home page of the site refers exclusively to operations in the Buffalo area. It does have a link to a page of announcements, including one dated

May 17, 2006 – the day before the instant action was commenced – stating: “The BSOR announces that they are now offering common carrier transportation services at its new Transload Facility in Croton-on-Hudson, New York. This facility serves Westchester County and New York City markets.”

5. I have spoken with the officials and employees in the Village Manager’s office and the Building Department, as well as with the Mayor and each of the Trustees, and none of them has been contacted by anyone from BOSR. Until the Village was served with the papers in the instant action, none of them had even heard of BSOR or the “BSOR Croton Yard.” The Village has at no time taken or threatened enforcement or other action against BSOR (other than opposing the instant lawsuit).

6. As will be described later in this affidavit, the property at 1A Croton Point Avenue was used since 1998 as a waste transfer station, operated by Metro Enviro Transfer, LLC and predecessor entities (collectively referred to as “Metro Enviro”). In July 2005, the New York Court of Appeals affirmed the Village’s right to close down Metro Enviro’s operations for serious environmental and permit violations. In September 2005, Metro Enviro vacated the site, and it has remained essentially dormant since.

7. Efforts over the past nine months by Northeast Interchange Railway – despite its misleading nomenclature, another waste hauler – to resume waste transfer station operations at the Site have been thwarted by rulings of the United States Surface Transportation Board and the Westchester County Supreme Court. The history of those efforts will be detailed in the following paragraphs.

Metro Enviro's C&D Transfer Station

8. In early 1997, Metro Enviro leased the site at 1A Croton Point Avenue for the purpose of operating a construction and demolition ("C&D") waste transfer station. Upon information and belief, there was a building on the property where C&D debris was processed, as it was transferred from trucks to rail cars. This building was generally known as the "processing building." It has not been known as the "Transload Facility" or anything of that sort.

9. Later in 1997, the 1600-foot stretch of track was installed along the westerly border of the property, adjacent to the Croton Harmon rail yard.

10. From 1998 through the summer of 2005, the site at 1A Croton Point Avenue was used as a C&D waste transfer station. The transfer station operated under a non-conforming use special permit, issued on May 4, 1998 by the Croton-on-Hudson Village Board of Trustees for a three-year period. The special permit contained 42 conditions relating to capacity limits, hours of operation, types of waste that could be accepted, and required training of personnel.

11. Beginning in 2000, Metro Enviro, in the words of the New York Court of Appeals, "repeatedly and intentionally violated conditions of the permit."¹ On the basis of those violations, and after a long series of hearings and investigations, the Croton-on-Hudson Village Board of Trustees voted, on January 27, 2003, not to renew the special

1

Metro Enviro Transfer, LLC v. Village of Croton-on-Hudson, 5 N.Y.3d 236, 239, 800 N.Y.S.2d 535, 536 (2005).

use permit and directed Metro Enviro to cease operations on February 17, 2003. A copy of the Board's Statement of Findings underlying that decision is annexed to this affidavit as Exhibit 2.

12. Metro Enviro immediately brought a CPLR Article 78 proceeding in Westchester County Supreme Court to challenge the denial. The case was assigned to Justice Francis Nicolai, who, on February 19, 2003, invalidated the Board of Trustees' determination and enjoined the closure of the transfer station.

13. Justice Nicolai's order was reversed by the Second Department Appellate Division. Metro Enviro Transfer, LLC v. Village of Croton-on-Hudson, 7 A.D.3d 625, 777 N.Y.S.2d 170 (2d Dep't 2004). The Appellate Division's decision was affirmed by the Court of Appeals, on July 6, 2005, at 5 N.Y.3d 236, 800 N.Y.S.2d 535 (2005). A copy of the Court of Appeals decision is attached to this affidavit as Exhibit 3.

14. On July 18, 2005, the Village directed Metro Enviro to cease accepting waste on July 23, 2005.

15. On July 21, 2005, Metro Enviro and Greentree Realty, LLC ("Greentree"), the owner of the Site, commenced another action before Justice Nicolai, essentially for a declaratory judgment that a C&D waste transfer facility could continue to operate at 1A Croton Point Avenue as a pre-existing, legal nonconforming use, and did not need a special permit.² On July 21, 2005, Justice Nicolai issued a temporary restraining order

²

Greentree Realty, LLC and Metro Enviro Transfer, LLC, Index No. 05-11872 (Westchester County Supreme Court).

enjoining the closure of the transfer station.

16. On August 26, 2005, Justice Nicolai issued an order enjoining the Village from “prohibiting or interfering with Greentree’s ability to lease and or operate it’s [sic] property for purposes of solid waste management, with the exception of Metro Enviro, which is required to comply with the Closure Order.” The decision indicated, however, that a solid waste facility would require a special permit from the Village. A copy of Justice Nicolai’s August 26, 2005 decision is annexed to this affidavit as Exhibit 4.

Northeast Interchange Railway’s Application to the Surface Transportation Board

17. Almost simultaneously with the proceeding before Justice Nicolai, another waste hauler, misleadingly named Northeast Interchange Railway, LLC (“NIR”), filed a Notice of Exempt Transaction with the United States Surface Transportation Board (“STB”), with respect to the 1600-foot length of track at 1A Croton Point Avenue. (This Notice was filed by James E. Howard, one of the attorneys for BOSR in the instant case.) According to its several submissions to the STB, NIR planned to acquire the assets of Metro Enviro, including its lease, and to transload construction and demolition waste over the 1600-foot stretch of track. Under the STB’s summary class exemption procedures, once a Notice of Exempt Transaction is filed, the exemption automatically becomes effective in seven days unless the STB takes adverse action. A copy of NIR’s Notice of Exempt Transaction is annexed to this affidavit as Exhibit 5.

18. The Village became aware of NIR's Notice of Exempt Transaction the day it was filed and immediately notified the STB that it would be seeking a stay of the exemption. On August 4, 2005, the Village filed a Petition to Reject the Notice of Exemption or, in the Alternative, for a Stay of Effectiveness. The next day, the STB issued an order staying the effectiveness of the Notice of Exempt Transaction until a further order of the STB. A copy of this order is annexed to this affidavit as Exhibit 6.

19. Three months later, on November 17, 2005, after extensive written submissions by both the Village and NIR, the STB rejected NIR's notice of exemption and ruled that if NIR wished to pursue its claim for exemption, it must "file either a petition for exemption under our case-by-case exemption procedures at 49 CFR part 1121, or a formal application under 49 U.S.C. 10901 and 49 CFR 1150 Subpart A." The STB stated its concerns as follows:

NIR's proposed transaction is controversial and raises important issues that make more scrutiny and the development of a more complete record necessary. The current construction and demolition waste operation at the site has attracted substantial opposition and local interest, including litigation in which the operations of NIR's predecessor were found to be a threat to the public health by the state court. Moreover, NIR has expressed an intent to convert this previously private construction waste transfer operation in to what could turn out to be a more extensive for-hire common carrier operation involving commodities in addition to construction waste.

A copy of the STB's complete Decision is annexed to this affidavit as Exhibit 7.

20. NIR never filed a petition for exemption or a formal application.

21. To the best of my knowledge, BSOR has not applied for STB approval to extend its operations to the 1600-foot stretch of track at 1A Croton Point Avenue.

Northeast Interchange Railway's State and Local Applications

22. While its matters were pending before the Supreme Court and the STB, NIR applied to the Westchester County Solid Waste Commission for a hauler's license, in order to commence waste transfer operations at 1A Croton Point Avenue. (NIR's attorneys on its matters in New York State were Crane, Parente, Cherubin & Murray, the attorneys for BOSR in the instant action.)

23. The Village urged the Solid Waste Commission not to issue the license on the grounds that the Village had evidence that several waste facilities in the Northeast owned and/or operated by NIR's parent company, Regus Industries, LLC ("Regus"),³ had been the subject of governmental enforcement actions, or had been investigated, for violating federal, state, and local permitting requirements and conditions.

24. The Village was particularly concerned about the Warren Hills C&D Landfill in Ohio, operated by Regus at the time the Ohio Attorney General commenced an action for a series of violations in operating the landfill. This action resulted in a consent order between the State and the Warren Hills Landfill operator, which continued to violate the consent order, causing the State of Ohio to commence a contempt proceeding.

³

NIR is a wholly owned subsidiary of Regus, apparently created for the purpose of operating the proposed transfer station in Croton-on-Hudson.

Additionally, while Regus was operating the Warren Hills Landfill, the federal Agency for Toxic Substances and Disease Registry warned of an "urgent public health hazard" posed by high concentrations of hydrogen sulfide at the landfill. Subsequently, the Emergency Response Branch of the United States Environmental Protection Agency determined that a substantial public health threat was posed by the site. The Village's correspondence relating to this landfill and other Regus operated waste facilities is annexed to this affidavit as Exhibit 8.

25. Nonetheless, in December 2005, the Solid Waste Commission granted NIR a hauler's license. The next month, the New York State Department of Environmental Conservation issued it a permit for a C&D waste processing facility at 1A Croton Point Avenue.

26. While its application before the Solid Waste Commission was pending, Andreas Gruson, the Chief Executive Officer of NIR, telephoned Richard Herbek, the Croton-on-Hudson Village Manager, and told him that NIR intended to commence waste transfer operations at 1A Croton Point Avenue as soon as NIR received its County license and State DEC permit, and that it did not need any approvals from the Village.

27. The Village, therefore, as soon as NIR received its hauler's license, commenced an action against NIR in Westchester County Supreme Court for a temporary restraining order and preliminary injunction enjoining NIR from commencing waste transfer station operations at the Site without first obtaining either a use variance or a special permit from the Village. The Village was successful in its application and, on

April 27, 2006, Justice Nicolai issued a preliminary injunction enjoining "NIR and its affiliate RSA . . . from operating a transfer station at the Property without first obtaining a special permit in accordance with the Village's Zoning Code." A copy of Justice Nicolai's April 27, 2006 Decision is annexed to this affidavit as Exhibit 9.

28. As of today, NIR has not applied for a special permit. Neither has any other entity applied to the Village for a special permit for a C&D waste transfer station or other use at the Site, or for a certificate of occupancy for an as-of-right permitted use, such as a railroad at the Site.

29. It is important to note that in its applications to the state and county, NIR never described its operations as rail transportation. Even in the proceeding before the Surface Transportation Board, NIR stated that it intended to provide rail transportation service for the purpose of transloading construction and demolition waste.

Eminent Domain Preliminary Steps

30. While the litigation was pending in Westchester Supreme Court, the Village took preliminary steps toward making a determination whether to acquire the 1A Croton Point Avenue site under the New York State Eminent Domain Procedure Law, for the purpose of using it as a Department of Public Works ("DPW") garage and storage facility.

31. On February 6, 2006, the Village Board of Trustees conducted a public hearing to determine whether there was a municipal need for the Site. The Village

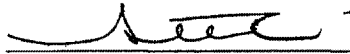
Manager, Village Engineer, and Superintendent of Public Works testified in detail that the Village needs a new DPW facility, as well as a storage site for other Village uses; that the Village has a pressing need for parking above the tidal flood line; that the site at 1A Croton Point Avenue is well-suited for those needs; and that the Village had explored many other sites to meet those needs but was unsuccessful. A copy of the minutes of the public hearing, which includes a transcript of the testimony of the three Village officials is annexed to this affidavit as Exhibit 10.

32. The Village has begun its review under the State Environmental Quality Review Act of the proposed acquisition and development of the Site.

33. The Village has made no final decision on whether to acquire the Site or develop a facility there.

34. Annexed as Exhibit 11 are pages printed from the web site of the New York Department of State on May 20, 2006, indicating that Greentree Realty LLC, Hanson Aggregates New York, Inc., and Coastal Distribution, LLC are New York corporations.

35. Annexed as Exhibit 12 are papers from the files of the Village concerning the Village's approval in 2003 of a special permit application for the Max Finkelstein Tire Warehouse.


Marianne Stecich

Sworn to before me this 23rd
day of May, 2006


Notary Public

MICHAEL B. GERARDO
Notary Public, State of New York
No. 4943938
Qualified in Westchester County
Commission Expires Nov. 7, 2007
2006

SECRET

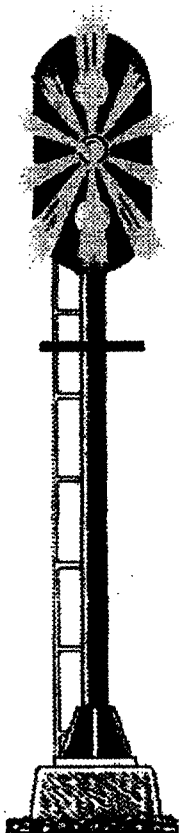
Exhibit 1

Buffalo Southern Railroad



Site Map

[\[News\]](#)
[\[Customers/Services\]](#)
[\[Transload Facility\]](#)
[\[Route Map\]](#)
[\[Rates\]](#)
[\[History\]](#)
[\[Feedback\]](#)
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The **Buffalo Southern Railroad (BSOR)** is a locally owned Class III Common Carrier shortline railroad company. Located in Western New York State, the mainline of the BSOR runs southward out of Buffalo towards Jamestown on a segment of 32 miles. The right of way, also referred to as Line 1246 is owned by **Erie County**. The BSOR operates the line on a lease with the **Erie County Industrial Development Agency**.



Traveling south from Buffalo, the railroad passes through prime industrial, residential and agricultural lands. Also having some of the best interchange connections at Buffalo (BC Junction), freight rates are competitive. Connections with all Class 1 railroads in Buffalo include the Norfolk Southern, CSX, Canadian Pacific and the Buffalo and Pittsburgh. Connections at Gowanda with the New York and Lake Erie extend the rail network farther south.

The BSOR's corporate office is located in Eden, New York. Only 15 miles south of Buffalo on Route 62, Eden is 1.5 miles from Interstate 90 Exit 52A. The line offers easy access to US Routes 20 and 5, State Routes 249, 179, 75 and 39 as well as Interstate 90, with all only short distances from sites along the BSOR. This makes the railroad perfectly situated for all customer needs both in rail sidings and vehicle traffic accessibility.

Locomotive and Rail Car Maintenance facilities are located online in a 7000 square foot shop.

With fuel costs rising and highway congestion getting worse, railroads offer an excellent advantage in moving your products! Contact the BSOR to discuss your needs.

General Information: Mainline 32 Miles in Length - Buffalo to Gowanda, NY - (Interchange with New York and Lake Erie that continues line to the south);

Yard Switching - Dunlop Tire (Off of Kenmore Yard, Tonawanda, NY)

Rates: The Buffalo Southern is a Reciprocal Switching Line. Waybill delivery information should state *Delivery by BSOR* for best rates.
[\[click here for downloadable rate information\]](#)

Operations: Trains are operated as needed. Typically several times per week. Customers demands set operational schedules.

Traffic: Grains (Feed), Fertilizer, Propane, Lumber, Scrap Metals, Cement, Aggregates, Paper, Brick

Facilities & Services: On Time/On Site Deliveries, Locomotive Leasing, Plant Switching, Team Tracks (Car Storage and Unloading Sites, Under Track Screw Auger and Loading Docks Available), Radial Stacker and Tipple Unloading, 2 Wyes (Car Turning), 2 Bay Locomotive/Car Shop, Connections with all major Railroads in Buffalo, Blasdell Site and other commercial sites available for developed to suit needs, **** NEW **** Transload Facility in Westchester County

Call for more details for your service needs.
[\[click here for a list of customer and services available\]](#)

Contacts:

Buffalo Southern Railroad, Inc.
8600 Depot Street
Eden, New York 14057

Albert Feasley - Vice President of Operations
Mary Jane Franz - Traffic Manager/Secretary of the Corporation

Car Tracing, Marketing, Sales and Rates: (716) 992-4979 Voice
Interchanges: (716) 992-9132 Fax

Erie County Industrial Development Agency
John Cappellino, Business Retention Specialist
275 Oak Street
Buffalo, New York 14203

Voice: (716)856-6525
Fax: (716)856-6754

Erie County
Christopher Jacobs, Director
or Laurence A. Rubin, Commissioner of Environment and Planning

Division of Planning
Room 1053, Rath Office Building
95 Franklin Street
Buffalo, NY 14202

Voice: (716) 858-8390
Fax: (716) 858-7248

Railroads of New York State

Explore the Eden Area Economics and Surrounding Businesses

Regional Knowledge Network



Don't meet us at the crossings, Remember:

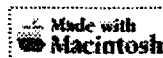
"When it's a tie at the crossing, you lose!"

The BSOR is a proud member of OLS

100001035 Deliveries of this Page!

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[email to BSOR Web Master](#)



BSOR News



News Updated 5/17/06

5/17/06 - The BSOR announces that they are now offering common carrier transportation services at its new Transload Facility in Croton-On-Hudson, New York. This facility serves Westchester County and New York City markets. The BSOR's services include complete loading and unloading for most commodity and car types; switching, storing and repair of rail cars; and track inspection services. The commodity types transloaded at the BSOR Croton facility include, among other things, aggregates, lumber, metals and concrete construction products.

Featured on site are electronic scales for rail and truck, an enclosed structure for transload of dusty materials and other loading equipment. The site is located on the Metro North line along the Hudson River, a short distance from major interstate highways and New York City. Rail car switching is being provided on site by the BSOR and interchanged to the national rail network via CSX.

See the new facility at Croton, contact the BSOR at bsorcroton@aol.com for more details.

5/1/06 - Locomotive 2010 was delivered to Gateway Metroport in place of locomotive 93. Loading operations have commenced for the shipping season. Once repairs are completed on 93, 2010 will return to Hamburg and 93 will assume her normal duties.

3/19/06 - The BSOR announces intention to sell surplus equipment. Listings have been placed on the Railswap.Org website. Items up for sale include Fairmont Tie Shear Parts, Natural Gas Shop Heaters and Miscellaneous EMD Locomotive Parts. Contact Pat Connors for more details.

3/17/06 - BSOR Shop Report - 423 was placed back into storage. Internal block inspection found minor rust damage inside of the block. It is felt that repairs can be made at a later date and attempts made to fire the block. No time frame is given. Engine 93

(S4) is in the shop for water system repairs and routine maintenance to prepare it for the up coming loading season. Once it is completed it is planned to return 93 to Gateway Metroport.

A slide table was constructed over the winter months to aid in wheel and traction motor work. The concrete work was completed in the fall with the steel table and track replaced over the last couple of months. The first engine rolled over the new construction this week. Engine 2010 is slated for wheel replacement with the use of the new table some time in the near future.

3/8/06 - RIEFLER CONCRETE CLOSES - As has been reported by several local news sources Riefler Concrete Products has closed it's doors, laying off hundreds of workers. This unfortunate news comes as a surprise to many, including the BSOR. Nothing outside of what has been reported is known by the BSOR. This will no doubt mean a minor drop in car counts. It is hoped that Riefler's is able to either reorganize or be sold to another producer that will utilize Riefler's many assets. The Hamburg Plant has a DOT approved transload and storage facility as well as multiple other rail unloading facilities on site. The BSOR Enginehouse remains unaffected by this closure at this time. **NOTE HOWEVER THAT ALL VISITORS AND DELIVERIES will now need to call ahead for access onto the property.**

1/1/06 - Locomotive 423 is in the shop for evaluation of possible return to service. This locomotive has been in storage since it's arrival from Omaha in 1998. Work to be performed include air updates, main generator cleaning and reassembly, prelubing and internal block inspection and water system inspection. An assessment will be made for feasibility to return this C415 to service. It was learned recently that the two ex-Spokane, Portland and Seattle C415s (#4010 and 4011) used by the Ohio River Terminal in Huntington, West Virginia have been cut up for scrap. The BSOR's 415 is now one of only 7 remaining in the US.

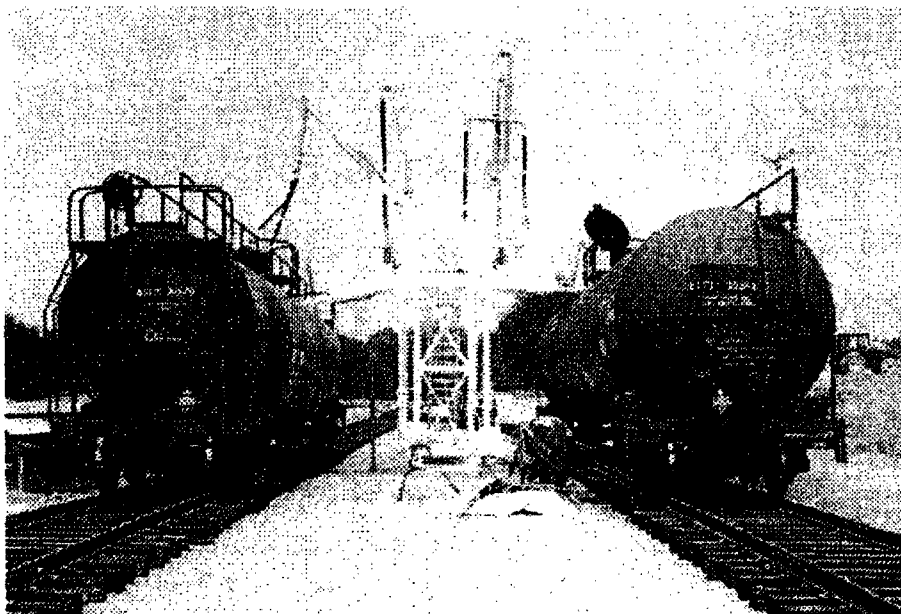
3/19/04 - Engine 4241 arrived safely in Cleveland on the Cuyahoga Valley Scenic Railroad. Best of luck to their maintenance department with restoration.

12/17/03 - The BSOR has sold ex Q&G #4241 to the Cuyahoga Valley Scenic Railroad. Crews from the CVSR have prepared the locomotive for shipping. The unit will be shipped early in 2004. It is hoped that the unit can be restored to operating condition and we look forward to seeing the unit return to service.

12/15/03 - Contractors are to begin work on installing 5000 ties to upgrade the mainline between Hamburg and North Collins.

8/31/03 - The BSOR anticipates additional new business this fall. BSOR crews continue construction of a siding for Crescent Manufacturing at North Collins. The ex-Agway Fertilizer plant is undergoing repairs to be utilized as a bulk feed storage and transload facility.

8/21/03 - Niagara Energy, LLC (Renaldo's) unloaded their first two tank cars at the new facility in North Collins. All 5 storage tanks were purged. Construction at the plant is on going and should be completed in the early fall. The BSOR crews worked hard to complete construction of two new tracks at the facility. Hazmat Training, Firemen Response and Handling Classes will be on going through the fall.



8/19/03 - Many thanks to the BSOR Employees, Strates Employees, NS and CSX. The train was loaded before dark and was on it's way to Syracuse at around 5 a.m. on the 19th! See you all next year.

For more information about the fair, visit the Erie County Fair on the web.

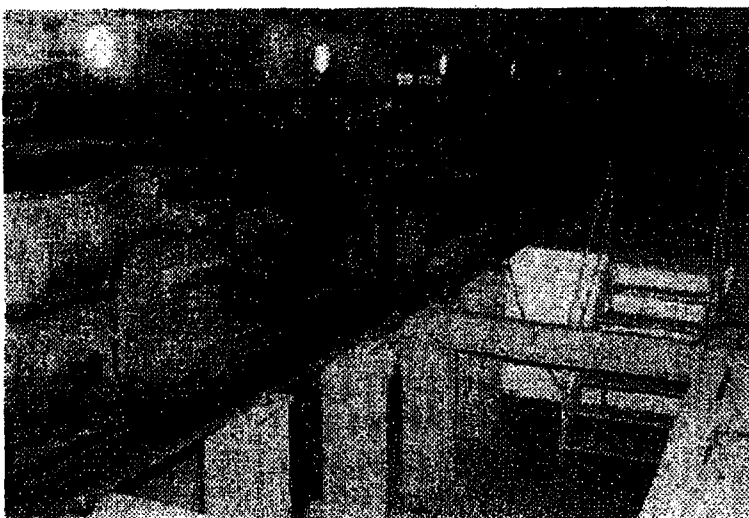
For Strates Train schedules later in the year, visit Strates.com.

7/31/03 - Work on the Niagara Energies propane transload facility continues to progress. BSOR and Renaldo's crews have installed two switches and several hundred feet of track. Test cars are expected to arrive in mid-August, with unloading and hazmat training to continue into September.

2/21/03 - The first propane storage tanks for the future transload facility have arrived at North Collins. It is hoped that construction will commence as soon as the snow breaks. The BSOR anticipates additional tie replacement, one crossing surface replacement and several switch upgrades for the anticipated delivery of propane.

2/1/03 - This winter's snowfall has hit hard in many areas of the northeast. Snow totals tended to be higher to the south. The thus far has only plowed once to the south to knock down banks piled up at crossings.

1/20/03 - The first locomotive is placed over the new inspection pit at the Hamburg Engine House. After nearly one year of planning and construction, the new pit is a welcome addition to the BSOR's maintenance facilities.



1/01/03 - The BSOR's Blasdell site is currently available for development and gives the BSOR added storage space for potential new customers. The site is available for transloading, car storage, car repair or many other uses. The BSOR is conveniently located with direct rail connections to all Class 1 railroads that access Buffalo, NY. The site is cleared with ample storage space and has electrical power readily available. It is located in the Village of Blasdell only a 1/2 mile from US Route 5 and 1 mile from Interstate 90. Interested parties are encouraged to call for more information. Further development on site is available. Contact the Buffalo Southern

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Exhibit 2

**Statement of Findings of the Village Board of Croton-on-Hudson, dated January 27, 2003
[pp. 13-26]**

January 27, 2003

**Village of Croton-on-Hudson
Village Board of Trustees
Statement of Findings
Regarding Renewal of the Special Use Permit for
Metro Enviro Transfer LLC – Croton-on-Hudson Waste Transfer Station**

Pursuant to the Village of Croton-on-Hudson Zoning Code ("Village Code") Section 230-56 and other applicable authority, the Village Board of Trustees makes the following findings regarding Metro Enviro Transfer LLC – Croton-on-Hudson Waste Transfer Station ("the Facility"):

I. Background

In 1984, the land on which the Facility is located ("the Site") was purchased by Robert V. Liguori. He proposed to change the operations on the Site from materials storage to wood processing and recycling. Subsequently, the Zoning Board of Appeals determined that the use of the Site had changed from one nonconforming use to another. Under what is now Village Code § 230-53A.(2), this triggered the need for a special use permit from the Village Board. A special use permit allowing wood processing and recycling was applied for and granted in 1988 to Industrial Recycling Systems, a company owned by Mr. Liguori. Since then, operations at the Site have been carried out subject to various special use permits with various conditions.

In late 1994, Mr. Liguori applied to New York State Department of Environmental Conservation ("DEC") for modification of the applicable solid waste management permit in order to expand the range of construction and demolition debris ("C&DD") that could be accepted from only materials attached to wood waste to a broader range of C&DD. In early 1995, Mr. Liguori applied for modification of the site plan and to increase the amount of material that could be processed. The application named Harmon Recycle & Rail in place of Industrial Recycling Systems. The Planning Board undertook a land use analysis and SEQRA analysis of the application and held public hearings on the application in June 1995. In July 1995, the Planning Board, as lead agency, adopted a negative declaration under SEQRA with respect to the application and approved the modified site plan.

In 1995, because Mr. Liguori was continuing to accept material but failing to timely ship it offsite, large amounts of material accumulated on site in violation of the DEC permit and the Village special use permit. In February 1996, Mr. Liguori entered into a consent order with DEC that required remediation of on-site conditions, including removal of the stockpiled materials, and payment of a \$35,000 fine. At the same time, DEC granted the permit modification Mr. Liguori had applied for in 1995. In May 1996, the Planning Board approved an amendment to the site plan, with an accompanying negative declaration under SEQRA, to permit the construction of a concrete retention pad pursuant to the DEC Consent Order as well as other proposed changes. In December

1996, DEC issued another notice of non-compliance based on Mr. Liguori's failure to remove the stockpiled materials. At the same time, Metro Enviro LLC offered to purchase the property and remedy all existing violations, as well as perform the site work necessary to bring the Facility into compliance with the DEC Consent Order and existing site plan.

In Spring 1997, Greentree Realty LLC purchased the Site from Mr. Liguori and granted a lease to Metro Enviro LLC. The latter remedied the violations, and applied for a DEC Part 360 permit to operate a C&DD transfer station on the Site. In August 1997, Metro Enviro LLC requested renewal and transfer of the special use permit to itself from Industrial Recycling Systems. The Village Board referred the request to the Planning Board for review in September 1997. In November 1997, DEC issued a Part 360 permit to Metro Enviro LLC to operate a C&DD processing facility on the Site. DEC also imposed various special conditions on the Part 360 permit, including the funding of an environmental monitor for the Facility by the applicant as well as various recordkeeping and reporting requirements. On November 25, 1997, the Planning Board recommended to this Board that the special use permit be granted.

The Village Board undertook a SEQRA review of the special use permit application, the Mayor convened a citizens committee to review the application, and the Village Board held public hearing sessions on the Metro Enviro LLC special use permit application between December 15, 1997 and May 4, 1998. On May 4, 1998, this Board adopted a negative declaration under SEQRA with respect to the application and issued Metro Enviro LLC a new three-year special use permit, with conditions, including that the processing area be enclosed in a building, effective May 5, 1998. Metro Enviro LLC did not take legal action to challenge any of the terms of the new special use permit. In late 1998, Metro Enviro LLC obtained from the Zoning Board of Appeals a side yard area variance and obtained from the DEC a modification of the DEC permit to allow construction of a metal building above the processing pad, as well as installation of the rail spur. In January 2000, counsel for Metro Enviro LLC notified this Board of the contemplated sale of the lease to the Site to Metro Enviro Transfer LLC ("Metro Enviro Transfer"), a subsidiary of Allied Waste Industries, Inc. ("Allied"). In March 2000, Metro Enviro Transfer purchased the lease to the Site. Metro Enviro Transfer did not take any legal action to challenge any of the terms of the special use permit. The ownership of the land did not change.

Metro Enviro Transfer requested permission to increase the tonnage of incoming material per day from 850 tons to 1,000 tons. By letter dated May 12, 2000, signed by Mayor Robert W. Elliott, the Village denied this request based on multiple prior violations of the then-existing tonnage limits, and on falsification of records to conceal the violations, and "directed that the tonnage capacity remain at 850 tons per day for the balance of the permit period." The Village's letter stated, "The Village Board is aware that under Paragraph 40 of the permit, the permit holder's 'Failure to observe each and every condition contained' in the permit 'shall be grounds for a stop-work order and revocation of the permit.' Further, under Paragraph 41, the Village retains the right under the permit and Village Code to 'order cessation of operations in the event of repeated ... violations, as well as the right to assess monetary penalties.'" The letter concluded by

stating, "The Village is not invoking these latter remedies at this time, but reserves the right to do so upon further investigation and consideration. The Village also expects the permit holder to take the necessary steps to assure that violations of the tonnage limit of 850 tons do not recur and to demonstrate to the Village the steps that have been taken to this end."

Metro Enviro Transfer made a timely request that the Village Board renew the special use permit in March 2001. Since that time, the special use permit has been extended thirteen times and its renewal has been discussed extensively in public at the following meetings of this Board: May 7, 2001; September 4, 2001; November 19, 2001; February 4, 2002; March 4, 2002; April 1, 2002; June 10, 2002; September 9, 2002; October 21, 2002; December 16, 2002; and January 15, 2003. The May 7, 2001 and January 15, 2003 meetings were officially noticed as public meetings at which all were allowed to speak. Representatives of Metro Enviro Transfer spoke at all of these meetings, except November 19, 2001. Members of the public spoke about the permit renewal on May 7, 2001, November 19, 2001, September 9, 2002, October 21, 2002, December 16, 2002 and January 15, 2003. A special meeting was held on January 15, 2003 to continue the public hearing on the issue. Representatives from Metro Enviro Transfer made a presentation in response to a draft of this Findings Statement and responded to questions, and members of the public gave their comments. At that time, all parties were notified that the Board would make its final decision on the matter at a special meeting to be held on January 27, 2003.

At the January 27, 2003 meeting Metro Enviro Transfer made another presentation and members of the public also expressed their views. All the information supplied by Metro Enviro Transfer, both orally and in writing, has been considered by the Board in making this decision. Unfortunately, Metro Enviro Transfer has still left unanswered many of the Village's questions. Metro Enviro Transfer has also refused to turn over to the Village full transcripts (or transcripts from which only legitimately proprietary and confidential information has been redacted) of the depositions taken by Walter Mack concerning the operations at the Facility, even though it appears that such transcripts would be pertinent to the issue of permit renewal.

II. Terms of the Special Use Permit

The special use permit governing operation of the Facility includes provisions limiting the type of waste that may be accepted at the Facility (§§ 1-2, 7), the permissible operations on site (§§ 3-6), the hours of operation (§ 31), the tonnage of material that may be processed on site (§§ 32-33), and certain physical improvements at the Site (§§ 35-38), among other items. The special use permit also requires that the Facility comply with all conditions, restrictions and limitations in the Facility's DEC permit (§§ 18, 26), with the provisions of the Operation & Maintenance ("O&M") Manual (§§ 19, 26), and with the performance standards of the Village Zoning Law (§ 20).

According to the minutes of the hearing on May 4, 1998, during his presentation urging the Board to grant the permit, Michael Zarin, counsel to Metro Enviro LLC, stated "if they [Metro Enviro] do not comply with their permit, they will be closed. There are

no ifs, ands or buts" and "[t]here is no comparison between this site and the Karta facility. If they look like Karta, they will be shut down immediately." The Board granted the permit shortly after hearing this reassurance from Mr. Zarin, a partner in the law firm (Zarin & Steinmetz) that currently represents Metro Enviro Transfer.

Paragraph 40 of the permit defines a procedure for revoking the permit if there is even a single violation of any permit condition. Under the sub-paragraph on stop work orders, the permit states that generally the permittee has five days to cure violations before work can be stopped, but no notice is required where "there are imminent hazards posed to the the public health, welfare and the environment, such as acceptance by the applicant of toxic or hazardous waste or garbage or, . . . the applicant has received three notices to remedy violation under this permit." The next sub-paragraph, on suspension and revocation, states "[t]he Village Board may suspend or revoke this permit after a public hearing . . . where it finds that the permittee has not complied with any or all terms of this permit." As noted above, neither Metro Enviro LLC nor Metro Enviro Transfer has challenged these or any other provisions of the special use permit.

Paragraph 41 states that the Village "will retain all powers of enforcement available under paragraph 40 and the Village Code, including, but not limited to, the right to order cessation of operations in the event of repeated or uncured violations, as well as the right to assess monetary penalties."

Section 230-56 of the Village Code governs renewal of special use permits issued by the Village Board of Trustees. It provides:

The grant of a special use permit for the use indicated therein may be conditioned on periodic renewal, which renewal may be granted only following upon public notice and hearing. *Such renewal shall be withheld or granted subject to terms and conditions additional to or different from those in the original grant only upon a determination that:*

A. The factors which justified the original grant no longer exist or have changed sufficiently to require additional or different terms and conditions; or

B. *The terms and conditions of the original special permit have not been or are not being complied with, wholly or in part.* A notice of violation pursuant to § 230-81 shall be prima facie evidence of lack of conformity with such terms and conditions.

(Emphasis added).

In addition, Special Use Permit renewal is discussed under Article XII of the Zoning Code, which enumerates the powers and duties of the Board of Appeals. The

Board finds that in this case the provisions discussing Special Use Permit renewal in Article XII are not applicable, because jurisdiction over the renewal of this Special Use Permit rests with the Village Board of Trustees, not the Board of Appeals. None of the applicable sections of the Zoning Code or the Special Use Permit provide that a showing of damage to health, safety or the environment is necessary before the Village may revoke or refuse to renew the Special Use Permit.

III. Violations of the Terms of the Special Use Permit

Numerous violations of the special use permit have occurred since Metro Enviro Transfer, a subsidiary of Allied, assumed operation of the Facility in March 2000. These violations (to the extent that the Village is aware of them) are summarized below.

A. Receipt of Industrial and Municipal Waste

The special use permit and the DEC permit both prohibit the Facility from accepting industrial waste. Notwithstanding these prohibitions, on numerous occasions since Metro Enviro Transfer took control of the Facility in March 2000, industrial waste has been accepted there. This fact first came to light, not at the initiative of Allied, but due to the monitoring activities of Walter Mack Esq., who was appointed by the Honorable Jed S. Rakoff of the U.S. District Court for the Southern District of New York in connection with the federal prosecution of certain solid waste management businesses purchased by Allied. Mr. Mack's investigations have revealed a number of ongoing violations of the state and local environmental laws at the Facility during the tenure there of Allied entities. A further report from Mr. Mack concerning the Facility is now expected.

