12/18/13

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
Armando V. Riccio+

Stephen E. Raymond*

William H. Menges[Δ]
Edward A. Kondracki[Δ]

*Also admitted to practice in the Commonwealth of Pennsylvania

+Also admitted to practice in the State of New York

[Δ]Of Counsel

cnorman@rclawnj.com

December 3, 2013

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

SENT BY: UNITED PARCEL SERVICE, NEXT DAY DELIVERY

RE: Allied Recycling, Inc., et al. v. Township of Southampton Zoning Board of Adjustment

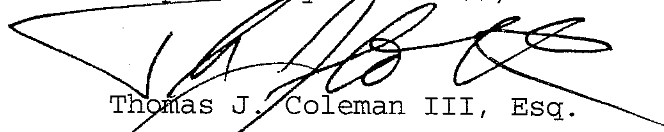
Dear Sir/Madam:

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

1) Trial Brief;
2) Certification of Christopher Norman;
3) Proof of Mailing; and
4) Proposed form of order.

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

Respectfully submitted,



Thomas J. Coleman III, Esq.

cc: Honorable Ronald E. Bookbinder, A.J.S.C.
Michael Ridgway, Esq. (w/encl.)
George Morris, Esq. (emailed w/encl.)
Sherri Hannah, Southampton Township Zoning Board Secretary (w/encl.)

RAYMOND COLEMAN
HEINOLD NORMAN, LLP
Thomas J. Coleman, III, Esq.
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-2448-13 CIVIL ACTION **CERTIFICATION OF SERVICE**

Dana Angelo, of full age, does hereby certify that:

1. I am employed as a legal assistant by the law firm of Raymond Coleman Heinold & Norman, LLC, attorneys for Defendant, Township of Southampton Zoning Board of Adjustment, in the above matter.

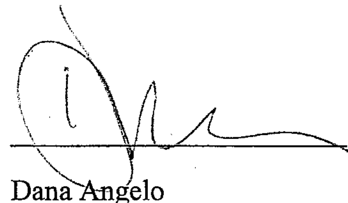
2. On December 3, 2013, I transmitted the persons listed below sealed envelopes containing the following Letter Brief and this Proof of Mailing.

The Honorable Ronald E. Bookbinder, P.J.Ch.,
Burlington County Courts Facility, 1st Floor, Old Court House,
49 Rancocas Road, Mt. Holly, New Jersey 08060 ***(via Regular Mail)***

Michael Ridgway, Esquire
Ridgway & Stayton, LLC
3 E. Stow Road
Marlton, New Jersey 08053 ***(via Regular Mail)***

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

Date: December 3, 2013



Dana Angelo

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

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

TRIAL BRIEF OF DEFENDANT
TOWNSHIP OF SOUTHAMPTON
ZONING BOARD OF ADJUSTMENT

Christopher J. Norman, Esq.
On the Brief

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

ALLIED RECYCLING, INC. and LAST CHANCE SALVAGE, INC. Plaintiffs,	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BURLINGTON COUNTY
	Docket No. BUR-L-2448-13
vs.	Civil Action
TOWNSHIP OF SOUTHAMPTON ZONING BOARD OF ADJUSTMENT Defendant.	**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 Stanton, for the plaintiffs, Allied Recycling, Inc. and Last Chance Salvage, Inc., and Thomas C. Coleman III, of the law firm of Raymond, Coleman, Heinold & Norman, 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 ______ day of December 2013, as follows:

1. Final Judgment is granted in favor of the defendant, Township of Southampton Zoning Board of Adjustment.
2. A copy of this Order shall be served upon attorneys for all of the parties within _____ days of receipt.

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

INTRODUCTION

Plaintiff Allied Recycling Corporation's ("Plaintiff") Complaint in Lieu of Prerogative Writ challenges defendant Southampton Township Zoning Board's ("Zoning Board") determination on a Certificate of Nonconforming Use, pursuant to *N.J.S.A.* 40:55D-68. Based on factual testimony adduced at two lengthy public hearings and other objective evidence, the Zoning Board found that Plaintiff's nonconforming use rights are limited to the operation of an auto-salvage yard.

The Zoning Board weighed testimony presented by Plaintiff's witnesses, which collectively was "imprecise" and "nebulous" as to the prior operation of the site for scrap-metal recycling, against the conflicting testimony of neighbors from an adjoining residential development, many of whom have resided there for 20 to 30 years. Those nearby residents testified that, in 2009, the character of use of the subject property transitioned from an historic operation as an auto-salvage yard to a more intensive scrap-metal recycling operation. From this record, the Zoning Board found the neighbors' testimony more credible. Such non-conforming use determination by the Zoning Board must be sustained under the Appellate Panel's comprehensive opinion in *Paruszewski v. Twp. of Elsinboro,* 297 *N.J. Super.* 531, 538 (App. Div. 1997)[1].

The Zoning Board concluded that Plaintiff had not met its evidentiary burden to prove that the subject property has historically and continuously operated as a full-scale junkyard for

[1] The New Jersey Supreme Court granted certification in *Paruszewski*, 149 *N.J.* 406, 694 *A.*2d 192 (1997), but its judicial review was strictly limited to the issues arising out of the Township Attorney's appearance before the Zoning Board in opposition to the nonconforming use application.

both auto-salvage and other scrap metal recycling activities, since the time of adoption of Agricultural-Residential zoning in 1982.[2]

The Zoning Board also relied upon other objective evidence presented at the public hearing to conclude that the subject property is limited to an auto-salvage yard. This evidence included a 1993 resolution of subdivision approval issued to the prior owner, which: (1) contained findings of the historic operation of the junkyard for auto-salvage purposes only; and (2) imposed a condition of approval to continue enforcement of this use restriction. Plaintiff's predecessor-in-interest did not file any prerogative writ action to set aside this use restriction, pursuant to R. 4:69-6(c).[3]

Further objective evidence comes from Plaintiff's own witnesses who had testified that the site was cleaned up in 2009 and 2010 to remove 140,000 tires from the site. Such testimony is consistent with a prior operation of the subject property as an auto-salvage yard. Moreover, the site clean-up further evidences Plaintiff's intent to transition the business from auto-salvage to a full-scale junkyard operation with scrap-metal recycling.[4]

Other legal considerations further support the Zoning Board's nonconforming use determination. At the public hearing, Plaintiff's legal argument was that the scope of its permitted nonconforming use activities is defined by Southampton Township's 1965 junkyard ordinance, regardless of the specific type of use activities that previously occurred at the site. This legal argument fails because a municipality has no legal authority to legislate the scope or

---

[2] In his November 19, 2013 report, Zoning Board Planner, Thomas Scangarello, P.P., reviews the zoning history of the site, including the 1982 Township Zoning Map, which depicts the original zoning as Agricultural-Residential. According to Scangarello, such zoning was implemented by Southampton Township to ensure consistency with the requirements of the Pinelands Commission's original Comprehensive Management Plan (CMP). See, Norman Certification, Exhibit "A".

[3] In essence, Plaintiff is indirectly and belatedly challenging a land use board condition imposed twenty (20) years ago, which is time-barred under the repose provision of R. 4:69-6(c).

[4] Some of the nearby residents even disputed the amount of tires that Allied Recycling claims it had removed from the site; these neighbors' recollection was only a few hundred tires and a much lesser number of automobiles were stored on-site.

expansion of a nonconforming use. *Nickels v. City of Wildwood,* 140 *N.J.* 261 (1995); and *Avalon Home & Land Owners v. Bor. of Avalon,* 111 *N.J.* 205 (1988).[5] Reliance upon the junkyard ordinance provisions is the crux of Plaintiff's justification for expanding its junkyard operation.

