

Oblong Land Conservancy
PO Box 601
Pawling, NY 12564

May 17, 2010

Dover Planning Board
126 East Duncan Hill Road
Dover Plains, NY 12522

Re: Rasco Materials, LLC, 2241 Route 22, Wingdale, NY (the “site” or “property”)
Site Plan application (the “application”)

Dear Chairman Wylock and members of the Dover Planning Board:

The Oblong Land Conservancy (“Conservancy”) respectfully requests that the Planning Board include this letter as part of the Board’s record with respect to a number of legal issues raised by this application. The Conservancy further requests that the Planning Board refrain from relying on the December 1, 2009 stipulation in making any decision on this application as the stipulation was unlawfully entered into by the Dover Town Board with the applicant. The application should be denied as the proposed use is a solid waste management facility under Section 145-50 of the Dover Code and is not a continuation of a lawful preexisting, nonconforming use.

THE TOWN BOARD CANNOT USURP THE AUTHORITY OF THE PLANNING BOARD, ZONING BOARD OF APPEALS OR THE BUILDING INSPECTOR UNDER THE GUISE OF A COMPROMISE OF A CLAIM PURSUANT TO THE NEW YORK STATE TOWN LAW

The stipulation entered into between the Dover Planning Board and Rasco Materials (the “Applicant”) is improper for several reasons. A freedom of information law requests reveals that no legitimate claim was ever presented to the Town Board with respect to the applicant’s allegation that a lawful preexisting, nonconforming use at the site had not ceased. There was no legitimate claim or controversy for the Town Board to settle. There is no request for an interpretation of the Dover Code from the applicant with respect to this issue anywhere in the Building Department or Town Board files. It appears that there was no determination by the Building Inspector as to whether the proposed use by the applicant would qualify as a

continuation of a purported lawful preexisting, nonconforming use. A plain reading of the stipulation is also evidence of this fact. The stipulation is merely an inartful attempt to give the applicant authority to undertake an action at the site that is not permitted by the Dover Code. The May 5, 2010 letter from the Building Inspector to the Planning Board is even better evidence. As far as the Building Inspector is concerned violations still exist at the site. As indicated below, the Building Inspector has confirmed in a May 5, 2010 letter to the Planning Board that the stop work order he issued for the site in 2005 as a result of local Code violations has not been rescinded and is still in effect. The Town's records reveal that the stop work order was never challenged by the site owner or operator or any other person or entity. Section 145-59.F of the Dover Code provides that the stop work order had to be challenged within 60 days of its filing through an appeal to the Zoning Board of Appeals. The Town Board cannot resuscitate the applicant's appeal via the stipulation.

Even if the applicant had challenged a determination by the Building Inspector as to the legality of the applicant's proposed use, the Town Board *could not* lawfully validate the applicant's baseless and specious claim that it is merely continuing a lawful preexisting, nonconforming use in accordance with the Dover Code and New York State case law. New York State Town Law Section 68 does not give town boards the authority to take such erroneous actions. *Wadsworth v. Board of Sup'rs of Livingston County*, 217 N.Y. 484 (1916)(Although a town board can compromise or settle an action or proceeding against the town with the approval of the court in which the action or proceeding is pending pursuant to Section 68 of the New York Town Law, a town cannot indirectly, by means of a compromise agreement, give validity to a void claim).

The Town Board lacked the authority to make determinations in purported settlement of a matter that is rightfully within the jurisdiction of the Planning Board, the Building Inspector and the Zoning Board of Appeals. The intent of the Town Board's stipulation with the applicant was clearly to usurp the authority of both the Building Inspector and the Planning Board so that the applicant could avoid controversy and the application of relevant provisions of the Dover Code including, but not limited to, Sections 145-50 and 145-74 and Article VI of the Zoning Law. As made clear by the public hearing record in this matter, those Dover Code provisions require the denial of the Rasco Materials application because the applicant proposes a privately owned and operated solid waste management facility and any such prior use of the site was not properly permitted and has been discontinued for more than a year under Section 145-24 of the Dover Code.

The Town Board in its November 2009 meeting minutes is under the misconception that it can and/or should authorize the Planning Board Chairman and the Building Inspector to enter into a stipulation with the applicant. The Town Board is apparently also under the misconception that

the Chair of the Planning Board can take action on behalf of the Planning Board without any action on the part of a quorum of Planning Board members. The law does not agree. The signatures of the Planning Board Chair and the Building Inspector at the end of the stipulation do not cure any of the defects in process.

