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Roy Goldberg
Writer's Direct Line: (202) 218-0007

Our File Number: 01ZY-103259

February 17, 2005

VIA MESSENGER
District of Columbia Board of Zoning Adjustment
c/o District of Columbia Office of Zoning
441 4th Street, N.W., Suite 210
Washington, D.C. 20001

Re: Case Number 17288 (Hearing Date March 15, 2005)
Appeal of Eastern Trans-Waste of Maryland, Inc.
1315 First Street, S.E., Square 703, Lot 54
Decision of Department of Consumer and Regulatory Affairs

Dear Sir or Madam:

Enclosed please find an original plus 20 copies of the supplemental exhibits of Appellant to be considered in this appeal:

11. Memorandum from Kendolyn Hodges-Simons, Interim Chief, Office of Enforcement, Compliance & Environmental Justice, D.C. Department of Health, to Denzil Nobile, Deputy Administrator, Building and Land Regulation Administration, DCRA.

12. Excerpts from brief filed by defendants in *Eastern Trans-Waste of Maryland, Inc. v. District of Columbia, et al.*, Civil Action No. 05-0032 (PLF), on February 15, 2005.

Please contact me at (202) 218-0007 if you have any questions.

Sincerely,

Roy Goldberg

SHEPPARD MULLIN RICHTER & HAMPTON LLP
Counsel for Appellant Eastern Trans-Waste of Maryland, Inc.

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Enclosures

BZA
Case No. 17288
Exhibit No. 17

Board of Zoning Adjustment
District of Columbia
CASE NO. 17288
EXHIBIT NO. 17

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Health
Environmental Health Administration

Office of Enforcement, Compliance & Environmental Justice



MEMORANDUM

TO: Denzil Noble
Deputy Administrator
Building and Land Regulation Administration
Department of Consumer and Regulatory Affairs
Attn: MarQuette Sanders

THROUGH: Kendolyn Hodges-Simons
Interim Chief, Office of Enforcement, Compliance
& Environmental Justice

FROM: Ibrahim Bullo
DOH Environmental Review Coordinator

DATE: September 14, 2004

SUBJECT: Environmental Assessment: Eastern Trans Waste of Maryland Project

Attached is an environmental assessment of the subject project. The Department of Health has reviewed the Environmental Impact Screening Form (EISF) and related documents for this project, with regard to our areas of concern as specified in the attached document. In summary, we find no apparent significant adverse impact or likelihood of substantial negative impact on the environment as a result of the proposed project. Therefore, the Department of Health does not recommend preparation of an Environmental Impact Statement (EIS) for this project.

Please contact me at 535-2506 should you have any questions about this assessment.

Attachment

Copy via e-mail:
David A. Clark, Acting Director, DCRA
Doreen Thompson, Interim Senior Deputy Director
Environmental Health Administration, DOH
Attn: Lisa Davis
Kenneth Campbell, General Counsel, DOH

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EASTERN TRANS-WASTE OF MARYLAND, INC., Plaintiff, v. DISTRICT OF COLUMBIA, *et al.*, Defendants.	)	Civil Action No. 05-0032 (PLF)

DEFENDANTS' MOTION TO DISMISS OR,
IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 12(b)(6) and 56(b), defendants District of Columbia, D.C. Department of Consumer and Regulatory Affairs, Denzil Noble, and Andrew Altman hereby move this Honorable Court to dismiss the complaint based on plaintiff's failure to state a claim upon which relief can be granted or, in the alternative, for summary judgment.

The grounds and the reasons are set forth more fully in the accompanying Memorandum of Points and Authorities and alternative proposed Orders. As required by LCvR 56.1, a Statement of Material Facts As to Which There is No Genuine Issue has been provided.

DATE: February 15, 2005

Respectfully submitted,

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GEORGE C. VALENTINE
Deputy Attorney General, D.C.
Civil Litigation Division

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EASTERN TRANS-WASTE OF MARYLAND, INC., Plaintiff,	)	
v.	)	Civil Action No. 05-0032 (PLF)
DISTRICT OF COLUMBIA, *et al.*, Defendants.	)	

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS OR,
IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Defendants,[1] pursuant to Fed. R. Civ. P. 12(b)(6) and 56(b), have moved this Court to dismiss the complaint or, in the alternative, for summary judgment. This memorandum of points and authorities is provided in support of the defendants' dispositive motion in accordance with LCvR 7.1(a). As required by LCvR 56.1, a Statement of Material Facts As to Which There is No Genuine Issue ("SMF") has been provided.

The Court should deny the requested relief because plaintiff's claims are substantively meritless and entirely local in character. This complaint reflects either a profound misunderstanding of eminent-domain law or, more likely, a willful and cynical ploy for financial

[1] Plaintiffs have named as defendants in this case the District of Columbia, the D.C. Department of Consumer and Regulatory Affairs ("DCRA"), Denzil Noble (Acting Administrator of the Building and Land Regulation Administration of DCRA), and Andrew Altman (formerly Director of the D.C. Office of Planning) (collectively, "the District"). Defendants Noble and Altman are named individually and in their official capacities.

