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VIA: REGULAR MAIL

January 13, 2017

Filing Intake-Law Division  
Burlington County Superior Court  
Burlington County Courts Facility  
49 Rancocas Road  
Mt. Holly, NJ 08060

RE: Allied Recycling, et al. v. Southampton Township Zoning Board of Adjustment  
Docket No. BURL-L-001390-16  
Letter Brief in Opposition

Dear Sir or Madam:

This office represents Allied Recycling, et al., the Plaintiff in the above matter. Enclosed please find Plaintiff's letter brief in Opposition to the Trial Brief of Defendant Southampton Township Zoning Board of Adjustment.

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

Respectfully submitted,

  
MICHAEL S. RIDGWAY, ESQ.

MSR:bms

Enclosure

c: The Honorable Ronald E. Bookbinder, A.J.S.C. via regular mail (w/encl.)  
Christopher J. Norman, Esq. via regular mail (w/encl.)  
Mr. John Gabrysiak via email  
Mr. Thomas Gabrysiak via email

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January 13, 2017

**"VIA: REGULAR MAIL"**

Burlington County Superior Court  
Attn: The Honorable Ronald E. Bookbinder, A.J.S.C.  
Chambers 703, 49 Rancocas Road  
Mount Holly, New Jersey 08060

RE: Allied Recycling Inc./Last Chance Salvage Inc.  
vs. Township of Southampton Zoning Board of Adjustment  
Docket No.: BUR-L-001390-16

Dear Judge Bookbinder:

Regarding the above referenced, please accept this Letter Brief in lieu of a more formal reply brief to Defendant Township of Southampton Zoning Board of Adjustment's ("Board") Trial Brief. The headings of the paragraphs below will correspond with the headings of the Defendant's Trial Brief.

**PRELIMINARY STATEMENT**

While Defendant's counsel does not wish to "rehash" the entire prerogative writ litigation history in this matter, Plaintiff feels it is of critical importance in that the prior history demonstrates the Board's inability, unwillingness or refusal to follow the Court's prior ruling(s). Counsel for the Board that Steven Jenkins was a witness for Allied when, in fact, Jenkins was a member of the public who spoke in opposition to Allied's application. Another opposition witness was Jack Riley who stated that although auto salvage occupied more than fifty percent of the use the Site also contained non-auto material on the half-acre to the front of the property. An Allied witness, Fred Myers, testified the percentage of cars to other materials fifty-fifty. The Court found the testimony of Fred Myers consistent and credible. See, Allied's Trial Exhibit "G".

Counsel for the Board introduces a legal memorandum (Exhibit "2" of Norman certification) dated May 11, 2016, the day before the Board both voted on and adopted the two Resolutions that are the subject of the action. This memorandum, which has never been introduced into evidence, raises several concerns.

First, it references an earlier memorandum which has not been introduced as yet. Counsel for Plaintiff would request a copy of said earlier memorandum. Second, this legal memorandum is dated May 11, 2016, only one day prior to the scheduled hearing date. This hardly gives Board members "full opportunity to fully review, and revise the Board's draft Resolutions, prior to their memorialization, in accordance with law," as claimed in Defendant's brief.

Third, and most problematic, the memorandum contains false statements. Counsel for Plaintiff was never advised by counsel for the Board of the hearing date. Counsel for Plaintiff only became aware of the hearing date during his discussion with the Board Secretary. See attached letter dated May 9, 2016 to counsel for Defendant Board.

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TO FILER

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## **COUNTERSTATEMENT OF FACTS AND PROCEDURAL HISTORY**

The Court's August 21, 2015 Tentative Disposition held that the Board's 1982 baseline non-conforming use determination that Allied's rights are limited to "auto-salvage" only was arbitrary and capricious and not supported by the record. The Court found 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" (underline added). The Court then directed the Board to reevaluate the quality and intensity of the use in light of this decision and then determine whether the intended use is substantially similar to the historic use.

With this directive in hand, the Board adopts Resolution 2016-6, limiting the use at the Site to auto-salvage only and scrap recycling equal to no greater than 10% of the business activity in terms of revenue, with no pre-existing all-purpose junkyard rights. The Resolution completely ignores the Court's ruling that the evidence submitted by Allied proved the prior use of an all-purpose junkyard as well as an auto salvage yard.

With the adoption of Resolution 2016-6, Resolution 2016-9 is fatally tainted. The Board is now being asked to vote on a (D)(2) variance to change the use from an auto salvage yard with a 10% recycling component to an auto salvage yard with a 50% recycling component when, in fact, the request should be to allow an auto salvage yard and full service junkyard with a recycling component to increase that recycling component. That fact notwithstanding, the Board, in making its decision, relied on facts that were never part of the record (See paragraph 8 C, D, E, etc.)

## **LEGAL ARGUMENT**

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

As stated earlier, beside the incorrect statements contained in the solicitor's May 11, 2016 memorandum, the Board members had little, if any, opportunity to review the extensive Resolutions, inasmuch as the memorandum was drafted only one day prior to the hearing date.