Moreover, a 2010 unreported Appellate Division opinion upheld a zoning board's determination restricting the owner's business operation to a nonconforming auto-salvage yard, and rejecting a legal argument that issuance of a junkyard license, pursuant to a junkyard ordinance, permits operation of a full-scale junkyard operation, including scrap-metal recycling. *Marlboro Auto Wreckers v. Zoning Bd. of Adjustment,* 2010 *N.J. Super. Unpub. LEXIS* 2204.[6] There, the Appellate Panel affirmed the trial court's findings that: (1) the property owner had failed to present adequate and objective proofs of a continuous operation of the three salvage sites for scrap-metal recycling; (2) the name of plaintiff's salvage yards[7], which included the word "auto", evidenced the owner's intent to operate an auto-salvage yard.

PROCEDURAL HISTORY

In 1993, plaintiff's predecessor-in-interest, Last Chance Auto Salvage, Inc.[8] was granted minor subdivision approval by Resolution 93.8, which contained explicit findings and an express

---

[5] In any event, the 1982 original agricultural-residential zoning designation is when the nonconforming use rights in the auto-salvage yard were established at the subject property; the use activities occurring up until 1982 define the scope of the nonconforming use; the 1965 junkyard ordinance is a licensing ordinance and not a zoning ordinance.

[6] A copy of this unpublished opinion is attached hereto, pursuant to the requirements of R. 1:36-3. See, Norman Certification, Exhibit "B". *Marlboro Auto Wreckers* is fully in accord with *Township of Fairfield v. Likanchuk's,* 274 *N.J. Super.* 320 (App. Div. 1994), which upheld a zoning board's denial of the property owner's attempt to expand its non-conforming auto-salvage yard to include concrete/asphalt recycling under the guise that it was a similar non-conforming use junkyard activity.

[7] Here, Plaintiff's predecessors-in-interest operated under the names "Last Chance Auto Salvage" and "S&P Autos" or "S&S Autos".

[8] Plaintiff's asserts in the complaint that the true company name is Last Chance Salvage, Inc.; however, the 1993 planning board application form, filed by Plaintiff's predecessor-in-interest, Daniel Giberson, specifically identifies the applicant by the name of "Last Chance Auto Salvage, Inc." and further describes the "proposed use" as "auto-salvage/residential". See Norman, Certification, Exhibit "C".

condition that the site has been, and could only be, operated as an auto-salvage yard. See, Norman Certification, Exhibit "D".

At the end of 2011, Plaintiff filed an application with the Zoning Board for minor site plan approval with use variance to permit the installation of a weight-scale, refurbishing of two existing buildings and the granting of a sign variance.

On March 14, 2013[9], the Zoning Board conducted a public hearing on Plaintiff's application, which sought approval for expansion of a non-conforming use, pursuant to *N.J.S.A.* 40:55D-70d(2).

By email letter of May 15, 2013, Plaintiff received instructions from the Zoning Board to amend its application to seek a Certificate of Nonconforming Use, pursuant to *N.J.S.A.* 40:55D-68, to determine the extent of Plaintiff's nonconforming use rights and, alternatively, for a use variance, pursuant to N.J.S.A. 40:55D-70(d)(1). Plaintiff amended its application accordingly.

A public hearing on the application was, thereafter, continued to August 8, 2013. At that August public hearing, the Zoning Board dismissed the application without prejudice due to Plaintiff's failure to notify the Board in writing that the application could not be prosecuted due to the illness of its attorney.

On August 19, 2013, the Township of Southampton filed a Verified Complaint and Order to Show Cause (Docket No. BUR-L-2037-13), the outcome of which proceeding this Court ordered a remand to the Zoning Board for additional public hearings and a determination on the still pending application.

On September 19, 2013, the Zoning Board conducted a second public hearing on Plaintiff's amended development application for a certificate of non-conforming use.[10] By

[9] A public hearing on this development application was delayed for more than a year, while Plaintiff awaited issuance of a Certificate of Filing from the New Jersey Pinelands Commission.

Resolution 2013-10, the Zoning Board concluded that Plaintiff had not presented sufficient evidence for issuance of a Certificate of Nonconforming Use to permit scrap-metal recycling activities, in addition the operation of the longstanding (and nonconforming use) auto-salvage yard. See, Plaintiff's Trial Brief, Exhibit "A".

The Zoning Board anticipated that a third public hearing might later be necessary on the application to consider the pending applications for a use variance or expansion of a nonconforming use, pursuant to N.J.S.A. 40:55D-70d(1) or (2), whichever approval may be required by law.

However, before the date for this third public hearing could be scheduled, Plaintiff, on October 7, 2013, filed a complaint in lieu of prerogative writ, seeking reversal of the Zoning Board's determination in Resolution 2013-10.

STATEMENT OF FACTS

A. Daniel Giberson's Testimony.

In 1947, the Giberson family[11] acquired the subject property, located at 440 New Road, Southampton Township. (T. 9/19/13 at 54). Daniel Giberson testified that, to the best of his recollection, his parents started operating a small-scale junkyard on the subject property in the early 1960's.[12] (T. 3/14/13 at 27-28; T. 9/19/13 at 55, 58). As to the scope of the initial junkyard operation by his father, Giberson provided the following testimony that was imprecise, nebulous and insufficient to establish non-conforming rights for scrap-metal recycling (T. 3/14/13 at 31):

---

[10] The Certificate of Nonconforming Use hearing would determine Plaintiff's base non-conforming use rights; it was anticipated a subsequent public hearing and determination by the Zoning Board might be necessary to determine whether to grant relief for a use variance, pursuant to either *N.J.S.A.* 40:55D-70d(1) or (2), whichever approval may be required by law.

[11] Daniel Giberson, the predecessor-in-interest, testified that his grandfathered acquired the subject property in 1947, ten years before he was born.

[12] Plaintiff's professional planner, James Miller, P.P. testified that the junkyard was open in 1963, based on aerial view photographs. (T. 3/14/13 at 18; 9/19/13 at 71, 73).

> He hauled cars, he hauled aluminum, you name it, metal-wise, junk-wise, it went out of 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 again and bring them to Vincentown and haul them again – or trucks, cars, metal, junk, whatever.

Giberson further testified (T. 9/19/13 at 58, 59):

> 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 just to get the cans, to get the metal.

Giberson testified that other miscellaneous junk materials would be taken to the yard, including cars, aluminum, refrigerators, washing machines, TV's and wooden boats (T. 9/19/13 at 56-59). As to the original scope of the auto-salvage activities, Giberson testified, "Might have been 20 automobiles in the day to junk."(T. 9/19/13 at 58):

Giberson then testified that the junkyard was later leased by his family to various operators, including Eddie Fuller, Shenny Pointsett and then Freeman Pointsett. (T. 3/14/13 at 27; 9/19/13 at 55). Giberson provided sparse testimony regarding his knowledge of the operations of the junkyard by these tenant/operators. Indeed, Giberson testified (T. 3/14/13 at 27):

> Everything's the same since back in the 60s whatever. I mean, the same lot's been there. I rented it out to Freeman Pointsett (phonetic). <u>I just went over there and picked up my money and that was it. You know, I didn't have anything to do with running the junkyard.</u>

The only notable testimony Giberson provided was that the first tenant/operator, Eddie Fuller, spent $30,000 to purchase a machine for removing rims from automobile tires (T. 9/19/13 at 63), which is consistent with the operation of an auto-salvage yard. Giberson further testified with regard to Fuller's operation (T. 9/19/13 at 64):

> ...in the 80's...Freeman did his own thing. He always hired or hauled cars out there. Everybody knows that. Cars, he had tanks in there at one time, tank transmissions, he had washing machines. He had a whole

> truckload of washing machines...And then he...used to strip cars. He put them in 55-gallon drums, all the wires, light it on fire and there was your copper.

