Exhibit G

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(NOTE: The status of this decision is **Unpublished**.)

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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-6137-08T26137-08T2

MARLBORO AUTO WRECKERS,

MORGANVILLE AUTO WRECKERS

and SCHECHTER ENTERPRISES,

Plaintiffs-Appellants,

v.

ZONING BOARD OF ADJUSTMENT

OF THE TOWNSHIP OF MARLBORO,

COUNTY OF MONMOUTH,

Defendant-Respondent.

Argued January 27, 2010 - Decided

Before Judges Axelrad, Sapp-Peterson and Espinosa.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-4357-08.

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

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

PER CURIAM

In this action in lieu of prerogative writs, plaintiffs Marlboro Auto Wreckers, Morganville Autowreckers and Schechter Enterprises appeal from the judgment entered in favor of the Marlboro Township Zoning Board of Adjustment (the Board) which

determined that plaintiffs' non-automotive scrap metal operations on three junkyard facilities were not a permitted use and did not constitute a pre-existing and non-conforming use. We affirm.

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

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

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

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

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

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

The same section defines a wholesale junk dealer as:

> A person who buys and sells junk in large quantities and who maintains a warehouse, yard or other place of

> business where discarded articles and materials of every description are purchased or collected in large quantities and are permitted to accumulate[.]

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

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

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

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

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

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

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

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

The Board members voted six to one to deny Schechter's request that the Ordinance be interpreted to find that its activities as a non-automotive loose scrap metal junkyard are a permitted use or alternatively, a pre-existing non-conforming use. The Board adopted

a resolution that listed the exhibits reviewed and the reasons for the Board's findings, which are summarized as follows.

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

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

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

The Board also found that Schechter failed to establish a lawful, pre-existing non-conforming use, stating that the evidence showed that use "for the general collection,

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

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

POINT I

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

A. THE APPELLATE STANDARD OF REVIEW.

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

POINT II

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

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

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

2. THE CHANGE IN THE TOWNSHIP'S

APPLICATION AND LICENSE FORM DOES NOT DEFEAT SCHECHTER'S RIGHTS AS A PERMITTED USE.

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

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

POINT III

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

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

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

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

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

POINT IV

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

POINT V

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

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

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

Although we review legal issues de novo, "we may give substantial deference to a municipal agency's interpretation of its ordinances where that decision is informed by knowledge of local circumstances and is combined with enforcement responsibility." Wyzykowski v. Rizas, 254 N.J. Super. 28, 38 (App. Div. 1992), aff'd in part, rev'd in part, 132 N.J. 509 (1993). Because planning and zoning Boards are more familiar with local characteristics, the court presumes that a Board's factual determinations are valid, and is not permitted to substitute its judgment for that of the Board. Kramer v. Bd. Adj., Sea Girt, 45 N.J. 268, 296 (1965). Kaufmann v. Planning Bd. for Warren, 110 N.J. 551, 557-58 (1988). A Board's decision will not be upset unless it is shown that it was arbitrary, capricious or unreasonable, or that it violated legislative policies, expressed or implied, in the act governing the agency. Burbridge v. Governing Body of Mine Hill, 117 N.J. 376, 385 (1990).

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

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

In reviewing the evidence of Schechter's activities, the court found that the fact that the operation constituted mainly automotive scrap was supported by Schechter's own testimony that the business was not "heavily into scrap" and that "non-automotive scrap was not a principal business at any of the three sites." In addition, the court found that the scrap metal operations produced only a few receipts and were not reconciled against the percentage of Schechter's operations dealing with automotive scrap metal.

The court also held that the applications for the three locations included "automotive uses alongside generic terms" and that the "name of two of the three locations involved the term 'auto'" which in the court's opinion was a clear indicator of Schechter's "intent to operate primarily as a motor vehicle junkyard." Accordingly, the court found that Schechter's operations clearly matched the description of Article I and therefore, the evidence "support[ed] the Board's finding that the Schechters were never licensed to operate, and cannot now seek to operate," as a non-automotive junkyard under Article II.

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

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

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

business that would require being licensed under Article II."

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

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

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

Affirmed.

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

Ehrym Euneva, LLC v. Keansburg Planning Bd. of Adjustment, 407 N.J. Super. 432 (Law Div. 2008).

(continued)

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I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION