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 THURSDAY, APRIL 10, 2014 AT 2:00 PM.

Allied Recycling Inc. and Last Chance Salvage Inc. v. Township of Southampton Zoning Board of Adjustment
Docket No. BUR-L-2448-13
April 10, 2014

ACTION IN LIEU OF PREROGATIVE WRITS

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Bookbinder, A.J.S.C.

Preliminary Statement

Plaintiffs Allied Recycling Inc. and Last Chance Salvage, Inc. (hereinafter, collectively, "Allied") own a property historically used as an auto salvage yard. Allied seeks a certificate of non-conforming use from the Township of Southampton Zoning Board of Adjustment (hereinafter the "Board"), that permits use of the property as an auto salvage yard and a scrap metal yard. The Board denied the certificate of non-conforming use on the grounds that use as a scrap metal yard was not identical to the historic use as an auto salvage yard. The Board failed to consider whether the new intended use was substantially similar to the historic use, and therefore applied the incorrect legal standard. *Arkam Machine & Tool Co. v. Lyndhurst*, 73 *N.J.* Super.

528, 532 (App.Div. 1962). Therefore the Board's finding is vacated and the case is remanded to the Board for further hearings 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 "Yard"). Tom Gabrysiak is the primary owner of Allied (hereinafter "Gabrysiak").

The Yard 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 Yard was owned by the Giberson family, the Yard 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 the Yard 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 Yard 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, and to date no certificate of non-conforming use has been granted.

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. *Board's Brief*

Exhibit C & D, Norman Certification Exhibit D. Last Chance is owned and controlled by the Gibersons.

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 Yard, 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 Yard or to expand the Yard's footprint.

Allied began leasing the Yard sometime in 2009 or 2010. Allied alleges that while leasing the Yard, 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 Yard 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 Yard 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 recommendation.

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 Resolution No. 2013-10. *Allied's Exhibit A.* The Board found that Allied failed to meet its burden of proof because the Yard's current use as an all-purpose junkyard was not identical to the Yard'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 Yard.

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

Arguments

I. Allied's Brief

Allied argues that the Board's denial was arbitrary, capricious, and unreasonable. Allied argues that its application was for a non-conforming use existing prior to the adoption of the inconsistent zoning ordinance, pursuant to *N.J.S.A.* 40:55D-68 & 55D-5. Allied argues that such uses can be continued under *Kessler v. Bowker*, 174 *N.J. Super.* 478 (App. Div. 1979). Allied admits that it bears the burden of proving the nature of the use at the time of the adoption of the inconsistent zoning ordinance. Allied summarizes the prerogative writs standard of review.

Allied argues that the issue here is whether the current use is substantially similar to the historic use. Allied argues that the Yard was historically used as an all-purpose junkyard. Allied cites to *Arkam Machine & Tool Co. v. Lyndhurst Tp.*, 73 *N.J. Super.* 528 (App. Div. 1962). Allied admits that illegal expansions are not permitted absent a variance under *Weber v. Pieretti*, 77 *N.J. Super.* 423 (App. Div. 1962). Allied argues that the Board applied the incorrect standard by requiring identical prior and current uses.

Allied briefly summarizes the precedent on impermissible expansions of non-conforming use, citing to *Belleville v. Parillo's, Inc.*, 83 *N.J.* 309 (1980), *Hantman v. Randolph Twp.*, 58 *N.J. Super.* 127 (App. Div. 1959), and *Barbarisi v. Bd. of Adjustment, City of Patterson, etc.*, 30 *N.J. Super.* 11, (App. Div.). Allied also briefly summarizes the precedent on permissible expansions of non-conforming use, citing to *State v. Wagner*, 81 *N.J. Super.* 206 (Cty. Ct. 1963), *Institute v. Board of Adjustment*, 270 *N.J. Super.* 396 (Law Div. 1993), and *Stout v. Mitschele*, 135 *N.J.L.* 406 (Sup. Ct. 1947).

Allied argues that the instant case is distinct from all of the prior precedent due to the fact that Southampton has an ordinance that defines a junkyard, as well as an ordinance that defines

the use of a junkyard. Allied argues that the current use is both consistent with the Southampton ordinances and substantially similar to the historic use.

Allied also cites to *Marlboro Auto Wreckers v. Zoning Board or Adjustment*, Docket No. A-6137-08T26137-08T2 (App. Div. Jan. 27, 2010) (slip op.). Allied summarizes the facts and holding of *Marlboro Auto Wreckers*, which upheld defendant zoning board's denial of plaintiff junkyard's non-conforming use application. Allied argues that the instant case is distinct form *Marlboro Auto Wreckers*, as in *Marlboro Auto Wreckers* the town provided licenses for either automotive junkyards or non-automotive junkyards, while here Southampton permits both uses under the same license. Allied also argues that, unlike in *Marlboro Auto Wreckers*, Allied provided significant testimony and exhibits regarding the previous non-automotive junkyard use.

Allied reiterates that the Board applied the incorrect standard. Allied argues that the Board required the current use to be identical to the prior use. Allied argues that the proper standard is whether the uses are substantially similar.

Allied reiterates that the Southampton ordinances do not distinguish between a junkyard and an auto salvage yard.

Allied argues that it is permitted to deviate from historic proportions of auto, wood, and scrap metal processing.

Allied argues that the Board ignored the uncontroverted testimony of Allied's witnesses. Allied argues that the Board accepted the testimony of Allied's expert as probative and credible, but nevertheless denied the application.

Allied argues that the Board was influenced by the testimony of neighboring residents regarding signage, visibility, lighting, traffic, and noise. Allied argues that the Board did not find that current use was more intense than the prior use. Allied argues that these issues are irrelevant,

and should instead be addressed as aspects of the application for a use variance to expand the non-conforming use.

II. The Board's Reply

The Board argues that Allied's non-conforming use is limited to use as an auto salvage yard, rather than as an all-purpose junkyard. The Board argues that the testimony of Allied's witnesses was imprecise and nebulous on the topic of whether the Yard recycled scrap metal. The Board argues that the neighboring residents testified that the use of the yard changed dramatically in 2009. The Board argues that it found the residents' testimony to be credible. The Board cites to *Paruszewski v. Twp. of Elsinboro*, 297 *N.J. Super.* 531, 538 (App. Div. 1997).

The Board argues that Allied failed to meet its evidentiary burden. The Board argues that Allied had to demonstrate that the Yard operated continuously as an all-purpose junkyard since 1982.

The Board argues that Southampton Planning Board Resolution 93.8 found the Yard to be an auto-salvage yard only. The Board notes that the Gibersons did not challenge that finding.

The Board argues that Allied witnesses testified that in 2009 and 2010, Allied removed thousands of tires from the Yard. The Board argues that this is consistent with use for auto salvage alone. The Board argues that this cleanup is also evidence of Allied's intent to expand and intensify the use of the Yard.

The Board argues that the junkyard licenses, which do not distinguish between all-purpose junkyards and auto salvage yards, do not affect the scope of the non-conforming use. The Board cites to *Nickels v. City of Wildwood*, 141 *N.J.* 261 (1995), and *Avalon Home & Land Owners v. Bor. of Avalon*, 111 *N.J.* 205 (1988), for the proposition that a municipality cannot legislate the scope or expansion of a non-conforming use.

The Board summarizes the facts and holding of *Marlboro Auto Wreckers v. Zoning Board or Adjustment*, Docket No. A-6137-08T26137-08T2 (App. Div. Jan. 27, 2010) (slip op.).

The Board summarizes the facts and holding of *Paruszewski v. Twp. of Elsinboro*, 297 *N.J. Super.* 531, 538 (App. Div. 1997).

The Board argues that the facts here are similar to those in *Paraszewski*. The Board againargues that Allied relies upon nebulous and imprecise testimony. The Board argues that at best the testimony demonstrates that there may have been some sporadic or intermittent scrap-metal recycling.

The Board argues that although Dan Giberson testified about occasional recycling of non-auto refuse, he failed to provide dates, and failed to testify regarding the scope or quantity of material recycled. The Board argues that Dan Giberson was a passive landlord with little knowledge of the day to day operation of the Yard.

The Board argues that Dan Giberson chose the name Last Chance Auto Salvage. The Court notes that Last Chance was incorporated under the name Last Chance Salvage, Inc., although Dan Giberson does refer to it as Last Chance Auto Salvage.

The Board argues that Southampton Planning Board Resolution 93.8 restricted the use of the yard to auto salvage.

The Board argues that Dan Giberson is potentially biased, as Allied still owed him money for the purchase of the Yard. The Court notes that the money owed was not contingent upon award of the certificate of pre-existing non-conforming use.

The Board argues that the testimony of Michael Ivins, one of Last Chance's customers, was similarly sparse, nebulous, and imprecise. The Board argues that Ivins failed to state when he dropped off non-auto refuse.

The Board argues that the record is clear that the Yard was historically used for auto-salvage, and that the scrap metal recycling use only recently began in 2009. The Board argues that this change was concurrent with increased traffic of large tractor-trailers.

The Board argues that the residents testified that they only observed auto salvage being transported to or from the Yard. The Board argues that the residents testified that traffic to and from the Yard increased greatly when Allied took over operation of the Yard.

The Board argues that Allied concedes that the Yard has transitioned the proportion of auto-salvage to scrap metal recycling at the Yard. The Board argues that Allied believes that it can conduct any of the uses described in the junkyard license ordinance, whether or not those uses were pre-existing.

The Board argues that the residents are more credible than Allied's witnesses. The Board reiterates that Allied failed to meet its burden of proof under *N.J.S.A.* 40:55D-68.

The Board again summarizes the facts and holding of *Marlboro Auto Wreckers v. Zoning Board or Adjustment*, Docket No. A-6137-08T26137-08T2 (App. Div. Jan. 27, 2010) (slip op.).

The Board argues that unlike in *Marlboro Auto Wreckers*, Allied did not present any testimony regarding the prior and current ratio of scrap metal recycling to auto salvage. The Board also argues that unlike in *Marlboro Auto Wreckers*, a Southampton Planning Board resolution identifies the prior use as auto salvage alone.

The Board argues that the licensing ordinance does not modify the scope of the prior non-conforming use. The Board argues that under *Nickels v. City of Wildwood*, 141 *N.J.* 261 (1995), and *Avalon Home & Land Owners v. Bor. of Avalon*, 111 *N.J.* 205 (1988), municipal ordinances cannot modify the scope of a pre-existing use.

The Board argues that the instant action is effectively a challenge of Southampton Zoning Board Resolution 93.8. The Board argues that Dan Giberson failed to challenge that resolution, and that Allied cannot now raise a collateral attack on the resolution.

The Board summarizes the facts and holding of *County of Ocean v. Zakaria Realty, Inc.* 271 *N.J. Super.* 280, 288 (1994).

The Board argues that Allied cannot now oppose the restrictions contained in Southampton Zoning Board Resolution 93.8.

III. Allied's Reply

Allied argues that the testimony of Allied's witnesses was not nebulous or imprecise. Allied argues that Dan Giberson and Michael Ivins testified to specific facts that demonstrated that the Yard was used for scrap metal recycling. Allied also argues that Gabrysiak testified that there were over 40,000 pounds of non-auto scrap metal at the Yard prior to Allied's purchase.

Allied argues that Last Chance is incorporated under the name "Last Chance Salvage, Inc.," and is therefore not limited to auto-salvage.

Allied argues that Southampton Zoning Board Resolution 98.3 was for a minor subdivision, and that the Board had no authority to limit the future use of the yard in connection with the resolution. Allied argues that the resolution admits to non-auto salvage at the Yard in the statement, "Applicant shall remove any junk cars, parts, or other salvage operations from [the] new lot." *Southampton Zoning Board Resolution 98.3* at p. 3. Allied argues that the resolution only involves limitations on the geographical footprint of the yard, not on the use.

Allied argues that the instant case is distinct from *Marlboro Auto Wreckers v. Zoning Board or Adjustment*, Docket No. A-6137-08T26137-08T2 (App. Div. Jan. 27, 2010) (slip op.).

Allied argues that the instant case is distinct from *Paruszewski v. Twp. of Elsinboro*, 297 *N.J. Super.* 531, 538 (App. Div. 1997).

Allied argues that the instant case is distinct from *Nickels v. City of Wildwood*, 141 *N.J.* 261 (1995), and *Avalon Home & Land Owners v. Bor. of Avalon*, 111 *N.J.* 205 (1988), as in those cases the municipality passed ordinances well after the non-conforming uses began, and that those ordinance allowed extreme changes to the non-conforming use.

