

LEGAL MEMORANDUM

From: Thomas J. Coleman, III, Esq. (Raymond Coleman, Heinold & Norman, LLP)

To: Southampton Township Zoning Board of Adjustment

RE: Allied Recycling, Inc. - 440 New Road
Application for Minor Site Plan Approval and Use Variance

Date: March 24, 2013

The Zoning Board has requested a legal opinion concerning the application filed by Allied Recycling, Inc., seeking Minor Site Plan Approval with a "D" variance for the purpose of refurbishing facilities at an existing nonconforming use auto salvage yard. Specifically, the applicant is seeking approval for a weight-scale, two-sided sign, refurbishing of two existing buildings and removal of 2,357 square feet of crushed stone in the driveway to restore it to its original condition.

The subject property consists of 12.62 acres and is located in the Rural Development Zone, which permits the following uses: single-family residential dwellings, agriculture, agriculture-commercial, churches, schools, professional offices, public infrastructure, cluster residential development and planned retirement community.

Township records indicate that, by Resolution 93.8, the Planning Board granted minor subdivision approval to Daniel Giberson of Last Chance Auto Salvage, Inc. (Allied Recycling's predecessor-in-interest), subject to findings and an express condition of approval that Lot 36.02 may only be utilized for operation of the existing "auto-salvage yard". Finding #5 Resolution 93.8 states, in pertinent part:

(5) **Applicant's proposal to divide the lot into new lot 36.02 (12.66 acres) and remainder lot 36.01 (21.751 acres) will create two (2) nonconforming lots, one dedicated to residential use only and the other dedicated to auto salvage only.**

Condition #2 of Resolution 93.8 states:

(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);**

The restrictions contained in Resolution 93.8 clearly were imposed to ensure that the non-conforming auto salvage yard would not expand and/or evolve into another use activity prohibited within the RD Zone.

In its present application, Allied Recycling, Inc. describes the current use of the site as a “junkyard/recycling facility”. Moreover, Allied Recycling advertises online that it is in the business of scrap iron and metal. Specifically, Allied Recycling’s webpage advertisement states:

Allied recycles about any product that contains ferrous or non-ferrous metals, including steel, aluminum, iron, lead, brass, copper and copper wire. We also process junk cars, heavy trucks and equipment, buses, trailers, computers, e-scrap wire, and just about any metal.

On its “services” webpage, Allied Recycling states that it purchases batteries, computers, wire, e-scrap, heavy trucks and equipment, in addition to junk cars. On this service webpage, Allied also advertises recycling for corporate services and municipal and government services.

Southampton Township has no records of any development approval, subsequent to Resolution 93.8, allowing for a supplemental change of use, to add a metal recycling business to its existing auto salvage yard business.

Under *N.J.S.A.* 39:11-2, the terms “motor vehicle junk business” or “motor vehicle junk yard” are statutorily defined as “...any business or any place of storage or deposit of two or more unregistered motor vehicles which ... are unfit for reconditioning for use for highway transportation, or used parts of motor vehicles or material which has been part of a motor vehicle, the sum of which parts or material ... would be equal in bulk to two or more motor vehicles....”.

The term “motor vehicle” is defined in *N.J.S.A.* 39:1-1 to include, “all vehicles propelled otherwise than by muscular power, excepting such vehicles as run only upon rails or tracks and motorized bicycles.

Thus, the lawful nonconforming auto-salvaging activities on the subject property should be specifically limited to cars, buses and trucks. Other more “generic” metal recycling activities of scrap metals are not part of an auto salvaging business.

This conclusion also finds direct support in the New Jersey decisional law interpreting pre-existing nonconforming uses.

In *Township of Fairfield v. Likanchuk’s*, 274 *N.J. Super.* 320 (App. Div. 1994), the Appellate Court confronted the issue of two disputed nonconforming use activities on a property, an auto salvage yard and a sand and gravel mining operation. The automobile salvage yard predated Fairfield Township’s adoption of its zoning ordinance in 1969. Then, in 1987, the property owner sought to establish an asphalt/concrete recycling center on the property seeking permits from the DEP and the municipal zoning officer. In 1992, the Township moved to restrain the recycling activity.

In defending the recycling activity, the property owner argued before the Appellate Panel that the “concrete/asphalt recycling is permitted as a continuation of defendant’s automobile salvage

yard, which it describes as a ‘junkyard’. The Appellate Panel squarely rejected this legal argument, concluding:

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

Id. at 331.

Under *Likanchuk’s*, Allied Recycling’s auto salvaging business is a nonconforming use, subject to the restrictions imposed by *N.J.S.A.* 40:55D-68. **The addition of a scrap metal business would be a change of use, requiring the granting of a use variance, pursuant to *N.J.S.A.* 40:55D-70(d)(1).** The recycling use activity does constitute an expansion of a nonconforming use, since the metal recycling business is distinct from an auto salvage yard business and, also, is not a permitted use in the RD Zone. Allied Recycling’s metal scrap business may substantially broaden its existing auto salvage business, in terms of creating a larger customer base, raising concerns with increased traffic to-and-from the site, intensity of industrial use of the property, and the potential for other significant site plan impacts.

The Appellate Court’s decision in *Saadala v. E. Brunswick Zoning Bd.*, 412 N.J. Super. 541 (App. Div. 2010), further supports the proposition that a (D)(1) use variance is required for any unapproved recycling activities. In *Saadala*, the Appellate Panel found that an application for redevelopment to replace two nonconforming uses (i.e. a convenience store and gasoline station) with a combined 7-Eleven convenience store with retail gas-pumps (i.e. a mini-mart) did not constitute an expansion of a nonconforming use, but rather was a “new use”, triggering the more onerous proofs of a (D)(1) use variance.

In so ruling, the Appellate Panel concluded that a substantial change in use to a pre-existing nonconforming use must be treated as a “new use”. In so finding, the Court analyzed *N.J.S.A.* 40:55D-68, which seeks to promote the planning goal of zoning uniformity through rigorous restriction against any substantial change to a nonconforming use. The policy goal is for a nonconforming use to eventually “wither and die” as the nonconforming use becomes obsolete. The Appellate Panel concluded:

When a landowner proposes to make a substantial change in a nonconforming use, such as the change from use as a restaurant to use as a discotheque involved in *Perillo’s*, the application to authorize this change often will be made because the existing use is no longer physically or economically viable and thus is not “thriving.” In such circumstances, there is a greater likelihood that “the nonconforming use wither and die” if the application is denied than where an applicant only seeks authorization for expansion of an existing use.

Here, it seems quite clear that Allied Recycling's business goal is to supplement and evolve its business from nonconforming auto salvage to a "new" metal recycling business. Such change does not constitute a modernization of an auto salvage yard business, but rather attempt to transition from one type of nonconforming use to another new "non-permitted" use, which triggers the need for a (D)(1) use variance.

CONCLUSION

Allied Recycling must present proofs meeting the more rigorous requirements of approval for a (D)(1) use variance, if it wishes to pursue the lawful continuation of its recycling use activities.

Allied Recycling may pursue approval of the weight scale, two-sided sign and refurbishing of the two existing buildings as an expansion of a nonconforming use, if it demonstrates such improvements are needed for its nonconforming auto salvage business.