SHEPPARD MULLIN
SHEPPARD MULLIN RICHTER & HAMPTON LLP
ATTORNEYS AT LAW

11th Floor East | 1300 I Street, NW | Washington, DC 20005-3314
202-218-0000 *office* | 202-218-0020 *fax* | *www.sheppardmullin.com*

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

May 3, 2005

Our File Number: 01ZY-103259

VIA MESSENGER

RECEIVED
D.C. OFFICE OF ZONING
2005 MAY -3 AM 11: 27

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 Appellant's Proposed Findings of Fact and Conclusions of Law.

Separately please find the original building construction plans that were submitted to the DCRA but were not previously submitted to the Board.

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

Sincerely,

Roy Goldberg

Roy Goldberg

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

W02-DC:9RGG1\100023328.1

Enclosures

BZA
Case No. 17288
Exhibit No. 22

Board of Zoning Adjustment
District of Columbia
CASE NO. 17288
EXHIBIT NO. 22

RECEIVED
D.C. OFFICE OF ZONING
2005 MAY -3 AM 11: 27

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
	)	Scheduled Date for Decision:
	)	May 10, 2005

APPELLANT EASTERN TRANS-WASTE OF MARYLAND, INC.'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

SHEPPARD MULLIN RICHTER & HAMPTON LLP

Roy Goldberg
1300 I Street, N.W.
Suite 1100 East
Washington, D.C. 20005-3314
Telephone (202) 218-0007
Facsimile (202) 312-9425/202 218-0020
Counsel for Appellant
Eastern Trans-Waste of Maryland, Inc.

Dated: May 3, 2005

Appellant Eastern Trans-Waste of Maryland, Inc. ("ETW") hereby respectfully submits the following proposed Findings of Fact and Conclusions of Law for this appeal:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

1. This appeal involves a solid waste transfer facility at 1315 First Street, N.E., Square 703, Lot 54 (the "Facility"). Appellant Eastern Trans-Waste of Maryland, Inc. ("ETW") possesses a certificate of occupancy (No. B 162503) issued on March 17, 1992 for the purposes of "Warehouse (Waste & Rec.)." A copy of the certificate is included within Appellant's Exhibit 1. For at least a decade while ETW was operating the Facility, it was zoned M for Industrial.

2. After determining that it desired to make some minor internal repairs and improvements to the Facility, ETW on October 10, 2003, submitted to the D.C. Department of Consumer and Regulatory Affairs ("DCRA") a construction permit application for these changes (the "Application"). App. Exhibit 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.

3. ETW intends to replace the existing weigh scale and provide one additional scale. Transcript of Hearing on March 15, 2005 ("Tr."), at 323-24 (Testimony of Mark Reynolds). The existing "scale frequently breaks down and it is a requirement that the trucks get weighed and with the one scale breaking down, it was stopping operations." *Id.* at 324. The new scale was "[t]echnically more modernized, but essentially the same . . . size." *Id.* at 347 (Testimony of Rob Sochovka). The new scale would not allow trucks to move in faster because it was more modern. *Id.* It is typical for a solid waste transfer station to have two scales. *Id.* at 348. ETW's intention is not "to have two [trucks] come in at the same time, but maybe to have one go out as one came in." *Id.* The objective of the improvements was not to affect the volume of the Facility. *Id.* at 356 (Testimony of Dave Florance). The company is not planning to enlarge the tipping floor. *Id.* at 360. Rather, the company seeks to make its existing operations more modern, and faster. *Id.*

4. The DCRA initially approved the Application for zoning purposes and did not require that ETW submit an Environmental Impact Statement ("EIS") or an

"Environmental Impact Screening Form" ("EISF"). App. Exhibit 1, at 1; Tr., at 327 (Testimony of Mark Reynolds).

5. However, on January 12, 2004, DCRA sent a letter to ETW which stated that "[b]ased 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." App. Exhibit 2.