Allied argues that it does not seek to expand the footprint of the use, but rather a certificate of non-conforming use that is consistent with the prior use of the Yard.

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 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).

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*, § 11-

2.2, p. 299 (2014). "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).

Analysis

Allied argues that the Board erred by ruling that historic use of the Yard for non-automotive scrap metal was unsupported by the record, and by disregarding Allied's argument that the current use is not a substantial change from the historic use. The Board erred in failing to consider whether the current use of the Yard for non-automotive scrap metal is a substantially different use than the historic use for automotive scrap metal. Therefore the case is remanded to the Board for further hearings consistent with this opinion.

In *Marlboro Auto Wreckers v. Zoning Board or Adjustment*, Docket No. A-6137-08T26137-08T2 (App. Div. Jan. 27, 2010) (slip op.), plaintiff Schechter owned three auto salvage yards, Marlboro Auto Wreckers, Morganville Auto Wreckers, and Schechter Enterprises. All three yards were operated as pre-existing non-conforming uses. *Id.* at p. 1-2. Schechter requested a permit to install a scrap metal bailer in order to process a greater proportion of non-automotive scrap metal on the property. *Id.* The Marlboro Zoning Board denied the permit, and Schechter appealed. *Id.* at 6.

The appellate court affirmed the Marlboro Zoning Board for the reasons stated in the trial court's opinion. *Id.* at 18. The trial court considered the following facts: (1) Schechter admitted

that the yards were primarily used for automotive scrap; (2) Schechter could only produce a few receipts for non-automotive scrap, and those few receipts were not reconciled with the greater proportion of automotive salvage at the yard; (3) two out of three of the yards were named as auto wreckers, indicating the owner's intent; and (4) the Marlboro Township required separate licenses for automotive salvage and scrap metal processing. *Id.* at 15-16.

Here, as in *Marlboro Auto Wreckers*, the Gibersons primarily used the Yard for auto salvage. While Allied presented some testimony below that local residents would occasionally bring non-automotive scrap to the Yard, Allied presented no evidence of the dates that this scrap was brought to the Yard, and it did not submit any evidence regarding the relative proportion of non-automotive scrap to auto salvage stored in the Yard. [T. 3/14/14 at 31; T. 9/19/13 at 35, 41-42, 56-59, 64.] Allied also produced receipts dated between August 28, 2009, and October 1, 2009, that describe sales and transfers of scrap to other yards. *Allied's Exhibit A-10.* The scrap is described as rolls of aluminum, wood debris, copper, brass, light iron, and steel. *Id.* However, Allied submitted no evidence that the refuse described existed at the yard prior to 1982, and Allied did not reconcile the receipts to the quantity of auto salvage in the Yard. Allied also presented testimony that there was a large quantity of auto salvage at the Yard in 2009, primarily in the form of over 140,000 tires. [T. 3/13/13 at 33-34.] Lastly, Allied presented expert testimony that aerial photography of the Yard taken in 2000 and 2007 show piles of miscellaneous material that are not automobiles. *Allied Exhibit A-2*, [T. 9/19/13 at p. 77-78.] However, Allied provided no evidence that these piles did not consist of dismantled automobiles, and Allied provided no evidence that these piles existed in 1982.

Additionally, although Last Chance was incorporated under the name Last Chance Salvage, Inc., Dan Giberson referred to the businesses that ran the Yard as Last Chance Auto

Salvage, S&P Autos, and S&S Autos. [T. 9/19/13 at 65-66.] The 1993 minor subdivision application filed by Dan Giberson's attorney refers to Last Chance as Last Chance Auto Salvage, Inc. *Board's Exhibit C*. The Board's 1993 resolution approving the subdivision also refers to Last Chance as Last Chance Auto Salvage, Inc., and describes Last Chance as the operator of an auto salvage operation. Southampton Planning Board Resolution 9.38.

However, unlike in *Marlboro Auto Wreckers*, Allied seeks to install a weight scale instead of a scrap metal bailer, and the Southampton licensing ordinances do not distinguish between auto salvage yards and scrap metal yards. Southampton Ordinance §§ 4-4.5, 12-2.3.

