

ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF SOUTHAMPTON

RESOLUTION NO. 2014- 8z

CONCERNING THE APPLICATION OF
ALLIED RECYCLING, INC. FOR
CERTIFICATE OF NON-CONFORMING USE RIGHTS,
PURSUANT TO N.J.S.A. 40:55D-68

1

WHEREAS, Allied Recycling, Inc. previously made application to the Zoning Board of Adjustment of the Township of Southampton for Minor Site Plan Approval and Variance Approval {N.J.S.A. 40:55D-70(d)} for property located at 440 New Road, known as Block 2401, Lot 36.02 (the "Property") on the Official Tax Map of the Township of Southampton; and

WHEREAS, the Applicant proposed to install a weight scale and refurbish existing buildings on the Property; and

WHEREAS, the Applicant subsequently amended its Application before the Board to request a Certificate of Non-Conforming Use for its proposed use of the Property, pursuant to N.J.S.A. 40:55D-68; and

WHEREAS, a Certificate of Filing from the New Jersey Pinelands Commission, dated January 2, 2013, was submitted by the Applicant; and

WHEREAS, at its September 19, 2013 Hearing, the Zoning Board of Adjustment denied a Certificate of Non-Conforming Use to the Applicant for its proposed use; and

WHEREAS, the Applicant appealed the Board's denial of a Certificate of Non-Conforming Use and the matter was subsequently remanded to the Board by the Superior Court of New Jersey, Law Division, in order for the Board to render a determination on the 1982 base line nonconforming use rights of the Property; and

WHEREAS, a public hearing on the remand was held by the Board on July 10, 2014, after appropriate public and personal notice was provided to all property owners within 200 feet of the Property and published in the Official Newspaper of the Township¹; and

WHEREAS, the Applicant presented evidence to the Board through testimony, plans and other evidence; and

¹ A Public Hearing was held by the Planning Board for the Use Variance with Minor Site Plan Application on March 14, 2013. A Public Hearing for the Issuance of a Certificate of Non-Conforming Use was held on September 19, 2013. The September 19, 2013 testimony is relevant to the matter as remanded by the Superior Court,

WHEREAS, the following exhibits were introduced by the Applicant at the July 10, 2014 Public Hearing:

- Exhibit 7-10-1 - 1970 Photograph of site in question;
- Exhibit 7-10-2 - 1995 Photograph of site;
- Exhibit 7-10-3 - 2002 Photograph of site;
- Exhibit 7-10-4 - 2007 Photograph of site;
- Exhibit 7-10-5 - 2014 Google Earth Photograph of site;
- Exhibit 7-10-6 - Applicant's Minor Site Plan; and

WHEREAS, the following exhibits were introduced by the Applicant at the March 14, 2013 and September 19, 2013 Public Hearings;

- A-1 - Color rendering of site plan;
- A-2 - 1963 aerial photograph of Property, without Falcon Drive;
- A-3 - 1965 aerial photograph of Property, without Falcon Drive;
- A-4 - 1970 aerial photograph of Property, without Falcon Drive;
- A-5 - 1995 aerial photograph of Property, with Falcon Drive;
- A-6 - 1993 Resolution of the Southampton Planning Board approving minor subdivision of Block 2401, Lot 36.01, into Lot 36.01 (21.751 acres) and the Property (Lot 36.02 -12.666 acres);
- A-7 - 1993 Minor Subdivision Plan prepared by Lord, Anderson and Worrell;
- A-8 - Photograph of screening taken on March 8, 2013;
- A-8 - April 4, 2013 Letter of Thomas J. Coleman, III, Board Solicitor to Michael Ridgway, Applicant's Attorney (misidentified as a second Exhibit A-8);
- A-9 - April 16, 2013 Letter from Michael Ridgway to Thomas J. Coleman in response to April 4th letter;
- A-10 - Sampling of receipts for materials taken off the Property;
- A-11 - 2007 aerial photograph;
- A-12 - 2000 aerial photograph from the Delaware Valley Regional Planning Commission; and

WHEREAS, the following exhibits were introduced by nearby residents and members of the public at the September 19, 2013 Public Hearing:

- B-1 - Photograph of large purple truck taken on August 14, 2013;

- B-2 - Photograph of truck;
- B-3 - Photograph of loaded truck;
- B-4 - Photograph of same truck taken at 1:30;
- B-5 - Photograph of Pennsylvania truck;
- B-6 - Photograph of debris piles; and

WHEREAS, the Board, after carefully considering the evidence presented by the Applicant and the public, makes the following findings of fact with respect to the establishment of the 1982 base line nonconforming use rights of the Property:

1. The Applicant is the owner of the Property located at 440 New Road in the Rural Development Zoning District of the Township of Southampton. The Property is 12.666 acres +/- in area. A junk business has operated from the property for a considerable number of years and the Township has issued licenses for a junkyard since 1967. The Applicant identified the current use of the Property as a junk/salvage/recycling yard.

