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Before the
District of Columbia
Board of Zoning Adjustment

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

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Exhibit No. 23

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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

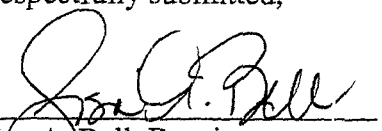
Based on the record taken as a whole, including the testimony and evidence of record including the building permit applications, plans and all documentation submitted by the parties to this appeal, the Board is concludes that DCRA did not error ion its decision to refer ETW to the BZA for a special exception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

Accordingly, the Board denies the appeal.

_____
Geoffry H. Griffis, Chairman

Vote: _____

Respectfully submitted,

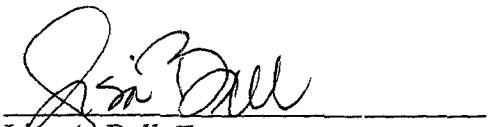


Lisa A. Bell, Esquire
Senior Counsel
Attorney for Appellee
Office of the General Counsel
Department of Consumer and
Regulatory Affairs
941 N. Capitol Street, NE
Washington, D.C. 20002

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

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FAX

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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.

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