6. At a subsequent meeting between ETW and DCRA officials on January 27, 2004, DCRA's then-Acting Zoning Administrator, Denzil Noble told ETW that the agency was reconsidering the application with respect to the EIS issue. Tr., at 335 (Testimony of Rob Sochovka).

7. On March 30, 2004, ETW submitted an EISF to DCRA. App. Exhibit 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. . . ."

App. Exhibit 3, at 2.

8. 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. In the form, ETW "wanted to reiterate . . . that this is not a new project. . . . This has nothing relative to a new project. It is existing and it is staying as it is." Tr., at 339 (Testimony of Mark Reynolds).

9. One of the District agencies that received the EISF to review and provide comments was the Office of Planning. In a memorandum to DCRA dated May 3, 2004, the Office of Planning characterized the repairs and improvements proposed by ETW in its Application as a "full reconstruction of the facility." App. Exhibit 5, at 1. The agency stated:

> The Capitol Gateway (CG) Overlay states that *existing industrial uses with valid Certificates of Occupancy shall be deemed conforming but are not entitled to expand.* After 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).

This was factually inaccurate because as set forth in the EISF, although the construction phase would result in ten additional people with three to five vehicles on site, the operational phase "will result in no change to existing operations." App. Exhibit 3, at 2.

10. The D.C. Department of Health ("DOH") also received the EISF to review and provide comments. In a memorandum to DCRA dated September 14, 2004, the 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," and therefore did not recommend preparation of an Environmental Impact Statement (EIS) for this project." App. Exhibit 11.

11. On September 23, 2004, ETW representatives met with DCRA officials to discuss the agency responses to the EISF. Tr., at 341 (Testimony of Rob Sochovka). During that meeting, DCRA provided ETW for the first time with the May 3, 2004 memorandum from the Office of Planning. (App. Exhibit 5). ETW pointed out that the May 3 memo contained an obvious error because it "was clearly denoted" in the EISF "that there would not be any expansion or any enlargement of the facility." Tr., at 342. DCRA's Denzil Noble responded that ETW "would have to proceed through the Office of Zoning to appeal the process because it was pretty much already ruled upon." *Id.* Even with the obvious error there "wasn't anything that DCRA was going to do at that point until [ETW] cleared up the matter with the zoning." *Id.* at 342-43. Mr. Noble stated that until the zoning issue was resolved, DCRA "would reserve" on the issue of whether an environmental impact statement would . . . be needed." *Id.* at 343.

12. 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." App. Exhibit 10. 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.*

13. The DCRA refused to grant ETW's permit application. In a referral memorandum to this Board dated November 3, 2004, DCRA characterized the proposed repairs and improvements as effecting an "enlargement to an existing non-conforming use." App. Exhibit 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.*

14. On December 15, 2004, ETW filed an appeal of the DCRA's denial of its permit application.

15. 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, which includes the subject property. 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.

16. The Board conducted a hearing in this case on March 15, 2005. During that hearing the current Zoning Administrator for DCRA, Mr. Toye Bello, testified that he made the decision to deny the application. Tr., at 404-05. Mr. Bello stated that he did not deny the application because of a perceived enlargement or expansion of the current use. Tr., at 395. Indeed, at the hearing the DCRA conceded that "there was an error made" by the Office of Planning. Tr., at 403. The DCRA "agree[d] with the appellant with regard to the OP report. We understand that the OP report did incorrectly identify the ten extra employees as part of their analysis." *Id.*

17. Instead, during the hearing, Mr. Bello claimed for the first time that he denied the application based on his belief that the proposed changes constituted a "structural alteration" and, therefore, under 11 DCMR § 2002.4, the Board must grant a variance before such changes could be permitted. Tr., at 379-85.

18. Mr. Bello acknowledged that section 2002.4 only could apply if ETW's use of the Facility as a solid waste transfer station was deemed to be a "*non-conforming* use" rather than a "*conforming* use" as a result of its inclusion in the Capitol Gateway Overlay. Tr., at 402-03; and 407. However, Mr. Bello maintained that despite the language in 11 D.C.M.R. § 1605.1 stating that an "industrial use that is first permitted in the . . . M Zone . . . shall be deemed a conforming use," ETW's current use of the Facility is a "*non-conforming* use." Tr., at 384-85.

