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

ORAL ARGUMENT IS SCHEDULED FOR
FRIDAY, AUGUST 21, 2015 AT 2:30 PM.

Allied Recycling Inc. and Last Chance Salvage Inc. v. Township of Southampton Zoning Board of Adjustment
Docket No. BUR-L-309-15
August 21, 2015

ACTION IN LIEU OF PREROGATIVE WRITS

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

Thomas J. Coleman, III, Esq., and Christopher J. Norman, Esq., Attorneys for Defendant Township of Southampton Zoning Board of Adjustment
Phone: (856) 222-0100 Fax: (856) 222-0411

Bookbinder, A.J.S.C.

Preliminary Statement

Plaintiffs Allied Recycling Inc. and Last Chance Salvage, Inc. (*hereinafter,* collectively, "Allied") own property located at 440 New Road in the Township of Southampton [*hereinafter* "the Site" or "the Property"]. In September of 2013, Allied sought a certificate of non-conforming use from the Township of Southampton Zoning Board of Adjustment (hereinafter the "Board"), to permit use of the property as an auto salvage yard and a scrap metal yard, which was denied. Allied appealed the Board's denial of a Certificate of Nonconforming Use, and the matter was subsequently remanded to the Board by the Court for the Board to determine first, the 1982 baseline nonconforming use rights of the Property, and second, whether the proposed use was substantially similar to the historic use.

The Court finds that the Board's determination that the 1982 baseline non-conforming use rights of the Property is "auto-salvage only" is arbitrary, capricious and unreasonable, and not grounded in the record. The Court's holding is limited to the Board's determination relating to the "character" of the use as "auto-salvage only." The Court finds that the record overwhelmingly reveals that the property was used continuously as an auto salvage yard and all-purpose junkyard that accepted and paid customers for scrap metal. The Court makes no determination as to the extent, intensity and incidents of this use, and remands the matter back to the board to reevaluate the quality and intensity of the use in light of this decision.

Upon determining the quality of the use, the Board must then determine whether the intended use is substantially similar to the historic use. The Board may seek additional information from the applicant, or undergo this analysis based upon the evidence already submitted.

Therefore, the Board's finding is vacated and the case is remanded to the Board for further evaluation consistent with this opinion.

Statement of Facts and Procedural History

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

On or about April 10, 2014, Judge Bookbinder issued a tentative disposition, and on May 23, 2014, a final judgment. [Allied Exs. "B" and "C"]. The final judgment remanded the matter back to the Board to determine: (a) the baseline nonconforming use rights by issuance of a Certificate of nonconforming Use, pursuant to *N.J.S.A.* 40:55D-68; (b) whether the proposed operation of a full-scale junkyard/scrap-metal center is "substantially similar" to the non-conforming use activities at the Salvage Yard in 1982 when zoning was first adopted, thereby obviating any need to obtain a use variance under *N.J.S.A.* 40:55D-70(d); and (c) alternatively, whether a use variance should be granted pursuant to *N.J.S.A.* 40:55D-70(d)(1).

Consistent with the final judgment, a hearing was held on July 10, 2014. At the conclusion of the hearing, the Board determined that the 1982 baseline non-conforming use was "auto salvage" use only. On July 31, 2014, the Board adopted *Southampton Planning Board Resolution* 2014-8Z, which authorized the issuance of a Certificate of Nonconforming Use for the business operation of "auto salvage," which includes the sale of salvaged auto-parts and the crushed remains of motor vehicles. [Allied Ex. "D"].

As a result of the decision of the Board, on or about September 29, 2014, Allied filed a Complaint in Lieu of Prerogative Writs challenging the Board's determination and asserting that the Board acted in an arbitrary, capricious and unreasonable manner by ruling contrary to the evidence that use of the Site prior to and up to June 18, 1982 was solely an auto salvage yard.

On July 31, 2014, a hearing was held to determine whether the current use of the Property is substantially similar to the 1982 baseline use of the Property. At the conclusion of the hearing, the Board determined that the current use of the Site as a full service junkyard is not substantially similar to the baseline use as an auto salvage yard in 1982. On August 14, 2014, the Board adopted two resolution, *Southampton Planning Board Resolutions* 2014-11 and 2014-12 stating this conclusion. [Allied Ex. "E"].

As a result of these resolutions, on September 30, 2014, Allied filed a second Complaint in Lieu of Prerogative Writs claiming that the Board's determination that the proposed full-scale junkyard is not substantially similar to the nonconforming use activities conducted at the Property in 1982 when zoning was first adopted was arbitrary, capricious and unreasonable.

On September 30, 2014, and November 13, 2014, hearings were held in which Allied sought a use variance to operate the Site as a full-service junkyard, with certain restrictions. At the conclusion of the second hearing, the Board determined that Allied had not met its burden of proof so as to allow the Board to grant the use variance as requested. On December 11, 2014, the Board adopted *Southampton Planning Board Resolution* 2014-17, denying the use variance pursuant to *N.J.S.A.* 40:55D-70(d)(1).

On January 30, 2015, Allied filed a third Complaint in Lieu of Prerogative writs claiming that the Board acted in an arbitrary, capricious and unreasonable manner in denying the use variance.

On August 12, 2015, the Court signed an Order consolidating the three related Allied Complaints for adjudication under consolidated Docket Number BUR-L-309-15.

Arguments

I. Allied's Brief

Allied argues that the Board's decision ruling that the 1982 non-conforming use rights of the site is solely auto salvage was arbitrary, capricious, unreasonable and contrary to the evidence submitted to the Board. Allied argues that its witnesses gave explicit and expansive testimony with regard to the full service junkyard use of the site prior to 1982. Allied argues that the testimony included the number of employees working on the Property at the time, the fact that there were two junkyards operating at the site, the non-automotive use of a scale at the site; the type of equipment used at the site, the amount and consistency of site activity, and the height of material stored at the junkyard.

Allied argues that of the eighteen residents that testified at the hearing, only five ever set foot on the junkyard property. Allied argues that some of the residents admitted that there were other recycling activities besides auto salvage use at the site.

Allied argues that the Board's resolution determining that the 1982 "baseline" nonconforming use rights of the site is auto salvage is entirely contrary to the facts presented. Allied argues that the resolution itself states that auto salvage was only the primary use at the site, and agreed that the recycling of scrap metal and other junk materials was part of the use of the site in 1982. Allied argues that while there was no credible testimony presented, the Board claimed that an increase in the noise and levels of traffic were indicative of a significant change of use of the site. Allied also argues that the Board partially based its decision on a lack of financial receipts, knowing that junkyards are not prone to the retention of records.

Allied argues that a Board's decision must be based on the evidence and be decided strictly on the basis of the facts presented at the hearing. *Kramer v. Bd. of Adjust., Sea Girt,* 45 *N.J.* 268, 280 (1965). Allied argues that the decision is reversible if arbitrary, capricious, or so unreasonable as to amount to an abuse of discretion.

Allied argues that the Board had no rational basis for limiting the "baseline" rights solely as an auto salvage yard. Allied argues that the Board's resolution ignored uncontroverted testimony from numerous witnesses as to the historic use of the site, substituting evidence that is supported by the record with contrived, unsupported rationalizations for an incorrect baseline.

Allied argues that the Board's determination that the current intended use of the site is a substantial change from the incorrect determination of the "baseline" use was arbitrary, capricious, unreasonable and contrary to the evidence submitted to the Board. Allied argues that the Board's erroneous "baseline" use determination taints its analysis with regard to ever subsequent decision, including as to whether the proposed and intended use is substantially different from the "baseline" use.

Allied argues that at the July 31, 2014 hearing, Allied submitted significant, substantial and credible testimony that the current and propped use is substantially similar to the "baseline" use. Allied contends that Larkins testified as a licensed site remediation professional that from an environmental standpoint, there is no difference between an auto salvage yard and a full-service junkyard. Allied argues that Larkins testified generally to the similarities between the operations of a salvage yard and a junkyard. Allied argues that Gabrysiak testified that the processing operations are substantially similar with respect to a junkyard and an auto salvage yard, and that the "footprint" of the Site is smaller than the historic use of the Site. Allied also argues that Litwornia, the traffic engineer, testified that based on the earliest traffic study he could find from

1995, traffic on New Road, Route 206 and Route 70 all decreased substantially from 1995 to the current date. Allied argues that Litwornia also testified that New Road was more than able to handle the current use at the junkyard location. Allied also contends that Miller, Allied's professional planner, opined that the use of the Site as a full service junkyard was not substantially changed from the erroneously determined "baseline" determination of the Board at its previous hearing that the Site was historically used as an auto salvage yard.