When asked about the name and ownership of the company "Last Chance Salvage", Giberson responded, "I am Last Chance Auto Salvage...Me and my mom coming out of Burlington, we decided to make that name." (T. 9/19/13 at 65-66). When asked about the business names of the other prior operators of the site, Giberson replied either "S&P Autos" or "S&S Autos". (T. 9/19/13 at 66).

Giberson was also asked if he retained any financial interest in the junkyard, after conveying the subject property to Allied Recycling 20-months ago. Giberson confirmed that he was still owed monies from the sale. The Zoning Board made a specific finding that Giberson still retains a financial interest in the subject property, which suggested potential bias in his testimony in favor of Plaintiff. See, Allied Reycling, Exhibit "A", Paragraph 7c and T. 9/19/13 at 60.

B. The 1993 Development Application.

Giberson also testified that, in 1993, he appeared before the Southampton Planning Board and obtained minor subdivision approval to carve out the existing 12.66 acre lot for the auto-salvage yard operation. (T. 3/14/13 at 28-29).

Giberson represented in the 1993 development application form that the applicant's name was "Last Chance Auto Salvage" and described the proposed use as "Auto-Salvage/Residential". See Norman, Certification, Exhibit "C".

Moreover, Giberson's professional engineer submitted a letter to the Planning Board stating, "Please note that Last Chance Auto Salvage, Inc. is owned solely and completely by

Daniel Giberson and his wife Pamela Giberson. Each owning equal shares of said corporation." See Norman, Certification, Exhibit "D".[13]

Resolution 93.8 (which granted the minor subdivision approval) identifies the application as "IN THE MATTER OF THE APPLICATION OF LAST CHANCE AUTO SALVAGE, INC." See Norman, Certification, Exhibit "D". The Resolution contains very specific findings on the operation of the site restricting its use to an existing auto-salvage yard:

> (4) The lot is presently dedicated to mixed uses, containing both the auto salvage yard and a single family residence.
>
> (5) Applicant's proposal to divide the lot into new lot 36.02 (12.666 acres) and remainder lot 36.01 (21.751 acres) will create two (2) conforming lots, one dedicated to residential use and other dedicated to auto salvage only.
>
> (7) The auto salvage operation is confined to an area delineated on the Plan submitted by Applicant – the remainder of proposed lot 36.02 is wooded.

In addition, the Planning Board imposed condition #2, which provides:

> (2) There shall be no further clearing of the wooded portion of new lot 36.02, nor shall there be any expansion of the area devoted to auto salvage operations (or storage of junk cars).

Thus, Resolution 93.8 is clear and objective evidence that the subject property was restricted in use to a then operating "auto-salvage yard". Giberson did not appeal or legally challenge the use restriction imposed by the Planning Board in Resolution 93.8.

The Zoning Board Attorney presented this evidence as part of the record at the public hearing. (T. 9/19/13 at 51).

---

[13] The Pinelands Commission's June 4, 1993 Certificate of Filing for Giberson's subdivision application states: "There is an existing single-family dwelling and an automobile salvage yard on the parcel. Norman Certification, Exhibit "E".

C. Michael Ivins' Testimony.

Plaintiff's only other fact witness regarding the past historic operation of the site was Michael Ivins. (T. 9/19/13 at 34-37, 41-42). Without providing any dates or meaningful information regarding the historic and continuous use of the subject property for scrap-metal recycling, Ivins provided only nebulous and imprecise testimony that he occasionally brought materials to the auto-salvage yard for sale when it was operated by Mr. Pointsett. Ivins testified that the very few miscellaneous items he sold to Pointsett were metal parts of machinery, appliances, a couple of washing machines, tires and rims and maybe an old transmission. (T. 9/19/13 at 35, 41-42).

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

Tom Gabrysiak is the present owner of the subject property and current operator of the Allied Recycling operation. (T. 3/14/13 at 5-7;). Gabrysiak testified that Allied Recycling purchased the property from Giberson in September 2011. (T. 3/14/13 at 32, 92).

Gabrysiak testified that when his company took over the junkyard operation, it 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 yard that were primarily "auto-salvage" related. Gabrysiak testified (T. 3/14/13 at 33-34):

> And there was so much material in there just piled and it was everywhere. And there was hundreds of vehicles, there were very large piles of materials of all different sorts and it took us close to a year.
>
> There was --I think there was about 140,000 tires on the site which we've removed all of but about four or 5,000 at this point, but it's a constant process. So, when spent quite a bit of time cleaning the property, making it presentable...
>
> We took out – I think it was about 450 yard trucks full of material initially and then probably another 200 moving forward after we started actually operating.

Gabrysiak testified that prior operators of the auto-salvage yard left a 12-foot high pile of tires that was about 35-feet deep. (T. 3/14/13 at 81).

Gabrysiak testified that his current business operation is now a full-scale junkyard 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 has become a big part of operating a junkyard, which is now more of a "modern metal recycling facility".[14] (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).

At the third public hearing, Gabrysiak presented delivery receipts of scrap metal business sales. (T. 9/19/13 at 21-27). However, these business receipts were from 2009 and 2010, not from the earlier time when nonconforming use rights for the auto-salvage yard were established when the original zoning ordinance was adopted in 1982. As a relatively new operator of the site, <u>Gabrysiak's factual testimony had little import in establishing the non-conforming use rights for the subject property to recycle scrap-metals</u>.

Gabrysiak's attorney argued on behalf of his client that Plaintiff is entitled to engage in all of the activities permitted under Southampton Township's 1965 junkyard licensing ordinance,

[14] 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).

regardless of what past and prior nonconforming use activities that took place. (T. 9/19/13 at 12-14, 119). Indeed, Gabrysiak's attorney argued before the Board:

> If all that was done on that site for the past 40 years was collect bottles and sell bottles, my position is they're allowed to now start collecting lumber and sell lumber because the license allows them to do that.

(T. 9/19/13 at 129).

E. 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 Plaintiff took over ownership, there are now very high piles of materials stacked in the yard, now visible from her residence. (T. 3/14/13 at 77-80).

Wishart further noted the restriction in the 1993 Planning Board approval limiting the business operation to auto-salvage only:

> Since that resolution was passed by the planning board...and since the resolution specifically states that it is to be used for auto salvage use only, it seems to me that to allow nonconforming use for recycling does not fit under that permit.

(T. 9/19/13 at 144).

Theresa Lettman, of 17 Pemberton Road, Southampton, testified to her concern with any expansion of the junkyard, since that the subject property is located in a Pinelands rural development area, which has a rural character with big lots. (T. 3/14/13 at 87).

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 change in the salvage yard operation, since Plaintiff recently took over 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 (Exhibits B-1, B-2 and B-3) 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).

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, affirmed the prior testimony concerning the nuisance issue of large trucks in a rural/residential setting and the recent change in character of the operation by Plaintiff from a smaller auto-salvage yard to a 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 know 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 tht 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.

Steven Jenkins, of 446 New Road, testified (T. 9/19/13 at 161-162):

I live at 446 New Road. I've been there 20 years. I know the Fullers, the Pointsetts, hell, they kept my car running, you know, and I –I've seen Pointsett's operation. I – I mean the place was small. It was tiny. I used to walk through it to go deer hunting on the other side. There were no mountains of tires. That was a lie. There was no wall of tires. There were some tires lying in the driveway when you came in. Once you got in there, there were no tires. There were a lot of cars, a few school buses, some trucks. That's what it was. That wall of tires, that was a lie. …

> And as far as traffic in and out of there, he had – all I ever saw was one rolloff one-ton flat bed. I seen it in the evenings, two crushed cars headed to Camden. The cars that he had in there, I seen them bring it on his flat bed one at a time. I've never seen anybody bring anything into that place. I've never seen anybody bring a car in other than him.