2. The Applicant proposed to install a weight scale and refurbish existing buildings. The weight scale was installed without the Applicant first obtaining the required approvals or permits.

3. The existing business is a non-conforming use in the Rural Development Zone and the Applicant filed an Application for minor site plan approval and a (D) variance for its proposal. The Applicant subsequently amended its application to also request, in the alternative, a certificate of non-conforming use and a (D)(1) variance.

4. The Applicant filed a Complaint in Lieu of Prerogative Writ after the Board denied a Certificate of Non-Conforming Use for the Applicant's use of the Property.

5. The matter was remanded to the Board to determine the base line nonconforming use rights of the Property, from the date of the original adoption of the Rural Development Zoning requirements in 1982.

6. Michael Ridgway, Esquire, represented the Applicant from the filing of the Application, including the March 14, 2013 and September 19, 2013 Public Hearings. He further represented the Applicant at the July 10, 2014 remand hearing.

7. The Applicant offered the following testimony at the March 14, 2013 and September 19, 2013 Public Hearings as pertaining to the Issuance of a Certificate of Non-Conforming Use:

a. Dan Giberson

- The Property had been in the ownership of his family from 1947 up until its sale in 2009 to the Applicant and it has had a history of tenant/operators including his parents, Mr. Eddie Fuller, Shiny Pointset and Freeman Pointset;
- Over the years, tomato cans, automobiles, televisions, washing machines and wooden boats were taken to the site;
- Dan Giberson had no involvement in the operation of the junkyard and was a passive landlord, who merely collected the rent from the tenant/operators;
- The Applicant still owes Giberson monies from the sale of the property in 2010; Mr. Fuller acquired equipment for tire-rim removal in the early 1980's for \$30,000 and, thereafter, on-site tire storage became a substantial part of the junk yard operation until the time the property was acquired by the Applicant;
- In 1993, Giberson made application for a minor subdivision approval under the name, "Last Chance Auto Salvage", and Resolution 93.8 contained specific findings of fact and a condition of approval restricting the use of the site to an "auto-salvage yard".
- The business name of the prior tenant/operators of the site prior to the minor subdivision approval was either "S & P Autos" or S & S Autos".
- Pursuant to Resolution 93.8 of the Southampton Planning Board, the auto salvage yard could only encompass 3.5 acres of the entire 12.66-acre Property.

b. Thomas Gabrysiak²

- The Applicant purchased all of the stock of Last Chance Salvage from Mr. Pointset on July 27, 2012;
- The Applicant had rented the Property prior to its purchase in 2010;

² Testified at the March 14, 2013 Hearing and represented himself as an owner of the Applicant.

- When the stock was acquired from Mr. Pointset, the Applicant took a year to clean up the site to remove approximately 135,000 tires and other vast stockpiles of miscellaneous non-recyclable materials to transition its use to a auto-salvage yard and full-scale scrap metal recycling operation;
- The current business operation is now a full-scale junkyard and is not limited to auto salvage;
- The “junkyard business” has evolved over the past few years with scrap metal recycling becoming a greater percentage of use in relation to auto-salvage;
- Business scrap-metal delivery receipts were provided by the Applicant for calendar years 2009 and 2010, but no such receipts were provided by the Applicant, relating back to the relevant time period of 1982;
- Applicant’s current business operation now has 15-20 employees who work on- and off-site in trucks at any given time.

c. James Miller³

- A certificate of non-conformity should be granted because the use as a junk yard has continued since 1963; the definition of junk yard includes a reference to any other material considered junk and a reference to selling or exchanging;
- Recycling is one of the activities that goes on at a junk yard;
- The use proposed by the Applicant is similar to that of the prior owners and is consistent with the definition of junk yard in the Township Ordinances;
- The only change has been in the ownership of the site;
- The scale modernizes the use, but does not change it;
- The site is particularly suited for a recycling center.

d. Michael Ivins

³ Recognized at the March 14, 2013 Hearing as the Applicant’s Professional Planner and qualified to offer expert testimony in his field.