Allied argues that it is well-settled that non-conforming uses or structures existing at the time of passage of an ordinance may be continued. *Kessler v. Bowker,* 174 *N.J. Super.* 478 (App. Div. 1979). Allied argues that the question before the Court is whether or not the current use at the Site is substantially similar to the "baseline" use at the Site. Allied argues that if the use is substantially similar, it will be permitted. *Arkam Machine & Tool Co. v. Lyndhurst Tp.,* 73 *N.J.* 528 (App. Div. 1962). Allied explains that if there has been an illegal expansion of the use, it will not be permitted, absent a variance. *Weber v. Pieretti,* 77 *N.J. Super.* 423 (App. Div. 1962).

Allied lists a number of cases that hold that the expanded use was non-permissible: *Belleville v. Parillo's, Inc.* 83 *N.J.* 309 (1980) (involving a bar to a disco); *Hantman v. Randolph Twp.,* 58 *N.J. Super.* 127 (App. Div. 1959), *certif. den.* 31 *N.J.* 550 (1960) (involving summer bungalows to year-round occupancy); *Barbarisi v. Bd. of Adjustment, City of Patterson,* 30 *N.J. Super.* 11 (App. Div. 1954) (regarding an auto repair shop to rug cleaning business).

Allied cites a number of cases that hold that the expanded use was permissible: *State v. Wagner,* 81 *N.J. Super.* 206 (Cty. Ct. 1963) and *Institute v. Bd. of Adjustment,* 270 *N.J. Super.* 396 (Law Div. 1993) (both regarding an increase in number of tenants); *Stout v. Mitschele,* 135 *N.J.* 406 (1947) (involving changing a business from dairy farming to horse raising).

Allied argues that in Judge Bookbinder's tentative decision, the Court listed several factors to assist the Board in determining whether or not the current use is substantially changed from the "baseline" use. Allied argues that Judge Bookbinder gave additional direction regarding permissible expansion of a non-conforming use as follows:

> The Court notes, however, that an increase of intensity alone, without change to the nature or geographical footprint of the use, is insufficient to constitute a substantial change. [T]he rule of law which prohibits a substantial extension or enlargement of the original use does not forbid an increase in the amount or intensity of use within the same area, so that such a nonconforming use may not only be continued but, also, may be increased in volume and intensity. Neither is a mere increase in the volume of business conducted on premises constituting a nonconforming use normally considered to be an improper expansion of such nonconforming use. *State v. Wagner,* 801 *N.J. Super.* 206, 210 (Cty. Ct. 1963) (cited approvingly by *Nuckel v. Borough of Little Ferry Planning Bd.,* 208 *N.J.* 109-110 (2011). Therefore, while the quantity and weight of traffic to and from the yard, the number of employees working at the yard, and the overall effect of a change on the neighborhood are relevant, they are not determinative factors.

Allied argues that numerous witnesses stated that the surrounding development has not significantly changed over the years, as many were residents living adjacent to the site in 1982.

Allied argues that the Board's decision was heavily influenced by the testimony of the adjoining residents and the Boards own concerns about signage, lighting, future traffic and noise. Allied argues that the record shows that there was no finding that the current use is more intense, generates more noise, generates more traffic or is different than the prior use. Allied argues that if there are legitimate issues with the current noise level, traffic, lighting, etc., they should be addressed under the nuisance ordinances of the Township or more properly addressed at the time of site plan review. Allied argues that it has provided more than sufficient, unrefuted evidence that the current and proposed use of the Site are substantially similar to the incorrectly determined "baseline" 1982 use of the Site.

Allied argues that the Board's determination denying the use variance for the Site is arbitrary, capricious, unreasonable and contrary to the evidence submitted to the Board. Allied

argues that its planner, Miller, gave clear and unambiguous expert testimony that the use of the Site as a junkyard carried out several purposes of zoning as defined in the Municipal Land Use Act. Allied argues that the Supreme Court has singled out subsection (a) as the one purpose that "most clearly amplifies the meaning of special reasons." *Medici v. BPR Co.,* 107 *N.J.* 1 (1987). Allied argues that the general welfare purpose is also the one most often relied on to produce special reasons in support of a variance. *Burbridge v. Mine Hill Tp.,* 117 *N.J.* 376, 386-387 (1990). Allied argues that Judge Bookbinder specifically pointed out the *Burbridge* case in his tentative decision.

Allied argues that the property is particularly suited for a full service junkyard. Allied argues that its planner testified that the Site is already being used as a junkyard, notwithstanding the Board's incorrect ruling that the use was limited to an auto salvage yard. Allied argues that the junkyard use has been in place for approximately 70 years and, at this date, is not suitable for residential development consistent with current zoning. Allied argues that it is clear that the entire Site was covered with various types of refuse. [Allied Ex. 7-10-1]. Allied argues that in comparing Exhibit 7-10-1 to Exhibit 7-10-5, it is clear that the Site is particularly suited for full service junkyard use and that use as a junkyard can lessen the impact on the surrounding neighborhood if properly designed and run.

Allied argues that in addition to satisfying the positive criteria under *N.J.S.A.* 40:55D-70(d), Allied must also satisfy the negative criteria in order to obtain a use variance. Allied argues that it must demonstrate that the variance can be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zoning plan and zoning ordinance. Allied argues that generally, in a case involving a use that is not inherently beneficial, an applicant must provide an "enhanced quality of proof" concerning the negative

criteria showing that "the variance sought is not inconsistent with the intent and purpose of the master plan and zoning ordinance." *Medici, supra,* 107 *N.J.* at 21.

Allied argues that Miller testified that there is a unique set of circumstances at hand. Allied argues that there is already a pre-existing nonconforming use defined by the Board as one that solely operates an auto salvage junkyard. Allied argues that an expansion of the use will allow other products to be salvaged that are smaller and require less handling and noise to break down and recycle. Allied argues that it is more than willing to make considerable concessions in regard to aesthetics, buffering, lighting, hours of operation, traffic, and location of noise at the site to further benefit the public good and mitigate its operation and effect on the residential neighborhood that has been constructed subsequent to the establishment of the nonconforming use.

Allied argues that the Board erred in not considering site plan mitigation issues prior to denying the relief requested by Allied. Allied argues that where there are concerns about the alleged impact of the expansion of use on the surrounding neighbors and the area in general, site plan mitigation is central to resolving the problems with the proposed expansion. Allie argues that the Board's planner indicated a strong desire not to have a bifurcated application. [9/30/14T 107:20-25; 108:1-10; 109:11-25; 110:1-8; 125:16-25; 126:1-25; 127:1-6]. Allied argues that the Board's attorney rejected the Board's planner's recommendation. [9/30/14T 130:8-25; 131:1-25; 132:1-2].

Allied argues that Judge Bookbinder directed the Board in the tentative disposition to consider whether aesthetic conditions could be applied to minimized the impact of change. Allied argues that where the site plan issues are central to resolving the problems that cause the proposed use not to satisfy the negative criteria, the variance application and the site plan review

should not be bifurcated. *Scholastic Bus Co. v. Zoning Bd.,* 326 *N.J. Super.* 49 (App. Div. 1999). Allied argues that bifurcation is not appropriate where the variance and site plan issues are highly interrelated. *House of Fire v. Clifton Bd. of Adj.,* 379 *N.J. Super.* 526, 539-40 (App. Div. 2005). Allied argues that this is especially appropriate in this factual setting where there currently exists an auto salvage yard with virtually no controls as to the scope and intensity of its use; a Site severely lacking in any aesthetic appeal. Allied argues that the Board, as directed by Judge Bookbinder, should have considered the site plan so as to allow the Board and Allied to attempt to satisfy the negative criteria by minimizing the impact of the alleged change in use.

II. The Board's Reply

The Board argues that the Board's granting of a certificate of nonconforming use to permit the continued operation of an auto-salvage yard is supported by substantial evidence in the record below. The Board sets forth the 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 (Ch. Div.), *aff'd,* 77 *N.J. Super.* 423 (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 (1965).

