Raymond | Coleman
Heinold | Norman LLP
attorneys at law

325 New Albany Road
Moorestown, NJ 08057

Tel. 856.222.0100
Fax 856.222.0411

Stephen G. Raymond
Thomas J. Coleman, III*
Douglas L. Heinold
Christopher J. Norman

Stephen E. Raymond*

William H. Menges^Δ
Edward A. Kondracki^Δ

*Also admitted to practice in the Commonwealth of Pennsylvania
^ΔOf Counsel

cnorman@rclawnj.com

RECEIVED
JAN -3 2017
Chambers of
Ronald E. Bookbinder, A.J.S.C.
+FILED

December 30, 2016

Filing Intake, Law Division
Superior Court of New Jersey
Burlington County Courts Facility
49 Rancocas Road
Mount Holly, NJ 08060

RE: Allied Recycling, Inc., et al. v. Township of Southampton Zoning Board of Adjustment
Docket Number: BUR-L-001390-16

Dear Judge Bookbinder:

Enclosed for filing, please find an original and one (1) copy of the following on behalf of defendant, Township of Southampton Zoning Board of Adjustment:

1) Trial Brief;
2) Certification of Christopher Norman;

Please return a stamp-filed copy of the above in the enclosed self-addressed stamp envelope.

Respectfully submitted,

Christopher J. Norman, Esq.

CJN/jns
encl.

cc: Honorable Ronald E. Bookbinder, A.J.S.C. (w/encl.)
Michael Ridgway, Esq. (w/encl.)
Thomas J. Coleman III, Esq.

Thomas J. Coleman III, Esq.
Christopher J. Norman, Esq.
Attorney ID No. 027861991
RAYMOND, COLEMAN, HEINOLD & NORMAN, LLP
325 New Albany Road
Moorestown, New Jersey 08057
(856)222-0100
Attorneys for Defendant, Township of Southampton Planning Board

ALLIED RECYCLING, INC. and LAST CHANCE SALVAGE, INC. Plaintiffs, vs. TOWNSHIP OF SOUTHAMPTON ZONING BOARD OF ADJUSTMENT Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BURLINGTON COUNTY Docket No. BUR-L-001390-16 Civil Action

TRIAL BRIEF OF DEFENDANT
TOWNSHIP OF SOUTHAMPTON
ZONING BOARD OF ADJUSTMENT

Christopher J. Norman, Esq.
On the Brief

PRELIMINARY STATEMENT

Defendant Southampton Township Zoning Board ("Zoning Board") will not rehash the entire prior prerogative writ litigation history in this matter involving a nonconforming-use junkyard, but will condense its presentation to those matters now pending before the Court, which have not been previously adjudicated.

At issue before the Court is whether the Zoning Board has complied with the Court's prior remand instructions in its August 21, 2015 and January 12, 2016 written opinions. See Allied's Trial Exhibits "G" and "H".

The Zoning Board did comply with the Court's remand instructions.

First, the Zoning Board did not reopen the record for supplemental evidence and/or testimony because the Court instructed in its opinions, dated August 21, 2015 and January 12, 2016, that such would not be required given that a fully developed record already exists in this matter.

Second, the Zoning Board evaluated the ongoing business activities of Allied's junkyard in 1982 when the nonconforming use rights were established at the time of zoning ordinance adoption. This evaluation was based on the record from multiple zoning board hearings. The Zoning Board considered the testimony proffered by several of Plaintiff Allied Recycling, Inc.'s ("Allied") fact witnesses, including Dan Giberson, Fred Myers, David Blyer, Michael Evans and Stephen Jenkins (not merely Stephen Jenkins as asserted by Allied in its Trial Brief). See, Allied's Trial Exhibit "I". Critical in the record was evidence that, in 1982, only a smaller sized-scale (the size of a dining room table) existed at the junkyard for the weighing of scrap-metal for recycling purposes. Two (2) of Allied's fact witnesses (Myers and Blyer) confirmed that such small weight-scale was used to weigh copper-wire for purchase. Only Stephen Jenkins provided

testimony that scrap-metal recycling constituted 10%[1] of the junkyard business at that time. Jenkins is the only Allied witness who provided testimony in the record specifically quantifying the "quality and intensity" of scrap-metal recycling activity at the Allied junkyard.[2] It was Allied (not the Zoning Board) that carried the legal burden of proof to establish the extent of its scrap-metal recycling nonconforming rights. *Parazewski* v. *Elsinboro Tp.*, 297 *N.J. Super.* 531, 536 (App. Div. 1997), aff'd 154 *N.J.* 45 (1998). The Zoning Board's comprehensive findings on its nonconforming use rights determination are fully set forth in Resolution 2016-6. See, Allied's Trial Exhibit "I".

Third, the Zoning Board considered the increase of scrap-metal recycling activity from 10% of the business in 1982 to 50% as currently proposed by Allied (in its minor site plan application) as triggering an expansion of a nonconforming use. In considering this application and weighing the evidence, the Zoning Board determined that Allied had not met its statutory burden for entitlement to relief under *N.J.S.A.* 40:55D-70(d)(2). Many of the reasons supporting the denial of the earlier (D)(1) use variance, also supported the denial of the (D)(2) expansion of nonconforming use variance. These reasons are fully set forth in Resolution No. 2016-9 (See, Allied's Trial Exhibit "J") and fully supported by the comprehensive record below.

Lastly, Allied incorrectly asserts that the Zoning Board's "substantially similar use" determination had been previously adjudicated by the Court to be invalid in the prior litigation between the parties. That is simply not true, as the Court never adjudicated the "substantially similar use" issue. Indeed, the Court instructed the Zoning Board to re-conduct a "substantially similar use" determination at its last remand from August 21, 2015, which instruction the Zoning

[1] Jenkins' testimony estimating scrap metal recycling was 10% in 1982 is wholly consistent with a junkyard operating with a small weight-scale the size of a dining room table.
[2] The remainder of nonconforming use junkyard activity would be traditional and customary (i.e. auto-salvage and ancillary long-term storage of junked materials).

Board has followed. Previously, the Court has only adjudicated the issue of determining Allied's nonconforming use baseline rights. See, Certification of Christopher Norman, Exhibit "1" and Allied's Trial Exhibits "G" and "H".

The Board's findings on the "substantially similar use" determination remain the same as before, as the predicate facts in the record have not materially changed. Scrap-metal recycling activity was most recently deemed by the Zoning Board in Resolution 2016-6 to be 10% of the nonconforming use rights from 1982 (See Allied's Trial, Exhibit "I"); such usage is comparable to the scrap-metal recycling activity previously recognized in Resolution 2014-11 as being sporadic and intermittent. (See, Allied's Trial, Exhibit "E").

In addition, the Zoning Board did not engage in any "prejudgment" in the manner of its adoption of Resolution No.'s 2016-6 and 2016-9, pursuant to the Court's remand instructions.

First, there was no requirement for the Zoning Board to reopen the record.

Second, a legal memo provided to the full Zoning Board by its Board Solicitor, in advance of the remand hearing of May 12, 2016, indicates that: 1) Allied's attorney was fully appraised that the draft Resolutions would be considered; 2) Allied's attorney replied that he would not be attending the May 12, 2016 public hearing on the remand, but that his client would attend to observe; and 3) most importantly, the Zoning Board was explicitly instructed by Board Solicitor that it was not bound by the findings of fact and conclusions of law in the two (2) draft Resolutions. Indeed, the May 11, 2016 legal memo provided the following instructions to the Zoning Board, in pertinent part:

> You should review both resolutions prior to the public hearing and be prepared to ask questions and or to deliberate on its findings and conclusions of law. If you are satisfied with both resolutions, memorialization will occur at the hearing on May 12, 2016. If you believe additional findings are warranted in either of the resolutions, or if you disagree with the substance of the two (2) resolutions, please present your reasons at the hearing.

See, Certification of Christopher Norman, Exhibit "2".

Thus, the outcome of the May 12, 2016 public hearing on the remand proceeding was neither preordained, nor pre-determined. Zoning Board members were given full opportunity to fully review, and revise the Board's draft Resolutions, prior to their memorialization, in accordance with law. The Zoning Board's final determinations did not materially depart from its previous decisions in this protracted litigation.

COUNTERSTATEMENT OF FACTS & PROCEDURAL HISTORY

In Allied litigation #1 (Docket No. BUR-L-2448-13), this Court entered an April 10, 2014 Tentative Disposition and May 23, 2014 implementing order remanding the matter to the Zoning Board to determine: 1) the extent of Allied's baseline nonconforming use rights; 2) whether Allied's proposed use is "substantially similar" to the baseline nonconforming use rights; and 3) in the alternative, whether a use variance should be granted pursuant to *N.J.S.A.* 40:55D-70(d)(1).

In the consolidated Allied litigation #2 (Docket No. BUR-L-309-15), this Court entered an August 21, 2015 Tentative Disposition holding (at page 37): 1) the Zoning Board's 1982 baseline non-conforming use determination that Allied's rights are limited to "auto-salvage" only was arbitrary and capricious; and 2) the matter shall be remanded to the Zoning Board to: a) reevaluate the quality and intensity of the 1982 use (i.e. specifically determine how much of the nonconforming use activity in 1982 was devoted to a traditional junkyard use, as compared to scrap-metal recycling activity); b) determine whether the intended/proposed use is "substantially similar" to the historic use; and c) consider "additional information from the applicant, or undergo this analysis based upon the evidence already submitted."

In accordance with the Court's remand instructions (See Allied's Trial Exhibit "G" at page 37), the Zoning Board elected not to reopen the already fully developed record. Rather the Zoning Board set a public hearing for the remand hearing on May 12, 2016.

In advance of the public hearing, the Zoning Board Solicitor prepared a May 11, 2016 legal memorandum to the Zoning Board, accompanied with the draft Resolutions. 2016-6 and 2016-9. See, Certification of Christopher Norman, Exhibit "2". Said legal memo states in pertinent part:

- No additional evidence by way of documentation or testimony will be taken.
- Our office has notified Allied Recycling's attorney, Michael Ridgeway of the May 12, 2016 hearing date.
- Mr. Ridgeway will not be attending the meeting, but has indicated his client may attend the hearing strictly for observation purposes.
- Mr. Ridgeway has also acknowledged that Judge Bookbinder ruled in both the August 21, 2015 and January 12, 2016 opinions that the Zoning Board has no obligation to reopen the record, since it is already very comprehensive and fully developed.
- "...the Zoning Board must reconsider the Minor Site Plan and Use Variance application under the legal analysis for expansion of a pre-existing lawful nonconforming use. This will require the Zoning Board to acknowledge in its decision that the use already exists, and presumably will be less injurious to the neighborhood and zone plan because the use is already there."
- Many of the proofs supporting the Zoning Board's denial of a use variance in Resolution 2014-17 similarly justify a denial for expansion of an already existing nonconforming use.
- You should review both resolutions prior to the public hearing and be prepared to ask questions and or deliberate on its findings and conclusions of law.
- If you are satisfied with both resolutions, memorialization will occur at the hearing on May 12, 2016.
- If you believe additional findings are warranted in either of the resolutions, or if you disagree with the substance of the two (2) resolutions, please present your reasons at the hearing.

At the remand hearing on May 12, 2016, the Zoning Board voted to adopt and memorialize Resolution 2016-6 (See, Allied's Trial Exhibit "I") and Resolution 2016-9 (See Allied's Trial Exhibit "J").

Resolution 2016-6 (See, Allied's Trial Exhibit "I") sets forth in detail multiple excerpts from the comprehensive record of public hearings on Allied's development applications.

Paragraph 3A through F of Resolution 2016-6 cites the testimony of Allied's fact witnesses Giberson, Myers, Blyer, Evans and Jenkins, all of whom the Court found had provided credible factual testimony.

Paragraphs 4-6 of Resolution 2016-6 contains findings detailing Allied's illegal installation of a new and larger weight-scale to be used in conjunction with a proposed expansion of scrap-metal recycling activity. Such larger scale, which could weigh trucks containing scrap-metal, would replace a smaller-sized scale (the size of a dining room table) that was used at the junkyard when nonconforming use rights were established in 1982.

Paragraphs 6 through 9 of Resolution 2016-6 highlight the following:

> 6. The new weight-scale is significantly larger than the existing weight-scale historically used at the junkyard property, which was "small" and approximately the size of a "dining room table according to Allied's fact witnesses, David Blyer and Fred Myers. Trucks could be weighed on this new weight-scale, allowing for a significant intensification and expansion of scrap-metal recycling activity. With this new and larger weight-scale at the junkyard scrap-metal can be processed with much greater efficiency and in significantly larger quantities in comparison to a pre-existing smaller weight-scale, the size of a dining room table.
>
> 7. Gabrysiak testified since he cleaned up the junkyard and brought in his new equipment including the new and larger weight-scale, the current use of the junkyard is now 50% auto-salvage and 50% scrap-metal recycling. (T. 6/10/14 at 46-48).
>
> 8. Neither Allied, Giberson or any of Allied's fact witnesses presented any evidence of financial records to prove that any scrap-metal recycling activity occurred at the junkyard, on or before June 8, 1982, the date upon which nonconforming use rights would have vested.
>
> 9. Considerable testimony was adduced on the Record from a substantial number of nearby residents to the junkyard indicating their personal recollection that when Allied took over the junkyard in 2010, they noticed a significant change in character of use activity at the junkyard. These changes included:

A. A significant increase of truck traffic hauling scrap-metal to/from the junkyard;
B. A significant increase in noise from the operation of heavy construction equipment onsite to create large and tall stockpiles of "white metals", which piles are sorted and processed for resale; and
C. A significant increase in turnover of materials accepted/sold at the junkyard.

Based on these findings in Resolution 2016-6, the Zoning Board concluded, in pertinent part:

1. Nonconforming use rights at the Allied junkyard are restricted to auto-salvage (and incidental long-term storage of junked materials) and use of an existing smaller-sized scale on the property, approximately the size of a dining room table, to engage in the business of scrap recycling of copper cable and wire and other similar materials, such as those described herein. Such scrap-metal recycling may constitute no more than 10% of the business activity conducted by Allied in terms of revenue.

2. The Zoning Board reincorporates its findings of fact and conclusions of law in Resolutions 2014-11 and -12 (copies attached hereto and incorporated herein by reference as Exhibits "A" and "B") as to whether Allied's existing use activities are "substantially similar" in use to the nonconforming use rights described in the preceding paragraph #1. This reevaluation of the base-line nonconforming use rights does not alter or require a modification to the findings and conclusions of law set forth in Resolutions 2014-11 and -12.

4. Lastly, the Zoning Board adopts Resolution 2016-[9] with respect to denial of variance relief, pursuant to *N.J.S.A.* 40:55D-70(d)(2), for the expansion of a nonconforming use for the reasons set forth therein.

In Resolution 2016-9, the Zoning Board set forth its findings of fact[3] and conclusions of law for denying the requested expansion of nonconforming use (D)(2) variance. The Board's detailed reasoning is set forth at Paragraph 8a through –i as follows:

A. The increase of more intensive scrap-metal recycling activity at the junkyard from 10% to 50% of the overall business use is incompatible within an agricultural-residential zoned area having an established character of single-family dwellings.

[3] Excerpts from the record supporting the findings in Resolution 2016-9 are set below in the Legal Argument section of this Trial Brief at pages 25-29

B. Allied Recycling's proposed expansion of scrap-metal recycling would entail deliveries by large tractor-trailers on narrow Township Public Roads to access the junkyard, creates an unsafe traffic situation.

C. Approval of this expanded use will eventually require the widening and improvement of Township streets that would be incompatible in its agricultural-residential setting, and will result in additional taxpayer expense for such improvements, including substantial and recurring road maintenance costs, associated with continuous heavy truck traffic volume.

D. Allied Recycling cannot mitigate the adverse impacts to the adjacent residential properties as screening and buffering cannot be adequately established to mitigate the noise and visual impacts of the Applicant's proposed use. Scrap metal piles at the heights established by Allied Recyling cannot be adequately screened from public view in this agricultural-residentia setting by landing, fencing or otherwise.

E. The proposed noise levels, while not exceeding state standards of 65 dB, still represent an added inconvenience and enhanced nuisance from the perspective of the nearby residents, affecting their quality of life and property values.

F. Allied Recycling operates an auto salvage yard and full scale scrap metal recycling facility in Springfield Township. Allied Recycling can readily explore bifurcating its business operations, so that the Southampton Property is used only as an auto salvage yard and the Springfield property could be utilized exclusively for metal recycling. While this may create some inconvenience for Allied Recycling and affect profitability of its business operations to some degree, Allied Recycling is still not entitled to the granting of a use variance in order to maximize its profits.

G. The Board specifically finds, through repeated and credible testimony of a number of neighbors over numerous public hearings, that since Allied Recycling commenced operations in 2011, the use of the Property has significantly intensified from what existed prior to its occupation and establishment of its business on the premises.

H. Allied Recycling is not entitled to use variance relief to maximize its business profits.

I. Allied Recycling's testimony and argument that the economic feasibility of its existing junkyard operation will be in jeopardy if its expansion of non-conforming use scrap metal recycling activity is not granted approval supports a Board determination that this non-conforming use should not be expanded, but rather should continue to cessation upon functional obsolescence. Such outcome would be consistent with Southampton Township's longstanding zoning policy to prohibit junkyards township-wide and to eliminate such nonconforming uses from areas with a residential agricultural character.

Such findings caused the Zoning Board to conclude at Paragraph 9 of Resolution 2016-9:

> Based upon the proofs above, Allied Recycling has not satisfied the positive and negative criteria to permit the proposed expansion of the nonconforming use activity of scrap-metal recycling from 10% to 50% of the business operations at its Southampton junkyard site.

LEGAL ARGUMENT

I. THE ZONING BOARD DID NOT PREJUDGE THE MATTER BEFORE IT AT THE REMAND HEARING CONDUCTED ON MAY 12, 2016.

Allied asserts that the Zoning Board's actions to adopt and memorialize Resolutions 2016-6 and 2016-9 constituted prejudgment and grounds to set aside its decisions. Allied further asserts that "the Board should have been charged with a proper and correct reading of the Court's ruling, a brief primer on the (D)(2) variance requirements, and reexamination of the applicants revised site plan and concessions prior to any vote". See Allied's Trial Brief at 23.