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.

LEGAL ARGUMENT

I. PLAINTIFF FAILED TO MEET ITS LEGAL BURDEN TO ESTABLISH NON-CONFORMING USE RIGHTS TO OPERATE A FULL-SCALE JUNKYARD/METAL RECYCLING CENTER FACILITY.

A. Standard of Review.

This case very closely parallels the factual setting and legal analysis in *Parazewski, supra.* There, the Appellate Division, at pages 536-538, set forth the appropriate standard of judicial review of a Zoning Board's decision on an application for a certificate of nonconforming use:

> The party asserting the existence of a nonconforming use prior to the adoption of the relevant zoning ordinance has the burden of proof. *N.J.S.A.* 40:55D-68; *Weber v. Pieretti,* 72 *N.J. Super.* 184, 195, 178 A.2d 92 (Ch. Div.), *aff'd,* 77 *N.J. Super.* 423, 188 A.2d 702 (App. Div. 1962), *certif. denied.* 39 *N.J.* 236 (1963). When the zoning board rejects an application to certify a use as nonconforming that decision is entitled to judicial support if it is based on substantial evidence. *Kramer v. Board of Adj., Sea Girt,* 45 *N.J.* 268. 296, 212 A.2d 153 (1965).
>
> ****
>
> The critical question is whether the law requires a certain level of activity for a nonconforming activity to be considered a "use." Clearly, a mere intention to use the property is not enough to establish use. *Morris County Land, etc. v. Parsippany-Troy Hills Tp.,* 40 *N.J.* 539, 550, 193 A.2d 232 (1963).

*****

In Cox, *New Jersey and Land Use Administration,* }11-1.2 at 191 (1995) the following comment on *State v. Gargiulo, supra,* appears:

> From *Gargiulo* it is evident that the use to be protected must be of a continuing rather than an ephemeral nature.

In *State v. Loux,* 76 *N.J. Super.* 409, 413, 184 A.2d 755 (App. Div. 1962), the court, in sustaining a conviction for violation of the local zoning ordinance, noted that it was rejecting defendant's contention that his activity constituted maintenance of a nonconforming use in part because "[t]he testimony adduced by the defendant as to the use of the lots was imprecise and nebulous."

****

...we perceive [*Loux*] central holding to be that a nonconforming use may not be established by nebulous and imprecise evidence which indicates at most intermittent use at indefinite times. To put the matter more generally, "for rights in a previously existing use to be protected under the doctrine of vested nonconforming uses" one of the factors which must be proven is that the use "be sufficiently substantial to warrant invocation of constitutional protection." 4 Rathkopf, *The Law of Zoning and Planning* }51.01 at 51-9 (4th ed. 1994).

B. **Legal Analysis – *Paruszewski.***

In *Paruszewski, supra,* a plaintiff-farmer sought a certificate of nonconforming use to utilize his 135-acre family farm property for an airstrip for take-off and landing of small, single-engine airplanes about 5 to 20 times a year. The zoning board denied the application, specifically finding that:

> It is clear that there has been aircraft activity at the Paruszewski farm which activity pre-dates the original Township Zoning Ordinance which was adopted on February 27, 1968. While the applicant testified that this activity was fairly frequent, between 5 to 20 times per year, much of his testimony was contradicted by neighbors and his father. In addition, the Board concludes that much of the testimony of the applicant was not credible. ***Although all of the other witnesses testified that there was aircraft testimony on the Paruszewski farm, the credible testimony is that it began in approximately 1960 and was very sporadic. ***The neighbors, some of whom lived across from the ...farm for 30 years, testified that the number of take-offs and landings were (sic) very low and characterized them as unusual events which attracted their attention.

Id. at 535. The Appellate Division, upon review of this record, affirmed the trial court's upholding of the zoning board's denial, concluding:

> Plaintiff's evidence wholly fails to meet the principles of law stated above. The zoning board was entitled to reject his testimony as incredible, as it did. His father's testimony was equally imprecise if not equally disingenuous. The evidence from the opponents was clear and strong. The zoning board was entitled to credit it and draw the obvious conclusion that a plane landing or taking-off from this field was an extremely rare and remarkable event and that the actual use was at best ephemeral, intermittent, and indefinite. Since the zoning board's findings were based on substantial evidence, the trial court was correct in upholding them, and we are bound to do likewise. *Kramer v. Board of Adj., Sea Girt, supra.*

Id. at 538.

Here, the record is substantially similar to *Paruszewski*. Plaintiff relies upon sparse, nebulous and imprecise testimony from two fact witnesses to establish that scrap-metal recycling activities has been a continuous nonconforming use activity on the subject property (in addition to auto-salvage) since the adoption of agricultural-residential use zoning in 1982. These two witnesses only provided anecdotal evidence that would, at best, prove some scrap-metal recycling activity may have occurred on a "sporadic" or "intermittent" basis.

The predecessor-in-interest, Dan Giberson, testified that occasional recycling of soup cans, washer and dryers, refrigerators, wooden boats, tv's was part of the original junkyard operation. However, Giberson provided no dates of these activities in his testimony, nor did he quantify the amount and scope of this type of recycling activity. In fact, Giberson testified that his involvement was strictly limited to that of a passive landlord; his interaction with the prior junkyard operators was collecting a rent check.[15]

---

[15] Giberson testified: "Everything's the same since back in the 60s whatever. I mean, the same lot's been there. I rented it out to Freeman Pointsett (phonetic). I just went over there and picked up my money and that was it. You know, I didn't have anything to do with running the junkyard." T. 3/14/13 at 27.

Giberson's testimony cast further doubt on historic scrap-metal recycling activities when he confirmed that, on his 1993 subdivision application, he was the owner and principal of the applicant, "Last Chance Auto Salvage" and that he handpicked the name. The 1993 Resolution of minor subdivision approval contains findings that the use of the subject property will continue to be restricted to the operation of an auto-salvage yard.

Finally, Giberson's testimony suggests potential bias as he conceded that Plaintiff still owed him monies on the sale of the subject property in 2010. Giberson's financial interest in the subject property may be threatened if Plaintiff is restricted to operating the site for auto-salvage only.

Plaintiff's, other fact witness, Michael Ivins also provided sparse, nebulous and imprecise testimony concerning the scope of the junkyard operation. Ivins did not say when he delivered personal items as "junk" to the salvage yard. Nor did he provide any meaningful detail on how the junkyard had operated. His testimony was merely anecdotal and supportive of scrap-metal recycling as a "sporadic" or "intermittent" use.

The only clear factual evidence on the record is: (1) that the auto-salvage yard was historically used for that purpose; and (2) Plaintiff began transitioning the business to a more intensive auto salvage/scrap metal recycling use in 2009, when it cleaned up the site (including the removal of tires) and introduced new scrap-metal recycling activities. The change in use was noticeable and material as large tractor-trailers began deliveries to and from the site, drawing the attention and ire of nearby residential property owner/neighbors on New Road and Falcon Drive.

With regard to the longstanding auto-salvage operation, there is ample evidence in the record from testimony of Plaintiff's witnesses and nearby residential property owners that

automobiles were taken to the site on flat-bed trucks and that tires were stored on-site, although the amount of tires is subject to question.[16]

With regard to the scrap-metal recycling activities, the Falcon Drive and New Road residential neighbors testified, very consistently and convincingly, that the operation of auto-salvage suddenly changed when Plaintiff took over site operations in 2009. Today, scrap-metal recycling activities are taking place; large tractor-trailer deliveries to and from the site from New Road, a narrow 20' wide rural roadway, have been an ongoing occurrence in the past 20-months, causing noise, increased traffic, and potential traffic safety issues. Plaintiff has also recently added a weight-scale, which is typically used in the operation of a scrap-metal recycling facility.