The Board argues that the question is whether the law requires a certain level of activity for a nonconforming activity to be considered a "use." The Board argues that a mere intention to use the property is not enough to establish use. *Morris Cty Land, etc. v. Parsippany-Troy Hills Tp.,* 40 *N.J.* 539, 550 (1963). The Board argues that the use to be protected must be of a continuing rather than an ephemeral nature. *State v. Gargiulo,* 103 *N.J. Super.* 140 (App. Div. 1968). The Board argues that "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).

The Board cites *Paruszewski v. Twp. of Elsinboro,* 297 *N.J. Super.* 531 (1997), *aff'd* 154 *N.J.* 45 (1998) in which 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 5-20 times a year. The Board contends that the Appellate Division found that "[t]he 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." *Id.* at 538.

The Board argues that the record in the instant matter is substantially similar to *Paruszewski.* The Board argues that Allied relies upon nebulous, imprecise and purely anecdotal testimony from several fact witnesses to establish that scrap-metal recycling activities have been a continuous nonconforming use activity at the auto salvage yard since the adoption of agricultural-residential use zoning in 1982. The Board also argues that Allied relies upon testimony from its principal and expert witnesses, which have no personal knowledge of the specific use activities on Allied's property in 1982 when non-conforming use rights were established.

The Board argues that in the tentative decision of April 10, 2014, incorporated in the final judgment, the Court concluded that Allied failed to meet its legal burden of proof for the granting of a Certificate of Nonconforming Use to permit scrap-metal recycling activity. The Board argues that the Court found substantial evidence in the record to support the Board's finding that Allied's nonconforming use rights were limited to the operation of an auto salvage-

yard. The Board states its conclusions regarding Allied's principal use of the Salvage Yard in 1982:

> 1) the principal use of the Salvage Yard in 1982 was auto-salvage, which involved the sale of salvaged auto parts and crushed remains of motor vehicles; 2) longer-term storage of other miscellaneous junked materials was an accessory use activity to the auto-salvage yard (i.e. the principal use) in 1982; 3) scrap-metal recycling activity was merely a "sporadic" and "intermittent" occurrence at the Salvage Yard in 1982; 4) Allied presented no evidence of financial records for scrap-metal recycling from 1982; 5) when Allied took over the Salvage Yard in 2009, the site was cleaned up in preparation for converting 50% of the Salvage Yard to scrap-metal recycling; 6) after this business transition was complete, there was two separate principal uses (auto-salvage and scrap-metal recycling) at the Salvage Yard, the latter of which involves higher turnover of scrap-metal materials and greater truck traffic to and from the site; 7) the change in character and intensity of use at the Salvage Yard became immediately apparent to nearby residents after Allied took possession; and 8) nearby residents noticed new large and unsightly piles of scrap materials at the Salvage Yard, increase in noise from equipment, and greater truck traffic in their previously peaceful and rural residential neighborhood; and 9) after receiving complaints from these nearby residents, Southampton commenced zoning enforcement against Allied for commencing a new unpermitted use activity.

The Board argues that it properly found that an auto-salvage yard is not "substantially similar" to a full-scale junkyard/scrap metal recycling center, and therefore, required the granting of a use variance, pursuant to *N.J.S.A.* 40:55D-70(D)(1). The Board sets forth the standard of review for the continuation of non-conforming uses: "[T]he Court stated that "an existing nonconforming use will be permitted to continue only if it is a continuance of substantially the same kind of use as that to which the premises was devoted at the time of the passage of the zoning ordinance." *Saadala v. East Brunswick Zoning Bd. of Adj.*, 412 *N.J. Super.* 541, 548 (App. Div. 2010). Allied argues that "[A]ny doubt as to whether enlargement or change of the use is substantial rather than insubstantial is to be resolved against the property owner." *Township of Fairfield v. Likanchuk's, Inc.*, 274 *N.J. Super.* 320, 328 (1994).

The Board argues that its decision "denying prior nonconforming use protection or expansion is entitled to greater deference than a decision finding and protecting a prior

nonconforming use." *McDowell, Inc. v. Bd. of Adjustment,* 334 *N.J. Super.* 201, 225 (App. Div. 2000). The Board also argues that its determination on the "substantial change" issue is presumptively valid because it involves a mixed question of law and fact. *Bonaventure Intern, Inc. Borough of Spring Lakes,* 350 *N.J. Super.* 420, 438 (App. Div. 2002). *See also* Cox & Koenig, *New Jersey Zoning & Land Use Administration,* § 33-1.1, p. 717 (2015).

The Board argues that "substantial change" determination focuses upon: "the quality, character and intensity of the use, viewed in their totality and with regard to their overall effect on the neighborhood and the zoning plans." *Coneselice v. Borough of Seaside,* 358 *N.J. Super.* 327, 334-35 (App. Div. 2003). The Board argues that in *Saadala,* Judge Skillman emphasized that "substantial change" typically occurs when the existing nonconforming use cannot survive without any modification thereto. *Saadala,* 412 *N.J. Super.* at 549. The Board argues that several Appellate Court opinions have found that substantial change" occurs when there is alternation or modification to a principal and accessory use activity of a nonconforming use. *Coneselice, supra,* 358 *N.J. Super.* at 334; *Nouhan v. Bd. of Adjust. of Clinton,* 392 *N.J. Super.* 283 (App. Div. 2007); *Heagan v. Borough of Allendale,* 42 *N.J. Super.* 472 (App. Div. 1956); *Township of Fairfield,* 274 *N.J. Super.* at 330.

The Board argues that another factor in the "substantial change" determination is any increase in intensity of use. *Avalon Home and Land Owners Ass'n v. Borough of Avalon,* 111 *N.J.* 205, 211 (1988). The Board argues that the fact that a proposed change to a nonconforming use would be "less intense" than the existing use, alone is not dispositive. The Board cites an unpublished decision in which the Appellate Division rejected the owner's proposition that "substantial change" does not occur when a proposed change in use is "less intense." *Tricare*

Treatment Servs., L.L.C. v. Chatham Borough Planning Bd., No. A-5371-12T1 (App. Div. Oct. 21, 2014) (slip op.).

The Board also argues that decisional law in New Jersey recognizes a distinction in character between junkyard/auto-salvage yards and a recycling center. Allied argues that in *Mayor v. Board of Adjustment,* 32 *N.J.* 130 (1960), the New Jersey Supreme Court, while judicially reviewing a variance application involving a junkyard, analyzed the distinction between a traditional junkyard/auto-salvage yard, which involves the longer-term storage of junked materials as a principle use, compared to scrap-metal recycling, which involves higher turnover of materials.

The Board argues that in an unpublished Appellate Division case, *Arroyo v. Brick Recycling Co.,* No. A-3966-12T2 (App. Div. March 4, 2014) (slip op.), the Court noted the same use distinction between a scrap-metal recycling center and an auto-salvage yard. [Norman Certification, Ex. "1"]. The Board also argues that in another unpublished case *Marlboro Auto Wreckers v. Zoning Bd. of Adjustment,* No. A-6137-08T2 (App. Div. Jan. 27, 2010) (slip op.), the Court upheld a zoning board's determination restricting the owner's nonconforming use rights to the operation of an auto-salvage yard. [Norman Certification, Ex. "2"]. The Board argues that Judge Havey found that a recycling center is clearly a distinct use from an auto-salvage yard in *Township of Fairfield,* 274 *N.J. Super.* at 331.

The Board argues that it concluded that the 1982 auto salvage yard operations were not "substantially similar" to the proposed full-scale junkyard/scrap metal recycling center in 2014 in *Southampton Planning Board Resolutions* 2014-11 and 2014-12. The Board quotes its findings from the Resolutions. The Board argues that there is no factual dispute that when Allied took over the Salvage Yard in 2009, the use transitioned from auto-salvage to a full-scale

Junkyard/scrap metal recycling center. The Board argues that from the decisional law, there is no dispute that: 1) the essential use characteristic of an auto-salvage business involves the long-term storage of automobiles and, to a lesser extent, other miscellaneous junked materials; and 2) the essential use character of a scrap-metal recycling business involves the processing and recycling of scrap-metals with short-term storage being an incidental activity of the business. The Board argues that because the scrap-metal recycling business involves a greater turnover of material and accordingly greater truck traffic to/from such business, and greater noise from the piling of scrap-metals by heavy equipment, the nature and character of these two businesses are clearly distinct. *Township of Fairfield,* 274 *N.J. Super.* at 331.