The power to interpret the zoning law is vested in the building inspector and the zoning board of appeals *See Barron v. Geltnik*, 107 A.D.2d 1017 (4th Dept. 1985)(finding that the ZBA had no authority to consider the matter of whether a use fits the definition of preexisting, nonconforming as set forth in its zoning law unless the building inspector has first considered the matter); *Jamil v. Village of Scarsdale Planning Board*, 24 A.D.3d 552(2d Dept. 2005)(finding that the planning board correctly relied on the building inspector's determination). The Dover Town Board does not have this authority. New York case law requires the Planning Board to utilize its applicable land use laws in reviewing, approving and denying applications. In so doing, the Planning Board will rightfully make informal interpretations of the local laws. *East Moriches Property Owners' Association, Inc. v. Planning Board of Town of Brookhaven*, 66 A.D.3d 895 (2d Dept. 2009) (rejecting a neighbor's argument that the planning board made an implicit interpretation of the zoning law merely by approving an application). The Dover Town Board does not have this authority either. *See Spinosa v. Ackerman*, 98 Misc.2d 1073 (1979). When a town board does usurp the authority of its planning board, its decision is null and void.

THE EXISTING VIOLATIONS AT THE SITE PRECLUDE THE PLANNING BOARD FROM RECEIVING, REVIEWING OR GRANTING ANY SITE PLAN APPLICATION

Based on a site walk by the Planning Board in January of 2010, there are outstanding state and Dover Code violations at the site. Willie Janeway, the New York State Regional Director for Region 3 has concurred with this conclusion as it concerns state violations for the record. Neither the applicant nor the site owner need local approval to rectify outstanding state violations at the site. A number of these state violations are also Dover Code violations including, but not limited to, the existence of the solid and hazardous waste located at the site. In fact, As best stated by the Building Inspector, the stop work order he issued in 2005 is still in effect as he has "not rescinded it." There is apparently no evidence that the former operator of the site ever obtained the local approvals necessary to lawfully run its operation. Dover Code Section 145-57.H forbids the Planning Board from receiving, reviewing or granting this applicant site plan approval or any other approval until the outstanding violations are rectified. No other conclusion can be drawn from a plain reading of the applicable local law provision and the record in this matter.

**THE PROPOSED USE AT THE SITE IS NOT A CONTINUATION OF A LAWFUL
PREEXISTING, NONCONFORMING USE AND SHOULD NOT BE PERMITTED**

Section 145-24.A of the Dover Code clearly states that “If a nonconforming use of land or structures is discontinued for a period of one year, it shall not thereafter be reestablished except as provided in Subsection B, and any future use shall be in conformity with this chapter.” Subsection B does not apply to this application. The period of one year has been held by the courts in this state to be an adequate amount of time.

It is undisputed in the record that the applicant’s and landowner’s operation of a solid waste management facility at the site ceased in November 2005. The nonconforming use of land at the site was discontinued under any rational interpretation of the Dover Code and New York case law. In this regard, the Planning Board appears to have been misled by the Town Board and its counsel and the applicant. The case law indicates that an intention to abandon a nonconforming use of property must be established if the zoning law fails to provide that mere discontinuation of the nonconforming use of property for a specified time constitutes abandonment. The annexed cases and treatise pages are merely provided as examples.

CONCLUSION

The Conservancy appreciates the Planning Board’s consideration of the issues herein and requests that the Rasco application be denied.

Sincerely,

Chris Wood
Chairman

123 A.D.2d 866, 507 N.Y.S.2d 646

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Supreme Court, Appellate Division, Second Department, New York.
In the Matter of Nicholas MARZELLA, Respondent,
v.
David MUNROE, et al., etc., Appellants.

Oct. 27, 1986.

Petitioner seeking building permit appealed from determination of zoning board of appeals which denied application. The Supreme Court, Westchester County, Donovan, J., granted petition and remitted matter to board for hearing on whether proposed restoration of subject property would violate village code. On appeal, the Supreme Court, Appellate Division, held that petition was properly granted, as evidence adduced before Zoning Board demonstrated no **intention for abandonment of nonconforming use** of subject property.

Affirmed.

West Headnotes

[1]  [KeyCite Citing References for this Headnote](#)

- ↳ 414 Zoning and Planning
 - ↳ 414VI **Nonconforming Uses**
 - ↳ 414k1317 Discontinuance or **Abandonment**
 - ↳ 414k1318 k. In general. [Most Cited Cases](#)
(Formerly 414k336.1, 414k336)

Intention to **abandon nonconforming use** of property must be established if zoning ordinance fails to provide that mere discontinuation of **nonconforming use** of property for specified period of time constitutes an **abandonment**.

[2]  [KeyCite Citing References for this Headnote](#)

- ↳ 414 Zoning and Planning
 - ↳ 414VI **Nonconforming Uses**
 - ↳ 414k1317 Discontinuance or **Abandonment**
 - ↳ 414k1318 k. In general. [Most Cited Cases](#)
(Formerly 414k336.1, 414k336)

Evidence before zoning board as to **intent to abandon** did not support determination that **nonconforming use** had been **abandoned**.