For the reasons set forth in the Zoning Board Solicitor's legal memorandum of May 11, 2016 to the Zoning Board, this assertion must be rejected. In the legal memo, Zoning Board members were instructed ahead of the public hearing as follows:

- No additional evidence by way of documentation or testimony will be taken.
- Our office has notified Allied Recycling's attorney, Michael Ridgeway of the May 12, 2016 hearing date.
- Mr. Ridgeway will not be attending the meeting, but has indicated his client may attend the hearing strictly for observation purposes.
- Mr. Ridgeway has also acknowledged that <u>Judge Bookbinder ruled in both the August 21, 2015 and January 12, 2016 opinions that the Zoning Board has no obligation to reopen the record, since it is already very comprehensive and fully developed.</u>

- "...the Zoning Board must reconsider the Minor Site Plan and Use Variance application under the legal analysis for expansion of a pre-existing lawful nonconforming use. This will require the Zoning Board to acknowledge in its decision that the use already exists, and presumably will be less injurious to the neighborhood and zone plan because the use is already there."
- Many of the proofs supporting the Zoning Board's denial of a use variance in Resolution 2014-17 similarly justify a denial for expansion of an already existing nonconforming use.
- You should review both resolutions prior to the public hearing and be prepared to ask questions and or deliberate on its findings and conclusions of law.
- If you are satisfied with both resolutions, memorialization will occur at the hearing on May 12, 2016.
- If you believe additional findings are warranted in either of the resolutions, or if you disagree with the substance of the two (2) resolutions, please present your reasons at the hearing.

The Zoning Board members were provided with the drafts of Resolutions 2016-6 and 2016-9, along with the May 11, 2016 legal memo from the Board Solicitor.

The Zoning Board members were not required to discuss the application at the May 12, 2016 remand hearing, nor verbalize the reasons for their vote on the record. *Scully-Bozarth Post v Burlington Planning Bd.,* 362 *N.J. Super.* 296, 312 (App. Div.), certif. den. 178 *N.J.* 34 (2003); See also, Cox & Koenig, *New Jersey Zoning & Land Use Administration,* 19-7.1 at 426 (Gann 2015).

In accordance with the recommended practice in Cox, *supra*, 19-7.1 at 427, as evidenced by the Zoning Board Solicitor's May 11, 2016 legal memo, a copy of proposed Resolutions 2016-6 and 2016-9 were "circulated to all members of the board prior to the meeting" and prior to their memorialization.

Also, in accordance with the recommended practice in Cox, *supra*, 19-7.1 at 427, as evidenced by the Zoning Board Solicitor's May 11, 2016 legal memo, every board member was afforded the opportunity "to review the proposed resolution and request changes or clarifications."

Moreover, the Zoning Board was specifically instructed in the May 11, 2016 legal memo on the legal significance of the standard of review for a (D)(2) variance:

- "...the Zoning Board must reconsider the Minor Site Plan and Use Variance application under the legal analysis for expansion of a pre-existing lawful nonconforming use. This will require the Zoning Board to acknowledge in its decision that the use already exists, and presumably will be less injurious to the neighborhood and zone plan because the use is already there."[4]

If there was a requirement to reopen the record to consider new and supplemental information, then Allied's legal argument of prejudgment might be plausible. However, the Court specifically ruled in the August 21, 2015 and January 12, 2016 opinions that such reopening of the record was not required. The Zoning Board elected not to reopen the already fully developed record.

II. THE ZONING BOARD COMPLIED WITH THE COURT'S REMAND INSTRUCTIONS.

In its January 12, 2016 Tentative Disposition (at pages 10-11), the Court summarized the scope of the remand proceedings to be conducted by the Zoning Board:

> The Court again reiterates that its holding is limited and makes no determination as to the extent, intensity and incidents of this use, and remands the matter back to the Board to reevaluate the quality and intensity of the use in light of this decision. Upon determining the quality of the use, the Board must then determine whether the intended use is substantially similar to the historic use. The Board may seek additional information from the applicant, or undergo this analysis based upon the evidence already submitted.

See, Allied's Trial Brief, Exhibit "H".

In compliance with these remand instructions, the Zoning Board:

- Elected not to reopen the record to consider new testimony.

[4] Such instruction, however did not compel the Zoning Board to grant (D)(2) variance relief. Zoning Boards have considerable discretion to approve or deny an expansion of a non-conforming use, provided such decision is supported by credible evidence in the record.

- Reevaluated the quality and intensity of the 1982 use (i.e. the Board specifically determined how much of the nonconforming use activity in 1982 was devoted to a traditional junkyard use, as compared to scrap-metal recycling) - the Zoning Board, after considering the comprehensive evidence in the record, including testimony of Allied's four (4) fact witnesses, found and concluded:

    1. Nonconforming use rights at the Allied junkyard are restricted to auto-salvage (and incidental long-term storage of junked materials) and use of an existing smaller-sized scale on the property, approximately the size of a dining room table, to engage in the business of scrap recycling of copper cable and wire and other similar materials, such as those described herein. Such scrap-metal recycling may constitute no more than 10% of the business activity conducted by Allied in terms of revenue.

- Determined that the intended use (50% scrap metal recycling/50% traditional junkyard use) was not "substantially similar" to junkyard's historic use (10% scrap metal recycling/90% traditional junkyard use) for the reasons previously set forth in Resolution 2014-11. See Allied's Trial Brief, Exhibit "E". In Resolutions 2014-11, the Zoning Board concluded:

  [Paragraph 8 of findings] "...The Applicant's current use of the Property is not substantially similar to the 1982 base line nonconforming use as there are now 2 primary uses. The addition of a second primary use on this Property in a residential zone creates a significant impact on the surrounding neighborhood. ...The current equipment [larger sized scale for weighing trucks carrying scrap-metal] impacts the neighborhood more than the prior equipment [smaller-sized scale the size of a dining room table]. The height and type of [scrap metal] materials stored at the site has increased as well the traffic."

  [Paragraph 3 of conclusions] "The increase in the noise levels and traffic, since the Applicant commenced operations at the site in 2010 is further evidence of a significant change in use of the Property ..."

The Zoning Board went further than the Court's remand instructions required by setting forth additional findings of fact and conclusions of law in Resolution 2016-9 to deny Allied's request for relief under *N.J.S.A.* 40:55D-70(d)(2) (i.e. expansion of a nonconforming use).

III. THE ZONING BOARD'S FINDINGS AND CONCLUSIONS OF LAW IN RESOLUTION 2016-6 ARE SUPPORTED BY CREDIBLE EVIDENCE IN THE RECORD AND THE DECISONAL LAW.

A. Standard of Review – Baseline Nonconforming Use Rights.

This Court remanded the matter to Zoning Board to make a baseline non-conforming use determination by reevaluating the "quality and intensity of use" as relates to traditional junkyard use activity[5] (auto-salvage and long term storage of junked materials) as compared to scrap-metal recycling activity at Allied's junkyard in 1982, when nonconforming use rights vested.

B. Legal Analysis – Baseline Nonconforming Use Rights.

The Zoning Board's specific findings of fact supportive of its 1982 baseline nonconforming use rights determination are set forth at Paragraphs 3a-f of Resolution 2016-6. (See Allied's Trial Exhibit "I"):

> 3. The Record indicates the following with respect to historic "scrap-metal recycling" activity at the junkyard:
>
> A. Dan Giberson ("Giberson"), the predecessor-in-interest, testified that his parents started operating a small-scale junkyard on the subject property in the early 1960's. (T. 3/14/13 at 27-28; T. 9/19/13 at 55, 58). Describing the scope of the initial junkyard operation, Giberson testified:
>
>> He hauled cars, he hauled aluminum, you name it, metal-wise, junk-wise, it went out there and he would take that to Camden or Trenton. And he would come back every day [at] five, six o'clock in the morning, load up the trucks and bring them to Vincentown and haul them again – or trucks, cares, metal, junk, whatever.
>
> (T. 3/14/13 at 31) (See also, Court's Tentative Opinion, 7/10/14 at 33).
>
> Giberson further testified:
>
>> Like I said, get[ting] back to my dad, Stokie's here had tomato cans and they'd run over them with the steel tractors to get the

[5] Allied attempts, at pages 26-27 of its Trial Brief, to obfuscate the extent of its historic scrap-metal recycling activity by emphasizing two distinct classes of historic junkyard activities (automotive and non-automotive) had existed in 1982. The junkyard's historic acceptance of non-automotive junk (e.g. urinals) cannot bootstrap Allied's argument that scrap-metal recycling was historically greater than 10% of overall junkyard activity in 1982.

> cans, to get the metal...That's what started it...Might have been 20 automobiles back in the day to junk.

(T 9/19/13 at 58-59). (See, Court's Tentative Opinion, 7/10/14 at 34). Giberson further testified that other miscellaneous junk materials would be accepted at the junkyard, including cars, aluminum, refrigerators, washing machines, TV's and wooden boats. (T 9/19/13 at 56-59).

B. Fred Myers testified that he owned an alarm company and would take refuse or scrap from his business to the junkyard from 1973-1998, including alarm equipment, cabinets, and conduit from commercial jobs, cable, fire alarms, standby batteries, and hardware. (See, Court's Tentative Opinion, 7/10/14 at 28). Myers testified that such junk was delivered in a service van, every couple of months. (See, Court's Tentative Opinion, 7/10/14 at 28).

Myers also testified that Freeman Poinsett (a prior junkyard operator at the site) had 3-4 employees and did not usually buy scrap metal, but would accept it. (See, Court's Tentative Opinion, 7/10/14 at 29).

C. In terms of the usage of a weight-scale at the junkyard (which the Zoning Board deems critical in evaluating the overall scope and intensity of any scrap-metal recycling activity), the following testimony was adduced at the July 10, 2014 public hearing (T. 7/10/14 at 43-44):

> Mr. Murphy: I have a question for you. When you took your metal there, did they weigh it before you put it on the pile?
>
> Mr. Myers: Most of that metal at that time was for the longest time I guess early on the scrap yard didn't weigh a lot of it and then they would weigh only certain things. Yes, they'd weigh certain things like cable, copper.
>
> Mr. Murphy: When they would weight it was like a little scale or truck scale?
>
> Mr. Myers: Some kind of a scale.
>
> Mr. Murphy: Do you remember if it's small, big? Did you drive your truck over it?
>
> Mr. Myers: A small scale, medium.
>
> Mr. Coleman: Could you put your truck on it?
>
> Mr. Myers: No.

> Mr. Murphy: You wouldn't drive across it unload your stuff and leave and get weighed again?
>
> Mr. Myers: It's small material, not vehicles, like copper cable.

Mr. Myers further opined on cross-examination by Board Member Robbins (T. 7/10/14 at 47) (See, Court's Tentative Opinion, 7/10/14 at 38):

> Mr. Robbins: So you would drive in there in your van and Freeman or somebody would have had like a little portable scale or something, like a bar scale, you'd put the stuff on the scale?
>
> Mr. Myers: Scrap metal as I indicated before he didn't usually buy that. He took it early on but all the other materials that you just push [i.e.] the metal scrap cabinets and so forth out into their pile of scrap metal on the ground and then certain items like copper cable you weighed on the small scale.
>
> Mr. Robbins: Even then copper, I'm assuming maybe brass?
>
> Mr. Myers: Not in our business, just copper cable.
>
> Mr. Myers: Copper had value.
>
> Mr. Robbins: And he would pay you for that based on the weight, but the other stuff, the cabinets really had --it was a place for you to dispose of it essentially. You weren't really getting money for it?
>
> Mr. Myers: Yes.

D. David Blyer testified that the previous owners of the junk-yard did not have a scale that you drive onto with a car, but that they had a scale about the size of a dining room table. (See, Court's Tentative Opinion, 7/10/14 at 31). Blyer also testified that he was paid for copper wire, dating back prior to 1982. (See, Court's Tentative Opinion, 7/10/14 at 31).

E. Michael Evans testified that he saw Eddie Fuller (a prior junkyard operator) place light iron inside of cars before they were crushed. And that Freeman Pointsett would load three cars on a six point truck to haul them to Trenton and Camden. (See, Court's Tentative Opinion, 7/10/14 at 30). Evans could not quantify the percentage of automobile parts to scrap metal. (See, Court's Tentative Opinion, 7/10/14 at 30).

F. Stephen Jenkins testified that back in 1980 there was 90 percent cars, 10 percent other material, which testimony the Court found to be credible. (See, Court's Tentative Opinion, 7/10/14 at 32, 33).

C. Distinguishing Junkyards from Recycling Centers.

Decisional law in New Jersey recognizes a distinction in character between junkyard/auto-salvage yards and a recycling center.

In *Mayor v. Board of Adjustment*, 32 *N.J.* 130 (1960), the New Jersey Supreme Court, while judicially reviewing a variance application involving a junkyard, analyzed the distinction between a traditional junkyard/auto-salvage yard (involving auto-salvage and the longer-term storage of junked materials as a principle use), compared to scrap-metal recycling (wherein material storage is merely incidental to the recycling of metal, which involves higher turnover of materials).

Looking to law of other jurisdictions, the *Mayor* Court noted that "junk yards" and "auto salvage yards" are practically synonymous due to their emphasis of the long-term storage of junked materials: "[t]he term 'junk yard' has often been applied to places devoted to the storage and commercial use of one type of waste material…" *Mayor, supra,* at 136; "the court speaks of an 'automobile salvage or junk yard' and of 'junked automobiles' being burned and broken into parts." *Ibid.;* "the court described an "automobile junk yard' as part of the business of 'buying old automobiles, wrecking them and selling serviceable parts as such and junking the residue…" *Ibid.;* and "automobile junk yard cases are considered under the general heading of junk yards. *Mayor, supra.*

The Supreme Court, in *Mayor,* then contrasted junkyards to the business of scrap metal recycling:

> *Grace Iron & Steel Corp. v. Ackerman,* 123 *N.J.L.* 54 (Sup.Ct. 1939), cited by plaintiffs, is not to the contrary. The use involved in that case was considerably different from that in question here. In that case it was said:
>
> "The proofs disclose that prosecutor is engaged in the business of vending scrap iron, steel and metal. It has places of business in this country and in Europe. It has used the locus merely as a shipping station, and sought the certificate of occupancy as a warrant for continuing that use. It is designed to employ the premises for the storage of these commodities only as an incident to this primary use. *Ibid.*

In *Arroyo v. Brick Recycling Co.,* 2014 *N.J. Super. Unpub.* LEXIS 423, an Appellate Panel noted the very same use distinction between a scrap-metal recycling center and an auto-salvage yard, upon its judicial review of the granting of a use variance to convert a closed lumber business to a scrap-metal recycling center. See, Christopher Norman Certification, Exhibit "3".

There, the Appellate Panel distinguished a recycling facility from an auto-salvage yard:

> ...that the recycling facility was designed to take ferrous and non-ferrous scrap metal from various sources, including construction sites, local building contractors, and individual homeowners. All materials received would be processed, promptly loaded on trucks or rail cars and shipped out. It was clear from the board hearing that the applicant did not plan to use the premises as a "junkyard" a use the zoning ordinance prohibited anywhere in Wall Township. DeCenzo testified that, unlike other scrap metal facilities....the facility would accept junked automobiles but would not store them on the premises or sell auto parts, the way a typical junkyard would.

Arroyo, *supra,* Slip Opinion at 2-3. The Appellate Panel noted Trial Court Judge Lawson's finding "that the plant would not be a prohibited "junkyard" which typically would involve the long-term storage of abandoned materials." *Arroyo*, *supra,* Slip Opinion at 6. The Appellate Panel then affirmed the Zoning Board's decision:

> Contrary to plaintiff's argument, the Board's conclusion that the use would not be a prohibited "junkyard" is supported by substantial credible evidence in the record. The applicant's vice-president cogently explained the difference between a junkyard and a recycling center and his testimony established that Brick would not be running a junkyard.

Arroyo, *supra,* Slip Opinion at 10.

In *Marlboro Auto Wreckers v. Zoning Bd. of Adjustment, supra*, the Appellate Panel upheld a zoning board's determination restricting the owner's nonconforming use rights to the operation of an auto-salvage yard. See, Christopher Norman Certification, Exhibit "4". The Appellate Panel rejected the junkyard owner's claims that issuance of a junkyard license, pursuant to municipal ordinance, permits operation of a full-scale junkyard operation, including scrap-metal recycling.

Lastly, Judge Havey found in *Township of Fairfield, supra*, 274 *N.J. Super.* at 331, that a recycling center is clearly a distinct use from an auto-salvage yard.

D. Standard of Review – Substantial Similar Use/Continuation of Nonconforming Use Rights.

In *Saadala, supra*, 412 *N.J. Super.* 541, 548 (App. Div. 2010), Judge Skillman set forth the standard of review for the continuation of non-conforming uses:

> [Court] decisions dealing with the continuation of nonconforming uses indicate that this phrase should be construed restrictively. In *Parillo's,* the Court distinguished between an "enlargement" and a "change" in a nonconforming use and stated that in determining whether a "change" in use was "substantial", our "[c]ourts ...have proceeded with a caution approaching suspicion." 83 *N.J.* at 316, 416 A.2d 388. Most significantly, the Court stated that "an existing nonconforming use will be permitted to continue only if it is a continuance of substantially the same kind of use as that to which the premises was devoted at the time of the passage of the zoning ordinance." *Ibid.* This comment at least suggests that the Court would take a restrictive view of what constitutes an expansion of a preexisting nonconforming use rather than the establishment of a new use.