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

Again and, as stated earlier, the Board did not comply with the Court's ruling finding the Site was used as an auto salvage yard and full-service junkyard with a recycling component. The second bullet point states the Board found the nonconforming use rights are restricted to auto-salvage and 10% scrap metal, with no mention of the nonconforming full-service junkyard use found by the Court. Further, and as will be discussed later, there is no creation of a second use on the Site. There are three components to any full service junkyard site: auto salvage, all-purpose

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junkyard and recycling. The percentages of any one of the three components fluctuate depending on numerous variables.

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

#### **A. Standard of Review-Baseline Nonconforming Use Rights.**

The Court decided the Site's nonconforming use rights already consisted of auto salvage, and full-service junkyard that recycled materials. The matter was remanded to the Board to determine the quality and intensity of the above 1982 three components of the Site.

#### **B. Legal Analysis-Baseline Nonconforming Use Rights.**

Paragraphs 3a-f of Resolution 2016-6 ignore significant testimony found credible by the Court. Specifically, the testimony of Fred Myers, who stated there was a fifty-fifty split between auto salvage and other materials and Jack Riley, who stated to a significant non auto salvage use at the Site. Further, the continuing claim that a non-electrical scale versus a drive on scale is a determining factor is improper. Also, the Board's Resolution 2016-6, F7 states the new, larger scale allows for "greater efficiency and in significantly larger quantities" than the prior scale. This point was made many times during the several hearings regarding this application and the Board placed great weight on the scale in making its decision. However, an increase of intensity alone, without change to the nature or geographical footprint of the use, is insufficient to constitute a substantial change. *State v. Wagner*, 81 N.J. Super 206, 210 (Ct. Ct.1963)(cited approvingly by *Nuckel v. Borough of Little Ferry Planning Bd.*, 208 N.J. 109-119 (2011)).

#### **C. Distinguishing Junkyards from Recycling Centers.**

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. As testified to on several occasions by Allied and its witnesses, although calling itself Allied Recycling, it intends to retain the auto salvage yard and all purpose junkyard as it has historically been used, notwithstanding the limiting determination and definition imposed by the Board. The Mayor case 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." This is exactly the historical and current use of the Allied's Site. The term "recycling center", as defined in the Mayor case and referenced in Defendant's brief, does not apply to Allied's use of the Site. The recycling center defined in the Mayor case (and as quoted in Defendant's brief), used the property solely as a shipping station, and the use of the site for the storage of said materials was

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only as an incident to the primary use of shipping the materials elsewhere. In further contrasting junkyards to the business of scrap metal recycling, and citing the Grace case, the Supreme Court in Mayor stated the property “.. Is not intended to devote the premises, nor has such use been made of them, to the cutting, sorting, treatment or processing of the scrap metal..... There is no equipment upon the premises except an electro – magnet crane used for the lifting of the metal pieces to the moored vessel.” In contrast, the above description as found in the Grace case is exactly how the property has and will continue to be used: to collect junk (whether it be cars or other junk), as defined above and to use equipment upon the premises to cut, sort and process said junk.

The same analysis above can be applied to Arroyo. In Arroyo, the recycling center accepted only ferrous and non-ferrous scrap metal at the site, nothing else. In fact, although Arroyo would accept junked automobiles, they would be immediately transported to another location where they would be drained of fluids and crushed. They would then be returned to the site, placed on railroad cars and shipped out-of-state. There were to be no junked automobiles stored on the premises nor would any auto parts be sold to the public at that location. That use is in stark contrast to the current and historical use of the Site in question. As stated above, and as explicitly testified to, the Site has historically been used as an auto salvage yard and all-purpose junkyard open to the public as well as a Site accepting junk, as defined in the Mayor case, above, and using equipment to cut, sort, and process said junk at the premises.

Finally, Marlboro can be distinguished in that appropriate and significant proofs had been submitted to the Board as to the use of the property as not just an auto – salvage yard.

#### **D. Standard of Review- Substantial Similar Use/Continuation of Nonconforming Use.**

As stated earlier, because the Board incorrectly determined the baseline use of the property (auto salvage only with 10% recycling v. auto salvage and full-service junkyard with recycling), the “substantially similar” determination by the Board is fatally flawed. That fact notwithstanding, Judge Bookbinder, in his Tentative Disposition dated April 10, 2014 (see Plaintiffs Exhibit “B”), outlined several relevant factors to determine whether there is a substantial change in use. Allied 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 the Allied would retain the geographical boundaries set by the 1993

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subdivision. Further, although Allied was not allowed to provide significant testimony as to the Site Plan submitted by Allied, a representative of Allied testified that it was willing to limit the height and visual impact of the material stored at the Site, the quantity and weight of traffic to and from the Site and limit the number of employees at the Site. Finally, citing *State v. Wagner*, Judge Bookbinder stated “While the quantity and weight of traffic to and from the Yard, the number of employees working at the yard, and the overall effect of the change of the neighborhood are relevant, they are not determinative factors.”