*646 John L. Murray, White Plains, for appellants.

Walsh, Maroney & Ponzini, Tarrytown (Robert J. Ponzini and Mark L. Davies, of counsel), for respondent.

Before THOMPSON, J.P., and WEINSTEIN, LAWRENCE and EIBER, JJ.

MEMORANDUM BY THE COURT.

In a proceeding pursuant to CPLR article 78 to review a determination of the Zoning Board of Appeals of the Village of Dobbs Ferry, dated April 12, 1985, which denied the petitioner's application for a building permit, the appeal is from a order of the Supreme Court, Westchester County (Donovan, J.), entered July 25, 1985, which granted the petition, annulled the determination, and remitted the matter to the zoning board of appeals for a hearing on whether the proposed restoration of the subject property would violate of the Code of the Village of Dobbs Ferry § 300-78.

ORDERED that leave to appeal to this court is hereby granted by Justice Weinstein; and it is further,

ORDERED that the order is affirmed, with costs.

[1] [2] The court properly granted the petition and annulled the zoning board's determination that the **nonconforming use** of the subject property had been **abandoned**. Since the zoning ordinance in this case fails to provide that the mere discontinuation of a **nonconforming use** of the property for a specified period of time constitutes an **abandonment**, an **intention** to **abandon** the **nonconforming use** of the property must be established (see, *647 [Matter of Prudco Realty Corp. v. Palermo](#), 93 A.D.2d 837, 461 N.Y.S.2d 585, *affd.* 60 N.Y.2d 656, 467 N.Y.S.2d 830, 455 N.E.2d 483, [Matter of Concerned Citizens of Montauk v. Lester](#), 62 A.D.2d 171, 404 N.Y.S.2d 360; [City of Binghamton v. Gartell](#), 275 App.Div. 457, 90 N.Y.S.2d 556). The evidence adduced before the zoning board, however, belied any **intention** to **abandon** the **nonconforming use** of the property (see, [Matter of Daggett v. Putnam](#), 40 A.D.2d 567, 334 N.Y.S.2d 556; [Baml Realty v. State of New York](#), 35 A.D.2d 857, 314 N.Y.S.2d 1013; [Gauthier v. Village of Larchmont](#), 30 A.D.2d 303, 291 N.Y.S.2d 584; [City of Binghamton v. Gartell](#), *supra*).

N.Y.A.D. 2 Dept.,1986.
Marzella v. Munroe
123 A.D.2d 866, 507 N.Y.S.2d 646

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1 N.Y. Zoning Law & Prac. § 10:42

New York Zoning Law and Practice
Database updated September 2009

Patricia E. Salkin

Chapter 10. Protection, Limitation, and Termination of Nonconforming Uses
C. Restrictions on Nonconforming Use
5. Abandonment or Discontinuance

[References](#)

§ 10:42. Abandonment or discontinuance of use

West's Key Number Digest

West's Key Number Digest, [Zoning and Planning](#) ¶336-338.

Where a municipality's zoning ordinance provides that nonconforming uses will be considered abandoned where the use is discontinued for a period of 12 consecutive months, the court found that the village established that between April 9, 2002 and January 4, 2004 the property ceased to be operated as a gas station which was a preexisting nonconforming use, and therefore the property lost its nonconforming use status due to abandonment. The court noted in a footnote that although the property owner may not have intended to abandon the use, because the zoning ordinance contained a lapse period, inquiry into intent is foreclosed. [Village of Waterford v. Amna Enterprises, Inc.](#), 27 A.D.3d 1044, 812 N.Y.S.2d 169 (3d Dep't 2006).

Where the municipal zoning code provides that a nonconforming use is deemed to be abandoned "when it has not in fact been actually used for a continuous period of three years," the court found that the town established that the subject property had not been used as a mobile home park for a continuous three year period, and that the previous owner has abandoned the nonconforming use. [Town Bd. of Town of Southampton v. Credidio](#), 21 A.D.3d 547, 800 N.Y.S.2d 732 (2d Dep't 2005).

