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February 25, 2005

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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 Pre-Hearing Brief of Appellant Eastern Trans-Waste of Maryland, Inc.

Sincerely,

Roy Goldberg

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

Enclosures

BZA
Case No. 17288
Exhibit No. 20

Board of Zoning Adjustment
District of Columbia
CASE NO. 17288
EXHIBIT NO. 20

BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

APPEAL OF EASTERN TRANS-WASTE OF MARYLAND, INC., 1315 First Street, S.E. (Square 703, Lot 54)	)	BZA Appeal No. 17288
	)	Hearing Date: March 15, 2005

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PRE-HEARING BRIEF OF APPELLANT EASTERN TRANS-WASTE OF MARYLAND, INC.

SHEPPARD MULLIN RICHTER & HAMPTON LLP

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Counsel for Appellant
Eastern Trans-Waste of Maryland, Inc.

Dated: February 25, 2005

INTRODUCTION

Appellant Eastern Trans-Waste of Maryland, Inc. ("Appellant" or "ETW") respectfully requests that the Board reverse the decision of the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") not to grant Appellant's October 10, 2003 application for a construction permit to make minor internal repairs and improvements to its solid waste transfer facility at 1315 First Street, N.E., Square 703, Lot 54 (the "Facility"). DCRA's decision was arbitrary and capricious because it was based on a factual determination – that the proposed repairs and improvements would result in an enlargement of the Facility – that was: (1) not based on any evidence in the record before the agency, and (2) directly contrary to the undisputed evidence in the record before the agency.

In its November 3, 2004 memorandum referring ETW's application to the Board, DCRA characterized the planned project as a "proposed enlargement to an existing non-conforming use" at the Facility. Appeal Ex. 4. This statement was erroneous for two reasons:

(1) First, DCRA's characterization of the current use of the Facility as a "non-conforming" use was incorrect because of the D.C. Zoning Commission's determination that the continuation of industrial uses in areas that were zoned M Industrial prior to recent zoning amendments to effectuate the Capitol Gateway Overlay initiative are a deemed to be "conforming" uses. *See* 52 D.C. Reg. 63, 78 (Jan. 5, 2005) ("A commercial or industrial use that is first permitted in the CM or M Zone Districts and that is in existence with a valid Certificate of Occupancy *as of the date the provisions of this Chapter first became effective* shall be deemed a conforming use, but shall not be entitled to expand"); *see also* 11 D.C.M.R. 1605.1. Prior to the effective date of the Capitol Gateway Overlay zoning changes, the Facility was operating under a valid Certificate of Occupancy in an M Zone District.

(2) Second, there is no evidence in the agency record that the repairs and improvements proposed by ETW would result in an "enlargement" of the current Facility. Nothing in the proposed work would have increased the square footage of the Facility. Furthermore, in its Environmental Impact Screening Form ("EISF") dated March 30, 2004 (Appeal Ex. 3), ETW made it clear that following completion of the construction phase there would be "no change to existing operations." EISF, at 2. DCRA issued no findings to support its apparent conclusion that the changes would enlarge the Facility. However, DCRA apparently acted upon the incorrect information it received from the District of Columbia Office of Planning in a memorandum to DCRA dated May 3, 2004 (Appeal Ex. 5). The Office of Planning erroneously characterized the proposed changes as resulting in the addition of "approximately 10 new employees with between three to five additional vehicles." Ex. 5, at 1. However, as the District of Columbia Office of the Attorney General has conceded, the Office of Planning report was erroneous. Ex. 12 to Appeal (submitted on February 17, 2005). It was clearly arbitrary and capricious for the DCRA to base its findings on a conclusion that was not only unsupported in the record, but was directly contrary to the undisputed facts in the record.

As set forth above, the Zoning Commission has stated that an industrial use that was permitted within an M Zone and was in existence with a valid Certificate of Occupancy as of the date that the Capitol Gateway Overlay provisions became effective "shall be deemed a conforming use, but shall not be entitled to expand." 52 D.C. Reg. at 78; *see also* 11 D.C.M.R. 1605.1. There is nothing in the record before the DCRA to indicate that it concluded that the proposed changes would result in an expansion of the Facility. However, even if such a conclusion could be implied from the DCRA's apparent decision that the proposed changes would "enlarge" the Facility, that decision would be clearly erroneous. Under well-settled case

law the types of repairs and improvements proposed by ETW would not constitute an "expansion" of the Facility.