In *Township of Fairfield, supra,* 274 *N.J. Super.* at 328, Judge Havey provided further guidance:

> Nonconforming uses "may not be enlarged as of right except when the change is so negligible or insubstantial that it does not warrant judicial or administrative interference." *Belleville,* 83 *N.J.* at 316, 416 A.2d 388. Any

> doubt as to whether enlargement or change of the use is substantial rather than insubstantial is to be resolved against the property owner. *Ibid. Lehen v. Atlantic Highlands Zoning Board of Adjust.*, 252 *N.J. Super*. 392, 399, 599 A.2d 1283 (App. Div. 1991). The power to allow expansion of the nonconforming use when the change is not negligible or substantial is reposed exclusively with the board of adjustment ...

Accordingly, "the board's decision denying prior nonconforming use protection or expansion is entitled to greater deference than a decision finding and protecting a prior nonconforming use." *McDowell, Inc. v. Bd. of Adjustment*, 334 *N.J. Super*. 201, 225 (App. Div. 2000).

Moreover, the board's determination on the "substantial change" issue is presumptively valid because it involves a mixed question of law and fact. *Bonaventure Intern, Inc. Borough of Spring Lakes,* 350 *N.J. Super*. 420, 438 (App. Div. 2002). *See also*, Cox & Koenig, *New Jersey Zoning & Land Use Administration*, 33-1.1 at 717 (Gann 2015). Such deference is "based upon the Board's familiarity both with conditions in the municipality and with the land use plan embodied in the zoning ordinance, as well as disfavor for deviations from that plan." *McDowell, supra.,* 334 *N.J. Super*. at 225.

The "substantial change" determination focuses upon:

> "...the quality, character and intensity of the use, viewed in their totality and with regard to their overall effect on the neighborhood and the zoning plans."

Coneselice v. Borough of Seaside, 358 *N.J. Super*. 327, 334-335 (App. Div. 2003)

Certain factors are markers or strong evidence of "substantial change". In *Saadala, supra,* 412 *N.J. Super*. at 549, Judge Skillman emphasized that "substantial change" typically occurs when the existing nonconforming use cannot survive without any modification thereto:

> When a landowner proposes to make a substantial change in nonconforming use..., the application to authorize this change will often be made because the existing use is no longer physically or economically

> viable and thus is not 'thriving'." In such circumstances there is a greater likelihood that the 'nonconforming use will wither and die' if the application is denied than where an applicant only seeks authorization for expansion of an existing use.

Several Appellate Court opinions have also found that "substantial change" occurs when there is alteration or modification to a principal and accessory use activity of a nonconforming use. In *Coneselice, supra,* 358 *N.J. Super.* at 334, Judge Carchman, reviewing *Belleville,* found:

> The Court noted that although the discotheque conducted similar activities as the restaurant, including dancing, music, and the sale of alcohol, among other things, the conversion to a discotheque was an impermissible change of the nonconforming use because dancing became primary rather than incidental, the music was louder and operated by a disc-jockey rather than performed live, and more alcohol was sold. ... See also *Heagan v. Borough of Allendale,* 42 *N.J. Super.* 472, 483, 127 A.2d 181 (App. Div. 1956)(holding that addition of dancing and music to restaurant constituted impermissible change of nonconforming use).

In *Nouhan v. Bd. of Adjust. Of Clinton,* 392 *N.J. Super.* 283 (App. Div. 2007), Judge Skillman held that the addition of discotheque-nightclub to an existing nonconforming use restaurant constituted a "substantial change", notwithstanding the fact the nightclub had previously been granted a license by the municipality.

In *Heagan v. Borough of Allendale*, 42 *N.J. Super.* 472 (App. Div. 1956), the Panel held that the addition of music and dancing as an incidental use to a nonconforming restaurant constituted a "substantial change", necessitating variance relief.

In *Township of Fairfield, supra,* Judge Havey held that the addition of a concrete recycling center to an existing nonconforming use auto-salvage yard constituted a "substantial change" necessitating use variance relief. There, the owner of the auto-salvage yard, who described it as a "junkyard", asserted that concrete/asphalt recycling is nothing more than the storage of junk. *Township of Fairfield, supra,* 274 *N.J. Super.* at 330. Such argument was resoundingly rejected by Judge Havey, who opined:

> This argument needs little discussion. Defendant ignores the fact that his automobile salvage yard is not a permitted use. As such, its enlargement or alteration to include the recycling of asphalt and concrete or any other "junk" is subject to the heightened scrutiny given to prior nonconforming uses. Clearly a salvage yard for auto parts is very different from a recycling center. Even if there were some doubt as to this point, that doubt must be resolved against defendant. *See, Town of Beleville,* 83 *N.J. 316, 416 A.2d* 388; *Lehen,* 252 *N.J. Super.* at 399, 599 A.2dd 1283.

Ibid. at 331.

A third factor in the "substantial change" determination is any increase in intensity of use. *Avalon Home and Land Owners Ass'n v. Borough of Avalon,* 111 *N.J.* 205, 211 (1988). However, the fact that a proposed change to a nonconforming use would be "less intense" than the existing use, alone, is not dispositive. In *Tricare Treatment Services v. Chatham Borough Planning Board*, 2014 *N.J. Super.* LEXIS 2783, the Appellate Panel rejected the nonconforming use owner's blanket proposition that "substantial change" does not occur when a proposed change in use is "less intense".[6] Slip Opinion at 3. The Panel concluded:

> Tricare argues that its proposed use of the Inn was simply a continuation at a "less intense" level of that buildings preexisting nonconforming use, because fewer patients would reside in the treatment center than the number of guests who stayed for a night at the Inn. The fundamental character of the Parrott Mill Inn would be altered, however, by its issue as an in-patient gambling addiction treatment center rather than an inn providing bed and breakfast to Chatham visitors seeking a charming, historic spot to relax.

E. Substantial Similar Use/Continuation of Nonconforming Use Rights – Legal Analysis.

At Paragraph 2 of its Conclusions of Law in Resolution 2016-6 (See, Allied's Trial Court Exhibit "I"), the Zoning Board found that the change in use from 1982 (10% scrap metal recycling/90% traditional junkyard use) to the proposed use (50% scrap metal recycling/50% traditional junkyard use) constituted a substantial change. The Zoning Board's findings and

[6] A true copy of the unpublished opinion in *Tricare Treatment Services, LLC, supra,* is attached to the Certification of Christopher Norman as Exhibit "5". The Zoning Board is not aware of any conflicting decisions thereto.

conclusions in support are set forth in Resolution 2014-11 at Paragraph 8 (of the findings) and Paragraph (of the conclusions):

> [Paragraph 8 of findings] "...The Applicant's current use of the Property is not substantially similar to the 1982 base line nonconforming use as there are now 2 primary uses. The addition of a second primary use on this Property in a residential zone creates a significant impact on the surrounding neighborhood. ...The current equipment [larger sized scale for weighing trucks carrying scrap-metal] impacts the neighborhood more than the prior equipment [smaller-sized scale the size of a dining room table]. The height and type of [scrap metal] materials stored at the site has increased as well the traffic."
>
> [Paragraph 3 of conclusions] "The increase in the noise levels and traffic, since the Applicant commenced operations at the site in 2010 is further evidence of a significant change in use of the Property ..."

Moreover, as noted above, the decisional law clearly distinguishes a "traditional junkyard use" from "scrap metal recycling".

The decisional law further recognizes that when "changes" or "alterations" are proposed to a nonconforming use activity"[a]ny doubt as to whether enlargement or change of the use is substantial rather than insubstantial is to be resolved against the property owner. *Ibid. Lehen v. Atlantic Highlands Zoning Board of Adjust.,* 252 *N.J. Super.* 392, 399, 599 A.2d 1283 (App. Div. 1991)."

Also, when the nature of the proposed change is such that an accessory use activity would evolve into a principle use (in the case here, scrap metal recycling is proposed to increase from 10% to 50% of entire business activity at Allied's junkyard), the change is deemed substantial as a matter of law. See, *Coneselice, supra,* 358 *N.J. Super.* at 334:

> The Court noted that although the discotheque conducted similar activities as the restaurant, including dancing, music, and the sale of alcohol, among other things, the conversion to a discotheque was an impermissible change of the nonconforming use because dancing became primary rather than incidental, the music was louder and operated by a disc-jockey rather than performed live, and more alcohol was sold. ... See also *Heagan v. Borough of Allendale,* 42 *N.J. Super.* 472, 483, 127 A.2d

> 181 (App. Div. 1956)(holding that addition of dancing and music to restaurant constituted impermissible change of nonconforming use).

Next, if the proposed change is essential to ensuring the future financial viability of the nonconforming use [such as here, where Allied's principle testified that its junkyard could not survive without a change of use to 50% scrap metal recycling (T. 7/31/14 at pages 50-51)], the change is deemed substantial. *Saadala, supra,* 412 *N.J. Super.* at 549. In *Saadala,* Judge Skillman emphasized that "substantial change" typically occurs when the existing nonconforming use cannot survive without any modification thereto:

> When a landowner proposes to make a substantial change in nonconforming use..., the application to authorize this change will often be made because the existing use is no longer physically or economically viable and thus is not 'thriving'." In such circumstances there is a greater likelihood that the 'nonconforming use will wither and die' if the application is denied than where an applicant only seeks authorization for expansion of an existing use.

Lastly, Judge Havey opined in *Township of Fairfield, supra,* that the addition of a concrete recycling center to an existing nonconforming use auto-salvage yard constituted a "substantial change" necessitating use variance relief. There, the owner of the auto-salvage yard, who described it as a "junkyard", asserted that concrete/asphalt recycling is nothing more than the storage of junk. *Township of Fairfield, supra,* 274 *N.J. Super.* at 330. Such argument was resoundingly rejected by Judge Havey:

> This argument needs little discussion. Defendant ignores the fact that his automobile salvage yard is not a permitted use. As such, its enlargement or alteration to include the recycling of asphalt and concrete or any other "junk" is subject to the heightened scrutiny given to prior nonconforming uses. Clearly a salvage yard for auto parts is very different from a recycling center. Even if there were some doubt as to this point, that doubt must be resolved against defendant. *See, Town of Beleville,* 83 *N.J. 316, 416 A.2d* 388; *Lehen,* 252 *N.J. Super.* at 399, 599 A.2dd 1283.

Ibid. at 331.

IV. THE ZONING BOARD'S FINDINGS AND CONCLUSIONS OF LAW SET FORTH IN RESOLUTION 2016-9 ARE SUPPORTED BY CREDIBLE EVIDENCE IN THE RECORD.

The Board's detailed reasoning for denying an expansion of nonconforming use is set forth at Paragraph 8a through –i as follows:

A. The increase of more intensive scrap-metal recycling activity at the junkyard from 10% to 50% of the overall business use is incompatible within an agricultural-residential zoned area having an established character of single-family dwellings.

B. Allied Recycling's proposed expansion of scrap-metal recycling would entail deliveries by large tractor-trailers on narrow Township Public Roads to access the junkyard, creates an unsafe traffic situation.

C. Approval of this expanded use will eventually require the widening and improvement of Township streets that would be incompatible in its agricultural-residential setting, and will result in additional taxpayer expense for such improvements, including substantial and recurring road maintenance costs, associated with continuous heavy truck traffic volume.

D. Allied Recycling cannot mitigate the adverse impacts to the adjacent residential properties as screening and buffering cannot be adequately established to mitigate the noise and visual impacts of the Applicant's proposed use. Scrap metal piles at the heights established by Allied Recyling cannot be adequately screened from public view in this agricultural-residentia setting by landing, fencing or otherwise.

E. The proposed noise levels, while not exceeding state standards of 65 dB, still represent an added inconvenience and enhanced nuisance from the perspective of the nearby residents, affecting their quality of life and property values.

F. Allied Recycling operates an auto salvage yard and full scale scrap metal recycling facility in Springfield Township. Allied Recycling can readily explore bifurcating its business operations, so that the Southampton Property is used only as an auto salvage yard and the Springfield property could be utilized exclusively for metal recycling. While this may create some inconvenience for Allied Recycling and affect profitability of its business operations to some degree, Allied Recycling is still not entitled to the granting of a use variance in order to maximize its profits.

G. The Board specifically finds, through repeated and credible testimony of a number of neighbors over numerous public hearings, that since Allied Recycling commenced operations in 2011, the use of the Property has significantly intensified from what existed prior to its occupation and establishment of its business on the premises.

H. Allied Recycling is not entitled to use variance relief to maximize its business profits.

I. Allied Recycling's testimony and argument that the economic feasibility of its existing junkyard operation will be in jeopardy if its expansion of non-conforming use scrap metal recycling activity is not granted approval supports a Board determination that this non-conforming use should not be expanded, but rather should continue to cessation upon functional obsolescence. Such outcome would be consistent with Southampton Township's longstanding zoning policy to prohibit junkyards township-wide and to eliminate such nonconforming uses from areas with a residential agricultural character.

The Zoning Board's specific findings of fact in support of its conclusions above are set forth in Paragraphs 1 through 7. In reaching these findings, the Zoning Board relied upon the following evidence in the record:

A. **Tom Gabrysiak's Testimony (Allied Recycling, Inc.'s Principal)**

Tom Gabrysiak is the present owner of Salvage Yard and the President of Allied. (T. 3/14/13 at 5-7). Gabrysiak testified that Allied purchased the Salvage Yard from Giberson in September 2011. (T. 3/14/13 at 32, 92).

Gabrysiak testified that after his company took over the Salvage Yard, Allied spent approximately a year cleaning up the site. (T. 3/14/13 at 33). This cleanup involved the removal of vast stockpiles of materials from the Salvage Yard that were primarily "auto-salvage" related.

Gabrysiak testified that his current business operation is now a full-scale junkyard/recycling center and is not limited to auto-salvage. (T. 3/14/13 at 34-35, 37-38, 40, 96). Gabrysiak testified his business operation now has 15-20 employees, who work on- and off-site in trucks at any given time. (T. 3/14/13 at 37).

Gabrysiak testified that the "junkyard business" has evolved over the past few years; scrap-metal and recycling of other non-metal materials has become a larger part of the business operations of a junkyard.[7] (T. 3/14/13 at 41, 46). The materials are brought in and weighed on the weight-scale. (T. 3/14/13 at 41-42). The turnover in the recycling of scrap-metal materials is much quicker and, accordingly, the business operation has become more intensive and profitable. (T. 3/14/13 at 45).

B. Testimony From Resident-Neighbors

Catherine Wishart, from the adjoining residential development at 1 Falcon Drive, testified that she moved to her residence in 1994. She testified that the original operation of the auto-salvage yard was not a problem, but since Allied took ownership, there are now high piles of materials stacked in the yard, visible from her residence. (T. 3/14/13 at 77-80).

Larry Burke of 3 Falcon Drive testified concerning the recent development of large piles of materials, including scrap metal, now visible from his residence. (T. 3/14/13 at 101-102). Burke further testified:

> I moved into this residence five years ago exactly, September of '08. When I moved in then, I heard no noise, I saw no lights, I couldn't see any debris. Now from 200 yards away from my back door, I can see piles and other debris. I can see an RV. I can see the backs of tractor trailer trucks parked on the property. Five years ago, none of that was there.

(T. 9/19/13 at 157-158).

Patricia Topham of 450 New Road (at the corner of New Road and Falcon Drive) testified she has resided there for 37 years. (T. 3/14/13 at 104). Topham testified to the changes

[7] Gabrysiak did not dispute the Zoning Board's Attorney's comment that Plaintiff's company website advertises the purchase of "ferrous and non-ferrous materials, steel, light iron, cast iron, copper, aluminum, lead, brass, batteries, computers, e-scrap, and wire. (T. 9/19/13 at 46).

at the Salvage Yard since Allied took ownership, and the visibility of the white iron scrap metal piles from her property:

> I've lived there for 37 years and the whole time the junkyard was there I heard nothing, okay. I did see trucks go by, but I heard nothing. And if you ride past there, as I did today, you can, from New Road, see a huge mound of white stuff. And I do worry about my property value. ...I walk my neighborhood almost everyday, okay, and you can look over and you can see this stuff behind these peoples' houses. ...and when you go down Falcon Drive you can see all that stuff and you couldn't before.

(T. 3/14/13 at 104-105). Topham also presented August 14, 2013 photographs of large trucks, taken from the Wolf's property at 437 New Road, transporting large quantities of scrap metal to the Salvage Yard. Topham testified:

> Large purple truck. Very large purple truck. Eighty thousand pounds. I was told. It is a hundred and two inches wide going down a road that is only 20 foot wide with school buses coming down it. This truck [photograph] I took at around 10:20 in the morning. It came back in the afternoon and I have other pictures of it coming back out again, all rights?
>
> ....The other day, last Wednesday...the 14th also, at five after there was this large dump truck and it was just loaded to the top and with stuff bouncing all around.

(T. 9/19/13 at 148-150).

Topham also testified that, in 1977, tow-trucks occasionally made deliveries to the Salvage Yard with very little noise. She recalled no awareness of the Salvage Yard near her property until the 1990's. She further testified that, today, oversized trucks come to/from the Salvage Yard on narrow residential roads, creating traffic safety issues, particularly for school-bus traffic. Topham testified that, since Allied took over the Salvage Yard, it is a much different operation than what existed in the past. (T. 9/19/13 at 146-157; 7/10/14 at pages 115-118).

Josh Wolf of 437 New Road (across the street from the Salvage Yard) testified concerning the new issue of large truck traffic in the neighborhood:

> ...I know when the previous owners had the junkyard there was traffic in and out most, you know, individuals bringing – you know, once in a while there would be a flatbed, but since the new company has taken over they have large tractor trailers.
>
> ...very large trailers. I don't know how many yards, 50 yard, 60 yard trailers on them that they're using to transport material, you know, in and out of the junkyard...
>
> And also I just – I mean, that's what he needed the scale for is for trucks that probably shouldn't be coming up and down New Road, which is mostly a rural residential area.
>
> ...definitely the noise has increased just, you know, in the yard itself and from the trucks coming and going. Sometimes they have to sit out on the street for a minute, you know, blocking traffic before they can turn in.

(T. 3/14/13 at 109-111).