Where a pre-existing non-conforming use was ordered to stop by injunction until the owner complied with applicable town, building and fire codes in August of 1997, and rather than make the necessary repairs, the owner sold the property in November 1998, it was reasonable for the zoning board of appeals to conclude on application of the new owner for an area variance, that the property owner did not voluntarily discontinue the nonconforming use under the Town zoning code since it was the injunction that prevented the owners from continuing the nonconforming use. The Second Department reiterated that even where the reviewing court might disagree with the zoning board of appeals, the determination of a board regarding the continuation of a preexisting nonconforming use must be sustained if it is rational and supported by substantial evidence. The Board's determination was supported by a finding that despite numerous code violations over the years, the previous owners continued the nonconforming use up until the injunction legally prevented them from doing so. [Savetsky v. Board of Zoning Appeals of Town of Southampton](#), 5 A.D.3d 779, 774 N.Y.S.2d 188 (App. Div. 2d Dep't 2004), leave to appeal denied (N.Y. Aug. 31, 2004).

A Trustee in a bankruptcy proceeding is bound by the same zoning laws as any other property owner, and the automatic stay provisions of [section 362 of the Bankruptcy Code](#) and [11 U.S.C.A. § 362](#) do not exempt a trustee from compliance. Therefore, where the non-conforming use of the property as a mine ceased for a period of more than one year, triggering a provision in the local law that provides that "In any district, whenever a non-conforming use of land, premises, building or structure has been discontinued for a period of one year, such non-conforming use shall not thereafter be reestablished, and all future use shall be in conformity with the provisions of this ordinance," the trustee could not auction off the property for use as a gravel pit. [In re Chaffee Aggregates, Inc.](#), 300 B.R. 170, 42 Bankr. Ct. Dec. (CRR) 7, 50 Collier Bankr. Cas. 2d (MB) 1623 (Bankr. W.D. N.Y. 2003).

There was substantial evidence to support a zoning board of appeals' determination that a preexisting nonconforming use had been abandoned and that alleged incidental activities did not suffice to constitute a continued operation of the nonconforming use (a batch plant for the production of cement) during the time in question. Telephone records showed no call activity during that period of time. The zoning board of appeals could properly determine that the use was abandoned notwithstanding that (1) an invoice for stone during that time period was produced (where a letter confirmed delivery but the bill was invoiced to a different part of the company in a different locality); (2) there was evidence of rental of a front loader for a total of

10 1/2 days during the first month where the zoning board alleged inactivity; and (3) a letter from a company officer was produced that confirmed that the facility "was actively operated and maintained through the late fall of 1995" (when the zoning board claimed that the period of inactivity ran from August 12, 1995 to September 25, 1996). [Town of Johnsburg v. Town of Johnsburg Zoning Board of Appeals, 299 A.D.2d 796, 751 N.Y.S.2d 85 \(3d Dep't 2002\)](#).

Petitioner owned a building in New York City that had a large billboard painted on the side of it. The billboard had been there since the 1920s and, as the zoning changed over the years, had become a nonconforming use. The billboard was in constant use except for a 27-month period when the building was undergoing legally required facade inspections and repairs. The New York City Board of Standards and Appeals determined that since the nonconforming use had been discontinued for over two years, pursuant to the Zoning Resolution § 52-61 it had lost its previously afforded protection. However, the Appellate Division, First Department, concluded that the City Zoning Resolution "may not reasonably be read to authorize termination of petitioner's protected nonconforming use under the particular circumstances presented." Specifically, the court found that since the cessation of the use was legally mandated for duly permitted and diligently completed repairs, allowing the Resolution to trigger a termination of the use under these circumstances would "raise a most serious question as to whether the Zoning Resolution purports to authorize and unconstitutional taking." [149 Fifth Avenue Corp. v. Chin, 759 N.Y.S.2d 455 \(App. Div. 1st Dep't 2003\)](#).

Where petitioner put forth documentary evidence and sworn testimony that the parcel in question had been in use since the 1950s with no termination of use either prior to or after the current version of the City's zoning law, the court determined that there was insufficient evidence to warrant a conclusion by the zoning board of appeals that the use of the parcel was not of a sufficient continual duration. [Partition Street Corp. v. Zoning Board of Appeals of City of Rensselaer, 302 A.D.2d 65, 752 N.Y.S.2d 749 \(3d Dep't 2002\)](#).

The Appellate Division, Second Department, upheld the lower court's remittal to the zoning board of appeals for a determination as to whether the issuance of a certificate of compliance for boiler and chimney installations on the subject property extended the nonconforming use and whether the nonconforming use on the subject property had been abandoned or discontinued pursuant to the town code. [Salino v. Town of Brookhaven Bd. of Zoning Appeals, 288 A.D.2d 477, 732 N.Y.S.2d 907 \(2d Dep't 2001\)](#).

