

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PATRICIA BIALIK,

Petitioner-Appellant,

v

STAMBAUGH TOWNSHIP,

Respondent-Appellee.

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UNPUBLISHED

April 29, 2008

No. 276281

Iron Circuit Court

LC No. 06-003508-AV

Before: Bandstra, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Petitioner appeals by leave granted the circuit court's order affirming the decision of respondent Stambaugh Township's Board of Zoning Appeals denying her application for a land use permit. This matter is being decided without oral argument. MCR 7214(E). We reverse.

This case involves an attempt by petitioner to obtain a land use permit to repair or replace a boathouse on her property. The boathouse constituted a nonconforming use because it was located within 75 feet of the normal high water mark, which was prohibited by local ordinance Article 7, Section 7.3. However, because the boathouse had been constructed well before the enactment of the zoning ordinances, it enjoyed prior nonconforming use status.

Petitioner is a trustee of the Clarence J. Eusebio Trust, which owns the property where the boathouse in question was located. The property was originally acquired by petitioner's uncle in the mid-1950s, and the boathouse was erected in the late 1950s. After the uncle's death, petitioner's parents acquired the property and maintained the boathouse. The property was subsequently placed in trust.

The matter of the boathouse was first brought before respondent's Zoning Board of Appeals (ZBA) when petitioner sought a variance for construction of a single-family home within the side lot set-backs. During this meeting, petitioner requested permission to repair the boathouse because a roof timber had recently fallen. The ZBA agreed to allow repairs but "without encroachment of height or size of the original."

Petitioner made plans to begin the repairs in the spring; however, the boathouse roof completely collapsed during the winter from the weight of extraordinary snowfall. Petitioner tore down the boathouse in the spring of 2004 and had started to replace it within the footprint of the original structure when respondent's zoning administrator issued a stop work order.

Petitioner applied for a land use permit seeking permission to replace the boathouse. The zoning administrator concluded that the prior nonconforming use had been discontinued, so he denied the permit. Petitioner appealed to the circuit court, which remanded the matter to the ZBA for further proceedings.

The ZBA conducted several meetings on the matter and again denied petitioner's application for a land use permit. At the final meeting, several area residents gave testimony as to the dilapidated condition of the boathouse and that such condition had been present for an extended period of time. Petitioner provided an affidavit that stated that she had never had any intent to abandon the boathouse and that a watercraft of some kind had been stored in the boathouse from the time of its construction until the timber fell, prompting her initial request to repair the structure. There was no testimony to contradict this affidavit. Nevertheless, the ZBA concluded that the zoning administrator correctly determined that the prior nonconforming use had been abandoned; consequently, petitioner was not entitled to rebuild the boathouse.

Petitioner appealed to the circuit court, which affirmed the decision of the ZBA. Despite noting that the language of the ordinance, which presumes abandonment after one year of nonuse, was probably invalid, the trial court found that substantial evidence about the state of disrepair of the boathouse had been presented to the ZBA, and that the determination that the boathouse had been abandoned was supported by the evidence. The court declined to redecide the facts as found by the ZBA.

Petitioner argues that the decision of the ZBA, subsequently upheld by the circuit court, was contrary to law because there was no showing that petitioner intended to abandon her prior nonconforming use. We agree.

Pursuant to the zoning enabling act, the circuit court is required to review the record to determine if the decision of the ZBA complies with the constitution and law of the state, is based on proper procedure, is supported by competent, material, and substantial evidence on the whole record, and represents the reasonable exercise of discretion granted by law. MCL 125.3606(2). We apply the same factors to our review of the circuit court's decision. *Reenders v Parker*, 217 Mich App 373, 378; 551 NW2d 474 (1996). Board findings of fact are entitled to deference, provided that they are procedurally proper, while the court has authority to decide questions of law. *Macenas v Village of Michiana*, 433 Mich 380, 395-396; 446 NW2d 102 (1989).

A prior nonconforming use is a vested right in the use of particular property that does not conform to zoning restrictions but is protected because it lawfully existed before the zoning regulation's effective date. *Belvidere Twp v Heinze*, 241 Mich App 324, 328; 615 NW2d 250 (2000). Generally speaking, a nonconforming use may not be expanded, and one of the goals of local zoning is the gradual elimination of nonconforming uses. *Jerome Twp v Melchi*, 184 Mich App 228, 231; 457 NW2d 52 (1990). Thus, the vested right to continue a nonconforming use may be lost through abandonment. *Dusdal v City of Warren*, 387 Mich 354, 360; 196 NW2d 778 (1972). "The necessary elements of 'abandonment' are intent and some act or omission on the part of the owner or holder which clearly manifests his voluntary decision to abandon." *Rudnik v Mayers*, 387 Mich 379, 384; 196 NW2d 770 (1972).

In *Livonia Hotel, LLC v City of Livonia*, 259 Mich App 116, 127-128; 673 NW2d 763 (2003) this Court rejected the validity of an ordinance provision that declared valid

nonconforming uses<sup>1</sup> abandoned solely on the basis of non use for one year. The Court held the ordinance directly contravened the *Dusdal-Rudnik* requirement that intent to abandon must accompany nonuse for a legal abandonment to arise. This Court emphasized the necessity for showing an owner's intention to abandon before prior nonconforming use status can be stripped.

Respondent contends that the testimony of area residents as to the condition of the boathouse was sufficient to infer petitioner's intent to abandon her prior nonconforming use. We disagree.

An owner's intent to intent to abandon a use may be proved by circumstantial evidence. *Rudnik, supra* at 385. But the *Rudnik* Court declined to find sufficient evidence of abandonment in the testimony of the city building inspector that he had observed the property on many occasions and noted it was vacant and in disrepair. Such testimony did not "clearly manifests [the owner's] voluntary decision to abandon" the use. *Id.* at 384.

In the instant case, in addition to the testimony of area residents as to the condition of the boathouse, petitioner submitted an affidavit to the ZBA that affirmatively stated that she never intended to abandon the nonconforming use. In addition, petitioner's affidavit stated that watercraft had been stored in the boathouse, except when it was being used in the lake, from the time it was constructed until the fall of 2003 when a fallen roof timber damaged the canoe currently being stored there. Some area residents who testified as to the general disrepair of the boathouse also admitted that they could not see into the boathouse to say for sure that it was not being used.

The evidence does not support the conclusion that petitioner intended to abandon using the boathouse. Without such a showing, the elements of abandonment cannot be satisfied. *Rudnik, supra* at 384. The trial court erred by upholding the decision of respondent's ZBA.

We reverse and remand to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra  
/s/ E. Thomas Fitzgerald  
/s/ Jane E. Markey

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<sup>1</sup> The valid nonconforming use at issue in *City of Livonia* arose from the issuance of a special use permit under a prior ordinance.