Following Mr. Mack's revelations, Metro Enviro Transfer admitted that Facility personnel knowingly directed industrial waste from the Engelhard Corporation's Peekskill Films Plant to the Facility, and the Facility accepted this waste on at least 18 occasions between February 2, 2001 and March 19, 2001. Metro Enviro Transfer has also admitted that on, at minimum, 24 other occasions, including four times in 2002, mixed industrial and municipal waste from the Engelhard Corporation was processed at the Facility.

The Village Manager issued a Notice of Violation relating to the 18 loads accepted between February 2, 2001 and March 19, 2001 on August 9, 2002, shortly after the facts regarding those 18 loads were disclosed by Metro Enviro Transfer. The Board discussed the acceptance of those 18 loads of industrial waste and imposed a fine at its meeting on September 9, 2002. Metro Enviro Transfer explained at the meeting that Matt Hickey, then a General Manager of Allied, made arrangements for these loads to be taken to the Facility. Charles Marino, the site manager at the time, knew the loads were not C&DD and protested accepting the loads. Despite his protests, however, Mr. Hickey directed Mr. Marino to accept the loads. The loads were then processed with general C&DD.

After processing, the loads were shipped for disposal to the CLD Landfill, a C&DD landfill operated by BFI Corporation (an Allied subsidiary) at 9960 Southrange Road, Salem, Ohio 44460 under Bills of Lading that falsely identified the contents to be C&DD. Mr. Marino, the Site Manager at the time, signed the Bills of Lading, even though he knew that the waste was partially industrial waste.

Independent research by the Board's special counsel indicated that the CLD Landfill is only licensed to accept C&DD and that waste from Engelhard is classified as industrial waste under OHIO ADMIN. CODE § 3745-29-01 A. In a letter dated January 24, 2003, counsel to Metro Enviro Transfer admitted that the CLD Landfill was not permitted to accept industrial waste. Sending industrial waste from Engelhard to the CLD Landfill was a violation of the DEC permit (which requires waste from New York transfer stations to be disposed in a lawful manner, even if out of state) and, therefore, of the Village's special use permit (which incorporates the DEC permit by reference). A Notice of Violation was issued for this conduct on January 27, 2003. Nor was this the first time the CLD Landfill accepted unpermitted waste; on January 7, 2003, Allied supplied to the Village's special counsel Allied's Record of Compliance that was submitted to DEC in November 2000. This shows that the CLD landfill received three notices of violation for receiving non-permitted waste from October 1999 to June 2000.

The Board notes that counsel to Metro Enviro Transfer stated at the September 9, 2002 Village Board meeting that Mr. Hickey directed the industrial waste to go from the Facility in Croton-on-Hudson to another Allied operated transfer station in Mt. Kisco in March 2001. Counsel also explained that Mr. Hickey's employment with Allied was terminated for cause in October 2001. At the January 15, 2003 public hearing, this representation changed, and the Board was informed by counsel for Metro Enviro Transfer that in fact Mr. Hickey was not terminated for cause. At the October, 2001 meeting, John DiNapoli, the regional engineer for Allied, stated that Allied owns a facility in Niagara Falls that could take such waste and did not contradict statements that the Mt. Kisco facility was not authorized to take industrial waste. Representatives of the Village of Mount Kisco have confirmed that the transfer station there was, in fact, not authorized to accept industrial waste.

Though Metro Enviro Transfer had admitted to 18 improper shipments, at the September 9, 2002 meeting the Village Attorney pointed out that Allied had actually identified 23 shipments coming from Engelhard's Peekskill Films Plant, including one on January 2, 2002, and asked how Allied knew that the additional five were not industrial waste. Allied's counsel stated that the Mr. Mack had not identified these loads as industrial waste and "there are two sections to the facility, one of which has material that would potentially or likely be classified as industrial material. The other does not. To the best of Allied's information those other five loads are C and D or other non-industrial loads." Later Mr. Di Napoli stated that Allied believed these loads to be "C and D material." As discussed below, Metro Enviro Transfer's letter of December 2, 2002 states that five additional loads of mixed industrial and municipal waste came from Peekskill Films to the Facility, including one in 2002. The information supplied by Metro Enviro Transfer on January 24, 2003 shows that the dates and quantities of these shipments match exactly with the dates of the five shipments that Allied previously

contended were not industrial waste. It is thus apparent that the five loads that Allied claimed were C&DD at the September 9, 2002 meeting have now been identified as industrial and municipal waste.

In a letter to this Board of October 11, 2002, Metro Enviro Transfer's counsel stated "DEC has not cited Engelhard as a hazardous waste generator." In fact, a search of online databases of the United States Environmental Protection Agency has revealed that Engelhard's Peekskill Film Plant, where the first 18 loads of waste originated, is a conditionally exempt small quantity generator under the Resource Conservation and Recovery Act ("RCRA"), a federal statute governing storage, treatment and disposal of hazardous wastes. At the January 15, 2003 public hearing discussing the Draft Statement of Findings, counsel for Metro Enviro Transfer clarified that this statement was meant to convey that Engelhard had not been cited by DEC as a hazardous waste violator. According to the EPA compliance information website, the Engelhard plant in Buchanan, NY is listed as in violation of RCRA general requirements from October 21, 2002. In addition, according to news reports, on January 5, 2000, 1,000 gallons of titanium oxychloride, a yellow liquid that is corrosive and highly irritating to the eyes, spilled from a tank at the Engelhard plant on lower South Street, Peekskill.

On December 9, 2002, the Village received a letter dated December 2, 2002 from Metro Enviro Transfer that admitted that 24 loads of industrial waste had been shipped to the Facility from three Engelhard plants in addition to the 18 that had previously been disclosed. According to this letter, five of these 24 loads came from Peekskill Film, seven from Peekskill Pigment and 12 from the Ossining plant. Four of these additional loads were received in 2002 and 18 in 2001. Exact dates were not supplied by Metro Enviro Transfer at that time and the letter implies that the contents of the additional loads were not documented. Clarification of these points was requested from Metro Enviro Transfer, and on January 24, 2003, Metro Enviro Transfer supplied the Village with a redacted table indicating shipments to the Facility on the following dates (in addition to the 18 shipments previously identified): March 8, 2001 to May 1, 2001 (four shipments from Peekskill Film); January 2, 2002 (one shipment from Peekskill Film); April 26 to July 27, 2001 (five shipments from Peekskill Pigments); January 4 and March 13, 2002 (two shipments from Peekskill Pigments); June 12 and October 10, 2000 (two shipments from Ossining); January 9 to December 6, 2001 (nine shipments from Ossining); March 19, 2002 (one shipment from Ossining). Regulatory information available online shows that Peekskill Pigments is a large quantity generator of hazardous waste under RCRA and that the Ossining Plant filed a hazardous waste report with DEC in 1998. The Village issued a Notice of Violation for these loads on December 11, 2002. The table supplied by Metro Enviro Transfer indicates that, except for the 18 previously identified loads, all of the improper shipments were in open-top containers. It would have been much easier for Metro Enviro Transfer employees to identify improper shipments in open-top than in closed-top containers. Moreover, Metro Enviro Transfer's letter of January 24, 2003 to the Village states, without elaboration, that "Metro Enviro believes that the loads accepted by Metro Enviro may have been added to, subtracted from or processed before being shipped from the facility." The meaning and import of this statement are unclear.

Metro Enviro Transfer has obtained an affidavit from an employee of Engelhard that states in a general fashion that Engelhard did not provide Allied or its subsidiaries with hazardous wastes. The affidavit does not state what actually was contained in the loads that went to Metro Enviro Transfer. However, at the January 27, 2003 Board meeting, counsel for Allied Waste Industries admitted that the waste received included test tubes with residue from pigment testing. Unfortunately, at the January 15, 2003 meeting, Metro Enviro Transfer was unable to answer several questions the Board and its counsel had about the affidavit, and Metro Enviro Transfer did not bring the Engelhard official who signed the affidavit, or anyone else from Engelhard, to the January 15, 2003 meeting at which Metro Enviro Transfer presented the affidavit, and thus the Board has been unable to cross-examine the affiant. A number of questions remain about how the national Director of Environment, Health and Safety for a large corporation, who is apparently based in New Jersey as the affidavit was notarized in that State, could have personal knowledge about such matters. In addition, the Board notes that the affiant swore that Engelhard manages and disposes of hazardous waste in strict accordance with all applicable federal and state laws, but failed to mention the violation listed on the EPA website. The affidavit is found to have little probative value.

The nature of construction and demolition debris would make the receipt of certain kinds of unauthorized wastes especially problematic. On at least two recent occasions, the waste received at the Facility included pieces of equipment that caught fire on the tipping floor (a snow blower on September 23, 2002 and a small motor on January 16, 2003). In each case the fire was extinguished. In the case of the snow blower incident, the Croton Volunteer Fire Department was called to the scene to extinguish the fire. If nonconforming highly flammable waste materials had been present on the floor, it is not clear whether the firefighting efforts would have gone so smoothly. Indeed, one of the kinds of nonconforming waste that Metro Enviro accepted from Engelhard was plastic film that might have combusted if it had been there at the same time as the snow blower or the motor.

B. Other Violations

Capacity Exceedance and Record Falsification - At the Board meeting on June 18, 2001, Peter Lindemulder, Regional Vice President of Allied, admitted that the capacity limits set for the transfer station in the special use permit and the DEC permit were violated on 25 occasions between March 22, 2000 and August 21, 2000. Mr. Lindemulder also admitted that an employee at the Facility falsified the daily tonnage reports given to the Village by running the computer summary early if the tonnage for the day was approaching the daily limit established under the Village's special use permit, and booking the remaining loads to the next day.

At the Board meeting on February 4, 2002, counsel to Metro Enviro Transfer explained that the company would be entering into a consent order with DEC regarding recordkeeping errors, dust problems and tonnage overages. Counsel explained that the tonnage records kept at the loaders did not match the record of tonnage going into the facility. On February 11, 2002, the Village Engineer issued a Notice of Violation for maintenance of inaccurate and unreliable tonnage records in 2000 and 2001 and

inadequate supervision to prevent unacceptable recordkeeping in violation of special use permit condition 34. A twenty-sixth violation of the capacity limit was disclosed in a letter to the Village from David Steinmetz, Esq. on February 28, 2002.

Stockpiling of Tires - In mid-2002, the Village became aware that Metro Enviro Transfer's practice was to store tires that were accepted at the Facility in a container until that container was full, in violation of special use permit paragraphs 1, 2, 3, 7 and 18, and DEC Permit Special Condition 16. The Village Manager issued a Notice of Violation on June 12, 2002, because tires are prohibited material under the Special Use Permit and Metro Enviro Transfer is required to promptly remove them from the property. Old tires are known to be a potential breeding ground for mosquitoes and other pests, as well as a potential fire hazard.

Failure to Provide All Required Training - As the Metro Enviro Transfer Facility's general manager testified at the January 15, 2003 hearing, "Training of employees is one of the absolute most important aspects of running a facility such as this one." Inspection of the training records of the Facility on November 26, 2002 revealed that some of the O&M Manual requirements with respect to training were not being observed. These requirements are incorporated into the special use permit by reference (§§ 19, 26). Specifically: i) no documentation of initial training was maintained at the Facility; ii) monthly safety meetings were not held in 20 of the 32 months that Allied has owned the Facility; iii) not all employees attended the monthly meetings that were held; iv) quarterly compliance training has only been held once in the 10 quarters that Allied has owned the Facility; and v) no training has been conducted by a New York certified asbestos inspector regarding recognition of waste potentially containing asbestos and contaminated soils. The Village Manager issued a Notice of Violation covering the lack of training on December 13, 2002. On December 18, 2002, Metro Enviro Transfer responded to the Notice of Violation of December 13, 2002 and proposed various remedies for the future.

A few other less serious violations have occurred since March 2000, when Allied took control of the Site. These are summarized in the following table, along with the violations discussed above.

Summary of Violations of the Special Use Permit from March 2000 to Date

<u>Violation</u>	<u>Provision Violated</u>	<u>Village Notice of Violation Sent and Fine Imposed</u>
Inadequate training and record keeping from March 2000 to date	Special use permit paragraphs 19 and 26. O&M Manual Section 4.5: Table 2 1); ¶ 2; Table 2 2); Table 2 3); and ¶ 3 b.	Notice of Violation issued on December 13, 2002. No fine to date.

<u>Violation</u>	<u>Provision Violated</u>	<u>Village Notice of Violation Sent and Fine Imposed</u>
Disposal of industrial waste to the BFI CLD Landfill in Ohio that was not authorized to accept it between 2000 and 2002.	Special use permit paragraph 18. DEC Special Permit condition 10(c), 16.	Notice of Violation issued on January 27, 2003. No fine to date.
Acceptance of 24 loads of unauthorized industrial waste between 2000 and 2002.	Special use permit paragraphs 1, 2, 3, 7 and 18. DEC Permit Special Condition 10(a) and (b). 6 N.Y.C.R.R. § 360-1.7.	Notice of Violation issued on December 11, 2002. No fine to date.
Storage of unacceptable material (vehicle tires) on site beyond the maximum allowable time (12 hours) from November 2001 to June 2002.	Special use permit paragraphs 1, 2, 3, 7 and 18. DEC Permit Special Condition 16. 6 N.Y.C.R.R. § 360-1.7.	Notice of Violation issued on June 12, 2002.
Processing and mishandling two refrigerators on the side of the tipping floor, which are unauthorized waste, on June 7, 2002.	Special use permit paragraphs 1, 2, 3 and 7. DEC Permit Special Condition 10(b). 6 N.Y.C.R.R. § 360-1.7.	No Notice of Violation issued. No fine imposed by Village. Violation noted in DEC Monitor's inspection report dated June 6, 2002.
Failure to collect leachate – rainwater observed coming into contact with material outside building and running to rail tracks without being collected in leachate collection tank. Reported March 30, 2001.	Special use permit paragraph 18 and 26. DEC Permit Special condition 19. 6 N.Y.C.R.R. § 360-1.7.	No Notice of Violation issued. No fine imposed by Village. Violation noted in DEC Monitor's inspection report dated March 30, 2001.
Acceptance of 18 additional loads of unauthorized industrial waste between February 2, 2001 and	Special use permit paragraphs 1, 2, 3, 7 and 18. DEC Permit Special	Notice of Violation issued on August 9, 2002. Fine imposed on September 9,

<u>Violation</u>	<u>Provision Violated</u>	<u>Village Notice of Violation Sent and Fine Imposed</u>
March 19, 2001.	Condition 10(a) and (b). 6 N.Y.C.R.R. § 360-1.7.	2002.
Annual report for 2000 was filed 29 days late in violation of Part 360 regulations.	Special use permit paragraphs 18 and 26. DEC Permit Special conditions 5 and 13. 6 N.Y.C.R.R. §§ 360-1.7, 360-16.4(i)(1).	No Notice of Violation issued. No fine imposed by Village. Violation noted in DEC Monitor's inspection report dated May 15, 2001.
Acceptance of tonnage in exceedance of limit specified on 26 occasions between March 22, 2000 and August 21, 2000.	Special use permit paragraphs 18, 26 and 34. DEC Permit Special condition 9. 6 N.Y.C.R.R. § 360-1.7.	Notice of Violation issued on February 11, 2002 for maintenance of inaccurate and unreliable tonnage records in 2000 and 2001, and inadequate supervision. No fine imposed by Village.

Thus, this Board finds that six Notices of Violation have been issued covering numerous violations of special use permit conditions since March 2000, when an Allied subsidiary took control of the Facility. In addition, at least four additional kinds of violations of the permit conditions have occurred during the same time period.

IV. Decision

The Facility is located in the Light Industrial LI District. On June 18, 2001, the law governed this district was changed so that a waste transfer station became a prohibited use, Village Code § 230-18 E. This means that the Village has decided that such a use is not compatible with the health, safety and welfare of the community. Notwithstanding this finding, this Board recognizes that non-conforming uses may be continued provided that they do not threaten the health and safety of the community and that they operate in compliance with their permits and other applicable requirements.

The Board has spent many hours hearing testimony about the Facility from Metro Enviro Transfer and from citizens. Several members of the Board have visited the Facility. Metro Enviro Transfer has been given every opportunity to submit oral and written evidence, and the Board has carefully considered all of this evidence. The Board has extended the initial three-year permit for over 20 months since its expiration to allow

Careful consideration of this application to renew the permit. While the special use permit gave the Board the authority to revoke the permit for just one violation, the Board has exercised restraint regarding this right in the face of numerous confirmed violations. At this time, however, the Board has gathered enough information to make a final decision.

The Board is particularly concerned with the knowing acceptance and processing of industrial and municipal waste. The Facility was sited, designed, built and operated as a transfer station for construction and demolition debris. C&DD is primarily solid material such as wood, pipes, bricks, cement, rebar, and the like. Because it is chemically and physically stable, and tends to have physically recognizable forms, it is less heavily regulated than municipal solid waste, hazardous waste or radioactive waste. The environmental laws impose less onerous controls on the handling, transfer and disposal of C&DD than that of these other materials.

At the January 15, 2003 Village Board meeting, Metro Enviro Transfer presented, as an alleged expert in solid waste management, Mr. Robert D. Barber, who has a BSE degree in civil engineering and, after three years in the public works department of the City of Farmington, New Mexico, spent fourteen years (1984-1998) with Waste Management, Inc., and since 1998 has served as a consultant to the country's three largest waste disposal companies. Mr. Barber testified orally (he did not submit a written report) that the permit violations at Metro Enviro Transfer did not cause injury to health, safety and the environment, and that the Facility has built-in safeguards to prevent such injury in the case of such violations. The Village subsequently retained the services of a leading environmental consulting firm, Malcolm Pirnie Inc. of White Plains, New York to evaluate Mr. Barber's statement and to render an independent opinion. Mr. Richard Brownell of Malcolm Pirnie has submitted an affidavit differing with Mr. Barber's assessment, and stating that the kinds of regulations that Metro Enviro Transfer violated were designed to protect health, safety and the environment, and that the integrity of the regulatory process depends on enforcement of these regulations without respect to whether damage to health, safety or the environment has occurred or can be proven to have occurred. The Board finds Mr. Brownell to be the more credible witness.

Industrial waste – waste materials from industrial operations – may take many forms; some of it may be hazardous and some may not. It is frequently impossible to discern from its physical appearance the degree, if any, of hazard it poses. It often comes from industrial operations that generate hazardous waste (though the hazardous waste is supposed to be segregated for separate handling).

Metro Enviro Transfer has claimed that the unauthorized receipt of industrial and municipal waste at the Facility from Engelhard was caused by Matt Hickey, whose employment with Allied affiliates was terminated for cause in October 2001. Metro Enviro Transfer also stated its belief that five later loads from the same source were not industrial or municipal waste. Despite this, these five later loads were recently acknowledged by Metro Enviro Transfer to be industrial and municipal waste, and 19 other loads of suspected industrial and municipal waste were identified, including some that were shipped in 2002 – well after Mr. Hickey left the company. Several of the plants

that are generating the waste loads are known generators of hazardous waste, but Metro Enviro Transfer states it does not know whether the industrial and municipal waste it accepted from these plants contained hazardous waste. The health and safety of residents of the Village of Croton-on-Hudson was placed in jeopardy by these multiple violations of the special use permit and of the DEC permit at a facility that is designed to accept only C&DD.

The Board is also concerned that Allied deliberately diverted this industrial and municipal waste to another transfer station (in Mt. Kisco) that was not permitted to accept it, and disposed of it at a landfill (in Ohio) that was not authorized to take it, all in contravention of permit conditions and the laws of two states and at least two municipalities. Such deliberate serial disregard of permit conditions and governing law is intolerable.

The violations relating to lack of training are not merely technical transgressions. The training was designed, among other things, to ensure that Facility personnel would exclude unauthorized waste, and would otherwise fully comply with the special use permit.

The deliberate misreporting of daily tonnage figures in 2000 and the inability of the applicant to reconcile tonnage figures in 2001 is also a major issue. The capacity limit relates to the size of the Facility and to the volume of truck traffic that will travel to the Facility. Thus it is designed to protect the health and safety of the community.

At the January 15, 2003 hearing, Metro Enviro Transfer officials made a major point of saying that the compensation of top company officials was tied to permit compliance. However, they also admitted that they are not aware that anyone at Allied or at Metro Enviro Transfer has been penalized because of any of the violations that occurred at Croton.

A request by the Village for the release of the reports of the federal court monitor, Walter Mack, is currently pending before the United States District Court. The Village also asked Metro Enviro Transfer to turn over the exhibits to Mr. Mack's reports. Late the evening of Friday, January 24, 2003, Metro Enviro Transfer did make available to the Village's Special Counsel certain of these exhibits, including excerpts that Metro Enviro Transfer selected from the transcripts of depositions that Mr. Mack had taken. The pages that Metro Enviro Transfer chose to turn over predominantly concerned its past falsification of tonnage records; little or no discussion in these depositions relating to the industrial and municipal waste violations was made available to the Village.

This Board finds that since March 2000, when Metro Enviro Transfer took over the Facility, the terms and conditions of the special use permit have been violated on multiple occasions and in numerous ways. Metro Enviro Transfer has repeatedly offered words of assurance to this Board that, while the Facility did not comply in the past, it will comply in the future. Further violations have all too frequently negated the effect of those assurances. The Board has reached the point where it can no longer rely on the present assurances of Metro Enviro Transfer that things will improve in the future. A

constant stream of violations – some of them disclosed only because of the ongoing investigation of the federal court monitor – establish that, after almost three years, Metro Enviro Transfer and its parent company, Allied, have not established either the mechanisms or the culture required for environmental compliance. At the January 15, 2003 hearing, the latest in a series of general managers for the Facility – brought on just a month earlier – testified that he had been hired “to create a culture of safe environmentally compliant and healthy and efficient operations.” While that is a laudable goal, it is too late. Allied has had nearly three years to create such a culture, and, as the string of violations demonstrates, it has failed. The time has come for the Village Board to take decisive action to fulfill its duty to protect the health and safety of the community. Metro Enviro Transfer should not be able to postpone the day of reckoning by delaying the production of requested materials or by pledging to do what it has repeatedly promised and failed to do in the past.

In accordance with Section 230-56 of the Village Code and Paragraph 41 of the Special Use Permit, the Board declines to grant any further extensions of the existing permit or grant the current application for renewal of the permit. The Special Use Permit will terminate effective February 17, 2003. The Board authorizes the Facility to operate until February 17, 2003. The Facility is ordered to cease accepting waste at midnight on that day.

On February 1, 2003, Metro Enviro Transfer LLC shall commence closing the Facility in accordance with the closure plan approved under the DEC permit. All waste shall be removed from the facility by 5:00 p.m. on February 24, 2003. The Facility shall be fully secure at all times to prevent illegal dumping.

This decision is issued not only under the Board's powers under the Village Code and the Special Use Permit, but also pursuant to the Board's powers and duties under N.Y. Municipal Home Rule Law Sec. 10, N.Y. Village Law Secs. 4-412, 7-725-b, 7-700 and 7-704, N.Y. Environmental Conservation Law Sec. 8-0103, and any other authorities which imbue the Board with the power to protect public health, safety and the environment.

Here, the record reflects not mere lapses or errors in judgment but a wholesale failure of petitioner's duty, reflecting an indifference if not cynicism toward his judicial office. Petitioner's failure to abide by the legal requirements of his office, in a manner that conveyed the appearance of impropriety and favoritism, debased his office and eroded public confidence in the integrity of the judiciary. We conclude that the proper remedy for this misconduct is removal from office.

Accordingly, the determined sanction should be accepted, without costs, and Michael H. Feinberg removed from the office of Surrogate of Kings County.

Chief Judge KAYE and Judges G.B. SMITH, CIPARICK, ROSENBLATT, GRAFFEO, READ and R.S. SMITH concur in per curiam opinion.

Determined sanction accepted, etc.



5 N.Y.3d 236

In the Matter of METRO ENVIRO
TRANSFER, LLC, Appellant,

v.

VILLAGE OF CROTON-ON-HUDSON
et al., Respondents.

Court of Appeals of New York.

July 6, 2005.

Background: Applicant for renewal of a special use permit to operate a construction and demolition debris waste transfer station brought Article 78 proceeding to review determination of village board of trustees which denied the application. The Supreme Court, Westchester County, Nicolai, J., granted the petition, and respondents appealed. The Supreme Court, Appellate Division, 7 A.D.3d 625, 777

N.Y.S.2d 170, reversed and applicant appealed.

Holding: The Court of Appeals, Rosenblatt, J., held that substantial evidence of permit violations supported determination of village board of trustees not to renew permit.

Affirmed.

1. Zoning and Planning ⇐384.1

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

2. Zoning and Planning ⇐375.1, 378.1, 435

A village board is not without discretion in deciding whether to grant a special use permit; scientific or expert evidence is not necessary, but a board may not base its determination on generalized community objections.

3. Zoning and Planning ⇐618

A reviewing court may not substitute its own judgment for that of a zoning board, even if such a contrary determination is itself supported by the record.

1237 Zarín & Steinmetz, White Plains (David S. Steinmetz, Daniel M. Richmond and Jody T. Cross of counsel), for appellant.

Arnold & Porter LLP, New York City (Michael B. Gerrard and Richard Webster of counsel), for respondents.

METRO ENVIRO v. VILLAGE OF CROTON-ON-HUDSON N.Y. 1211

Cite as 833 N.E.2d 1210 (N.Y. 2005)

¹²⁹⁸ Donna M.C. Giliberto, Albany, for New York State Conference of Mayors and Municipal Officials, amicus curiae.

¹²⁹⁹ OPINION OF THE COURT

ROSENBLATT, J.

[1] 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 use permit for a solid waste transfer facility operated by Metro Enviro, LLC.¹ 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.

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 10 tempo-

rary 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.

¹³⁰⁰ The Board released a 14-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 CPLR 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 A.D.3d 625, 627, 777 N.Y.S.2d 170 [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 condi-

1. Metro Enviro, LLC is an entity distinct from appellant Metro Enviro Transfer, LLC. Metro

Enviro Transfer acquired Metro Enviro's assets in March 2000.

tions in the future, the Board was wrong in denying renewal of the special permit. In essence, Metro asserts that to justify nonrenewal, 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 nonrenewal, the many violations here, and their willful nature, sufficiently support the Board's decision.

[2] In *Matter of Twin County Recycling Corp. v. Yevoli*, 90 N.Y.2d 1000, 1002, 665 N.Y.S.2d 627, 688 N.E.2d 501 [1997], we recognized that a board is not without discretion in deciding whether to grant a special use permit.² Scientific or expert evidence is not necessary, but a board may not base its determination on "generalized community objections" (*id.*). In *Matter of Market Sq. Props. v. Town of Guilderland Zoning Bd. of Appeals*, 66 N.Y.2d 893, 895, 498 N.Y.S.2d 772, 489 N.E.2d 741 [1985], we held that "expert opinion . . . may not be disregarded in favor of [24]generalized community objections," but nevertheless affirmed the board's denial of a special use permit because there were other grounds in the record.³ The same principle applies to renewal of a special use permit. This is not to say that denials and nonrenewals 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.

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.⁴ 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.

[3] 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" (*Matter of Retail Prop.*

2. See also 2 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).

3. 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 op-

posed 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.

4. See e.g. *Matter of Atlantic Cement Co. v. Williams*, 129 A.D.2d 84, 88, 516 N.Y.S.2d 523 (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").

Trust v. Board of Zoning Appeals of Town of Hempstead, 98 N.Y.2d 190, 196, 746 N.Y.S.2d 662, 774 N.E.2d 727 [2002]). Here, the quantity and character of Metro's violations would have 1212constituted 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.

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

Order affirmed, with costs.



5 N.Y.3d 217

Carlo ALBANESE et al., Respondents,

v.

CITY OF NEW YORK et al., Appellants, et al., Defendants.

Court of Appeals of New York.

July 6, 2005.

Background: Worker sued city for injuries sustained when worker fell from scaffolding hung from a ramp over highway. The Supreme Court, Bronx County, Alexander W. Hunter, Jr., J., denied city's motion for summary judgment, and appeal was taken. The Supreme Court, Appellate Division, 10 A.D.3d 545, 782 N.Y.S.2d 37, modified and city appealed.

Holding: The Court of Appeals, Kaye, Chief Judge, held that city was not an owner of the roadway construction site within meaning of scaffolding law and law governing construction.

Reversed.

Highways 115

For purposes of claim brought by worker who sustained injuries when he fell from scaffolding which was hung from an expressway ramp over expressway, city was not an owner of the roadway construction site within meaning of scaffolding law and law governing construction, excavation, and demolition work; although accident occurred on arterial highway, which ran through city and connected to state highways, roadwork was performed by the state and was ongoing at time of accident, and city did not perform any of the actual construction work on the project. McKinney's Labor Law §§ 240, 241; McKinney's Highway Law §§ 349-b to 349-f.

1213Smith Mazure Director Wilkins Young & Yagerman, P.C., New York City (Mark D. Levi of counsel), for appellants.

Schneider, Kleinick, Weitz & Damashek, New York City (Charles J. Nolet, Jr. of counsel), for respondents.

OPINION OF THE COURT

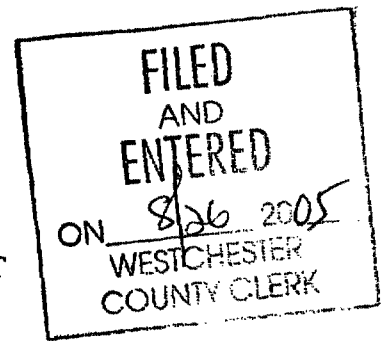
KAYE, Chief Judge.

Plaintiff Carlo Albanese, a carpenter, was at work on a scaffold suspended from a Cross Bronx Expressway ramp over the Bruckner Expressway in the City of New York when a tractor-trailer heading east on the Bruckner struck the bottom of the scaffold. Plaintiff was thrown into the air and fell back down onto the scaffold.

As of the date of the accident, the expressways were under construction as part of a two-year New York State-initiated project that included the comprehensive resurfacing and rehabilitation of the Cross Bronx-Bruckner Interchange, Cross 1213Bronx Expressway, Throgs Neck Expressway-Hutchinson River Parkway resurfacing, and joint restoration and re-

NOTE

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - ENVIRONMENTAL CLAIMS PART

-----X
GREENTREE REALTY, LLC and METRO ENVIRO
TRANSFER, LLC,

Petitioners/Plaintiffs,

DECISION

Index No. 11872/05

-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
NICOLAI, J.

The following papers numbered 1 to 33 were read on this motion by Petitioners/Plaintiffs for an order:

- (1) enjoining the enforcement of a pending Village Board Order adopted by Resolution July 18, 2005, which would prohibit an existing construction and demolition debris processing facility and transfer station located at 1A Croton Point Avenue from accepting new waste and require that Metro Enviro Transfer, LLC commence the 90 day closure procedures;
- (2) enjoining Respondents from prohibiting or interfering with Petitioner Greentree Realty's use, including its ability to lease and/or operate, the property for the purposes of solid waste management, including, in particular, the property's current use as host to the existing facility;
- (3) enjoining Respondents from prohibiting or in any way interfering with Petitioner Metro Enviro Transfer, LLC's use of the property to operate its existing facility; and
- (4) enjoining Respondents from prohibiting or in any way interfering with the

use of the property to operate the existing facility by any entity with appropriate State and County permits and/or approvals;

and cross motion by Respondents/Defendants for an order pursuant to CPLR 3211(a)(1), (5), and (7) dismissing the Petition/Complaint.¹

Order to Show Cause - Affirmations	1- 6
Notice of Cross Motion - Affirmations	19- 20
Replying Affirmation	29- 30
Memorandums of Law	18, 28, 33
Exhibits	7- 17, 21- 27, 31- 32

Upon the foregoing papers, it is Ordered that the motion and cross motion are decided as follows:

In 1988, the Village of Croton-on-Hudson issued a special use permit to Industrial Recycling Systems ("IRS"), authorizing it to operate a wood processing and recycling transfer station on the property. In 1997, Greentree Realty LLC ("Greentree") purchased the property and leased it to Metro Enviro L.L.C. (an entity distinct from Petitioner) who requested and received a renewal and transfer of the pre-existing special use permit held by IRS. In 1998, the special use permit which included numerous conditions, was issued for a three-year duration. In March 2000, Metro Enviro Transfer ("Metro Enviro") acquired the assets of Metro Enviro L.L.C. for \$10 million dollars with the expectation that it would operate on the leased premises for many years. The permit expired on May 5, 2001, but Metro Enviro promptly applied for renewal. On January 27, 2003, the Village Board of Trustees of the Village of Croton-On-Hudson ("Board") issued a Statement of Findings denying the renewal application based upon certain violations of the special use permit. Specifically, the Board cited mishandling of unauthorized waste, exceeding the maximum permitted tonnage, failure to collect leachate on one occasion and failure of certain training, reporting and record-keeping requirements.

In the prior action between Petitioner Metro Enviro Transfer and the Village of Croton-On-Hudson, this Court granted Petitioner's application for an Order annulling the determination of the Board which denied Metro Enviro Transfer's application for renewal of its special use permit and staying the Board's decision requiring Metro Enviro Transfer to cease accepting waste at its transfer station and closing the facility ("the Facility") on February 17, 2003. On appeal, the Second Department reversed and dismissed Metro Enviro's Petition. The Appellate Division stated that the Board did not need to wait for actual harm to occur because it was sufficient that conditions were violated, and there was substantial evidence not only establishing the existence of the violations, but also that they posed a threat to the community and the environment. By Decision dated July 6, 2005, the Court of Appeals held that the Appellate Division properly dismissed the

¹Papers submitted after the return date of the motion and cross motion were not read or considered.

Article 78 Petition.

Petitioners commenced the present action pursuant to CPLR 3001 for a judgment declaring that the operation of a transfer station and processing facility in the Village on property owned by Greentree is a pre-existing, legal nonconforming use. Greentree, which was not a party in the prior action, purchased the property ("Property") in 1997 with the expectation that the Property would continue to host a solid waste processing facility. Since the use of the Property for processing waste was expressly permitted under the zoning code, Petitioners assert that the Village has sanctioned the Property as a pre-existing, legal nonconforming use. Petitioners further maintain that substantial investments were made in the Property to upgrade and improve the Facility and a Special Permit was issued. Petitioners now seek a Temporary Restraining Order and Preliminary Injunction enjoining the enforcement of a pending Village Board Order, adopted by Resolution July 18, 2005 which would prohibit the Facility from accepting new waste as of July 23, 2005 (the "Closure Order").

Petitioners recognize that the Court of Appeals upheld the Board's decision to deny renewal of the special use permit that allowed the lessee, Metro Enviro to operate its Facility at the Property. Petitioners claim that decision, however, does not alter the status of the Property as a pre-existing, legal nonconforming use. Petitioners further claim that there are only a few ways in which a pre-existing legal nonconforming use may be terminated; none of which are applicable in the instant case. Notwithstanding the fact that Metro Enviro has no special use permit to operate the transfer station, Petitioners nevertheless contend that the Village may not disregard or invalidate Petitioners constitutionally protected property rights to a pre-existing legal nonconforming use. In addition, Petitioners assert that although the use of the Property for solid waste management was expressly permitted to operate as-of-right under the Village Code until 2001, it is uncontroverted that on June 18, 2001, the Board enacted an amendment to Section 230-18 of the Village Code concerning Prohibited Uses and the transfer station and processing facilities such as Metro Enviro's became "Expressly Prohibited." As a result, Petitioners argue that if this Court does not stay enforcement of the Village's Closure Order requiring that the Facility cease accepting new waste: (1) Petitioners will sustain irreparable damage to their right to use the Property for its allowed non-conforming use, including loss of goodwill and reputation, loss of an established customer base, an indelible taint on the Property's status as a pre-existing, legal nonconforming use, which would likely impede Greentree's ability to re-lease the Property, substantial lost revenue, and losses to the investment of over \$10,000,000 in the Facility; and (2) havoc would be wrought upon Westchester County's already stressed solid waste network.

A preliminary injunction is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and upon the relevant facts set forth in the moving papers (William M. Blake Agency, Inc. v Leon, 283 AD2d 423, 424 (2nd Dept. 2001); and Peterson v Corbin, 275 AD2d 35). To prevail upon a motion for a preliminary injunction, the moving party has the burden of demonstrating that (1) there is a likelihood that it will succeed on the merits of the action, (2) it will suffer irreparable injury absent the issuance of a preliminary injunction, and (3) the balance of equities is in its favor (see Valdez v Northeast Brooklyn Hous. Dev. Corp., 2005 NY Slip Op 50986U; Neos v Lacey, 291 AD2d 434). When the facts are sharply disputed, a preliminary injunction will not be granted (see Price Paper & Twine Co. v Miller, 182 AD2d 748).