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

Again, Resolution 2016-6 ignores the Court’s ruling by stating in Paragraph 1 that the historic use is auto salvage only and 10% recycling, ignoring the Court’s finding of a full-service junkyard. Also, the Board continues to refer to an earlier Resolution 2014-11, a Resolution that was improper and remanded. Reviewing Paragraph 8 of that Resolution the Board, as a basis for the denial of the relief requested, continues to claim there are now 2 primary uses on the Site when the Court, in its current ruling, states the historic, nonconforming use consists of the auto salvage yard, the full-service junkyard and the recycling component.

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

The Board’s vote on the (D)(2) variance is fatally flawed because they were voting on an incorrect premise. Based upon the earlier, incorrect, Resolution (2016-6), the Board determined the baseline use of the property was solely an auto salvage use with a 10% recycling component. This was incorrect as the Court had earlier ruled the nonconforming use was an auto salvage yard, and a full-service junkyard with a recycling component. Thus, the Board voted on a Resolution that was incorrectly drafted. Further the Board’s detailed reasoning for denying the expansion of the nonconforming use is flawed as well. Paragraphs 8B-F are all based upon suppositions not found in the record.

Furthering the argument contained in Plaintiff’s Trial Brief, the Board makes no mention of the Board’s failure to attempt to mitigate any expansion of the use by the use of Site Plan constraints. 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 treat his matter as a bifurcated application but 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. A quick look at the 1970 aerial photograph and the 2014 aerial photograph (submitted as Exhibits 7-10-1 and 7-10-5 at the July 10, 2015 Zoning Board hearing)

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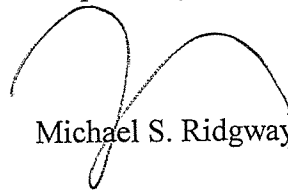
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will bear this out. It is interesting to note that, in the Arroyo case, cited by the Board, the Court referenced Burbridge v. Mine Hill, 117 N. J. 568 A.2d 527 (1990), where the Court, taking a pragmatic approach, found that the benefits of allowing the application 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 Id. At 378.“ This was noted by the Court even though, in Arroyo, the application was for a (D)(1) variance. Judge Bookbinder, in his Tentative Disposition, also advised the Defendant Zoning Board, referencing Burbridge, to consider whether aesthetic conditions could be applied to that minimize the impact of any alleged change.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Michael S. Ridgway', with a stylized, flowing script.

Michael S. Ridgway, Esquire

MSR:bms

Enclosures

c: Christopher J. Norman, Esquire (via: regular mail and email)

Thomas Gabrysiak, Allied Recycling, Inc.(via: email)

John Gabrysiak, Allied Recycling, Inc. (via: via email)

**RIDGWAY & STAYTON, L.L.C.**  
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May 9, 2016

VIA: FAX and REGULAR MAIL

Raymond Coleman Heinold Norman LLP  
Attn: Christopher J. Norman, Esq. and Thomas J. Coleman III, Esq.  
325 New Albany Road  
Moorestown, NJ 08057

RE: Allied Recycling, Inc./ Last Chance Salvage  
vs.  
Southampton Township Zoning Board

Dear Mssrs. Norman and Coleman:

Regarding the above referenced, please allow this letter to serve as my recollection of recent events surrounding this matter and the conversation I had with Mr. Norman last week.

I had received calls from Ms. Hannah, the Southampton Township Zoning Board Secretary, over the past couple of weeks. She contacted me to advise me that the applicant, Allied, needed to replenish its escrow account. She advised me that the escrow funds had to be paid inasmuch as the Allied matter was scheduled for an upcoming Zoning Board meeting.

Not having received any notice of such a meeting from any third party affiliated with Southampton Township, I put a call into Mr. Coleman. On Mr. Coleman's behalf, Mr. Norman did call me back and advised me that the subject matter was scheduled for a discussion by the Board members and professionals only and vote by the Zoning Board on Thursday, May 12, 2016. Further, we discussed the fact that the Zoning Board, consistent with Judge Bookbinder's rulings on both August 21, 2015 and January 12, 2016, upon remand, is to reevaluate the quality and intensity of the 1982 use in light of the Judge's decision. Upon determining the quality of the use, the Zoning Board is then to determine whether Allied's current, proposed use is substantially similar to the historic use. Judge Bookbinder, in both of his opinions, did state that the Zoning Board may seek additional information from Allied or undergo this analysis based upon the evidence already submitted.

From my discussion with Mr. Norman, he has stated that the Zoning Board is going to undergo this analysis based upon the evidence already submitted and that the Zoning Board will not be taking any further testimony from any third party with respect to this matter. Based upon that representation, I will not be in attendance at the Zoning Board hearing this coming Thursday when the Zoning Board will make its decision. A representative of my client has indicated that he may attend. In any event, my client has retained the services of a court stenographer to transcribe the Zoning Board's discussion and vote on this matter.



Upon receipt of this correspondence, please contact me if you feel that any of the above information is not consistent with the information I received from both the Zoning Board Secretary and/or Mr. Norman.

Thank you.

Very truly yours,

MICHAEL S. RIDGWAY, ESQ.

MSR:bms  
Enclosures

Ms. Sheri Hannah, Southampton Township Zoning Board Secretary, via fax (609.859.1394)  
Thomas Gabrysiak via email  
John Gabrysiak via email