Nancy King, of 445 New Road, reiterated prior testimony concerning the nuisance activity of large trucks in their rural/residential neighborhood and the recent change in character of Allied's operation from a smaller auto-salvage yard to a larger-scale auto salvage/scrap-metal recycling center:

> I live at 445 New Road. K-i-n-g. I've lived there since about 1985. It's a narrow road. There's no passing. The speed limit is 35. ... They talk about the big trucks. I live fairly close to the road. ...And the noise is horrendous from the big trucks and they are big.
>
> Like the previous guy said, there were old flatbeds, maybe an old tow truck, a lot of pickup trucks. Now it's big dump trucks with open --like he said, up and down. And it's not necessarily the time of operation. It's just all day long and I have my windows open and I can't hear the tv. I never heard such a racket. Plus, I do live on New Road. I don't live as close as the other people. I can hear the clamor back there....
>
> ...There was a junkyard back there for many years. Nobody even knows it existed. There was no place to weigh things because it was a junkyard. That concerns me because there's a big difference between a salvage yard, a junkyard, and a recycling facility. ...If you have a salvage yard there really shouldn't be a need for anything to be weighed. You take it out like the guy previous did and have it weighed in Camden or Trenton. Not on

> site. ...I think everybody's about had it because now everybody sees what's going on. It is a lot different than what was there before.

(T. 3/14/13 at 112-113). King further testified (T. 9/19/13 at 158-159):

> I have lived at my residence for about 30 years. I think what Pat was trying to say and what I will say is when Pointsett had that junk yard at any time in the last 30 years, I never saw an out-of-state truck, particularly that size...come down New Road. I personally never saw a washer, a refrigerator, an air conditioner going by my house and I live fairly close to the road and I'm outside a lot, too. Never. I saw an old guy with an old flat bed going about 10 miles an hour with one vehicle, one automobile or a pickup truck, on the back that he was hauling to Camden or wherever you took it because he did not have a scale. He was running an auto salvage yard, a junk yard, not a recycling center. These big trucks that are going up and down ...I've lived in this house for 30 years. I never saw anything like what is going on there. It's not what it used to be.

King summarized her testimony (T. 3/14/13 at 117):

> You don't call it a junkyard when it's -- and it is a recycling facility. It's not a junkyard. I don't care what the old guy did that was there before. He ran a junkyard. This is a recycling facility. Very different than what it was 30 or 50 years ago.

Bruce Gsell, of 10 Ridge Road, testified (T. 9/19/13 at 138):

> As -- as I know it, the place was very, very small, a really small operation, the locals would roll in and roll out, unload, drop off stuff just it was testified earlier. Today, it is a larger operation.

John Wishart, of 1 Falcon Drive, testified (T. 9/19/13 at 141):

> ...that it was a small junk yard, heavily wooded, sight unseen. Okay? You could not visually see it from any point in the neighborhood or from New Road. That is no longer the point. It is now a cleared operation. Vegetation has been removed and piles of light aluminum, I would consider light aluminum, light steel, now tower...above the trees.

J.P. Price, of 33 Falcon Drive, testified (T. 9/19/13 at 165):

> I've been there 30 years. I have been in that facility. As a matter of fact, my – my original '77 Monte Carlo about four years ago when I – we picked it up, I went back there, looked at it, I –I hardly saw anything, you know, I mean, some cars and buses and things like ...and I only saw

> flatbed trucks once in a while, you know, with a car on top of it going out, coming in, and –but now I've seen big trucks so that's a difference.

The Zoning Board's findings of the substantial adverse impacts on the rural residential zoning district and nearby residential neighborhood were amply supported by testimony of nearby residents. The Board, based on its familiarity and knowledge of local conditions, had discretion to accept this factual testimony over the testimony provided by Allied's witnesses. *Kramer v. Bd. of Adjust., Sea Girt,* 45 *N.J.* 268, 288 (1965); See also, Cox & Koenig, *supra.,* 19-4.2 at 366 (Gann 2015).

At page 30 of its Trial Brief, Allied argues that the Zoning Board had an affirmative legal obligation to impose conditions of approval to permit the expansion of the proposed nonconforming use activity to 50% scrap-metal recycling. Such legal analysis is not applicable here, since Allied's junkyard is not an inherently beneficial use. *Sica v Board of Adjustment of Tp. of Wall,* 152 *N.J.* 152 (1992).

CONCLUSION

For the forgoing reasons, the Zoning Board's decisions on the remand from the Superior Court must be sustained and the Complaint of Allied Recycling must be dismissed.

Respectfully submitted,

Christopher Norman, Esq.
Thomas J. Coleman, III, Esq.

Thomas J. Coleman III, Esq.
Christopher J. Norman, Esq.
Attorney ID No. 027861991
RAYMOND, COLEMAN, HEINOLD & NORMAN, LLP
325 New Albany Road
Moorestown, New Jersey 08057
(856)222-0100
Attorneys for Defendant, Township of Southampton Planning Board

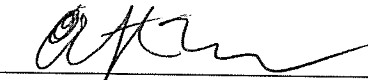
ALLIED RECYCLING, INC. and LAST CHANCE SALVAGE, INC. Plaintiffs,	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BURLINGTON COUNTY
vs.	Docket No. BUR-L-001390-16
	Civil Action
TOWNSHIP OF SOUTHAMPTON ZONING BOARD OF ADJUSTMENT Defendant.	CERTIFICATION OF CHRISTOPHER NORMAN

Christopher Norman, of full age, does hereby certify as follows:

1. I am attorney for the Defendant Southampton Township in the above-litigation and I and am familiar with the facts set forth herein.
2. Attached hereto as Exhibit "1" is a true copy of the Court's April 8, 2014 Opinion and implementing Final Judgment, entered May 23, 2016.
3. Attached hereto as Exhibit "2" is a true copy of the Southampton Township Zoning Board Solicitor's May 11, 2016 legal memorandum to the Zoning Board related to the above-captioned matter.
4. Attached hereto as Exhibit "3" is a true copy of the unpublished Appellate Panel Opinion in *Arroyo v. Brick Recycling Co.,* 2014 *N.J. Super.* LEXIS 423, submitted pursuant to R. 1:36-3.
5. Attached hereto as Exhibit "4" is a true copy of the unpublished Appellate Panel Opinion in *Marlboro Auto Wreckers v Zoning Bd. of Adjustment,* 2010 *N.J. Super. Unpub.* 2204, submitted pursuant to R. 1:36-3.

6. Attached hereto as Exhibit "5" is a true copy of the unpublished Appellate Panel Opinion in *Tricare Treatment Services v Chatham Borough Planning Board,* 2014 *N.J. Super.* LEXIS 2783, submitted pursuant to R. 1:36-3.

I certify that the forgoing statements made by me are true. I am aware that if any of the forgoing statements made by me are wilfully false, I am subject to punishment.



Dated: 12/18/16

Christopher Norman

EXHIBIT "1"

Thomas J. Coleman III, Esq.
RAYMOND, COLEMAN, HEINOLD & NORMAN, LLP
325 New Albany Road
Moorestown, New Jersey 08057
(856)222-0100
Attorneys for Defendant, Township of Southampton Planning Board

FILED with the Court
MAY 23 2014
Ronald E. Bookbinder, A.J.S.C.

ALLIED RECYCLING, INC. and LAST CHANCE SALVAGE, INC. Plaintiffs, vs. TOWNSHIP OF SOUTHAMPTON ZONING BOARD OF ADJUSTMENT Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BURLINGTON COUNTY Docket No. BUR-L-2448-13 Civil Action **FINAL JUDGMENT**

THIS MATTER, having been brought before the Court on cross-applications by the parties through their attorneys, Michael Ridgway, Esq. of the law firm of Ridgway and Stayton, for the plaintiffs, Allied Recycling, Inc. and Last Chance Salvage, Inc., and Thomas J. Coleman, III and Christopher Norman, of the law firm of Raymond, Coleman, Heinold & Norman, LLP for the defendant, Township of Southampton Zoning Board of Adjustment, and the court having considered the submissions and arguments of counsel, and for good cause shown,

IT IS HEREBY ORDERED, this 23rd day of May 2014, as follows:

1. The cross-motions filed by Plaintiffs and Defendants are hereby denied for the reasons set forth in the Court's April 8, 2014 tentative decision.
2. The Court hereby adopts and incorporates the findings and conclusions of the April 8, 2014 tentative opinion, except that, on the remand of the application to the Southampton Township Zoning Board, the legal burden of proof on the establishment plaintiffs' nonconforming use rights shall rest exclusively with the plaintiffs.
3. At the remand hearing, the Southampton Township Zoning Board shall determine the extent of plaintiffs' "baseline" nonconforming use rights, through the issuance of a Certificate of Nonconforming Use; such determination shall be based on the record from

the prior public hearings and any supplemental testimony and/or evidence plaintiffs adduce on the record.

4. At the remand hearing, the Southampton Township Zoning Board shall determine whether plaintiffs' proposed use is substantially similar to the baseline nonconforming use rights, as elucidated in *Arkam Machine & Tool Co. v. Lyndhurst*, 73 *N.J. Super.* 528, 532 (App. Div. 1962) and other applicable decisional law; such determination shall be based on the record from the prior public hearings and any supplemental testimony and/or evidence plaintiffs adduce on the record.

5. At the remand hearing, plaintiffs may also pursue relief, in the alternative, to seek a use variance, pursuant to *N.J.S.A.* 40:55D-70(d)(1), to allow for the operation of a full service junkyard/recycling center, in the event the Southampton Township Zoning Board determines that the Certificate of Nonconforming Use does not encompass a full service junkyard/recycling center.

6. The Southampton Township Zoning Board shall conduct the remand hearing no later than July 17, 2014. Accordingly, plaintiffs must timely file any supplementary documents in advance of the remand hearings to meet this filing deadline.

7. Because the Court has not issued an order granting a stay or injunctive relief, the Township of Southampton is not precluded from enforcement of any zoning violations with respect to activities conducted on plaintiffs' real property.

8. The Court shall not retain jurisdiction in this matter and it is hereby dismissed without prejudice.

Honorable Ronald E. Bookbinder, A.J.S.C.

This tentative disposition of the motion(s) before Judge Ronald E. Bookbinder in Burlington County, New Jersey is based on the papers submitted in the case below. The tentative disposition may not reflect the Judge's final decision, as discussed on the record at oral argument. Pursuant to New Jersey Court Rules, Judge Bookbinder may expand his findings of fact and conclusions of law. No further paper submissions will be permitted.

ORAL ARGUMENT IS SCHEDULED FOR THURSDAY, APRIL 8, 2014 AT 2:00 PM.

Allied Recycling Inc. and Last Chance Salvage Inc. v. Township of Southampton Zoning Board of Adjustment
Docket No. BUR-L-2215-13
April 8, 2014

ACTION IN LIEU OF PREROGATIVE WRITS

Michael S. Ridgway, Esq., Attorney for Allied Recycling Inc. and Last Chance Salvage Inc.
Phone: (856) 810-7723 Fax: 856-810-7729

Thomas J. Coleman, III, Esq., Attorney for Defendant Township of Southampton Zoning Board of Adjustment
Phone: 856-222-0100 Fax: 856-222-0411

Bookbinder, A.J.S.C.

Preliminary Statement

Plaintiffs Allied Recycling Inc. and Last Chance Salvage, Inc. (hereinafter, collectively, "Allied") own a property historically used as an auto salvage yard. Allied seeks a certificate of non-conforming use from the Township of Southampton Zoning Board of Adjustment (hereinafter the "Board"), that permits use of the property as an auto salvage yard and a scrap metal yard. The Board denied the certificate of non-conforming use on the grounds that use as a scrap metal yard was not identical to the historic use as an auto salvage yard. The Board failed to consider whether the new intended use was substantially similar to the historic use, and therefore applied the incorrect legal standard. *Arkam Machine & Tool Co. v. Lyndhurst*, 73 *N.J.* Super.

528, 532 (App.Div. 1962). Therefore the Board's finding is vacated and the case is remanded to the Board for further hearings consistent with this opinion.

Statement of Facts and Procedural History

Allied owns and operates a salvage yard at 440 New Road, Southampton, New Jersey (Southampton Township Official Tax Map Plate 24, Block 2401, Lot 36.02) (hereinafter the "Yard"). Tom Gabrysiak is the primary owner of Allied (hereinafter "Gabrysiak").

The Yard had been effectively owned by the Giberson family from 1947 until July 27, 2012. The Giberson family began using the property as a salvage yard in 1963. Throughout the time that the Yard was owned by the Giberson family, the Yard was leased to various different individuals that ran the business continuously until July 27, 2012.

Sometime in the 1980's, one of the tenants operating the Yard purchased and installed a tire splitter, which splits tires in three in order to remove the tire rims. The tenant also placed cars into a fifty-five gallon drum and lit them on fire in order to strip away everything that was not metal.

On June 8, 1982, the Board adopted a master plan that designated the Yard as part of a Rural Development District, which is primarily zoned for agricultural and residential use. Junkyards are a prohibited use within the district. Southampton Ordinance § 19-2.6. Until 2013 no one filed for a certificate of non-conforming use, and to date no certificate of non-conforming use has been granted.

On May 7, 1993, the Gibersons formed the corporation Last Chance Salvage, Inc. (hereinafter "Last Chance"). Last Chance has also referred to as "Last Chance Auto Salvage, Inc." in various legal documents, including one drafted by the Gibersons' attorney. *Board's Brief*

Exhibit C & D, Norman Certification Exhibit D. Last Chance is owned and controlled by the Gibersons.

On September 2, 1993, the Board passed a resolution subdividing the Giberson's property into two portions. *Southampton Planning Board Resolution 93.8.* The first portion was sold off for residential use. The second portion, containing the Yard, was transferred into Last Chance's possession. As part of the subdivision the then existing footprint of the yard was restricted, and Last Chance agreed not to clear any of the woods surrounding the Yard or to expand the Yard's footprint.

Allied began leasing the Yard sometime in 2009 or 2010. Allied alleges that while leasing the Yard, Allied made significant improvements to the site including removal of thousands of tires, and installing fencing and security lighting, and installing a weight scale.

Jody Mazeall, Southampton Building Inspector, (hereinafter "Mazeall") determined that the weight scale had been improperly installed without a site plan application.

Last Chance, and subsequently Allied, received licenses to operate the Yard as a junkyard every year from 1963 until Mazeall determined that the weight scale was improperly installed without a site plan application. The earliest license submitted to this Court is dated December 19, 1989.

Allied argued that no site plan application was necessary. Nevertheless, on December 20, 2011, Allied submitted an application for minor site plan approval to install a weight scale and to refurbish two existing buildings. Allied also filed a use variance on the possibility that the weight scale would be determined an expansion of a pre-existing non-conforming use.

On July 27, 2012, Allied purchased the Yard from Last Chance.

Allied alleges that the Site has been used since 1963 as an all-purpose junkyard. The Board alleges that the Site was limited to use as an auto salvage yard.

On or about March 14, 2013, the Board held a public meeting on Allied's application. The Board subsequently recommended that Allied apply for a certificate of non-conforming use as well as a use variance. Allied amended its application to be consistent with the Board's recommendation.

On or about August 8, 2013, the Board held another public hearing on Allied's application. Allied's representative did not attend the meeting, and the Board dismissed the application without prejudice.

On or about August 19, 2013, Southampton filed an Order to Show Cause enjoining use of the property as a salvage yard pending Allied's re-application. The Court denied Southampton's motion.

On or about September 19, 2013, the Board held another public hearing on the application.

At the conclusion of the meeting on September 19, 2013, the Board denied the application, and formalized the denial by adopting Resolution No. 2013-10. *Allied's Exhibit A*. The Board found that Allied failed to meet its burden of proof because the Yard's current use as an all-purpose junkyard was not identical to the Yard's previous use as an auto salvage yard. The Board further found that Allied failed to present sufficient evidence regarding the types of junk previously stored at the yard, or the extent of the scrap processing that occurred at the Yard.

On or about October 7, 2013, Allied filed the instant action in lieu of prerogative writs.

Arguments

I. Allied's Brief

Allied argues that the Board's denial was arbitrary, capricious, and unreasonable. Allied argues that its application was for a non-conforming use existing prior to the adoption of the inconsistent zoning ordinance, pursuant to *N.J.S.A.* 40:55D-68 & 55D-5. Allied argues that such uses can be continued under *Kessler v. Bowker*, 174 *N.J. Super.* 478 (App. Div. 1979). Allied admits that it bears the burden of proving the nature of the use at the time of the adoption of the inconsistent zoning ordinance. Allied summarizes the prerogative writs standard of review.

Allied argues that the issue here is whether the current use is substantially similar to the historic use. Allied argues that the Yard was historically used as an all-purpose junkyard. Allied cites to *Arkam Machine & Tool Co. v. Lyndhurst Tp.*, 73 *N.J. Super.* 528 (App. Div. 1962). Allied admits that illegal expansions are not permitted absent a variance under *Weber v. Pieretti*, 77 *N.J. Super.* 423 (App. Div. 1962). Allied argues that the Board applied the incorrect standard by requiring identical prior and current uses.

Allied briefly summarizes the precedent on impermissible expansions of non-conforming use, citing to *Belleville v. Parillo's, Inc.*, 83 *N.J.* 309 (1980), *Hantman v. Randolph Twp.*, 58 *N.J. Super.* 127 (App. Div. 1959), and *Barbarisi v. Bd. of Adjustment, City of Patterson, etc.*, 30 *N.J. Super.* 11, (App. Div.). Allied also briefly summarizes the precedent on permissible expansions of non-conforming use, citing to *State v. Wagner*, 81 *N.J. Super.* 206 (Cty. Ct. 1963), *Institute v. Board of Adjustment*, 270 *N.J. Super.* 396 (Law Div. 1993), and *Stout v. Mitschele*, 135 *N.J.L.* 406 (Sup. Ct. 1947).

Allied argues that the instant case is distinct from all of the prior precedent due to the fact that Southampton has an ordinance that defines a junkyard, as well as an ordinance that defines

the use of a junkyard. Allied argues that the current use is both consistent with the Southampton ordinances and substantially similar to the historic use.