Conclusions of Law

19. 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

[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).

(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).

20. The DCRA referral to the Board characterized the proposed changes as an "enlargement to an existing non-conforming use." App. Exhibit 4, at 1. This determination was arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence in the record, otherwise not in accordance with law, and made without observance of procedure required by law.

21. Although the November 3 referral from DCRA to the Board portrayed the proposed changes as constituting an "enlargement" of the Facility (App. Exhibit 4), at the hearing the DCRA's Mr. Bello testified that the agency had *not* denied the permit on the basis that the proposed work would effect an enlargement or expansion of the Facility. Tr., at 395. But even assuming that the DCRA had denied the permit on that basis, such a determination would have been neither factually nor legally supportable. Rather, it would have been: (1) not based on evidence in the record before the agency, and (2) directly contrary to the evidence that was before the agency.

22. The Office of Planning's finding that the project would result in the addition of ten new employees and three to five vehicles (App. Exhibit 5) was erroneous. 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." App. Exhibit 3, at 2; *see also id.* (there "will result in no change to existing operations"). At the hearing, the DCRA conceded that "there was an error made" by the Office of Planning. Tr., at 403. The DCRA "agree[d] with the appellant with regard to the OP report. We understand that the OP report did incorrectly identify the ten extra employees as part of their analysis.").

23. Nor was there any other evidence in the agency record that the repairs and improvements proposed by ETW would result in an "enlargement" or "expansion" of the current Facility. *See also Hot Shoppes, Inc. v. Clouser*, 231 F. Supp. 825, 830-31 (D.D.C. 1964), *aff'd*, 346 F2d 834(D.C. Cir. 1965) ("no substantial evidence to support" finding that "proposed structure would constitute an 'enlargement' of the nonconforming use"). 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.[2]

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.

24. DCRA's stated rationale at the hearing for its denial of the permit – that use of the Facility as a solid waste transfer station constitutes a "*non-conforming* use" – is patently without merit. The regulations promulgated by the Zoning Commission expressly state that an "industrial use that is first permitted in the . . . M Zone District[] 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** . . . ." 11 D.C.M.R. § 1605.1 (bold emphasis added).[3] Given this unambiguous language in the

---

[2]8A McQuillin, Municipal Corporations, § 25.210. (3d ed. 1965 Rev.).

[3]In making its decision to deny the permit, DCRA did not question or challenge the validity of ETW's certificate of occupancy. Tr., at 393-94 (Testimony of T. Bello).

regulation providing that the continuing industrial use is to be treated as a *conforming use* it is impossible to accept the District's assertion that the ETW site is now a *nonconforming use*. *See Chagnon v. District of Columbia Bd. of Zoning Adjustment*, 844 A.2d 345, 348 (D.C. App. 2004) (Board's decision may not contradict the "plain language of the regulation itself"); *Watergate W. v. District of Columbia Bd. of Zoning Adjustment*, 815 A.2d 762, 765 (D.C. App. 2003) (Board's interpretation of zoning regulation may not be "plainly erroneous or inconsistent with the regulation"). Indeed, because 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. *See Page Associates v. District of Columbia*, 463 A.2d 649, 656 (D.C. App. 1983) (Board's interpretation of Zoning Commission regulations may not "be so restrictive as to undermine the rationale" of the regulation).

25. Because the ETW Facility constitutes a "*conforming* use" under 11 D.C.M.R. § 1605.1, DCRA's claim that the proposed changes require a variance because they would result in "structural alterations" has no relevance. The provision on which DCRA relies – 11 D.C.M.R. § 2002.4 – is entitled "Nonconforming Uses within Structures" and clearly does not apply to *conforming uses*. *See* Tr., at 402-03 (Testimony of T. Bello) (if section 1605.1 designates the use as "conforming" then section 2002.4 does not apply), and *id.* at 407 (same). Accordingly, even assuming for the sake of argument that one or more of the proposed changes would constitute a "structural alteration," this would provide no legal predicate to deny the permit, given the site's status as a *conforming use*.