Even Plaintiff's principal, Tom Gabrysiak, didn't hide the fact that his company was making this transition in its business operations, conceding that the company now advertises for scrap-metal and other-types of recycling activities. Plaintiff's attorney further argued before the Zoning Board that the issuance of a junkyard license by Southampton Township allowed the company to conduct any of the activities listed in the municipal junkyard ordinance, regardless of whether they have historically occurred in the past.

The Zoning Board considered the entire record and found the neighboring residents testimony more credible on the past historic use of the subject property for auto-salvage operations only. *See, Paruszewski, supra,* at 538. The Zoning Board also concluded that Plaintiff's witnesses' testimony was nebulous, imprecise and insufficient to establish nonconforming use rights for scrap-metal recycling. Based on this record, the Zoning Board, therefore, determined that Plaintiff had not met its statutory burden of proof under *N.J.S.A.* 40:55D-68.

---

[16] The nearby residents testified that the amount of automobiles and tires maintained on the site was insubstantial and not visible from their properties, prior to Plaintiff's purchase of the property in 2010; whereas, Tom Grabrysiak testified that his company removed 1,400 tires over a 12-month period.

c. **Legal Analysis –** ***Marlboro Auto Wreckers.***

The Zoning Board's determination must also be sustained under the facts and legal analysis in *Marlboro Auto Wreckers, supra.* In this 2010 unpublished opinion, the Appellate Panel upheld the zoning board's nonconforming use determination restricting the rights of the owner to an auto-salvage yard. There, the property owner argued that its nonconforming use rights emanated from the municipality's issuance of a junkyard license and allowed it to operate a full-scale junkyard operation, including scrap-metal recycling.

In *Marlboro Auto Wreckers,* the Appellate Panel considered evidence presented by the property owner that past activity of scrap-metal recycling constituted 25% of the overall use, including the processing of "unwanted appliances". Norman Certification, Exhibit "B" at page 2 of 5. In reviewing this evidence, the Appellate Panel noted the property owner failed to produce any receipts dating back to 1982 (when zoning amendments made the salvage yards lawfully pre-existing uses) that would objectively verify and quantify the extent of the prior scrap-metal recycling activity. Norman Certification, Exhibit "B" at page 2 of 5.

The Appellate Panel further noted that the present owner was required by the local zoning officer to file its application for a certificate of nonconforming use in 2007, after expressing a desire to purchase scrap-metal machines to process scrap-metal. Norman Certification, Exhibit "B" at page 2 of 5. Such evidence clearly demonstrated the owner's intent to transition the business from auto-salvage to more intensive scrap-metal recycling.

The Appellate Panel further noted that the property owner's fact witnesses, three scrap-metal operators, provided only limited information concerning only their prior business dealings with the property owner over short and specific periods of time; these witnesses failed to present

any evidence regarding the full scope of scrap-metal recycling at the salvage yard sites and whether it had occurred continuously from the time the salvage yards became lawfully nonconforming uses. Norman Certification, Exhibit "B" at pages 2-3 of 5.

The Appellate Panel further noted that nearby residents commented at public hearings and disputed that the subject properties were utilized continuously for scrap-metal recycling and further expressed their "concerns that if the Schecter properties were allowed to operate as loose scrap yards in the future, the increase in commercial traffic, noise and pollution would have an adverse impact on the neighboring property owners." Norman Certification, Exhibit "B" at page 3 of 5.

Lastly, the Appellate Panel noted the significance of the word "auto" in the name of the salvage yards, which supported the owner's historic intent to operate auto-salvage yards. Norman Certification, Exhibit "B" at page 5 of 5.

The Appellate Panel sustained the following findings of the Honorable, Lawrence Lawson, A.J.S.C. in *Marlboro Auto Wreckers*[17]:

> In reviewing the evidence of Schetcher's activities, the court found that the fact that the operation constituted mainly automotive scrap was supported by Schecter'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 scrap metal operations produced only a few receipts and were not reconciled against the percentage of Schecter's operations dealing with automotive scrap metal. The court also held that the applications for the three locations included "automotive uses alongside the 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 Schecter's "intent to operate primarily as a motor vehicle junkyard.

[17] While *Marlboro Auto Wreckers* is an unpublished decision, Judge Lawson's findings and conclusions of law are fully in accord with *Township of Fairfield v. Likanchuk's,* 274 *N.J. Super.* 320 (App. Div. 1994), which upheld a zoning board's denial of the property owner's attempt to expand its non-conforming auto-salvage yard to include concrete/asphalt recycling under the guise that it was a similar non-conforming use junkyard activity.

Norman Certification, Exhibit "B" at page 5 of 5.

Here, the facts are less supportive of nonconforming scrap-metal activities than presented by the unsuccessful plaintiff in *Marlboro Auto Wreckers.* There, the property owner, at least attempted to quantify the extent of the scrap metal recycling at 25% of the entire junkyard operation and presented testimony from other operators. Here, Plaintiff and its witnesses provided no estimate or quantification of prior scrap-metal recycling; it relied merely upon anecdotal testimony from a passive landlord and a resident who occasionally sold his personal "junk" to Plaintiff's predecessors-in-interest.

In addition, here, there is clear and indisputable evidence of a 1993 Southampton Township Planning Board Resolution that identifies the prior use of the site as "auto-salvage".[18] In *Marlboro Auto Wreckers*, there was no such uncontroverted evidence.

c. A Junkyard Ordinance May Not Legally Create Or Define The Scope Of A Nonconforming Use.

In its challenge to the Zoning Board's determination on a certificate of nonconforming use, Plaintiff argues that Southampton Township's junkyard ordinance defines the scope of its nonconforming use rights, including the right to engage in scrap-metal recycling. Plaintiff argues at page 12 of its Trial Brief:

> 1. The question before the Court is whether or not the current use at the Site (a junkyard) is substantially similar to the historic use at the Site (a junkyard), as the term "junkyard" is defined in the Township Ordinances.

Plaintiff's attorney also argued before the Zoning Board:

[18] In addition, prior owner, Dan Giberson affirmed that he created the name "Last Chance Auto Salvage" and that subsequent junkyard operators also had the term "auto" in their business name, which is evidence of intent by prior business owners at the site to operate an auto-salvage yard. *See, Marlboro Auto Wreckers* at page 5.

> If all that was done on that site for the past 40 years was collect bottles and sell bottles, my position is they're allowed to now start collecting lumber and sell lumber because the license allows them to do that.

(T. 9/19/13 at 129).

Such legal argument that an ordinance can delineate the scope of non-conforming use rights has been squarely rejected by the New Jersey Supreme Court. *Nickels v. City of Wildwood,* 140 *N.J.* 261 (1995) and *Avalon Home & Land Owners v. Bor. of Avalon*, 111 *N.J.* 205 (1988).[19] In *Avalon Home & Land Owners, supra* at 211-212, the Supreme Court set forth the reasoning:

> The court concluded that such an expansion, purportedly authorized by the ordinance, was directly contradictory to the Legislature's grant of authority to boards of adjustment to grant variances to permit expansion of nonconforming uses. *N.J.S.A.* 40:55D-70(d). We are fully in accord with this conclusion as well.

d. Pursuant To *R.* 4:69-6(c), Plaintiff May Not Utilize a Certificate of Nonconforming Use Hearing Process To Pose An Indirect And Belated Legal Challenge To The Findings And Condition Of Approval In Southampton Township Planning Board Resolution 93.8.