Allied also cites to *Marlboro Auto Wreckers v. Zoning Board or Adjustment*, Docket No. A-6137-08T26137-08T2 (App. Div. Jan. 27, 2010) (slip op.). Allied summarizes the facts and holding of *Marlboro Auto Wreckers*, which upheld defendant zoning board's denial of plaintiff junkyard's non-conforming use application. Allied argues that the instant case is distinct form *Marlboro Auto Wreckers*, as in *Marlboro Auto Wreckers* the town provided licenses for either automotive junkyards or non-automotive junkyards, while here Southampton permits both uses under the same license. Allied also argues that, unlike in *Marlboro Auto Wreckers*, Allied provided significant testimony and exhibits regarding the previous non-automotive junkyard use.

Allied reiterates that the Board applied the incorrect standard. Allied argues that the Board required the current use to be identical to the prior use. Allied argues that the proper standard is whether the uses are substantially similar.

Allied reiterates that the Southampton ordinances do not distinguish between a junkyard and an auto salvage yard.

Allied argues that it is permitted to deviate from historic proportions of auto, wood, and scrap metal processing.

Allied argues that the Board ignored the uncontroverted testimony of Allied's witnesses. Allied argues that the Board accepted the testimony of Allied's expert as probative and credible, but nevertheless denied the application.

Allied argues that the Board was influenced by the testimony of neighboring residents regarding signage, visibility, lighting, traffic, and noise. Allied argues that the Board did not find that current use was more intense than the prior use. Allied argues that these issues are irrelevant,

and should instead be addressed as aspects of the application for a use variance to expand the non-conforming use.

II. The Board's Reply

The Board argues that Allied's non-conforming use is limited to use as an auto salvage yard, rather than as an all-purpose junkyard. The Board argues that the testimony of Allied's witnesses was imprecise and nebulous on the topic of whether the Yard recycled scrap metal. The Board argues that the neighboring residents testified that the use of the yard changed dramatically in 2009. The Board argues that it found the residents' testimony to be credible. The Board cites to *Paruszewski v. Twp. of Elsinboro*, 297 *N.J. Super.* 531, 538 (App. Div. 1997).

The Board argues that Allied failed to meet its evidentiary burden. The Board argues that Allied had to demonstrate that the Yard operated continuously as an all-purpose junkyard since 1982.

The Board argues that Southampton Planning Board Resolution 93.8 found the Yard to be an auto-salvage yard only. The Board notes that the Gibersons did not challenge that finding.

The Board argues that Allied witnesses testified that in 2009 and 2010, Allied removed thousands of tires from the Yard. The Board argues that this is consistent with use for auto salvage alone. The Board argues that this cleanup is also evidence of Allied's intent to expand and intensify the use of the Yard.

The Board argues that the junkyard licenses, which do not distinguish between all-purpose junkyards and auto salvage yards, do not affect the scope of the non-conforming use. The Board cites to *Nickels v. City of Wildwood*, 141 *N.J.* 261 (1995), and *Avalon Home & Land Owners v. Bor. of Avalon*, 111 *N.J.* 205 (1988), for the proposition that a municipality cannot legislate the scope or expansion of a non-conforming use.

The Board summarizes the facts and holding of *Marlboro Auto Wreckers v. Zoning Board or Adjustment*, Docket No. A-6137-08T26137-08T2 (App. Div. Jan. 27, 2010) (slip op.).

The Board summarizes the facts and holding of *Paruszewski v. Twp. of Elsinboro*, 297 *N.J. Super.* 531, 538 (App. Div. 1997).

The Board argues that the facts here are similar to those in *Paraszewski*. The Board againargues that Allied relies upon nebulous and imprecise testimony. The Board argues that at best the testimony demonstrates that there may have been some sporadic or intermittent scrap-metal recycling.

The Board argues that although Dan Giberson testified about occasional recycling of non-auto refuse, he failed to provide dates, and failed to testify regarding the scope or quantity of material recycled. The Board argues that Dan Giberson was a passive landlord with little knowledge of the day to day operation of the Yard.

The Board argues that Dan Giberson chose the name Last Chance Auto Salvage. The Court notes that Last Chance was incorporated under the name Last Chance Salvage, Inc., although Dan Giberson does refer to it as Last Chance Auto Salvage.

The Board argues that Southampton Planning Board Resolution 93.8 restricted the use of the yard to auto salvage.

The Board argues that Dan Giberson is potentially biased, as Allied still owed him money for the purchase of the Yard. The Court notes that the money owed was not contingent upon award of the certificate of pre-existing non-conforming use.

The Board argues that the testimony of Michael Ivins, one of Last Chance's customers, was similarly sparse, nebulous, and imprecise. The Board argues that Ivins failed to state when he dropped off non-auto refuse.

The Board argues that the record is clear that the Yard was historically used for auto-salvage, and that the scrap metal recycling use only recently began in 2009. The Board argues that this change was concurrent with increased traffic of large tractor-trailers.

The Board argues that the residents testified that they only observed auto salvage being transported to or from the Yard. The Board argues that the residents testified that traffic to and from the Yard increased greatly when Allied took over operation of the Yard.

The Board argues that Allied concedes that the Yard has transitioned the proportion of auto-salvage to scrap metal recycling at the Yard. The Board argues that Allied believes that it can conduct any of the uses described in the junkyard license ordinance, whether or not those uses were pre-existing.

The Board argues that the residents are more credible than Allied's witnesses. The Board reiterates that Allied failed to meet its burden of proof under *N.J.S.A.* 40:55D-68.

The Board again summarizes the facts and holding of *Marlboro Auto Wreckers v. Zoning Board or Adjustment*, Docket No. A-6137-08T26137-08T2 (App. Div. Jan. 27, 2010) (slip op.).

The Board argues that unlike in *Marlboro Auto Wreckers*, Allied did not present any testimony regarding the prior and current ratio of scrap metal recycling to auto salvage. The Board also argues that unlike in *Marlboro Auto Wreckers*, a Southampton Planning Board resolution identifies the prior use as auto salvage alone.

The Board argues that the licensing ordinance does not modify the scope of the prior non-conforming use. The Board argues that under *Nickels v. City of Wildwood*, 141 *N.J.* 261 (1995), and *Avalon Home & Land Owners v. Bor. of Avalon*, 111 *N.J.* 205 (1988), municipal ordinances cannot modify the scope of a pre-existing use.

The Board argues that the instant action is effectively a challenge of Southampton Zoning Board Resolution 93.8. The Board argues that Dan Giberson failed to challenge that resolution, and that Allied cannot now raise a collateral attack on the resolution.

The Board summarizes the facts and holding of *County of Ocean v. Zakaria Realty, Inc.* 271 *N.J. Super.* 280, 288 (1994).

The Board argues that Allied cannot now oppose the restrictions contained in Southampton Zoning Board Resolution 93.8.

III. Allied's Reply

Allied argues that the testimony of Allied's witnesses was not nebulous or imprecise. Allied argues that Dan Giberson and Michael Ivins testified to specific facts that demonstrated that the Yard was used for scrap metal recycling. Allied also argues that Gabrysiak testified that there were over 40,000 pounds of non-auto scrap metal at the Yard prior to Allied's purchase.

Allied argues that Last Chance is incorporated under the name "Last Chance Salvage, Inc.," and is therefore not limited to auto-salvage.

Allied argues that Southampton Zoning Board Resolution 98.3 was for a minor subdivision, and that the Board had no authority to limit the future use of the yard in connection with the resolution. Allied argues that the resolution admits to non-auto salvage at the Yard in the statement, "Applicant shall remove any junk cars, parts, or other salvage operations from [the] new lot." *Southampton Zoning Board Resolution 98.3* at p. 3. Allied argues that the resolution only involves limitations on the geographical footprint of the yard, not on the use.

Allied argues that the instant case is distinct from *Marlboro Auto Wreckers v. Zoning Board or Adjustment*, Docket No. A-6137-08T26137-08T2 (App. Div. Jan. 27, 2010) (slip op.).

Allied argues that the instant case is distinct from *Paruszewski v. Twp. of Elsinboro*, 297 *N.J. Super.* 531, 538 (App. Div. 1997).

Allied argues that the instant case is distinct from *Nickels v. City of Wildwood*, 141 *N.J.* 261 (1995), and *Avalon Home & Land Owners v. Bor. of Avalon*, 111 *N.J.* 205 (1988), as in those cases the municipality passed ordinances well after the non-conforming uses began, and that those ordinance allowed extreme changes to the non-conforming use.

Allied argues that it does not seek to expand the footprint of the use, but rather a certificate of non-conforming use that is consistent with the prior use of the Yard.

Standard of Review

Appeals from an action by a planning board are reviewable for arbitrary, capricious, or unreasonable decisions. *Cell v. Zoning Bd. of Adjustment*, 172 N.J. 75, 81-82 (2002); *Burbridge v. Mine Hill Twp.*, 117 N.J. 376, 385 (1990). Factual determinations made below are presumed to be valid, and any applications of discretionary authority based upon factual determinations will not be overturned unless they are arbitrary, capricious, or unreasonable. The burden of proof rests on the movant. *Cell*, 172 N.J. at 82. Legal decisions, such as the proper legal standard to be applied to the facts, are reviewed *de novo*. *Nuckel v. Borough of Little Ferry Planning Bd.*, 208 *N.J.* 95, 102 (2011); *Green Meadows at Montville, L.L.C. v. Planning Bd. of Tp. of Montville*, 329 *N.J. Super.* 12, 24 (App.Div. 2000).

In the hearing below, the burden of proof rested on Allied by the preponderance of the evidence. *S&S Auto Sales, Inc. v. Zoning Bd. of Adjustment for Borough of Stratford*, 373 *N.J. Super.* 603, 614 (App.Div. 2004). "It is important that the evidence presented to the board establish exactly what the use was at the time of adoption of the ordinance, its character, extent, intensity, and incidents." Cox & Koenig, *New Jersey Zoning & Land Use Administration*, § 11-

2.2, p. 299 (2014). "A nonconforming use is not restricted to the identical particular use which was in existence at the time of the enactment of the zoning ordinance, but embraces the same or substantially similar use within the zoning classification." *Arkam Machine & Tool Co. v. Lyndhurst*, 73 *N.J.* Super. 528, 532 (App.Div. 1962). *See also Pugh v. Zoning Bd. of Adjustment*, No. A-5590-08T2 (App. Div. Apr. 16, 2010) (slip op. at 1). However, the scope of the non-conforming use should be strictly limited, and reduced "to conformity as is compatible with justice." *Belleville v. Parrillo's Inc.* 83 *N.J.* 309, 315 (1980).

Analysis

Allied argues that the Board erred by ruling that historic use of the Yard for non-automotive scrap metal was unsupported by the record, and by disregarding Allied's argument that the current use is not a substantial change from the historic use. The Board erred in failing to consider whether the current use of the Yard for non-automotive scrap metal is a substantially different use than the historic use for automotive scrap metal. Therefore the case is remanded to the Board for further hearings consistent with this opinion.

In *Marlboro Auto Wreckers v. Zoning Board or Adjustment*, Docket No. A-6137-08T26137-08T2 (App. Div. Jan. 27, 2010) (slip op.), plaintiff Schechter owned three auto salvage yards, Marlboro Auto Wreckers, Morganville Auto Wreckers, and Schechter Enterprises. All three yards were operated as pre-existing non-conforming uses. *Id.* at p. 1-2. Schechter requested a permit to install a scrap metal bailer in order to process a greater proportion of non-automotive scrap metal on the property. *Id.* The Marlboro Zoning Board denied the permit, and Schechter appealed. *Id.* at 6.

The appellate court affirmed the Marlboro Zoning Board for the reasons stated in the trial court's opinion. *Id.* at 18. The trial court considered the following facts: (1) Schechter admitted

that the yards were primarily used for automotive scrap; (2) Schechter could only produce a few receipts for non-automotive scrap, and those few receipts were not reconciled with the greater proportion of automotive salvage at the yard; (3) two out of three of the yards were named as auto wreckers, indicating the owner's intent; and (4) the Marlboro Township required separate licenses for automotive salvage and scrap metal processing. *Id.* at 15-16.

Here, as in *Marlboro Auto Wreckers*, the Gibersons primarily used the Yard for auto salvage. While Allied presented some testimony below that local residents would occasionally bring non-automotive scrap to the Yard, Allied presented no evidence of the dates that this scrap was brought to the Yard, and it did not submit any evidence regarding the relative proportion of non-automotive scrap to auto salvage stored in the Yard. [T. 3/14/14 at 31; T. 9/19/13 at 35, 41-42, 56-59, 64.] Allied also produced receipts dated between August 28, 2009, and October 1, 2009, that describe sales and transfers of scrap to other yards. *Allied's Exhibit A-10.* The scrap is described as rolls of aluminum, wood debris, copper, brass, light iron, and steel. *Id.* However, Allied submitted no evidence that the refuse described existed at the yard prior to 1982, and Allied did not reconcile the receipts to the quantity of auto salvage in the Yard. Allied also presented testimony that there was a large quantity of auto salvage at the Yard in 2009, primarily in the form of over 140,000 tires. [T. 3/13/13 at 33-34.] Lastly, Allied presented expert testimony that aerial photography of the Yard taken in 2000 and 2007 show piles of miscellaneous material that are not automobiles. *Allied Exhibit A-2*, [T. 9/19/13 at p. 77-78.] However, Allied provided no evidence that these piles did not consist of dismantled automobiles, and Allied provided no evidence that these piles existed in 1982.

Additionally, although Last Chance was incorporated under the name Last Chance Salvage, Inc., Dan Giberson referred to the businesses that ran the Yard as Last Chance Auto

Salvage, S&P Autos, and S&S Autos. [T. 9/19/13 at 65-66.] The 1993 minor subdivision application filed by Dan Giberson's attorney refers to Last Chance as Last Chance Auto Salvage, Inc. *Board's Exhibit C.* The Board's 1993 resolution approving the subdivision also refers to Last Chance as Last Chance Auto Salvage, Inc., and describes Last Chance as the operator of an auto salvage operation. Southampton Planning Board Resolution 9.38.

However, unlike in *Marlboro Auto Wreckers*, Allied seeks to install a weight scale instead of a scrap metal bailer, and the Southampton licensing ordinances do not distinguish between auto salvage yards and scrap metal yards. Southampton Ordinance §§ 4-4.5, 12-2.3.

The record supports the Board's conclusion that Allied failed to demonstrate that the Yard was historically used for scrap metal prior to June 8, 1982. However, the Board failed to consider whether use as a scrap metal yard was a substantial change in use, and the record does not support a categorical distinction. Unlike in *Marlboro Auto Wreckers*, where Schechter sought to install new scrap metal processing equipment, there is no evidence in the record that conversion to a greater proportion of non-automotive scrap will necessarily include a greater amount of scrap processing. Moreover, unlike in *Marlboro Auto Wreckers*, the Southampton Ordinances do not exhibit any intent by the Gibersons or the Township to distinguish auto salvage from scrap metal.

Rather than considering whether scrap metal was a substantially different use than auto salvage, the Board found that the two uses were non-identical. Southampton Zoning Board Resolution 2013-10 at p. 6. Therefore the Board applied the incorrect legal standard. Insubstantial changes to the non-conforming use are generally permitted. For example, in *Schaible v. Board of Adjustment*, 15 *N.J. Misc.* 707, 709 (Sup. Ct. 1937), the Supreme Court of New Jersey held that a change in the types of material stored in a building is not a substantial

change if the new materials are no more or less detrimental or dangerous to the community. In *Stout v. Mitschele*, 135 *N.J.L.* 406, 409 (Sup. Ct. 1947), the New Jersey Court held that a minor change in a business, namely from a dairy farm to a horse farm, was not a substantial change.

"The focus in cases such as this must be on the quality, character and intensity of the use, viewed in their totality and with regard to their overall effect on the neighborhood and the zoning plan." *Belleville v. Parrillo's, Inc.*, 83 *N.J.* 309, 314 (1980). Here, the record is insufficient as to what the intended change in use from auto salvage to scrap metal will entail. Moreover, the Board did not determine the quality and intensity of the historic use. Therefore the Court must remand the case for further hearings.

First, the Board must set the baseline for the non-conforming use by defining, as specifically as possible, the quality and intensity of the use on June 8, 1982. Then, if the intended use is not consistent with the historic use, the Board must determine whether the intended use constitutes a substantial change.

Relevant factors may include, but are not limited to: (1) the environmental impact of storing scrap metal versus auto salvage; (2) the quantity, type, and weight of processing equipment used at the Yard; (3) whether Allied intends to expand the geographical boundaries of the Yard; (4) the height and visual impact of the material stored at the Yard; (5) the quantity and weight of traffic to and from the Yard; (6) the number of employees working at the yard; and (7) the overall effect of the change on the neighborhood; and (7) the Southampton Master Plan.

The Court notes, however, that an increase of intensity alone, without change to the nature or geographical footprint of the use, is insufficient to constitute a substantial change.

> [T]he rule of law which prohibits a substantial extension or enlargement of the original use does not forbid an increase in the amount or intensity of use within the same area, so that such a nonconforming use may not only be continued but, also, may be increased in

> volume and intensity. Neither is a mere increase in the volume of business conducted on premises constituting a nonconforming use normally considered to be an improper expansion of such a nonconforming use.
> [*State v. Wagner*, 81 *N.J. Super.* 206, 210 (Cty. Ct. 1963) (cited approvingly by *Nuckel v. Borough of Little Ferry Planning Bd.*, 208 *N.J.* 95, 109-110 (2011)).]

Therefore, while the quantity and weight of traffic to and from the Yard, the number of employees working at the yard, and the overall effect of the change on the neighborhood are relevant, they are not determinative factors.

Additionally, the Board should consider whether aesthetic conditions could be applied that minimize the impact of the change. *See Burbridge v. Mine Hill Tp.*, 117 *N.J.* 376 (1990) (geographic expansion of a non-conforming junkyard is permissible where landscaping and screening improves the visual conformity and impact on nearby residences).