26. Even assuming that the use of the Facility could be found to be *non-conforming*, the DCRA has pointed to no evidence in the underlying record of where the agency determined that the proposed changes constitute "structural alterations." In response to a question from the Board whether there was any other documentation that . . the Zoning Division considered 2002.4 . . . as the reason for the denial of the permit," Mr. Bello pointed to no such documentation. Tr., at 404. Although Mr. Bello claimed to have made that determination when he was presented by a staff member with the pending application, there was no written corroboration provided to the Board.

27. Even if the Board were to agree with DCRA that the current use is *non-conforming* and that this was in fact the basis for the denial of the permit, we would still conclude that the permit was improperly denied. There is no evidence that any of the proposed changes constitute "structural alterations." Section 2002.4, 11 D.C.M.R., states as follows:

> Ordinary repairs, alterations, or modernizations may be made to a structure or portion of a structure devoted to a nonconforming use. Structural alterations shall not be

> allowed, except those required by other municipal law or regulations; provided, that structural alterations shall be permitted to a lawfully existing, nonconforming flat or apartment house located within a Residence District.

28. The proposed scales are not "structural alterations" to the Facility because they are mechanical equipment, and the definition of "structure" does "not include mechanical equipment." 11 D.C.M.R. § 199.1. DCRA has acknowledged this fact. *See* Tr., a 408 (Testimony of T. Bello).

29. There also is no basis to determine that the proposed modernization of the employee restrooms and break area would qualify as a structural alteration. These are interior repairs and improvements to existing facilities.

30. Furthermore, the repairs to and replacement of portions of the roof, walls and concrete floor would not be so substantial as to constitute a structural alteration. Section 2002.4 expressly distinguishes between "ordinary repairs, alterations or modernizations" on the one hand, and "structural alterations" on the other. This dichotomy demonstrates the intention not to include ordinary repairs within the definition of "structural alteration." If something is a repair, it is not included within the scope of the second sentence of section 2002.4. The scope of the work planned by ETW is that of a repair, not a structural alteration.

31. Finally, even if the Board were to credit DCRA's assertion that the proposed changes to the floor, walls and floor constituted a structural alteration, we would remand the application to the DCRA to allow ETW to present evidence regarding the issue of whether such changes are exempt from the variance requirement because the work is required by D.C. law. Under § 2002.4, structural alternations to non-conforming uses may be allowed if "required by other municipal law or regulations . . . ." The evidence now before the Board is that the roof repairs are to address snow damage from the year 2000. Tr., at 323. At the hearing, ETW referred to provisions in Title 21 of D.C.M.R. which pertain to the construction and operation of solid waste transfer stations. For example, 21 D.C.M.R. § 731.15(d) provides that in order to receive a solid waste transfer facility permit, the "[a]reas where solid waste is or will be handled, deposited, placed, processed, or disposed" must "(1) Be fully enclosed," and "(2) Have impermeable floors." In addition the facility must be constructed or modified "so as to prevent disease vectors from entering the building through the facility's foundation, roof, exterior walls, doors, or conduits . . . ." 21 D.C.M.R. 731.15(e). *See* Tr., at 409-10. However, because DCRA never apprised ETW that it was considering rejecting the permit because the proposed work constituted a structural alteration (*see* Tr., at 400-01) and thereby failed to observe prior notice and due process and procedures required by law, ETW did not have an opportunity to present this evidence to the DCRA while that agency was considering its application for the construction permit.

32. For the reasons set forth above, the decision of the DCRA which refused ETW's application for a construction permit was arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, not in accordance with law, and made without observance of procedure required by law. The decision is hereby reversed and the DCRA is ordered to grant the application and issue the permit.

