

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 7, 2006**

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. 2004AP3383**

**Cir. Ct. No. 2004CV92**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**THE KRAEMER COMPANY, LLC,**

**PLAINTIFF-RESPONDENT,**

**V.**

**PIERCE COUNTY BOARD OF ADJUSTMENT,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Pierce County:  
ROBERT W. WING, Judge. *Affirmed.*

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

¶1 PER CURIAM. The Pierce County Zoning Board of Adjustment appeals an order reversing its conclusion that use of The Kraemer Company, LLC's property for non-metallic mineral extraction or quarrying required a

conditional use permit. We reject the board's various arguments and affirm the order.

### **Background**

¶2 Kraemer owns property in Pierce County that has been continuously used for non-metallic mineral extraction or quarrying from 1957 to the present. It is undisputed that such use of the property preceded the adoption of any relevant zoning regulations. With the subsequent adoption of zoning codes in 1972, Kraemer's use of the property as a quarry constituted a legal nonconforming use. In 1998, the county adopted a comprehensive revision to the zoning codes. Under these revisions, Kraemer's property is now located in a primary agricultural zoning district in which non-metallic mining is permitted only as a conditional use.

¶3 In February 2004, the county notified Kraemer that the zoning code revisions required Kraemer to apply for and obtain a conditional land use permit for the continued operation of the quarry. The zoning administrator determined that the 1998 zoning revisions effectively extinguished the quarry's legal nonconforming use status. The board affirmed the zoning administrator's decision, concluding that the quarry lost its nonconforming use status when the zoning revisions permitted non-metallic mining as a conditional use. The circuit court reversed the board's decision, and this appeal follows.

### **Discussion**

¶4 On certiorari review, this court reviews the decision of the Board of Adjustment, not the decision of the circuit court. *Board of Regents v. Dane County Board. of Adj.*, 2000 WI App 211, ¶10, 238 Wis. 2d 810, 618 N.W.2d

537. Our certiorari review is limited to one or more of the following: (1) whether the board kept within its jurisdiction; (2) whether the board proceeded on a correct theory of law; (3) whether the board's action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that the board might make the decision it did. *Id.*

¶5 Although the board raises numerous arguments on appeal, the essential issue is whether a county can extinguish vested rights in a legal nonconforming use of property by adopting a zoning ordinance that makes that use a conditional use. We conclude that it cannot. A legal nonconforming use is described as “an active and actual use of land and buildings which existed prior to the commencement of the zoning ordinance and which has continued in the same or a related use until the present.” *Walworth County v. Hartwell*, 62 Wis. 2d 57, 60, 214 N.W.2d 288 (1974). A property owner acquires a vested interest through such “active and actual use” of the land. *See Walworth County v. Seitz*, 140 Wis. 2d 111, 117, 409 N.W.2d 403 (Ct. App. 1987). In discussing the vested property interests inherent in a legal nonconforming use, our supreme court has noted that “a nonconforming use existing at the time a zoning ordinance goes into effect cannot be prohibited or restricted by statute or ordinance, ... zoning regulations cannot be made retroactive and neither can prior nonconforming uses be removed nor existing conditions be affected thereby.” *Des Jardin v. Town of Greenfield*, 262 Wis. 43, 47-48, 53 N.W.2d 784 (1952).

¶6 The board nevertheless cites *State ex rel. Brooks v. Hartland Sportsman's Club, Inc.*, 192 Wis. 2d 606, 531 N.W.2d 445 (Ct. App. 1995), for the proposition that a legal nonconforming use is extinguished when it becomes a conditionally permitted use under a zoning ordinance. The board's reliance on *Brooks*, however, is misplaced. There, the property's use as a gun club was

always with the permission of the municipality. Therefore, the property owner had no vested interest prohibited or restricted by a zoning ordinance that formalized the permission requirement.

¶7 Here, it is undisputed that non-metallic mining on Kraemer's property predated both the adoption of, and relevant amendments to, the zoning ordinance. That use has continued, unchanged and uninterrupted, to the present day. Therefore, non-metallic mining is a legal nonconforming use of the property and Kraemer possesses a vested right in that legal nonconforming status and the continuation of the use. Thus, contrary to the board's assertions, the 1998 zoning code revisions cannot extinguish or restrict this legal nonconforming use, *Des Jardin*, 262 Wis. 2d at 47, nor require Kraemer to obtain a permit in order to continue with this legal nonconforming use. *Brandt v. Pewaukee Town Bd.*, 15 Wis. 2d 6, 12, 112 N.W.2d 157 (1961) (where quarrying predated zoning code, landowner not obligated to submit to restrictions in the code or obtain permit to continue use).

¶8 The board nevertheless argues it has a right to regulate "the manner in which a nonconforming land use is engaged." Citing a common law interest in the gradual elimination of nonconforming land uses, the board intimates it has the power to zone a legal nonconforming use out of existence "in deference to conforming, permitted land uses." Vested rights in a legal nonconforming use, however, may only be impaired or eliminated by the property owner's discontinuation of, or substantive change in the use. *See* WIS. STAT. § 59.69(1)(a) (2003-04); *see also Waukesha County v. Pewaukee Marina, Inc.*, 187 Wis. 2d 18, 24, 522 N.W.2d 536 (Ct. App. 1994). To the extent the board claims that the unlimited right of expansion, without the need to submit to regulation, conflicts with nonconforming land use law, the board is again mistaken. Wisconsin law

“protects the expansion of a legal nonconforming use as long as the essential character of the use is not identifiably changed.” *Racine County v. Cape*, 2002 WI App 19, ¶7, 250 Wis. 2d 44, 639 N.W.2d 782; *see also Seitz*, 140 Wis. 2d at 121; *Smart v. Dane County Bd. of Adj.*, 177 Wis. 2d 445, 501 N.W.2d 782 (1993).

¶9 The board also attempts to sidestep the holdings of *Des Jardin* and *Brandt* by claiming that a “conditional use” is the same as a “permitted use.” The board contends that because a nonconforming use is a use not permitted, and a conditional use is the same as a permitted use, a particular use designated as “conditional” under a zoning code cannot be deemed a legal nonconforming use. The board’s argument is an exercise in semantics, and we are not persuaded. Under the Pierce County Zoning Ordinance’s own language, “conditional use” and “permitted use” are distinct terms. A “permitted use” is defined as a use permitted by right, while a “conditional use” is a use not permitted by right but, rather, subject to the discretionary judgment of the land management committee. Moreover, even if we assume a “permitted use” cannot simultaneously be a “nonconforming use,” it does not logically follow that pre-existing, vested rights in a given use are nullified by declaring the use “permitted.”

¶10 Because the county cannot extinguish vested rights in a legal nonconforming use of property by adopting a zoning ordinance that makes that use a conditional use, Kraemer is not required to obtain a conditional use permit for the continued operation of the quarry. We therefore affirm the order.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).