STATEMENT OF FACTS

The Facility

The Facility is located at 1315 First Street, S.E. Since at least the early 1990's it has operated as a solid waste transfer facility at that site. ETW possesses a Certificate of Occupancy (No. B 162503) issued on March 17, 1992 for the purposes of "Warehouse (Waste & Rec.)." For at least a decade while ETW was operating the Facility, it was zoned M for Industrial.

The Construction Permit Application

After determining that it desired to make some minor internal repairs and improvements to the Facility, ETW on October 10, 2003, submitted to DCRA a construction permit application for these changes (the "Application"). Appeal Ex. 1. The "Contract Agreement" with the vendor selected to perform the work (enclosed within the Application) described the work as: "Construction of weight scale replace/repair: weight scale, structural steel, roof, siding, concrete floor, overhead doors, bathroom, scale house." The cost estimate was $400,000. The environmental intake form stated that the project was solely an interior renovation with no change in the use or capacity of the structure being renovated. The project would not increase the square footage of the Facility.

The Environmental Impact Screening Form

The DCRA initially approved the Application for zoning purposes. Appeal Ex. 1, at 1. However, on January 12, 2004, DCRA sent a letter to ETW which stated that "Based on a review of the building plans and associated application, and pursuant to the DC Environmental Policy Act, it has been determined that the proposed work is substantial, requiring the submission of an Environmental Impact Statement (EIS) to DCRA. Unless and until there is a finding of no

adverse effect, or an adverse effect is identified but a determination is made that the public health, safety or welfare is not imminently and substantially endangered, DCRA cannot issue the building permit, as requested." Appeal Ex. 2. On March 30, 2004, ETW submitted an Environmental Impact Screening Form "at the request of Ms. Lorraine Bennett, and Mr. Denzil Noble of the D.C. Department of Consumer and Regulatory Affairs." Appeal Ex. 3, at 1.

The EISF described the "Project Definition" as follows:

> "Construction of one weight scale: Install one new 50' weight scale in addition to existing scales. State, Federal Laws and Business procedures require that trucks entering and leaving this facility must be weighed. Scales can frequently get stuck, break or become unreliable. Currently, no back-up scale is causing many customer complaints. When a scale is not operational, back-up's occur and customers must endure long waiting times. The physical size of the building is a limited factor to any increase or growth in business operations. This additional scale is a responsible business decision, and has no potential to have any environmental impact."
>
> "Repair/Replace Existing Structural Steel: Due to the age, damage from snowstorm of 2002/2003, no engineering data and physical damage. The steel needs replacement."
>
> "Existing Weight Scale: Due to age this scale is due for replacement. See picture number one."
>
> "Existing Roof Structure: Due to age, damage from snowstorm of 2002/2003, a portion of the roof and sub-structure has failed requiring immediate replacement. See picture number two."
>
> "Existing Siding: Due to age, damage from the snowstorm of 2002/2003, vehicular damage, mixed construction materials, replace approximately 212 linear feet of brick, metal, grates, masonry with material that matches the existing. . . "
>
> "Existing Concrete Floor: Replace damaged existing concrete floor in limited area."
>
> "Existing Overhead Doors: Existing doors are damaged/unsuitable/removed. Replacement is required."
>
> "Existing Scalehouse and Bathrooms: Services need replacement. . . ."

Appeal Ex. 3, at 2.

The EISF stated that "None of the proposed changes will 'substantially alter' the facility. They will not make any physical modification to the facility which will increase or decrease by more than 10% per year the facility's maximum annual capacity, as indicated in any applicable solid waste facility permit. Nor will the proposed changes in any way alter or modify the method by which the waste is processed or disposed, or increase the amount of any air pollutant not previously emitted." *Id.* at 1. The EISF further stated:

> Permit Application #59B is for renovations to a small portion of the existing building with the exception of one new scale. . . . none of the work . . . will result in significant adverse environmental impacts. The '**Construction Phase**' will result in ten (10) +/- additional people with three to five vehicles on site. Delivery of construction materials will be minimal, approximate average of two deliveries per day. The '**Operational Phase**' will result in no change to existing operations.