Respectfully submitted:

SHEPPARD MULLIN RICHTER & HAMPTON LLP

Roy Goldberg
1300 I Street, N.W.
Suite 1100 East
Washington, D.C. 20005-3314
Telephone (202) 218-0007
Facsimile (202) 312-9425/202 218-0020
Counsel for Appellant
Eastern Trans-Waste of Maryland, Inc.

Dated: May 3, 2005

CERTIFICATE OF SERVICE

I certify that on May 3, 2005, a true and accurate copy of the foregoing Appellant's Proposed Findings of Fact and Conclusions of Law was served via first class mail on the following persons:

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

Before the
District of Columbia
Board of Zoning Adjustment

RECEIVED
D.C. OFFICE OF ZONING
2005 MAY -4 PM 4:39

APPEAL OF:	)	
	)	
Eastern Trans-Waste of Maryland, Inc.	)	
challenging the Administrative Decision of DCRA	)	BZA Appeal No. 17288
to deny building permit as a matter of right.	)	

PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

APPEAL NO. 17288 of Eastern Trans-Waste of Maryland, Inc., pursuant to 11 DCMR § 3100 and 3101, from the decision of the Department of Consumer and Regulatory Affairs Zoning Administrator not to issue a building permit as a matter of right for new construction at its solid waste facility at 1315 I Street, N.W., Washington, D.C.

HEARING DATES: March 15, 2005

DECISION DATE: May 10, 2005

I. FINDINGS OF FACT

1. Appellant, Eastern Trans Waste of Maryland, Inc. (ETW), operates a solid waste facility at 1329 First Street, S.E., Washington, D.C. 20003. ETW holds a Certificate of Occupancy, No. B162503 for a warehouse (Waste and Rec.). The Certificate of Occupancy was issued March 17, 1992.

2. On or about October 10, 2003, ETW applied to the Department of Consumer and Regulatory Affairs ("DCRA") for a building permit for almost a half-million dollars' worth of construction at their solid-waste transfer facility located at 1315–1329 First

BZA
Case No. 17288
Exhibit No. 23

Street, S.E. At the time plaintiff began operations in the early 1990s, the site was located in an M zone, which allows general industrial uses. 11 DCMR § 820.

3. Plaintiff produced a statement of work from a contract agreement with Durable Steel Structures to describe the scope of the proposed work. The September 4, 2003 agreement described the proposed work as "construction of weight scale, replace/repair: weight scale, structural steel, roof, siding, concrete floor, overhead doors, bathroom and scale house." Plaintiff's Appeal Statement, dated December 21, 2004, Exh. 3.

4. The building permit application provided to DCRA by ETW did not include any evidence or supporting documents that the proposed structural alterations, as outlined in 11 DCMR 2002.4, were required by other municipal regulations.

5. District law requires an Environmental Impact Statement ("EIS") for any "substantial modification" of an existing solid-waste facility; DCRA informed plaintiff of this fact by letter dated January 12, 2004. (*citing* D.C. Official Code § 8-109.11 (2001 ed.)). As a result, on or about April 1, 2004, plaintiff submitted an Environmental Impact Screening Form ("EISF").

6. A more detailed description of the proposed work was provided in the Environmental Impact Screening Form (EISF) to DCRA. The project definition states in pertinent part:

> (a) Construction of one weight scale: install one new 50' weight scale in addition to existing scales;
> (b) Replace/Repair Existing Structural Steel;
> (c) Existing Weight Scale: replacement;
> (d) Existing Roof Structure;
> (e) Existing Siding;
> (f) Existing concrete floor;
> (g) Existing overhead Doors; and,

(h) Existing Scale house and bathrooms.

7. The Office of Planning ("OP"), in its EISF report on plaintiff's proposed project dated May 3, 2004, noted that the location of the site had been rezoned almost three years ago to the "Capitol Gateway (CG) Overlay" district. *See also* 52 D.C. Reg. 63–78 (Jan. 7, 2005) (Notice of Final Rulemaking and Zoning Commission Order No. 971).

8. 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).

