Appeal No. 17288 of Eastern Trans-Waste of Maryland, Inc. ("ETW"), pursuant to 11 DCMR 3100 and 3101, from the administrative decision of the Zoning Administrator of the Department of Consumer and Regulatory Affairs. Appellant alleges that the Zoning Administrator erred in denying the issuance of a building permit, and instead requiring variance relief from the Board of Zoning Adjustment, to make repairs and improvements to an existing solid waste transfer facility in the CG (Capital Gateway) CR District at premises 1315 1st Street, S.E. (Square 703, Lot 54).

HEARING DATE: March 15, 2005
DECISION DATE: May 10, 2005

ORDER

PRELIMINARY MATTERS

Appellant Eastern Trans-Waste of Maryland, Inc. ("Appellant" or "ETW") filed this appeal with the Board of Zoning Adjustment ("Board" or "BZA") on December 21, 2004. Appellant claimed that the Zoning Administrator ("ZA") of the Department of Consumer and Regulatory Affairs ("DCRA") erred in denying Appellant a building permit to allow it to perform repairs and improvements at its solid waste handling facility located at 1315 1st Street, S.E. The ZA denied the building permit and instead informed Appellant that it required two variances from the Board before it could proceed with the work on its facility.

The dispute herein arises out of a decision of the Zoning Commission in the Spring of 2001 to hold a further hearing with respect to Zoning Commission case no. 96-3/89-1. That case, begun in 1996, concerned the establishment of an overlay district that includes Appellant's property within its boundary. In connection with the establishment of the overlay, Appellant's property was to be rezoned from M to CR. By virtue of 11 DCMR § 3202.5, all building permit applications filed after the date of the Commission's decision to hold the hearing had to be processed in accordance with requirements of the rezoning being considered. Solid waste handling facilities are not permitted in CR Districts. Normally, when a property's zoning changes to a district in which its use is disallowed, it is treated as a nonconforming use. Such uses may continue, but may not expand, undergo significant structural alteration, or be rebuilt if substantially destroyed. The Zoning Commission, however, added language to the proposed overlay that deemed uses similar to Appellant's to be conforming, but precluded their expansion. The Zoning Administrator did not process this building permit application in accordance with that

BZA
CASE No. 17288
EXHIBIT No. 25

Board of Zoning Adjustment
District of Columbia
CASE NO. 17288
EXHIBIT NO. 25

provision because he believed that it did not take precedence over the fact that solid waste handling facilities were not permitted in CR zones. Because he believed that the Appellant's facility was a nonconforming use, he analyzed the proposed construction against what was permitted for such uses and concluded that it went beyond the type of structural alterations allowed.

Although Appellant's facility is within the area represented by Advisory Neighborhood Commission ("ANC") 6D, and although the ANC was automatically a party to this appeal, it did not submit any report to the Board either in favor of, or opposing, the appeal. The Capitol Hill Restoration Society filed a letter with the Board on February17, 2005, urging the Board to grant the appeal.

The Board heard the appeal on March 15, 2005, with both the Appellant and DCRA participating in the hearing.

At its May 10, 2005 decision meeting, the Board decided to grant the appeal by a vote of 5-0-0.

FINDINGS OF FACT

Background and History

1. The property that is the subject of this appeal ("subject property") is located at 1315 1st Street, S.E., at Square 703, Lot 54. The property is developed with the Appellant's solid waste handling facility.

2. The Appellant's facility was and is operating under a certificate of occupancy (No. B162503), issued on March 17, 1992, for a "Warehouse (Waste and Rec.[ycling])." Exhibit No. 4, Attachment 1. The C of O was issued at a time when the Zoning Regulations did not include provisions that directly regulated solid waste handling facilities. Subsequently, the Commission adopted 11 DCMR § 822.3, which permitted new solid waste handling facilities in M zones, but only by special exception.

3. The definition of nonconforming use in § 199 of the Zoning Regulations (11 DCMR) includes a provision stating that a "use lawfully in existence at the time of adoption or amendment of this title that would thereafter require special exception approval from the Board of Zoning Adjustment shall not be deemed a nonconforming use." However, an extension or enlargement of that use requires special exception review. 11 DCMR § 3104.2.

4. On June 1, 2001, the Zoning Commission published notice of its intent to hold a further public hearing with respect to Zoning Commission case 96-3/89-1,

which would establish a new overlay, originally called Buzzard Point (BP), but later renamed the Capital Gateway (CG) Overlay District.

5. Subsection 1600.2 of the advertised text indicated that the new overlay was intended to "assure development of the area with a mixture of residential and commercial uses, and a suitable height, bulk and design of buildings" while also allowing "for continuation of existing industrial uses ...during the extended period projected for redevelopment."

6. The advertised text included several proposed zoning map amendments, including the following:

   4. Rezone from M to BP/CR:

   All of squares 605, 607, 609, 611, 660, 661, 662, E662, 664, 703, 705, 706 and the northern half of Square 665.

7. Appellant's property is located in square 703.

8. Neither the CR district, nor the advertised overlay provisions, permit solid waste handling facilities, either as a matter of right or by special exception. However, consistent with the stated purposes of the overlay, the Commission proposed a limited "grandfathering" provision, designated as § 1605.1, which, as advertised, read:

   > 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 (date), shall be deemed a conforming use and shall be entitled to expand on its current lot or lots as a matter of right up to the permitted commercial FAR and height limits of the underlying zone district; Provided, that the performance standards of §§ 804, 805, 825 and 826 applicable to the use shall apply to any expansion.

9. On August 2, 2002, the Zoning Commission published a notice of proposed rulemaking in the D.C. *Register* for case 96-3/89-1 (*49 D.C. REG. 7538).* The notice included a revised version of proposed § 1605.1, which read as follows:

   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 (date), shall be deemed a conforming use, but shall not be entitled to expand.