Id. at 2 (emphasis in original). ETW also stated that:

> In addition, none of the proposed changes will "substantially alter" the facility. They will not make any physical modification to the facility which will increase or decrease by more than 10% per year the facility's maximum annual capacity, as indicated in any applicable solid waste facility permit. Nor will the proposed changes in any way alter or modify the method by which the waste is processed or disposed, or increase the amount of any air *pollutant* not previously emitted.

Id. The EISF also repeatedly stated that the project "will not alter or change existing conditions" *Id.* at 5-6.

The Office of Planning Memorandum

In a memorandum to DCRA dated May 3, 2004 (Appeal Ex. 5), the Office of Planning characterized the repairs and improvements proposed by ETW in its Application as a "full reconstruction of the facility." Ex. 5, at 1. This conclusion followed from the Office of Planning's factual assumption that "[a]fter completion of the renovation project, approximately 10 new employees with between three to five additional vehicles will be added to the site. The proposed renovation project will substantially alter the facility." *Id.* (emphasis in original).

The Office of Planning's finding that the project would result in the addition of ten new employees and three to five vehicles was a blatant mischaracterization of the record. As set forth above, the EISF had clearly stated that although the "construction phase" would result in approximately ten additional people and three to five vehicles on site, the "operational phase" "will result in no change to existing operations." Appeal Ex. 3, at 2.

The Department of Health Memorandum to DCRA

In a memorandum to DCRA dated September 14, 2004, the D.C. Department of Health ("DOH") reported it found "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." Appeal Ex. 11 (submitted February 17, 2005).

The October 12, 2004 Memorandum from DCRA

In a memorandum dated October 12, 2004 DCRA stated that EISF "Reports have been received from all reviewing agencies, the District Department of Transportation, the Department of Health, the DC Water and Sewer Authority, the Department of Public Works and the Office of Planning." Appeal, Ex. 10 (submitted February 11, 2005). DCRA stated that "None of the reports, except that submitted by the Office of Planning, indicates that the project will result in a substantial negative impact on the environment." *Id.* The DCRA memorandum failed to acknowledge the fact that the Office of Planning's recommendation to DCRA was subject to the Office of Planning's erroneous characterization of the impact of the work on the Facility.

The November 3, 2004 Referral to the Board

In a memorandum to the BZA dated November 3, 2004, DCRA characterized the proposed repairs and improvements as effecting an "enlargement to an existing non-conforming

use." Appeal Ex. 4, at 1. DCRA specifically stated that to grant the Application it was necessary for the Board to issue a:

> Variance pursuant to Section 2002.4 to allow proposed **enlargement to an existing non-conforming use** as "warehouse-waste and recycling" structure and from Section 3202.5(b) for filing this project after the Zoning Commission made a decision on the amendment of the Commercial Residential CR Zone District Classification. (Second 3103.2)

Id. (emphasis added).

The Notice of Final Rulemaking for the Capitol Gateway Overlay Zoning Amendments

On January 5, 2005, the Zoning Commission published in the D.C. Register a Notice of Final Rulemaking and Order No. 97, Z.C. Case No. 96-3/89-1, for the Capitol Gateway Overlay zoning amendments. 52 DC Reg. 63. The final rulemaking implemented the following new section in 11 DCMR:

> **1605 EXISTING INDUSTRIAL USES**
>
> 1605.1 A commercial or industrial use that is first permitted in the CM or M Zone Districts and that is in existence with a valid Certificate of Occupancy *as of the date the provisions of this Chapter first became effective* shall be deemed a conforming use, but shall not be entitled to expand."

52 DC Reg. at 78. In enacting this amendment, the Commission explained:

> 2. Existing Industrial Uses
>
> The advertised text would have recognized existing industrial uses as conforming. 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.

Id. at 66-67.

STANDARD OF REVIEW

Under the D.C. Administrative Procedure Act, agency decisions may not be 1) "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 2) made "without observance of procedure required by law," or 3) "unsupported by substantial evidence in the record . . . ." D.C. Code § 2-510(a)(3)(A), (D), and (E). Among other things the agency decision must be based on a "consideration of all the relevant factors."[1] The agency must examine all relevant data and articulate a rational explanation for its action. *Eagle-Picher Industries, Inc. v. United States*, 759 F.2d 905 (D.C. Cir. 1985); *National Wildlife Federation v. FERC*, 801 F.2d 1505 (9th Cir. 1986) (agency decisions must consider important aspects of the problem, and offer an explanation for a decision that is contrary to evidence before agency).