9. As a result of the map amendment, the subject property was rezoned from the underlying industrial "M" zone to "CR" zoned district in addition to the Capitol Gateway Overlay.

10. Pursuant to 11 DCMR § 602.1(o), the "CR" zoned district prohibits any use first permitted in the "M" District. The solid waste facility is first permitted in "M" zoned district by special exception.

11. 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." *See also* 52 D.C. Reg. 66–67, *codified as amended at* 11 DCMR § 1605.1.

12. 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.

13. On September 23, 2004, representatives of ETW met with DCRA to discuss the status of the project. 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.

14. On or about November 3, 2004, DCRA sent a referral letter to the Board of Zoning Adjustment ("BZA"), indicating that the ETW application for a building permit could not be issued in light of the zoning issues. The applicant was informed of the need to seek a variance from BZA. The referral memorandum stated in part, "The Board of Zoning Adjustment approval is required as follows:

> 1. 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 . . ."

Plaintiff's Exh. 4.

15. ETW has appealed DCRA's denial of its building permit application and decision to refer the applicants to the BZA. The hearing on the appeal was held by the BZA on March 15, 2005. At the hearing, the appellant conceded that the proposed work is a structural alteration.

II. CONCLUSIONS OF LAW

A. *Zoning Classification*

16. A solid waste handling facility is permitted by special exception, in the industrial "M" zoned district, if it meets the requirements set out in §§ 822.3 through 822.14 (2003).

17. The general industrial "M" zoned districts are designed to provide areas suitable for development as heavy industrial sites, but at that same time protect those industrials developments from the intrusion of non-industrial uses that impede the full utilization of properly located industrial sites.

18. The Capitol Gateway Overlay, 11 DCMR § 1605, states a commercial or industrial use that is first permitted in the CM or M Districts and that is in existence with a valid Certificate of Occupancy as of the date o the provisions of this Chapter first became effective shall be deemed a conforming use, bust shall not be entitled to expand.

19. The Zoning Regulations define a non-conforming use as any use of land or of a structure, or of a structure and land in combination, lawfully in existence at the time this title or any amendment to this title became effective, that does not conform to the use provisions for the district in which the use is located . . . [t]hat nonconforming use shall be considered a conforming use, subject to the further provisions of §§ 3104.2 and 3104.3 D.C. Code Ann. § 6-601.05(c) (2001 ed.).

20. The restrictions set out in Sections 2002, 2003 and 2004 shall apply to nonconforming uses within structures, whether the structure is conforming or nonconforming. 11 DCMR § 2002.1 (2003)

21. The zoning provisions governing nonconforming uses include Section 2002.4. Section 2002.4 provides ordinary repairs, alterations, or modernizations may be made to a structure or portion of a structure devoted to a nonconforming use. Structural alterations shall not be allowed, except those required by other municipal law or regulation; provided, that structural alterations shall be permitted to a lawfully existing, nonconforming flat or apartment house located within a Residence District. 11 DCMR § 2002.4 (2003)

B. *Statutory construction*

22. It is a canon of statutory interpretation that one looks at the particular statutory language within the context of the whole legislative scheme when legislative intent is to be determined. *See,* 2A Norman J. Singer, *Sutherland on Statutory Construction* § 46.05 (5th ed. 1992). Nonconforming uses shall be reviewed in conjunction with the goals and policies of the zoning regulations.

23. In the interpretation of a statute or regulation, a court will first look to the language of the act, *see* McDonald v. United States, 496 A.2d 274, 276 (D.C. 1985), and when the language is unambiguous and does not produce an absurd result, the court will not look beyond its plain meaning. *See* J. Frog, Ltd. v. Fleming, 598 A.2d 735, 738 (D.C. 1991); *see also* Peoples Drug Stores, Inc. v. District of Columbia, 470 A.2d 751, 755 (D.C. 1983) (en banc). If the language of a statute is clear and admits of no more than one meaning, we are not empowered to look beyond the literal words of the statute. Nova Univ. v. Educ. Inst. Licensure Comm'n, 483 A.2d 1172, 1179 (D.C. 1984), *cert.*

denied, 470 U.S. 1054, 84 L. Ed. 2d 822, 105 S. Ct. 1759 (1985); *see also* *Auger v. District of Columbia Bd. of Appeals & Review*, 477 A.2d 196, 211 (D.C. 1984). The terms and conditions of the zoning regulations which govern industrial and commercial uses in an "M" zoned district are expressly outlined.