Plaintiff's Certificate of Nonconforming Use application cannot be used to circumvent the salient repose provisions of R. 4:69-6(c). The Southampton Township Planning Board, in Resolution 93.8, has already rendered a fact-finding and implementing condition of approval restricting the use of the subject property to an auto-salvage yard. Dan Giberson, the prior owner, did not pose a legal challenge to this Resolution, now in effect for 20-years, to set aside the use restriction. Under the *Rule*, a complaint in lieu of prerogative writ must be filed within

[19] Such argument, in the specific context of a junkyard ordinance, is also impliedly rejected in *Marlboro Auto Wreckers*, where the property owner asserted her nonconforming use rights emanated from a junkyard license issued pursuant to a junkyard ordinance. The Appellate Panel recognized that the property owner still has the legal burden to demonstrate clear and adequate factual proofs in support of the past historic and continuous non-conforming use activity.

45-days of the right of accrual. Plaintiff's predecessor-in-interest, long ago, waived its legal rights to pose a legal challenge.

Plaintiff's belated legal challenge is similar that which occurred in *County of Ocean v. Zakaria Realty, Inc.*, 271 *N.J. Super.* 280, 288 (1994). There, the Honorable Patrick King, J.A.D. held that a plaintiff, who waited 14-years to pose a belated legal challenge to a donative easement filing by Ocean County to acquire public right-of-way, was barred from pursuing the complaint. Judge King opined at 288:

> <u>We conclude that defendant's lack of diligence during the fourteen-year lapse of time before attacking the Planning Board's requirement</u> of the "donative" conveyance of the fifteen-foot-wide road easement <u>is fatal to its claim for compensation in this condemnation proceeding</u>. As the County points out, the defendant could have granted the easement under protest and promptly started an action in lieu of prerogative writ to challenge the alleged "donation . . . for possible future street widening." The defendant did not do so but proceeded to use the roadside parking spaces without approval until condemnation loomed.

Here, Plaintiff has waited 20-years to pose an indirect legal challenge to the use restriction contained in Southampton Township Planning Board Resolution 93.8.

CONCLUSION

For the forgoing reasons, judgment should be entered in favor of the Southampton Township Zoning Board of Adjustment and the complaint of plaintiff must be dismissed with prejudice.

Respectfully submitted,

Thomas J. Coleman III, Esq.
RAYMOND, COLEMAN, HEINOLD & NORMAN, L.L.P.
Attorneys for Defendant,
Southampton Township Zoning Board of Adjustment

On The Brief: Christopher Norman, Esq.

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

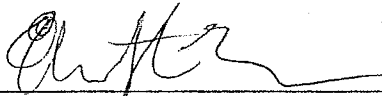
ALLIED RECYCLING, INC. and LAST CHANCE SALVAGE, INC. Plaintiffs, vs. TOWNSHIP OF SOUTHAMPTON ZONING BOARD OF ADJUSTMENT Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BURLINGTON COUNTY Docket No. BUR-L-2448-13 Civil Action CERTIFICATION OF CHRISTOPHER NORMAN IN SUPPORT OF SOUTHAMPTON TOWNSHIP ZONING BOARDS TRIAL COURT EXHIBITS

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

1. I am an attorney at the law firm of Raymond, Coleman, Heinold & Norman, LLP and am familiar with the facts set forth herein.
2. Attached hereto as Exhibit "A" is a true copy of the November 19, 2013 Planning Report of Tom Scangarello, P.P., the Township and Zoning Board Planner for Southampton Township regarding the zoning history of the subject property of this litigation.
3. Attached hereto as Exhibit "B" 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.
4. Attached hereto as Exhibit "C" is a true copy of the 1993 Application Form, submitted by Dan Giberson to the Southampton Township Planning Board, on his application for minor subdivision approval for Block 2401, Lot 36.01.

5. Attached hereto as Exhibit "D" is a true copy of Southampton Township Planning Board Resolution 93.8 granting minor subdivision approval to Dan Giberson for Block 2401, Lot 36.01.
6. Attached hereto as Exhibit "E" is a true copy of the 1993 Certificate of Filing issued by the New Jersey Pinelands Commission to Dan Giberson on his application for minor subdivision approval for Block 2401, Lot 36.01.

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: 11/26/13 Christopher Norman

EXHIBIT A

Professional Planners: Civil Engineers
Landscape Architects: Environmental Consultants

520 Stokes Road, Suite A-1, Medford, NJ 08055
Tel: 609 654-1120 Fax: 609 654-1265
tjsa.mail@comcast.net

TRANSMITTAL

Date: November 19, 2013

To: Chris Norman, Esq.
Raymond Coleman Heinold and Norman

From: Thomas J. Scangarello, PP

Re: Allied Recycling – Zoning
Block 2401 Lot 36

Chris:

Per your request, we have conducted a comprehensive search through our archived files for zoning maps and ordinances. Based on the materials found it would appear that the current zoning was established in 1982.

Timeline:

August 3, 1967	Letter to Mr. William Giberson from Robert W. Criscuolo, Esq, Parker, McCay and Criscuolo, representing Southampton Township. Warning to Mr. Giberson to obtain a license for the junk business being operated on Block 2401 Lot 36 or cease operation and remove the junk.
Year 1977	Proposed Zoning Map prepared by Taylor Wiseman & Taylor indicating that the majority of land that was to eventually fall under Pinelands jurisdiction was zoned AR (Agricultural-Residential). Block 2401 Lot 36 is located in this zone.

Year 1978	Zoning Map prepared by Taylor Wiseman & Taylor introducing PRC (Planned Retirement Community) Zone between Big Hill Road and New Road. Block 2401 Lot 36 is not included in this new zone.
June 8, 1982	Planning Board public hearing to adopt a Master Plan (Land Use Element) in conformance with the Pinelands Comprehensive Management Plan (CMP). The Land Use Element specifically states that the area designated as the CMP Rural Development District in Southampton is primarily zoned Agricultural-Residential (AR) with 3,545 acres. The Land Use Element is proposing the creation of the Rural Development Zone with 5,575 acres. The Zoning Map was revised by this office in 1982 and we believe adopted in March of 1983. Block 2401 Lot 36 is included in this new zone.
Year 1993 or 1994	Block 2401 Lot 36 is subdivided creating Lot 36.01 (with frontage on New Road to the southwest of the applicant's property) and Lot 36.02 (the applicant's parcel with the junk yard).
December 31, 1989	Date of Issue: License to Eileen Giberson for Junk Yard (Oldest copy of license provided by applicant)
Note:	No changes have been made to the Zoning Map or ordinance since 1982/83 that would have a direct effect on the applicant's property.

Please contact this office if you have any questions or need additional information.

Thanks.

Tom

Sent via email: cnorman@rclawnj.com

EXHIBIT B

User Name: Christopher Norman
Date and Time: 11/26/2013 10:50 AM EST
Job Number: 6488924

Document(1)

1. Marlboro Auto Wreckers v. Zoning Bd. of Adjustment, 2010 N.J. Super. Unpub. LEXIS 2204

   Client/matter: -None-

LexisNexis® | About LexisNexis | Privacy Policy | Terms & Conditions | Copyright © 2013 LexisNexis.

No *Shepard's Signal*™
As of: November 26, 2013 10:50 AM EST

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, license, automotive, motor vehicle, metal, permitted use, junk dealer, non-conforming, pre-existing, loose, sites, wholesale, license application, photographs, ordinance

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:

> A person who goes about the streets soliciting the purchase of junk or who maintains a

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

> 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, nonconforming 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.

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.

---

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

EXHIBIT C

Date of Submission: 2/1/92 Received by: [illegible]

_____ ZONING BOARD OF ADJUSTMENT _____ PLANNING BOARD

TOWNSHIP OF SOUTHAMPTON
LAND DEVELOPMENT APPLICATION

ALL PERTINENT ITEMS MUST BE COMPLETED.