ARGUMENT

I. THE DCRA ACTED ARBITRARILY AND CAPRICIOUSLY IN DETERMINING THAT A VARIANCE IS NECESSARY FOR THE WORK PROPOSED IN ETW'S PERMIT APPLICATION.

DCRA's determination that a variance from the Board is necessary for Appellant's construction permit Application to be granted was arbitrary and capricious because it was based on a factual predicate – that the proposed work would result in an "enlargement" of the Facility – that was not based on any evidence in the record, and was directly contrary to the undisputed evidence before the agency.

---

[1] *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29 (1983); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *National Treasury Employees Union v. Helfer*, 53 F.3d 1289 (D.C. Cir. 1995).

In its November 3, 2004 referral memorandum to the Board, the DCRA characterized the proposed work as resulting in an "**enlargement** to an existing **non-conforming use** . . . ." Appeal Ex. 4, at 1 (emphasis added). This characterization was erroneous for two reasons. First, under the Zoning Commission's final rulemaking for the Capitol Gateway Overlay amendments, ETW's continued use of the Facility as a solid waste transfer station constitutes a "conforming use" rather than a "non-conforming use." Second, there is no support in the record for concluding that the proposed work would enlarge the Facility. To the contrary, the undisputed evidence is that the Facility would not be enlarged as a result.

A. The Continued Use of the Facility as a Solid Waste Transfer Station is a "Conforming Use."

DCRA's characterization of the Facility as a "non-conforming use" in its referral memorandum (Appeal Ex. 4) was erroneous because the Zoning Commission has stated that a "commercial or industrial use that is first permitted in the CM or M Zone Districts and that is in existence with a valid Certificate of Occupancy *as of the date the provisions of this Chapter first became effective* shall be deemed a conforming use . . . ." 52 D.C. Reg. at 78; 11 DCMR 1605.1. Since 1992 ETW has possessed a valid Certificate of Occupancy for the Facility. This predated the effective date of the Capitol Gateway Overlay amendments by at least 10 years. Thus ETW's continued use of the property for a solid waste transfer station is a "conforming use." Accordingly, DCRA's reference to 11 DCMR 2002.4 in its November 3, 2004 referral memorandum (Appeal Ex. 4) was erroneous. Section 2002.4 is part of 11 DCMR 2002, entitled "Nonconforming Uses within Structures." Clearly section 2002.4 can have no application here.

B. DCRA's Conclusion that the Proposed Work would Enlarge the Facility is Unsupported in the Evidence before the Agency and Contrary to the Undisputed Evidence before the Agency.

The conclusion of DCRA in its November 3, 2004 referral memorandum that the proposed work would enlarge the facility (Appeal Ex. 4) is not expressly tied to any evidence in the record before the agency. For this reason alone, the conclusion is arbitrary and capricious.

Moreover, the conclusion is contrary to the undisputed evidence from Appellant that the proposed changes would not enlarge the Facility. Nothing in the proposed work was going to increase the square footage of the Facility. Moreover, as set forth above, the EISF stated that following construction there "will result in no change to existing operations." Appeal Ex. 3, at 2. None of the proposed changes will "substantially alter" the facility. *Id.* "They will not make any physical modification to the facility which will increase or decrease by more than 10% per year the facility's maximum annual capacity, as indicated in any applicable solid waste facility permit. Nor will the proposed changes in any way alter or modify the method by which the waste is processed or disposed, or increase the amount of any air *pollutant* not previously emitted." *Id.*

DCRA's conclusion that the proposed work would enlarge the Facility appears to be based on the Office of Planning's erroneous finding that "[a]fter completion of the renovation project, approximately 10 new employees with between three to five additional vehicles will be added to the site." Appeal Ex. 5, at 1. This was a blatant mischaracterization of the EISF, which actually stated that "The 'Construction Phase' will result in ten (10) +/- additional people with three to five vehicles on site. . . . The 'Operational Phase' will result in no change to existing operations." Appeal Ex. 3, at 2. The Office of the Attorney General for the District of Columbia has acknowledged the error of the Office of Planning. *See* Appeal Ex. 12 (submitted February 17, 2005) ("OP in its EISF report on [ETW'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") (emphasis added).