Plaintiff requested and was granted a meeting with DCRA officials, on January 27, 2004, to challenge DCRA's initial determination that the proposed work would amount to a "substantial modification." DEx. 3. On or about April 1, 2004, plaintiff submitted not an EIS, but an Environmental Impact Screening Form ("EISF"), for construction projects that have the potential of negative environmental impacts. DEx. 4; SMF ¶ 4; *see* The D.C. Environmental Policy Act, *codified as amended* at D.C. Official Code §§ 8-109.01 *et seq.* (2001 ed.) The EISF, as its name indicates, is a preliminary step taken to capture information that will assist various District agencies in making an informed decision as to whether, for any given project, the more-detailed EIS should be required. No permit or license for a proposed project may be issued until the required environmental impact review is completed. 20 DCMR § 7203.6.

DCRA, pursuant to established procedure, circulated plaintiff's EISF to the various agencies that regularly review proposed construction projects for potential negative environmental impacts: the Department of Public Works ("DPW"), the Department of Transportation, the Water and Sewer Authority, the Department of Health ("DOH"), and the Office of Planning ("OP"). *See* 20 DCMR § 7203 (DCRA is "lead agency" for purposes of EISF review).

OP in its EISF report on plaintiff's proposed project dated May 3, 2004, erroneously noted that the project would add "approximately 10 new employees" and "three to five additional vehicles" to the site. DEx. 5; Complaint ¶ 34. In fact, those changes would be, according to plaintiff, temporary, *i.e.*, only for the duration of the construction. Complaint ¶ 29 (citing EISF). The OP report noted correctly, however, that the location of the site had been rezoned almost three years ago to the "Capitol Gateway (CG) Overlay" district. DEx. 5 at 1; SMF ¶ 5; *see also*

52 D.C. Reg. 63–78 (Jan. 7, 2005) (Notice of Final Rulemaking and Zoning Commission Order No. 971).[3]

The OP report concluded that, as a result of the rezoning, "existing industrial uses with valid Certificates of Occupancy shall be deemed conforming but are not entitled to expand." DEx. 5 at 1; SMF ¶ 7; *see also* 52 D.C. Reg. 66–67, *codified as amended at* 11 DCMR § 1605.1.[4]

By memo dated July 12, 2004, DOH notified DCRA that, after an inspection at the site, DOH required more information from ETW on their proposed construction, and requested that DCRA have ETW contact DOH directly. DEx. 6. By letter dated July 14, 2004, DCRA passed this request to ETW's agent. DEx. 7.

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[3] The referenced rezoning was first proposed, and public hearings held, in November of 1996. *See* 52 D.C. Reg. at 63. The Zoning Commission "re-advertised the case on June 15, 2001, and an additional public hearing was held on September 20, 2001." *Id.* Pursuant to District law, applications for building permits received after a proposed zoning change has been "set down" (*i.e.*, after the Zoning Commission has decided to hold a public hearing on the proposed change) are processed according to the proposed rezoning. 11 DCMR § 3202.5(b); SMF ¶ 7. *See also* 52 D.C. Reg. at 69 (rezoning made permanent by publication of final order had been in place since August 15, 2001, the date of the advertisement of the revised notice of proposed rulemaking).

[4] *Id.*:

> The Zoning Commission concluded that the existing commercial or industrial uses that are first permitted in a CM or M industrial zone should not be permitted to expand, because the uses are inconsistent with the intent of these map and text amendments, and the Commission's vision for the Overlay area. The Commission recognized the importance of the uses to the District, but concluded that allowing the expansion of such uses would be contrary to the efforts to change the character of the area and stimulate redevelopment of the Overlay area as a residential and commercial mixed-use community. Therefore, the Zoning Commission modified the advertised language to deem existing industrial uses conforming, but to prohibit their expansion.

Although DCRA had notified ETW's agent to contact DOH directly, the agent responded by letter to DCRA on July 28, 2004, purportedly addressing DOH's concerns. DEx. 8. By letter dated the next day—July 29—DCRA again "strongly encourage[d]" ETW's agent to communicate directly with DOH staff. DEx. 9.

By memorandum dated September 14, 2004, DOH ultimately determined that there would be no apparent significant adverse impact or likelihood of substantial negative impact on the environment as a result of the proposed project. DEx. 10; SMF ¶ 8. On September 23, 2004, representatives of ETW met with DCRA to discuss the status of the project. DEx. 11; SMF ¶ 9. At that time, ETW was told that the project could not proceed (*i.e.*, DCRA could not issue the building permit) until the zoning issues raised by OP were resolved. DEx. 11; SMF ¶ 9. ETW was informed then that it would have to seek a variance from the Board of Zoning Adjustment ("BZA"), in light of the rezoning of the site. DEx. 11; SMF ¶ 9. DCRA officially referred the matter to the BZA on or about October 15, 2004. DEx. 12; SMF ¶ 9. ETW has appealed DCRA's denial of its building permit application, and a hearing on the appeal has been scheduled by the BZA for March 15, 2005. DEx. 13; SMF ¶ 10. ETW's appeal at the BZA appears to be based solely on OP's erroneous conclusion regarding ETW's EISF, and not on DCRA's stated reason for denial of the application—the underlying zoning change, which mandates a variance. *See* DEx. 14 (copy of ETW's brief to the BZA).

As of the date of the instant motion, neither ETW nor any other party has legally challenged the rezoning of the area in the Capital Gateway Overlay. SMF ¶ 11.[5]

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[5] Despite this fact, plaintiff here "disputes" the referenced rezoning by the Zoning Commission. *See* Complaint ¶ 15 ("ETW does not accept that this attempt [sic] change is either effective or legal . . . .").