Applying these principles to the instant case with respect to Petitioner Metro Enviro, the Court finds that Metro Enviro did not meet its burden of demonstrating a likelihood of success on the merits or that the balance of equities tip in their favor in the absence of a preliminary injunction.

Respondents correctly contend the balance of equities strongly favors the Village. The Court of Appeals decision, effectively denying the special use permit to Metro Enviro, is fatal to Petitioner Metro Enviro's argument. It is therefore, the Court's opinion that Petitioner Metro Enviro has failed to demonstrate a clear right to injunctive relief. Thus, Metro Enviro's motion for a preliminary injunction enjoining Respondents from enforcing the Closure Order, is denied in its entirety.

The decision to grant or deny a preliminary injunction rests in the sound discretion of the Supreme Court (see First Franklin Square Assocs. v Franklin Square Prop. Account, 15 AD3d 529). Contrary to Respondents' contentions, Petitioner Greentree made the requisite showing. Therefore, as to Petitioner Greentree, the Preliminary Injunction is granted to the extent that Respondents are enjoined from prohibiting or interfering with Greentree's ability to lease and or operate it's property for purposes of solid waste management, with the exception of Metro Enviro, which is required to comply with the Closure Order as described herein. The Preliminary Injunction is necessary to maintain the status quo until this Court determines the merits of the action (see CPLR 6301). The \$25,000 bond set on July 21, 2005 shall continue. In addition, upon re-lease of the Property, in the event that Respondents' review of the required permits and/or approvals is unreasonably delayed, Petitioner Greentree may apply to this Court for appropriate relief.

Respondents also argue that the Petition/Complaint must be dismissed since Petitioners failed to exhaust administrative remedies. It is well established that "one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in ... court." (Watergate II Apts. v Buffalo Sewer Auth., 46 NY2d 52) Courts will generally not review objections to agency determinations that have not been pursued through administrative channels. However, exceptions to the exhaustion requirement clearly exist. The rule of finality and exhaustion may be avoided if the administrative remedy available would be futile or if irreparable harm would ensue without judicial intervention. Here, Petitioners concede that they have not "technically" exhausted their administrative remedies because pursuing such remedies would be an "exercise in futility" in light of Respondents' determined adherence to enforcing the Closure Order. Petitioners maintain that presenting their claim of a legal right to use the Property for solid waste management to the Building Inspector and the Zoning Board of Appeals would result in needless delay and cost. In light of the dismissal of the Article 78 by the Court of Appeals, this Court finds that any attempt by Petitioners to obtain the opinion of the Building Inspector and the Zoning Board of Appeals as to their legal claim, through administrative remedies would be futile, and therefore Petitioners' failure to exhaust their administrative remedies is excused. Accordingly, in the interest of judicial efficiency, and because Petitioners have established that the pursuit of such remedies would be futile (cf. Segalla v Town of Amenia, 309 AD2d 742), the cross motion to dismiss for failure to exhaust is denied.

Respondents cross-move for an order pursuant to CPLR 3211 (a)(1), (5) and (7) dismissing the Petition/Complaint upon the grounds that Petitioners' claims are barred by the Statute of Limitations and Petitioners had a full and fair opportunity to litigate the issues that were previously decided by the Appellate Division, Second Department and affirmed by the Court of Appeals. Petitioners have styled this matter as a declaratory judgment action, seeking a determination of the legal status of the Property, and are bound by that tactical decision. The decision to treat a case as a declaratory judgment action instead of a CPLR Article 78 proceeding, however, has enormous significance, most notably for purposes of determining the applicable Statute of Limitations. "In order to determine the Statute of Limitations applicable to a particular declaratory judgment action, the court must 'examine the substance of that action to identify the relationship out of which the claim arises and the relief sought' (Solnick v Whalen, 49 NY2d 224). If the court determines that the underlying dispute can be or could have been resolved through a form of action or proceeding for which a specific limitation period is statutorily provided, that limitation period governs the declaratory judgment action [citations omitted]" (Matter of Save the Pine Bush v City of Albany, 70 NY2d 193). Because the CPLR contains no provision setting forth the Statute of Limitations applicable to declaratory judgment actions, the six-year catch-all Statute of Limitations applies (see CPLR 213 [1]). Based upon the foregoing, this Court concludes that the present action was timely commenced and therefore Petitioner's claims are not barred by the Statute of Limitations.

Respondents also cross-move for an order dismissing the Petition/Complaint upon the grounds that Petitioners' claims are barred by the doctrines of res judicata and collateral estoppel. Generally, the doctrine of issue preclusion prevents a party from relitigating issues in a subsequent proceeding which were raised and decided against that party in a prior proceeding (Ryan v New York Telephone Company, 62 NY2d 494, 500). One of the controlling factors is the identity of the issues in the two actions. The identical issue necessarily must have been decided in the prior action and be decisive in the present action. Also, the party to be precluded from relitigating an issue must have had a full and fair opportunity to contest that prior determination (D'Arata v New York Cent. Mut. Fire Ins. Co., 76 NY2d 659, 664; Kaufman v Eli Lilly & Co., 65 NY2d 449; see also Schwartz v. Public Admin. of the Co. of Bronx, 24 NY2d 65). Additional factors which the court must take into consideration are the nature of the forum in the prior litigation, the nature of the litigation, the competence and expertise of counsel, the availability of new evidence, the differences in the applicable law and the foreseeability of future litigation (Gilberg v Barbieri, 52 NY2d 285, 292).

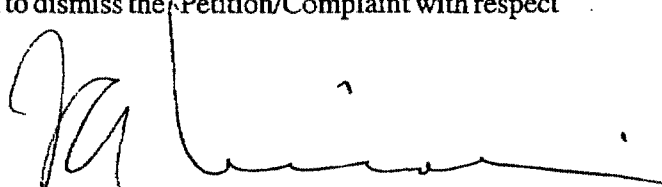
Collateral estoppel will only be applied to matters "actually litigated and determined" in a prior action (Restatement [Second] Judgments § 27; see also D'Arata v New York Cent. Fire Ins. Co., *supra* at 666). For a question to have been actually litigated, "it must have been properly raised by the pleadings or otherwise placed in issue and actually determined in the prior proceeding" (Halyalkar 109 v Board of Regents, 72 NY 2d 261). Here, issue preclusion is sought to be applied to the specific finding that 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; and therefore the Board could order closure of the Facility despite its status as a pre-existing nonconforming use. Contrary to Petitioners' contentions, collateral estoppel precludes relitigation of this issue which was "actually and necessarily decided" in the prior action (see Koether v Generalow, 213 AD2d 379).

The issue of Metro Enviro's right to continue operating was conclusively decided by the Court of Appeals, at which time the Petitioner/ Plaintiff Metro Enviro had a full and fair opportunity to litigate. Accordingly, the cross motion to dismiss the Petition/Complaint of Metro Enviro is granted upon the grounds that Metro Enviro is barred by the doctrine of collateral estoppel from relitigating this issue.

However, the Court must now decide whether issue preclusion is equally applicable to Greentree, as the owner of the property. To determine whether privity has been established – as Petitioners contend – the test to be applied is whether the critical issue to be precluded was necessarily decided by the Court of Appeals and whether Greentree, against whom issue preclusion is sought, had a full and fair opportunity to litigate in the prior action. To establish privity, for estoppel purposes, “the connection between the parties must be such that the interests of the non-party can be said to have been represented in the prior proceeding” (Green v Santa Fe Indus., 70 NY2d 244). Privity has also been found where a person so controlled the conduct of the prior litigation in which they were interested so that issue preclusion may properly be invoked against them (Id at 254). Although Respondents urge that Greentree, as Metro Enviro's landlord, is in privity with Metro Enviro, there is no evidence that Greentree's interests were represented in the prior action. Thus, Petitioners correctly contend that Greentree did not appear in the prior action and therefore was not “accorded a full and fair opportunity to contest the issue.”

In light of the foregoing, the Court finds that Respondents' cross motion, insofar as it seeks to dismiss the Petition/Complaint on the basis of collateral estoppel and res judicata brought by Metro Enviro is granted. However, the cross motion to dismiss the Petition/Complaint with respect to Greentree is denied.

Dated: White Plains, New York
August 25, 2005



FRANCIS A. NICOLAI
A.J.S.C.

TO:
ZARIN & STEINMETZ
Attorneys for Petitioners/Plaintiffs
81 Main Street, Suite 415
White Plains, NY 10601

ARNOLD & PORTER LLP
Attorneys for Respondents/Defendants
399 Park Avenue
New York, NY 10022-4690

JAMES E. HOWARD LLC
ONE THOMPSON SQUARE
SUITE 201
CHARLESTOWN, MA 02129

TEL (617) 886-9322
FAX (617) 886-9324



July 29, 2005

VIA FEDERAL EXPRESS

Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001

91444.5

Re: Finance Docket No. 34734
Northeast Interchange Railway, LLC--Lease and Operation
Exemption--Line in Croton-on-Hudson, New York

Dear Secretary Williams:

Enclosed for filing in the above-captioned matter are the original and 10 copies of a Verified Notice of Exempt Transaction including, as Exhibit B, a caption summary in the form required by 49 CFR 1150.34. Also enclosed are a check in the amount of \$1,500 representing the filing fee and a computer disk containing the Notice and caption summary.

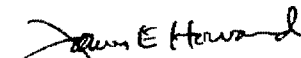
Could you please date stamp the enclosed extra copy of the Notice and return it to me in the enclosed self-addressed, stamped envelope? If there are any questions with respect to this matter, please direct them to me. Thank you very much for your assistance.

ENTERED
Office of Proceedings

AUG 01 2005

Part of
Public Record

Very truly yours,


James E. Howard

Enclosures
cc: Andreas Y. Gruson

FILED

AUG 1 2005

AIRMAIL
100% D-50 00

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34734



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

VERIFIED NOTICE OF EXEMPT TRANSACTION

FILED

AUG 1 2005

SURFACE
TRANSPORTATION BOARD

ENTERED
Office of Proceedings

AUG 31 2005

Part of
Public Record

James E. Howard
One Thompson Square
Suite 201
Charlestown, MA 02129
Tel. No. 617-886-9322

Attorney for Northeast Interchange Railway, LLC

Dated: July 29, 2005

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34734

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

VERIFIED NOTICE OF EXEMPT TRANSACTION

In accordance with 49 C.F.R. 1150.31-1150.34, Northeast Interchange Railway, LLC ("NIR") hereby submits this Verified Notice of Exempt Transaction. The following information corresponds to the requirements of 49 C.F.R. 1150.33:

49 C.F.R. 1150.33(a). The full name and address of the applicant is

Northeast Interchange Railway, LLC
1A Croton Pointe Ave.
Croton-on-Hudson, NY 10520

49 C.F.R. 1150.33(b). The name, address and telephone number of the representative of the applicant who should receive correspondence is

James E. Howard
One Thompson Square
Suite 201
Charlestown, MA 02129
617-886-9322

49 C.F.R. 1150.33(c). NIR has reached an agreement with Allied Waste North America, Inc. ("Allied") to acquire ownership of Metro Enviro Transfer, LLC ("Metro"), a wholly-owned, noncarrier subsidiary of Allied. The assets of Metro include a lease from Greentree Realty, LLC ("Greentree") of an approximately 10 acre parcel of real

estate located in Croton-on-Hudson, New York. The leased property includes approximately 1,600 feet of track that connects with the Hudson line of CSX Transportation ("CSX") at approximately mile post QC 35.

49 C.F.R. 1150.33(d). NIR will be the operator of the line.

49 C.F.R. 1150.33(e). The proposed transaction is summarized below:

- (1) The name and address of the entity which is leasing the line to NIR is

Greentree Realty, LLC
c/o Kenneth Gunshor, Esq.
100 South Bedford Road
Suite 150
Mount Kisco, NY 10549

- (2) The parties propose to implement the transaction promptly after this Verified Notice of Exempt Transaction becomes effective.

- (3) The line to be operated by NIR is approximately 1,600 feet in length, and it connects with the Hudson line of CSX at approximately mile post QC 35 in Croton-on-Hudson, NY.

- (4) NIR will be acquiring 1,600 feet of line.

- (5) Greentree is not a railroad and does not by leasing the line to NIR intend to become a railroad or to provide common carrier transportation by rail. The line was built in approximately 1997 and has been operated by Metro, as the lessee of the line and the surrounding 10 acre parcel, which has switched cars to and from CSX at the connection at mile post QC 35. The rail transportation business on the line and such 10 acre parcel of property has consisted primarily of the transloading of construction and demolition waste material from trucks to rail cars for shipment by rail to disposal sites. Metro's construction and demolition waste transloading operation is licensed by the New York

State Department of Environmental Conservation ("NYSDEC"). The NYSDEC permit could be assigned to NIR if NIR elects to do so. A special use zoning permit allowing Metro's construction and demolition waste transloading operation has not been renewed by the town of Croton-on-Hudson. The New York State Appeals Court recently ruled that Croton-on-Hudson had the right not to renew Metro's special use permit, and Croton-on-Hudson has ordered Metro to discontinue construction and demolition waste transloading.

By means of this transaction, NIR, a noncarrier, intends to become a common carrier by rail, and its entire rail line will initially consist of the 1,600 foot track. NIR will provide rail transportation service for the transloading of construction and demolition waste and other materials, and it intends to build additional tracks on the leased property in order to serve other rail customers, such as shippers or receivers of intermodal containers, lumber, brick, road salt, steel and bulk liquids. NIR expects to enter into an interchange agreement with CSX, as well as other commercial arrangements with CSX and other rail carriers, in order to handle both existing and new rail traffic to and from the line of NIR.

NIR is wholly owned by Regus Industries, LLC, which is in turn controlled by Gordon Reger, who also has a controlling interest in the New York Cross Harbor Railroad Corporation, a class III rail carrier. Concurrently with the filing of this Verified Notice of Exempt Transaction, Gordon Reger is filing a verified notice of exemption pursuant to 49 C.F.R. 1180.2 regarding his control of a second rail carrier. See Finance Docket No. 34735.

49 C.F.R. 1150.33(f). A map indicating the line, the area to be served and roads, cities and states in the area is attached as Exhibit A.

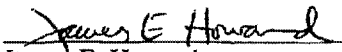
49 C.F.R. 1150.33(g). The projected annual revenues of NIR will not exceed \$5,000,000. A certificate complying with 49 C.F.R. 1150.33(g) is attached as Exhibit B.

Caption Summary. A caption summary in the form prescribed by 49 C.F.R. 1150.34 is attached as Exhibit C.

Environmental and Historic Impact. In accordance with 49 C.F.R. 1105.6(c)(2), the proposed transaction does not require any environmental documentation, because there will be no significant changes that exceed the thresholds established in 49 C.F.R. 1105.7(e)(4) or (5). No historic report is required, because the proposed transaction meets the criteria of 49 C.F.R. 1105.8(b)(1).

Respectfully submitted,

NORTHEAST INTERCHANGE RAILWAY, LLC


James E. Howard
One Thompson Square
Suite 201
Charlestown, MA 02129
Tel. No. 617-886-9322

Attorney for Northeast Interchange Railway, LLC

Dated: July 29, 2005

VERIFICATION

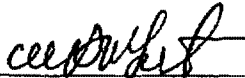
State of New York :
County of ~~Westchester~~ *NY* : ^{ss}

Andreas Y. Gruson, being duly sworn, deposes and states that he has read the foregoing Verified Notice of Exempt Transaction, knows the facts asserted there are true and the same are true as stated.



Andreas Y. Gruson
Chief Executive Officer
Northeast Interchange Railway, LLC

Subscribed and sworn to before me
this 26th day of July 2005,



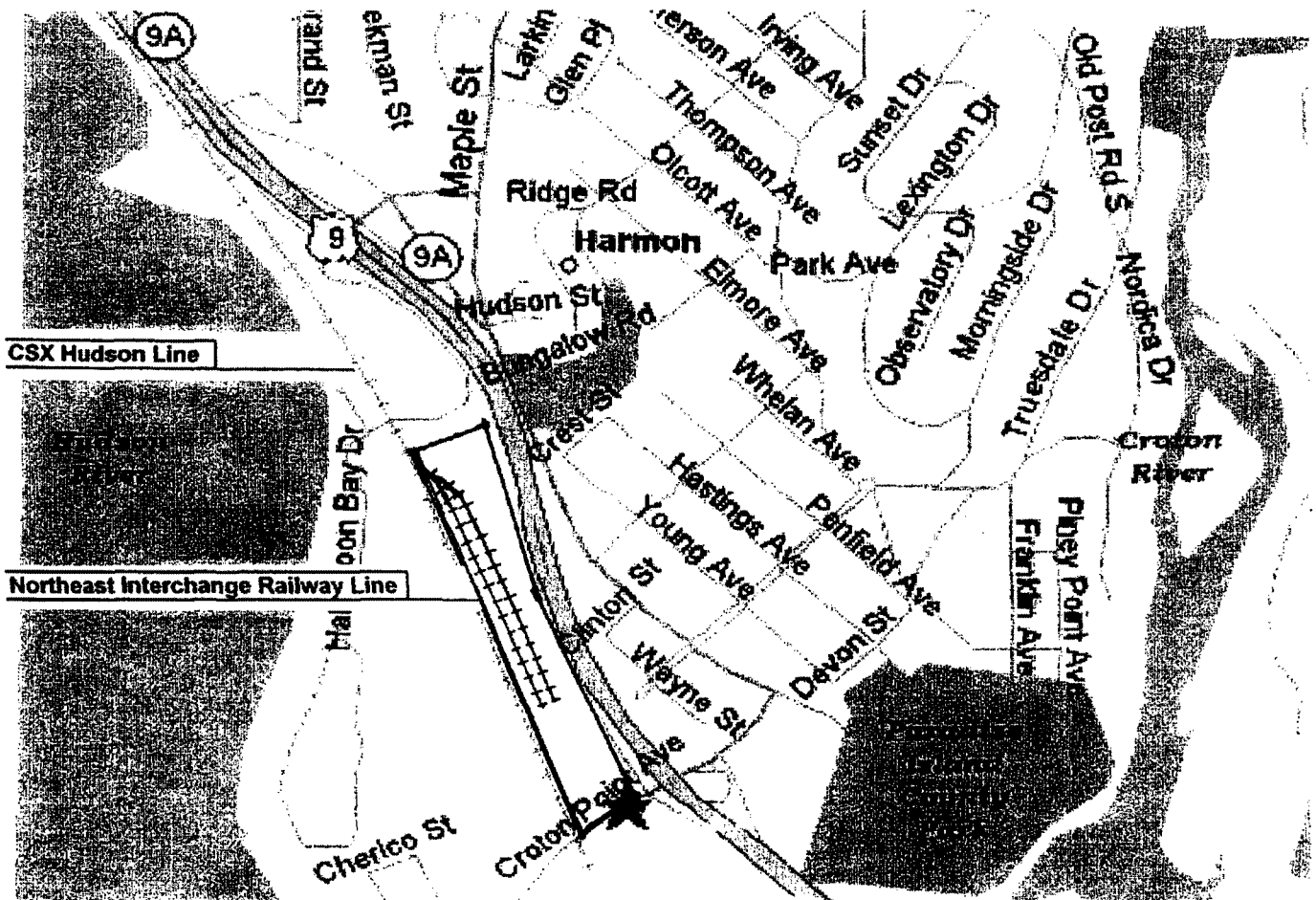
Notary Public

My Commission Expires:

Aug 6, 2005

MARGARITA PLISCHTEJEV
Notary Public, State of New York
No. 01PL6062257
Qualified in Queens County
Commission Expires 8/6/05

EXHIBIT A



CROTON-ON-HUDSON

EXHIBIT B

CAPTION SUMMARY

SURFACE TRANSPORTATION BOARD

NOTICE OF EXEMPTION

Finance Docket No. 34734

**NORTHEAST INTERCHANGE RAILWAY, LL--LEASE AND OPERATION
EXEMPTIO--LINE IN CROTON-ON-HUDSON, NEW YORK**

Northeast Interchange Railway, LLC, a noncarrier, has filed a Verified Notice of Exemption under 49 C.F.R. 1150.31 to lease and operate a line located in Croton-on-Hudson, New York. The line is located within a 10 acre parcel of real property that will be leased to NIR. The owner and lessor of the property and line is Greentree Realty, LLC, a noncarrier. The line is approximately 1,600 feet in length and it connects with the Hudson line of CSX Transportation at mile post QC 35.

Any comments must be filed with the Surface Transportation Board and served on

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

This Notice is filed under 49 C.F.R. 1150.31. If the Notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke the exemption will not automatically stay the transaction.

EXHIBIT C

CERTIFICATION

I, Andreas Y. Gruson, Chief Executive Officer of Northeast Interchange Railway, LLC, hereby certify under penalty of perjury that (1) the projected annual revenues of Northeast Interchange Railway, LLC will not exceed \$5,000,000 and will not exceed the maximum amount for a Class III rail carrier as set forth in 49 C.F.R. 1201 and (2) I am qualified and authorized to make this certification on behalf of Northeast Interchange Railway, LLC.



July 29, 2005

36082
CO

SERVICE DATE – AUGUST 5, 2005

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34734

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

STB Finance Docket No. 34735¹

GORDON REGER
– CONTINUANCE IN CONTROL EXEMPTION –
NORTHEAST INTERCHANGE RAILWAY, LLC

Decided: August 5, 2005

By notice filed on August 1, 2005, Northeast Interchange Railway, LLC (NIR), a noncarrier, invoked the summary class exemption procedure at 49 CFR 1150.31 to lease and to operate, as a common carrier by railroad, approximately 1,600 feet of track that connects with CSX Transportation, Inc. (CSXT), at approximately milepost QC 35, in Croton-on-Hudson, NY. The track is owned by Greentree Realty, Inc. (Greentree), a noncarrier, and is under lease to Metro Enviro Transfer, LLC (Metro), a wholly owned subsidiary of Allied Waste North America, Inc. (Allied). NIR has reached an agreement to acquire Metro from Allied, including Metro's rights under its lease with Greentree. Under the class exemption procedures, the exemption would ordinarily go into effect on August 8, 2005.

NIR states that it will initially provide rail transportation service for the transloading of construction and demolition waste and other materials over the 1,600 feet of track. The firm plans to install, at an unspecified date, additional trackage on the property to serve other traffic, such as intermodal, lumber, brick, road salt, steel, and bulk liquid shipments. NIR expects to enter into an interchange agreement with CSXT for the interchange of traffic.

NIR asserts that the trackage was constructed "in approximately 1997" and has been used by Metro to switch cars to and from track owned by CSXT at milepost QC 35. According to NIR, Metro has been transloading construction and demolition debris at the site from trucks to rail cars for shipment by railroad to disposal sites and has operated under license from the New

¹ These proceedings are not consolidated but are being considered in the same decision for administrative convenience.

York State Department of Environmental Conservation (NYSDEC). The town of Croton-on-Hudson, however, has declined to renew a zoning permit for such use, and the town's position has been upheld by the New York Court of Appeals.² According to NIR, the town has ordered Metro to discontinue its transloading of construction and demolition waste. By supplement e-filed on August 3, 2005, NIR clarifies that it intends to transfer the Metro license issued by NYSDEC to NIR and that it "intends to operate the facility in full compliance with the license and other applicable regulations of NYSDEC notwithstanding the fact that the license requirements and regulations are arguably preempted by 49 U.S.C. 10501."

NIR is wholly owned by Regus Industries, LLC, which is in turn controlled by Gordon Reger (Reger). Reger owns a controlling interest in the New York Cross Harbor Railroad Corporation (NYCH), a Class III rail carrier. To allow his common control of NYCH and NIR if NIR becomes a licensed railroad common carrier, Reger has concurrently filed a notice of exemption in Gordon Reger – Continuance in Control Exemption – Northeast Interchange Railway, LLC, STB Finance Docket No. 34735. That exemption would also ordinarily go into effect, under the class exemption procedures, on August 8, 2005. In this notice, Reger asserts that businesses that he controls transport various commodities by rail, including construction, demolition, and other solid wastes.

On August 4, 2005, the Village of Croton-on-Hudson (Village) filed a petition to reject the notice in STB Finance Docket No. 34734, or, alternatively, to stay its effectiveness. The Village argues that: (1) the notice is void ab initio for containing false, misleading and inadequate information; (2) the Board has no authority over the track because it is exempt spur track; and (3) the activity in which NIR would be engaging is not subject to Board jurisdiction because it is not rail transportation by a rail carrier, but merely continuation of the same waste processing activities by a different entity.

The operations of the Metro waste transfer facility have been the subject of extensive litigation, including the decision by the State's highest court that Croton-on-Hudson could deny renewal of Metro's special use zoning permit. The operations involve the transloading of waste materials and have generated substantial local interest. The transaction proposed by NIR would attempt to convert what apparently were private carrier operations subject to state and local regulation into for-hire common carrier service, triggering the agency's primary jurisdiction and raising important issues regarding the potential preemption of the proposed service from many aspects of local control. The Village has raised issues that should be addressed by the Board before the exemption is allowed to become effective.

In light of the objections raised by the Village and the important issues raised by these filings, the Board will enter a housekeeping stay of both notices to provide sufficient time to resolve the issues presented here. NIR will be given 10 days to reply to the Village's petition.

² Metro Enviro Transfer, LLC v. Vill. of Croton-on-Hudson, ___ N.E.2d ___, available at 2005 WL 1556709 (N.Y. 2005).

The stay will remain in effect and the exemptions sought under the notices will not become effective until further order of the Board.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The notices in STB Finance Docket Nos. 34734 and 34735 are stayed and the exemptions sought under the notices will not become effective until further order of the Board.
2. NIR's reply to the Village's petition is due by August 15, 2005.
3. This decision is effective on its date of service.

By the Board, Roger Nober, Chairman.

Vernon A. Williams
Secretary

RECEIVED

Exhibit 7

36278
EB

SERVICE DATE – LATE RELEASE NOVEMBER 18, 2005

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34734

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

STB Finance Docket No. 34735¹

GORDON REGER
– CONTINUANCE IN CONTROL EXEMPTION –
NORTHEAST INTERCHANGE RAILWAY, LLC

Decided: November 17, 2005

In STB Finance Docket No. 34734, we are rejecting the notice of exemption because the transaction is inappropriate for consideration under the class exemption procedure at 49 CFR 1150.31, which allows parties involved in routine transactions to use abbreviated summary procedures to obtain authority, subject to an after-the-fact Board review if objections are received. In STB Finance Docket No. 34735, we are rejecting, as moot, the notice of continuance-in-control exemption related to that transaction.

BACKGROUND

By notice filed on August 1, 2005, Northeast Interchange Railway, LLC (NIR), a noncarrier, invoked the summary class exemption procedures at 49 CFR 1150.31 to lease and to operate, as a common carrier by railroad, approximately 1,600 feet of track that connects with CSX Transportation, Inc. (CSXT), at approximately milepost QC 35, in Croton-on-Hudson, NY. The track is owned by Greentree Realty, Inc. (Greentree), a noncarrier, and is under lease to Metro Enviro Transfer, LLC (Metro), a wholly owned subsidiary of Allied Waste North America, Inc. (Allied). NIR has reached an agreement to acquire Metro from Allied, including Metro's rights under its lease with Greentree. Under the class exemption procedures, the exemption was due to go into effect on August 8, 2005.

¹ These proceedings are not consolidated but are being considered in the same decision for administrative convenience.

In its notice filing, NIR states that it plans to initially provide rail transportation service for the transloading of construction and demolition waste and other materials over the 1,600 feet of track. The firm plans to install, at an unspecified date, additional trackage on the property to serve other traffic, such as intermodal, lumber, brick, road salt, steel, and bulk liquid shipments. NIR expects to enter into an interchange agreement with CSXT for the interchange of traffic.

NIR asserts that the trackage was constructed "in approximately 1997" and has been used by Metro to switch cars to and from track owned by CSXT at milepost QC 35. According to NIR, Metro has been transloading construction and demolition debris at the site from trucks to rail cars for shipment by railroad to disposal sites and has operated under license from the New York State Department of Environmental Conservation (NYSDEC). The town of Croton-on-Hudson, however, has declined to renew a zoning permit for such use, and the town's position has been upheld by the New York Court of Appeals. According to NIR, the town has ordered Metro to discontinue its transloading of construction and demolition waste. By supplement filed on August 4, 2005, NIR states that it intends to transfer the Metro license issued by NYSDEC to NIR and that it intends "to operate the facility in full compliance with the license and other applicable regulations of NYSDEC notwithstanding the fact that the license requirements and such regulations are arguably preempted by 49 U.S.C. 10501."

NIR is wholly owned by Regus Industries, LLC, which is in turn controlled by Gordon Reger (Reger). Reger also owns a controlling interest in the New York Cross Harbor Railroad Corporation (NYCH), a Class III rail carrier. To allow his common control of NYCH and NIR if NIR becomes a licensed railroad common carrier, Reger has concurrently filed a notice of exemption in STB Finance Docket No. 34735, Gordon Reger – Continuance in Control Exemption – Northeast Interchange Railway, LLC. In that notice, Reger asserts that businesses that he controls transport various commodities by rail, including construction, demolition, and other solid wastes. That exemption was also due to go into effect, under the class exemption procedure, on August 8, 2005.

On August 4, 2005, the Village of Croton-on-Hudson (Village) filed a petition to reject the notice in STB Finance Docket No. 34734, or, alternatively, to stay its effectiveness. The Village argued that: (1) the notice is void ab initio for containing false, misleading and inadequate information; (2) the Board has no licensing authority over the track because it is exempt spur track or switching track; and (3) the activity in which NIR would be engaging is not subject to Board jurisdiction because it is not transportation by railroad, but merely continuation of the same private waste processing activities by a different entity. NIR filed a reply on August 5, 2005.

In light of the objections raised by the Village and the important issues raised by these filings, the Board, by decision served on August 5, 2005, entered a housekeeping stay of both exemptions intended to be covered by the notices, specifying that the exemptions sought under

the notices would not become effective until a further order of the Board. Not yet having seen NIR's first reply filed on August 5, the Board gave NIR until August 15, 2005, to file a reply to the Villages' petition to reject the notice in STB Finance Docket No. 34734. On August 12, 2005, NIR filed a "Supplemental Reply" pursuant to the Board's August 5, 2005 decision.

On August 15, 2005, the Village filed a "Supplementary Filing" in support of its petition filed on August 4, 2005. On August 16, 2005, the State of New York and NYSDEC filed a statement asking us to continue to stay the exemptions and to seek additional information on the planned operations.

On August 22, 2005, NIR filed a motion to strike the Village's supplemental pleading filed on August 15, 2005, arguing that the supplemental pleading is not allowed under our regulations and contains "redundant, irrelevant, impertinent and incorrect information." Also, on August 25, 2005, NIR filed a petition to supplement the record to address three letters² that were received by the agency but not served on NIR. NIR tendered copies of three letters that it sent in reply to the persons making the communications.

PRELIMINARY MATTERS

We will strike the Village's supplemental pleading filed on August 15, 2005. It is an impermissible reply to NIR's reply filed on August 12, 2005. 49 CFR 1104.13(c). The pleading has not been accompanied by a motion for its admission. Nor is it permitted by any other order of the Board. Moreover, in light of the action that we are taking in this decision, our exclusion of this pleading will not prejudice the Village. As explained below, we are rejecting NIR's notice of exemption and requiring NIR, if it wishes to pursue Board authority, to file either a petition for an individual exemption, under 49 CFR 1121, or an application under 49 CFR 1150 Subpart A. Thus, if NIR pursues Board authority in a subsequent proceeding, the Village will have the opportunity to submit information to assure development of a full factual record.

We will grant NIR's unopposed petition to supplement the record to address the three letters.

² The letters were from Congresswoman Sue Kelley, Senator Charles A. Schumer, and Westchester County Legislator Thomas Abinanti.

DISCUSSION AND CONCLUSIONS

We will reject the exemption notice filed in STB Finance Docket No. 34734 because the lease and operation transaction contemplated by NIR is not appropriate for consideration under the abbreviated class exemption procedures of 49 CFR 1150.31. Because we are rejecting this notice, we will also reject, as moot, the related notice of exemption filed in STB Finance Docket No. 34735.

As we have explained in prior cases, see, e.g., Riverview Trenton Railroad Company — Acquisition and Operation Exemption — Crown Enterprises, Inc., STB Finance Docket No. 33980, slip op. at 6-10 (STB served Feb. 15, 2002) (Riverview Trenton), the class exemption is meant to be used for routine transactions that have not attracted substantial controversy and local interest, such as transactions where new operators would be continuing an existing common carrier rail service over lines that selling carriers can no longer operate profitably. Where an individual transaction differs substantially from the type of routine matter that the class exemption was intended for, the Board may reject or revoke notices seeking to use the class exemption so that it may consider the merits of the proposal in more depth, through either a petition for exemption or an application, as in Riverview Trenton.

In STB Finance Docket No. 34734, the factual and legal issues presented in the pleadings filed to date demonstrate that NIR's proposed transaction is controversial and raises important issues that make more scrutiny and the development of a more complete record necessary. The current construction and demolition waste operation at the site has attracted substantial opposition and local interest, including litigation in which the operations of NIR's predecessor were found to be a threat to the public health by the state court. Moreover, NIR has expressed an intent to convert this previously private construction waste transfer operation into what could turn out to be a more extensive for-hire common carrier operation involving commodities in addition to construction waste. The Village cites this planned expansion in support of its argument that the operational changes that are expected would exceed the Board's thresholds for conducting an environmental review.³

The Village has asked us to examine the extent of the Board's jurisdiction over the proposed operations, and thus the extent to which state and local regulation of the handling of construction waste on the property would be preempted under 49 U.S.C. 10501(b). It notes that a non-railroad, or a railroad to the extent it is engaged in activities other than transportation, is not subject to Board jurisdiction. The Village raises concerns about the nature of the handling that the waste material would receive at the site (which, it believes, will constitute processing,

³ The Board typically does not conduct an environmental review on proposals to lease and operate an existing line unless there will be an increase in rail traffic operating over the line of at least 8 additional trains a day (3 in an air quality non-attainment area) or a 100% increase in traffic (measured in gross ton miles annually). See 49 CFR 1105.7(e)(4), (5).

rather than transloading), whether NIR would be operating as a common carrier by railroad (rather than as a private shipper of waste), and whether the transaction is private track or excepted from our licensing authority under 49 U.S.C. 10906 on the ground the track is switching or spur track. Under these circumstances, we conclude that our class exemption procedure is not appropriate for considering NIR's proposed transaction, and we will reject its notice.

Because we are rejecting NIR's notice of exemption in STB Finance Docket No. 34734, NIR will have to file either a petition for exemption under our case-by-case exemption procedures at 49 CFR part 1121, or a formal application under 49 U.S.C. 10901 and 49 CFR 1150 Subpart A, if it desires to pursue Board authority for the transaction. Any filing must include NIR's entire case-in-chief. Either the petition for exemption or the application process should allow the Board to compile a record sufficient to resolve the issues that have been raised about this proposal.

The continuance-in-control notice filed by Gordon Reger in STB Finance Docket No. 34735 is moot because it flows from the transaction underlying the notice in STB Finance Docket No. 34734, which we are rejecting. Accordingly, we will reject the notice of exemption in STB Finance Docket No. 34735 as well. Should the Board authorize the transaction at issue in STB Finance Docket No. 34734 in another proceeding, Mr. Reger may file a similar continuance-in-control notice referring to the authority obtained in that other proceeding.

This decision will not significantly affect the quality of the human environment or the conservation of energy resources.

It is ordered:

1. In STB Finance Docket No. 34734, the notice is rejected, and that proceeding is discontinued.
2. In STB Finance Docket No. 34735, the notice is rejected as moot, and that proceeding is discontinued.
3. This decision is effective on its date of service.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary

10/1/2018

Exhibit 8

Village of **Croton-on-Hudson** New York

Stanley H. Kellerhouse Municipal Building
One Van Wyck Street
Croton-on-Hudson, NY 10520-2501

Mayor
Dr. Gregory J. Schmidt

Trustees
Thomas P. Freeman
Charles A. Kane
James M. Steinberg
Leo A. W. Wiegman

Alcayde
Richard E. Hudek

Treasurer
Abraham J. Zambano

Clerk
Margaret Keeler

Engineer
Daniel F. O'Connor, PE

September 21, 2005

Westchester County Solid Waste Commission
100 East Fourth Street, 7th Floor
Mount Vernon, New York 10550

Re: Application of Northeast Interchange Railway for a Class A License

Dear Chairman McShane and Members of the Commission:

The Village of Croton-on-Hudson is writing to urge the Solid Waste Commission to deny Northeast Interchange Railway (NIR) a Class A license under the Westchester County Solid Waste and Recyclables Collection Licensing Law ("Licensing Law") to conduct a hauling business in Westchester County on the grounds that a similar business conducted by the principals of NIR in Ohio created a very serious health and safety hazard for the people of the Town in which it was situated.