10. Had the Zoning Commission not included this provision, the facilities it describes would have become nonconforming uses. While nonconforming uses may continue in operation until they are abandoned or destroyed, they cannot expand, 11 DCMR § 2002.3, nor undergo structural alterations other than those that would be considered "ordinary" or "required by other municipal law or regulation." 11 DCMR § 2002.4.

11. Section 3202.5 of the Zoning Regulations provides that if an application for a building permit is filed after the date that the Commission "has made a decision to hold a hearing" to rezone the property, "the application may be processed, and any work authorized by the permit may be carried to completion, only in accordance with the zone district classification of the site pursuant to the final decision of the Zoning Commission in the proceeding, or in accordance with the most restrictive zone district classification being considered for the site."

12. Since the proposed CR rezoning is the most restrictive, any building permit filed by the Appellant between June 1, 2001 and August 1, 2002 would have been governed by the provisions advertised and after, August 2, 2002, by the revised text of the proposed rule.

13. In or around October, 2003 – after the Commission published the notice of proposed rulemaking but prior to the effective date of the final rule -- Appellant applied to DCRA for a building permit to perform renovation work, consisting of repairs and improvements, at its facility. Exhibit No. 21, Attachment 1.

14. Specifically, the Appellant sought to repair or replace portions of the facility's structural steel, roof and sub-structure, siding and floor, service doors, and bathrooms.

15. By memorandum to the Board dated November 3, 2004, DCRA indicated that it was denying the application based upon zoning grounds. DCRA characterized Appellant's proposed project as "an enlargement to an existing non-conforming use," and stated that Appellant needed variances from §§ 2002.4 and 3202.5(b) of the Zoning Regulations in order to proceed with its proposed repairs and improvements. Exhibit No. 4, Attachment 4.

16. The Appellant filed a timely appeal of that decision on December 21, 2004.

17. On January 7, 2005, the map and text amendments that established the CG Overlay and rezoned the Appellant's property became final. *D.C Register* at 52 D.C. Reg. 63 (2005). The text of § 1605.1 as published in the notice of

proposed rulemaking was unchanged other than that the date upon which grandfathering would be determined was stated to be the date when the final rulemaking became effective.

18. During the hearing on the appeal, the Zoning Administrator conceded that the proposed repairs and improvements did not constitute an "expansion" of the Appellants' use. He said, however, that he denied the permit on zoning grounds, with the November 3, 2004 memo, because he found that the use was a nonconforming use in the underlying CR zone and he interpreted some of the repairs to be the type of "structural alterations" not permitted by § 2002.4 to be undertaken to buildings housing nonconforming uses.

CONCLUSIONS OF LAW

Pursuant to the § 8 of the Zoning Act of 1938, D.C. Official Code § 6-641.07(g)(4) (2001), the Board may hear and decide appeals where it is alleged that there is error in any decision made by any administrative officer or body in the administration or enforcement of the Zoning Regulations. The decision being appealed in this case is the denial of the building permit based upon two findings: (1) the Appellant's facility was a nonconforming use, and (2) the proposed construction exceeded the extent permitted such uses. The Board concludes that both findings were in error.

As a result of the Zoning Commission's decision to hold a further hearing on what later became known as the Capital Gateway Overlay, the Zoning Administrator was required by 11 DCMR § 3202.5, to process the building permit application filed by the Appellant in accordance with the requirements of the CR zone district, as modified by the overlay text. Although the Zoning Administrator gave effect to the CR use requirements, he did not, pursuant to § 1605.1, "deem" Appellant's use to be conforming.

The Zoning Administrator did so, not because he thought that the Appellant's use failed to meet the two prerequisites of the provision, *i.e.* its use is first permitted in a CM or M District and it holds a valid certificate of occupancy[1], but because he did not "see any specific language in this overlay that addresses that as to which takes precedence." March 15, 2005 hearing transcript at 384, lines 24-25. However, § 1600.3, both as proposed and as finally adopted, provides that the text of the CG Overlay is to prevail over conflicting provisions of the underlying zone. Moreover, the very purpose of the grandfathering provision was to act as an exception to those sections of the Zoning Regulations that would have resulted in Appellant's use being treated as nonconforming.

[1] Although the Zoning Administrator indicated during the hearing that there was an issue as to the validity of the certificate of occupancy, it was not stated as a ground for permit denial and therefore is not before the Board.

The Board concludes that § 1605.1, as it appeared in the Notice of Proposed Rulemaking, required that the Zoning Administrator deem uses that met its prerequisites as conforming, even if those uses were not permitted in the underlying zone. Although the subsection prohibits the expansion of such uses, the government conceded that no expansion would result from the construction, and the Board concurs. The Appellant merely proposes to repair, replace, or modernize portions of its roof, siding, floor, doors, and bathrooms. Even had this been a nonconforming use, such activities are exactly the type of "ordinary repairs, alterations, or modernizations [that] may be made to a structure or portion of a structure devoted to a nonconforming use." 11 DCMR § 2002.4.

For the reasons stated above, the Board concludes that the Appellant has met its burden of proof in demonstrating that DCRA erred in denying it a building permit for repairs and improvements to its solid waste transfer facility. Therefore, it is hereby **ORDERED** that this appeal be **GRANTED.**

VOTE: **5-0-0** (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr. John A. Mann, II and Kevin Hildebrand, to grant.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member has approved the issuance of this Decision and Order and authorized the undersigned to execute the Decision and Order on his or her behalf.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: OCT 2 5 2005

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

BZA APPEAL NO. 17288

As Director of the Office of Zoning, I hereby certify and attest that on OCT 2 5 2005, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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ATTESTED BY: _____
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