The City of Ithaca amended its zoning ordinance to modify the time period during which an owner must occupy a nonconforming residence so as not to lose the nonconforming status. Under the standard in effect until August 1998, the petitioner would have satisfied the criteria for nonconforming status, and, in fact, had changed his pattern of residency to comply now with the newly enacted criteria. If the newly enacted criteria were to apply for the period prior to August 1998, the petitioner's property would lose its nonconforming status. In determining which law applied, the court reiterated that zoning ordinances are to be applied prospectively, and, therefore, the former ordinance would apply because it was in effect during the claimed abandonment period. [Greene v. Board of Zoning Appeals of City of Ithaca, 267 A.D.2d 835, 700 N.Y.S.2d 299 \(3d Dep't 1999\)](#).

Where the City Code provides for termination of nonconforming uses based upon non-operation or nonuse for a period of twelve successive calendar months or more, the court upheld the determination by the zoning board of appeals that petitioner's right to continue the nonconforming use of his building as a two-family dwelling was terminated when he leased the unit as a one-dwelling unit, renting out the "whole house" as opposed to either of the two units. The court's decision was based upon the fact that the two units were not separated into distinct apartments and that the basement kitchen contained no operable stove. [E.P.G. Associates v. City of Ithaca Bd. of Zoning Appeals, 257 A.D.2d 744, 682 N.Y.S.2d 724 \(3d Dep't 1999\)](#).

The Appellate Division upheld the determination of a zoning board of appeals that a nightclub use was abandoned because the property was not "actually used" as a nightclub for a continuous three-year period. Although the nightclub was used one night per year from 1993 to 1996 for a four- to six-hour annual holiday party attended by 20-40 friends and business acquaintances of the deceased's son, this fact alone was not enough to prove that the premises were "actually

used" as a nightclub. The court determined that the phrase "actually used" does not mandate a complete cessation of the use, but rather is qualifying language that equates abandonment with something less than a total discontinuance of the nonconforming use. [Estate of Cuomo v. Rush, 273 A.D.2d 234, 708 N.Y.S.2d 695 \(2d Dep't 2000\)](#).

The Appellate Division, Second Department found that a pre-existing nonconforming use ceased to exist when the petitioner stopped using the subject property as a group home for more than one year due to the alleged fact that the petitioner was unable to secure a tenant for this use, although the petitioner intended to find a tenant who would use the property for this purpose. The local zoning law provided that nonconforming uses may be continued indefinitely, but "shall not be re-established if such use has been discontinued for any reason for a period of one year or more or has been changed to, or replaced by, a conforming use. The intent to resume a nonconforming use shall not confer the right to do so." The court found that there was a clear cessation of the prior nonconforming use. [Vite, Inc. v. Zoning Bd. of Appeals for Town of Greenville, 282 A.D.2d 611, 723 N.Y.S.2d 239 \(2d Dep't 2001\)](#).

Since the use of the subject premises as a parking garage had been discontinued for a period of two years after the adoption of the current zoning regulations which made the use a nonconforming one, the petitioner was no longer entitled to nonconforming status, since the use was abandoned under § 52-61 of the Zoning Resolution of the City of New York. [Ponte Equities, Inc. v. Chin, 284 A.D.2d 283, 726 N.Y.S.2d 849 \(1st Dep't 2001\)](#).

Since a nonconforming use qualifies as such only if it is lawfully in existence when the zoning ordinance becomes effective, a nonconforming use is "only valid if there be a continuance of a nonconforming use in unbroken sequence from the time the zoning ordinance became effective to the date of the alleged violation."[\[FN1\]](#) Municipal legislatures have not relied on this logic, but have included in their zoning ordinances specific provisions for the termination of abandoned nonconforming uses.[\[FN2\]](#) Some ordinances terminate nonconforming uses after a specific period of abandonment;[\[FN3\]](#) others are drafted in terms of "discontinuance" of use.[\[FN4\]](#) The term "abandonment," as it is employed in these ordinances, imports some manifestation of intent to abandon the nonconforming use.

Abandonment in law depends in law upon the concurrence of two and only two factors: one, an intent to abandon or relinquish; and two, some overt act, or some failure to act, which carries the implication that owner neither claims nor retains any interest in the subject matter of the abandonment.[\[FN5\]](#)

Applying this definition, the Appellate Division ruled that a right to maintain two trailers on a parcel of land as a nonconforming use is not abandoned by the removal of one trailer for a period in excess of one year, the time limited by the ordinance for abandonment of a nonconforming use.[\[FN6\]](#) No abandonment of use was found where the owner of a nonconforming junkyard discontinued business for four years, but maintained a watchman on the premises during the period of inactivity.[\[FN7\]](#) Where, during a period of six or seven years prior to the termination of a lease between petitioner-lessor and lessee-oil corporation, petitioner exercised no control over the nonconforming use or premises and could not compel the lessee to operate a gasoline station, it was held that the nonconforming use was in fact discontinued.[\[FN8\]](#) Discontinuance due to a fire which partially destroyed the nonconforming premises was held not to amount to abandonment, there being no voluntary cessation and no intent to relinquish the right of use.[\[FN9\]](#) A protracted discontinuance of a boarding house was said not to equal an abandonment where the interruption of use was caused by wartime restrictions.[\[FN10\]](#) A temporary discontinuance of use due to condemnation by the government of part of the nonconforming premises was held not an abandonment, because the intent to abandon was lacking.[\[FN11\]](#) And failure to renew a license to conduct a nonconforming parking lot did not equal an abandonment of the use, although such failure subjected the owner to certain penalties.[\[FN12\]](#)