As the Commission is no doubt aware, Northeast Interchange Railway is directly controlled by Regus Industries, LLC. In NIR's submission to the federal Surface Transportation Board (STB) for an exemption from state and local laws, in order to operate a construction and demolition transfer station at a rail spur located in Croton-on-Hudson, Gordon Reger stated that he controls Regus Industries, LLC, which directly controls NIR. A copy of his statement is attached to this letter as Exhibit A. (To date, the STB has not acted on NIR's request.)

In connection with operating a transfer station in the Village of Mount Kisco, Regus Industries stated that it or one of its affiliate corporations operated the Warren Hills Landfill in Ohio. A copy of that letter is attached as Exhibit B.

We are opposing the licensing of NIR and other Regus-controlled entities because we believe that Regus's operation of the Warren Hills Landfill demonstrates that Regus is not fit to conduct a hauling business in Westchester County. Under the County's Licensing

Westchester County Solid Waste Commission

September 21, 2005

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Law, a license may be denied on the grounds that there has been "[a] finding of liability against an applicant or any principal of such applicant in a civil or administrative action that bears a direct relationship to the fitness of the applicant or any of its principals to conduct the business for which the license or registration is sought." [§ 826-a.400(2)(b)]

The series of civil proceedings in an Ohio Court of Common Pleas, resulting in two consent orders, which continued to be violated, bears a direct relationship to how Regus-controlled companies might run their waste operations in Westchester County. On July 1, 2003, the Attorney General of the State of Ohio commenced an action against Warren Hills, LLC and Warren Recycling, Inc. (referred to collectively as "Warren Hills Landfill") in connection with their operation of a construction and demolition debris ("C&DD") landfill. The complaint sought permanent injunctive relief and civil penalties for a series of violations, including inadequate leachate control, water pollution, inadequate fire control, failing to extinguish a landfill fire, and accepting solid waste. On the same date, the Trumbull County Court of Common Pleas entered a consent order agreed to by the State and Warren Hills Landfill.

Beginning in July 2003, the Warren Hills Landfill continued to violate the Ohio laws, as well as the consent order. The continuing violations included acceptance of solid waste, water pollution, inadequate leachate control, inadequate fire control, and uncontrolled surface runoff. As a result, in March 2004, the State of Ohio commenced a contempt proceeding for failure to comply with the terms of the consent order and for posing a continuous threat to public health and safety and the environment. In November 2004, Warren Hills stipulated that it was in contempt. Copies of the contempt motion and second consent order are attached to this letter as Exhibits C and D, respectively.

In reviewing this information, it is important to realize that the charges against the Warren Hills Landfill were not merely technical or bureaucratic violations; they were serious health and safety-threatening violations.

In addition to the civil action brought by the State against the Warren Hills Landfill, the federal Agency for Toxic Substances and Disease Registry ("ATSDR") investigated the landfill in response to complaints of leachate and odors emanating from the site. In December 2003, it issued an "ATSDR Media Announcement," warning of an "urgent public health hazard" posed by high concentrations of hydrogen sulfide at the landfill. The announcement warned:

Westchester County Solid Waste Commission

September 21, 2005

Page 3

- People with pre-existing cardiopulmonary disease or respiratory problems are at risk from the levels of hydrogen sulfide present in outdoor air in residential areas.
- On the basis of the levels of hydrogen sulfide and methane found in landfill vents, ATSDR finds that the potential for fire and explosion under extreme conditions on the landfill presents a threat to community members and workers at the site.
- There is a physical hazard to children and adults who access the unrestricted landfill.

* * *

- Members of the community cannot easily avoid exposures because hydrogen sulfide was also found inside homes.
- The levels of hydrogen sulfide, and possible other noxious-smelling compounds, in the air are resulting in a diminished quality of life for community members.

A copy of the entire ATSDR Media Announcement, along with a follow-up announcement, is annexed as Exhibit E.

Subsequently, the Emergency Response Branch of the United States Environmental Protection Agency commissioned a Site Assessment Report of the Warren Hills Landfill, which concluded that the levels of hydrogen sulfide, a hazardous substance, "are well above these health-based action levels and verifies that conditions in the site area have not changed significantly since November 2003, when ATSDR's health consultation was published. Therefore, a substantial public health threat is posed by the [Warren Hills] Site." A copy of the entire Site Assessment Report is annexed as Exhibit F.

Section 826-a.400(2) lists as another basis for denying a license, the commission of "any of the acts which would be a basis for the suspension or revocation of a license," and a license may be suspended for "a negligent or intentionally tortious act in relation to the handling, storing, treating, disposing or transporting of solid, hazardous, infectious,

Westchester County Solid Waste Commission

September 21, 2005

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medical or regulated waste.” [§ 826-a.401(1)(c)] It may also be suspended for being “in persistent or substantial violation of any local, state or federal law, rule or regulation regarding the handling of solid waste or recyclables.” [§ 826-a.401(1)(h)] Both of these standards were violated by the storage of C&DD at the Warren Hills Landfill in such a manner as to result in toxic emissions.

Although Regus has stated that it “divested Warren Hills LLC . . . in July 2004,” the lawsuits and investigations described above concerned actions and violations that occurred while Regus still had its ownership interest in the Warren Hills landfill.

Furthermore, Regus has refused to answer questions raised in connection with the lease transfer in Mount Kisco as to who acquired Warren Hills LLC. It does not make sense that it could divest itself of a company, in an arm’s length transaction, given the record of violations and, perhaps liabilities, it accumulated in its operation of the landfill. Until and unless Regus reveals to whom it divested the facility, and what the terms of the transaction were, its claim that the contempt finding occurred after Regus divested itself of the facility should not be credited.

The Village is aware that Regus and its affiliates operate transfer stations, landfills, and waste hauling businesses throughout the United States. The Village has not conducted its own investigation of Regus’s operations; it just “happened upon” the information about the Warren Hills Landfill. We believe the record of operation of that landfill alone is a sufficient basis to conclude that NIR is not fit to conduct a waste hauling, or similar, business in Westchester County. If the Commission does not agree that those grounds are adequate, we implore you to conduct a thorough investigation of all of the other Regus-controlled businesses.

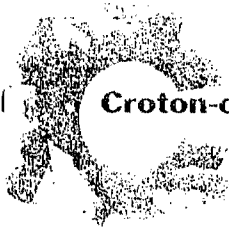
Thank you for the opportunity to address you.

Sincerely,



Marianne Stecich
Village Attorney

Village of **Croton-on-Hudson** New York



Stanley H. Kellerhouse Municipal Building
One Van Wyck Street
Croton-on-Hudson, NY 10520-2501

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Dr. Gregory J. Schuch

Trustees
Thomas E. Brennan
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James M. Steinberg
Leo A. W. Wiegman

Manager
Richard F. Herick

Treasurer
Abraham L. Zambano

Clerk
Margaret Keesler

Engineer
Daniel E. O'Connor, PE

VIA FAX (914-6852) AND OVERNIGHT DELIVERY

October 7, 2005

Westchester County Solid Waste Commission
100 East First Street, 7th Floor
Mount Vernon, New York 10550

Re: Application of Northeast Interchange Railway for a Class A License

Dear Chairman McShane and Members of the Commission:

The Village of Croton-on-Hudson is writing to follow up on two issues raised at the September 21, 2005 Solid Waste Commission hearing on the application of Northeast Interchange Railway (NIR) and other Regus companies for licenses to conduct a hauling business in Westchester County.

While Regus Industries Operated the Warren Hills Landfill in Ohio,
There Were Significant Health and Safety-Threatening Violations.

The representatives of Regus have sought to "explain away" the substantial violations at the Warren Hills Landfill in Ohio by obfuscating the ownership interests of the Warren Hills Landfill, and by trying to persuade the Commission that Regus's business is to acquire dirty sites and try to clean them up. Neither of those "explanations," however, negates the well-documented facts that while Regus *operated* the Warren Hills Landfill, there were serious health and safety-threatening violations that were the subject of a consent order with the State of Ohio, a contempt proceeding by the State of Ohio, a declaration of an "urgent public health hazard" by the Agency for Toxic Substances and Disease Registry, and a Site Assessment Report by the Emergency Response Branch of the United States Environmental Protection Agency.

Even if some of the violations that were the subject of those judicial and administrative actions occurred prior to Regus's arrival on the scene, substantial violations continued after September 2002, the date that Regus states it began operating the Warren Hills Landfill.¹ The Warren Hills Landfill and the State of Ohio entered into a consent order in July 2003 and, because of violations continuing beyond that date, the State of Ohio commenced a contempt proceeding in March 2004, all within the period that Regus admits to operation of the landfill. It is important to note that the continuing violations were not the result of acquiring a dirty site; they included accepting solid waste (at a construction and demolition debris landfill), inadequate fire control, inadequate leachate control, and uncontrolled surface runoff.

As Mr. Berger reported at the September 21, 2005 hearing, the Regus companies accumulated a number of environmental violations at other sites. But, because the Village has not been provided with a copy of Mr. Berger's written report, we have not been able to look further into those violations nor to investigate sites that we did not realize Regus operated. The Village, therefore, again urges the Commission to conduct a thorough investigation into every site owned or operated by any Regus-controlled company.

Regus Intends to Operate the Transfer Station in Croton-on-Hudson
Without Submitting to Village Zoning Laws and Other Regulation.

In response to Commissioner Schwartz's questions about NIR's application before the Surface Transportation Board (STB) for an exemption from state and local regulation, Mr. Gruson and Mr. Vacco stated that NIR/Regus was voluntarily seeking licenses and approvals from the County and the New York State Department of Environmental Conservation. Notably, they did not agree to comply with Village zoning laws and other regulations.

Mr. Gruson's and Mr. Vacco's statements to your Commission are consistent with

¹ At the Commission's hearing on September 21, 2005, Andreas Gruson said that Regus began operating the site as early as September 2002. According to an earlier letter from Regus's attorney, it operated the Warren Hills Landfill from January 2003 to July 2004. (See Exhibit B to Village's September 21, 2005 submission to the Commission)

NIR's written submission to the STB, a copy of which is enclosed. Although the submission states that NIR will "operate in accordance with federal, state and local regulations," it is apparent from the context of the statement that by "local" they mean "County." Furthermore -- and perhaps more importantly -- in its submission, NIR states that it will comply with state and local regulations only if the regulations do not interfere with their operations. In NIR's own words, "This is not to say, however, that NIR will not avail itself of the ability to seek the preemption of such state and local regulations if their application interferes with or prevents rail operations." (Supplemental Reply at page 6) (Note that their proposed transfer station would be part and parcel of their "rail operations.") In addition, in a Verified Statement to the STB, Andreas Gruson discusses "cooperation" with only DEC and the Solid Waste Commission -- again, not the Village -- and as to that cooperation, he states: "We believe that NIR would be exempt from regulation by the Commission if such regulation interfered with rail transportation service, but NIR is willing to work with the Commission, just as NIR will work with the DEC, on a cooperative basis." (Verified Statement of Andreas Y. Gruson at page 4)

NIR's apparent refusal to submit to Village regulation is confirmed by the fact that neither NIR nor any of the other Regus entities has applied to the Village of Croton-on-Hudson for a special permit to continue operating a construction and demolition debris transfer station. Indeed, Andreas Gruson, in a telephone conversation with the Village Manager this week, stated that NIR does not need a special permit from the Village.²

Without a special permit, NIR would be operating in Croton-on-Hudson outside of any of the reasonable regulations imposed by the Village to minimize the impact of a non-conforming, and potentially noxious, use on neighboring properties and the Village as a whole. NIR's predecessor operated under a special permit that had a list of 43 conditions, which, *inter alia*, established operating hours; imposed tonnage limits on the amount of

² Mr. Gruson stated that, according to Judge Nicolai (in his decision on the application of Greentree Realty, LLC and Metro Enviro Transfer, LLC for a preliminary injunction), NIR did not need a special permit. This statement is bizarre, since NIR was not a party to the lawsuit before Judge Nicolai, and -- more importantly -- in the following language, Judge Nicolai clearly implies that a special permit would be necessary: "In addition, upon re-lease of the Property, in the event that Respondents' [the Village] review of the required permits and/or approvals is unreasonably delayed, Petitioner Greentree [the owner of the property] may apply to this Court for appropriate relief."

Westchester Solid Waste Commission

October 7, 2005

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material that could be accepted; detailed which materials could be accepted at the site, and which were not acceptable; prohibited the use of incinerators, wood chippers, and rock crushers; banned composting, burial, or other on-site disposal of materials; regulated noise, odors, and lighting; required compliance with Fire Department directives; limited the parking of trucks; and provided for inspections and enforcement. Many of the conditions included in the special permit granted by the Village of Croton-on-Hudson regulated items that were not covered by DEC permitting. A copy of the special permit issued to NIR's predecessor is enclosed.

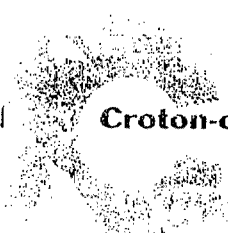
The conditions imposed by the Village were not NIMBY-motivated restrictions to prevent the transfer station from operating. They were regulations designed to protect the health, safety and welfare of the Village's residents.

Again, the Village of Croton-on-Hudson thanks the Commission for its careful attention to this important matter and urges the Commission to refuse to issue NIR and the other Regus-controlled business hauling licenses, on the grounds that Regus's operations, such as the Warren Hills Landfill in Ohio, demonstrate that it is not fit to conduct a waste hauling or similar business in Westchester County. These concerns are exacerbated by NIR's attempt to conduct this business in Croton-on-Hudson free from local regulation.

Sincerely,

Marianne Steeich
Village Attorney

Village of **Croton-on-Hudson** New York



Stanley H. Ketterhouse Municipal Building
One Van Wyck Street
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Clerk
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Engineer
Daniel E. O'Connor, P.E.

VIA DHL OVERNIGHT DELIVERY AND FAX (813-6852)

November 11, 2005

Westchester County Solid Waste Commission
100 East First Street, 7th Floor
Mount Vernon, New York 10550

Re: Application of Northeast Interchange Railway for a Class A License

Dear Chairman McShane and Members of the Commission:

On October 20, 2005, Michael Gerrard, the Village's special environmental counsel, and I met with Chairman McShane and Bruce Berger to explain why the Village was not going to meet with Andreas Gruson and other principals of NIR or other Regus-controlled entities. We explained that our position before the Solid Waste Commission was that NIR should not be licensed as a waste hauler because Regus's operation of the Warren Hills Landfill in Ohio, which resulted in past and pending civil actions, demonstrates that a Regus company is not fit to conduct a hauling business in Westchester County. Since the Village believes that NIR should not be licensed in Westchester County, it makes no sense to discuss with them commencing operations in Croton-on-Hudson.

At the meeting, Chairman McShane asked whether we had any information about the Regus-controlled Champion City construction and demolition debris transfer station, located in Brockton and Avon, Massachusetts. According to Mr. Berger, Champion City had a reputation as a "model facility." At the time, we had no information about it, but over the last two weeks, we have done some research and learned that Champion City, like Warren Hills, has a poor record of compliance with local governmental requirements.

According to our research, Champion City has been the subject of active opposition by two citizens groups, POWER (Protecting Our Water and Environmental Resources), and RATTSS (Residents Against Trash Transfer Station). Although the principal focus of their concern in recent years seems to have been the expansion of the facility, much of the opposition was based on complaints about the existing operation.

Westchester County Solid Waste Commission

November 11, 2005

Page 2

In June 2002, the Town of Avon, whose drinking water wells are in close proximity to Champion City, and which filed objections to the original Champion City transfer station, entered into a Settlement Agreement with Champion City. The Settlement Agreement contained pages of conditions directed at protecting the Town of Avon water supply, limiting truck traffic in the Town, insuring that trucks and railroad cars using the facility be covered, limiting the hours of operation, and protecting against noise and dust from the facility.

One of the conditions of the Settlement Agreement was that Champion City conduct regular testing of groundwater and landfill gas at the facility and provide the Town with the results. During construction, however, the monitoring wells were destroyed, and the Town was deprived of critical information respecting its water supply.

The coordinator of POWER sent me a videotape presented at a public meeting in September 2003, which showed a series of violations of the Settlement Agreement. The violations included trucks traveling through town without covers over the debris, train cars leaking dirty fluids into the public water supply, uncovered train cars, an absence of doors covering the bays, dust spreading beyond the site, and work being done at the site far earlier and later than the permitted hours of operation. We would be happy to furnish you a copy of the tape if you are interested.

According to the citizens groups, their complaints of violations were, for the most part, ignored by state officials. Whether or not those violations resulted in administrative enforcement actions, they represent compelling reasons why a local government would not want such an operation in its community. The violations also demonstrate that there is a pattern of Regus-controlled waste companies making promises that sound convincing, but not complying with them.

Doubts about the trustworthiness of Champion City officials were also raised by their failure to inform Town of Avon officials about a plume of gas and oil that was approaching the Avon wells. A February 2004 article in The Enterprise, a daily Boston-area newspaper, reported that "Avon officials were startled . . . when they heard that the plume [of gas and oil beneath the Champion City site] had moved 30 feet closer to a well that provides 60% of the town's water." Champion City had learned about the plume in late 2003 and notified the state, but did not notify local officials until several months later. A copy of the newspaper article is enclosed.

Westchester County Solid Waste Commission

November 11, 2005

Page 3

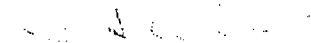
Just a few days ago, we also learned that there may be legal proceedings pending against the Sunny Farms Landfill in Fostoria, Ohio, another Regus entity, relating to environmental compliance. We have ordered copies of the Sunny Farm files from the Ohio EPA, which expects to send them to us in two weeks.

Having explored the Champion City site and learned of the enforcement issues with Sunny Farms, the Village of Croton-on-Hudson is now even more convinced that another Regus-controlled company is not fit, and should not be licensed, to haul in Westchester County.

On the subject of Warren Hills, I am enclosing a time line Michael Gerrard distributed to Mr. McShane and Mr. Berger at our meeting last month. The time line shows that, almost immediately after Warren Hills LLC (a Regus entity) began operating the landfill, it began to receive notices of violation, and on July 1, 2003 that entity signed a consent order with the state. Warren Hills LLC then persistently violated the consent order, and, although in July 2004 it "divested" its interest in the landfill, in November 16, 2004 Warren Hills LLC signed a stipulation of contempt acknowledging that it had violated the consent order. It is clear that the landfill was operated terribly during Regus's watch. I am also enclosing a graph Mr. Gerrard distributed at the meeting of Regus's connections to NHR and other waste companies.

Again, the Village of Croton-on-Hudson is grateful to the Commission for its careful consideration of this licensing matter and urges the Commission to deny a hauling license to NHR and the other Regus-controlled companies.

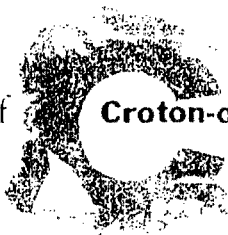
Sincerely,



Marianne Stecih
Village Attorney

Enclosures

Village of **Croton-on-Hudson** New York



Stanley H. Kellerhouse Municipal Building
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Manager
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Recorder
Abraham I. Zimbrano

Chief
Margaret Kreisler

Engineer
Daniel H. O'Connor, PE

December 9, 2005

Westchester County Solid Waste Commission
100 East First Street, 7th Floor
Mount Vernon, New York

Re: Application of Northeast Interchange Railway (NIR) for a Class A License

Dear Chairman McShane and Members of the Commission:

As I wrote in my letters of November 11 and November 17, 2005 to the Solid Waste Commission, the Village of Croton-on-Hudson was awaiting files from the Ohio Environmental Protection Agency documenting the "series of serious violations" at the Sunny Farms Landfill, referred to by Ellen Gerber, Supervisor of the Northwest District Office of the Ohio EPA Division of Solid and Infectious Waste.

Last week I received a large box of materials containing letters, reports, and notes of investigations, dating back to early 2003, from the Ohio EPA and Seneca County General Health District. These documents paint a very disturbing picture of persistent violations of environmental laws, which seem to have intensified beginning in early 2005 – when Regus was indisputably in control of the landfill.

As the Commission is aware, Sunny Farms Landfill, in Fostoria, Ohio, is owned and operated by Regus Industries. Regus appears to have taken over the landfill (previously named San-Lan Landfill) from Hocking Environmental Group some time in 2003. A sign-in sheet from a meeting with representatives of Ohio EPA and the Seneca County Health District about the San-Lan Landfill on November 18, 2003 shows two representatives from Regus in attendance. A sign-in sheet from a February 22, 2005 meeting about Sunny Farms also shows two representatives from Regus, including Andreas Gruson, in attendance.

Putting aside the repeated instances of administrative violations (failure to keep required records, to file mandatory reports, and to supply required information et al.), there is a host of violations that have substantive environmental impacts. When Regus acquired the landfill from Hocking Environmental, the facility was under a consent order with respect to groundwater contamination. That should have led the owners to exercise special diligence in meeting all regulatory requirements. Instead, it is apparent from the Ohio EPA records that, since Regus began operating the landfill, operations at the site have been characterized by a wide variety of significant violations.

Prior to Regus's taking over the landfill, the only violation letters involved compliance with the groundwater consent order. Once Regus started operating the landfill, the range of violations broadened significantly and the number of violations increased dramatically. Below is listing of only some of the violations referred to in the Ohio EPA files. Each of these is documented in a letter or memo, dated as follows, from the Ohio EPA or Seneca County Health District (SCHD):

- October 6, 2003 -- An "extensive amount of dust on County Road 18 from the truck traffic coming out of the landfill," in violation of landfill's air pollution permit and the solid waste regulations. Watering truck is out for repair; Regus failed to notify Ohio EPA as required. (OEPA)
- January 16 and January 28, 2004 -- Despite repeated requests, Regus continues to fail to submit quality assurance/quality control data and other information required to determine if its groundwater monitoring results are accurate. (OEPA) [This violation persisted through the most recent report, dated November 1, 2005.]
- July 13, 2004 -- Failure to submit reports required under Explosive Gas Monitoring Plan. (OEPA)
- January 3, 2005 -- Waste transported by rail and deposited at landfill is not being covered daily as required by regulations; at time of inspection, "daily cover had not been placed in that area for at least several days." Working face not kept "at a manageable size/area." (SCHD)

Westchester County Solid Waste Commission

December 9, 2005

Page 3

- January 14, 2005 -- On the rail cars being unloaded, "There appeared to be a lot of solid waste mixed in with the construction and demolition debris." (SCHD)
- January 25, 2005 -- Rail cars containing solid waste were improperly logged as having only construction and demolition debris. (SCHD)
- March 30, 2005 -- Regus admitted that it had "overfilled" portions of the landfill (i.e., deposited waste above the maximum allowable elevation) and was being required to remove and relocate this waste. Additionally, there were "deep erosion gullies throughout the west slope," and the "rip-rap channel at the northwest corner of Phase I was noted to be badly eroded," and the west perimeter ditch had "an excessive accumulation of silt that was hindering flow." This was cited "for not maintaining the integrity of the engineered components of the sanitary landfill facility and for not promptly taking corrective actions or repairs." (OEPA)
- April 5, 2005 -- There were visible emissions from the landfill, in violation of the permit. (OEPA)
- April 22, 2005 -- Numerous rail cars that contained solid waste were improperly logged as containing only construction and demolition debris. (SCHD)
- May 6, 2005 -- During an inspection, it was found that "the leachate tanks were full, as the lights/alarms were flashing." The leachate collection pipes were storing in excess of 20 inches of leachate, though the permit limit was 12 inches. (SCHD)
- May 10, 2005 -- "No evidence of an [sic] fugitive dust control on any roadway. Entrance & egress RW to facility very dusty & considerable dirt tracked onto CR -- very dusty." (OEPA)
- May 12, 2005 -- A "leachate outbreak" that had previously been noted still existed, and the leachate levels still exceeded the permit limits. (SCHD)

Westchester County Solid Waste Commission

December 9, 2005

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- May 16, 2005 -- Regus began accepting construction and demolition debris by rail transfer in May 2004 in large volumes (3000 tons/day), and built a rail transfer station. All this required permits from Ohio EPA, but Regus did not obtain them. This creates "potential significant increase in the emissions of fugitive dust and hydrogen sulfide (H₂S)." "[T]here is no evidence of any control equipment or control measures employed to minimize emissions of fugitive dust from these activities." Additionally, "[t]here was no evidence of a water truck in operation and most roadways were extremely dusty. Dirt was also being tracked onto the public roadway causing significant fugitive dust emissions whenever traffic passed the landfill." Plus, "[t]here was a significant odor emanating from the landfill operations." Finally, even though Sunny Farms had been cited several times previously, there were still "no signs that are displayed in the manner required regarding asbestos waste disposal operations." (OEPA)
- June 29, 2005 -- The landfill was found to be accepting many items that should have been rejected, such as metal bed frames, metal overhead garage door, and metal piping. "A spotter was not present at the time of the inspection and a bulldozer was pushing the unacceptable items around at the time of the inspection." In addition, a previously-noted leachate outbreak had been repaired, but a new one had appeared. Also, leachate levels at four pumps were significantly in excess of 12 inches. Finally, daily logs of operations had not been completed. (SCHD)
- June 30, 2005 -- The scales were not working for most of the week. "During this time the weights at the scale house were guessed based upon history, load composition, or estimates." Older daily logs still not signed. No daily logs from week prior to inspection. (SCHD)
- June 30, 2005 -- Once again the leachate levels exceed permit limits. "The alarms were on/flashing, the tank was full, and no trucks were hauling leachate." Additionally, "there was a lot of trash on the access roads that had fallen off of the trucks taking rail debris from the unloading facility to the working face. The roads were covered with wood, paper, metal and miscellaneous debris at the time of the inspection." "All debris must be removed from road surfaces and trucks need enclosed rear gates to prevent waste from falling out." Owners cited for "completing the forms and

Westchester County Solid Waste Commission

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making a determination on the contents [that the rail cars contained C&D] before the rail cars are unloaded." (SCHD)

- July 20, 2005 -- Several railcars containing solid waste were improperly logged as containing only construction and demolition debris. Additionally, "we observed loads of unidentifiable waste material being unloaded from the rail cars listed above. The waste was loaded into landfill dump trucks and hauled directly to the working face where it was disposed. The contents of the rail cars were determined to be unidentifiable and the weight for the entire rail cars must be properly categorized as a solid waste." This letter notes that a state fee is assessed for solid waste disposal. Thus logging waste as construction and demolition debris rather than as solid waste amounts to evasion of the fee. (SCHD)

- July 27, 2005 -- Visual emissions far in excess of permit. (OEPA)

- August 9, 2005 -- More rail cars noted that contained solid waste but were logged as construction and demolition debris. Regus is reminded that this could lead to underpayment of solid waste disposal fees. Additionally, the leading area of the landfill "needs more cover, as an excessive amount of trash was exposed... We also observed several leachate outbreaks ... that need to be addressed before they flow into the ditch." (SCHD)

- August 15, 2005 -- A compilation of statistics from May, June and July 2005 shows that when no outside observer is present, Regus logs 22% to 28% of the loads as containing solid waste; but when a government observer is present, 59% to 64% of the loads are logged as containing solid waste. (SCHD)

- September 23, 2005 -- Visible dust emissions were observed. The water truck was not seen. Two trucks "were moving earth from near the pond toward the landfill. These two trucks made many trips during this period on the observed roadway since both drove at high speed back and forth." (OEPA)

- October 19, 2005 -- Regus continues to be in violation of an order "issued on June 30, 2003 for not reconstructing the east cap of Phase I of the landfill by the December 1, 2003 deadline." (OEPA)
- November 1, 2005 -- Regus has failed to install monitoring wells necessary to determine the extent of groundwater contamination from the landfill. "The contamination extends beyond all of [the existing] wells as depicted on the isopleth maps." (OEPA)

I am including with this letter a copy of the August 15, 2005 compilation of statistics showing the difference in describing the waste loads when an inspector was present at Sunny Farms and when the unloading was not observed. Those statistics are a clear demonstration of Regus's dissembling and manipulation of its records, which makes it impossible for state and local regulators to "ensure that solid waste ... is disposed of or recycled in an environmentally safe and sound manner," as required by the Westchester County Solid Waste and Recyclables Collection Licensing Law ("County Solid Waste Licensing Law").

Notably, in the letter dated January 25, 2005 from the Seneca County General Health District, Regus was cited for failing to file a disclosure statement about firing their manager and hiring a new key employee. It is obvious from a review of the dates of the violations listed above, that the hiring of the new manager coincided with the pattern of understating the amount of solid waste being dumped at the landfill, as well as with a sharp increase in the frequency of violations.

The Village of Croton-on-Hudson believes that licensing a business with a compliance record as disgraceful as Regus's at Sunny Farms and Warren Hills (ownership issues notwithstanding) will certainly not promote the health, welfare and safety of the people of Croton-on-Hudson and will not ensure that solid waste is disposed of in an environmentally safe and sound manner. Irrespective of Regus's compliance history at Champion City in Massachusetts (which we have good reason to believe is not the "model operation" Mr. Berger states it is), its performance at the two landfills in Ohio clearly demonstrates that the Regus companies lack honesty and integrity and are not fit to operate solid waste facilities in Westchester County.

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At the several Commission meetings on NIR's application, some of the Commissioners stated that the Commission's goal in issuing hauling licenses is to make sure that haulers are not connected to organized crime. While that is one of the stated purposes of the County Solid Waste Licensing Law, it is listed as the "second purpose" of the law. The Law's "first purpose" is to: "(1) enable Westchester County to promote the general health, welfare and safety of the people of Westchester County; (2) ensure that solid waste generated within the county is disposed of or recycled in an environmentally safe and sound manner ..."

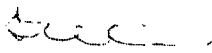
It is regrettable that it was necessary for the Village to shoulder the expense and trouble of conducting this inquiry into the Sunny Farms landfill, after the staff of the Solid Waste Commission had assured the Commission members that they had done an "exhaustive investigation" of the Regus controlled entities, including the Sunny Farms Landfill. It was not until I telephoned Mr. Berger on the morning of November 17, 2005 to tell him what I had just learned from Ohio EPA that the Commission staff contacted the Northwest District Office.

The Village has serious doubts about the thoroughness of the investigation of Regus controlled businesses. Based on the Village's own investigation, however, the conclusion seems inescapable that NIR should not be licensed in Westchester County. In addition to the actions by the Attorney General with respect to Warren Hills, there is pending administrative activity (although not yet a formal "action") respecting the Sunny Farms Landfill "which directly relates to the fitness to conduct the business or perform the work for which the license is sought." County Solid Waste Licensing Law § 826-a.400.2.b.

I have enclosed with my letters to Chairman McShane and Mr. Berger copies of all the documents referred to above. If anyone would like me to send you copies as well, please call me at 674-4100.

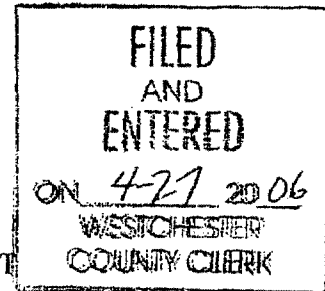
Once again, thank you for your careful attention to this matter.

Sincerely,


Marianne Stecich
Village Attorney

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - ENVIRONMENTAL CLAIMS PART



-----X
THE VILLAGE OF CROTON-ON-HUDSON, NEW YORK

Plaintiff,

DECISION

Index No. 22176/05

-against-

NORTHEAST INTERCHANGE RAILWAY, LLC
GREENTREE REALTY, LLC,

Defendants.
-----X

NICOLAI, J.

The following papers numbered 1 to 37 were read on this motion by plaintiff for an order granting a preliminary injunction enjoining defendants from commencing operation of a waste transfer station in the Village of Croton-on-Hudson until they obtain a special permit from the Village; and cross motion by defendant for an order dismissing plaintiff's causes of action in the Amended Complaint pursuant to 3211(a)(4) and/or 3211(a)(7); or in the alternative, consolidating the instant action with Greentree Realty, LLC v Village of Croton-on-Hudson (Index No. 11872/05).

Order to Show Cause - Affidavit	1- 3, 8- 10
Notice of Cross Motion - Affidavit	22- 23, 31
Memorandum of Law	7, 36, 37
Exhibits	4- 6, 11- 21, 24- 30, 32- 35

Upon the foregoing papers, it is ordered that this motion and cross motion are decided as follows:

Plaintiff commenced the present action to enjoin defendant Northeast Interchange Railway ("NIR") from commencing operation of a waste transfer station on the property located at 1A Croton Point Avenue, Croton-on-Hudson, New York (the "Property"), owned by defendant Greentree Realty LLC ("Greentree"). It is undisputed that this Property was previously owned by the Milano family from the early 1960s, until it was sold to Robert V. Liguori in 1984. According to Louis Milano, whose father owned the property, in the 1970s, the Property was used principally as a construction yard for the Milano's construction business. Louis Milano further stated that in 1970, the Milanos

contracted with Westchester County to provide sand as cover for the landfill until 1978, when the contract was terminated. According to Louis Milano, in 1978 the Property was used for a truck repair business. (This assertion is supported by Zoning Board of Appeals minutes dated February 9, 1977, when the Milano's lawyer appeared on their behalf for the "continuance of a nonconforming use permit for the repair & service of motor vehicles.")¹ According to the affidavit of the Village Manager, Richard F. Herbek, in 1984, the Milanos sold the Property to Robert V. Liguori who obtained a special permit to change from one nonconforming use (truck repair) to another (wood waste recycling). Thereafter, in 1988, the Village of Croton-on-Hudson issued a special use permit to Industrial Recycling Systems ("IRS"), authorizing it to operate a wood processing and recycling transfer station on the Property, thereby creating the nonconforming use of a waste transfer station. In 1997, Greentree purchased the Property and leased it to Metro Enviro which requested and received a renewal and transfer of the pre-existing special use permit held by "IRS." The Department of Environmental Conservation issued a Part 360 Solid Waste Management Permit to Metro Enviro to operate a waste transfer station on the Property and imposed a number of conditions on the issuance of the permit. In 1998, the Village Board of Trustees of the Village of Croton-on-Hudson (the "Board") issued the special use permit under §230-53.A (the successor to §7.1.1.2) providing numerous conditions, for a three-year duration. However, on January 27, 2003, the Board issued a Statement of Findings denying Metro Enviro's renewal application based upon certain violations of the special use permit. This denial to renew the special permit, however, did not extinguish the existing prior nonconforming use.

It is undisputed that the Property is located in the Village of Croton-on-Hudson's Light Industry L1 Zoning District.² The 1979 Zoning Code provides in pertinent part:

§7.1 NON-CONFORMING BUILDINGS AND USES

Subject to the provisions of §7.1.6 the following provisions shall apply to all buildings and uses existing on the effective date of this local law, which buildings and uses do not conform to the requirements set forth in this local law; to all buildings and uses that become non-conforming by reason of any subsequent amendment to this local law and the zoning map which is a part thereof; and to all buildings housing non-conforming uses:

¹Defendants submitted an affidavit of Angelo Milano who stated that his family "used the Property as a repair garage and for the storage and transfer of various products and materials, such as rocks, stone, soil and other debris." Mr. Milano concluded that the products and materials were obtained from the construction business which was in existence prior to 1979, when the Village amended its Zoning Code. This assertion is disputed by the Village Manager, who stated that "the property was used mainly to do the repair work on the Milanos' trucks, which they used in their construction business. The property was also used to transfer clean sand in connection with the contract that the Milanos had with Westchester County to provide cover material for the Croton Point Landfill."

²Until 1979, the district was known as the "Manufacturing M District."

7.1.1 Any non-conforming use, except those non-conforming uses specified in § 7.1.5, be continued indefinitely, but:

7.1.1.2 Shall not be changed to another non-conforming use without a special permit from the Village Board of Trustees, and then only to a use which, in the opinion of said Board, is of the same or a more restricted nature....