24. Where, then, the meaning of the plain language of a statute is clear, we must enforce it according to its terms, *see* *United States v. Edelen*, 529 A.2d 774, 778 (D.C. 1987), and "there is no need to engage in an analysis of legislative intent." *Butler v. Butler*, 496 A.2d 621, 622 (D.C. 1985). The meaning of the plain language of the Capitol Gateway Overlay, however, is obfuscated when applied to existence of a solid waste facility such as ETW, and the regulatory scheme governing solid waste facilities.

25. Moreover, the Court has noted that interpreting any portion of an act, the statutory meaning of a term or phrase must 'be derived not from the reading of a single sentence or section, but from consideration of [the] entire enactment against the backdrop of its policies and objectives." *Carey v. Crane Serv. Co.*, 457 A.2d 1102, 1105 (D.C. 1983) (quoting *Don't Tear It Down v. Pennsylvania Ave. Dev. Corp.*, 206 U.S. App. D.C. 122, 128, 642 F.2d 527, 533 (1980)). The Capitol Gateway Overlay must be interpreted in context of its goals and policies. That is true of the underlying commercial M zoned classification.

26. In circumstances where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, *the two should be harmonized if possible; but if there is any conflict* the latter will prevail, regardless of whether it was passed prior to the general statute, unless it appears that the legislature intended to make the general act controlling. 2A Sutherland, *supra,* § 51.05, at 499 (emphasis added and footnotes omitted). In this way, any conflicts between the conditions established by the Overlay and the restrictions of the underlying zone would be resolved in favor of the latter.

C. *Noncomforming Uses*

27. Both this court and the Zoning Commission have stressed that nonconforming uses are not favored and must be regulated strictly so that the goals of the districting scheme established by the Zoning Commission are not undercut. *See* Zoning Regs. § 7101.1. *See also* *Wood v. District of Columbia*, D.C.Mun.App., 39 A.2d 67, 69 (1944). In *Silverstone v. District of Columbia Board of Zoning Adjustment*, D.C.App., 372 A.2d 1286, 1290 (1977), *aff'd on reconsideration*, 396 A.2d 992 (1979), this court stated:

> Despite the protection given by the courts to such substantial property rights on nonconforming uses, the continuance of uses and structures that do not conform to the current zoning restrictions and to the general

scheme of desirable land uses militates against the effectiveness of the planning and zoning scheme as a whole.

In this way, the Zoning Administrator interprets the solid waste facility as a nonconforming use that is disfavored.

28. The Court has expressly stated that any interpretation of the zoning regulations which expand the prerogatives of nonconforming users are generally undesirable. *See George Washington University v. District of Columbia Board of Zoning Adjustment*, D.C.App., 429 A.2d 1342, 1345 (1981); *Lenkin v. District of Columbia Board of Zoning Adjustment* D.C.App., 428 A.2d 356, 358 (1981); *Sheridan-Kalorama Neighborhood Council v. District of Columbia Board of Zoning Adjustment, supra* at 963. Accordingly, any interpretation of the zoning regulations that transforms a solid waste facility into a permissible use is inconsistent with the zoning regulations.

D. *Zoning Administrator Decision*

29. The Board accepts the interpretation of the Zoning Administrator that the restrictive nature of the underlying commercial zone CR classification is in conflict with the Capitol Gateway Overlay. The Board gives deference to the administrative interpretation of the Zoning Administrator.