Lastly, Allied argues that it should be permitted to use the Yard in any way that is consistent with Southampton Ordinance definitions of a junkyard. The definitions contained in Southampton Ordinance §§ 4-4.5, 12-2.3, are not relevant to the instant case. "[A] municipality may not by ordinance authorize the expansion of a non-conforming use." *Nickels v. City of Wildwood*, 140 *N.J.* 261, 265 (1995) (citing *Avalon Home & Land Owners Asso. v. Avalon*, 111 *N.J.* 205, 206-08 (1988)). In *Marlboro Auto Wreckers, supra*, Docket No. A-6137-08T26137-08T2 at p. 16, the court considered the municipal licensing ordinances only in so far as they evidenced the historic intent of the owner. Here the historic use of the Yard is narrower and less intense than the use permitted by Southampton ordinances and licensing. Therefore the ordinances neither demonstrate the intent of the historic landowner, nor do they expand the permissible non-conforming use. Therefore Southampton Ordinance §§ 4-4.5, 12-2.3 are not relevant.

Tentative Disposition

For the reasons set forth above, the Board's determination is hereby **VACATED**, and the above captioned case is **REMANDED** for further hearings consistent with this opinion.

EXHIBIT “2”

LEGAL MEMORANDUM - SUPPLEMENTAL

From: Christopher Norman, Esq. & Thomas J. Coleman, III, Esq.

To: Southampton Township Zoning Board of Adjustment

RE: ***Allied Recycling, Inc. v. Southampton Township Zoning Board***
Remand from Superior Court of New Jersey
ATTORNEY-CLIENT PRIVILEGED

Date: May 11, 2016

This legal memorandum supplements the prior legal memorandum our office prepared for the May 12, 2016 hearing on the remand.

Parenthetically, we do not believe public notice of the May 12, 2016 hearing is required, since the Zoning Board will render its determinations based on the existing record through its adoption of two (2) resolutions. No additional evidence by way of documentation or testimony will be taken. Our office has notified Allied Recycling's attorney, Michael Ridgway of the May 12, 2016 hearing date. Mr. Ridgway will not be attending the meeting, but has indicated his client may attend the hearing strictly for observation purposes. Mr. Ridgway has also acknowledged that Judge Bookbinder ruled in both his August 12, 2015 and January 12, 2016 opinions that the Zoning Board has no obligation to reopen the record, since it is already very comprehensive and fully developed.

The first resolution the Zoning Board will consider for adoption and memorialization is the subject matter of our earlier legal memorandum on the remand hearing.

The second resolution (attached) the Zoning Board will consider at the May 12, 2016 hearing is the subject matter of this supplemental legal memorandum.

In his August 12, 2015 and January 12, 2016 opinions, Judge Bookbinder directed the Zoning Board to make a determination quantifying the extent of Allied Recycling's nonconforming use rights to engage in scrap-metal recycling. In the first resolution the Zoning Board will consider for adoption, this sum is quantified at 10% of the overall junkyard business revenues.

Since the Zoning Board is directed by Court Order to recognize that scrap-metal recycling is a part of Allied Recycling's non-conforming use junkyard activity, the proposed expansion of such activity from 10% to 50% constitutes an expansion of a nonconforming use, pursuant to *N.J.S.A.* 40:55D-70(d)(2).

In Zoning Board Resolution 2014-17, the Zoning Board previously considered Allied Recycling's application for Minor Site Plan and Use Variance Approval of the weight-scale and refurbishment of existing buildings and denied the requested relief. However, the Zoning Board made such determination at the time under an assumption that Allied Recycling only had non-conforming rights to engage in "auto-salvage" and that the addition of scrap-metal recycling

constituted the introduction of a new use, requiring the more rigorous proofs of a use variance, pursuant to *N.J.S.A.* 40:55D-70(d)(1). Judge Bookbinder ruled that the Zoning Board's determination was erroneous in this regard.

Accordingly, the Zoning Board must reconsider the Minor Site Plan and Use Variance application under the legal analysis for expansion of a pre-existing lawful nonconforming use. This will require the Zoning Board to acknowledge, in its decision that the use already exists, and presumably will be less injurious to the neighborhood and zone plan because the use is already there. Such is not the case in a (D)(1) use variance application, where a new prohibited use activity is proposed to be introduced in a zoning district.

The second resolution the Zoning Board will consider for adoption re-examines the Minor Site Plan and Use Variance Application. The second resolution has been drafted to deny the requested relief, but it engages in the legal analysis that is applicable to an application seeking approval for expansion of a lawful pre-existing nonconforming use, pursuant to *N.J.S.A.* 40:55D-70(d)(2).

Many of the proofs supporting the Zoning Board's denial of a use variance in Resolution 2014-17 similarly justify a denial for expansion of an already existing nonconforming use.

You should review both resolutions prior to the public hearing and be prepared to ask questions and or to deliberate on its findings and conclusions of law. If you are satisfied with both resolutions, memorialization will occur at the hearing on May 12, 2016. If you believe additional findings are warranted in either of the resolutions, or if you disagree with the substance of the two (2) resolutions, please present your reasons at the hearing.

EXHIBIT “3”

No *Shepard's* Signal™
As of: May 29, 2014 11:31 AM EDT

Arroyo v. Brick Recycling Co.

Superior Court of New Jersey, Appellate Division
February 6, 2013, Argued Telephonically; March 4, 2014, Decided
DOCKET NO. A-3966-12T2

Reporter: 2014 N.J. Super. Unpub. LEXIS 423

JOHN C. ARROYO, Plaintiff-Appellant, v. BRICK RECYCLING CO., INC., A CORPORATION OF THE STATE OF NEW JERSEY, and THE ZONINGBOARD OF ADJUSTMENT OF THE TOWNSHIP OF WALL, Defendants-Respondents.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY RULE 1:36-3 FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: [*1] On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-1847-12.

Core Terms

Zoning, site, variance, junkyard, recycling, use variance, recycling center, proposed use, industrial, premises, metal

Counsel: Robert J. Inglima, Jr., argued the cause for appellant.

Mark R. Aikins, argued the cause for respondent Brick Recycling Co., Inc. (Mark R. Aikins, L.L.C., attorney; Mr. Aikins, on the brief).

Geoffrey S. Cramer argued the cause for respondent Zoning Board of Adjustment of the Township of Wall (Law Office of Geoffrey S. Cramer, attorneys; Jeff Thakker, of counsel; Mr. Cramer, on the brief).

Judges: Before Judges Reisner and Alvarez.

Opinion

PER CURIAM

Plaintiff John C. Arroyo appeals from a March 18, 2013 order, affirming the decision of the Wall Township Zoning Board of Adjustment (Board) to grant a use variance application filed by defendant Brick Recycling Co., Inc. (Brick or the applicant). Having reviewed the record, we conclude that the Board's decision was supported by sufficient credible evidence and was consistent with applicable law. We also find that the Law Division correctly applied the law in reviewing the Board's decision. We affirm, substantially for the reasons stated by the Board in its resolution dated March 17, 2012, and the reasons stated in the opinion of Judge Lawrence M. Lawson, issued [*2] February 20, 2013.

I

Brick applied for a use variance to convert a closed lumber business into a scrap metal recycling center. The applicant needed a use variance, because neither lumber yards nor recycling centers were permitted uses in the highway business (HB-120) zone, located along Routes 33/34 in Wall Township. The application did not involve any new buildings. The applicant proposed to put the existing buildings to a different use, without any new construction. The applicant planned to use an existing rail spur on the property to transport the scrap metal to buyers in other states, thereby reducing the need for truck transportation and the associated traffic. The applicant sought continued approval of the existing setbacks and other bulk variances obtained by the previous owner.

At the Board hearing, Brick's vice-president Peter DeCenzo explained that the recycling facility was designed to take ferrous and non-ferrous scrap metal from various sources, including construction sites, local building contractors, and individual homeowners. All materials received would be processed, promptly loaded on trucks or rail cars, and shipped out. It was clear from the Board hearing record that [*3] the applicant did not plan to use the premises as a "junkyard," a use the zoning ordinance prohibited anywhere in Wall Township. DeCenzo testified that, unlike other scrap metal facilities, his facility would not store materials on the premises for extended periods of time.

For example, the facility would accept junked automobiles but would not store them on the premises or sell auto parts, the way a typical junkyard would. Instead, any junked autos brought to the facility would be promptly transported to the applicant's existing yard in Brick Township, where they would be drained of fluids and

crushed.[1] The flattened autos would then be returned from the ***Brick*** Township facility to the Wall Township facility, loaded on railroad cars, and shipped to out-of-state buyers. DeCenzo agreed that any variance could be conditioned on there being no sales of auto parts to the public and no storage. During the Board hearing, the members emphasized their opposition to having a junkyard in the Township, and the applicant assured them that the facility would not be operated as a junkyard.

Addressing [*4] the potential impact of the project on the surrounding neighborhood, the applicant's planner testified that the property fronts on Routes 33/34, but is bounded by wooded areas on the other three sides. The applicant agreed to beautify the site by providing landscaping along Routes 33/34, to shield the existing barbed wire fencing and storage areas from public view. The planner testified that, because the site is surrounded by wetlands on one side and United States Navy property on the other, future development around it was unlikely. He testified that, "hardly anybody is going to see this site or be aware of what's going on here. It's so nicely secluded."

Further, he explained that the proposed use was consistent with the actual uses nearby, which were largely industrial. Neighboring uses included an asphalt plant and a lighting factory.

The planner testified that the facility would involve a substantially lower amount of traffic than the prior use (276 trips per day, as opposed to 1800 trips). He also testified that the property had been on the market for two or three years, and that allowing the variance would return the property to a viable economic use as opposed to leaving it vacant, [*5] provide a source of new jobs, and further the public interest in recycling. There was no opposition to the application, and the Board approved it unanimously.

In its resolution, the Board found that the "site has been vacant for a considerable period of time."[2] The Board further found that "accessibility to the railroad spur is extremely important for [***Brick***] inasmuch as it provides access for sales to domestic users," the "existence of the large building will enable [***Brick***] to provide better security for the valuable metals," ***Brick*** will use the three existing sheds on the property and utilize the existing lighting system, unless the Board's Engineer requires additional lighting, and no changes will be made to the water and sewer system. The Board concluded that the proposed use served the purpose of the Municipal Land Use Law because it "will promote the maximum practical recovery of recyclable materials."

The Board took "administrative notice of the fact that this section of Wall Township has an established development pattern" consisting [*6] of significant industrial use. The Board also took "positive notice of [***Brick***'s] willingness to take over an abandoned commercial site and to rehab it and to provide an additional source of employment in the community as well as undertaking to maintain the existing infrastructure and provide much needed landscaping and screening improvements." Finally, the Board determined that the proposed facility "advances the purposes of the Municipal Land Use Law for this mixed commercial industrial area of the Township and that no substantial detriment to the Zoning Plan or Zoning Ordinance of the Township or public good will be posed by [the] grant of the use variance."

In a thorough written opinion, which we need not repeat in detail, Judge Lawson found that the Board made sufficient, specific findings about the particular suitability of the proposed use for the particular site, as well as findings that the applicant satisfied the negative criteria, as required by *N.J.S.A. 40:55D-70(d)*. Judge Lawson found that the plant would not be a prohibited "junkyard" which typically would involve long-term storage of abandoned materials. He also found that, taken in context, the (d) variance subsumed the [*7] several bulk variances that were required. He remanded the matter to the Board for the limited purpose of allowing ***Brick***, which was the contract purchaser of the property, to submit a corporate disclosure statement to the Board.[3] *See N.J.S.A. 40:55D-48.1 to -48.3*.

II

On this appeal, plaintiff argues that the trial court "erred" in finding that ***Brick*** satisfied both the positive and negative criteria, and in remanding the matter to the Board to permit ***Brick*** to file a corporate disclosure statement nunc pro tunc. We cannot agree.

Like the trial court, our review of the Board's resolution is deferential. In a very recent decision addressing use variances, the Supreme Court reaffirmed the narrow scope of our review of a zoning board's decision:

---

[1] As a result, there would be no danger of environmental pollution caused by leaking fluids at the Wall site.

[2] In his trial court brief, plaintiff agreed that the property had been unused for many years and was deemed abandoned by the municipal authorities.

[3] Judge Lawson properly declined to consider issues which plaintiff did not raise at the pre-trial conference except as they bore upon his conclusion that the Board did not act arbitrarily.

> [Z]oning boards, "because of their peculiar knowledge of local conditions[,] must be allowed wide latitude in the exercise of delegated discretion." That board's decisions enjoy a presumption of validity, and a court may not substitute its judgment for that of the board [*8] unless there has been a clear abuse of discretion. In evaluating a challenge to the grant or denial of avariance, the burden is on the challenging party to show that the zoning board's decision was "arbitrary, capricious, or unreasonable."
>
> [*Price v. Himeji, LLC, 214 N.J. 263, 284, 69 A.3d 575 (2013)* (citations omitted).]

In order to obtain a use variance under *N.J.S.A. 40:55D-70(d)*, an applicant must prove the "positive criteria" by showing that there are "special reasons" to grant the variance, and must also prove the "negative criteria" by showing that granting the variance will not have a negative effect on the surrounding properties, and that allowing this particular project at "the designated site" will not undermine the purpose of the municipal zoning ordinance. *Himeji, supra, 214 N.J. at 284-85*.

As in this case, one way to satisfy the positive criteria is to demonstrate that the proposed site "is particularly suitable for the proposed use." *Medici v. BPR Co., 107 N.J. 1, 4, 526 A.2d 109 (1987)*. In *Himeji*, the Court clarified that the "particular suitability" standard does not require proof that the property is unique, in the sense that it is "the only possible location for the particular project." *Id. at 287*.

> Our [*9] use of the words peculiar and particular makes clear that the inquiry concerning whether a proposed use variance should be granted on this basis is an inherently fact-specific and site-sensitive one. Although the availability of alternative locations is relevant to the analysis, demonstrating that a property is particularly suitable for a use does not require proof that there is no other potential location for the use nor does it demand evidence that the project "must" be built in a particular location. Rather, it is an inquiry into whether the property is particularly suited for the proposed purpose, in the sense that it is especially well-suited for the use, in spite of the fact that the use is not permitted in the zone. Most often, whether a proposal meets that test will depend on the adequacy of the record compiled before the zoning board and the sufficiency of the board's explanation of the reasons on which its decision to grant or deny the application for a use variance is based.
>
> [*Id. at 292-93*.]

We find no error in the Board's decision that this property is particularly suited for use as a recycling center, even though recycling centers are not permitted in the HB-120 zone. To [*10] an extent, this case resembles *Burbridge v. Mine Hill, 117 N.J. 376, 568 A.2d 527 (1990)*, where the Court, taking a pragmatic approach, found that the benefits of allowing the applicant to clean up "a sprawling and unsightly mess" outweighed the detriments of allowing the applicant to expand a pre-existing non-conforming auto salvage business. *Id. at 378*.

Here, the Board was faced with an unsightly, long-abandoned industrial property, in an area surrounded by industrial uses, albeit zoned for somewhat more upscale development.[4] The applicant proposed to clean up the premises, add landscaping, return the property to the tax rolls, and provide both jobs and a recycling source for the community. We find no basis in the record to second-guess the Board's decision that the property was "especially well-suited for the use" as a recycling facility, *Himeji, supra, 214 N.J. at 293*, that the presence of the railroad spur would decrease traffic from the premises, and that the isolated location and the new owner's willingness to add landscaping would avoid any harm to the neighborhood from a non-conforming use.

Contrary to plaintiff's argument, the Board's conclusion that the use would not be a prohibited "junkyard" is supported by substantial credible evidence in the record. The applicant's vice-president cogently explained the difference between a junkyard and a recycling center and his testimony established that ***Brick*** would not be running a junkyard.

Finally, in failing to raise the issue in the pre-trial conference, plaintiff waived its right to complain that ***Brick*** filed a corporate disclosure statement for the property owner instead of for itself. *See R. 4:69-4*; *Lertch v. McLean, 18 N.J. 68, 73, 112 A.2d 735 (1955)* (stating that "issues not presented in the pretrial order are deemed to be waived"). Having failed to properly present the issue to Judge Lawson, plaintiff likewise cannot present the issue on appeal. *Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234, 300 A.2d 142 (1973)*. However, even if we

[4] Having failed to participate in the Board hearing, plaintiff must take the record as he finds it. [*11] There was no objection to the planner's testimony that the property had been on the market for several years, with no prospective buyer other than ***Brick***. And even plaintiff admitted in the Law Division that the property was unused and abandoned.

consider the issue, we would find no abuse of discretion in Judge Lawson's [*12] decision to remand the matter to the Board to correct the defect. *See* Cox & Koenig, *New Jersey Zoning and Land Use Administration* § 27-1.4 (2013) (noting that such a defect, discovered after approval of a land use application, could "almost undoubtedly . . . be cured by filing of the required affidavit nunc pro tunc").

To the extent not specifically addressed, plaintiff's arguments are without sufficient merit to warrant discussion in a written opinion. *R. 2:11-3(e)(1)(E)*.

Affirmed.

EXHIBIT "4"

No *Shepard's* Signal™
As of: June 29, 2015 11:46 AM EDT

Marlboro Auto Wreckers v. Zoning Bd. of Adjustment

Superior Court of New Jersey, Appellate Division

January 27, 2010, Argued; September 2, 2010, Decided

DOCKET NO. A-6137-08T2

Reporter
2010 N.J. Super. Unpub. LEXIS 2204; 2010 WL 3517033

MARLBORO AUTO WRECKERS, MORGANVILLE AUTO WRECKERS and SCHECHTER ENTERPRISES, Plaintiffs-Appellants, v. ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF MARLBORO, COUNTY OF MONMOUTH, Defendant-Respondent.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: [*1] On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-4357-08.

Core Terms

non-automotive, scrap, junkyard, scrap metal, Ordinance, properties, license, automotive, motor vehicle, operations, permitted use, metal, pre-existing, non-conforming, applications, activities, Zone, junk dealer, collected, loose, sites, wholesale, license application, court found, court noted, photographs, CAPRICIOUS, materials

Counsel: Timothy D. Lyons argued the cause for appellants (Giordano, Halleran & Ciesla, attorneys; Mr. Lyons, of counsel; Mr. Lyons and Vincent M. DeSimone, on the brief).