The Board argues that Allied's principal, Thomas Gabrysiak, testified that Allied must be granted approval to operate a full-scale junkyard/scrap metal recycling center, because otherwise the pre-existing auto-salvage yard will no longer be a financially feasible business operation. The Board argues that this is further evidence of a "substantial change" of use. *See Saadala,* 412 *N.J. Super.* at 549.

The Board argues that further evidence of a "substantial change" of use comes from Gabrysiak's testimony that Allied's proposed operation of the Salvage Yard would be 50% auto salvage/50% scrap-metal recycling. The Board argues that this would be a "substantial change" of use from 1982 when the primary use of the subject property was auto-salvage with occasional scrap-metal being placed into cars and vehicles prior to crushing. The Board argues that it properly found that the proposed scrap-metal activities would introduce a second "prohibited" principal use to the property causing adverse and substantially detrimental impacts within a rural residential zoning district and to a nearby residential neighborhood. The Board argues that its findings were amply supported in the record by testimony of nearby residents, who had

complained of enhanced noise and truck traffic emanating from Allied's use of the Salvage Yard since 2009, which use had departed substantially from the less nuisance oriented auto-salvage use activities of its predecessors.

The Board argues that numerous neighborhood residents provided testimony disputing the assertion that the proposed scrap-metal recycling activities would be "less intense" than an auto-salvage yard. The Board argues that several of these residents have resided in the nearby residential neighborhood since prior to 1982. The Board argues that it was within its rights to accept the credibility of testimony of these nearby residents over those Allied's fact witnesses. *Paruszewski v. Twp. of Elsinboro,* 297 *N.J. Super.* 531 (1997); *Kramer v. Bd. of Adjust., Sea Girt,* 45 *N.J.* 268, 288 (1965); *see also* Cox & Koenig, § 19-4.3, p. 366 (2015).

The Board addresses Allied's argument that it was impossible to present proofs of the nonconforming use activities dating back to 1982. The Board argues that the Appellate Court found this argument wholly unavailing in *Heagan,* 42 *N.J. Super.* at 478. The Board argues that accordingly, the Court must affirm the *Southampton Planning Board Resolutions* 2014-11 and 2014-12, finding and concluding that the proposed change from auto-salvage to full-scale junkyard/scrap metal recycling does not involve a "substantially similar" use.

The Board also argues that because scrap-metal recycling would constitute a new use activity not permitted by Ordinance, Allied must seek a use variance pursuant to *N.J.S.A.* 40:55D-70(d)(1). The Board argues that in *Nuckel v. Little Ferry Planning Bd.*, 208 *N.J.* 95, 97 (2011), the Supreme Court held that a developer proposing "to place a driveway on an undersized lot that houses a nonconforming use, to service a hotel on an adjacent lot" required the granting of a use variance, pursuant to *N.J.S.A.* 40:55D-70(d)(1) because the driveway "constitute[d] a second principal use, prohibited by the zoning ordinance . . . ."

The Board argues that in *Saadala,* Judge Skillman held that the establishment of a combined convenience store and retail gas station, to replace two separate nonconforming uses for a convenience store and retail gasoline station required the granting of a use variance, pursuant to *N.J.S.A.* 40:55D-70(d)(1). The Board argues that the holdings in *Nuckel* and *Saadala* are premised upon the legal principle that changes to a nonconforming use are inherently disfavored by law. The Board argues that if there is any doubt whether the use variance to be requested is a (d)(1) "use variance" or (d)(2) "expansion of nonconforming use," such doubt must be resolved against the property owner. *See Township of Fairfield, supra,* 274 *N.J. Super.* at 238 (citing *Town of Belleville,* 83 *N.J.* at 316; *Lehen,* 252 *N.J. Super.* at 399).

The Board argues that scrap-metal recycling is not a permitted use activity in Southampton Township. The Board argues that Allied proposed that scrap-metal recycling would introduce a new and second principal use activity to an existing nonconforming auto-salvage yard in a rural residential zoning district. The Board argues that Allied's development application does not involved just an expansion of the nonconforming use auto-salvage yard. The Board argues that therefore, Allied must satisfy enhanced burden of proofs for a use variance, pursuant to *N.J.S.A.* 40:55D-70(d)(1), to introduce an entirely new prohibited use, which includes the enhanced burden to satisfy the *Medici* criteria.

The Board articulates the standard of review of a zoning board denial of a use variance from *Kinderkamuck v. Mayor of Oradell,* 421 *N.J. Super.* 8, 12-13 (App. Div. 2011). The Board argues that because of the legislative preference for municipal land use planning by ordinance rather than variance, use variances may be granted only in exceptional circumstances. *Funeral Home Mgmt., Inc. v. Basralian,* 319 *N.J. Super.* 200, 207 (App. Div. 1999). The Board argues that it may permit a nonconforming use only where the applicant can demonstrate "special

reasons" for the variance, known as the "positive criteria." *N.J.S.A.* 40:55D-70(d)(1); *New Brunswick Cellular Tel. Co. v. Borough of S. Plainfield Bd. of Adj.*, 160 *N.J.* 1, 6 (1999). The Board argues that the application must meet the "negative criteria" "by showing that [the] variance can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance." *N.J.S.A.* 40:55D-70(d). The Board then goes through the standard of review analysis for the positive and negative criteria.

The Board argues that it properly found that Allied did not meet its statutory burden to satisfy the "negative criteria" of *N.J.S.A.* 40:55D-70(d)(1), including the enhanced *Medici* criteria for entitlement to a use variance. The Board states its reasons for denying the (d)(1) use variance. The Board argues that the foundation of the use variance denial was on Allied's failure to meet its statutory burden to satisfy the "negative criteria," including the enhanced *Medici* criteria. The Board argues that its findings of the substantial adverse impacts on the rural residential zoning district and nearby residential neighborhood were amply supported by testimony of nearby residents. The Board argues that it had wide discretion to accept this factual testimony over the testimony provided by Allied's witnesses. *Kramer v. Bd. of Adjust., Sea Girt,* 45 *N.J.* 268, 288 (1965); Cox & Koenig, *supra,* 19-4.2, at 366.

The Board argues that Allied made no effort to present planning testimony on the enhanced *Medici* criteria. The Board argues that Allied did not reconcile the Township's longstanding zoning policy in place since 1982, which bans junkyards and recycling centers township-wide. The Board argues that the Township and its officials have implemented a longstanding zoning policy to preserve its rural residential character. The Board argues that the

Salvage Yard only continues to operate in the Township due to the statutory protection afforded to nonconforming uses, pursuant to *N.J.S.A.* 40:55D-68.

III. Allied's Response

Allied argues that the Board's claims that its findings as adopted by *Southampton Planning Board Resolution* 2014-8Z were affirmed by the Court in its April 10, 2014 Tentative Disposition are incorrect. Allied argues that the decision was rendered by the Court on April 10, 2014, and the Resolution was adopted on July 10, 2014, some three months afterwards. Allied argues that the Tentative Disposition remanded the matter back to the Board for further hearings to determine, among other matters, the baseline use of the property.

Allied argues that the *Southampton Planning Board Resolutions* 2014-11 and 2014-12 finding that the current use is substantially different from the baseline use was contrary to the preponderance of the evidence submitted by Allied. Allied argues that the Board made unsubstantiated findings regarding the scale of the prior and current uses in determining that the collection of obsolete appliances, construction equipment and material and other miscellaneous "junk" is consistent with the operation of a traditional auto-salvage yard. Allied argues that the Board adopted *Southampton Planning Board Resolution* 2014-17 denying Allied's use variance request based in part on assumptions that were not part of the record. Allied argues that despite the Board's claims, there was no testimony that the use of the site will both create an unsafe traffic condition and will require the widening and improvement of Township streets, resulting in additional taxpayer expense. Allied also argues that the testimony presented does not support the Board's claims that Allied will expand the geographical location of the use closer to adjacent residents, and in fact, the testimony presented just the opposite.

Allied argues that its witnesses' testimony was replete with factual, detailed information in regard to both the historical and current expansive use of the property. Allied argues that there is no question that the subject property was not intermittently used as a full-service junkyard.