The Zoning Code, currently in effect in the Village has been amended over the years. The 1961 Zoning Code regulating the "Manufacturing M District" where the Property is located, described the permitted use as follows:

Manufacturing, assembly, converting, altering, finishing, cleaning or any other processing or storage of products or materials...[§ 3.10.1.g]

The 1979 Zoning Code, regulating the "Light Industrial L1 Zoning District", where the Property is located, added the word "light" and dropped the language "or materials" to permit:

Light manufacturing, assembly, converting, altering, finishing, cleaning or any other processing or storage of products...[§ 230-18B(2)]³

In support of the application for a preliminary injunction, plaintiff asserts that the only way in which another waste facility operator, such as NIR, can take advantage of the Zoning Code's protection of pre-existing legal nonconforming uses, is if the waste processing use existed in 1979 when the zoning code amendment disallowing it, was enacted. Plaintiff asserts that a waste transfer station was not a lawful use under the 1979 Zoning Code nor under the 1990 Zoning Code. More importantly, in 1979, a waste processing facility was not operating at the 1A Croton Point Avenue location. Therefore, pursuant to §7.1 and its' current counterpart §230-53, only lawful uses that existed on the effective date of the new Zoning Code or subsequent amendments may continue indefinitely. Plaintiff concludes therefore, that the use of the Property as a transfer station was not an as-of-right use when Metro Enviro began its construction and demolition debris operations in 1998, and therefore, it was not a lawful pre-existing nonconforming use entitled to continue indefinitely. Since the use that was allowed to operate at the Property was only allowed by virtue of the nonconforming use special permit (granted to Metro Enviro in 1998), and the refusal to renew that special permit was upheld by the Court of Appeals in Metro Enviro Transfer, LLC v Village of Croton-on-Hudson, 5 NY3d 236, the right to continue the nonconforming use was lost.

Defendants oppose the motion upon the grounds that the construction and demolition debris

³The 1990 Zoning Code similarly describes the manufacturing use as in the 1979 Zoning Code, but the nonconforming use provision is renumbered §230-53.A(2).

transfer station and processing facility (the "Facility") is a "pre-existing, legal nonconforming use" which is not required to obtain a special permit or variance to continue. Since the use of the Property for processing waste was expressly permitted under the Zoning Code, defendants maintain that the Village has sanctioned the Property as a pre-existing, legal nonconforming use. The relevant provision of the Zoning Code is section 230-53 which provides in pertinent part:

A. Any nonconforming use...may be continued indefinitely, but:

(2) Shall not be changed to another nonconforming use without a special permit from the Village Board of Trustees and then only to a use which, in the opinion of said Board, is of the same or a more restricted nature.

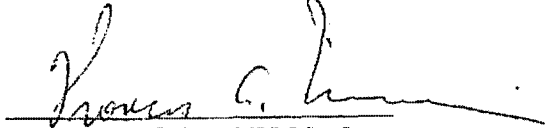
Defendants assert that the Zoning Code is clear that a nonconforming use "may be continued indefinitely" particularly since the use of the Property is not going to be changed. Furthermore, defendants assert that NIR and RS Acquisition Co., LLC ("RSA"), the current lessee, expressly stipulate that they will operate the Facility within the parameters of the pre-existing, nonconforming use that existed prior to the amendments to the Zoning Code in 2001.

Village Law §§7-714 and 20-2006 permit the Village to seek preliminary injunctive relief to enforce its zoning law. The Village correctly contends the special permit expired in 2001, and the termination of the special permit was upheld by the Court of Appeals in Metro Enviro Transfer, LLC v Village of Croton-on-Hudson (id). While the non-renewal of Metro Enviro's nonconforming use special permit did not eviscerate the protected property rights at issue, it is undisputed that eight years have elapsed since the special permit was issued to Metro Enviro, and prior to the issuance of a new special permit, the Village has the right to impose conditions necessary to prevent harm to the community and the environment. Thus, the Village must be able to assure its citizens that a new operator will manage the Facility in such a way that it will not harm their health, safety and welfare.

After hearing oral argument and in view of the foregoing, the Court finds that plaintiff has demonstrated its right to injunctive relief. Accordingly, plaintiff's motion for a preliminary injunction is granted. NIR and its affiliate RSA are therefore enjoined from operating a transfer station at the Property without first obtaining a special permit in accordance with the Village's Zoning Code. Upon application by defendants, the Village will issue a determination within a reasonable time frame. The mandatory undertaking required by CPLR 6312(b) is fixed at \$25,000.

The cross motion is granted solely to the extent that the instant action is consolidated with Greentree Realty, LLC v Village of Croton-on-Hudson (Index No. 11872/05).

Dated: White Plains, New York
April 25, 2006


FRANCIS A. NICOLAI
A.J.S.C.

TO:

MURPHY STECICH & POWELL, LLP

Attorneys for Plaintiff

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Tarrytown, NY 10591-4100

ZARIN & STEINMETZ

Attorneys for Defendant Greentree Realty, LLC

81 Main Street, Suite 415

White Plains, NY 10601

CRANE, PARENTE, CHERUBIN & MURRAY

Attorneys for Defendant Northeast Interchange Railway, LLC

90 State Street

Albany, NY 12207

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Board of Trustees Minutes February 6, 2006

The Village of *Croton-on-Hudson*, New York

A Regular Meeting of the Board of Trustees of the Village of Croton-on-Hudson, NY was held on Monday, February 6, 2006 at the Municipal Building, Van Wyck Street, Croton-on-Hudson, NY 10520.

The following officials were present:

Mayor Schmidt	Trustee Wiegman
Village Manager Herbek	Trustee Brennan
Village Attorney Waldman	Trustee Steinberg
Treasurer Zambrano	Trustee Kane

1. CALL TO ORDER:

Mayor Schmidt called the meeting to order at 8:10 p.m.

2. APPROVAL OF VOUCHERS:

Trustee Kane made a motion to approve the vouchers as follows, subject to review by the Audit Committee. The motion was seconded by Trustee Brennan and approved unanimously.

General Fund	\$39,210.46
Water Fund	1,077.32
Capital Accounts	3,474.00
Trust & Agency	1,354.00
	\$76,470.38

Mayor Schmidt honored Bill Vlad upon his retirement as chief of the Croton on Hudson Fire Dept., thanking him for his dedication and for the hours he has put in. Mayor Schmidt read an official proclamation naming February 6, 2006 as Bill Vlad day in the Village.

3. PUBLIC HEARING:

Village Manager Herbek opened the Public Hearing being held to determine the Village's need for the property owned by Greentree Realty, 1A Croton Point Ave., Section 78.116, Block 2, Lots 1 and 2, as the first step in the process of acquiring the property by eminent domain. He added that legal notice of this public hearing has been published in the official Village newspapers.

Presentations:

Maryanne Stecich, Croton Village Attorney, stated that this hearing is the first step; proper notices have been published and served; the Board is going to begin the SEQRA process by determining they are to be Lead Agency; an appraiser has been retained to put a dollar value on the property; within 90 days after public hearing is closed, the Board of Trustees will prepare a determination and publish its findings; within 30 days of the publishing of the findings, the property owner may commence action in the Appellate Division; the proceeding must be heard as expeditiously as possible; the Village must offer, in writing, just compensation for property then four things can happen-the property owner can accept or reject the offer, the property owner can do nothing and in 90 days the offer is deemed rejected, or the property owner can accept the offer as advance payment; the next step is for the Village to commence a proceeding in the court to acquire the property; an order of the Supreme Court will give a time limit to the property to start an action for damages if the offer was rejected.

Attorney Stecich stated that this proposed acquisition is a classic example of why municipalities have the power to condemn property when it is needed for a public use. Attorney Stecich quoted from a US Supreme Court case that describes a municipality's eminent domain power.

Village Manager Herbek explained the Village's need for a new Public Works facility. (full text of his presentation attached).

Ken Kraft, Superintendent of Public Works, spoke on behalf of the need for a new facility. (full text of his presentation attached).

Dan O'Connor, Village Engineer, stated that he took into account the 2004 Needs Assessment prepared by the DPW plus additional items and the Needs Assessment for the Parks and Recreation Dept. for his conceptual plan. He explained the proposal using a diagram posted on the bulletin board. Mr. O'Connor stated that he also took into consideration the zoning of the area; additional analysis will be done as needed.

Mayor Schmidt opened the floor for public comments:

- a. Maria Cudequest, 84 Grand St., thanked the staff for their presentations this evening. She added that in her opinion, the Village has a crying need for this space; the site is the right size and is truly serving a public need; also she agrees that additional parking spaces are needed;
- b. Richard Pellicci, 65 Radnor Ave., stated that he is organizing a group of residents for a number of projects around the Village and is thrilled on this plan to move the DPW to this site.
- c. Bruce Kauderer, 6 Georgia Lane, stated that he has been a resident over 30 years and is a real estate attorney; he said that this is the wrong tactic and wrong procedure to go forward with at this time, at least not on this site; eminent domain proceedings are about the same throughout the country; the municipality must pay full market value of the site; if a waste transfer station can be put on this site, then you are talking about an established business with a high value and an operation that cannot simply relocate down the street which means the Village would have to pay the entire value of this business- perhaps up to 50 million dollars. He added that Croton will have to take title to the property before knowing what the value is and this process may take several years. He stated that he feels the Village cannot afford to take this property now and asked why not take the Georgia-Pacific/Finklestein property; he urged the Board to form an advisory committee and believes they have gotten some very bad advice on doing this now; get experts within the Village working on this.
- d. David Steinmetz, Zarin & Steinmetz, Attorneys at Law, stated that he is representing Greentree Property LLC, owners of this property; they are opposed to the proposed condemnation of this property and he has been joined by Thatcher Proffitt & Wood as co-counsel. Mr. Steinmetz presented a letter and legal arguments- copies were given to each member of the Board. He stated that government must establish a purpose and need and then invoke the power of eminent domain; they believe the record in this procedure shows it is backwards. He added that this piece of property has been controversial for several years in this Village. He asked if there has been any recent empirical analysis of any properties in the Village. Mr. Steinmetz stated that he had represented the owners of the Georgia Pacific property and knows that this property was burdened and depressed and doesn't believe the Village was actively pursuing purchase of this property. He noted that a municipality cannot condemn land in excess of a stated need and there is no articulated need for 10 acres; a condemnation cannot be conducted in bad faith and there are pending matters before the Village's Board of Appeals regarding this property. He added that there needs to be a comprehensive environmental review; he is under a disadvantage having not seen the environmental assessment form as he can not get it until tomorrow; he asked that under fairness, keep the public hearing open until they can review the EAF; they need to study the environmental impacts of terminating the non-conforming use rights on this property- taking away the only piece of property in Westchester County that is zoned light industrial, on a rail spur, between a rail line and a state highway and is an ideal location for a transfer station; he urged a study of the implications to the entire Westchester County who have made use of this property as a transfer station. He suggested that the eminent domain proceeding be abandoned at this time and revisit the public purpose doctrine; there is no valid purpose to condemn this property at this time and urged the Board to keep the Public Hearing open.
- e. John McManus, 90 State Street, Albany, NY, on behalf of Crane, Parente, Cherubin & Murray, Attorneys at Law, representing Regus Industries, Suburban Carting Corp., and NIR who are lessees of the property of subject and operator of the facility and who formally oppose the Village's proposed condemnation of the property located at 1A Croton Point Ave.. He provided the Board with a copy of his letter stating that the Village cannot act in bad faith or so arbitrarily as to be unreasonable; the facts clearly state that the Village is acting arbitrarily and in bad faith. He cited legal battles between the Village and MetroEnviro stating that an injunction is in effect under which the Village is "enjoined from prohibiting or interfering with Greentree's ability to lease and or operate it's property for purposes of solid waste management"; the proposed condemnation is in violation of this injunction. Mr. McManus stated that NIR is now prepared to operate the facility; MetroEnviro is no longer the operator the facility; the presence of 1600 feet of track used to provide rail transfer service for the transloading of materials may hold that the Village's use of the EDPL, as applied to the Property and the track is without effect as this action and is preempted by the Interstate Commerce Commission Termination Act of 1995. He added that the amount of property is in excess of the alleged need; 4 to 7 acres are needed, not 10 acres; the proposed condemnation could cost the Village millions of dollars; the Environmental Review of this action is incomplete; he has not been provided with a copy of the EAF. He suggested that the Public Hearing should be left open until the EAF is available for review and comment.

Village Attorney Stecich stated that the EAF became available today as required; there will be plenty of opportunity to express comments and there is no reason to keep the Public Hearing open. Attorney Stecich asked Ken Kraft or Dan O'Connor to address the need for 4 to 6 acres. Mr. O'Connor stated that a section of the site is unusable land- slightly over an acre; a right of way is needed just to get to this site; 4 to 6 acres addresses just the site proper, not the access roads nor scale house nor the landscape berm; there also is a need for additional parking for the train station.

f. Laura Seitz, 2 Brook Trail, said that if Mr. Kauderer's figures are correct, this could bankrupt the Village; the costs should be part of the information available for residents to form their opinion.

g. Bob Wintermeier, 43 Radner Ave., stated that he asked Mr. Steinmetz years ago how much it might take to purchase this property -10 million dollars? - and his comment was met with laughter. He added that he attended the work session several weeks ago when eminent domain came up and the fire department training facility also came up as a use; meetings are held all over because there is no physical place to address some of the problems; he prefers to see a final solution to this and has no problem with eminent domain; however, they must take a look at estimated cost; he does not expect it would bankrupt the Village.

h. Michael Goetz, 13 Irving Ave., questioned how the Village goes about borrowing money for something like this? The Board had no answer at this time. Mr. Goetz asked if once the procedure is begun, can it be stopped if the dollar figures change. Village Attorney Stecich replied that it depends on what point they are at; if the property has been acquired, it would be more difficult.

Trustee Brennan made a motion to close the Public Hearing, seconded by Trustee Steinberg; approved unanimously.

4. CORRESPONDENCE:

Village Manager Herbek read the following correspondence (full text available at the Village Office):

- a. A letter from Anthony Amato, Green Power Partnership Account Manager, stating that Croton on Hudson has been awarded membership to the 2005 Green Power Leadership Club for demonstrating exemplary environmental leadership; a leadership plaque from them has been hung in the Village Office.
- b. A letter from Craig S. Kominoski, NYS Office of Real Property Services with the Revised Residential Assessment Ratio which has been corrected to 2.93.
- c. A notice from Donald C. DeWitt, NYS board of Real Property Services, with the Certificate of Final Railroad Ceiling Assessment.
- d. A letter signed by members of the Croton Senior Citizens Club stating that they are in agreement with the idea of closing the Skate Park and selling its components to the Town of Cortlandt; the letter was signed by 77 individuals.
- e. A letter from Thomas Belfior, Westchester Sheriff/Commissioner of Public Safety regarding recently enacted legislation requiring that anyone owning a dangerous dog notify the village clerk and a report be filed; the county would like to partner with the village to create a countywide dangerous dog registry. Village Manager Herbek stated that he will send a copy of this to the Police department.
- f. A letter from Joseph Ferone, Attorney, regarding property owned by Donald Campbell, 21 Cook Lane, which is a vacant lot; Mr. Campbell has attempted to sell the property but the title company could not issue a marketable title because of the property's designation as parkland. Village Manager Herbek asked to put this on a future work session along with additional forthcoming documentation.
- g. A memo from Ann Gallelli, Planning Board, regarding the relatively new concept of Twindominiums and recommending the Board take action to revise the Zoning Code to address this as soon as possible. Village Manager Herbek will put this on a work session agenda for consultation with the Planning Board.
- h. A letter from Westchester County Executive, Andrew Spano, about pending legislation before the Westchester County Board of Legislators regarding eminent domain, a proposed local law is provided and they are requesting comments be sent to Planning Commissioner Jerry Mulligan by e-mail to JEM1@westchestergov.com or to his attention at 148 Martin Ave., Rm. 432, White Plains, NY 10601.
- i. A letter from Andrew Spano regarding funding that has been approved to stabilize the wine cellars located at Croton Point Park from further deterioration. Mayor Schmidt stated that the tours have been discontinued at present because of unsafe conditions.

CITIZEN PARTICIPATION-Agenda Items

Dan Daubney, 45 Bungalow Road, asked if the piece of property referred to has a connection to the municipal sewer. Village Manager Herbek replied that it does not at this time but a sewer can be constructed and installed to service that location. Mr. Daubney asked if that would enable neighboring areas not connected to hook into it, such as Croton Point Ave. Mr. Herbek replied that there is a county force main that runs along Croton Point Ave.

RESOLUTIONS:

a) On motion of Trustee Brennan, seconded by Trustee Kane, the following resolution was adopted unanimously by the Board of Trustees of the Village of Croton-on-Hudson, New York:

RESOLVED: that pursuant to Article 15, Section 116 of the Election Law, the following persons are hereby appointed inspectors of election to preside at the Village Election of March 21, 2006:

DEMOCRATIC: Cornelia Cotton
Ann Harbeson
Carol Shanesy
Fran Allen
Laura Seitz

Alternates:
Linda Potthast
Margaret Opie

REPUBLICAN: Audrey Gabrielsen
Lucy Agosta
Ruth Waitkins
Jean Kraemer
Alice Zimei

Alternates:
Mary Santella
Sandra Guinan

and be it

FURTHER RESOLVED: that the compensation for each inspector of election shall be fixed at \$200.00 per day, and \$225.00 for each chairperson.

- b) On motion of Trustee Steinberg, seconded by Trustee Brennan, the following resolution was adopted unanimously by the Board of Trustees of the Village of Croton-on-Hudson, New York:

WHEREAS, the Village of Croton-on-Hudson has a need for a large parcel of property on which to locate a new Department of Public Works (DPW) facility to replace the existing Municipal Garage and locate the salt shed, new materials storage, excavated material storage, composting and leaf storage, and other DPW and public uses; and

WHEREAS, the Village has been looking for many years for an available parcel in the Village to accommodate those uses; and

WHEREAS, the Village has identified the 9.7+ acre parcel of property at 1A Croton Point Avenue as the appropriate size and location to meet the Village's need for a new DPW facility; and

WHEREAS, the Village is considering whether to acquire the property by eminent domain; and

WHEREAS, the Village Board of Trustees must consider the environmental impacts of acquiring the property by eminent domain and constructing a new facility for DPW and other Village uses; and,

WHEREAS, a full Environmental Assessment Form and Coastal Assessment Form have been drafted, NOW, THEREFORE BE IT RESOLVED: that the Village Board of Trustees declares its intent to serve as lead agency for the purpose of conducting a coordinated review,

AND BE IT FURTHER RESOLVED: that the Village Board authorizes the circulation of the Environmental Assessment Form to the Village of Croton on Hudson Planning Board, the Village of Croton on Hudson Waterfront Advisory Committee, the Village of Croton on Hudson Water Control Commission, the Westchester County Department of Planning, the Westchester County Department of Transportation, the Westchester County Department of Parks, Recreation, and Conservation, the Westchester County Solid Waste Commission, the Westchester County Department of Health, the NYS Department of Transportation, the New York State Department of State, the New York State Department of Environmental Conservation, and Metro North Railroad.

Discussion: Trustee Wiegman asked how quickly will the boards be asked to respond. Village Manager Herbek replied that they will have 30 days.

7. CITIZEN PARTICIPATION - NON-AGENDA ITEMS:

a) Maria Cudequest, 84 Grand St., stated that she read an article from an Ohio newspaper regarding Sunny Farms landfill and she provided a copy to the Board. Village Attorney Stecich stated that she also read that article and is forwarding it to the Westchester County Solid Waste Commission. Maria Cudequest added that she has sent it to the Solid Waste Commission, the members of the commission and some legislators who have expressed an interest.

b) Bob Wintermeier, 43 Radner Ave., regarding flooding in the parking lot, stated that this problem has been with the Village through several administrations; he has heard that money was allocated to fix the problems but it was for everything west of the main thoroughfare which did not pertain to the flood area. Mr. Wintermeier was referred to the Buckhurst study and page 15 has an extensive proposition to build a parking garage for \$4 million; his concern is that

this is an expense which would require raising parking fees by 5% to cover the loss of spaces, and has no fiscal benefit to the Village. Trustee Wiegman replied that there was an amount in the budget to improve the parking lot this year to improve the traffic flow which was step 1; step 2 is what is referred to in the study; any further work beyond unsnarling the traffic will require raising the grade and moving the cars off the 2 ½ acres. Mayor Schmidt added that the Transit Oriented study was just a study to look at the possibilities of what else could be done; it came back with three significant options, none of which the Board at the time felt met the needs. Trustee Steinberg replied the most recent work session was the first time this was discussed by the Board this year and the proposal was not going to address the flooding as it occurred this past winter. Mr. Wintermeier stated that he looks forward to hearing more about this.

Trustee Brennan replied that there has been misconception about the money taken out of the budget for upgrades of the train station this year; those funds would not have done anything to remedy the flooding problem. Trustee Wiegman added that money for the parking lot was cut out of the budget at the last hour which sent a message to commuters that fees were being raised, but the flooding would not be corrected. Trustee Brennan stated that the money is still available when a workable plan comes up.

Richard Pellicci at 65 Radnor Ave. stated that he was told about the flooding at the station when he was bidding on his house 13 years ago.

8. APPROVAL OF MINUTES:

Trustee Brennan made a motion to approve the minutes of the Regular Board Meeting held on January 17, 2006 as corrected. Trustee Steinberg seconded the motion. The Board voted approval with Trustee Wiegman abstaining.

9. REPORTS:

Village Manager Herbek reported that last Tuesday, Wednesday and Thursday the staff received training on performance management through International City Management Center for Performance Measurement along with several other municipalities; a consortium has been started with 8 municipalities. He read the goals and objectives for 15 service areas, adding that consortiums are being developed throughout the country; Westchester County is interested in more information; his hope is that this process will help staff to become more efficient. Mr. Herbek informed the Board of the dates set for work sessions; the Public Hearing on the budget is scheduled for April 10th. Village Manager Herbek stated that they have postponed the work session for next Monday.

Treasurer Zambrano reported that he also attended this training last week and feels it will be beneficial to both staff and taxpayers. He reported that they are in the process of having RPS software installed with will be used as an assessment tool; MUNIS system requires using this software. Treasurer Zambrano stated that the Tentative Assessment Roll was filed on February 1st; Grievance day will be held on February 21st, from 4 to 8 pm. He added that they are working on the budgets; department heads have turned in their budgets and discussions will be held over the next few weeks.

Trustee Wiegman reported that the parking lot flooding issue has been raised; the Village has a lot of information at its disposal and this needs to be moved forward on. Trustee Wiegman added that a local expert, Mark Holzer, may be available to consult on performance management. Village Manager Herbek replied that Mr. Holzer is aware of what they are doing and has offered to help but on a slightly different route.

Trustee Kane reported that Sunday, from 9 am to 3 pm, the Hudson River Eagle Fest at Teatown Reservation is scheduled; there will be different events along the Hudson River; the boat ramp will have a warming tent with a guide available.

Trustee Steinberg congratulated Boy Scout Troop 28 on its 50th anniversary. He added that the Croton Harmon school district has established a hall for distinguished alumni and nomination forms are available on line.

Trustee Brennan thanked the staff members for their presentations tonight. He stated that the Croton Harmon school sports seasons are coming to an end; please support the local schools. He added that they are coming into election season but nothing should be political; all should pull together as a board to get the parking lot flooding problem fixed;

Mayor Schmidt reported that prior to the Jan. 31st flooding, there was advance warning of possible high tide was coming in and the parking lot was closed down; this solution worked well; the public knows it caused a lot of confusion and the Board must work through the steps to solve this problem.

Trustee Brennan made a motion to adjourn. Trustee Steinberg seconded the motion; approved unanimously. The meeting was adjourned at 11:10 p.m.

Respectfully submitted,

Phyllis A. Bradbury

Phyllis A. Bradbury, Secretary

Village Clerk

Eminent Domain Hearing – February 6, 2006

Good evening, my name is Richard F. Herbek and I am the Village Manager of Croton-on-Hudson. I was appointed Village Manager in December of 1980 and officially took office on January 15, 1981.

History of discussions with the Board of Trustees and the Croton community regarding the need for a new DPW facility.

The Village's Department of Public Work's Facility located at the Croton Harmon Railroad Station Parking Lot dates back to the late 1960's. The facility was completed in 1970 and the Public Work's personnel moved into the facility in the fall of 1970.

By 1977 the minutes of Village Board meetings reveal that the size of the facility was already an issue and a problem. The area allocated for the Public Work's Department was extremely limited in terms of area and space needs and the ability to house public works vehicles, equipment and machinery. In fact many vehicles, equipment and machinery had to be stored in outside areas at the facility which has shortened the life of the vehicles, equipment and machinery.

In 1978 the personnel in the Public Work's Department reported to the Board of Trustees that space was continuing to be a problem. The Village at that time wanted to establish a recycling center for Village residents. The DPW warned the Board that there was no room for such an operation on the DPW site, as they were short of space and could not locate more recycling bins at the facility. A storage area was temporarily established in the rear area of the DPW which is now being used as part of the Croton Harmon parking area.

Space continued to be a problem at the DPW site. In 1986 a section of the chain link fence surrounding the DPW was moved to add more parking spaces at the parking lot which further decreased the size of the DPW area. The Village's sand and salt piles also were moved further to the rear of the commuter parking lot which meant that the Village's front end loader needed to be driven to the salt and sand piles every time loading operations were required. The demands of increasing the number of commuter parking spaces always conflicted with the needs of the DPW. As Village Manager I pointed out at a Village Board meeting twenty years ago that not having a consolidated facility where all operations could be carried out in one location made for a much less efficient operation. In effect, the loading of sand and salt trucks and the storage of materials at such a distant location from the DPW Central Garage building was problematic. Also, I noted that this distant offsite location was becoming a dumping area for contractors and others who took advantage of this offsite, unmanned DPW storage area. Consequently the Village spent thousands of dollars over the years cleaning up the materials that were illegally dumped in this location.

At a Village Board Meeting on December 15, 1986 Village residents vociferously complained about the storage of debris behind the Municipal Garage. The offsite area which the DPW was using became an eyesore and an aesthetic concern. At the meeting I explained that this was our public works yard. I went on to explain that the Village needed to store a quantity of debris in the yard until we had a substantial enough load to take to the Charles Point Resource Recovery Facility and other disposal sites. I also said that we recognized the problem of the illegal dumping in that area and that the Village needed a larger public works facility. I stated emphatically that the public works facility should not be in that location.

To help alleviate some of the storage needs for the Municipal Garage I proposed the construction of a storage shed in the 1987-88 Village Budget. Again space limitations prevented us from constructing such a storage shed.

At the June 20, 1988 Village Board Meeting I reported to the Board and the public that the Public Work's site was continuing to be used as a dumping ground and that the long term plan was to relocate the Municipal Garage operation, including the Public Works yard, and clean up the whole area.

On August 29, 1988 I reported to the Board of Trustees about the relocation of the Municipal Garage. This included a discussion that the Village had been exploring the possibility of relocating the municipal garage to the area southwest of the Croton Point Avenue bridge, owned by Westchester County, and discussions that I had with the staff of Westchester County. This was eventually ruled out as a site because of concerns about the proximity of the Croton Point landfill, wetland areas, soil conditions, groundwater levels, the lack of sanitary sewers and site drainage.

On October 17, 1988 the Board of Trustees established a committee to among other things evaluate the needs and possible relocation of the Municipal Garage. Although the need for a relocated facility was stressed by the then Village Administration, the committee did not complete the review and instead focused on other public works issues.

In June of 1989 the Village was notified by the MTA about the availability of the former Georgia Pacific Building located on Half Moon Bay Drive. This was actively evaluated and pursued as a DPW site but before the Village could act it was sold for use as a Goodyear Tire Storage Facility.

In October of 1989 the complaints about the conditions of the areas used by DPW continued. One resident commented that

"there's a new dump in Croton which is developing behind the Municipal Garage. The resident pointed out at the Board meeting that the white goods, (refrigerators, stoves, washing machines, etc.), asphalt, tree stumps etc., in that area are disgracing the beauty of the main entrance way into the Village.

From 1989 until 1997 many discussions took place at work sessions and with the staff concerning space problems at the facility and the needs of the DPW which were increasing with the continuing growth and development throughout the Village.

At the Village Board meeting of October 6, 1997 I reported that the Village should not give up the search for a new location for the DPW.

In 1999, we proposed a Butler type building at the DPW to temporarily house the displaced fire apparatus during the construction of the new Harmon firehouse. The intent was to ultimately add some internal storage for DPW trucks and equipment after the fire apparatus was relocated back to the new Harmon Firehouse. Unfortunately this was not funded.

In May, 2000 we proposed the construction of a building at the wellfields to house water meters, valves and other equipment needed by the Water Department to replace space lost when the wellfields were automated and also to consolidate supplies and equipment that needed to be moved out of the DPW garage. The plan to build an addition to Wellhouse # 3 was approved by the Board but we recognized at the time that this would house only limited amounts of meters, valves and equipment and that this location was in a flood zone and therefore was not constructed.

In 2000 the Village utilized space at the Municipal Place site for an in-vessel composting area for the Village's leaves. Although this operation was successful and the Village received a "Pride in Public Works" award from the New York State Conference of Mayors, the operation needed to be discontinued at this location due to the construction of the skateboard facility.

Due to the construction of the small boat launch area in 2000 at the existing DPW storage area behind the Municipal Garage more space needed to be allocated behind the skateboard park at Municipal Place for the storage of excavated materials and roadside debris. This area was even further away from the Municipal Garage and made coordinating and bringing equipment to the site even more time consuming and less efficient. Also, complaints arose that this area was also a Village Gateway and having a storage yard at this location was unsightly and should not be there. Since no other space was available the Village erected a stockade fence to screen the view as best as possible.

In fact, at that time, Trustee Deborah McCarthy stated that the locating of the skateboard facility at the Municipal Place site brought forward the issue of the proper location for the DPW. She said "they have outgrown their current site which could also be income producing through additional parking spots. We need to address this issue." She called for a committee to be established to find a new site for the DPW.

At the Board meeting of May 27, 2003 a resident stated that the lot next to the skateboard park is near a Gateway entrance to the Village and is very trashy-looking. Mayor Elliott replied that the Village is continuing to try to find a location for a DPW staging area which is needed for the storage of concrete and other materials. Other complaints were about contractor cones and pallets in the same location. At the same meeting Trustee Georgianna Grant added that the Croton Landing Property is also a mess noting that there is a huge mountain of unprocessed leaves with paper bags and torn plastic bags.

In 2004, the Village made the decision to store broken sections of concrete along with some limited amounts of asphalt at the wellfield location which is 2 and 1/2 miles from the DPW Garage and right on the Croton River. A number of residents were upset with this decision and raised questions about the environmental impacts on the Croton River. Due to public concerns regarding environmental issues the use of this site was discontinued.

The question about the storage of road materials, concrete and other supplies needed for the Harmon water improvement project came up in 2004 and 2005. The Village worked with Historic Hudson Valley to utilize some of their land at the end of Hastings Avenue for the storage of water main and certain other supplies. This was for a temporary two year agreement which ends in July, 2006.

In 2004 the staff actively evaluated the use of property along Route 129 outside of the Village but eliminated consideration of this site because it was too close to the Croton River basin upstream from the Village's water shed area and the site itself had numerous environmental constraints. We also recognized that the siting of such a facility would involve land use decisions by the Town of Cortlandt and there was no assurance that approvals for a DPW facility could be obtained.

In 2005 the Village was able to utilize Metro North's east yard for the storage of broken sections of concrete for the sidewalk improvement program. Although we had fewer complaints compared to the Municipal Place location and the wellfields location we have been told by Metro North that this area will be unavailable in 2006 and that we should find another location. Another storage area has not yet been identified.

The need for an updated and larger DPW facility goes back almost 30 years. It has been one of the most pressing needs of the Village during the time that I have been Village Manager, which now spans 26 years. There is no question in my mind

that an improved, larger, more efficient facility is in the Village's long term best interest. We have heard the complaints from residents about the use of Village parks, wellfield property, gateway areas and other open space for DPW use for a very long time.

We recognize the need for a site that can accommodate:

- Leaf storage and possible composting
- Salt storage
- Contractors staging area
- Storage of excavated and waste materials from DPW operations
- Storage of trap rock, item 4, clay etc.
- Tree limbs and stumps storage area
- Concrete storage and crushing
- Central Garage for maintenance and repair of vehicles and equipment
- Indoor heated storage for vehicles and equipment using hydraulics and diesel fuel
- Larger office space, locker rooms and training room
- Vehicle washing facility (requires a municipal sewer connection which we do not have at the current site.)
- Storage for the Recreation and Parks Department such as sand, clay for ballfields and other recreational storage needs (much of the Recreation and Parks storage is now taking place at Blackrock Park in a flood zone area.)

We have attempted to locate a site for many, many years. We have looked at:

- Croton Point Avenue site owned by Westchester County
- Municipal Place site
- Georgia Pacific site
- Site owned by WD contractors in Town of Cortlandt out on Route 129
- East yard
- Wellfield area
- Site at 1A Croton Point Avenue

All of these sites with the exception of the site at 1A Croton Point Avenue have been eliminated from consideration for one reason or another.

In 1997-1998 I proposed the allocation of \$1,500,000 in the capital budget for a new DPW facility. This was also included in the 1998-1999 capital budget. In the 1999-2000 capital budget \$2,000,000 was recommended. The capital budget notes state:

- Construction of a new building to house the vehicles, equipment and DPW offices is necessary. The existing facility should be replaced. The existing facility is beginning to age prematurely and is showing signs of structural fatigue. The existing facility is undersized to allow for the DPW to properly serve the future needs of the Village residents.

Recognizing that 1A Croton Point Avenue was the most viable location for DPW the Village included this concept in the negotiations with Allied Waste when we were working on an agreement which would have also included certain financial benefits to the Village if Allied Waste was to remain in operation. This would have provided about 4 acres of the almost 10 acres of the site for Village use. This agreement was never concluded or approved by the Board of Trustees. Allied Waste was eventually shut down by a decision of the NYS Court of Appeals.

In consideration of the continuous flooding which has taken place at the Croton Harmon Parking Facility some nearby land is also needed to provide alternate parking during periods when the parking lot floods and up to 500 cars are displaced. The area at 1A Croton Point Avenue closest to Croton Point Avenue would provide the best location for such alternate parking requirements until we are able to remedy the flooding problems in sections G and H of the Croton Harmon Parking Facility.

Our analysis of Village needs from public works, recreation, water, parking, storage space and other municipal needs shows that the entire site at 1A Croton Point Avenue is needed to provide public services to the Village of Croton-on-Hudson.

If we are successful in relocating the DPW facility to 1A Croton Point Avenue the Village will be able to demolish the current facility and utilize this area for additional, much needed parking at the Croton Harmon Station Parking Facility. We have estimated that an additional 150 spaces can be created at the existing DPW site. If the Village was able to sell non resident permits for these 150 spaces an additional \$140,400 in revenue per year would be generated. In addition to these 150 spaces we estimate that 100 additional parking spaces could be created at 1A Croton Point Avenue. This would generate an additional \$93,600 in revenue per year. Therefore a total of \$234,000 in additional revenue per year could be

used to fund the cost of acquiring 1A Croton Point Avenue and building a new DPW facility.

Submitted by: Richard F. Herbek, Village Manager of Croton-on-Hudson, New York.

Mr. Herbek is also currently Regional Vice President of the International City/ County Management Association which represents 8,000 professional local government managers across the United States and internationally.

Public Hearing for Proposed New DPW Site & Facility February 6, 2006

I have been the Superintendent of the Croton on Hudson Department of Public Works for over ten years. Almost immediately after I was hired I recognized the need for a new DPW facility. The DPW staff told me they have been pointing out to the Village Administration the need for additional storage space for equipment & supplies for many years. I requested a new Municipal Garage be placed in the Capital Budget shortly thereafter. I wanted the Village Board to understand the need and begin thinking about a new DPW facility.

How was I able to assess the need for a new facility?

There are trucks that are parked outdoors that should be parked indoors. When we have a snow storm we cannot fit trucks with the plows on them, inside the garage. In the middle of a storm if a large truck needs repair we have to remove the plow before we can make any repairs.

Because they are parked outside many of the trucks including all the sanitation and recycling trucks and large dump trucks have engine block heaters that are plugged in each night so the truck will start on the cold winter mornings. I don't want to think about how much energy is used each winter to keep the large engine blocks warm at night.

The repair area of the garage is grossly undersized. There is one long narrow bay for large trucks or two small vehicles and two bays with lifts for small trucks or cars. When a large truck, sanitation truck, fire truck or dump truck needs repair it takes up one entire large truck bay. When major maintenance is underway on a garbage truck for instance it can be in the garage for several days. Should another large truck need immediate repair there is no room for the two vehicles in the garage at the same time. One can barely squeeze between vehicles and the storage areas and work benches when the garage repair area is fully occupied.

Lack of storage is a huge issue. Automotive supplies are out on the floor of the repair area of the garage. Truck tires are in cold storage. Cold storage is a roofed area otherwise open to the elements, kind of like a large car port. We store material in any empty corner we can find. In storage we have: biodegradable leaf bags, residential recycling bins, bags of magnesium chloride we use on the sidewalks and bags of cold patch blacktop. Each of these items is stored in different areas of the garage or where ever we can find room for them. Because these items must be kept under a roof, preferably indoors, they take the place of vehicles and equipment that should be parked under a roof. Four garbage trucks, one large dump truck, the Vac-All (a vacuum truck used to clean out catch basins and vacuum leaves), leaf loaders, stump grinder, tractor, skid steer and about 12 small dump trucks and pick-ups should all be parked indoors but are parked outside or in cold storage. The street sweeper has to be winterized and parked in cold storage each year because there is no room for it indoors. Reason being all the salt trucks absolutely have to be parked in the garage in the winter. That said we still have to park one small salt spreader truck outside during the winter because there is not enough room in the garage. That truck also has an engine block heater. This winter is one in which I wish we could sweep the Village streets but we can't because of the limited space at the Municipal garage.