Ronald Cucchiaro argued the cause for respondent (Weiner Lesniak, attorneys; Michael B. Steib, on the brief).

Judges: Before Judges Axelrad, Sapp-Peterson and Espinosa.

Opinion

PER CURIAM

In this action in lieu of prerogative writs, plaintiffs Marlboro Auto Wreckers, Morganville Autowreckers and Schechter Enterprises [1] appeal from the judgment entered in favor of the Marlboro Township Zoning Board of Adjustment (the Board) which determined that plaintiffs' non-automotive scrap metal operations on three junkyard facilities were not a permitted use and did not constitute a pre-existing and non-conforming use. We affirm.

Schechter owns three properties that are operated as a commercial salvage yard in Marlboro Township. The first and second properties, Marlboro Auto Wreckers and Morganville Auto Wreckers, are both located in the LC (Land Conversation) Zone [*2] and have been owned and operated by Schechter since 1955 and 1962, respectively. The third property, Schechter Enterprises, is located in the C2 (Neighborhood Commercial) Zone and has been owned and operated by plaintiffs since 1980. Without a variance, junkyards are not permitted uses within either zone.

Marlboro Township Ordinance No. 37-82 (the Ordinance) was passed on September 23, 1982, and requires a license to operate a motor vehicle junkyard and a separate license to operate as a wholesale or retail junk dealer.

Pursuant to Article I, section 82-1, a license is required to operate a motor vehicle junkyard, which is defined in Article I, section 82-3 as:

> Any business or place of storage or deposit . . . which displays in or upon which there is displayed to the public view two (2) or more motor vehicles which are unfit for use for the highway transportation [sic], or used parts of motor vehicles or old iron, metal, glass, paper, cordage, or other waste or discarded material which has been part of any motor vehicle, the sum of which parts or material shall equal in bulk two (2) or more motor vehicles.

Article II governed wholesale or retail junk dealers and, in section 82-19, defined [*3] a loose retail junk dealer as:

[1] "Schechter" is used to refer to the plaintiffs collectively, or, to Elaine Schechter individually.

> A person who goes about the streets soliciting the purchase of junk or who maintains a store, shop or other place of business or truck, cart or other vehicle for the purchase, sale and collection in small quantities of discarded articles and materials of every description, commonly called "junk."

The same section defines a wholesale junk dealer as:

> A person who buys and sells junk in large quantities and who maintains a warehouse, yard or other place of business where discarded articles and materials of every description are purchased or collected in large quantities and are permitted to accumulate[.]

In or about 2007, Schechter was considering adding a new scrap metal machine to one of the properties to process more non-automotive scrap and contacted the Zoning Officer, Sarah Paris, to request a permit to operate the bailer on the properties. Paris denied the permit and issued a notice to Schechter that the use of the properties involving the collection and sale of scrap metal not related to motor vehicles was prohibited. Plaintiffs sought a stay of enforcement of the zoning officer's action pending the presentation of an application to the Board for an [*4] interpretation that the plaintiff's activities were either a permitted use or a pre-existing, non-conforming use.

The Board held three hearings on plaintiff's consolidated applications from March 2008 to July 2008. In support of her contention that all three properties had continuously operated as non-automotive junk dealers under Article II, Elaine Schechter testified that, since their inception, the properties collected both kinds of junk metal: automotive and non-automotive scrap. Junked cars would be crushed, stacked, and stored on the properties until the price for the metal went up, at which point the automotive scrap was sold. Although some non-automotive scrap, such as unwanted appliances, was dropped off at the sites, Schechter admitted that they were never "heavy into scrap" and that it never generated significant revenue. Schechter wanted to buy a bailer for the scrap metal so that she could eliminate a middle man and expand the loose junk operations. In the past, scrap metal amounted to only 25% of the business. However, Schechter acknowledged that the percentages varied from year to year and she could not produce an accurate number.

Schechter was asked whether she could [*5] produce receipts of non-automotive scrap Schechter collected and sold prior to 1982 and a breakdown of the different materials included in the sale in an effort to prove how much of Schechter's business included loose scrap compared to automotive scrap prior to the Ordinance's adoption. Schechter was unable to provide pre-1982 receipts.

Before the ordinance was passed in 1982, junkyard license applicants did not have to specify whether they operated as an automotive or non-automotive facility, but were simply asked to describe their operations generally. When the ordinance was passed, section 82-22, required the license application to state the purpose for which the junkyard is to be used. Although Schechter had applied for and received licenses to operate the junkyards both before and after the ordinance was passed, neither the application nor the license forms specified whether licensure was granted under Article I as an automotive facility, or Article II as a non-automotive facility. Schechter produced a number of junkyard licenses beginning in January 1, 1977 and continuing through 1982, which described the nature of the business as "scrap iron and metal, repairs, auto and truck [*6] sales, auto parts, tires, glass, et cetera." This description of the business was identical to the descriptions on the license applications that were completed after the Ordinance was adopted. The Township simply granted a "Junkyard License" to Schechter and did not list whether an Article I or Article II license was granted.

Schechter presented Andrew Janiw as an expert witness in the field of professional planning. Janiw described a series of aerial photographs of Schechter's properties that were taken as early as the mid-1950s. Based on his review of the photographs, Janiw opined that Schechter's efforts to segregate metal was a "continuing effort" and that the operation historically included "a mix of both auto wreckage as well as scrapping metals[.]" He also estimated that the segregated non-automotive scrapping activities depicted in the photographs constituted "25, 35, [or] 45 percent" of the total square footage of the landmass available at the three sites. It appears, however, that the quality of the photographs left room for debate as to the level of support they provided for this opinion. Janiw also provided an expert opinion that Schechter's non-automotive metal scrapping [*7] activities "clearly preexisted the [O]rdinance." His opinion was based upon his review of Articles I and II of the Ordinance, the junkyard licenses awarded before and after the Ordinance was adopted, the license applications before and after the Ordinance was adopted, and the aerial photographs.

Schechter presented the testimony of three operators in the scrap metal business who had done business with the Schechter properties. Anthony Auriemma testified that he also bought scrap metal, "both automotive and non-automotive," from all three Schechter properties since

1979, that the practice continued up until the date of the hearing and although he no longer serviced all three properties, he continues to service one of the sites. However, testimony from the other witnesses failed to provide evidence regarding recent practices. Leonard Sholish, who started in the scrap metal business in 1975, testified about his experience in removing large amounts of scrap metal during the 1980's and 90's from two of the Schechter properties. Although Sholish opined that Schechter collected and sold both scrap metal from automobiles and loose non-automotive scrap metal throughout the 1980's and 90's and [*8] that loose scrap metal amounted to between 10 to 50 percent of Schechter's operation at any given time, he had not conducted business at any of the Schechter properties since the "mid 90's." Similarly, Clyde Cameron testified that he sold automotive and non-automotive scrap to Schechter starting in the 1970's, but had not sold metal to Schechter since the mid-1980's.

The Board's planner, Thomas Scangarello, a planner with Planning Design Collaborative, LLC, provided his opinion concerning the Ordinance and the junkyard activities for the record. Scangarello testified that it was clear to him that the sites were being used for storing scrap metals, not weighing and selling them.

During the course of the hearing, public comment was permitted. Comments from the residents disputed Schechter's contention that all three sites had remained active through the years and included some concerns that if the Schechter properties were allowed to operate as loose scrap yards in the future, the increase in commercial traffic, noise and air pollution would have an adverse impact on the neighboring residents.

The Board members voted six to one to deny Schechter's request that the Ordinance be interpreted [*9] to find that its activities as a non-automotive loose scrap metal junkyard are a permitted use or alternatively, a pre-existing non-conforming use. The Board adopted a resolution that listed the exhibits reviewed and the reasons for the Board's findings, which are summarized as follows.

The Board noted that under Section 84-30(E) of the Ordinance, because "any use not specifically permitted in the zoning district established by this chapter is . . . expressly prohibited[,]" Schechter's use of the three properties in question as a non-automotive scrap metal junkyard was not a permitted use because the properties were located in either a "LC Land Conservation or C-2 Neighborhood Commercial Zone." The Board noted that while the Ordinance acknowledged certain junkyards operating at the time of its adoption, the Ordinance did not rezone the areas where they were located, and therefore, did not "confer upon them the status of being 'permitted' uses." In addition, the Board emphasized that Article I requires that to qualify as a "motor vehicle junkyard," the scrapped materials must have been "part of any motor vehicle," conversely, metals not originally part of a motor vehicle fall under Article [*10] II, and are appropriate for wholesale junk dealers. The Board concluded that Schechter's activities did not constitute that of a wholesale junk dealer.

The Board addressed plaintiffs' argument that the Judgment in the *Altobelli* litigation, an unpublished Law Division case, supported their position because Morris Schechter had testified that his business consisted of both automotive and non-automotive scrap. The Resolution noted in addition to its finding on the validity of the ordinance, the *Altobelli* court made the following pertinent finding:

> Section 89-2 of the Ordinance was deemed to be a reasonable and valid limitation on the number of junk yards (11) and the Court further found that the Township may limit the number of junkyards "to those which comprise pre-existing, non-conforming uses[.") Equally important, the Court found that the Plaintiffs therein, including the Applicants here, have not been denied licenses and were therefore without standing to challenge the limitation. Thus it would appear that the Courts have already ruled that the Applicants herein constituted pre-existing non-conforming uses to the extent that they existed in 1982. They are not permitted uses.

The Board [*11] also found that Schechter failed to establish a lawful, pre-existing non-conforming use, stating that the evidence showed that use "for the general collection, collation and sale of scrap metal and [non-automotive] materials" from 1982 and before was "at best, minimal and sporadic in nature." The Board cited Schechter's testimony that "the company was not heavily into scrap[,]" that Schechter could not identify with any reasonable certainty the quantity of non-automotive metal processed, that people in the community would just leave assorted metal items on the properties from time to time, and that residents in the immediate community testified that "there had been no evidence of any significant metal operations not related to motor vehicles on the sites."

Plaintiffs appealed the Board's decision to the New Jersey Superior Court. In a June 16, 2009 written opinion, Judge Lawrence M. Lawson, A.J.S.C., affirmed the Board's decision.

In this appeal, plaintiffs present the following arguments:

POINT I

THE TRIAL COURT'S DECISION MUST BE REVERSED IN THAT THE LOWER COURT ERRED SINCE THE RECORD BELOW FAILS TO SUPPORT THE BOARD'S FINDINGS IN ITS RESOLUTION(S) OF DENIAL OF SCHECHTER'S APPLICATIONS, [*12] AND THEREFORE THE BOARD'S DECISIONS TO DENY THE APPLICATIONS WERE AGAINST THE WEIGHT OF THE EVIDENCE AND THUS ARBITRARY, CAPRICIOUS AND UNREASONABLE AND AN ABUSE OF THE BOARD'S DISCRETION, AND THE COURT BELOW SHOULD HAVE REVERSED THE BOARD'S DECISION.

A. THE APPELLATE STANDARD OF REVIEW.

B. THE "ARBITRARY, CAPRICIOUS AND UNREASONABLE" STANDARD OF REVIEW.

POINT II

THE TRIAL COURT ERRED IN AFFIRMING THE BOARD'S DECISION SINCE THE BOARD'S DECISION, AS SET FORTH IN THE RESOLUTION(S), WAS ARBITRARY, CAPRICIOUS AND UNREASONABLE AS BEING CONTRARY TO AND INCONSISTENT WITH SCHECHTER'S PROOFS PRESENTED AS TO A PERMITTED USE.

A. THE TRIAL COURT ERRED IN HOLDING THAT SCHECHTER'S OPERATIONS WERE NOT A PERMITTED USE.

1. SCHECHTER'S PERMITTED USE DOES NOT CONSTITUTE A "RE-ZONING" BY THE TOWNSHIP.

2. THE CHANGE IN THE TOWNSHIP'S APPLICATION AND LICENSE FORM DOES NOT DEFEAT SCHECHTER'S RIGHTS AS A PERMITTED USE.

3. THE TRIAL COURT ERRED IN ITS ANALYSIS OF THE EVIDENCE BEFORE THE BOARD IN AFFIRMING SCHECHTER'S OPERATIONS ARE NOT A PERMITTED USE.

4. THE LOWER COURT ALSO MISINTERPRETED THE IMPORT OF THE HOLDING IN THE ALTOBELLI ACTION.

POINT III

THE TRIAL COURT ERRED IN AFFIRMING THE BOARD'S DECISION THAT SCHECHTER [*13] DID NOT ESTABLISH A PRE-EXISTING, NON-CONFORMING USE UNDER THE ORDINANCE.

A. THE LOWER COURT ERRED IN NOT AFFORDING SUFFICIENT CREDIBILITY AND WEIGHT TO THE TESTIMONY OF ELAINE SCHECHTER, AND THE SCHECHTER WITNESSES, IN SUPPORT OF SCHECHTER'S APPLICATION FOR A PRE-EXISTING NON-CONFORMING USE CERTIFICATION.

1. THE COURT BELOW, AS DID THE BOARD, IMPROPERLY DISREGARDED AND IGNORED MS. SCHECHTER'S TESTIMONY.

2. THE LOWER COURT, AS DID THE BOARD, IMPROPERLY DISREGARDED AND IGNORED THE TESTIMONY OF SCHECHTER'S WITNESSES - LEONARD CHOLISH, ANTHONY AURIEMMA AND ANDREW JANIW.

3. THE COURT FAILED TO CONSIDER THE TESTIMONY OF MORRIS SCHECHTER, AND THE PROCEEDINGS FROM THE ALTOBELLI ACTION.

POINT IV

THE LOWER COURT IMPROPERLY DETERMINED THAT THE BOARD WAS NOT ESTOPPED FROM DENYING SCHECHTER'S CERTIFICATION OF A PRE-EXISTING NON-CONFORMING USE.

POINT V

THE LOWER COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO ACCEPT AND CONSIDER THE POST-TRIAL SUBMISSION ON BEHALF OF SCHECHTER.

A. THE LOWER COURT SHOULD HAVE ACCEPTED AND CONSIDERED SCHECHTER'S LETTER BRIEF.

B. THE TRIAL COURT ERRED IN NOT FOLLOWING ITS PRIOR RULING IN ELTRYM.

Although we review legal issues de novo, "we may give substantial deference to a [*14] municipal agency's interpretation of its ordinances where that decision is informed by knowledge of local circumstances and is combined with enforcement responsibility." *Wyzykowski v.*

Rizas, 254 N.J. Super. 28, 38, 603 A.2d 53 (App. Div. 1992), *aff'd in part, rev'd in part*, 132 N.J. 509, 626 A.2d 406 (1993). Because planning and zoning Boards are more familiar with local characteristics, the court presumes that a Board's factual determinations are valid, and is not permitted to substitute its judgment for that of the Board. *Kramer v. Bd. Adj., Sea Girt*, 45 N.J. 268, 296, 212 A.2d 153 (1965), *Kaufmann v. Planning Bd. for Warren*, 110 N.J. 551, 557-58, 542 A.2d 457 (1988). A Board's decision will not be upset unless it is shown that it was arbitrary, capricious or unreasonable, or that it violated legislative policies, expressed or implied, in the act governing the agency. *Burbridge v. Governing Body of Mine Hill*, 117 N.J. 376, 385, 568 A.2d 527 (1990).

In his comprehensive and well reasoned opinion, Judge Lawson addressed each of the arguments raised by plaintiffs on appeal.

The court noted that Articles I and II are separated pursuant to an "or" provision. As a result, applicants must seek licensure and meet the requirements as an automotive junkyard under [*15] Article I, or they must seek licensure as a non-automotive facility under Article II. The court held that Schechter's scrapping operations that were required to be licensed under Article II, were never licensed under Article II, and therefore, would not be permitted to operate as a non-automotive junkyard in the future.

In reviewing the evidence of Schechter's activities, the court found that the fact that the operation constituted mainly automotive scrap was supported by Schechter's own testimony that the business was not "heavily into scrap" and that "non-automotive scrap was not a principal business at any of the three sites." In addition, the court found that the scrap metal operations produced only a few receipts and were not reconciled against the percentage of Schechter's operations dealing with automotive scrap metal. The court also held that the applications for the three locations included "automotive uses alongside generic terms" and that the "name of two of the three locations involved the term 'auto'" which in the court's opinion was a clear indicator of Schechter's "intent to operate primarily as a motor vehicle junkyard." Accordingly, the court found that Schechter's [*16] operations clearly matched the description of Article I and therefore, the evidence "support[ed] the Board's finding that the Schechters were never licensed to operate, and cannot now seek to operate," as a non-automotive junkyard under Article II.

In regard to the *Altobelli* decision, the court noted that although Morris Schechter testified at the *Altobelli* hearing that he engaged in some non-automotive scrap work, the Board drew the reasonable inference that the *Altobelli* court's findings were related to Schechter as a licensed "motor vehicle junkyard" and not as an Article II "wholesale junk dealer" who was engaged in non-automotive scrap metal operations.

In regard to whether plaintiffs had established a non-conforming pre-existing use, the court found that the Board correctly concluded that plaintiffs failed to meet their burden of proof. Specifically, the court noted that the testimony supported the Board's ruling, and that the descriptions of Schechter's operations in the licenses and license applications provided proof of an automotive scrap metal business but failed to establish non-automotive scrap iron activities.

The court also found no grounds for the application of the estoppel [*17] doctrine. Despite Schechter's argument that the new application forms did not allow a full description of the extent of their business activities, the applications presented to the court both before and after adoption of the Ordinance contained the same descriptions concerning the use of the three properties, and therefore, Schechter did not rely on the actions of Marlboro's officials when the license application forms were altered. In addition, the court noted that during the *Altobelli* litigation, Morris Schechter had argued that they were operating as an automotive junkyard, which did not require licensing under Article II, and therefore could not now argue that "they should be permitted to operate as a business that would require being licensed under Article II."