Allied argues that the Board's reliance on *Paruszewski* is misplaced. Allied argues that there was conflicting testimony as to the number of takeoffs and landings at the farm property. Allied argues that in the instant matter, there was significant, consistent and factual testimony not only by Allied's principal but by Allied's witnesses, many of whom had personal knowledge of the specific use activities during the time when the nonconforming use rights were established. Allied argues that the Board denies the existence of the nonconforming use and then admits the existence of the use, but states that it is subsumed as part of the auto-salvage use.

Allied argues that because the Board incorrectly determined the baseline use of the property, the "substantially similar" determination by the Board is fatally flawed. Allied argues that it presented substantial and credible testimony that there was no change in the environmental impact of scrap metal versus auto salvage, that the processing of the material was similar, and that Allied would retain the geographical boundaries set by the 1993 subdivision. Allied argues that although it was not allowed to provide significant testimony as to the Site Plan, a representative testified that it was willing to limit the height and visual impact of the material stored at the property, the quantity and weight of traffic to and from the property and limit the number of employees at the property.

Allied argues that in citing both the *Mayor* and *Arroyo* cases, the Board is basing its reasoning on the proposed use being a large-scale scrap-metal only recycling center, which is not the case. Allied argues that on several occasions, Allied testified that it intends to retain the auto

salvage yard as it has historically been used, notwithstanding the limiting determination and definition imposed by the Board. Allied argues that *Mayor* defines "junk" as "articles that have outlived their usefulness in their original form, and are commonly gathered up and sold to be converted into another product, either of the same or a different kind by some manufacturing process." Allied argues that this is exactly the historical and current use of Allied's property.

Allied argues that the term "recycling center," as defined in *Mayor* does not apply to Allied's use of the property. Allied argues that the recycling center used in *Mayor* was used as a shipping station, and the storage of materials was only incidental to the primary use of shipping the materials elsewhere. Allied argues that its use of the property is akin to that in *Grace*, which is to collect junk, and to use equipment upon the premises to cut, sort and process junk. Allied also argues that the use of the recycling center in *Arroyo* is in stark contrast to the current and historical use of the property in question. Allied argues that the site has historically been used as an auto salvage yard open to the public as well as a property accepting junk. Allied argues that *Marlboro* can be distinguished in that appropriate and significant proofs have been submitted to the Board as to the use of the property as not just an auto-salvage yard.

Allied argues that as a result of the Board's incorrect determination as to the baseline use of the property, the Board also made an incorrect and improper decision with respect to whether or not there has been a substantial change from the property's current use to its historic baseline use. Allied argues that the Board bases its decision of a substantial change on the fact that the property is now a recycling center, as defined in the *Mayor* and *Arroyo* cases above. Allied argues that its use of the property is not as a recycling center, but as a junkyard as it has historically been used.

As to the Board's position that Allied must seek a use variance, Allied argues that the Board's incorrect determination as to the baseline use of the property taints the entire application process. Allied argues that the Board's insistence on defining the use incorrectly as a scrap metal recycling center colors its legal analysis. Allied argues that there currently exists on the property a well-defined and factually determined junkyard. Allied argues that it is not proposing the establishment of a scrap-metal recycling business. Allied argues that the above notwithstanding, it provided sufficient expert testimony satisfying both the positive and negative criteria for the granting of the requested variance.

Allied argues that the Board makes no mention of the Board's failure to attempt to mitigate any expansion of the use through the use of Site Plan constraints. Allied argues that in this matter, where the issues raised by adjacent neighbors and the Board professionals were all development issues, it would be incumbent upon the Board not to treat this matter as a bifurcated application but to attempt to mitigate any alleged concerns by way of Site Plan controls so as to change the property from a junkyard that is aesthetically unappealing to a site with proper controls. Allied argues that in *Arroyo,* cited by the Board, the Court referenced *Burbridge v. Mine Hill,* 117 *N.J.* 376, 378 (1990), where the Court found that the benefits of allowing the application in order to clean up "a sprawling and unsightly mess" outweigh the detriments of allowing the applicant to expand a pre-existing non-conforming auto salvage business. Allied argues that in his Tentative Disposition, Judge Bookbinder also advised the Board to consider whether aesthetic conditions could be applied to minimized the impact of any alleged change.

Standard of Review

Appeals from an action by a planning board are reviewable for arbitrary, capricious, or unreasonable decisions. *Cell v. Zoning Bd. of Adjustment*, 172 N.J. 75, 81-82 (2002); *Burbridge*

v. Mine Hill Twp., 117 N.J. 376, 385 (1990). Factual determinations made below are presumed to be valid, and any applications of discretionary authority based upon factual determinations will not be overturned unless they are arbitrary, capricious, or unreasonable. The burden of proof rests on the movant. *Cell*, 172 *N.J.* at 81-82. Legal decisions, such as the proper legal standard to be applied to the facts, are reviewed *de novo*. *Nuckel v. Borough of Little Ferry Planning Bd.*, 208 *N.J.* 95, 102 (2011); *Green Meadows at Montville, L.L.C. v. Planning Bd. of Tp. of Montville*, 329 *N.J. Super.* 12, 24 (App. Div. 2000). The arbitrary and capricious standard is analogous to the substantial evidence standard. Cox & Koenig, *New Jersey Zoning & Land Use Administration*, § 42-3.1, p. 890 (2015). *Cell,* 172 *N.J.* at 89.

In the hearing below, the burden of proof rested on Allied by the preponderance of the evidence. *S&S Auto Sales, Inc. v. Zoning Bd. of Adjustment for Borough of Stratford*, 373 *N.J. Super.* 603, 614 (App. Div. 2004). "It is important that the evidence presented to the board establish exactly what the use was at the time of adoption of the ordinance, its character, extent, intensity, and incidents." Cox & Koenig, *New Jersey Zoning & Land Use Administration*, § 27-2.2, p. 580 (2015). "A nonconforming use is not restricted to the identical particular use which was in existence at the time of the enactment of the zoning ordinance, but embraces the same or substantially similar use within the zoning classification." *Arkam Machine & Tool Co. v. Lyndhurst*, 73 *N.J.* Super. 528, 532 (App. Div. 1962). *See also Pugh v. Zoning Bd. of Adjustment*, No. A-5590-08T2 (App. Div. Apr. 16, 2010) (slip op. at 1). However, the scope of the non-conforming use should be strictly limited, and reduced "to conformity as is compatible with justice." *Belleville v. Parrillo's Inc.* 83 *N.J.* 309, 315 (1980).

Judicial review is intended to be a determination of the validity of the agency's action, not substitution of the court's judgment therefor. Cox & Koenig, *New Jersey Zoning & Land Use*

Administration, § 42-3.1, p. 890 (2015); *CBS Outdoor v. Lebanon Plan. Bd.*, 414 *N.J. Super.* 563, 578 (App. Div. 2010); *Rocky Hill Citizens v. Planning Bd.*, 406 *N.J. Super.* 384, 411-412 (App. Div. 2009); *Fallone Prop.. v. Bethlehem Plan Bd.*, 369 *N.J. Super.* at 561.

Findings of Credibility and Fact Relating to Baseline Use Rights of the Property

The Board found that auto-salvage use alone was the primary business undertaken at the Property in 1982, and that any other activity, including the dumping of junk materials and the recycling of scrap-metal was only "sporadic" and "anecdotal" and not giving rise to the establishment of any property right under *N.J.S.A.* 40:55D-68. *Southampton Planning Board Resolution* 2014-8Z. The Board further found that Allied failed to meet its legal burden of proof to establish that scrap-metal recycling was a lawful and continuous nonconforming use right "business activity" at the property in 1982. Allied argues that the Board's resolution finding that the 1982 baseline nonconforming use rights of the Site is auto salvage use only is contrary to the facts presented.

1. Baseline Rights Hearing, July 10, 2014

a. Gary Civalier

Allied presented testimony by the Plaintiff's engineer, Gary Civalier [*hereinafter* Civalier], its traffic expert, Alexander Litwornia [*hereinafter* Litwornia], owner Tom Gabryziak [*hereinafter* Gabryziak], and three individuals with knowledge of the historical activities on the Site, Fred Myers, Michael Evans, and David Blyler.