- When Mr. Pointset operated the salvage yard, it resembled “Sanford and Sons”, but now the Property has been cleaned up;
 - He personally took items to the junk yard, including, old washing machines, transmissions, wife fencing and old metal.
8. The Applicant offered the following additional testimony at the Remand Hearing:
- a. Gary Civalier⁴
 - The 1970 Photograph (7-10-1) shows an abundance of material on the site;
 - The 1995 Photograph (7-10-2) is an aerial photograph that shows the subdivision of the Property and the site has a large amount of material stored on site;
 - The 2002 Photograph (7-10-3) is an infrared photograph that shows the site having a large amount of material on it;
 - The 2007 Photograph (7-10-4) still shows a large amount of material on the site;
 - The 2014 Photograph (7-10-5) shows the site as it currently exists and has been considerably cleaned up from prior years;
 - The current use of the Property appears to be less intense than in prior years’ use, but admitted that he had not been on the Property in 1982, and only has personal knowledge from 2010 to the present date;
 - Admitted that he could not tell how much of the debris shown on the Photographs submitted was wood.
 - b. Thomas Gabrisiak
 - At the current time, 50% of the use is auto salvage and 50% is recycling;
 - We moved our equipment onto the site in 2010-2011;
 - We sell car parts;
 - We have 2 employees every day on-site, not including truck drivers;

⁴ Recognized by the Board at the March 14, 2013 Public Hearing as the Applicant’s Professional Engineer and qualified to offer expert testimony in his field.

- We crush the cars now the same way that has been done from a long time ago.
- c. Alexander Litwornia
 - He is the Applicant's Traffic Engineer, licensed in the State of New Jersey and has been qualified by land use boards in the State of New Jersey to provide expert testimony in his field;
 - Testifies about the Traffic Report he prepared and submitted to the Board⁵.
- d. Fred Myers
 - He resides at 126 Grassy Lake Road in Shamong and he is 62 years old;
 - In 1982 he was in his mid 20's and visited the Property on a recurring basis;
 - From 1973 until 1996 he owned a fire alarm company and visited the site every couple of months to deliver refuse, consisting of conduits, batteries, hardware and cabinets;
 - He would deliver the refuse in a van and dumped it on scrap piles at the site;
 - He observed various piles consisting of steel beams, tires, aluminum siding; wood, mobile homes and construction debris;
 - The debris piles were at least 12 feet in height and the tire piles were higher;
 - A loader was used to move the piles;
 - The site contained more junkyard materials in 1982 than what exists there today;
 - It was 50% auto salvage and 50% non-auto salvage;
 - A small scale was used to weigh the refuse brought to the site;
 - He does not have any receipts evidencing the material he brought to the site;

⁵ The testimony of Mr. Litwornia was largely regarding current activity and current traffic counts on the site. Litwornia provided no testimony regarding the 1982 use of the site for the purpose of determining the 1982 base line nonconforming use rights of the Property.

- There were 4 workers at the site when he delivered refuse to the site.
- e. Michael Evans
- He resides at 1 Whoopaditty Lane, Woodland Township and is 58 years old;
 - He has been employed by the Applicant as a truck driver since September, 2013;
 - He frequently visited the site as a teenager as his family was friends with the then owner of the Property;
 - He saw steel, tires, cars, light iron, I-beams, washers and bath fixtures when he would visit the site as a teenager;
 - There were approximately 6 employees at the site in the late 1960's early 1970's;
 - When the site was owned by the Fullers and Pointsets, the junkyard material storage was significant and disorganized;
 - The Applicant has cleaned-up the Property and it is much more open;
 - The prior owners would fill the cars with light iron and then crush the cars;
 - Admitted that he did not know what percentage of use was attributable to auto salvage.
- f. David Blyler
- He resides on Fellowship Road in Moorestown and is 71 years old;
 - When in high school he would visit the site with his grandfather;
 - We bought and sold stuff at the site;
 - I bought a car engine there and scrapped a corrugated roof there;
 - I walked the site before and after 1982;
 - There were huge piles of cars and tires on site;
 - He also saw I-beams, bar joists, roof trusses, 8-10 urinals, wood, shingles, sheetrock and appliances around the perimeter;
 - A scale the size of a dining room was used to weigh material back then;
 - The prior operator paid me for copper;

- Could not state what percentage of use was attributed to auto salvage;
- The use never really changed.