While an interruption of use, when it is caused by circumstances beyond the control of the user, is said not to constitute an abandonment, because the intent to abandon is lacking, a protracted period of disuse, unaccompanied by circumstances which belie an intent to abandon,

may be regarded as an abandonment.[\[FN13\]](#) A right of nonconforming use of a building for six apartments was not abandoned simply because a certificate of occupancy erroneously stated that the building was used for only two apartments.[\[FN14\]](#) Where the zoning ordinance does not provide for the termination of a nonconforming use upon the mere discontinuance of the use for a specified period, proof of intent to abandon is needed to prove abandonment of the use.[\[FN15\]](#)

Thus, where an airplane manufacturer discontinued its nonconforming factory during the depression of the thirties, and did not resume such use for more than 10 years, it abandoned its right to the nonconforming use.[\[FN16\]](#) A five-year discontinuance of a gasoline station, plus failure during that period to renew permits, was held an abandonment of use.[\[FN17\]](#) And the same result was reached where the nonconforming use was discontinued for five years, resumed briefly, and discontinued for four years more.[\[FN18\]](#) Where the zoning ordinance required termination of the right of nonconforming use after a period of one year or more, a nonconforming use for the manufacture of wall paper is not preserved where no manufacturing had occurred during a year and the only use made of the property was for the storage and some wholesaling of wallpaper.[\[FN19\]](#) Even a brief period of discontinuance may constitute an abandonment if the circumstances supply the element of intent. Thus, the Appellate Division found the requisite intent where a gasoline station was discontinued for 90 days and was boarded and surrounded by a chain link fence. [\[FN20\]](#) However, where an ordinance prohibited the return of a nonconforming use after a discontinuance of two years or more, it is irrelevant that the user did not intend to abandon the use.[\[FN21\]](#)

Notwithstanding that a zoning ordinance permits a change from one nonconforming use to another, a change may not be effected after the nonconforming use has been abandoned.[\[FN22\]](#) A reviewing court will not substitute its judgment for that of the board where evidence and testimony is presented as to whether a use was abandoned after the requisite period of time.[\[FN23\]](#)

Abandonment of a nonconforming use does not occur until there has been a "complete cessation of the entire nonconforming use" and the burden of proof lies on the petitioner. [People v. Simpson, 5 Misc. 3d 1029\(A\), 799 N.Y.S.2d 163 \(Dist. Ct. 2004\).](#)

Petitioner sought review of the Board of Standards and Appeals determination that modified a certificate of occupancy to provide that a nonconforming retail use cannot be maintained on the first floor of the subject premises because the nonconforming use had been discontinued for over 2 years. The Court held that the Board's determination had a rational basis and was not capricious or arbitrary. [1491 Richmond Road, LLC v. New York City Bd. of Standards and Appeals, 35 A.D.3d 614, 824 N.Y.S.2d 745 \(2d Dep't 2006\).](#)

The determination of the ZBA approving the establishment of nonconforming uses of the subject property for a restaurant and bar with outside service, a marina, and a ferry landing, with outside entertainment, was irrational and not based upon evidence in the record because all of the nonconforming uses were substantially discontinued for a period of more than one year within the meaning of the Town Code which provides, in part, that the "substantial discontinuance of any nonconforming use for a period of one year or more terminates such nonconforming use of a structure or premises." While an "abandonment" of a legal nonconforming use requires "a complete cessation" of the nonconforming use, a "substantial discontinuance" of a legal nonconforming use requires something less than a complete cessation of that use. The certificate of occupancy clearly stated that the restaurant and bar that had been operated on the premises were closed in excess of 1 year. The premises were also used solely as a restaurant and bar during a three-year period, without outside service or entertainment, and that no marina or ferry terminal was in operation during that period. This evidence conclusively proved that the nonconforming uses were substantially discontinued for a period of more than one year, hence the determination of the ZBA that the nonconforming uses did not run afoul of the Town Code was irrational and not based on the evidence in the record. Additionally, granting the application to establish the use of a ferry terminal as a nonconforming use was irrational because the ZBA specifically found that the premises were never used as a ferry terminal.