The building itself is in very bad condition. The garage floor, office floor and walls continue to settle. The garage floor is different levels and has significant cracks. The concrete block walls in the office have large cracks in them. Some doors work freely in spring, summer and fall and bind in the winter when the ground heaves. The chair at my desk rolls down the hill away from my desk. When the existing Municipal Garage was built in the late 1960's, piles were driven, some 120 feet deep, to support the structure or framework of the garage. The original floor was not concrete. A few years after the garage was built a concrete floor was poured but it was not tied into the pile caps, hence the settling of the garage floor. The office area was also not tied to the piles and is still settling after all these years hence the cracks in the walls and the sloping floor.

The office area of the Municipal Garage is also undersized. Ten years ago there was one bathroom, a uni-sex bathroom so to speak. We divided the bathroom area so we now have a men's and woman's room. The woman's room is off the entrance lobby. The men's room is at the far end of the combination locker room, lunch room. You have to squeeze between the table in the middle of the room and the lockers to get to the men's room. The table in the middle of the room is not large enough to seat even half our employees at lunch time. One cannot even get to the men's room when there are people seated at the table with out people getting up from the seats around the table.

During long snow storms, windstorms or hurricanes when we work around the clock there is no place for the men to rest. Even if we had cots there is not even enough available floor space to set them up. In the middle of the night when we try to get an hour or two or three of rest guys nap in the cab of trucks parked in the garage or in the cab of the plow truck left running outside the garage. There are times when guys have gone to the community room downstairs in the Municipal building and pulled out the exercise mats to nap. When we conduct training we have to schedule it in the Municipal Building meeting room. All the DPW employees meet here because it is the only room large enough to accommodate all the DPW employees. Using this room presents other issues such as parking and leaving the DPW unmanned.

Until two years ago I shared an office with two other people. We got to know each other real well but it did not lend itself to productivity or having any private conversations with Mr. Herbek or any employee. When I wanted to have a private conversation with someone I had to go outside. There were times I had to use the phone in the garage to prevent my conversation from being overheard. We have since reorganized the offices by eliminating the small garage area used for water department storage, so I now have my own office. The supplies the water department stored in the small garage at DPW were moved into storage containers we bought and placed at the well field. We have to get creative when looking for areas to store things.

The Municipal Garage has a 20 year roof that is 35 years old. We are constantly calling a roofing company to repair the roof. We spent several thousand dollars fixing leaks so far this fiscal year. Last year we were advised that it was time for a new roof, at an estimated cost of \$80,000. There are new Stormwater Phase II regulations that require us to bring our DPW garage into compliance. This could cost tens of thousands of dollars. I have an engineering firm working on a proposal to bring us into full compliance with the Phase II Stormwater regulations.

Several years ago we were visited by the NYS DEC and the result of the visit was we were told to close off all the garage floor drains, so they do not discharge into the River. They also prohibited us from washing vehicles any more; so we no longer wash vehicles.

I have been asked how much the life expectancy of a piece of equipment is shortened because it is parked outside. After discussing this with our Garage Foreman, I can tell you maybe 10 - 15 %. The inability to properly wash equipment has a much greater impact on the equipment's life. We work in a dirty environment, so dirt and dust collect in every nook and cranny in a piece of equipment. The dirt and dust gets damp and rots on the metal of the equipment. Additionally some of our equipment is handling corrosive materials on a regular basis.

We barely have enough room to park all the equipment we must park outside on our 1.2 acre site. In the summer when we employ additional summer help we do not have enough parking spaces for all our employees.

Materials storage is another major issue. Materials were stored at the far south end of the train station parking lot. This material storage area was converted into a canoe and kayak launch area and salt shed in 2000. Since that time we have been looking around the Village for places to store materials, new materials and waste materials. Waste materials such as excavated blacktop from water leaks, and drainage reconstruction jobs, excavated dirt and rock, street sweepings, tree stumps and large logs for example. We cannot buy new materials or supplies in bulk because we have no room to store things like culvert pipe, catch basins, item 4 and gravel. Recently we dismantled the culvert pipe at the drying basin for the yacht club dredging area at Croton Landing and had to place the pipe at the well field because we had no room for it anywhere else. Our supplies and materials are spread out throughout the Village. We are now using the former sewer treatment plant site, now referred to as the Municipal Place site for waste materials. Ten years ago the sewer treatment plant pits were still in place after the plant had been closed in the late 1970's or early 1980's. We filled in the pits to make it a useable area. For several years we used the site for waste materials storage and as a compost area. Subsequently the area the DPW was using was reduced when the skate park was put in. We agree that this location is not a very good one for waste material storage because it is in the Gateway area but more importantly because it further spreads out the DPW operation. As I said earlier, the Salt shed and other new materials are stored at the south end of the train station parking lot. This past Tuesday when sections G & H of the parking lot were closed due to the coastal storm and the resulting tidal flooding; cars were parked everywhere in the area south of the Municipal garage blocking access to our materials storage area. If we had to get to the salt shed or to any gravel or item 4 we would not have been able to. This could have created a very hazardous situation throughout the entire Village if the temperature got below freezing.

The need for a new, larger and centralized DPW facility still exists. The big question was where? I understand in the late 1980's the former Georgia-Pacific building now Finklestein Tire warehouse was looked into, as was the area of the new soccer fields at Croton Point. Former Mayor Elliott, Mr. Herbek and I spent countless hours talking about potential locations for a new DPW facility.

We looked at the Metro-North east yard, the area just north of the old Croton North Station. While small I told them we could make it work especially if we could convince the NYSDOT to allow us to use even a small portion of their Rt. 9 Right of Way. Metro North is now planning to develop that area for their own use and the NYSDOT has not looked favorably on the use of their Right of Way.

The former sewer plant at the corner of Municipal Place and Riverside Avenue sat idle for many years. All the structures were still in place 10 years ago. I recall a Village Board meeting back then when a trustee asked me why the abandoned cars were parked there. This area was used as a dumping ground by everyone. We filled in the pits and made a useful site out of the area. I thought this too could be a future DPW site. While very small, I thought or perhaps hoped we could make it happen. I recall even asking if we might talk to Van Cortlandt Manor about the field just south of the Shop Rite plaza. I knew I was grasping at straws.

Two years ago, Mr. Herbek, Dan O'Connor & I met with the owners of a large parcel about a 1/2 mile outside the Village on Route 129, about placing the DPW facility there. That went no further than the initial discussion primarily because of the surrounding wetlands and the runoff from the property drains to the Croton River. In March 2004 I wrote a report to Mr. Herbek and the Village Board on the future needs of the DPW. I have a copy of that report titled "New DPW Facility Report" with an attached space needs estimate here. Some of the estimated space needs in my March 2004 memo, are outdated and do not include all of the Department of Public Works storage needs. Around that same time Mr. Herbek and I discussed the possibility of moving the DPW garage to the northern portion of the 1A Croton Point Avenue site. I recall telling him the area being discussed was not large enough for the future needs of the DPW.

The need for a new modern DPW facility is clear. The Municipal garage is structurally deficient. There is not enough storage area for supplies, materials or equipment. There is not enough room for our employees. The office area is too small and outdated. The repair shop is so small it's an accident waiting to happen. Our operations are spread out all over the Village. Replacing the current DPW facility is something that has been discussed and looked into for over 20 years. It is time to plan for the next 50 plus years; this cannot wait.

I repeat the need for a centralized, unified, new DPW facility is apparent.

I am submitting my presentation, the March 2004 "New DPW Facility Report" and all these photos for the record.

Submitted by:

Kenneth Kraft, Superintendent of Public Works, Village of Croton on Hudson, NY.

Mr. Kraft is the immediate past President of the Westchester County Association of Municipal Public Works Administrators and a past President of the New York Metropolitan Chapter of the American Public Works Association.

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NYS Department of State

Division of Corporations

Entity Information

Selected Entity Name: GREENTREE REALTY LLC

Selected Entity Status Information

Current Entity Name: GREENTREE REALTY LLC

Initial DOS Filing Date: JANUARY 31, 1997

County: WESTCHESTER

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)

GREENTREE REALTY LLC

1A CROTON POINT AVENUE

CROTON-ON-HUDSON, NEW YORK, 10520

Registered Agent

NONE

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

[Search Results](#)

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NYS Department of State

Division of Corporations

Entity Information

Selected Entity Name: HANSON AGGREGATES NEW YORK, INC.

Selected Entity Status Information

Current Entity Name: HANSON AGGREGATES NEW YORK, INC.

Initial DOS Filing Date: NOVEMBER 21, 1967

County: ONEIDA

Jurisdiction: NEW YORK

Entity Type: DOMESTIC BUSINESS CORPORATION

Current Entity Status: ACTIVE

Selected Entity Address Information

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

C/O C T CORPORATION SYSTEM

111 EIGHTH AVENUE

NEW YORK, NEW YORK, 10011

Chairman or Chief Executive Officer

JAMES K. KITZMILLER

8505 FREEPORT PARKWAY

IRVING, TEXAS, 75063

Principal Executive Office

C/O HANSON BUILDING MATERIALS AMERICA, INC.

1333 CAMPUS PARKWAY

NEPTUNE, NEW JERSEY, 07753

Registered Agent

C T CORPORATION SYSTEM

111 EIGHTH AVENUE

NEW YORK, NEW YORK, 10011

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

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NYS Department of State

Division of Corporations

Entity Information

Selected Entity Name: COASTAL DISTRIBUTION, LLC

Selected Entity Status Information

Current Entity Name: COASTAL DISTRIBUTION, LLC

Initial DOS Filing Date: MARCH 12, 2001

County: SUFFOLK

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)

COASTAL DISTRIBUTION, LLC

1633 NEW HIGHWAY

FARMINGDALE, NEW YORK, 11735

Registered Agent

NONE

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

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REDACTED

On motion of TRUSTEE Grant, seconded by TRUSTEE Weigman, the following resolution was adopted by the Board of Trustees of the Village of Croton-on-Hudson, New York:

WHEREAS, Peter Elkin, on behalf of the Max Finkelstein Tire Warehouse, in his letter to the Board on November 12, 2002, has applied for a special permit for an expansion of an existing building in the Light Industrial Zone; and

WHEREAS, this matter was referred to the Planning Board for their recommendation; and

WHEREAS, the Planning Board recommended granting of the special permit subject to the conditions outlined in their November 27, 2002 memo to the Village Board; and

WHEREAS, based on the short EAF prepared by the applicant, the Village Board has determined that there will be no significant environmental impact from this action,

NOW THEREFORE BE IT RESOLVED: that the Village Board of Trustees hereby adopts the attached Negative Declaration declaring this an unlisted action,

AND BE IT FURTHER RESOLVED: that the Village Board of Trustees grants the special permit subject to the conditions outlined by the Planning Board's memo to the Village Board November 27, 2002.

Date: January 21, 2003

Village of Croton-on-Hudson, New York



Stanley H. Kallenhouse Municipal Building
One Van Wyck Street
Croton-on-Hudson,
NY 10520

(914) 271-4781-2
FAX (914) 271-2836

January 22, 2003

Peter Elkin, AIA
Hauppauge Center
64 Cain Drive
Brentwood, NY 11717

Re: Max Finkelstein Tire Warehouse
Section 78.12, Block 4, Lot 1
Application for Special Permit-
Expansion of Existing Building in the
LI Zone

Dear Mr. Elkin:

On November 12, 2002, you applied for a special permit for an expansion of an existing building in the LI Zone. As you are aware, a public hearing on this matter was held on January 6, 2003.

Please be advised that at the regular meeting of the Board of Trustees held on January 21, 2003, the Board granted the special permit subject to the conditions outlined by the Planning Board's memorandum to the Board of Trustees, dated November 27, 2002.

Attached is a copy of the resolution of January 21, 2003, the negative declaration and the Planning Board's memorandum of November 27, 2002.

The next step in the process is for you to apply for an amended site plan approval with the Planning Board.

Sincerely yours,

Richard F. Herbek
VILLAGE MANAGER

RFH/pk

Mayor
ROBERT W. ELLIOTT

Trustees
GEORGIANNA K. GRANT
DEBORAH Y. MCCARTHY
DR. GREGORY J. SCHMIDT
LEO A. W. WIEGMAN

Manager-Clerk
RICHARD F. HERBEK

Treasurer-Deputy Village Clerk
ROBERT T. REARDON

Attorney
SEYMOUR M. WALDMAN

Engineer
DANIEL O'CONNOR, P.E.
271-4783

EXHIBIT 3

5/25/06

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 06 CIV. 3755
Judge McMahon

BUFFALO SOUTHERN RAILROAD, INC.,

Plaintiff,

- against -

VILLAGE OF CROTON-ON-HUDSON; GREGORY J. SCHMIDT, as Mayor of the Village of Croton-on-Hudson; DANIEL O'CONNOR, P.E., as Engineer and Building Inspector for the Village of Croton-on-Hudson; RICHARD F. HERBEK, as Manager of the Village of Croton-on-Hudson; THOMAS P. BRENNAN, as Trustee on the Village Board of Trustees; CHARLES A. KANE, as Trustee on the Village Board of Trustees; ANN GALLELLI, as Trustee on the Village Board of Trustees; LEO A. W. WIEGMAN, as Trustee on the Village Board of Trustees; CHRIS KEHOE, as member of the Village Planning Board; VINCENT ANDREWS, as member of the Village Planning Board; FRANCES ALLEN, as member of the Village Planning Board; ROBERT LUNTZ, as member of the Village Planning Board; KATHLEEN RIEDY, as member of the Village Zoning Board of Appeals; RHODA STEPHENS, as member of the Village Zoning Board of Appeals; RUTH WAITKINS, as member of the Village Zoning Board of Appeals; WITT BARLOW, as member of the Village Zoning Board of Appeals; and PAUL ROLNICK, as member of the Village Zoning Board of Appeals,

Defendants.

**MEMORANDUM OF LAW IN FURTHER SUPPORT OF
PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION**

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Of Counsel:

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PRELIMINARY STATEMENT

BSOR¹ respectfully submits this memorandum of law in further support of its motion for a preliminary injunction to enjoin the Village from condemning the BSOR Croton Yard and from applying and enforcing against BSOR zoning ordinances, permitting and pre-clearance requirements, and other local regulations.

By its moving papers, BSOR established that it is a "rail carrier" and its transloading and switching activities at the BSOR Croton Yard are "transportation" as those terms are defined by the ICCTA. Further, BSOR demonstrated the irreparable harm that it has suffered and will continue to suffer at the Village's hands in the absence of a preliminary injunction. Pursuant to the ICCTA's express preemption provision and the Second Circuit's recent analogous decision in Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638 (2d Cir.), cert. denied, 126 S. Ct. 547 (2005), this Court should grant BSOR's motion and preliminarily enjoin the Village from applying and enforcing against BSOR any eminent domain statutes and zoning and land use ordinances.

The Village does not and cannot challenge BSOR's status as a "rail carrier" or that its transloading and switching activities are "transportation." Nor does the Village even attempt to distinguish the Second Circuit's binding precedent in Green Mountain or the mass of other judicial and administrative precedent that consistently holds that state and local regulation of a rail carrier's transportation activities are preempted by the ICCTA.

Unable to mount a substantive defense, the Village resorts instead to burdening this Court with pages of unnecessary discussion of alleged past activities by unrelated entities -- Northeast Interchange Railway, LLC ("NIR") and Metro Enviro Transfer, LLC ("Metro") -- at the Property

¹ The terms used herein are as defined in BSOR's memorandum of law dated May 16, 2006, except where specifically noted.

and making, at best, inaccurate and, at worst, false allegations about BSOR's conduct. Any activities that NIR and/or Metro may or may not have engaged in at the Property are wholly irrelevant to the two core questions of law pending before this Court: (1) whether BSOR is a "rail carrier," and (2) whether its transloading and switching activities are "transportation." Further, the Village's allegations, among others, that BSOR is not currently operating at and not publicly offering service at the BSOR Croton Yard are utterly false. In fact, BSOR has been holding itself out to the public generally to provide common carrier rail service at the BSOR Croton Yard since March 2006. For example, BSOR interchanged 14 rail cars with CSX in March at the BSOR Croton Yard for interstate transportation, and BSOR is expecting to interchange and unload rail cars containing sand and other building materials from Coastal on May 25th. Feasley Aff. II at ¶¶ 2-13. In sum, the Village's "red herrings" and inaccuracies are no defense to BSOR's motion, which is grounded in the ICCTA's unambiguous express preemption provision and the mountain of judicial and administrative precedent that unfailingly holds that state and local laws that do or would regulate rail operations -- including, as relevant here, eminent domain statutes and zoning and permitting ordinances -- are preempted.

In light of the lack of any dispute as to the two legal issues presently pending before this Court and the Second Circuit's clear direction in Green Mountain, this Court should grant BSOR's motion for a preliminary injunction.

ARGUMENT

BSOR'S MOTION FOR A PRELIMINARY INJUNCTION SHOULD BE GRANTED

As discussed in more detail in BSOR's memorandum of law dated May 16, 2006, see pages 8-21, BSOR readily satisfies the twin requirements for the issuance of a preliminary injunction: BSOR will suffer irreparable harm in the absence of an injunction and it has a

likelihood of success on the merits of its claims that the Village cannot apply and enforce its eminent domain statutes and zoning and land use provisions to BSOR and the BSOR Croton Yard.

A. BSOR Will Suffer Irreparable Harm In The Absence Of A Preliminary Injunction

As an initial matter, the Village asserts that BSOR will not suffer irreparable harm if a preliminary injunction is denied because BSOR has “yet to operate” and therefore “has no goodwill to lose.” Defs.’ Mem. of Law at 24. Contrary to this erroneous assertion, however, BSOR is and has been operating at and publicly offering service at the BSOR Croton Yard. Feasley Aff. II at ¶¶ 2-13. Therefore, the Village’s conclusion that BSOR’s goodwill has not been and cannot be harmed in the absence of a preliminary injunction is without merit.

Moreover, contrary to the Village’s citation to a single non-binding decision that BSOR will suffer no legally cognizable harm if a preliminary injunction is denied, BSOR’s loss of existing and prospective customers and business opportunities, as well as the accompanying damage to BSOR’s goodwill and reputation, see Feasley Aff. I at ¶¶ 23-36; Feasley Aff. II at ¶¶ 11-12; Rutigliano Aff. at ¶¶ 11-16; Meehan Aff. at ¶¶ 8-13, are injuries that are widely recognized as irreparable in this and other Circuits. See, e.g. Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 404 (2d Cir. 2004) (holding that loss of business opportunities and relationships with clients who could “produce an indeterminate amount of business over years to come” are hard to measure in dollars and are properly considered irreparable harm); Coastal Distrib., LLC v. Town of Babylon, No. 05-CV-2032, 2006 U.S. Dist. LEXIS 8400, at *8 (E.D.N.Y. Jan. 31, 2006) (holding, under analogous facts, that loss of business opportunities, goodwill, and reputation are irreparable harm); Natsource LLC v. Paribello, 151 F. Supp.2d 465, 469 (S.D.N.Y. 2001) (recognizing that a loss of prospective customers is an irreparable harm as it is “very

difficult to calculate monetary damages that would successfully redress the loss of a relationship with a client that would produce an indeterminate amount of business in years to come”); Towers Fin. Corp. v. Dun & Bradstreet, Inc., 803 F. Supp. 820, 823 (S.D.N.Y. 1992) (collecting cases and holding that damage to reputation and goodwill constitutes irreparable harm); Canadian Nat’l Ry. Co. v. City of Rockwood, No. 04-40323, 2005 U.S. Dist. LEXIS 40131, at *25-26 (E.D. Mich. June 1, 2005) (holding, under facts analogous to this action, that loss of goodwill, future contracts, and market opportunities are irreparable harm).

For a discussion of the additional ways in which BSOR will be irreparably harmed if a preliminary injunction is denied, BSOR respectfully refers the Court to pages 11 through 13 of BSOR’s memorandum of law dated May 16, 2006.

In sum, BSOR has shown that it is likely to suffer irreparable harm in the absence of a preliminary injunction.

B. BSOR Has A Likelihood Of Success On The Merits Of Its Preemption Claim In This Action

The second prong that a movant must meet for a court to issue a preliminary injunction is likelihood of success on the merits. “A movant . . . need not show that success is an absolute certainty. He [or she] need only make a showing that the probability of his [or her] prevailing is better than fifty percent. There may remain considerable room for doubt.” Wali v. Coughlin, 754 F.2d 1015, 1025 (2d Cir. 1985). Thus, a finding that a movant has more than a “fifty-fifty chance” of succeeding on the merits of his or her claim would warrant a finding of a likelihood of success on the merits. Coastal, 2006 U.S. Dist. LEXIS 8400, at *12-13. BSOR has more than satisfied this element for a preliminary injunction.

ICCTA preemption plainly and explicitly applies to all “transportation by rail carriers.” 49 U.S.C. § 10501(b)(1). As a result, the Village’s statutes and regulations are preempted if (1) BSOR is a “rail carrier” and (2) its transloading and switching activities are “transportation.”²

1. BSOR Is A “Rail Carrier”

The term “rail carrier” is defined as “a person providing common carrier railroad transportation for compensation.” 49 U.S.C. § 10102(5). BSOR has submitted proof that it meets this definition. Feasley Aff. I at ¶¶ 2-4, 9-14; see also Rutigliano Aff. ¶¶ 7-8, 11; Meehan Aff. ¶¶ 3-13. Indeed, the Village does not -- nor can it -- mount a specific challenge to BSOR’s status as a “rail carrier” in opposition to this motion. Defs.’ Mem. of Law at 14.³

2. BSOR’s Transloading And Switching Operations At The BSOR Croton Yard Are “Transportation”

The ICCTA broadly defines the term “transportation” as including:

(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and

² BSOR respectfully refers this Court to its memorandum of law dated May 16, 2006, see pages 12-13, for a discussion of BSOR’s likelihood of success on the merits of its Commerce Clause and 42 U.S.C. § 1983 claims. If this Court ultimately resolves this action in favor of BSOR based on its ICCTA preemption claim, however, these two additional claims need not be considered. Norfolk S. Ry. Co. v. City of Austell, No. 1:97-cv-1018, 1997 U.S. Dist. LEXIS 17236, at *25 (N.D. Ga. 1997) (refraining from ruling upon the merits of railroads’ Commerce Clause argument after holding that municipal zoning ordinance and land-use permitting requirement used to prevent railroads from constructing, developing, and operating an intermodal facility are expressly preempted by the ICCTA).

³ To the extent that the Village posits that BSOR is “illegally holding itself out as a common carrier,” Defs.’ Mem. of Law at 14, based on the Village’s subsequent argument and accompanying submissions, Id. at 14-15; Gitomer Aff. ¶ 13 (recognizing BSOR’s common carrier operations), the crux of the Village’s contention appears to be more that BSOR is operating an additional railroad line without STB approval. Although this position is irrelevant to the instant motion concerning ICCTA preemption, BSOR’s response is at Point “E” infra.

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

49 U.S.C. § 10102(9) (emphasis added).

Under this expansive definition, the STB has held that transloading (i.e., the transfer of commodities from truck to rail, or vice versa) is “transportation” under the ICCTA. See, e.g., Borough of Riverdale, 1999 STB LEXIS 531, at *17-22. Likewise, federal courts, including the Second Circuit, have consistently held that transloading is “transportation” under the ICCTA and, therefore, state and local laws and regulations that attempt to regulate a rail carrier’s transportation activities are preempted. See, e.g., Green Mountain, 404 F.3d at 644; Coastal, 2006 U.S. Dist. LEXIS 8400, at *15; City of Rockwood, 2005 U.S. Dist. LEXIS 40131, at *10-20; Soo Line R.R. Co. v. City of Minneapolis, 38 F. Supp.2d 1096, 1101 (D. Minn. 1998); Norfolk S. Ry. Co. v. City of Austell, No. 1:97-cv-1018, 1997 U.S. Dist. LEXIS 17236, at *19-20 (N.D. Ga. 1997).

Here, the BSOR Croton Yard is a rail “facility” that constitutes “transportation” under the ICCTA. 49 U.S.C. § 10501(b)(1). The BSOR Croton Yard is used to transfer commodities and/or containers of cargo moving in interstate commerce between trains and trucks. Feasley Aff. I at ¶¶ 11-13, 23-28. As such, the BSOR Croton Yard is plainly a “facility . . . related to the movement of . . . property . . . by rail.” 49 U.S.C. § 10102(9)(A). Further, BSOR’s services related to that movement include “receipt, delivery, . . . storage, handling, and interchange of . . . property.” 49 U.S.C. § 10102(9)(B); see also Feasley Aff. I at ¶¶ 11-13, 23-28. As with BSOR’s status as a “rail carrier,” the Village does not even attempt to argue that transloading activities of

the type conducted at the BSOR Croton Yard are not "transportation" under the ICCTA and applicable precedent.⁴

In sum, BSOR is a "rail carrier" and the BSOR Croton Yard constitutes "transportation" under the ICCTA; thus, the STB has exclusive jurisdiction and preemption applies. The Village's statutes and regulations intrude upon this jurisdiction as they seek to regulate and/or halt BSOR's rail transportation activities at the BSOR Croton Yard. Accordingly, the statutes and regulations the Village has attempted and would seek to exercise against BSOR are preempted by the ICCTA. See, e.g., Green Mountain, 404 F.3d at 643-644; Coastal, 2006 U.S. Dist. LEXIS 8400, at *1-2; City of Rockwood, 2005 U.S. Dist. LEXIS 40131, at *1-2; New York, Susquehanna & W. Ry. Corp. v. City of Paterson, No. 05-2338 (D. N.J. Mar. 14, 2006) (McManus Aff. I at Ex. "E"); Wisconsin Cent. Ltd. v. City of Marshfield, 160 F. Supp.2d 1009, 1013 (W.D. Wis. 2000); City of Austell, 1997 U.S. Dist. LEXIS 17236, at *24; Borough of Riverdale – Petition for Declaratory Order – New York Susquehanna and Western Railway Corp., STB Fin. Docket No. 33466, 1999 STB LEXIS 531, at *19 (served Sept. 10, 1999).

To the extent the Village relies on Hi Tech Trans., LLC v. New Jersey, 382 F.3d 295 (3d Cir. 2004) and J.P. Rail, Inc. v. N.J. Pinelands Comm'n, 404 F. Supp.2d 636 (D. N.J. 2005) to argue that the Village's attempts to regulate or condemn the BSOR Croton yard are not preempted by the ICCTA, those cases are readily distinguishable on the basis that the party providing transportation services was not a rail carrier. Here, by contrast, BSOR's status as a rail carrier is undisputed.

⁴ To the extent that the ownership of the Yard is raised, the ICCTA is clear that "transportation" does not hinge on ownership of the subject property or facilities. 49 U.S.C. § 10102(9).

C. A Preliminary Injunction Benefits The Public Interest

The Village does not challenge the multiple ways that the public interest will be served if a preliminary injunction is granted. BSOR's Mem of Law at 22-24.⁵ Similarly, the Village does not refute BSOR's well-supported contentions that the requested preliminary injunctive relief will not harm the public interest. Id. at 24-25. Thus, in the event that this Court considers this factor, it tips in favor of granting the preliminary injunctive relief BSOR seeks.

D. The Village Woefully Understates The ICCTA's Broad And Sweeping Preemptive Reach

"Every court that has examined the statutory language has concluded that the preemptive effect of section 10501(b) is broad and sweeping." City of Creede, CO – Petition for Declaratory Order, STB Fin. Document No. 34376, 2005 STB LEXIS 486, at *10-11 (served May 3, 2005). Indeed, in its recent analysis of Section 10501(b), the Second Circuit opined that "[i]t is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations." Green Mountain, 404 F.3d at 645 (internal quotation omitted); see also City of Auburn v. United States, 154 F.3d 1025, 1029 (9th Cir. 1998) (holding that the ICCTA is "among the most pervasive and comprehensive of federal regulatory schemes" (internal quotation omitted)), cert. denied, 527 U.S. 1022, 119 S. Ct. 2367 (1999); Wisconsin Cent., 160 F. Supp.2d at 1013 ("It is clear that the ICCTA has preempted all state efforts to regulate rail transportation." (emphasis added)). As a result, the Second Circuit, numerous other federal Circuit and District Courts, and the STB have all consistently held that state and local laws that do or would regulate rail operations -- including, as relevant here, eminent domain statutes and zoning and permitting ordinances, among others -- are categorically preempted. See, e.g., Green

⁵ Insofar as the Village fleetingly contests BSOR's assessment concerning a reduction in truck traffic due to the BSOR Croton Yard's operation, that challenge rests on the faulty assumption that the Yard is not operational. Feasley Aff. II at ¶¶ 2-13.

Mountain, 404 F.3d at 642-45 (holding that preconstruction permitting of railroad transload facility preempted); Railroad Ventures, Inc. v. Surface Transp. Bd., 299 F.3d 523, 561 (6th Cir. 2002) (holding that the ICCTA preempts certain Ohio state statutes “to the extent that they intrude upon the jurisdiction of the STB with regard to the regulation of rail transportation under § 10501(b)”); Friberg v. Kansas City S. Ry. Co., 267 F.3d 439, 443 (5th Cir. 2001) (holding that the ICCTA’s language “could not be more precise, and it is beyond peradventure that regulation of [a railroad’s] train operations, as well as the construction and operation of the [railroad’s] side tracks, is under the exclusive jurisdiction of the STB unless some other provision in the ICCTA provides otherwise;” thus, Texas statute and plaintiffs’ common law claim are preempted by the ICCTA); City of Auburn, 154 F.3d at 1033 (“State and local permitting laws regarding railroad operations are preempted by the plain language of the ICCTA, and the statutory framework surrounding it.”); Coastal Distrib., 2006 U.S. Dist. LEXIS 8400, at *14-15, 29 (holding that municipality’s attempts to enforce a stop work order and certain zoning regulations against rail carrier’s transload facility was preempted by the ICCTA); Maynard v. CSX Transp., Inc., 360 F. Supp.2d 836, 840-42 (E.D. Ky. 2004) (noting that “Federal courts have also consistently held that state and local statutes, regulations and ordinances which involve railway matters do not survive ICCTA preemption challenges” and holding that “the ICCTA preempts state common law claims with respect to railroad operations”); Dakota, Minn. & E. R.R. Corp. v. South Dakota, 236 F. Supp.2d 989, 1005-1008 (D. S.D. 2002) (holding that revisions to state eminent domain law are preempted where revisions added new burdensome qualifying requirements to the railroad eminent domain power that would have the effect of state regulation of railroads), aff’d on other grounds, 362 F.3d 512 (8th Cir. 2004); Wisconsin Cent., 160 F. Supp.2d at 1013 (holding that ICCTA’s “clear and broad” preemption clause precludes “all state efforts to

regulate rail transportation,” including an attempt by a municipality to use Wisconsin’s general eminent domain law to condemn a portion of a railroad passing track); Burlington N. Santa Fe Corp. v. Anderson, 959 F. Supp. 1288, 1295 (D. Mont. 1997) (holding that the ICCTA “reserves no area of regulation for the individual states”); City of Austell, 1997 U.S. Dist. LEXIS 17236, at *24 (holding that municipal zoning ordinance and land-use permitting requirement used to prevent railroads from constructing, developing, and operating an intermodal facility are expressly preempted by the ICCTA); City of Creede, 2005 STB LEXIS 486, at *11 (“[S]tate or local permitting or preclearance requirements of any kind that would affect rail operations (including building permits, zoning ordinances, and environmental and land use permitting requirements) are categorically preempted.”); Borough of Riverdale, 1999 STB LEXIS 531, at *19 (holding that “state or local laws that would impose a local permitting or environmental process as a prerequisite to the railroad’s maintenance, use, or upgrading of its facilities are preempted because they would, of necessity, impinge upon the federal regulation of interstate commerce.”).⁶

Ignoring the weight of the above judicial and administrative precedent, the Village relies instead on Maumee & W. R.R. Corp. and RMW Ventures, LLC – Petition for Declaratory Order, STB Fin. Docket No. 34354, 2004 STB LEXIS 140 (served Mar. 3, 2004) and District of Columbia v. 109,205.5 Square Feet of Land, No. 05-202, 2005 U.S. Dist. LEXIS 7990 (D. D.C.

⁶ Interestingly, the Village’s counsel is currently advancing a similarly broad reading of the ICCTA’s preemption provision on behalf of a railroad in an action in the United States District Court for the District of Columbia. There, Arnold & Porter, on behalf of CSX, posits that “[t]his preemption provision is ‘clear and broad,’ and precludes ‘all state efforts to regulate rail transportation.’” McManus Aff. II at Ex. “A” (citations omitted) (emphasis added). Indeed, counsel further avers that “ICCTA preemption has been found even where the statute in question could be characterized as an exercise of state and local police powers to protect health, safety and the environment.” *Id.* These positions are diametrically opposed to and in conflict with the arguments Arnold & Porter now advances to this Court on behalf of the Village.

2005), in support of its argument that its eminent domain power to condemn the BSOR Croton Yard is not preempted by the ICCTA. The two authorities cited by the Village, however, are readily distinguishable on their facts and do not support the Village's position.

In District of Columbia, the city sought to acquire an easement for a bike and pedestrian trail; in Maumee the city sought to acquire an easement for an at-grade crossing over the rail line. In stark contrast to the situation presented in both District of Columbia and Maumee -- where the city's exercise of its eminent domain power to acquire a non-exclusive easement across railroad property did not impede railroad operations -- the Village here seeks to condemn the BSOR Croton Yard itself, thereby wholly preventing BSOR from continuing its railroad operations at such location. Far from posing no interference to BSOR's provision of railroad transportation, the Village's attempt to use its eminent domain power to condemn the BSOR's railroad facilities constitutes "the most extreme type" of regulation of railroad operations and is categorically preempted by the ICCTA's broad express preemption provision. Wisconsin Cent., 160 F. Supp.2d at 1013 (holding that an attempt to use state eminent domain law to condemn a portion of a railroad passing track constitutes impermissible local regulation of railroad operations and is preempted by the ICCTA).

E. The Village's "Spur Versus Railroad Line" Discussion Is Irrelevant To The Resolution Of The Instant Motion

Despite the Village's protracted discussion of the Croton Track as a spur or a railroad line and the purported need for STB approval, this point is wholly irrelevant to the resolution of the instant motion. Regardless of the classification, the Village's attempted regulation of BSOR and the BSOR Croton Yard is preempted. If the Croton Track is a railroad line, as the Village argues, the Village concedes that preemption applies. Defs.' Mem. of Law at 13. If the Croton Track is a spur pursuant to 49 U.S.C. § 10906, ICCTA preemption applies with the same effect.

See, e.g., Wisconsin Cent., 160 F. Supp.2d at 1013 (holding that an attempt to use state eminent domain law to condemn a portion of a railroad "passing track" is preempted by the ICCTA); Flynn v. Burlington N. Santa Fe Corp., 98 F. Supp.2d 1186, 1188 (E.D. Wa. 2000) (holding that local authority over spurs and side tracks is preempted by the ICCTA); CSX Transp., Inc. v. Georgia Pub. Serv. Comm'n, 944 F. Supp. 1573, 1584 (N.D. Ga. 1996) (noting preemption of state regulation of spur track under the ICCTA); The New York City Econ. Dev. Corp. - Petition For Declaratory Order, STB Fin. Docket No. 34429, 2004 STB LEXIS 434, at *19-20 (served July 15, 2004) (holding that section 10501(b) preemption applies as to construction of switching and spur track, even where the STB lacks licensing authority); Joint Petition for Declaratory Order - Boston & Maine Corp. and Town of Ayer, MA, STB Fin. Docket No. 33971, 2001 STB LEXIS 435, at *15-16 (served May 1, 2001) (holding same and collecting cases).

If the Court concludes after the preliminary injunction phase that the classification of the Croton Track is relevant to an issue in the case, this Court should make the determination without a referral to the STB. Indeed, numerous courts have addressed the issue of whether a track is a spur or a railroad line without reference to the STB. See, e.g., Georgia S. & Florida Ry. Co. v. Duval Connecting R.R. Co., 324 F.2d 801, 802 (5th Cir. 1963); Hughes v. Consol-Pennsylvania Coal Co., 945 F.2d 594, 612 (3d Cir. 1991), cert. denied, 504 U.S. 955, 112 S. Ct. 2300 (1992); BAR Techs. Inc. v. Conemaugh & Black Lick R.R., 73 F. Supp.2d 512, 516-517 (W.D. Pa. 1999).⁷

⁷ Whether this Court concludes that it should decide the issue or that it should be referred to the STB, however, this Court should issue the requested preliminary injunction in order to preserve the status quo in the interim. Further, the Village suggests that the question of the scope of preemption should be referred to the STB as well. Given the extensive judicial precedent on this issue, there is even less reason to refer the question of the scope of preemption to the STB.