Civalier provided testimony concerning aerial photographs from 1970, 1995, 2002, 2007 and 2014. Civalier testified that the aerial photo from 1970 depicts materials on the Site extending beyond the current boundaries of the Site. [7/10/14T 9:11-18]. Civalier testified that

there was some non-auto material on the ground according to his assessment of the 1970 photo. [7/10/14T 19:13-15]. Cavalier was never on the site himself prior to 2010. [7/10/14T 13:8-11].

The Court finds that Civalier's testimony did little to assist in establishing the baseline use rights of the site prior to 1982, given the low quality of the photographs. However, the Court finds credible Civalier's testimony that the present day operation occupies less land than the 1982 Site, which is uncontroverted by the Board.

b. Litwornia

Litwornia, the traffic expert retained by Allied, presented testimony about a traffic study that he performed to determine the capacity of New Road, the road upon which the junkyard is situated. Litwornia's testimony goes to the present traffic on New Road and the road's traffic capacity, rather than the establishment of baseline use rights prior to 1982. For this reason, the Court will withhold discussion of Litwornia's testimony at this time.

c. Fred Meyers

Fred Meyers testified that he owned an alarm company and that he would take refuse or scrap from the alarm company to the site in question from 1973-1998. [7/10/14T 36:2-3]. Meyers testified he brought alarm equipment, cabinets, and conduit from commercial jobs, cable, fire alarms, standby batteries, and hardware to the junkyard. [7/10/14T 36:15-22]. Meyers testified that he went to the Site every couple of months, dropping off the material in his service vans, dumping the material into its designated pile. [7/10/14T 27:6-11]. Meyers testified that the site had piles of steel beams, piles of tiles and piles of any scrap yard, and recycling yard. Meyers testified that they had a large truck with a rig on the back that they used for typical scrap yard related chores, as well as a larger articulated loader. [7/10/14T 39:2-7].

Meyers testified that the material changed constantly; at times there were more piles of material and at other times, more vehicles. Meyers testified that the percentage was fifty-fifty of cars to other materials. [7/10/14T 39:6-10]. Meyers testified that there were 12-foot high piles, and piles of tires higher than 20 feet. [7/10/14T 40:14-23]. Meyers testified that they weighed certain things like cable and copper with a small to medium scale. [7/10/14T 43:19-1 T 44:1]. Meyers testified that you could not drive across the scale. Meyers testified that they had a loader that Poinsett used to drive around, and push material into the piles. [7/10/14T 48:8-10]. Meyers testified that the piles would get loaded onto a large flatbed truck, and the material would go out with the cars. [7/10/14T 48:18-21]. Meyers testified that they had three or four employees working at the site. [7/10/14T 49:10-11].

Meyers also testified that Freeman did not usually buy scrap metal, but would take it. [7/10/14T 47:11-12]. Meyers testified that you pushed the metal scrap cabinets and so forth out into the corresponding pile, and that you weighed copper cable on a small scale. [7/10/14T 47:13-16]. Meyers testified that Freeman would pay him for copper based on weight, but then other material like cabinets, had little value, and he could dispose of them there. [7/10/14T 47:21-25].

The Court finds that Meyers testified consistently and credibly based on his familiarity with the Site that there was non-automotive junk and metal scrap brought to the Site. The Court also finds credible that there was a small to medium scale on the site for measuring material, as well as three to four employees.

d. Michael Evans

Michael Evans testified that he is currently employed at Allied but that he visited the site in question many times prior to 1982 because he was close friends with the Fullers' children.

[7/10/14T 51:21-25; 1T 52:8-10]. Evans testified that he would see piles of tires, cars, and light iron at the Site. [7/10/14T 52:16-17]. Evans testified that there was also heavy steel, aluminum, urinals, washers and dryers. [7/10/14T 53:2-12]. Evans testified that he saw Freeman, Shenny and probably one other man working on the Site, and that Eddie Fuller had two or three men working with him in 1969/1970. [7/10/14T 54:11-13]. Evans testified that they had cars stacked sometimes on top of each other, and they had some small piles of stuff around in different spots. [7/10/14T 55:1-4].

Evans stated, "[w]hen I was younger they would just take out the windows [of cars], bust the windows out and put the light iron in them and smash the cars down and load them up and take the cars out that way and, you know, after they took off what they wanted, transmission or whatever. And then later on when Eddie Fuller left, Freeman had a loader and he used to use the loader." [7/10/14T 55:14-21]. Evans testified that "you'd put three [cars] on like a six point truck and haul them over to Trenton and Camden." [7/10/14T 55:1-3]. Evans testified that they had a boom truck with a winch on it used to lift and load the cars. [7/10/14T 56: 21-24]. Evans testified that he could not state the percentage of auto parts to metal. [7/10/14T 57:19-23]. When asked if cars were the main focus of the scrap yard, Evans testified that "I would guess, yeah, it's possible, but they would get light iron and stuff, you know, come in and that's what they would do with it [load the metal into the cars]." [7/10/14T 62:3-5].

The Courts finds Evans testimony credible based on his familiarity with the Site that there was non-automotive junk and scrap brought to the Site. The Court finds Evans testimony credible that there were likely five workers on the Site. The Court finds that Evans admission that the main focus of the scrap yard was likely automotive scrap lends credence to the fact that the property was also used continuously as a regular junkyard that accepted metal.

e. David Blyler

David Blyler testified that he went to the site many times before 1982 with his grandfather, both to buy and sell materials. [7/10/14T 64:16-24]. Blyler testified that he sold corrugated roofing that came off an old shed to the Site. [7/10/14T 65: 4-6]. Blyler testified that he went to the Site on several occasions before and after 1982, and that he saw huge I-beams, bar joists, and roof trusses. [7/10/14T 66:10-25]. Blyler testified that there were piles at least as high as the ceiling of material back in 1959, 1960, and 1962. [7/10/14T 69:6-9]. Blyler testified that the previous owners of the Site did not have a scale that you drive onto with a car, but that they had a scale about the size of a dining room table. [7/10/14T 69:23-25]. Byliner testified that he could not determine the percentage of the Site was used for car parts as opposed to the rest of the junkyard because the material was always changing. [7/10/14T 76:12-18]. Blyler stated, "They were obviously recycling metals. They paid me for copper that we took in there. There's no question they were recycling metals." [7/10/14T 77:9-11]. Blyler testified that he was paid for copper wire pre-1962. [7/10/14T 70:17].

The Court finds that Blyler testified credibly and in great detail about the auto and non-auto materials on the Site. Blyler admitted that he could not give an accurate percentage about car parts to other materials on the Site, but testified consistently about the non-auto materials that he saw when his grandfather took him there in high school, as well as the existence of a scale for weighing metals.

f. Members of the Public Testifying in Opposition to Allied's Application

Jack Riley testified that back in 1980, 1981, and 1982, there was more than 50 percent cars on the Site because the owner mainly made his money on parts. [7/10/14T 86:25-1T:87:1-2]. Riley testified that the urinals, construction debris and boat were out in the front, which was

approximately half an acre in size, and not in the one to two acres in the back. [7/10/14T 90:1-25].

Pat Topham testified that she moved to the area in 1977 and only saw tow trucks back then, no flatbeds. [7/10/14T 115:17-20]. Topham testified that she did not hear noise back then. [7/10/14T 116:21-22]. Topham testified that she has never been to the Site. [7/10/14T 117:2-3].

Dorothy Chappine testified that she moved to the area in 1961 and saw flatbed trucks going by with the cars on them, but never went to the junkyard. [7/10/14T 118:22-1T 119:2]. Chappine also testified that she could not hear anything back in the 1980's, and admits that she cannot hear anything now either. [7/10/14T 120:6-15].

Patty Travaglio testified that she never heard any noise back when she moved to the neighborhood in 1976. [7/10/14T 121:3-7]. Travaglio testified that she has never been to the site, but she hears noise now. [7/10/14T 121:7-13]. Travaglio testified that she could see trees at the site before, and now the trees are gone. [7/10/14T 122:23-123:9].

Dan Suwak testified that back in 1982 it was a very small operation and it was very quiet. [7/10/14T 128:10-15]. Suwak testified that he has never been to the Site. [7/10/14T 128:6-7].

Nancy King testified that when she would visit family in the area back in 1980 she never heard anything from the site, but she has never entered the property. [7/10/14T 130:1-19].