A. BASIC INFORMATION:

1. Applicant(s)
Name Last Chance Auto Salvage, Inc.
Address 302 Issac Budd Road
City Southampton
State/Zip Code NJ 08088
Phone # 609.859.3634

2. Owner(s)
Name Daniel D. Giberson
Address 302 Issac Budd Road
City Southampton
State/Zip Code NJ 08088
Phone # 609.859.3634

3. If applicant is not the owner, set forth in detail the nature and source of the legal beneficial right by which you claim to submit this application.

4. TYPE OF APPLICATION: (Check as many items as applicable)
Asterisk (*) applications require a public hearing with notice and legal advertisement.

x Minor Subdivision ____ Major Sub-Prel.* ____ Major Sub-Final
____ Exempt Subdivision ____ Minor Site Plan* ____ Major Site Plan-Prel.*
____ Major Site Plan Final ____ Conditional Use* ____ Bulk Variance*
____ Use Variance* ____ Informal Review ____ Other

NOTE: If a variance is requested in conjunction with this application, the exact nature of the variance must be indicated on the application form. See #12.

5. LIST PROFESSIONALS INVOLVED:

a. Engineer
Name Raymond L. Worrell, II
Address 651 High Street
City/State/Zip Code Burlington, NJ 08016
Phone # (609) 387-2800

b. Attorney
Name Robert F. Rogers
Address 140 W. Broad Street
City/State/Zip Code Burlington, NJ 08016
Phone # (609) 386-1700

c. Architect
Name
Address
City/State/Zip Code
Phone #

d. Site Planner
Name
Address
City/State/Zip Code
Phone #

e. Other
Name
Address
City/State/Zip Code
Phone #

f. Other
Name
Address
City/State/Zip Code
Phone #

B. SITE INFORMATION:

6. LOCATION OF PROPERTY: BLOCK 2401 LOT 36A
PROPERTY LOCATION ADDRESS New Road

7. ZONING DISTRICT: (Circle one)

AP	AGRICULTURAL PRODUCTION	AR	AGRICULTURAL RESIDENTIAL
FA	FOREST A	FB	FOREST B
FC	FOREST C	HC	HIGHWAY COMMERCIAL
I	INDUSTRIAL	MR	MOBILE HOME RESIDENTIAL
(RD)	RURAL DEVELOPMENT	RC	RURAL COMMUNITY
RR	RURAL RESIDENTIAL	VR	VILLAGE RESIDENTIAL
VC	VILLAGE COMMERCIAL	RR1	RURAL RESIDENTIAL 1
OP	OFFICE PROFESSIONAL	MC	MUNICIPAL COMPLEX

8. DESCRIPTION OF PROPOSED USE:
Present Use Residential/Auto Salvage Proposed Use Prop. Lot-Auto Salvage Remainder-Residential
Number of Lots Proposed 2

LOT SIZE	FRONTAGE	SQUARE FEET	ACRES
Required	250	217,800 SF	5 AC
Existing	1460	1,499,204 SF	34.4 AC
Proposed	702	551,731 SF	

BUILDING SETBACK REQUIREMENTS

	Buffer	Front	One Side	Second Side	Rear
Required	N/A	100'	75'	75'	
Existing					
Proposed		100'	75'	75'	

PERCENT OF IMPERVIOUS COVERAGE		GROSS FLOOR AREA
Allowed		
Existing		
Proposed		

NO. OF PARKING SPACES AND LOADING

	Parking	Loading
Required		
Existing		
Proposed		

C. OTHER AGENCIES:

9. Other Approvals Required And Date Plans Submitted:

DANIEL GIBERSON
PAMELA GIBERSON
302 ISAAC BUD ROAD
SOUTHAMPTON, NJ 08088

1569

July 8 1993

55-399/312 329

PAY TO THE ORDER OF Southampton Twp $ 550.00

Fiftehund and 50 dollars DOLLARS

MIDLANTIC
Midlantic National Bank
Vincentown Office, Vincentown, NJ 08088

MEMO

⑆031203999⑆ ⑈0101443019⑈ 1569

r

rd:

h copy)

13. Waivers of Development Standards and/or Submission Requirements:

WAIVER FROM PERCOLATION TEST AND SOIL BORING

E. CERTIFICATION AND SIGNATURES:

Daniel D Giberson of full age, being duly sworn according to law, on oath deposes and says, that all of the above statements and the papers submitted herewith are true.

4-30-93
Date

Applicant's signature

Daniel D Giberson of full age, being duly sworn according to law, on oath deposes and says, that he is the owner of all that certain lot, piece of land situated, lying, and being in the municipality aforesaid, and known and designated as Block 2401, Lot 36A.

4-30-93
Date

Owner's signature

Co-owner's signature

AUTHORIZATION BY OWNER: (If anyone other than above owner is making this application, the following authorization must be executed.)

To the Planning Board/Zoning Board of Adjustment of the Township of Southampton:

_______________ is hereby authorized to make the within application.

Date

Owner's signature

LOT SIZE	FRONTAGE	SQUARE FEET	ACRES
Required	250	217,800 SF	5 AC
Existing	1460	1,499,204 SF	34.4 AC
Proposed	702	551,731 SF	

BUILDING SETBACK REQUIREMENTS

	Buffer	Front	One Side	Second Side	Rear
Required	N/A	100'	75'	75'	
Existing					
Proposed		100'	75'	75'	

PERCENT OF IMPERVIOUS COVERAGE — GROSS FLOOR AREA

	Percent of Impervious Coverage	Gross Floor Area
Allowed		
Existing		
Proposed		

NO. OF PARKING SPACES AND LOADING

	Parking	Loading
Required		
Existing		
Proposed		

C. OTHER AGENCIES:

9. Other Approvals Required And Date Plans Submitted:

	Yes	No	Month,Day,Year
1. Pinelands Commission	XXX		5.6.93
2. N.J. Dept. of Environment Protection		XXXX	
3. Burlington Co. Soil Conservation Dist.		XXX	
4. Burlington Co. Planning Board	XXX		5.7.93
5. N.J. Department of Transportation		XXX	
6.			

D. SUPPLEMENTAL ITEMS:

10. Previous Applications or Activity to either the Planning Board or Zoning Board:

Yes ______ No ✓ If Yes: ______ Month ______ Day ______ Year

Type of Action ______

Approved ______ Disapproved ______

11. Deed Restrictions or Covenants Affecting This Application: ______ Yes(attach copy) ______ No

12. Arguments for Variance: (attach sheet if necessary)

______

13. Waivers of Development Standards and/or Submission Requirements:

WAIVER FROM PERCOLATION TEST AND SOIL BORING

E. CERTIFICATION AND SIGNATURES:

Daniel D. Giberson of full age, being duly sworn according to law, on oath deposes and says, that all of the above statements and the papers submitted herewith are true.

4-30-93
Date

[signature]
Applicant's signature

Daniel D. Giberson of full age, being duly sworn according to law, on oath deposes and says, that he is the owner of all that certain lot, piece of land situated, lying, and being in the municipality aforesaid, and known and designated as Block 2401, Lot 36A.

4-30-93
Date

[signature]
Owner's signature

______
Co-owner's signature

AUTHORIZATION BY OWNER: (If anyone other than above owner is making this application, the following authorization must be executed.)

