

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 30, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 03-0792-FT

Cir. Ct. No. 02-CV-102

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**STATE OF WISCONSIN EX REL GARY P. ELLIS AND
JANET B. ELLIS,**

PLAINTIFFS-APPELLANTS,

V.

**SAWYER COUNTY BOARD OF APPEALS, SAWYER COUNTY
BOARD OF ADJUSTMENT, ARVID VALLEM, RAY ZUBROD,
ALAN GERBER AND KRIS MAYBERRY, SAWYER COUNTY
CLERK,**

DEFENDANTS-RESPONDENTS,

STATE OF WISCONSIN,

**INTERVENING DEFENDANT-
RESPONDENT.**

APPEAL from a judgment of the circuit court for Sawyer County:
NORMAN L. YACKEL, Judge. *Affirmed.*

Before Cane, C.J., Hoover P.J., and Peterson, J.

¶1 PER CURIAM. Gary and Janet Ellis appeal from a judgment affirming the Sawyer County Board of Appeals' decision that the Ellis construction violated local ordinances.¹ The Ellises argue that the board incorrectly determined that they constructed a replacement structure. They also contend their due process rights were violated. We disagree and affirm the judgment.

BACKGROUND

¶2 The Ellises own land on Round Lake in Sawyer County. A boathouse with a residence on the upper level is located on their property. SAWYER COUNTY, WI, ORDINANCE § 4.49(1) (2002), requires that structures must be set back at least seventy-five feet from the ordinary high water mark. However, structures that were within seventy-five feet at the time the ordinance was enacted are considered nonconforming uses and special limitations apply to those structures. For example, SAWYER COUNTY, WI, ORDINANCE § 10.1 (2002), states that a nonconforming building can only be routinely maintained. Further, § 10.11 states that if a nonconforming structure is removed, any future use of the building must conform to the ordinances, *i.e.*, be seventy-five feet back. Additionally, § 10.21 limits expenditures on alterations, additions or repairs to 50% of the building's current fair market value.

¶3 The Ellises' boathouse existed at the time the ordinances took effect and therefore is a nonconforming use. As such, any work done to the structure is subject to the restrictions provided by the ordinances.

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶4 In March 2002, the Ellises obtained a permit to make alterations and repairs to the structure. After work had commenced, the zoning administrator issued a “stop work” order because he determined that the work being done constituted more than mere alteration or repair. The administrator testified that “out of two 44 foot walls and two 24 foot walls ... the two 24 foot walls [were] gone. One 44 foot wall [was] gone. Approximately half or slightly more than half of the remaining 44 foot wall would be gone. The roof would have been gone.”

¶5 The Ellises appealed to the Sawyer County Board of Appeals and a hearing was held in May 2002. The board heard some evidence regarding construction costs, but decided not to accept any more evidence of cost. The board stated that, “when a substantial portion of the building is removed, leaving a 20-foot section wall remaining, it results in a replacement structure.” It also found that construction violated the 50% rule. The board thereby upheld the administrator’s decision.

¶6 The Ellises appealed to the circuit court, which upheld the board’s decision. The Ellises now appeal.

DISCUSSION

¶7 In an action for certiorari review, our review is the same as in the circuit court. *City News & Novelty, Inc. v. City of Waukesha*, 231 Wis. 2d 93, 102, 604 N.W.2d 870 (Ct. App. 1999). “We confine our review to whether: (1) the board kept within its jurisdiction; (2) the board acted according to the law; (3) the action was arbitrary, oppressive or unreasonable; and (4) the evidence presented was such that the board might reasonably make the order or determination in question.” *Id.* at 102-03. The interpretation of an ordinance is a

question of law we review independently. *Hansman v. Oneida County*, 123 Wis. 2d 511, 514, 366 N.W.2d 901 (Ct. App. 1985).

¶8 We first determine whether the board kept within its jurisdiction. WISCONSIN STAT. § 59.694(7)(a) provides in part:

POWERS OF BOARD. The board of adjustment shall have all of the following powers:

(a) To hear and decide appeals where it is alleged there is error in an order, requirement, decision or determination made by an administrative official in the enforcement of s. 59.69 or of any ordinance enacted pursuant thereto.