Stephen Jenkins testified that back in 1980 there was 90 percent cars, 10 percent other material. [7/10/14T 140:5-8]. When asked if he saw debris, wood or other material, Jenkins responded, "I'm not going to say I didn't, but not a lot." [7/10/14T 140:1-2].

The Court finds that the majority of the public that testified, save for two, never entered the Site. Therefore, these individuals could not offer any relevant testimony as to the character of use of the property back in 1982. The Court notes that their testimony may go to the extent,

intensity and incidents of use at the property, but not to the character of use. *See* Cox & Koenig, *New Jersey Zoning & Land Use Administration,* § 27-2.2, p. 580 (2015) (distinguishing between the character, extent, intensity and incidents of the use on the property). In other words, the testimony about noise level of the operation and traffic seen around the Site from residents that never entered the property provide qualitative evidence as to the intensity of the operation back in 1982. This testimony does not establish the existence or absence of materials stored and processed on the Site (e.g. auto parts only as opposed to general junk or metal).

There were two witnesses in the July 10, 2014 hearing that entered the Site and testified in opposition to Allied's application. The Court finds Jack Riley's testimony credible that auto salvage occupied more than fifty percent of the property use, but that the Site also contained non-auto material on the half-acre to the front of the property. The Court also finds credible Stephen Jenkins testimony in which he stated that there was 90 percent cars, and 10 percent other material on the Site.

2. March 14, 2013 Hearing, Testimony Relevant to Baseline Nonconforming Rights

a. Daniel Giberson

Giberson, the predecessor-in-interest of the property, testified that his parents started operating a small-scale junkyard on the property in the early 1960's. [3/14/13T 27:7-20]. Giberson testified that the junkyard opened around five o'clock in the morning, and he hauled cars, aluminum, "metal-wise, junk-wise, it went out of there and he would take that to Camden or Trenton." [3/14/13T 31:7-11]. Giberson testified that he would come back every day five, six o'clock in the morning, load up the trucks gain and bring them back to Vincentown and haul them again – "trucks, cars, metal, junk, whatever." [3/14/13T 31:12-15].

The Court finds Giberson's testimony credible but limited to what was going on at the Site during the 1960's.

Members of the public testified, however, no one spoke to the baseline rights of the property in 1982.

3. <u>September 19, 2013 Hearing, Testimony Relevant to Baseline Nonconforming Rights</u>

a. Michael Ivans

Ivans testified that there was a little bit of everything back when Pointsett was on the property. [9/19/13T 35:9-13]. Ivans testified that he was out of work for a while and he cleaned up items from his parents' house that were laying around such as lawn mowers, any kind of metal of value, piled everything in the back of his pickup and went to the site to sell them. [9/19/13T 36:3-11]. Ivans further testified that he took metal, parts of machinery, part of a Cotter, some washing machines, tires, rims, and an old transmission. [9/19/13T 41:22- 9/19/13T 42:6]. Ivans testified that he took wire fence to the site. [9/19/13T 42:9-10]. Ivans testified that he was on the Site "a few times, couple of times." [9/19/13T 53:5-6].

b. Daniel Giberson

Giberson testified that he visited the site often when he was young. [9/19/13T 54:13-15]. Giberson testified that first his parents operated the site, Eddie Fuller next, then Shenny Pointsett, and finally Freeman Pointsett. [9/19/13T 55:17-21]. Giberson testified that with his parents and grandparents, he would take cars, aluminum, and refrigerators to the site. [9/19/13T 56:11-15]. Giberson testified about the operation before it became a junkyard, stating that "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. . . . That's what started it. That started it. . . . Might have been 20 automobiles back in the day to junk." [9/19/13T 58:6-21].

Analysis

On or about May 23, 2014, this Court entered final judgment remanding the matter to the Board to establish the baseline non-conforming use rights of the property at issue. The Board was to define as specifically as possible, the quality and intensity of the use on June 8, 1982. After making this determination, the Board was to determine whether the present intended use is substantially similar to the historic use.

The Court finds that the Board's determination that the 1982 baseline non-conforming use rights of the Property is "auto-salvage only" is arbitrary, capricious and unreasonable, and not grounded in the record. The Court's holding is limited to the Board's determination of the "character" of the use as "auto-salvage only." The Court finds that the record overwhelmingly reveals that the property was used continuously as an all-purpose junkyard and auto salvage yard that accepted and processed scrap metal.

I. Legal Principles Guiding Judicial Review of Board Determinations relating to Nonconforming Uses of Property

N.J.S.A. 40:55D-68 states, "Any nonconforming use or structure existing at the time of the passage of an ordinance may be continued upon the lot or in the structure so occupied and any such structure may be restored or repaired in the event of partial destruction thereof."

The burden of proving the existence of a nonconforming use is upon the party asserting such use. Cox & Koenig, *New Jersey Zoning & Land Use Administration*, § 27-2.2, p. 580 (2015); *Berkeley Square v. Trenton Zoning Board of Adjustment,* 410 *N.J. Super.* 255, 269 (App. Div. 2009), *certif. den.* 202 *N.J.* 347 (2010); *Bonaventure Int'l v. Spring Lake,* 350 *N.J. Super.* 420, 432-433 (App. Div. 2002); *Ferraro v. Zoning Bd. of Keansburg,* 321 *N.J. Super.* 288, 291 (App. Div. 1999). The evidence presented to the board should establish exactly what the use was at the time of adoption of the ordinance, its character, extent, intensity and incidents. Cox &

Koenig, *New Jersey Zoning & Land Use Administration*, § 27-2.2, p. 580 (2015). It is particularly important in instances such as in the instant matter, where a question has arisen by a new owner who may be seeking to extend or substantially modify the use, that the record contain an ample description of the use as it is protected by the statute. *Id.*

The proper question presented to the board by one seeking a certificate for a nonconforming use is: what was the use which existed on the property in question at the time of adoption of the zoning ordinance? *Id.* at 581. The applicant must show that the use was not sporadic or occasional, whether principal or accessory. Cox & Koenig, *New Jersey Zoning & Land Use Administration*, § 27-1.3, p. 576 (2015); *Paruszewski,* 297 *N.J. Super., supra,* at 531. "[A] nonconforming use may not be established by nebulous and imprecise evidence which indicates at most intermittent use at indefinite times." *Id.* at 538. The use must "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).

As to the Court's role in reviewing board determinations, "[i]nsofar as a decision [of the Board] involves individualized fact finding, a court's review is limited to whether that decision is grounded in "sufficient" or "substantial evidence" in the record. *PADNA v. City Council of Jersey City,* 413 *N.J. Super.* 322, 332 (App. Div. 2010), *certif. den.* 205 *N.J.* 79 (2011).

II. The Board's Determination as to the "character" of the baseline nonconforming rights on the Property is Arbitrary, Capricious and Unreasonable

a. **Introduction**

The Court finds that the Board's determination that the 1982 baseline non-conforming use rights of the Property is "auto-salvage only" is arbitrary, capricious and unreasonable, and not grounded in the record. *See PADNA v. City Council of Jersey City,* 413 *N.J. Super.* 322, 332 (App. Div. 2010), *certif. den.* 205 *N.J.* 79 (2011) ("Insofar as a decision [of the Board] involves

individualized fact finding, a court's review is limited to whether that decision is grounded in "sufficient" or "substantial evidence" in the record."). The Court's holding is limited to the Board's determination of the "character" of the use as "auto-salvage only." The Court finds that the record overwhelmingly reveals that the property was used continuously as an all-purpose auto salvage yard and junkyard that accepted and processed scrap metal. The Court does not take issue with the Board's factual findings, which are presumed valid, however, applications of discretionary authority based upon factual determinations are to be overturned if arbitrary, capricious, or unreasonable. *Cell*, 172 *N.J.* at 81-82.

The Board Resolution explicitly states that the predominant purpose of the operation was auto-salvage, with ancillary acceptance of other junk materials and occasional metal-scrap processing. *Southampton Planning Board Resolution* 2014 8Z. The Court finds that ancillary acceptance of junk materials and the processing of metal-scrap was an existing use of the land that was neither temporary nor sporadic in 1982 based upon precise and credible evidence. *See Paruszewski*, 297 *N.J. Super.* at 665 (stating that the statute protects existing use occupying the land). Specifically, the Board's conclusion finding that the ancillary acceptance of non-auto material to be "sporadic" and "anecdotal" was not supported by the record.