[Eccleston v. Town of Islip Zoning Bd. of Appeals, 40 A.D.3d 854, 836 N.Y.S.2d 637 \(2d Dep't 2007\).](#)

[FN1] [People, on Complaint of Kelly v. Sheil, 26 N.Y.S.2d 188, 190 \(Magis. Ct. 1941\).](#)

Annotations: [Zoning: Right to resume nonconforming use of premises after voluntary or unexplained break in the continuity of nonconforming use. 57 ALR3d 279.](#)

[Zoning: Right to resume nonconforming use of premises after involuntary break in the continuity of nonconforming use caused by governmental activity. 56 ALR3d 138.](#)

[Zoning: Right to resume nonconforming use of premises after involuntary break in the continuity of nonconforming use caused by difficulties unrelated to governmental activity. 56 ALR3d 14.](#)

[FN2] Zoning Ordinance, Village of Springfield, § 132-47 (As of 1996).

[FN3] Zoning Ordinance, City of Rochester, § 115-96 (a) (1996).

[FN4] Zoning Ordinance, City of Lockport § 190-158 (1990).

[FN5] [City of Binghamton v. Gartell, 275 A.D. 457, 460, 90 N.Y.S.2d 556, 559 \(3d Dep't 1949\).](#)

"Generally speaking, abandonment of a use is more than the temporary cessation of operations, or even their prolonged discontinuance ... , and requires the concurrence of two factors (1) nonuser, coupled with (2) the intent to abandon." [Concerned Citizens of Montauk, Inc. v. Lester, 62 A.D.2d 171, 173, 404 N.Y.S.2d 360, 362 \(2d Dep't 1978\).](#)

See also [Quartuccio v. Waldbauer, 42 A.D.2d 614, 345 N.Y.S.2d 132 \(2d Dep't 1973\).](#)

[FN6] [Daggett v. Putnam, 40 A.D.2d 576, 334 N.Y.S.2d 556 \(4th Dep't 1972\).](#)

[FN7] [City of Binghamton v. Gartell, 275 A.D. 457, 90 N.Y.S.2d 556 \(3d Dep't 1949\).](#)

[FN8] [Hanna v. Crossley, 40 A.D.2d 577, 334 N.Y.S.2d 443 \(4th Dep't 1972\).](#)

A restaurant/bar, which was a lawful nonconforming use, had ceased operation for almost one year before it was purchased and although steps were taken to reopen the establishment, which was not accomplished until more than one year after the purchase, the zoning board properly determined that it had not lost its status as a nonconforming use under the town's zoning ordinance. [Sadler v. Zoning Bd. of Appeals of the Town of Union Vale, 240 A.D.2d 505, 658 N.Y.S.2d 127 \(2d Dep't 1997\).](#)

An abandonment of a nonconforming principle use terminates the property owner's right to maintain a nonconforming accessory use. [Galante v. Mineola Ford Sales, Ltd., 160 A.D.2d 758, 554 N.Y.S.2d 59 \(2d Dep't 1990\).](#)

A nonconforming business is not abandoned simply by turning it over to family members who do not own the property on which it is run, since a nonconforming use cannot be invalidated on the basis of the landowner's lack of personal relationship where the use itself has not changed. [Iazzetti v. Village of Tuxedo Park, Orange County, 145 Misc. 2d 78, 546 N.Y.S.2d 295 \(Sup. Ct. 1989\).](#)

There is no abandonment of a nonconforming use when the discontinuance involves a temporary cessation over which the owner has no control. [Carlington Corp. v. Siegel, 61 A.D.2d 813, 402 N.Y.S.2d 46 \(2d Dep't 1978\).](#)

A license to operate a nonconforming cabaret cannot be denied for failure to apply within six months where the lapse of time was due to the failure of a trustee in bankruptcy to deliver a lease to enable the application to be perfected. [Bogey's Emporium, Inc. v. City of White Plains, 114 A.D.2d 363, 493 N.Y.S.2d 880 \(2d Dep't 1985\).](#)

Where timely resumption of a nonconforming restaurant, bar, and discotheque was blocked by unwarranted conduct on the part of municipal officers, the landowner had a right to resume the use. An agreement by the owner with the village, entered to forestall improper opposition to

issuance of a liquor license, did not terminate owner's right to allow dancing. [Incorporated Village of Ocean Beach in Suffolk County v. Stein](#), 110 A.D.2d 820, 488 N.Y.S.2d 239 (2d Dep't 1985).

[FN9] [440 East 102nd Street Corp. v. Murdock](#), 285 N.Y. 298, 34 N.E.2d 329 (1941); [Navin v. Early](#), 56 N.Y.S.2d 346 (Sup. Ct. 1945).