9. The following testimony was provided by interested persons, including nearby residents and others with persons with personal knowledge, at the public hearings:

- a. Bruce Gsell who testified that the prior operation was very small and it was locals dropping miscellaneous junk materials;
- b. Josh Wolf, New Road (across the street from the site), noted that truck traffic to/from the site was previously flatbed trucks under prior operators, which is now replaced by large tractor trailers under the Applicant's operation;
- b. John Wishart, Falcon Drive, who testified that it was previously a small junk yard and more heavily wooded than it is now; the view of trees has now been replaced by large piles of scrap-metal.
- c. Ben Lerner, Falcon Drive, who testified that he moved to Falcon Drive 34 years ago and he is concerned that the site has now become an industrial site and a fire hazard to the community, since the Applicant commenced operations there;
- d. Kathleen Wishart, Falcon Drive, who asked questions regarding the 1993 subdivision approval and whether it restricted the use to auto-salvage only; Introduced exhibit 7-10-7, a Photograph of the site taken on September 14, 2013 showing that the piles of junkyard materials are much higher today than under prior operators;

Patricia Topham, New Road, who presented a series of truck photographs, and testified that the trucks now coming to/from the site are oversized and create a safety concern for school-bus drop offs as these oversized trucks are too wide for the narrow existing residential roadway; She has resided at 450 New Road since 1977; back then, she would see a tow truck every now and then; the noise from the site was very low back then; she did not know there was a junk yard there until the 1990's; the site is totally different now.

- f. Lawrence Burke who testified that there is now large piles of scrap-metal debris at the site, that was not present five years ago; has lived at 3 Falcon Drive since 1989; he took the Photograph identified as Exhibit 7-10-7; he took the photograph standing at the fence that separates his property from the Applicant's Property. Nancy King who testified that, previously, the operation was a small-scale auto-salvage yard with no need for a weight scale, as the junk vehicles could be weighed in Trenton or Camden; now, there are larger out-of-state trucks coming to/from the site transporting scrap-metal materials; moreover, in the past, she never saw the refrigerators, microwave ovens, and other household appliances that she now sees at the site; King has lived in the nearby New Road neighborhood since the early 1980's.
- h. Steven Jenkins, 446 New Road, who testified that the Applicant has cleared out brush and trees that previously existed on the site; Jenkins has lived near the site for 20 years and went deer hunting on the property and noticed then the site, prior to its operation by the Applicant was smaller-scale and involved mainly auto-salvage and school buses; he previously dated Mr. Fuller's daughter and is familiar with the site; he visited the site when he was growing up; the site was all cars in the 1960's, 1970's and 1980's and he would estimate the car use at 90% of the activity; the site is now very visible from his back yard in comparison to when he first moved in and you could not see the site.
- i. Penny Sundstram, who testified that there are now piles of debris at the site that did not previously exist;
- j. J. P. Price, who testified that there is more going on at the site in comparison to the operations of prior operators; has lived in the neighborhood for 30 years and sold his 77' Monte Carlo to the prior operator for auto-salvage..
- k. Jack Reilly
 - He has lived in the Township since 1978 and resides at 16 Falcon Drive;

- He purchased auto parts from the Freemans to restore cars;
 - He would visit the site 1 –2 times per week and during that time, the yard was more than 50% cars;
 - Back then, you would hear little noise coming from the site but he can now hear noise from his home due to the increased amount of scrap metal being moved;
- l. Mrs. Devone
- She resides at 13 Falcon Drive;
 - She remembers cars coming to the site on flatbed trucks;
 - There were always “odds” and “ends” on the site;
 - Back then, there was not a lot of noise coming from the site.
- m Robert Marcantonio
- He resides in Tabernacle;
 - When he was younger, he would visit the site often with his father;
 - What is on-site now is not what was on site back then;
 - The cars used to be stacked 3-4 cars high;
 - Before 1982 he went there for autos and took recycling metal there;
 - Could not state what the percentage of auto-salvage activity existed at the site in 1982.
- n Rose Chappine
- She has resided on New Road since 1961;
 - She never was on the site but recalls seeing flatbed trucks with cars being delivered to the site;
 - She has never heard noise from the site, then or now.
- o. Patricia Travaglio
- She has resided at 8 Falcon Drive since 1976;
 - She never heard noise or could see any part of the operation previously but now hears noise from the site and can see the operations.
- p. Bill Kelly
- Had lives on Floyd Drive since 1979;

- He visited the site in 1980 and 1981 to purchase parts to repair his cars;
- Only remembers seeing cars on site but cannot state what other activity may have been occurring on site.

q. Dan Siwak

- He has lived on Falcon Drive since 1975;
- He never visited the site but has driven by;
- Back in 1982 it was quiet and a small operation.