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

b. Analysis

The Board found that "auto-salvage" use alone was the primary business undertaken at the Property in 1982 when baseline nonconforming use rights were established, and that any other activity on the Property, including the dumping of junk materials and the recycling of scrap-metal can only be characterized as "sporadic" and anecdotal." *Southampton Planning Board Resolution* 2014 8Z.The Board found that the testimony put on by Allied's witnesses was rebutted by nearby neighbors. *Id.* The Board also found the evidence pertaining to the 1993 minor subdivision application and approval to be compelling and supportive of a finding that the non-conforming use rights of the Property are limited and restricted to an "auto-salvage yard." The Board also noted that Allied was unable to produce financial records supporting its application for a Certificate of Nonconforming Use.

However, in reviewing the record, the Court finds that the record supports a determination that the property was used continuously as a junkyard and auto-salvage yard that accepted metal scrap. Fred Meyers testified credibly and precisely that he owned an alarm company and that he would take refuse or scrap from the alarm company to the site in question from 1973-1998. [7/10/14T 36:2-3]. Meyers testified that he went to the Site every couple of months, dropping off the material in his service vans, dumping the material into its designated pile. [7/10/14T 27:6-11]. Meyers testified that Freeman would pay him for copper based on weight, but then other material like cabinets, had little value, and he could dispose of them there. [7/10/14T 47:21-25].

Evans testified that he would see piles of tires, cars, and light iron at the Site. [7/10/14T 52:16-17]. Evans testified that back in 1969/1970 there was also heavy steel, aluminum, urinals, washers and dryers. [7/10/14T 53:2-12].

Blyler testified that there were piles at least as high as the ceiling of material back in 1959, 1960, and 1962. [7/10/14T 69:6-9]. Blyler testified that the previous owners of the Site did not have a scale that you drive onto with a car, but that they had a scale about the size of a dining room table. [7/10/14T 69:23-25]. Blyler testified that he was paid for copper wire pre-1962. [7/10/14T 77:9-11].

Moreover, when asked if he saw debris, wood or other material back in 1980, Stephen Jenkins responded, "I'm not going to say I didn't, but not a lot." [7/10/14T 140:1-2].

Jack Riley testified that back in 1980, 1981, and 1982, there was more than 50 percent cars on the Site because the owner mainly made his money on parts. [7/10/14T 86:25-1T:87:1-2]. Riley testified that the urinals, construction debris and boat were out in the front, which was approximately half an acre in size, and not in the one to two acres in the back. [7/10/14T 90:1-25].

The Court finds that the record does not support the Board's finding that this testimony about the use of the property before 1982 was rebutted by nearby neighbors. Pat Topham, Dorothy Chappine, Patty Travaglio, Dan Suwak, and Nancy King acknowledged that they had never entered the site in 1982 or prior. They offered useful testimony as to noise level and traffic conditions, and what they observed around the Site, but could not speak to what the property was used for on the Site in 1982 or prior. Their testimony does not establish the existence or absence of materials stored and processed on the Site (e.g. auto parts only as opposed to general junk or metal).

Nearby neighbor Stephen Jenkins testified that back in 1980 there was 90 percent cars, 10 percent other material. [7/10/14T 140:5-8]. When asked if he saw debris, wood or other material, Jenkins responded, "I'm not going to say I didn't, but not a lot." [7/10/14T 140:1-2]. The Court

finds that this testimony supports Allied's contention that the property was used as a non-auto junkyard, and also goes to the intensity of use.

Jack Riley testified that back in 1980, 1981, and 1982, there was more than 50 percent cars on the Site because the owner mainly made his money on parts. [7/10/14T 86:25-1T:87:1-2]. Riley testified that the urinals, construction debris and boat were out in the front, which was approximately half an acre in size, and not in the one to two acres in the back. [7/10/14T 90:1-25]. Again, this testimony supports the previous testimony that the property was used for a general purpose junkyard that accepted non-auto material.

The Board also found the 1993 minor subdivision application and approval compelling stating that the Resolution "objectively supports a finding that the non-conforming use rights of the Property are limited and restricted to an auto-salvage yard." The Court finds this rationale to be flawed. Resolution 93.8 from the Planning Board did not limit or restrict the use of the property but merely approved a minor subdivision of the lot. The Resolution states that the operation is an "auto salvage operation (commonly referred to as a 'junk yard')." The Approval divided the lot into two, one dedicated to "residential use only and the other dedicated to auto salvage only." The Resolution stated that the Applicant has promised to remove "all junk cars or other salvage related operations from same."

This 1993 Resolution does not establish the 1982 baseline use rights of the property, as it was written eleven years after the date in question and resolved a completely separate application for minor subdivision of the property. The Planning Board does not have jurisdiction to issue certificates of nonconforming use of the land; that power may not be exercised by any other body other than the board of adjustment. *N.J.S.A.* 40:55D-48; *N.J.S.A.* 40:55D-20. Even if considering the Resolution as supporting evidence as to what the property was used for back in 1982, the

Resolution refers to the property as both an auto salvage yard and a junkyard, and also states that "other" salvage related operations will be removed from the residential lot.

The Board also states in the Resolution that the "any other activity on the Property, including the dumping of junk materials and the recycling of scrap-metal can only be characterized as "sporadic" and "anecdotal" . . . . *Southampton Planning Board Resolution* 2014-8Z. The "sporadic" and "anecdotal" language comes from *Paruszewski.* In *Paruszewski,* plaintiff applied to the zoning board for "certification that the use" of a field on his family's farm as an airstrip "existed before the adoption of the ordinance which rendered the use . . . nonconforming." *Id.* at 532. The Appellate Division affirmed the trial court and the Zoning Board's decision refusing to issue the certificate, holding that:

> "Plaintiff's evidence wholly fails to meet the principles of law . . . 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.

In stark contrast to *Paruszewski,* Allied's witnesses testified precisely and credibly. The evidence from the opponents largely went to intensity and extent of the use based upon their observations from outside of the Property. The vast majority of neighbors that testified had never entered the Site, and therefore, could not testify to the "character" of the use. Those resident that had entered the Property admitted seeing non-auto material and general junk of the premise. The Board's determination that the character of the use was auto-salvage only was not based on "substantial evidence," as was the case in *Paruszewski.*

The Court also finds that the testimony from both Allied's witnesses, as well as the nearby residents that entered the Site prior to 1982, established that the property was continuously used as an auto-salvage yard that also accepted non-auto junk and metal scrap. *See State v. Gargiulo,* 103 *N.J. Super.* 140, 146-48 (App. Div. 1968) (explaining that the use to be protected must be of a continuing rather than of an ephemeral nature). The Court finds that the testimony established with specificity and precision the kind of materials continuously accepted on the Site, and how they were processed throughout the years leading up to 1982. The Court acknowledges that Allied was unable to produce financial records or receipts from 1982 or prior supporting, however, there is no case law or statute that requires the production of financial records to support a baseline nonconforming rights determination. *See Paruszewski,* 297 *N.J. Super.* at 538 (stating only that a nonconforming use may not be established by nebulous and imprecise evidence).

The Court finds that the Board's determination that the 1982 baseline non-conforming use rights of the Property is "auto-salvage only" is arbitrary, capricious and unreasonable, and not grounded in the record. The Court finds that ancillary acceptance of junk materials and the processing of metal-scrap was an existing use of the land that was neither temporary nor sporadic in 1982 based upon precise and credible evidence. *See Paruszewski,* 297 *N.J. Super.* at 665 (stating that the statute protects existing use occupying the land). Specifically, the Board's conclusion finding that the ancillary acceptance of non-auto material to be "sporadic" and "anecdotal" was not supported by the record.

The Court's holding is limited to the Board's determination of the "character" of the use as "auto-salvage only." The Court finds that the record overwhelmingly reveals that the property was used continuously as an auto salvage yard and all-purpose junkyard that accepted and

processed scrap metal. The Court makes no determination as to the extent, intensity and incidents of this use, and remands the matter back to the board to reevaluate the quality and intensity of the 1982 use in light of this decision. Upon determining the quality of the use, the Board must then determine whether the intended us is substantially similar to the historic use. The Board may seek additional information from the applicant, or undergo this analysis based upon the evidence already submitted.

Tentative Disposition

The Board's finding is vacated and the case is remanded back to the Board for further evaluation consistent with this opinion.