Here, the Ellises allege the administrator erred in his decision that the construction violated their permit and the ordinances regarding nonconforming structures. The board was therefore within its jurisdiction to hear and decide the allegation.

¶9 The Ellises further argue that the board exceeded its jurisdiction when it determined that the Ellises violated the 50% rule because the administrator made no finding regarding that rule. However, the board found that the Ellises performed more than routine maintenance, which is the main issue in this case. We need not address arguments regarding the 50% rule because the rule does not affect the board's determination regarding routine maintenance.

¶10 Second, we determine whether the board acted according to law. A board acts according to law when it relies upon applicable ordinances and cases. *Edward Kraemer & Sons v. Sauk County Adj. Bd.*, 183 Wis. 2d 1, 8-9, 515 N.W.2d 256 (1994). The Ellises argue that the board erred when it found that they had constructed a replacement structure. However, the real issue is not whether they were constructing a replacement. Instead, the relevant analysis comes from § 10.1, which provides in part: "The lawful use of a building ...

which existed at the time this ordinance ... took effect and which is not in conformity with the provisions of this ordinance, including the *routine maintenance* of such a building or structure, may be continued” (Emphasis added). Consequently, the maintenance and repair of a nonconforming building are limited.

¶11 The board found that “when a substantial portion of the building is removed, leaving a 20-foot section wall remaining, it results in a replacement structure.” The Ellises contend the ordinance does not prohibit removal of a substantial portion of the building. They argue that as long as the cost of the repairs does not violate the 50% rule, they may make any repairs they wish to make.

¶12 The Ellises place undue emphasis on the words “replacement structure.” Implicitly, when the board found there was a replacement structure, it found that the construction constituted significantly more than routine maintenance and consequently the nonconforming building was removed. Removal of a nonconforming structure causes the structure to lose its nonconforming status. The board therefore was acting according to law when it made its determination.

¶13 Further, ordinances must be interpreted so as to avoid absurd results. *Walag v. Town of Bloomfield*, 171 Wis. 2d 659, 663, 492 N.W.2d 342 (Ct. App. 1992). Here, if owners of a nonconforming structure were able to make any changes they wished as long as they stay within the 50% rule, § 10.1, which allows only routine maintenance, would be rendered superfluous. Owners would be able to almost completely tear down a structure and rebuild it in its entirety. This is precisely what § 10.1 intends to prevent.

¶14 Third, we determine whether the action was arbitrary, oppressive or unreasonable. The Ellises only claim that “[b]y proceeding under incorrect theories of law, [the board’s] conclusions were arbitrary, unreasonable, and represented its will and not its judgment.” We have already determined that the board acted according to law. We therefore reject the Ellises’ claim that the board’s action was arbitrary and unreasonable.

¶15 Finally, we determine whether the evidence presented was such that the board might reasonably make the order or determination in question. Substantial evidence is evidence of such convincing power that reasonable persons could reach the same decision as the board. *Clark v. Waupaca County Bd. of Adj.*, 186 Wis. 2d 300, 304, 519 N.W.2d 782 (Ct. App. 1994). The substantial evidence test is highly deferential, and we may not substitute our view of the evidence for that of the board. *Id.*

¶16 The Ellises’ land use permit allowed them to make repairs. The administrator determined that all but twenty feet of wall was new. The builder testified that he replaced all the walls except for those twenty feet, and replaced the roof, many of the floor joists, and at least 50% of the floor decking. Additionally, the record contains photographs of the building that clearly show the work being done exceeded routine maintenance. This evidence would lead a reasonable person to believe the construction not only violated the Ellises’ permit, but also consisted of significantly more than “routine maintenance” allowed by § 10.1.

¶17 The Ellises also raise a due process issue. They argue the board made a finding that they violated the 50% rule without allowing the Ellises to present evidence as to the construction costs. Consequently, the Ellises maintain

the board had no facts upon which to base its conclusion, in violation of the Ellises' due process rights. However, the real issue in this case is whether the Ellises performed more than routine maintenance to their nonconforming structure. Whether the board should have addressed the 50% rule is not relevant to its determination that the Ellises performed more than routine maintenance. We therefore need not address the Ellises' due process argument.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.