To the Planning Board/Zoning Board of Adjustment of the Township of Southampton:

______ is hereby authorized to make the within application.

______
Date

______
Owner's signature

OFFICE OF:
COUNTY ENGINEER
LAND DEVELOPMENT SECTION
49 RANCOCAS ROAD
MOUNT HOLLY, N.J. 08060
(609) 265-5081

Board of Chosen Freeholders
Of The County of Burlington
MOUNT HOLLY, NEW JERSEY
08060

June 10, 1993

B93-33-061 Preliminary

Ms. Betty Conley, Secretary
Southampton Twp. Planning Board
P.O. Box 417
US 206 & Retreat Road
Vincentown, NJ 08088

RE: LAST CHANCE AUTO SALVAGE, INC.
2 Lots. 34.4 Acres.
Lots 36A. Block 2401.
Drawing No. 34-167 dated 4/26/93.
Located on New Road (MUNICIPAL).

Dear Ms. Conley:

Since the subdivision cited above does not abut a County road or create an adverse drainage condition affecting the Burlington County road system, the Burlington County Planning Board approves this preliminary subdivision plan subject to the following standard county requirement:

All subdivisions to be recorded in the County Clerk's Office must be prepared in conformance with the New Jersey Map Filing Law, Title 46:23-9.9 to 23-11; all subdivisions to be filed by deed in accordance with NJSA 40:55D-47 shall be signed by the chairman and secretary of the municipal planning board granting initial approval.

COUNTY PLANNING BOARD APPROVAL IN NO WAY AFFECTS OR NEGATES ANY APPROVAL REQUIRED BY THE MUNICIPALITY AND THE PINELANDS COMMISSION.

Very truly yours,

Mia C. Baker

mcb/rbs

Mia C. Baker
Principal Clerk Typist
for
R. Thomas Jaggard
Planning Engineer

cc: Burlington County Engineering Department
Lewis Nagy, Director Economic Development Department
Burlington County Land Use Office
Pinelands Commission
Last Chance Auto Salvage, Inc.
Daniel Giberson
Raymond Worrell

EXHIBIT D

SOUTHAMPTON TOWNSHIP PLANNING BOARD
ROBERT L. THOMPSON BUILDING
5 RETREAT ROAD
SOUTHAMPTON, NEW JERSEY 08088

RESOLUTION OF MEMORIALIZATION 93.8

IN THE MATTER OF THE APPLICATION OF
LAST CHANCE AUTO SALVAGE, INC.

BE IT RESOLVED, by the Planning Board of the Township of Southampton in the County of Burlington and State of New Jersey, that,

WHEREAS, LAST CHANCE AUTO SALVAGE, INC. ("Applicant") is the operator of an auto salvage operation (commonly referred to as a "junk yard") on Lot 36.01, Block 2401, Southampton Township;

WHEREAS, Applicant has made application to this Board seeking approval of a minor subdivision of the aforesaid lot;

WHEREAS, the said application was considered by the Board at a public hearing on September 2, 1993;

The Board finds the following facts:

(1) That Daniel D. Giberson is the owner of the subject lot and has consented to this application;

(2) The existing lot 36.01 is approximately 34.411 acres in size, is located along New Road in a Rural Development Zone in the Pinelands area;

(3) Applicant received a Certificate of Filing from the Pinelands Commission dated June 4, 1993;

(4) The lot is presently dedicated to mixed uses, containing both the auto salvage yard and a single family residence;

(5) Applicant's proposal to divide the lot into new lot 36.02 (12.666 acres) and remainder lot 36.01 (21.751 acres) will create two (2) conforming lots, one dedicated to residential use only and the other dedicated to auto salvage only. To the extent the salvage operation spills over at present in one small area onto the proposed residential (remainder) lot, Applicant has promised to remove all junk cars or other salvage related operations from same;

(6) Applicant proposes no new development on either lot;

(7) The auto salvage operation is confined to an area delineated on the Plan submitted by Applicant - the remainder of proposed lot 36.02 is wooded.

NOW, THEREFORE, BE IT RESOLVED that this application for minor subdivision is hereby granted, subject to the following conditions:

(1) Approvals from all other agencies having jurisdiction;

(2) There shall be no further clearing of the wooded

portion of new lot 36.02, nor shall there be any expansion of the area devoted to auto salvage operations (or storage of junk cars);

(3) Applicant shall remove any junk cars, parts, or other salvage operations from new lot 36.01;

(4) This subdivision shall be recorded within the time prescribed by law by map or deed filed at the Burlington County Clerk's Office. Said subdivision lines shall be precisely in accordance with the lot lines set forth on the plan titled "Minor Subdivision" drawn by Raymond L. Worrell, II, dated April 26, 1993, submitted with this application.

The following requirements of the Township ordinances are hereby waived:

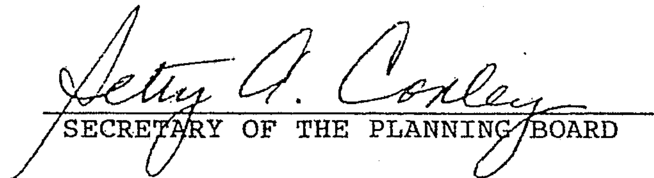
(1) Percolation tests and soil logs, due to the large size of the lots;

(2) Depiction of buildings on adjacent lots, due to large lot sizes and existence of substantial buffering.

SECRETARY'S CERTIFICATE

I hereby certify that the above is a true copy of a resolution adopted by the Planning Board of the Township of Southampton, in the County of Burlington and State of New Jersey,

in accordance with the authority granted to it under Ordinance 1976-3 and 1976-7 adopted in pursuance of the authority of Section 14 of Chapter 433 of the Laws of 1953, and the amendments thereto, at a meeting held on the 7th day of October, 1993.



SECRETARY OF THE PLANNING BOARD

EXHIBIT E

The Pinelands Commission

P.O. Box 7, New Lisbon, N.J. 08064 (609) 894-9342

CERTIFICATE OF FILING

June 4, 1993

Mr. Daniel D. Giberson
302 Issac Budd Road
Southampton, NJ 08088 .

Please Always Refer To
This Application Number

RE: App. No. 93-0489.01
Block 2401, lot 36A
Southampton Township

Dear Mr. Giberson:

This application for a two lot subdivision and no further development of the above referenced 34.42 acre parcel is complete. There is an existing single family dwelling and an automobile salvage yard on the parcel. The parcel is located in a Pinelands Rural Development Management Area.

The completion of this application has resulted in the issuance of this Certificate of Filing. This Certificate of Filing is required before any other agency can deem an application complete and take action on your proposed development. The agency may proceed to review and take action on the proposed development. The applicant must give notice to the Pinelands Commission of any modification of the proposed development and of any approval received for the proposed development within 5 days of receiving any approval.

The Subdivision Plan submitted to the Pinelands Commission was prepared by Lord, Anderson, Worrell and Barnett and dated April 26, 1993.

There are freshwater wetlands on the parcel.

This application is for the proposed two lot subdivision and no further development only. Any future development of the parcel shall be governed by the provisions of the Southampton Township land use ordinance and the Pinelands Comprehensive Management Plan.

THIS CERTIFICATE OF FILING IS NOT AN APPROVAL. It is the letter necessary for other agencies to review and act on your application. If either a municipal or county agency grants an approval or permit for the proposed development, that approval is subject to review by the Pinelands Commission. No local approval shall take effect and no construction or development shall occur unless written notice from the Pinelands Commission has been received, indicating either that the Commission will not review the local approval or that the Commission has approved the local approval.

This Certificate of Filing is transferable to future owners of this parcel.

If you have any questions, please contact the development review staff.

Sincerely,

William F. Harrison, Esq.
Assistant Director

WFH/ew/WS2
cc: Secretary, Southampton Township Planning Board
Southampton Township Construction Code Official
Southampton Township Environmental Commission
Burlington County Health Department
Burlington County Planning Board
Last Chance Auto Salvage
Raymond L. Worrell