10. After hearing the testimony from the multiple public hearings, Board Member Robbins summarized the unanimous consensus of the board members as follows: that the main and predominant purpose of the salvage yard operation at the site, up and until the relevant nonconforming use right time period in 1982, was “auto-salvage” with occasional metal-scrap being placed into the vehicles to increase weight and enhance sales; that there was some ancillary acceptance of certain non-recyclable materials for storage and dumping to which the tenant/operators derived little or no income; and that the nature of the proposed junk-yard operation transitioned, when scrap metal pricing meaningfully increased, subsequent to 2005, and became a more economically viable business activity to which the Applicant sought to establish and expand the existing operation to a full-scale auto junkyard with scrap metal recycling activity in 2009.

11. Board Member Haas further stated that Applicant has not submitted any financial records supporting its claim that the use in 1982 was other than auto salvage.

AND WHEREAS, based upon the above factual findings, the testimony provided by the Applicant’s witnesses and the testimony of the public, the Zoning Board of Adjustment has come to the following conclusions:

1. The 1982 base line non-conforming use rights of the Property, to which a Certificate of Nonconforming Use shall issue, is “auto-salvage”, which includes the sale of salvaged auto parts and the crushed remains of motor vehicles.

2. The “auto-salvage” use alone was the primary business undertaken at the Property in 1982 when baseline nonconforming use rights were established; 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” and not giving rise to the establishment of any

property right under *N.J.S.A. 40:55D-68*. Applicant has 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 when the Rural Development Zoning District use requirements were formally adopted and subsequently prohibited, to this date, any junkyard use.

3. The Applicant was unable to produce any financial records supporting its application for a Certificate of Nonconforming Use that the 1982 use of the Property was both auto- salvage and scrap-metal recycling. The only quantification established at public hearings by Applicant was that it had removed approximately 135,000 tires from the Property since commencing operations in 2009, which evidence is only supportive of auto-salvage yard operation.⁶

4. The Applicant could only offer anecdotal testimony from a few witnesses in general terms about other non-car materials being dumped and/or stored on site or occasionally placed within the interior of a motor vehicle to enhance auto-scrap returns. Such testimony was rebutted by that from several other nearby neighbors and residents familiar with the site during the relevant 1982 time period, who claimed that the site operated as a smaller-scale “auto-salvage” yard operation.

4. The evidence pertaining to the 1993 minor subdivision application and approval obtained by Dan Giberson, the prior owner, is compelling and objectively supports a finding that the non-conforming use rights of the Property are limited and restricted to an “auto-salvage” yard.

5. The increase in the noise levels and traffic, since the Applicant commenced operations at the site in 2010 is further indicative of a significant change of use of the Property from auto-salvage to scrap-metal recycling many years after the nonconforming use rights of the property had been established in 1982.

6. The Board also finds support for its decision based on the factual summary presented Board Member Robbins as set forth above and incorporates herein such findings in its decision of this application.

⁶ Testimony of Thomas Gabrysiak at the March 14, 2013 Public Hearing.

NOW, THEREFORE, BE IT RESOLVED by the Zoning Board of Adjustment of the Township of Southampton, on the 10th day of July, 2014, that this Board determines that the 1982 base line non-conforming use of the Property was an auto salvage yard.

ROLL CALL VOTE

Those in Favor of Board's Determination: 7
Those Opposed to Board's Determination: 0
Those Abstaining: 0

CERTIFICATION

I hereby certify that this foregoing Resolution is a true memorializing resolution, as adopted by the Zoning Board of Adjustment of the Township of Southampton in accordance with its decision at its special meeting on July 10, 2014.

**THE ZONING BOARD OF ADJUSTMENT
OF THE TOWNSHIP OF SOUTHAMPTON**

Attested:

Stephen Zoltowski
STEPHEN ZOLTOWSKI, CHAIRMAN

Sheri Hannah
SHERI HANNAH, SECRETARY

Dated: 7/31/14
Date of Approval: 7/10/14
Date of Memorialization: 7/31/14