The court concluded that the Board's decision was "clearly supported by the undisputed facts" presented by Schechter, their witnesses, members of the public, and Marlboro's officials, and was therefore not arbitrary or capricious.

Finally, the court held that Schechter's submission of a post-trial letter brief was filed without the court's permission and would therefore not be considered. In addition, the court noted that [*18] it had issued the *Eltrym* opinion, [2] was well aware of the decision, and that Schechter's case could be decided without addressing *Eltrym's* facts and holding. Plaintiffs' request that the court consider this submission without securing leave of court required a relaxation of the Rules of Court pursuant to *Rule 1:1-2*. Such relief is to be "granted only sparingly," *Romagnola v. Gillespie, Inc.*, 194 N.J. 596, 606, 947 A.2d 646 (2008), and we see no abuse of discretion in the court's refusal to grant it here.

[2] *Eltrym Euneva, LLC v. Keansburg Planning Bd. of Adjustment*, 407 N.J. Super. 432, 971 A.2d 466 (Law Div. 2008).

After reviewing the record, briefs and arguments of counsel, we are satisfied that none of the arguments presented have merit. We affirm substantially for the reasons set forth in Judge Lawson's opinion.

Affirmed.

Stephan Raymond

EXHIBIT "5"

No *Shepard's* Signal™
As of: June 29, 2015 11:47 AM EDT

Tricare Treatment Servs., L.L.C. v. Chatham Borough Planning Bd.

Superior Court of New Jersey, Appellate Division

October 21, 2014, Argued; November 25, 2014, Decided

DOCKET NO. A-5371-12T1, A-0864-13T1

Reporter
2014 N.J. Super. Unpub. LEXIS 2783

TRICARE TREATMENT SERVICES, L.L.C., Plaintiff-Appellant, v. CHATHAM BOROUGH PLANNING BOARD, CHATHAM BOROUGH BOARD OF ADJUSTMENT, THE MAYOR AND COUNCIL OF THE BOROUGH OF CHATHAM, Defendants-Respondents.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: [*1] On appeal from Superior Court of New Jersey, Law Division, Morris County, Docket No. L-1577-10 and L-1697-13.

Core Terms

variance, zoning, nonconforming use, zoning board, proposed use, planning board, Borough, administrative remedy, non-conforming, breakfast, ordinance, prerogative writ, continuation, compulsive, restaurant, enlarged, damages, bed

Counsel: Lawrence B. Litwin argued the cause for appellant.

Denis F. Driscoll argued the cause for respondents Chatham Borough Planning Board, Chatham Borough Board of Adjustment, and the Mayor and Council of the Borough of Chatham (Inglesino, Wyciskala & Taylor, L.L.C., and Horan & Aronowitz, L.L.P., attorneys; Mr. Driscoll and John E. Horan, of counsel and on the briefs).

James K. Pryor argued the cause for respondents Joseph J. Bell and The Bell Law Group n/k/a Bell, Shivas & Fasolo, P.C. in A-5371-12 (Bell, Shivas & Fasolo, P.C., attorneys; Mr. Pryor, of counsel and on the brief).

Ted Del Guercio, III, argued the cause for respondent Anne Marie Rizzuto in A-5371-12 (McManimon, Scotland & Baumann, L.L.C., attorneys; William W. Northgrave, of counsel and on the brief).

Judges: Before Judges Reisner, Koblitz and Higbee.

Opinion

PER CURIAM

This is a consolidated appeal of two separate lawsuits filed by plaintiff Tricare Treatment Services, Inc. (Tricare) against defendants: the borough of Chatham, its Planning Board, Board of Adjustment (Zoning Board), Mayor, and Council. In January 2010 Tricare sought to [*2] convert leased property,[1] the Parrott Mill Inn, a bed and breakfast in Chatham, to a residential rehabilitation center for compulsive gamblers. Tricare maintained that the conversion merely continued a nonconforming use of the property. When the Zoning Board did not agree, Tricare filed a complaint in lieu of prerogative writs on May 13, 2010.

After a finding that Tricare's treatment center was not a continuing nonconforming use, considerable motion practice, and the filing of many amended complaints, this action was ultimately dismissed without prejudice for failure to exhaust administrative remedies on February 8, 2013, and Tricare was given ninety days to seek a variance. Because Tricare no longer had a legal interest in the property, its request for a variance was deemed incomplete. On June 24, 2013, Tricare filed another complaint and this second action was dismissed on September 27, 2013, pursuant [*3] to *Rule 4:6-2(e)*, for failure to state a claim upon which relief can be granted.

Tricare appeals both of these dismissals, arguing that because the proposed use of the property as a residential

[1] The three-year lease agreement stated that the lease would commence March 1, 2010 "subject to the receipt of a non-appealable use approval from the Borough of Chatham and an unconditional and final certificate of occupancy . . . allowing Tenant's Permitted Use [as a treatment facility.]"

treatment center was improperly denied, Tricare should be able to move forward on its claims for damages against the municipal defendants and add lawyers as defendants, Anne Marie Rizzuto, Joseph J. Bell and his firm.[2] After reviewing the record in light of the many contentions advanced by Tricare on appeal, we affirm in all respects.

By way of additional background, the local zoning officer granted initial approval to Tricare on the basis that Tricare would continue the non-conforming use of the Inn. The zoning officer told Tricare to petition the planning board for a waiver of a site plan review. That waiver was subsequently granted by the planning board by voice vote on February 3, 2010. Chatham residents appealed the decision of the zoning officer and the Zoning Board reversed in a resolution passed in April 2010. When reversing the zoning officer, the Zoning Board determined [*4] that Tricare's proposed use of the Inn was not a continuing nonconforming use and thus required a variance.

Instead of seeking a variance, Tricare filed a complaint in lieu of prerogative writs on May 13. A week later the planning board adopted a "Resolution Reversing Approval of Waiver of Site Plan Due to Lack of Jurisdiction" indicating it had mistakenly exercised jurisdiction over the matter without notice to the public and unaware that the proposed use was not a continuation of the prior nonconforming use. In this resolution the planning board deemed its prior voice vote approval to therefore be "void *ab initio*[.]" During the litigation, defendants' counsel hired a private investigator, an action which Tricare objected to strenuously, but which was approved as appropriate by the motion judge. Tricare amended its complaint six times and engaged in three years of motion practice before finally filing for a variance in 2013. By that time Tricare had abandoned the lease agreement, the owner of the Inn objected to the variance, and the Zoning Board denied the application because Tricare could not perfect the application without an interest in the property.

During the litigation, the motion [*5] judge[3] determined after a de novo review of the record that the Zoning Board correctly decided that the proposed use of the Inn as a gambling rehabilitation center was not a continuation of a pre-existing, non-conforming use. This determination lies at the heart of the viability of Tricare's suit for damages. Tricare concedes, as it must, that it no longer has an interest in the use of the property, thus its appeal of the denial of that use is moot[4] except insofar as Tricare may have suffered damages from an improper denial of its proposed use. If the use was properly denied, then Tricare has no valid claim for damages against any defendant. We therefore begin with a discussion about whether Tricare's proposed use was properly deemed to require a variance.

I

The courts defer to decisions involving variances. A trial court may not disturb a municipal zoning board's [*6] decision granting a hardship variance unless such action was arbitrary, unreasonable, or capricious. *Jock v. Zoning Bd. of Adjustment, 184 N.J. 562, 597, 878 A.2d 785 (2005)*; *Columbro v. Lebanon Twp. Zoning Bd. of Adjustment, 424 N.J. Super. 501, 508-09, 38 A.3d 675 (App. Div. 2012)*. "Courts give greater deference to variance denials than to grants of variances, since variances tend to impair sound zoning." *Med. Ctr. at Princeton v. Twp. of Princeton Zoning Bd. of Adjustment, 343 N.J. Super. 177, 199, 778 A.2d 482 (App. Div. 2001)*. We employ the same standard of review as the trial court. *Wilson v. Brick Twp. Zoning Bd. of Adjustment, 405 N.J. Super. 189, 197, 963 A.2d 1208 (App. Div. 2009)*. Where, as occurred here, a zoning board has interpreted an ordinance, however, no deference is owed and our review is performed de novo. *Osoria v. W.N.Y. Rent Control Bd., 410 N.J. Super. 437, 443, 982 A.2d 1185 (App. Div. 2009)*.

The Parrott Mill Inn is a colonial-era home converted to a bed and breakfast, a pre-existing nonconforming use located in Chatham's B-3 Zone,[5] which does not allow overnight lodging. *N.J.S.A. 40:55D-68* provides that "[a]ny nonconforming use or structure existing at the time of the passage of an ordinance may be continued upon the lot or in the structure so occupied[.]" It is well-settled that the spirit

---

[2] Tricare alleges that these attorneys wrongfully hired a private investigator and took other improper actions during the litigation.

[3] Three judges were involved with this litigation at various times in its history. For the purposes of this opinion we need not distinguish among them.

[4] "An issue is moot when the decision sought in a matter, when rendered, can have no practical effect on the existing controversy." *Greenfield v. N.J. Dep't of Corr.*, 382 N.J. Super. 254, 257-58, 888 A.2d 507 (App. Div. 2006) (citation and internal quotation marks omitted)).

[5] Chatham's ordinance § *165-18*, describing uses allowed in the B-3 Zone, provides in pertinent part:

B. Permitted uses.

of zoning laws seeks to restrict rather than increase nonconforming uses. *Town of Belleville v. Parrillo's, Inc., 83 N.J. 309, 318, 416 A.2d 388 (1980)*. A nonconforming use will be allowed to continue only if the continuance is of substantially the same kind of use as that to which the premises were devoted at the time of passage of the zoning ordinance. *Avalon Home & Land Owners Ass'n v. Borough of Avalon, 111 N.J. 205, 210, 543 A.2d 950 (1988)* (citation omitted). Nonconforming "uses may be continued as of right, but may not be enlarged as of right[.]" [*7] *Reich v. Borough of Fort Lee Zoning Bd. of Adjustment, 414 N.J. Super. 483, 503, 999 A.2d 507 (App. Div. 2010)* (citation omitted); *see also Grundlehner v. Dangler, 29 N.J. 256, 263, 148 A.2d 806 (1959)* (holding that nonconforming uses may not be enlarged as of right "except where the enlargement is so negligible or insubstantial that it does not fairly warrant judicial or administrative notice or interference") (citation omitted).

The issue of whether a use constitutes an expansion of a prior nonconforming use is a mixed question of law and fact. *Bonaventure Int'l, Inc. v. Borough of Spring Lake, 350 N.J. Super. 420, 438, 795 A.2d 895 (App. Div. 2002)*; *see Belleville, supra, 83 N.J. at 317*. The determination of whether an activity is within the scope of the existing nonconforming use requires an examination of "the particular facts of the case, [*8] the terms of the particular ordinance, and the effect which the increased use will have on other property." *Hantman v. Twp. of Randolph, 58 N.J. Super. 127, 137, 155 A.2d 554 (App. Div. 1959)*, *certif. denied, 31 N.J. 550, 158 A.2d 451 (1960)*; *accord Belleville, supra, 83 N.J. at 317-18* (adopting the court's reasoning in *Hantman* as "the proper analysis for examining changes in nonconforming uses").

The facts were concededly not in dispute. When granting summary judgment to defendants, the motion judge determined that Tricare's proposed use of the Parrott Mill Inn "as a treatment facility for compulsive gamblers did not constitute a proper extension of the pre-existing, non-conforming use of the [property] as a bed and breakfast . . . ." This determination is based on both the controlling law and the evidence.

In an analogous situation, our Supreme Court determined that a restaurant's conversion into a nightclub was not a continuation of a non-conforming use. *Belleville, supra, 83 N.J. at 312-15*. The Court repeated the trial judge's comment that "'a 'disco' is a place wherein you dance and a restaurant a place wherein you eat.'" *Id. at 314*. The conversion of the property from a restaurant to a nightclub constituted a "substantial change" in its use. The Court opined that the fundamental inquiry is "an appraisal of the basic character of the use, before and after the change." [*9] *Id. at 316* (citation omitted). The Court noted that the "entire character of the business" was changed in that: "What was once a restaurant is now a dancehall." *Id. at 318*.

Tricare argues that its proposed use of the Inn was simply a continuation at a "less intense" level of that building's preexisting nonconforming use, because fewer patients would reside in the treatment center than the number of guests who stayed for the night in the Inn. The fundamental character of the Parrott Mill Inn would be altered, however, by its use as an in-patient gambling addiction treatment center rather than an inn providing bed and breakfast to Chatham visitors seeking a charming, historic spot to relax. Under Tricare's proposed use the public would be excluded from the facility as it would only be open to paying patients.

---

(1) Professional offices;

(2) Offices;

(3) Restaurants;

(4) Business services, retail trade and/or retail services, provided that the aggregate total of such uses shall not exceed 2,500 square feet on a tax lot of less than 1.5 acres, and such uses shall only be located on the ground floor;

(5) Child-care centers as provide for in N.J.S.A. 30:5B-1 et seq. and N.J.S.A. 40:55D-66.6

C. Conditional uses.

(1) Apartment units in accordance with *N.J.S.A.* 40:55D-67 and § *165-148*.

(2) Public utility in accordance with *N.J.S.A.* 40:55D-67 and § *165-143*.

(3) Banks in accordance with § *165-144*.

(4) Service stations in accordance with § *165-146*.

Further, the new treatment center would serve patients three meals a day instead of just breakfast. Patients would not be permitted to leave the facility and would receive intensive counseling for their compulsive gambling addiction at the site. Simply put, what was once a bed and breakfast would become an addiction rehabilitation center, a fundamental and substantial change of the nature and [*10] character of the business.

This type of modification of the fundamental character of the property is precisely the type determined to be an impermissible change of a non-conforming use. *Belleville, supra, 83 N.J. at 312-15*; *see also Conselice v. Borough of Seaside Park, 358 N.J. Super. 327, 335-37, 817 A.2d 988 (App. Div. 2003)* (stating that expansion of the residential portion of a mixed-use property where mixed use was prohibited required a use variance); *Hantman, supra, 58 N.J. Super. at 135-38* (stating that a change from a summer bungalow to a year-round occupancy required a variance).

Nonconforming uses may lawfully be enlarged by resorting to the variance procedure. *Grundlehner, supra, 29 N.J. at 269*. Plaintiffs failed to seek a variance for enlargement of the use of the Parrott Mill Inn to allow use as an addiction center for compulsive gamblers, as directed by the Zoning Board in 2010. Rather than seek a variance, Tricare opted instead to file a complaint in lieu of prerogative writs. Tricare did not file an application for a variance until 2013, three years after its interest in the property ended, rendering the variance application deficient on its face. The Zoning Board never decided whether to grant a use variance, because by the time Tricare filed for a variance it had abandoned plans to utilize the Inn and opened its facility elsewhere.

II

Tricare argues that the Zoning Board [*11] "proceeding violated the one stop shopping principle" of the zoning laws because it has no statutory authority, pursuant to *N.J.S.A. 40:55D-70*, to reverse the planning board. However, the Zoning Board in its resolution clearly stated that "the decision of the [z]oning [o]fficer in this matter was in error and should be reversed." Thus the Zoning Board reversed the zoning officer, not the planning board. The zoning officer's decision had resulted in the waiver of a site plan review by the planning board's February 3, 2010 voice-vote. The planning board rescinded its voice-vote waiver, determining that it had lacked jurisdiction.

N.J.S.A. 40:55D-70 enumerates the statutory powers given to a municipal zoning board of adjustment. *Subsection (a)* states that the zoning board shall have the power to "[h]ear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision or refusal made by an administrative officer based on or made in the enforcement of the zoning ordinance[.]" *N.J.S.A. 40:55D-70(a)*. Thus, Tricare's claim that the Zoning Board was without jurisdiction is without merit.

III

Plaintiff argues that the motion judge improperly dismissed its complaint for damages because defendants engaged in invidious [*12] discrimination against Tricare by denying its proposed use. For a civil rights claim in a land use context to succeed, a plaintiff must show evidence of governmental conduct "'that shocks the conscience[.]'" *Rezem Family Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 115, 30 A.3d 1061 (App. Div.)* (citing *Rivkin v. Dover Twp. Rent Leveling Bd., 143 N.J. 352, 366, 671 A.2d 567*, *cert. denied*, *519 U.S. 911, 117 S. Ct. 275, 136 L. Ed. 2d 198 (1996)*), *certif. denied and appeal dismissed*, *208 N.J. 366, 29 A.3d 739 (2011)*. "The reason for this high standard of proof is to prevent zoning appeals from being converted into civil rights claims." *Ibid.*

In *Rezem*, we dismissed the complaint because the plaintiff failed to exhaust available judicial and administrative remedies. In that case, as here, the plaintiff did not seek "a final decision on any application for a zoning change or development in the land, before [the] plaintiff filed [the] civil law suit." *Id. at 116*. Citing to *41 Maple Associates v. Common Counsel of Summit, 276 N.J. Super. 613, 619-20, 648 A.2d 732 (App. Div. 1994)*, we explained that a plaintiff may not pursue inverse condemnation claims and federal civil rights claims without first exhausting administrative remedies. *See R. 4:69-5* (imposing a duty of exhaustion of administrative remedies in prerogative writs actions).

Tricare acknowledges that it did not seek a use variance in 2010, electing instead to file a complaint in lieu of prerogative writs. It argues that it would have been "futile" to seek a variance because of the town's discriminatory [*13] attitude toward compulsive gamblers. Futility, however, is defined only as a situation where no administrative remedies exist and the issues to be resolved are only legal issues. *Brunetti v. Borough of New Milford, 68 N.J. 576, 589, 350 A.2d 19 (1975)*; *Warrenville Plaza, Inc. v. Warren Twp. Sewerage Auth., 230 N.J. Super. 461, 465, 553 A.2d 874 (App. Div. 1989)*. Tricare had an administrative remedy in 2010 but opted to wait until 2013 when it no longer had grounds to seek a variance.

Tricare's remaining arguments are without sufficient merit to warrant discussion in a written opinion. *R. 2:11-3(e)(1)(E)*. Thus dismissal of both actions was appropriate.

Affirmed.