It was arbitrary and capricious for the DCRA to base its conclusion that the proposed work would enlarge the Facility on the erroneous factual determination made by the Office of Planning.

Even if the erroneous determination of the Office of Planning is not considered, it is clear that the DCRA's conclusion that the proposed construction would enlarge the Facility is incorrect. In *Hot Shoppes, Inc. v. Clouser*, 231 F. Supp. 825 (D.D.C. 1964), *aff'd*, 346 F2d 834(D.C. Cir. 1965), the court reversed the Board's refusal to issue a building permit based on the Board's determination that the proposed construction would effect an "enlargement" of the non-conforming use of a drive-in service area adjacent to a restaurant. As a result of a zoning change, the drive-in service could continue, but the area could not be enlarged.

Part of the original structure was a storage area, enclosed on two sides by a basket weave wooden fence. This fenced-in area was adjacent to the main building. Plaintiff stored "commissary carts" in that area. These were carts were an enclosed metal cabinet in which food supplies were transported from the Hot Shoppes' commissary to various Hot Shoppe outlets. After delivery, the carts were placed in storage until picked up and returned to the commissary. The carts were thus part of plaintiff's general operations in transporting food to its various retail outlets. They were not used to transport food to cars, but were used to bring food to the restaurant itself, thus furthering the conforming uses (counter and table services) and nonconforming use (drive-in service) of plaintiff's restaurant.

In deciding that the case needed to be remanded to the BZA, the court stated:

> The Board determined that the proposed new structure constitutes "an enlargement," and as such is barred by the Zoning Act . . . . There is no

> substantial evidence to support this finding. Uncontradicted evidence presented to the Board in the form of an affidavit by the district manager of Hot Shoppes, Inc. stated that "the area to be occupied by the altered structure is enclosed on two sides by a roofless structure, consisting of a high basket-wave type wooden fence.," thus indicating that the floor area of the new structure would be the same size as the floor are of the fenced in area. It was further stated in the affidavit that 'the proposed alteration will not increase the volume of business.' This statement also stands uncontradicted in the record before the Board. . . . There is thus no evidence suggesting that the proposed structure would constitute an "enlargement" of the nonconforming use – namely, the restaurant's curb service. All of the evidence is to the contrary. The Board therefore committed error in finding that the proposed structure was an enlargement; such finding is not supported by substantial evidence and is arbitrary and capricious.

Id. at 830-31.

Similarly here, the DCRA's conclusion that the proposed construction would effect an "enlargement" of the Facility is arbitrary and capricious. It is not supported by evidence in the record and is contrary to the uncontradicted evidence that is in the agency record.

II. THE PROPOSED PROJECT WOULD NOT EXPAND THE PREEXISTING "CONFORMING USE" OF THE FACILITY AS A SOLID WASTE TRANSFER STATION.

As set forth above, the Zoning Commission determined that even following the effective date of the Capitol Gateway Overlay zoning amendments, a "commercial or industrial use that is first permitted in the CM or M Zone Districts and that is in existence with a valid Certificate of Occupancy *as of the date the provisions of this Chapter first became effective* shall be deemed a conforming use but shall not be entitled to expand." 52 D.C. Reg. at 78; 11 DCMR 1605.1. There is no finding in the record below that the construction proposed by ETW in its Application would result in an expansion of the current use of the Facility as a solid waste transfer station. Accordingly, no variance is required and the Application should be granted.

However, even assuming, *arguendo*, that the agency's conclusion that the proposed construction would result in an "enlargement" of the Facility (Appeal Ex. 4, at 1) could be construed as a determination that the work would effect an "expansion," such a determination is legally erroneous pursuant to well-established case law defining the term "expansion" for purposing of zoning regulations.

As set forth in the EISF, "[n]one of the proposed changes will 'substantially alter' the facility. They will not make any physical modification to the facility which will increase or decrease by more than 10% per year the facility's maximum annual capacity, as indicated in any applicable solid waste facility permit. Nor will the proposed changes in any way alter or modify the method by which the waste is processed or disposed, or increase the amount of any air pollutant not previously emitted." Appeal Ex. 3, at 1.