The record supports the Board's conclusion that Allied failed to demonstrate that the Yard was historically used for scrap metal prior to June 8, 1982. However, the Board failed to consider whether use as a scrap metal yard was a substantial change in use, and the record does not support a categorical distinction. Unlike in *Marlboro Auto Wreckers*, where Schechter sought to install new scrap metal processing equipment, there is no evidence in the record that conversion to a greater proportion of non-automotive scrap will necessarily include a greater amount of scrap processing. Moreover, unlike in *Marlboro Auto Wreckers*, the Southampton Ordinances do not exhibit any intent by the Gibersons or the Township to distinguish auto salvage from scrap metal.

Rather than considering whether scrap metal was a substantially different use than auto salvage, the Board found that the two uses were non-identical. Southampton Zoning Board Resolution 2013-10 at p. 6. Therefore the Board applied the incorrect legal standard. Insubstantial changes to the non-conforming use are generally permitted. For example, in *Schaible v. Board of Adjustment*, 15 *N.J. Misc.* 707, 709 (Sup. Ct. 1937), the Supreme Court of New Jersey held that a change in the types of material stored in a building is not a substantial

change if the new materials are no more or less detrimental or dangerous to the community. In *Stout v. Mitschele*, 135 *N.J.L.* 406, 409 (Sup. Ct. 1947), the New Jersey Court held that a minor change in a business, namely from a dairy farm to a horse farm, was not a substantial change.

"The focus in cases such as this must be on 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 plan." *Belleville v. Parrillo's, Inc.*, 83 *N.J.* 309, 314 (1980). Here, the record is insufficient as to what the intended change in use from auto salvage to scrap metal will entail. Moreover, the Board did not determine the quality and intensity of the historic use. Therefore the Court must remand the case for further hearings.

First, the Board must set the baseline for the non-conforming use by defining, as specifically as possible, the quality and intensity of the use on June 8, 1982. Then, if the intended use is not consistent with the historic use, the Board must determine whether the intended use constitutes a substantial change.

Relevant factors may include, but are not limited to: (1) the environmental impact of storing scrap metal versus auto salvage; (2) the quantity, type, and weight of processing equipment used at the Yard; (3) whether Allied intends to expand the geographical boundaries of the Yard; (4) the height and visual impact of the material stored at the Yard; (5) the quantity and weight of traffic to and from the Yard; (6) the number of employees working at the yard; and (7) the overall effect of the change on the neighborhood; and (7) the Southampton Master Plan.

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 a nonconforming use.
> [*State v. Wagner*, 81 *N.J. Super.* 206, 210 (Cty. Ct. 1963) (cited approvingly by *Nuckel v. Borough of Little Ferry Planning Bd.*, 208 *N.J.* 95, 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 the change on the neighborhood are relevant, they are not determinative factors.

Additionally, the Board should consider whether aesthetic conditions could be applied that minimize the impact of the change. *See Burbridge v. Mine Hill Tp.*, 117 *N.J.* 376 (1990) (geographic expansion of a non-conforming junkyard is permissible where landscaping and screening improves the visual conformity and impact on nearby residences).

Lastly, Allied argues that it should be permitted to use the Yard in any way that is consistent with Southampton Ordinance definitions of a junkyard. The definitions contained in Southampton Ordinance §§ 4-4.5, 12-2.3, are not relevant to the instant case. "[A] municipality may not by ordinance authorize the expansion of a non-conforming use." *Nickels v. City of Wildwood*, 140 *N.J.* 261, 265 (1995) (citing *Avalon Home & Land Owners Asso. v. Avalon*, 111 *N.J.* 205, 206-08 (1988)). In *Marlboro Auto Wreckers, supra*, Docket No. A-6137-08T26137-08T2 at p. 16, the court considered the municipal licensing ordinances only in so far as they evidenced the historic intent of the owner. Here the historic use of the Yard is narrower and less intense than the use permitted by Southampton ordinances and licensing. Therefore the ordinances neither demonstrate the intent of the historic landowner, nor do they expand the permissible non-conforming use. Therefore Southampton Ordinance §§ 4-4.5, 12-2.3 are not relevant.

Tentative Disposition

For the reasons set forth above, the Board's determination is hereby **VACATED**, and the above captioned case is **REMANDED** for further hearings consistent with this opinion.