Additionally, given that the facts relevant to the Croton Track's use (i.e., for purposes of switching, transloading, and storing rail cars) and physical characteristics (i.e., intrastate location, short length, stub-ended, no regularly-scheduled service, no invasion of another railroad's territory) cannot be disputed,⁸ this Court will be in a position to hold that the Croton Track comes within the section 10906 exception. See, e.g., Hughes, 945 F.2d at 612 (affirming district court holding that proposed track was a spur due to its short length, wholly intrastate location, use as a route to unload and transfer shipments, and the fact that it does not invade the territory of another railroad); The New York City Econ. Dev. Corp., 2004 STB LEXIS 434, at *15-17 (served July 15, 2004) (holding that similar uses and physical characteristics of subject track place it in the category of excepted spur or switching track under section 10906). In fact, such a holding would be consistent with the Village's position -- taken previously before the STB -- that the Croton Track is a spur track. See, e.g., Defs.' Mem. of Law at 4, 13.⁹ As a spur

⁸ Nor is the so-called "invasion test" touted by the Village determinative. Instead, courts consider a variety of relevant factors in deciding a track's classification. Id. In any event, briefly, there is no "invasion" here within the meaning of the test as it has been developed over the years. The BSOR Croton Yard does not, as the Village contends, compete with CSX; rather, the BSOR Croton Yard generates rail business for CSX. Under BSOR's operation, the Yard is being used for transloading rail cars, switching them within the Yard, and interchanging them with CSX. This is not invasion CSX's territory; it is switching and facilitating the movement of rail traffic that only CSX, the long-haul carrier, can handle. Stated differently, BSOR and CSX must work cooperatively to generate and move rail business. In sum, BSOR is not an "invader" attempting to take business away from CSX. Feasley Aff. II at ¶ 20.

⁹ Although the Village acknowledges that the Croton Track is a spur, the Village curiously argues that the BSOR's operation as a common carrier on the Croton Track somehow converts it into a "railroad line." This proposition is advanced on the basis of an affidavit by Louis E. Gitomer, Esq., who opines -- without the benefit of a citation to any statute, judicial precedent, or other authority -- that the Croton Track is not governed by section 10906. Interestingly, however, one decision Mr. Gitomer cites -- The New York City Econ. Dev. Corp., 2004 STB LEXIS 434, at *19 -- involved a situation in which three rail carriers, including CSX, were going to operate on a section 10906 track. The STB held that the subject track came within section 10906, Id. at *15-17; it did not then hold that CSX's common carrier operation on the spur or switching track converted it into a railroad line. See also Wisconsin Cent., 160 F. Supp.2d at 1013; Flynn, 98 F.

track, BSOR does not require STB approval for rail transportation operations at the BSOR Croton Yard because the STB “does not have authority” over such track. 49 U.S.C. § 10906.

F. The Presence Of An Interchange Agreement Between BSOR And CSX Is Irrelevant To The Resolution Of The Instant Motion

Based primarily on legal arguments advanced in Mr. Gitomer’s affidavit, the Village contends that BSOR will not be able to interchange cars with CSX without a formal interchange agreement. Indeed, Mr. Gitomer goes so far as to assert that CSX has no obligation to interchange traffic with BSOR unless it obtains STB authorization to operate the track in Croton. Again, these arguments are wholly irrelevant to the pending question concerning preemption of the Village’s eminent domain and zoning and land use provisions. Nevertheless, as shown below, these contentions are unfounded.¹⁰

The statutory provision cited by Mr. Gitomer -- 49 U.S.C. § 10742 -- in support of his argument does not address the obligation to interchange; rather, it simply requires rail carriers to provide “reasonable, proper, and equal facilities that are within [their] power to provide for the interchange of traffic.” The facilities for the interchange between BSOR and CSX at Croton are provided by BSOR on the Croton Track. There is no need for CSX to provide any facilities, and, given the physical layout at the connection, it would be impractical to interchange cars on the CSX line. Feasley Aff. II at ¶ 9.

Although interchange agreements are common, the Village cites no authority for the proposition that a written interchange agreement is a prerequisite to the interchange of cars or the

Supp.2d at 1188; Georgia Pub. Serv. Comm’n, 944 F. Supp. at 1584. In any event, Mr. Gitomer’s affidavit should be stricken as it is nothing more than nine additional pages of legal argument by the Village, on top of its maximum 25-page opposition brief.

¹⁰ To the extent it is relevant, BSOR has advised CSX that BSOR stands ready to negotiate an interchange agreement. Feasley Aff. II at ¶ 4.

movement of cars from one rail carrier to another. Indeed, BSOR and CSX both subscribe to the Association of American Railroads interchange rules, which are a detailed and extensive set of rules governing the interchange of cars, that govern interchange even without a written agreement. Further, CSX has an obligation under 49 U.S.C. § 11101 to provide service upon reasonable request. This provision makes it unlikely that CSX would attempt to hinder interstate commerce and prevent rail customers, such as Coastal, from moving their products into or out of Croton.

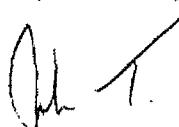
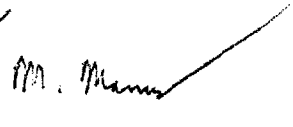
In sum, as with the Village's spur versus railroad line argument, its interchange agreement contention is of no moment.

CONCLUSION

Accordingly, this Court should grant BSOR's motion for a preliminary injunction.

Dated: May 25, 2006
Albany, New York

CRANE, PARENTE, CHERUBIN & MURRAY

By:  

John T. McManus (JM 5473)
Attorneys for Plaintiff BSOR
90 State Street
Albany, New York 12207
518.432.8000

Of counsel: James E. Howard

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BUFFALO SOUTHERN RAILROAD, INC.,

Plaintiff,

- against -

AFFIDAVIT OF
ALBERT FEASLEY

CIVIL ACTION No.: 06 CIV. 3755

JUDGE MCMAHON

VILLAGE OF CROTON-ON-HUDSON; GREGORY J. SCHMIDT, as Mayor of the Village of Croton-on-Hudson; DANIEL O'CONNOR, P.E., as Engineer and Building Inspector for the Village of Croton-on-Hudson; RICHARD F. HERBEK, as Manager of the Village of Croton-on-Hudson; THOMAS P. BRENNAN, as Trustee on the Village Board of Trustees; CHARLES A. KANE, as Trustee on the Village Board of Trustees; ANN GALLELLI, as Trustee on the Village Board of Trustees; LEO A. W. WIEGMAN, as Trustee on the Village Board of Trustees; CHRIS KEHOE, as member of the Village Planning Board; VINCENT ANDREWS, as member of the Village Planning Board; FRANCES ALLEN, as member of the Village Planning Board; ROBERT LUNTZ, as member of the Village Planning Board; KATHLEEN RIEDY, as member of the Village Zoning Board of Appeals; RHODA STEPHENS, as member of the Village Zoning Board of Appeals; RUTH WAITKINS, as member of the Village Zoning Board of Appeals; WITT BARLOW, as member of the Village Zoning Board of Appeals; and PAUL ROLNICK, as member of the Village Zoning Board of Appeals,

Defendants.

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

Albert Feasley, being duly sworn, deposes and says:

1. I am the Vice President of Operations for BSOR, and I submit this affidavit in further support of BSOR's motion for a preliminary injunction.

2. Today, I am awaiting the arrival of rail cars to the BSOR Croton Yard from Coastal containing sand and other building materials. Currently, these rail cars are located on CSX's line within one mile of the BSOR Croton Yard.

3. Until today, I had been advised that these rail cars would arrive at the BSOR Croton Yard either today or tomorrow. This morning, a CSX representative informed me that CSX would deliver the cars today. Shortly thereafter, CSX advised me that it would transport the cars to the BSOR Croton Yard tomorrow morning, following a track safety inspection of the Croton Track, where the cars will be interchanged. I had already inspected the Croton Track and found it to be in compliance with all applicable regulations. Subsequently, however, another CSX representative stated that CSX will not deliver the cars due to the pendency of this action.

4. BSOR has asked CSX to enter into an interchange agreement, but, to date, CSX has declined.

5. Nevertheless, BSOR subscribes to the Association of American Railroads interchange rules, and I understand that CSX does as well. These rules provide detailed guidance and requirements for the interchange of rail cars even without a written interchange agreement. As a result, even without an interchange agreement, BSOR maintains that CSX has an obligation to provide service requested by customers and, as part of providing that service, to interchange cars with CSX. BSOR is willing to permit CSX to operate on the Croton Track for purposes of interchanging cars even if there is no interchange agreement. In fact, as demonstrated below, CSX has already done so.

6. After the above cars are interchanged, BSOR is going to unload them and load trucks for Coastal for the sale and distribution of these products by Coastal in the Westchester County market.

7. I am aware that, in opposition to BSOR's pending motion, the Village has alleged that BSOR is not currently operating at and not publicly offering service at the BSOR Croton Yard. These contentions are utterly false.

8. Since executing the lease in March 2006, BSOR has held itself out to the public generally to provide common carrier rail service at the BSOR Croton Yard, including transloading and switching services to rail customers delivering or receiving various commodities by truck at the BSOR Croton Yard, transferring containers between trucks and rail cars, and providing other rail transportation services involving the exchange of empty and loaded rail cars for various commodities with CSX.

9. More specifically, on or about March 30, 2006, BSOR interchanged 14 rail cars with CSX from the BSOR Croton Yard for interstate transportation. BSOR charged a customer for BSOR's switching and interchange service. This interchange, as with all of BSOR's interchange of rail cars with CSX occurred on the Croton Track, not the through railroad line. It would be impractical to attempt to interchange with CSX on the through railroad line because it is heavily used both for freight and passenger operations.

10. Coastal has arranged with BSOR for it to transport sand and other building materials and products by rail to the BSOR Croton Yard for transfer to trucks for distribution throughout the Westchester County market. As I mentioned above, BSOR is expecting to interchange and unload these rail cars containing sand and other building materials on May 25th.

11. Since this Court's grant of the temporary restraining order, Coastal has begun the process of entering into a long-term agreement to transport and transload sand, aggregate, and other building materials and products. In the event that this Court does not grant the requested injunctive relief, Coastal has advised me that it is likely that it will terminate this process as the

uncertainty created by the Village's attempts to condemn and/or interfere with the BSOR Croton Yard will reemerge.

12. In addition, since March 2006, I have spoken with a number of other businesses that have expressed an interest in using BSOR's transportation and transloading services at the BSOR Croton Yard. Among other things, I have explained BSOR's services to these prospective customers and offered them initial transportation rate quotations. Again, in the event that this Court does not grant the requested injunctive relief, those businesses that have expressed an interest in using BSOR's transportation and transloading services are sure to look elsewhere if there is a threat that the BSOR Croton Yard will be condemned or closed.

13. Finally, since March 2006, BSOR has procured different pieces of equipment to load and unload rail cars at the BSOR Croton Yard.

The Croton Track

14. The Croton Track is approximately 1,600 feet long. It consists of a connection to a through railroad line and then splits into two tracks, one of which runs through the Transloading Facility. The other track is parallel to the first and is used primarily for storage. The Croton Track connects with the Hudson railroad line at approximately milepost QC 25 in the Village and is located wholly within New York State.

15. The Croton Track is "stub-ended," meaning that it does not connect with another rail line at both ends; rather, it ends on one side with a barrier.

16. The track is a lighter weight than the weight of the rail on the through line that connects with the Croton Track.

17. There is no regularly scheduled service on the Croton Track; instead, BSOR provides service on an as-needed basis.

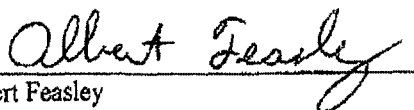
18. When BSOR does provide service on the Croton Track, it is typically used for loading, unloading, storage, or switching operations.

19. The Croton Track was not built to, nor is it used by BSOR, to invade another railroad's territory.

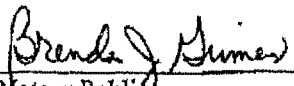
20. On the contrary, the BSOR Croton Yard has generated and is generating rail business for CSX. Under BSOR's operation, the Yard will be used for transloading rail cars, switching them within the Yard, and interchanging them with CSX. Further, BSOR is holding itself out as a common carrier to provide service to any rail customer that has commodities that can reasonably be handled at the Yard. This is not invasion of the territory of CSX; rather, it is switching and facilitating the movement of rail traffic that only CSX, the long-haul carrier, can handle. In sum, BSOR and CSX must work cooperatively to generate and move rail business; BSOR is not an "invader" attempting to take business away from CSX.

21. Greentree Realty, LLC owns the Croton Track.

22. BSOR has been a rail carrier operating at locations other than the BSOR Croton Yard since 1982. The Croton Track was not acquired in order to make BSOR a rail carrier and does not comprise BSOR's entire operations.


Albert Feasley

Sworn to before me this 24th
day of May, 2006


Notary Public

BRENDA J. GRIMES
Notary Public, State of New York
No. 01GR0133957
Qualified in Westchester County
Term Expires September 18, 2008

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BUFFALO SOUTHERN RAILROAD, INC.,

Plaintiff,

- against -

AFFIDAVIT OF JOHN
T. McMANUS

CIVIL ACTION NO.: 06 CIV. 3755

JUDGE McMAHON

VILLAGE OF CROTON-ON-HUDSON; GREGORY J. SCHMIDT, as Mayor of the Village of Croton-on-Hudson; DANIEL O'CONNOR, P.E., as Engineer and Building Inspector for the Village of Croton-on-Hudson; RICHARD F. HERBEK, as Manager of the Village of Croton-on-Hudson; THOMAS P. BRENNAN, as Trustee on the Village Board of Trustees; CHARLES A. KANE, as Trustee on the Village Board of Trustees; ANN GALLELLI, as Trustee on the Village Board of Trustees; LEO A. W. WIEGMAN, as Trustee on the Village Board of Trustees; CHRIS KEHOE, as member of the Village Planning Board; VINCENT ANDREWS, as member of the Village Planning Board; FRANCES ALLEN, as member of the Village Planning Board; ROBERT LUNTZ, as member of the Village Planning Board; KATHLEEN RIEDY, as member of the Village Zoning Board of Appeals; RHODA STEPHENS, as member of the Village Zoning Board of Appeals; RUTH WAITKINS, as member of the Village Zoning Board of Appeals; WITT BARLOW, as member of the Village Zoning Board of Appeals; and PAUL ROLNICK, as member of the Village Zoning Board of Appeals,

Defendants.

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

John T. McManus, being duly sworn deposes and says:

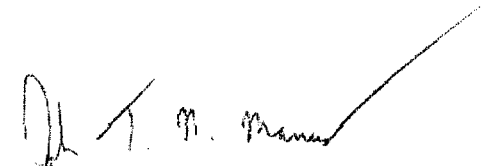
1. I am an attorney at law duly admitted to practice in the United States District Court for the Southern District of New York, and I am associated with the law firm of Crane,

Parente, Cherubin & Murray, attorneys for Plaintiff Buffalo Southern Railroad, Inc. ("BSOR").

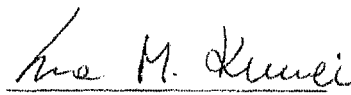
As such, I am fully familiar with the facts and circumstances of this action.

2. I respectfully submit this affidavit in further support of BSOR's motion for a preliminary injunction to enjoin the Village from condemning the BSOR Croton Yard and from applying and enforcing against BSOR zoning ordinances, permitting and pre-clearance requirements, and other local ordinances and regulations.

3. Attached hereto as Exhibit "A" are excerpts of a "Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction" dated February 22, 2005, submitted on behalf of Plaintiff CSX Transportation, Inc. by Arnold & Porter LLP in an action styled as CSX Transp., Inc. v. Williams, No. 05-00338 (ESH).


John T. McManus (JM 5473)

Sworn to before me this 25th
day of May, 2006


Notary Public

EWA M. KRAWIEC
Notary Public State of New York
Qualified in Saratoga County
No. 01KR6050386
Commission Expires November 6, 2006

EXHIBIT "A"

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CSX TRANSPORTATION, INC.	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 05-00338 (ESH)
	)	
ANTHONY A. WILLIAMS and	)	
DISTRICT OF COLUMBIA	)	
	)	
Defendants.	)	

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION**

Ellen M. Fitzsimmons	Irvin B. Nathan (D.C. Bar No. 090449)
Peter J. Shudtz	Mary Gabrielle Sprague (D.C. Bar No. 431763)
Paul R. Hitchcock	Kathryn E. Taylor (D.C. Bar No. 486564)
CSX TRANSPORTATION, INC.	ARNOLD & PORTER LLP
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Jacksonville, FL 32202	Washington, D.C. 20004-1206
(904) 359-3100	(202) 942-5000
	(202) 942-5999 (fax)

Attorneys for Plaintiff CSX Transportation, Inc.

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Id. at 46,583. The District's claim of uniqueness is appropriately met by this direction to petition the Federal Government, which has exclusive authority in this matter. Rather than follow that process, the District chose to ignore federal jurisdiction and act on its own in contravention of well-established judicial and administrative holdings.

D. The District Act Is Expressly Preempted by the Interstate Commerce Commission Termination Act.

Congress established a federal policy to promote a sound national rail transportation system "to meet the needs of the public and the national defense." 49 U.S.C. § 10101(4). Congress has entrusted the Surface Transportation Board with the responsibility and authority for ensuring that the national rail transportation system is sound. 49 U.S.C. § 10501.

As explained above, the question whether the District Act is preempted by the ICCTA's express preemption provision, 49 U.S.C. § 10501(b) (*see* Statutory Addendum), has been presented to the STB, which has jurisdiction to interpret the preemptive effect of its governing statute. Section 10501(b) provides that the jurisdiction of the Board over "transportation by rail carriers, and the remedies provided in this part with respect to . . . routes . . . is exclusive," and further provides that "the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." This preemption provision is "clear and broad," and precludes "all state efforts to regulate rail transportation." *Wisconsin Central Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009, 1013 (W.D. Wis. 2000); *see also CSX Transportation, Inc. v. Georgia Pub. Services Comm'n*, 944 F. Supp. 1573, 1581 (N.D.

Ga. 1996) ("It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations.").

ICCTA preemption has been found even where the statute in question could be characterized as an exercise of state and local police powers to protect health, safety and the environment. In *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998), for example, the Ninth Circuit held that the ICCTA preempted state and local environmental permit laws with respect to construction of a main line. *Id.* at 1029-31. The court rejected the city's argument that Congress intended only to preempt state "economic" regulation of railroads, not "traditional state police power," explaining that there is no clear line between "economic" regulation and "environmental" regulation: "For if local authorities have the ability to impose 'environmental' permitting regulations on the railroad, such power will in fact amount to 'economic regulation' if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line." *Id.* at 1031. Here, of course, the express purpose of the District Act is to prevent CSXT from operating over its main lines through the District. *See also Friberg v. Kansas City Southern Ry. Co.*, 267 F.3d 439, 443 (5th Cir. 2001) (finding Texas anti-blocking statute that is in effect an economic regulation of railroads to be preempted).

CSXT has argued to the STB that the District Act constitutes an impermissible attempt to regulate "rail transportation," which includes routing.¹⁸ The Act directly restricts CSXT's main line train operations, not only into and through the District itself,

¹⁸ Whatever overlap there might be among the authority of the STB, FRA, RSPA and DHS/TSA with respect to routing of shipments of hazardous materials by rail, there is plainly no gap for state or local direction of rail routing.

but also into and through states throughout the CSXT rail network. Such an attempt to subject train movements to local regulation is clearly preempted by the ICCTA.

E. The District Act Was Not an Authorized Exercise of Legislative Power Under the Home Rule Act.

The District Act is also invalid because it was passed by the D.C. Council in violation of the District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973) (as amended) ("Home Rule Act"). The Constitution empowers Congress "[t]o exercise exclusive Legislation in all Cases whatsoever, over . . . the Seat of the Government of the United States" U.S. Const., art. I, § 8, cl. 17. In the Home Rule Act, Congress delegated to the D.C. Council the power to "legislat[e] upon essentially local District matters," subject to "retention by Congress of the ultimate legislative authority" over the District of Columbia. Home Rule Act § 102 (D.C. Code § 1-201.02). In passing the District Act, the D.C. Council acted *ultra vires*, exceeding the limited legislative powers Congress granted to the Council.

Congress intended to relieve its burden of legislating about "essentially local" matters.¹⁹ The Home Rule Act provides that "[t]he Council shall have no authority to . . . [e]nact any act, or enact any act to amend or repeal any Act of Congress, which concerns the functions or property of the United States or which is not restricted in its application exclusively in or to the District." Home Rule Act § 602(a)(3) (D.C. Code § 1-206.02). Congress did not delegate to the D.C. Council the power to halt or impede the flow of

¹⁹ See 119 Cong. Rec. 22,947 (1973) (Senator Eagleton stating, "I believe it is not in the interest of this body, nor is it in the interest of the citizens of the United States we are elected to represent . . . that the time of the U.S. Senate be spent preparing, holding hearings, considering and debating matters that are purely local in nature.").

such security is to pay "such costs and damages as may be incurred or suffered by any party who is found to be wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). As discussed in Part III, *supra*, Defendants would suffer little, if any, injury from the issuance of emergency injunctive relief that is later overturned. Plaintiff therefore respectfully requests that the Court require only a modest security in this case.

CONCLUSION

For the foregoing reasons, Plaintiff CSXT respectfully requests that the Court grant Plaintiff's motion for a preliminary injunction, pending the Court's final review on the merits, enjoining the implementation and enforcement of the District Act or any variation of that Act that seeks to prohibit in the longer term the transportation within the District of Columbia of materials that may lawfully be transported in interstate commerce in accordance with federal regulations.

Respectfully submitted,

Dated: February 22, 2005

/s/ Mary Gabrielle Sprague

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EXHIBIT 4



PAUL R. HITCHCOCK
Associate General Counsel - Regulatory

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Paul_Hitchcock@csx.com

May 31, 2006

Via Facsimile No. 914-390-4152

The Honorable Colleen McMahon
Judge of the United States District Court
Southern District of New York
United States Courthouse, Room 533
300 Quarropas Street
White Plains, NY 10601

Re: Buffalo Southern Railroad, Inc. v. Village of Croton, et al.
Case No. : 06 CIV 3755

Dear Judge McMahon:

I have just finished reviewing a copy of a letter to Your Honor from Mr. McManus dated May 30, 2006. In that letter, he states: "The only conclusion that can be drawn from the above facts is that A&P's actions on behalf of the Village Defendants led CSX to withhold the Coastal rail cars from BSOR." Given that CSXT provides line haul transportation to and from the New York area, and must be involved in the movement of any rail cars to or from the siding at Croton, I have found it appropriate to have discussions with attorneys for both parties. I hope that you will not consider it inappropriate for CSXT to address conclusions contained in Mr. McManus' letter in a similar fashion.

The purpose of this letter is to assure you that CSX Transportation, Inc. has reached all decisions about this matter independently and has not been influenced in the slightest by the actions of the Village or its counsel.

Let me explain the difficult situation in which CSXT finds itself:

When it first came to my attention that the Buffalo Southern, a short line railroad operating in the Buffalo, NY area, was taking the position in legal documents filed with this Court that it was operating as a common carrier by rail on the siding at Croton, NY -- without so much as filing papers with the US Surface Transportation Board (STB) -- I was frankly surprised. In 29 years of practice before the STB and its predecessor, the Interstate Commerce Commission, it has always been my view that to have common carrier status, an operator of a railroad must be certificated by the agency to operate a

"line of railroad." (Carriers operating prior to 1920 were grandfathered.) An entity moving freight cars from one position to another on an exempt industrial siding is not engaged in common carriage by rail. It is merely an industrial switching operation which is entitled to none of the rights (and none of the many obligations) of a carrier operating a line of railroad. To my knowledge, the position urged by lawyers for Buffalo Southern is without precedent, and I do not expect it would be upheld by the STB.

Further militating against the position that Buffalo Southern is asking CSXT to accept is the past history of operations on this track. The sidetrack in question has long been regarded as an industry sidetrack, not a line of railroad. An industry sidetrack is a piece of track that connects to the line haul or local switching railroad. It is typically located on a shipper/receiver's property, sometimes an industrial park. The common carrier providing service to the customer enters into a sidetrack agreement with the customer or owner of the track with supplementary agreement with the actual shipper/receiver, if different. The sidetrack agreement defines responsibilities for, inter alia, liability, maintenance, and clearances to ensure cars do not collide with obstacles as they are moved along the track. I understand that CSXT or its predecessor, Conrail, entered into an industrial sidetrack agreement at some time in the past with a non-railroad entity at this location.

In deciding how to address these questions, CSXT must make its best assessment of the legal status claimed and act in a way that it believes is consistent with the policies and precedents of our regulator, the STB. Accordingly, when I learned that Buffalo Southern was demanding to be treated by CSXT as a rail carrier with rights of interchange under the ICC Termination Act administered by the STB (ICCT Act), I concluded that there was no basis for CSXT to recognize that alleged status absent some direction from the STB or this Court.

CSXT does not have an "interchange" with the Buffalo Southern at Croton. An interchange is created when two carriers agree to hold themselves out to the public and to the rest of the rail industry as conducting a set of well-understood relationships at a location. An agreement to establish an interchange is manifested by recording the fact with Railinc, a wholly owned subsidiary of the Association of American Railroads. Railinc maintains the industry's computer reference files which are used by all railroads as a basis for their computer systems to process shipping instructions and for many other purposes. (The STB can order the creation of an interchange or its cancellation; neither party can unilaterally create an interchange or unilaterally cancel one.) The act of CSXT in delivering or picking up cars from a sidetrack at Croton does not constitute interchange of traffic between two carriers.

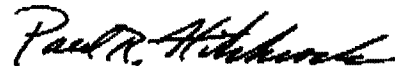
CSXT accordingly does not have an interchange agreement with Buffalo Southern regarding the track at Croton. Rail carriers enter into interchange agreements which identify the tracks on which cars will be left, define liability as between the parties, and otherwise govern the details of conducting interchange. AAR "Interchange Rules" do not govern processes and rights for interchange of traffic – they govern the repair and maintenance of freight cars that are interchanged among railroads.

CSXT does not gain anything from holding cars in its yard awaiting resolution of the Buffalo Southern's status. I did offer to Buffalo Southern's counsel in our call of the 25th, to hold a discussion of the possible ad hoc handling of the three cars in a three-way conversation among CSXT, Buffalo Southern and the STB's Office of Compliance and Enforcement. That offer was not accepted by them at that time. I renew that offer here. Alternatively, and Buffalo Southern's attorneys did react favorably to this suggestion, I offered to prepare an industrial sidetrack agreement(s) among CSXT and the current owner(s) or lessee(s) of the track in question, with appropriate reservations of rights and legal positions. That is to say, if an agreement governing the customary elements of a sidetrack agreement(s) can be reached among the appropriate parties, CSXT is prepared to deliver the cars in question, without requiring or expecting Buffalo Southern to waive any legal arguments it wishes to pursue before this court or the STB. On the very next business day following that conversation I engaged outside counsel to begin preparing such a document(s). CSXT will continue to pursue this avenue.

CSXT's physical connection with the track at Croton is by way of certain operating rights over Metro North which give us the right to pick up and deliver to customers there. CSXT does not anticipate any objection by Metro North should the Court or STB find that Buffalo Southern is a rail carrier, but neither can CSXT assure anyone that Metro North will not object.

Let me make clear that CSXT will comply with whatever decision this Court or the STB makes about Buffalo Southern's status. CSXT has not sought to intervene in the litigation on either party's side. CSXT will treat with Buffalo Southern at Croton as a common carrier entitled to interchange rights if that is the decision. That decision will impose certain obligations on CSXT under the ICCT Act and STB rules, and we will abide by them. If the decision is that Buffalo Southern's operation is an industrial switching function, CSXT is prepared to enter into sidetrack agreement(s) and to transport freight to and from the customers at that location. Pending a final decision, CSXT will continue to progress the interim arrangements discussed above – a sidetrack agreement(s) with reservation of rights and positions.

Very truly yours,



Paul R. Hitchcock

PRH/pkw

cc: Mr. John T. McManus, Facsimile No. 518-432-0086
Mr. Michael Gerard, Facsimile No. 212-715-1399
Mr. James Howard, Facsimile No. 617-886-9324



FACSIMILE TRANSMISSION

TRANSMIT TO:	Telephone No.	Facsimile No.
The Honorable Colleen McMahon Judge of the United States District Court Southern District of New York		914-390-4152
CC: Mr. John T. McManus		518-432-0086
Mr. Michael Gerard ✓		212-715-1399
Mr. James Howard		617-886-9324
RE:	Buffalo Southern Railroad v. Village of Croton-on-Hudson, et al. Case No.: 06-CIV 3755	
PLEASE NOTE -- THIS WAS FAXED TO YOU ON WEDNESDAY, MAY 31, 2006, BUT WE HAVE RECEIVED FAX NOTICE THIS MORNING THAT THE FAX DID NOT GO THROUGH TO YOU. WE REGRET ANY ANY INCONVENIENCE. ALSO BEING SENT TO Marianne Stecich 914-674-3688 as back-up for Mr. Gerard.		
FROM:	Paul R. Hitchcock Associate General Counsel - Regulatory Law Department Telephone: 904 / 359-1192 Facsimile: 904 / 359-7518	
DATE:	June 1, 2006	
NUMBER OF PAGES, INCLUDING COVER:	4	

THIS MESSAGE IS INTENDED FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED, AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL, AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING THE MESSAGE TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS INFORMATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA U.S. MAIL. THANK YOU.

If re-transmission is required, please call Peggy Wilson at 904-359-1716.

EXHIBIT 5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

BUFFALO SOUTHERN RAILROAD Inc.,

Plaintiff,

- against -

06 Civ. 3755 (CM)

VILLAGE OF CROTON-ON-HUDSON; GREGORY J. SCHMIDT, as Mayor of the Village of Croton-on-Hudson; DANIEL O'CONNOR, P.E., as Engineer and Building Inspector for the Village of Croton-on-Hudson; RICHARD F. HERBEK, as Manager of the Village of Croton-on-Hudson; THOMAS P. BRENNAN, as Trustee on the Village Board of Trustees; CHARLES A. KANE, as Trustee on the Village Board of Trustees; ANN GALLELLI, as Trustee on the Village Board of Trustees; LEO A. W. WIEGMAN, as Trustee on the Village Board of Trustees; CHRIS KEHOE, as Member of the Village Planning Board; VINCENT ANDREWS, as Member of the Village Planning Board; FRANCES ALLEN, as Member of the Village Planning Board; ROBERT LUNTZ, as Member of the Village Planning Board; KATHLEEN REIDY, as Member of Village Zoning Board of Appeals; RHODA STEPHENS, as Member of Village Zoning Board of Appeals; RUTH WAITKINS, as Member of Village Zoning Board of Appeals; WITT BARLOW, as Member of Village Zoning Board of Appeals; and PAUL ROLNICK, as Member of Village Zoning Board of Appeals,

Defendants.

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DECISION AND ORDER GRANTING PLAINTIFF'S
MOTION FOR A PRELIMINARY INJUNCTION

McMahon, J.:

Introduction

Plaintiff is a common carrier by rail in western New York. In March 2006, it entered into a lease for the property located at 1A Croton Point Avenue in Croton-on-Hudson ("the Yard").

Plaintiff's stated intention is to use the site to expand its business to the Westchester area by converting it into a transloading facility (a site where the contents of rail cars are loaded and unloaded).

For many years prior to 2006, the Yard housed a controversial recycling and waste management center. The Village of Croton-on-Hudson has been involved in litigation against a number of enterprises who own or have operated out of the Yard, including Greentree Realty (the owner), Northeast Interchange Railway, and Metro Enviro Transfer LLC. Plaintiff's lease was signed only a month after the Village Board commenced consideration of the possible condemnation of the site via its power of eminent domain.

And only weeks after two key events – a decision by a Justice of the New York State Supreme Court enjoining waste transfer operations on the site without the Village's consent, and the Village's announcement that acquisition of the site was financially feasible – Plaintiff (whose existence and lease were theretofore unknown to Village officials) filed a complaint in this Court, seeking to enjoin the Village from commencing any eminent domain proceeding and from enforcing other local zoning and building requirements, on the grounds that the Interstate Commerce Commission Termination Act of 1995 preempted all state and local regulation of the site while it is being used in transportation by rail carrier.

The Village contends that plaintiff is not entitled to an injunction, because BSOR has not applied for, let alone acquired, the necessary certificates from the federal Surface Transportation Board that would allow the Yard to be used for common carriage rail operations.

For the reasons set forward below, plaintiff's motion is granted, on conditions set forth below.

Facts

The Yard is a triangular parcel of land approximately ten acres in size. It is bounded by property of Metro-North Railroad to the west, by property owned by Croton-on-Hudson and New York State Route 9 to the east, and by privately held land to the north. Affidavit of Albert Feasley, Ex. A. The Yard contains a spur of dead-end track, 1600 feet in length, that intersects a main line of track passing through town at the edge of the Yard. Id. The main line is owned by CSX, a larger rail carrier. Feas. Aff. ¶¶ 5, 12. The Yard also contains a warehouse facility that is connected to the spur, which allows the spur to be used for unloading the contents of rail cars onto trucks and vice versa (termed a “transload facility”), several storage yards, a one-story office building, a parking lot, and small areas of land used for drainage and storing debris.

Since 1979, the Yard has been zoned “L-1” under the Village Zoning Law – permitting “Light manufacturing, assembly, converting, altering, finishing, cleaning or any other processing or storage of products.” Zoning Code § 230-18B(2).

A. History

In the 1970s and 1980s, the Yard was owned by a series of private individuals, who used it as a construction yard, a lot for storing sand, and a truck repair depot.

Since at least 1984, the Yard has been used by successive owners and lessees as a waste transfer station and wood recycling center. Each was required to get a permit from the Village to operate the Yard as a waste storage facility.

In 1997, the Yard was sold to Greentree Realty, Inc., who in turn leased it to Metro Enviro LLC. One year later, on May 4, 1998, Metro Enviro LLC received a permit from the

Village to operate a recycling center there. Affidavit of Marianne Stecich ¶ 10. Over the next few years, Metro Enviro allegedly violated several conditions of the permit, such as accepting more than the permitted amount of waste and failing to adequately train employees. Id. ¶¶ 10-11; see also Matter of Metro Enviro Transfer, LLC v. Village of Croton-on-Hudson, 5 N.Y.3d 236, 239, 800 N.Y.S.2d 535 (2005). In 2001, when the permit expired, the town undertook an extensive review of the site and Metro Enviro's operations there. On January 27, 2003, the Village Board voted not to reissue the permit. Stec. Aff. ¶ 11.

Metro-Enviro LLC sought an Article 78 review of the Village's decision in the Supreme Court in Westchester County. Justice Francis Nicolai ultimately found in favor of the company and ordered the Village to issue the permit. On appeal, the Second Department overturned Judge Nicolai's decision and upheld the Village's determination. Matter of Metro Enviro Transfer, LLC v. Village of Croton-on-Hudson, 7 A.D.3d 625 (2d Dept. 2004), aff'd 5 N.Y.3d 236, 800 N.Y.S.2d 535 (2005).

On July 18, 2005, the Village passed a resolution prohibiting Metro Enviro's facility from accepting new waste – essentially halting its operations. Stec. Aff. ¶ 14. Greentree Realty LLC (owner of the Yard) and Metro Enviro Transfer LLC (successor to Metro Enviro LLC) sought to enjoin enforcement of the resolution, on the grounds that the use of the Yard as a recycling center was a prior non-conforming use under the Zoning Code. Justice Nicolai denied Metro Enviro's motion for a preliminary injunction. See Greentree Realty LLC v. Village of Croton-on-Hudson, No. 11872/05 (Westchester Cty. Sup. Ct. August 25, 2005).

Around the same time, a separate but related entity, Northeast Interchange Railway LLC ("NIR"), reached an agreement to take over Metro Enviro's lease and operations and begin its

own waste management and recycling operation from the Yard. It applied to the New York State Department of Environmental Conservation and to Westchester County for permits to handle solid waste. *Stec. Aff.* ¶ 22. In December 2005, these permits were granted, along with a permit allowing the operation of a waste processing facility in the Yard. *Stec. Aff.* ¶ 25.

NIR also filed a Notice of Exemption Transaction with the federal Surface Transportation Board (“STB”) seeking STB approval to operate as a common carrier by rail over the 1600-foot stretch of track in the Yard. *Stec. Aff. Ex. 4*. Prior to this point, there is no evidence of the Yard’s being used in this fashion; the state court decisions dealt only with the site of a recycling center.

The Village opposed NIR’s application, leading the STB to stay the effectiveness of NIR’s Notice of Exemption.¹ Northeast Interchange Ry., STB Fin. Docket No. 34734 (S.T.B. August 5, 2005). After additional review, NIR’s Notice of Exemption was formally rejected. The STB held that the abbreviated review procedures available in notice of exemption proceedings were inappropriate for the substantial scope of NIR’s request (NIR never previously having engaged in common carrier operations). Northeast Interchange Ry., STB Fin. Docket No. 34734 (S.T.B. November 17, 2005). NIR was granted leave to resubmit a full application or a formal petition for exemption. *Id.*

On February 6, 2006 – apparently before any such application was made – the Village of Croton-on-Hudson commenced public hearings pursuant to New York Eminent Domain Procedure Law § 201, to begin consideration of condemning the Yard. The Village’s stated

¹ Notices of Exemption before the STB, as a procedural matter, become effective if they are not affirmatively stayed. *See Stec. Aff., Ex. 6 at 2.*

intent was to use the property for municipal office space and as a storage lot for salt, sand, and municipal vehicles. *Stec. Aff.* ¶ 30, *Opp.* at 3. The Village commissioned an appraisal of the site, to ascertain what a fair acquisition price would be.

On March 3, unbeknownst to the Village, R.S. Acquisition Inc., as lessee of the property from Greentree, subleased the site to plaintiff. *See infra*.

In April 2006, Judge Nicolai issued an injunction in favor of the Village, prohibiting NIR's proposed use of the Yard as a waste transfer station without the appropriate Village permits. *Decision, Village of Croton-on-Hudson v. Northeast Interchange Ry. LLC & Greentree Realty, LLC*, No. 22176/05 (Westchester Cty. Sup. Ct. April 27, 2006). Plaintiff's existence was still a secret, so it was not a party to that proceeding.

On or around April 18, 2006, the town released the results of its appraisal of the site, which indicated that the site could be acquired for approximately \$5 million, a "doable number" according the Village Mayor, Gregory Schmidt. Robert Marchant, Buyout of Croton Waste Facility Estimated to Cost \$5M, *Journal News*, April 18, 2006.

To date, the Village has not made a final decision on whether to acquire the Yard. *Stec. Aff.* ¶ 33. The entry of a temporary restraining order by this court has, of course, stayed the running of the 90 day period after the public hearing within which the Village is statutorily require to publish its determinations and findings pursuant to N.Y. EDPL § 204.

B. Buffalo Southern Railroad

Buffalo Southern Railroad (BSOR) is a common carrier by rail in western New York, engaged in the transportation of freight. *Affidavit of Albert Feasley*, ¶ 3. It owns a stretch of

track near Buffalo, and it has entered into “interchange agreements” with other rail carriers allowing it to ship freight by rail across the state. It is designated as a Class III rail carrier by the STB, which means that it has annual revenues of under \$20 million. Id. ¶ 2; see also 49 C.F.R. § 1201.1-1. BSOR avers that it has not heretofore transported solid waste as a regular part of its business.

On March 3, 2006, one month after the Village started investigating the possibility of eminent domain, BSOR leased the Yard from RS Acquisition Co., which in turn had leased it from Greentree. Feas. Aff. Ex. B. NIR, the prior tenant, had apparently abandoned its interest in the Yard, although when and how it did so is unexplained. BSOR’s stated purpose for acquiring the Yard was to expand its service area from western New York to the Westchester area. Id. ¶ 10. It now holds itself out as a common carrier at the Yard, including offering transloading and switching services there. Id. ¶ 11. It has never sought STB approval to operate as common carrier at or from the Yard, and alleges that it need not do so.

Plaintiff has commenced some operations in the Yard, though they have been minimal to date.² On March 30, 2006, it permitted CSX to use the Yard to load 14 rail cars for shipment via CSX tracks. Second Affidavit of Albert Feasley, ¶¶ 5, 9. Coastal Distribution LLC, a construction firm, has signed an agreement with BSOR for the shipment of construction materials from western New York to Westchester, to be offloaded in the Yard. Affidavit of Joseph Rutigliano, ¶¶ 6-7. At least one other enterprise, Hanson Aggregates Inc., has expressed interest in using common carrier services at the Yard once the legal status of the Yard is

² According to nearby observers, there is no staff or train traffic at the Yard on weekdays. Affidavit of Charles Kane, ¶¶ 6-7.

resolved. Affidavit of Daniel M. Meehan, ¶ 8.

As of the date of this opinion, plaintiff has not reached an interchange agreement with CSX, the owner of the main rail line through town.³ 2d Feas. Aff. ¶ 4. Absent such an agreement, BSOR's carriage of freight starts and stops within the confines of the Yard.

C. The Instant Action

On May 17, 2006, BSOR filed suit against the Village of Croton-on-Hudson and various Village employees, seeking to enjoin the Village's incipient eminent domain proceeding and to bar the enforcement of Village regulations against the Yard. BSOR claims that both the Interstate Commerce Commission Termination Act, 49 U.S.C. §§ 10101-11908 (2000) ("the ICCTA") and the dormant Commerce Clause preempt state action against BSOR's operations.

Until the filing of this lawsuit, the Village was unaware that BSOR had leased the Yard. Stec. Aff. ¶ 5. To date, the Village has not attempted to enforce any Village regulation against the Yard. Id.

On May 24, 2006, BSOR attempted to ship three rail cars containing building materials for Coastal LLC to the Yard. When the cars arrived at the CSX-owned track, CSX refused to deliver the cars to the Yard because plaintiff had no interchange agreement with CSX. Letter

³ An interchange agreement is an agreement between two rail carriers agreeing to offer joint common carrier services at a given location. Even absent an interchange agreement, BSOR asserts that CSX is nonetheless obliged to accept BSOR shipments under its statutory obligation as a common carrier (49 U.S.C. § 11101) and under the terms of the Association of American Railroads (AAR) Interchange Rules. 2d Feas. Aff. ¶ 5. CSX contests these assertions. Letter from Paul Hitchcock dated May 31, 2006 at 2.

from Peter McManus Dated May 30, 2006, at 1-2.⁴

Discussion

In order to obtain a preliminary injunction, an applicant must show (1) that s/he is likely to suffer irreparable injury if such relief is denied and (2) there is either a likelihood of success on the merits or sufficiently serious questions going to the merits to make them a fair ground for litigation, with a balance of hardships tipping decidedly in the applicant's favor. See In re Feit & Drexler, Inc., 760 F.2d 406, 415 (2d Cir. 1985).

Additionally, where, as here, a private party seeks to enjoin enforcement of state power, the public interest must be balanced against the private interest asserted by the plaintiff. Brody v. Village of Port Chester, 261 F. 3d 288 (2d Cir. 2001).

⁴ This Court has received a letter dated May 31, 2006, from CSX's general counsel Paul Hitchcock, regarding this incident. Counsel asserts that, in his opinion, "There is no basis for CSX to recognize [BSOR's] alleged status [as a common carrier by rail at the Yard] absent some direction from the STB or this Court." Letter from Paul Hitchcock Dated May 31, 2006 at 2. According to counsel, common carrier status requires certification from the STB; BSOR's current operations at the Yard are no more than "industrial switching" operations. Id. at 1-2. CSX is presently willing to deliver these three cars on an ad hoc basis if the STB grants its permission for such an arrangement. Alternatively, it will enter into something called a "sidetrack agreement," without prejudice to BSOR's legal position, pending resolution of its status. Id. at 3. Notwithstanding its belief that BSOR requires STB authorization, CSX states that it does not seek to intervene in this matter and will abide by the ultimate decision of this Court regarding BSOR's operations. Id.

As stated at oral argument, the Court credits CSX's assertion that it is a neutral third party and that the actions described in the text were not dictated by the Village. Given the possibility of third party liability for aiding and abetting violations of Chapter 109 of the ICCTA (see below), CSX's position is perfectly understandable and is in its self-interest. Plaintiff's hypothesis of a "conspiracy" between CSX and the Village is simply not credible.

A. Irreparable Injury

BSOR contends that the Village's eminent domain proceedings against the Yard would foreclose BSOR's ability to do business in the area entirely. Furthermore, it asserts that any delay in its operations would cause the loss of potential business and customer goodwill, including its arrangement with Coastal LLC. Such factors have been held to constitute irreparable injury in an analogous case. Coastal Distribution LLC v. Town of Babylon, No. 05 Civ. 2032, 2006 WL 270252, *3-4 (E.D.N.Y. Jan. 31, 2006).

B. Likelihood of Success on the Merits

Plaintiff's principal argument is that the I.C.C. Termination Act ("ICCTA") preempts any action that might constitute state or local regulation of a common carrier by rail. The ICCTA, in relevant part, vests exclusive jurisdiction over "transportation by rail carriers," which includes the yards and facilities used by such carriers in providing rail transport, in the federal Surface Transportation Board.⁵ 49 U.S.C. § 10501(b)(1) (2000). It further gives the STB exclusive

⁵ Section 10501 states in full:

The jurisdiction of the Board over—

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

jurisdiction over “the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities.” 49 U.S.C. § 10501(b)(2) (2000).

In Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638, 645 (2d Cir. 2005), the Second Circuit held that the ICCTA preempted the enforcement of local zoning ordinances against a rail carrier seeking to construct a rail yard on land abutting a line of track. “The plain language of section 10501 reflects clear congressional intent to preempt state and local regulation of integral rail facilities.” Id. However, the court held that local authorities may continue to exercise “traditional police powers,” provided that:

the regulations protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions.

Id. at 643. “Electrical, plumbing and fire codes, direct environmental regulations enacted for the protection of the public health and safety, and other generally applicable, non-discriminatory regulations and permit requirements would seem to withstand preemption.” Id.

It is against the backdrop of Green Mountain that I consider this application for injunctive relief.

1. Local Regulation of the Yard, Including The Exercise of the Power of Eminent Domain, Is Preempted by the ICCTA.

According to plaintiff, the Village’s exercise of its eminent domain power against the Yard is barred by the terms of section 10501. What case law there is on the matter supports this argument: the ICCTA has been held to preempt eminent domain proceedings where the state

49 U.S.C. § 10501(b) (2000).

action would “prevent or unreasonably interfere with railroad operations.” Maumee & W. R.R. Corp., STB Fin. Docket No. 34354 (S.T.B. March 3, 2004); accord Dist. of Columbia v. 109,205.5 Square Feet of Land et al., No. Civ.A. 05-202, 2005 WL 975745, *3 (D.D.C. Apr. 21, 2005). Even state action couched as an effort to protect the health and safety of local residents is preempted by the broad scope of federal preemption in this area. See Wisc. Cent. Ltd. v. City of Marshfield, 160 F. Supp. 2d 1009 (W.D. Wisc. 2000).

The Village contends, correctly, that whether a certain state action is preempted requires a fact-specific inquiry. However, under the standard set out in Maumee and District of Columbia, there is no question that the Village’s intended exercise of its eminent domain power exceeds what is permitted under the ICCTA. The Village is threatening to acquire the entire parcel of land in fee simple. It is not looking for an easement over some small area, as was the case in District of Columbia. Given that the use of the Yard as a transloading facility requires at least a portion of the ten acre tract – the 1600-foot spur of track, the offloading facility itself, storage facilities, roads, and parking – acquisition of the entire parcel by eminent domain would plainly interfere with BSOR’s operations.

Dakota, Minn. & E. R.R. Corp. v. South Dakota, 236 F. Supp. 2d 989, 1005 (D.S.D. 2002), *rev’d on other grounds*, 362 F.3d 512 (8th Cir. 2004), does not compel a different result. That case stands only for the proposition that a state may delegate its eminent domain authority to a federally regulated railroad without running afoul of the ICCTA. However, it says nothing regarding federal preemption of state eminent domain action *against* railroad property.

Were the Village to acquire the entire site under New York’s Eminent Domain Procedures Law, (N.Y. EDPL §§ 101-709), it would interfere with BSOR’s operation of a rail

facility on the site. The exercise of the power of eminent domain against the Yard is thus preempted by the ICCTA as it is currently on the books. See p. 21 *infra*.

Plaintiff also asks for an injunction halting the enforcement of Village “zoning laws, permitting and pre-clearance requirements, and other local ordinances and regulations” that could interfere with its operations the Yard.

The Second Circuit has plainly held that a municipality’s zoning and pre-construction permit ordinances cannot be enforced against facilities for transportation by rail. See Green Mountain, 404 F.3d at 640. It has also held that neutral health and safety rules that can be enforced without any exercise of discretion (like fire safety codes) are enforceable in spite of STB preemption. Id. at 643.

As the Village points out, it has not yet attempted to enforce any permit or zoning regulations against BSOR. Its sole concern to date has been halting recycling and waste management operations at the Yard. However, because the Village’s ability to regulate the site is limited by the contours of Green Mountain, an appropriate injunction would bar enforcement of any local law or regulation except those that “protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions.” Id. What those exceptional regulations might be would no doubt have to abide the Village’s attempt to exercise its authority over the Yard, and this Court will not try to predict how the Village might choose to do that.

2. The Legality of BSOR’s Operations Does Not Affect Federal Preemption

The Village acknowledges STB preemption and the Second Circuit's decision in Green Mountain. But it argues that preemption does not apply in this case, because BSOR's operations as a common carrier by rail at the Yard are unlawful unless the STB grants plaintiff a license (in the form of a certificate pursuant to 49 U.S.C. § 10902) to operate as a common carrier in Westchester County.

BSOR, for its part, contends that (a) its operations are in compliance with the ICCTA, and (b) even if they were not, the ICCTA still preempts local authority over the tracks and their associated buildings and other facilities in the Yard.

BSOR's argument about the legality of its operations presents an interesting, if not entirely novel, question, one that is probably best resolved by the agency in charge of the nation's rail system: the Surface Transportation Board.

BSOR's contention that the Village's argument is irrelevant to the application of ICCTA preemption, however, is a question of law – one that no other case addresses, as far as I know, but a question of the sort that is ordinarily resolved by courts, not administrative agencies.

I conclude that BSOR is likely to prevail on the issue of whether ICCTA preemption applies, because the question about the legality of its operation does not affect the STB's exclusive jurisdiction over the site under § 10501 of the ICCTA. I thus reject the Village's argument that preemption is dependent on the legality of BSOR's operation.

a. Whether or Not It Is Operating Legally, BSOR Is a "Rail Carrier" Within the Meaning of the ICCTA, So ICCTA Preemption Applies.

Section 10501 gives the Board exclusive jurisdiction over "transportation by rail carriers" (including "yards and facilities" of such carriers) and "the.....operation, abandonment or

discontinuance of spur...or side tracks, or facilities, even if the tracks are located.....entirely in one State.” 49 U.S.C. § 10501(b) (2000).

Both parties agree that, for the ICCTA’s preemption provisions to apply, BSOR must be a “rail carrier” that provides “transportation.” And both parties agree that, if BSOR is a rail carrier engaged in the provision of transportation, then the ICCTA preempts local regulation of plaintiff’s facilities.

“Transportation” is “the movement of passengers or property, or both, by rail.” 49 U.S.C. § 10102(9) (2000). For reasons best known to the drafters of the law, the term “transportation” also includes certain things used in the “movement of passengers or property... by rail,” including “yards, property, and facilities.” Id. The Yard itself is plainly a “yard [or] facility” used for the transportation of property, which means it falls under the definition of “transportation.” Id.

Under the ICCTA, a “rail carrier” is simply a “a person providing common carrier railroad transportation for compensation, [excluding local mass transit operations].” 49 U.S.C. § 10102(5) (2000). Under the literal terms of that definition, BSOR is a rail carrier. Indeed, it is classified as a Class III Rail Carrier by the STB. It provides common carrier railroad transportation for compensation in Buffalo and its environs. And it holds itself out as providing common carriage – and if the evidence is to be believed, it has on one or two occasions provided common carriage – in Westchester County. Therefore, it is a rail carrier.

The provisions of § 10501(b) are clear enough, and they clearly apply to the operations of a rail carrier. There would seem to be nothing more to be said.

But the Village nonetheless contends that the preemption provisions of § 10501(b) do not

because BSOR's provision of common carriage out of Croton-on-Hudson is unlicensed, and therefore illegal. That, it argues, means that BSOR is not really a "rail carrier" – at least, not in this part of the world.

The argument goes something like this: Chapter 109 of the ICCTA (Licensing) provides that a, "Class III rail carrier providing transportation subject to the jurisdiction of the Board may acquire or operate an extended or additional rail line under this section *only if the Board issues a certificate authorizing such activity.*" 49 U.S.C. § 10902(a) (2000) (Emphasis added). BSOR is indisputably a Class III rail carrier, and it has not previously been authorized to provide service in Westchester County. The Village argues that BSOR's proposed operation is an attempt to acquire or operate an "extended or additional rail line" without first obtaining the necessary operating authority. Until it obtains that authority, it cannot provide common carriage, so it is not a "rail carrier" within the meaning of the ICCTA and its facility is not within the STB's exclusive jurisdiction.

BSOR responds in two ways. First, it argues that the legality of its Croton operation is irrelevant to the issue of STB preemption over the site. Second, plaintiff contends that the Village is wrong: it did not need to seek approval or obtain any certificate from the STB before commencing operations; neither did it need to file a notice of exemption, as NIR did (without success). BSOR relies on an exception (not an exemption) to § 10902(a): 49 U.S.C. § 10906, which states, "The Board *does not have authority under this chapter* over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks." BSOR contends that the 1600 feet of track in the Yard is a "side" or "spur" track,

and so its operation in Croton is not considered to be an “extended or additional line.”⁶

The Village insists that the question about the legality of what BSOR is doing in Croton-on-Hudson must be resolved before this court can decide whether plaintiff is a “rail carrier” and so is likely to succeed on the merits of its application for injunctive relief. And the Village asserts that the preferred procedure for resolving that question is to refer the issue to the STB and to stay this action until the STB issues a ruling.

If the legality of BSOR’s new Croton operation were germane to the reach of section 10501, I would without hesitation refer this matter to the STB. Certainly someone should look into whether BSOR’s Westchester operation requires a certificate of authority, and under the doctrine of “primary jurisdiction” articulated by the Supreme Court in U.S. v. Western Pac. R. Co., 352 U.S. 59, 64 (1956), that someone ought to be the Surface Transportation Board. Determining whether BSOR requires a license to operate in the proposed fashion involves far more than simply interpreting the statute. The reviewing authority must decide whether an existing common carrier by rail may expand its base of operations to a new area (which is what BSOR says that it wants to do) without first obtaining a license from the STB by (1) first

⁶ The parties in this case have taken what at first appear to be contradictory positions: BSOR, seeking STB preemption of local action, asserts that the STB has no authority over its operations in the Yard, while the Village contends that preemption does not apply because the Yard operations are subject to STB authorization, which has not yet been given (or even requested). These positions arise from the presence of apparently contradictory provisions in the ICCTA itself: 49 U.S.C. § 10501(b)(2), which vests *exclusive jurisdiction* over the construction and operation of side and spur tracks in the STB, and 49 U.S.C. § 10906, which strips the STB of *authority* over the same.

One court has squared these two seemingly contradictory provisions. The Seventh Circuit has concluded that while entities may construct, transfer, or operate side or spur tracks without STB approval pursuant to 49 U.S.C. § 10906, the STB retains *exclusive jurisdiction* over those sites that preempts state or local regulation of such tracks under 49 U.S.C. § 10501(b)(2). United Transp. Union – Ill. Legislative Bd. v. Surface Transp. Bd., 183 F.3d 606, 612 (7th Cir. 1999).

acquiring track that would ordinarily be excepted from STB authority because it is “switch” or “spur” track, and then (2) contracting with other carriers for interchange rights over trackage outside its licensed operating area. This involves analysis, not only of the “intended use” of trackage, see Nicholson v. Interstate Comm. Comm’n, 711 F.2d 364, 367 (D.C. Cir. 1983); but also of the “purpose and effect” of the proposed arrangement. Texas & Pac. Ry. Co. v. Gulf. Colo. & Santa Fe Ry. Co., 270 U.S. 266, 46 S. Ct. 263 (1926); Brotherhood of Locomotive Engineers v. U.S., 101 F.3d 718, 728 (D.C. Cir. 1996). As I learned when I delved (more deeply than proved necessary) into these matters, these are complicated and arcane questions, on which the ICC and STB have spoken in the past (albeit not on these precise facts). Clearly, such matters should be resolved as a matter of national rail policy, not in a piecemeal fashion by unspecialized district courts.

Additionally, in his highly informative letter to the Court (for which I express my gratitude) the General Counsel of CSX advises the court that the STB also exercises considerable oversight over interchange and trackage agreements between common carriers, such as the ones BSOR had told the court it will have to enter into in order to fulfill its common carriage contracts with Coastal LLC and with any future customers. This factor, too, militates in favor of having the STB, not me, look into the legality of BSOR’s Croton-on-Hudson operation.

However, I have concluded that these thorny issues need not be resolved in order to determine this motion. Even if BSOR is operating illegally, the site is subject to exclusive STB jurisdiction as long as BSOR is providing common carriage by rail.

I reject the Village’s argument that, if BSOR’s local operation is illegal (because it is unlicensed), BSOR is not a “rail carrier” for ICCTA purposes in this part of the world. If BSOR

is required to obtain a license from the STB in order to do what it claims to be doing at the Yard, then it is a “rail carrier” that is conducting an illegal operation outside of the area where it is licensed to provide service. But as long as it is providing common carriage for compensation somewhere – and it is – it is still a “rail carrier” within the meaning of the statute. The Yard is a “facility” under the statute, and BSOR proposes to “move property by rail” out of Croton. Under the ICCTA, that is sufficient to trigger STB preemption over both BSOR’s operations and its facilities.

It actually makes no sense to subject only properly “licensed” rail carriers to STB jurisdiction. The ICCTA and its predecessor law, the Interstate Commerce Act, were passed in order to subject *all common carriages by rail* to federal oversight – and, not incidentally, to punish any railroad that provided common carriage without complying with the statutory scheme. If BSOR, a Class III rail carrier, is conducting unauthorized common carrier operations from Westchester County, in violation of Chapter 109 of the ICCTA, the statute itself provides remedies: a fine of up to \$5,000 per violation per day. 49 U.S.C. § 11901(a), see also *Gitomer Aff.* ¶ 23. Violations of Chapter 109 (of which sections 10902 and 10906 are part) also carry civil penalties of up to \$5,000 for any person “authorizing, consenting to, or permitting” such violation. 49 U.S.C. § 11901(c).⁷

The procedure for enforcing such violations, which is set forth in Chapter 117, is for “any person,” (which would include the Village of Croton-on-Hudson) to file a complaint with the Surface Transportation Board. 49 U.S.C. § 11701(a) (2000). The Board, upon receipt of a

⁷ As far as this court is concerned, this third-party penalty statute explains CSX’s reluctance to do anything that its lawyers believe would violate the ICCTA.

complaint, may commence an investigation and take “take appropriate action to compel compliance,” including a civil action for statutory penalties as described above. Id.; see also 49 U.S.C. § 11901(f) (2000). A complaint may be filed by any “person,” including a government agency, regardless of whether that entity suffered injury due to the alleged violation. 49 U.S.C. § 11701(b) (2000).

Another remedial section of the ICCTA, 49 U.S.C. § 11702, specifically grants the STB power to seek injunctive relief for violations of Chapter 109 through a civil action. 49 U.S.C. § 11702.

These are the exclusive, Congressionally-mandated remedies for BSOR’s purported violation of the ICCTA. Significantly, Congress has not vested the federal courts with authority to impose penalties for a violation of Chapter 109’s licensing regulations unless the STB brings a civil proceeding. Certainly nothing in the ICCTA suggests that a carrier’s violation of the licensing provisions of that Act renders it and its facilities subject to the jurisdiction of states and localities, thereby thwarting Congress’ clear intent that rail carrier facilities of all sorts be created, operated and discontinued only at the behest of the Surface Transportation Board. In fact, section 10501 clearly states that “remedies provided under this part... preempt the remedies provided under Federal or State law.” 49 U.S.C. § 10501(b). To put it succinctly, illegal operations by a rail carrier do not preempt preemption.

Therefore, the purported illegality of BSOR’s operation in Croton-on-Hudson does not impact the STB’s exclusive jurisdiction over the site – at least, while the “yard or facility” is under lease to a “rail carrier” that is purporting to provide “transportation” from that site. Moreover, the “abandonment” or “discontinuance” of what clearly appears to be “spur...or side

tracks, or facilities” would itself be subject to STB jurisdiction, even if the “rail carrier” were not providing “transportation” to and from the site. 49 U.S.C. § 10501(b)(2) (2000). Accordingly, the ICCTA preempts the Village’s exercise of eminent domain or other regulatory authority over the Yard, except to the minimal extent permitted by Green Mountain.

3. The Doctrine of Unclean Hands Does not Militate Against Entry of an Injunction.

During oral arguments, defendant suggested that plaintiff’s request for equitable relief should be denied under the “unclean hands” doctrine.

“The equitable powers of this court can never be exerted in behalf of one who has acted fraudulently, or who by deceit or any unfair means has gained an advantage.” PenneCom B.V. v. Merrill Lynch & Co., Inc., 372 F.3d 488, 493 (2d Cir. 2004) (quoting Bein v. Heath, 47 U.S. 228, 247 (1848)).

The purported fraud, deceit or unfair means that BSOR employed was not identified with precision. If it is BSOR’s unlicensed provision of common carriage from Croton, then, as just discussed, the Village’s remedy lies elsewhere: it should file a complaint with the STB and trigger the enforcement provisions of 49 U.S.C. §§ 11701-11901.

The very act of leasing the site to a “rail carrier” might also be the unfair means (although it is hard to see how that open and notorious action could constitute fraud or deceit). At oral argument, the Village announced its belief that the lease to BSOR was of a piece with numerous similar transactions that are taking place all over the country when municipalities try to close down noxious or offensive industrial uses of sites within their boundaries. According to counsel for the Village, the practice of placing industrial land containing trackage in the hands of

a real railroad like BSOR – or even an imaginary “railroad” like BSOR’s predecessor, NIR – in an effort to divest municipalities of the ability to regulate land within their borders has become so widespread that Congress is convening hearings on the issue, to see whether the ICCTA requires amending.

If indeed these representations by counsel are true (and it is nothing more than a lawyer’s representation; there is no evidence in the record of any such widespread practice), then there is reason for concern, since this Court very much doubts that Congress intended such a result. But the very fact that Congress is or may be convening hearings to decide whether it should plug a loophole in the law suggests that, as things stand now, the Village is preempted from condemning or regulating the site, except by application of neutral health and safety regulations as permitted by Green Mountain. Taking advantage of loopholes in laws is a time-honored American tradition. It is not a deceitful or unfair means to an end. And (once again), the Village’s remedy lies in a venue other than this Court: it can call Senators Schumer and Clinton and Representative Kelley, and urge them to support an amendment to the ICCTA to correct any manifest injustice that is being worked by the law’s loose language.

C. The Equities Balance in Favor of an Injunction

As between the parties to this lawsuit, the balance of hardship tips in favor of plaintiff.

BSOR faces a draconian result if the Village condemns the property: it will be forced to cease operations at the site. The Village has already taken the first step toward condemnation, by holding a public hearing on the possible condemnation of the site at which the Village’s need for a new Department of Public Works facility was presented in some detail. N.Y. EDPL §§ 202-203

(2006). If the Village commences a proceeding under Article 4 of EDPL, the land will almost certainly be condemned. The present record before this Court indicates that the land is certainly intended for a constitutionally permissible “public use.” See Kelo v. City of New London, Conn., - - U.S. - - , 125 S. Ct. 2655, 2663 (2005). Provided that this requirement is met, an aggrieved party’s right of appeal seems limited to the propriety of the condemnation proceedings themselves. See N.Y. EDPL § 207(c) (2006). And under the EDPL, the municipality holds nearly all the cards, with any aggrieved party having little right to participate in the initial determination and limited right to judicial review thereafter. See Brody v. Village of Port Chester, 434 F.3d 121, 132-33 (2d Cir. 2005). Only intervention by a court early in the condemnation process can stave off a taking that the Village is determined to make.

On the other hand, a temporary injunction against further takings or regulatory activities at the site has very little downside for the Village. BSOR asserts that its operations at the Yard will in fact serve the public interest, by increasing the flow of goods into Westchester county, and I can hardly find that an increased flow of goods into Westchester County is NOT in the public interest.

Plaintiff also asserts that its operations pose no risk to the public health or safety, because that it is not in the business of transporting hazardous materials. Feas. Aff. ¶ 42. Significantly, BSOR represented to the Court during oral argument that no shipment of waste materials is planned. On the record before me, that representation is credible. BSOR is not generally in the business of carrying such materials and it does not appear to have any necessary permits from the New York DEC or Westchester County to do so. Counsel has represented to this Court that plaintiff has no immediate plans to carry such waste. (Admittedly, counsel fudged when asked

whether it would so represent for all time). So there does not appear to be any imminent danger that waste management or recycling operations, which the state courts have already found inimical to the health and safety of Village residents, will resume at the Yard. And make no mistake: whatever the Village says about needing a new public works facility, it is the prevention of waste transfer (or similar) operations at the Yard – which seemed a distinct possibility as recently as a year ago – that underlies the Village’s interest in exercising its eminent domain powers.

I nonetheless acknowledge that the Village has advised the Court that it wants to acquire the Yard for use as a municipal storage lot for road and sewer trucks, salt, and other such items. Def. Opp. at 3. A temporary ban on the acquisition of this particular site for that purpose, however, is of little moment. Croton has apparently been seeking such a site since the mid-1980s. Id. Only in recent months has it focused on using the Yard for this purpose.

Moreover, in its (understandable) ire at having been blindsided by plaintiff (and its lessor), the Village revealed to the Court that it would have been willing to discuss a division of the site between the portions it might need and the part BSOR wanted to use – if only plaintiff had come to it before commencing a lawsuit. This suggests that the Village may not require the portion of the property devoted to rail-related uses for its public works operation.

In light of the above, I find that the Village’s interest in acquiring the site, while real, will not be harmed by the issuance of a preliminary injunction. It will work only a short delay in a process that has taken twenty years to get to this point.

Of course, the public has an interest in prohibiting the provision of unauthorized rail service. And if, as the Village alleges, BSOR’s proposed “common carriage” operation out of the

Yard needs to be licensed, there is a public interest in stopping illegal activity.

But that is a general public interest, not an interest of the Village of Croton-on-Hudson. And the public's interest can best be vindicated by appropriate proceedings before the STB – not by permitting the Village to assert regulatory authority in a circumstance where Congress wants that authority to rest solely with the STB.

D. Commerce Clause

Plaintiff also contends that it is entitled to relief under the Commerce Clause of the Constitution, as made actionable by 28 U.S.C. § 2201 (Count II) or 28 U.S.C. § 1983 (Count III). The Commerce Clause preempts state regulations that place a disparate burden on interstate commerce clearly excessive in relation to local benefits. United Haulers Ass'n Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 438 F.3d 150, 156-57 (2d Cir. 2006).

“It is a fundamental rule of judicial restraint, however, that this Court will not reach constitutional questions in advance of the necessity of deciding them.” Three Affiliated Tribes of Fort Berthold Reservation v. World Eng. PC, 467 U.S. 138, 157, 104 S. Ct. 2267 (1984). Where, as here, plaintiff has prevailed on its first cause of action, there is no need to reach the question of whether it has stated a valid constitutional claim under the Commerce Clause.

The Terms of the Injunction

Plaintiff's motion for a preliminary injunction against the Village's acquisition of the Yard by eminent domain is granted. However, this injunction is conditioned on (1) BSOR's posting of an undertaking with the Court in the amount of \$100,000; and (2) BSOR's continued

refusal to accept solid waste materials at the Yard.

The setting of a bond requires little or no explanation. Fed. R. Civ. P. 65(c) provides, “No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper.” That language has been held to vest “wide discretion” in the district courts to set the bond amount. Doctor’s Assoc’s, Inc. v. Stuart, 85 F.3d 975, 985 (2d Cir. 1996). It is the determination of this Court that \$100,000 is an amount sufficient to redress any possible harm to the Village as a result of the injunction’s delay in the condemnation of the site.

The other condition I am setting on the preliminary injunction requires more fulsome comment. A district court, in the exercise of its equity powers, may “impose conditions requiring maintenance of the status quo.... when the injunctive powers of the court are invoked and the conditions are necessary to do justice between the parties.” Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R. Co., 363 U.S. 528, 531-32, 80 S. Ct. 1326 (1960); accord U.S. v. Bedford Assoc’s, 618 F.2d 904, 914 (2d Cir. 1980).

Without question, the “status quo” at the Yard includes the absence of waste management, storage, or transshipment operations. The Village has litigated that position extensively, and won. While I have concluded that the prospect of harm resulting from the shipment of waste materials to and from the Yard is (at present) remote, the Village is legitimately concerned about that prospect. Before any railroad was involved with this site, the Village received two decisions from the State Supreme Court that shut down the waste management operation at the site. The timing of the lease, without more, suggests that BSOR’s acquisition of an interest in the property is as much a litigation tactic as a business decision. The

Village knows nothing about the relationship between BSOR and NIR, Greentree and Metro Enviro, because BSOR's very existence, and its lease, appear to have been kept carefully secret from the Village until the commencement of this lawsuit..

During oral arguments, the Village proposed that BSOR be enjoined from operating common carrier operations at the Yard altogether while the STB addresses the underlying matter.⁸ I treat that request as a cross-motion for a preliminary injunction, and I deny it, because the Village has not demonstrated that it and its citizens will suffer any irreparable harm in the event that BSOR commences shipment of non-hazardous materials at the Yard. At present, the only threat of harm to the Village comes from increased truck traffic and commercial activity in the area. Since BSOR cannot begin any significant operation at the Yard as long as CSX harbors legitimate doubts about the legality of the contemplated enterprise and appears unwilling to handle shipments bound for the Yard without having those issues resolved, the minimal risk of harm to the public interest does not create sufficient reason for this Court to enjoin BSOR's operations.

Nonetheless, I acknowledge the Village's abiding interest in preventing the commencement of waste management and recycling operations at the site, and I conclude that the equitable remedy of injunction *pendente lite* should be conditioned on the maintenance of the status quo as ordered by the state courts: no waste hauling of any sort. This condition allows BSOR to operate without opening up the can of worms that would result if this court were to issue an order that, in essence, overturned the work of the New York State Supreme Court.

⁸The Village also offered that it would agree to halt its eminent domain proceedings voluntarily if BSOR agreed to halt all operations at the Yard *pendente lite*. That offer was rejected by BSOR's attorney.

Nothing in the ICCTA requires me to ignore the fact that the state courts, over years of litigation concerning this site, have expressed a concern about the conduct of waste management and recycling operations in the Yard, and have enjoined other parties (albeit not plaintiff) from conducting such operations. In view of the findings of those courts, sitting in equity, I conclude that it is appropriate to maintain the status quo *vis-a-vis* waste management until there is some final resolution of the matters contested in this lawsuit.

If the Village intends to persist in its argument that the site is not within the exclusive jurisdiction of the Surface Transportation Board, and can convince me that the resolution of that question is necessary to the final resolution of this lawsuit, I will, as indicated previously, refer appropriate questions to the STB for resolution.⁹ This action would have to be stayed during the pendency of any such reference. Reiter v. Cooper, 507 U.S. 258, 268, 113 S. Ct. 1213 (1993). However, I decline to make such a reference now for two reasons: I do not believe reference is necessary to the resolution of this motion, and the Village may wish to take an immediate appeal from the entry of the preliminary injunction.

Conclusion

For the reasons stated above, BSOR's motion for a preliminary injunction halting the Village's eminent domain proceedings is granted. This injunction is conditioned on BSOR's

⁹ At present, it appears to the court that the following questions should be answered by the STB: (a) whether BSOR's operations at the Yard as a common carrier by rail constitute the operation of an additional or extended line of rail under the authority of the Board under 49 U.S.C. § 10902, and whether BSOR can avail itself of the statutory exception under 49 U.S.C. § 10906; (b) whether, if a certificate is required for its operations, such a certificate should be granted. There may be other questions to be referred as well.

The Village's cross-motion for an injunction of all BSOR activity at the Yard is denied.

This constitutes the decision and order of the Court.

Dated: June 12, 2006

A handwritten signature in black ink, appearing to read "Geller M. Mel", written over a horizontal line.

U.S.D.J.

BY FAX TO ALL COUNSEL