30. The Board also accepts the conclusion of the Zoning Administrator that ETW facility is a nonconforming use.

31. The Zoning Administrator is charged with the implementation of the Zoning Regulations.

32. The Board of Zoning Adjustment (BZA) is authorized to hear appeals by any person aggrieved by any decision of the "Inspector of Buildings" [or Zoning Administrator] granting or refusing a building permit or other administrative decision based upon the zoning regulations or a zoning map. The Board, however, has not found any reversible error in the determinations made by DCRA in its referral of the ETW application to BZA for special exception proceedings.

33. The Board will not interfere with the Zoning Administrator's interpretation or substitute its own judgment where the Zoning Administrator's interpretation is reasonable and there has been no abuse of discretion.

ORDER

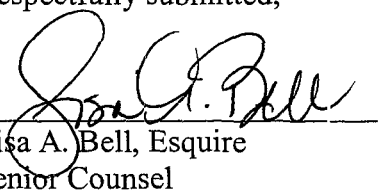
Based on the record taken as a whole, including the testimony and evidence of record including the building permit applications, plans and all documentation submitted by the parties to this appeal, the Board is concludes that DCRA did not error ion its decision to refer ETW to the BZA for a special exception proceeding.

Accordingly, the Board denies the appeal.

_____
Geoffry H. Griffis, Chairman

Vote: _____

Respectfully submitted,



Lisa A. Bell, Esquire
Senior Counsel
Attorney for Appellee
Office of the General Counsel
Department of Consumer and
Regulatory Affairs
941 N. Capitol Street, NE
Washington, D.C. 20002

Certificate of Service

I hereby certify that a copy of the foregoing is being served on the following parties and counsel, postage prepaid, by first class mail on this 4th day of May 2005:

Roy Goldberg, Esquire
Sheppard, Mullin, Richter & Hampton, LLP
1300 I Street, N.W. Suite 1100 East
Washington, D.C. 20005-3314



Lisa A. Bell, Esq.
Senior Counsel

Before the
District of Columbia
Board of Zoning Adjustment

RECEIVED
D.C. OFFICE OF ZONING
2005 MAY -4 PM 2:50

APPEAL OF:	)	
	)	
Eastern Trans-Waste of Maryland, Inc.	)	
challenging the Administrative Decision of DCRA	)	BZA Appeal No. 17288
to deny building permit as a matter of right.	)	

PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

APPEAL NO. 17288 of Eastern Trans-Waste of Maryland, Inc., pursuant to 11 DCMR § 3100 and 3101, from the decision of the Department of Consumer and Regulatory Affairs Zoning Administrator not to issue a building permit as a matter of right for new construction at its solid waste facility at 1315 I Street, N.W., Washington, D.C.

HEARING DATES: March 15, 2005

DECISION DATE: May 10, 2005

I. FINDINGS OF FACT

1. Appellant, Eastern Trans Waste of Maryland, Inc. (ETW), operates a solid waste facility at 1329 First Street, S.E., Washington, D.C. 20003. ETW holds a Certificate of Occupancy, No. B162503 for a warehouse (Waste and Rec.). The Certificate of Occupancy was issued March 17, 1992.

2. On or about October 10, 2003, ETW applied to the Department of Consumer and Regulatory Affairs ("DCRA") for a building permit for almost a half-million dollars' worth of construction at their solid-waste transfer facility located at 1315–1329 First

FAX

941 North Capitol Street, N.E., Suite 9406,
Washington, D.C. 20002

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS - Office of the General Counsel

Fax

To:	Jerrily Kress, Director Office of Zoning/ Geoffrey Griffis, Chair Board of Zoning Adjustment	**From:**	Lisa A. Bell Senior Counsel
Fax:	727-6072	**Page(s):**	____, INCLUSIVE
Phone:	727-6311	**Date:**	May 4, 2005
Re:	BZA Appeal No. 17288	**CC:**	

Attached: D.C. Department of Consumer and Regulatory Affairs (Appellee)'s Proposed Findings of Fact and Conclusions of Law.

RECEIVED
D.C. OFFICE OF ZONING
2005 MAY -4 PM 2:50