However, even assuming, *arguendo*, that the additional weight scale and/or any of the other improvements would allow ETW to increase the amount of business at the Facility, the law is clear that a "mere increase in the amount of business done pursuant to a nonconforming use is not an illegal expansion of the original use." *Helicopter Associates, Inc. v. City of Stamford,* 201 Conn. 700, 716, 519 A.2d 49, 57 (1986); *see also Salerni v. Scheuy*, 140 Conn. 566, 571, 102 A.2d 528, 530 (1954) ("Ordinarily a mere increase in the amount of business done in pursuance of a nonconforming use, or a change in the equipment used, does not constitute a change of the use itself"); *Vermont Brick & Bloc, Inc. v. Village of Essex Junction*, 135 Vt. 481, 484, 380 A.2d 67, 69 (1977) ("An enlargement or expansion of a nonconforming use, rather than a mere increase in business, is indicated where new facilities or a new product is involved"; "manufacturing of concrete . . . in . . . trucks" was "far different . . . prior nonconforming use of on-premises manufacture of concrete bricks and blocks and sale of building materials"); *Village*

of Lake Villa v. Fargo Ice & Sons, Inc., 90 Ill. App. 3d 545, 546, 413 N.E.2d 532, 533 (1980) ("mere increase in the volume of business is not a prohibited expansion"; "Nor can we agree . . . that since the operation has changed from the manufacture of ice on the premises to the purchase of ice from outside sources and storage on the premises, there is a new and different use"). As one authority has stated:

> It is the general rule that the employment of modern and more effective instrumentalities, not previously used, in a nonconforming business or use or in connection with a nonconforming building does not constitute a prohibited expansion or enlargement of the business, use or building. In short, an owner can modernize facilities and employ improved instrumentalities in connection with a nonconforming building or use. However, the instrumentalities must be ordinarily and reasonably adapted to make the use in question available to the owner, and, moreover, the original nature and purpose of the undertaking must remain unchanged. Thus, for example, in mining, quarrying and similar types of uses, the introduction of new, mechanized devices and equipment is not an enlargement or extension of the use, but merely a more effective method of carrying it on.

8A McQuillin, Municipal Corporations, § 25.210. (3d ed. 1965 Rev.).

Similarly here, the proposed repairs and improvements would not expand the Facility. Rather they would merely assist the Facility in conduct a more efficient and effective operation.

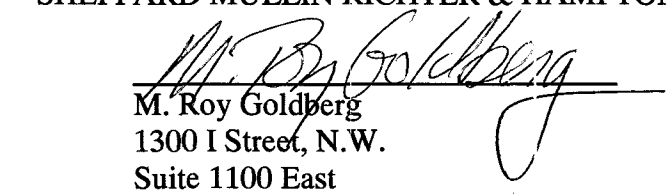
Finally, the proposed changes are intended to help ETW continue to perform the conforming use. The proposed renovation and repair of the structure is consistent with the Zoning Commission's recognition of the "importance of the [conforming industrial] uses to the District." 52 D.C. Reg. at 67.

CONCLUSION

For the reasons set forth above, Appellant respectfully requests that the Board reverse the decision of the DCRA which refused to grant the construction permit Application unless a variance was issued by the Board.

Respectfully submitted:

SHEPPARD MULLIN RICHTER & HAMPTON LLP



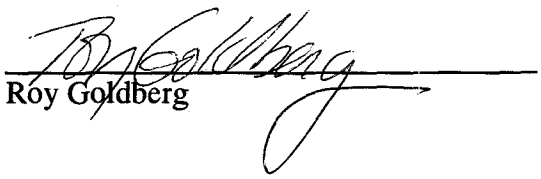
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Counsel for Appellant
Eastern Trans-Waste of Maryland, Inc.

Dated: February 25, 2005

CERTIFICATE OF SERVICE

I certify that on February 25, 2005 a true and accurate copy of the foregoing Pre-Hearing Brief of Appellant Eastern Trans-Waste of Maryland, Inc. was served via First Class U.S. Mail, postage prepaid, on the following person:

Julie Lee, Esquire
General Counsel
District of Columbia Department of Consumer and Regulatory Affairs
941 North Capitol Street, NE, Suite 9400
Washington, DC 20002



Roy Goldberg