[FN10] [Marshak v. City of Long Beach](#), 195 Misc. 125, 81 N.Y.S.2d 74 (Sup. Ct. 1948), judgment aff'd, 278 A.D. 966, 105 N.Y.S.2d 983 (2d Dep't 1951).

"The mere temporary *non-use* of the property as a two-family house unaccompanied by other acts referable only to an intent to abandon such use in favor of another, is insufficient to destroy such a substantial property right." [Hackett v. Roos](#), 196 N.Y.S.2d 197, 198 (Sup. Ct. 1959).

Discontinuance of the use of a driveway for 21 months, due to lack of funds for essential repairs, did not result in abandonment of use by a club. [Froelich v. Beach Point Club, Inc.](#), 202 N.Y.S.2d 115 (Sup. Ct. 1960).

[FN11] [440 East 102nd Street Corp. v. Murdock](#), 285 N.Y. 298, 34 N.E.2d 329 (1941).

[FN12] [Henning v. Goldman](#), 8 Misc. 2d 228, 169 N.Y.S.2d 817 (Sup. Ct. 1957).

[FN13] [Deyo v. Hagen](#), 41 A.D.2d 790, 341 N.Y.S.2d 328 (3d Dep't 1973).

Abandonment does not occur when a nonconforming use is discontinued unless the discontinuance is accompanied by intent to abandon. [Prudence v. Town of Ithaca Zoning Bd. of Appeals](#), 195 A.D.2d 662, 599 N.Y.S.2d 749 (3d Dep't 1993).

[FN14] [Wemett v. Zoning Bd. of Appeals of City of Rochester](#), 178 A.D.2d 975, 578 N.Y.S.2d 735 (4th Dep't 1991).

[FN15] [Town of Ithaca v. Hull](#), 174 A.D.2d 911, 571 N.Y.S.2d 609 (3d Dep't 1991).

[FN16] [Curtiss-Wright Corporation v. Incorporated Village of Garden City](#), 296 N.Y. 839, 72 N.E. 2d 26 (1947).

[FN17] [Larson v. Howland](#), 124 N.Y.S.2d 754 (Sup. Ct. 1953).

[FN18] [Longo v. Eilers](#), 196 Misc. 909, 93 N.Y.S.2d 517 (Sup. Ct. 1949).

[FN19] [New Venture Realty, Ltd. v. Fennell](#), 210 A.D.2d 412, 620 N.Y.S.2d 99 (2d Dep't 1994).

[FN20] [Highway Oil Co., Inc. v. Zoning Bd. of Appeals of City of Fulton](#), 55 A.D.2d 821, 390 N.Y.S.2d 298 (4th Dep't 1976).

[FN21] [Sapakoff v. Town of Hague Zoning Bd. of Appeals](#), 211 A.D.2d 874, 621 N.Y.S.2d 215 (3d Dep't 1995), appeal dismissed, 85 N.Y.2d 923, 627 N.Y.S.2d 324, 650 N.E.2d 1326 (1995).

Where, however, a zoning ordinance does not provide for the termination of a right of nonconforming use upon the discontinuance of such use for a prescribed period, no abandonment of the nonconforming use can occur unless the user has evidenced intent to abandon it. [Marzella v. Munroe](#), 123 A.D.2d 866, 507 N.Y.S.2d 646 (2d Dep't 1986), appeal granted, 69 N.Y.2d 605, 513 N.Y.S.2d 1026, 505 N.E.2d 954 (1987) and order aff'd as

modified, [69 N.Y.2d 967](#), [516 N.Y.S.2d 647](#), [509 N.E.2d 342](#) (1987).

[FN22] The right to continue a nonconforming use of a frame structure as a multiple dwelling was abandoned where the use was changed to maintain a convent, a legal use, and the latter use was continued for more than twenty years. [Ellentuck v. Stein](#), [44 A.D.2d 714](#), [354 N.Y.S.2d 705](#) (2d Dep't 1974).

[FN23] [Calvi v. Zoning Bd. of Appeals of City of Yonkers](#), [238 A.D.2d 417](#), [656 N.Y.S.2d 313](#) (2d Dep't 1997).

174 A.D.2d 911, 571 N.Y.S.2d 609

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Supreme Court, Appellate Division, Third Department, New York.
TOWN OF ITHACA, Appellant,
v.
Lawrence H. HULL, Respondent.
June 20, 1991.

Town brought action to enjoin landowner from using barn for commercial storage in residential zone. The Supreme Court, Tompkins County, Ellison, J., ruled in favor of landowner. Town appealed. The Supreme Court, Appellate Division, [Harvey](#), J., held that: (1) testimony by predecessor in interest that barn had been used for commercial storage prior to residential zoning ordinance established that use of premises as preexisting nonconforming use was created prior to the ordinance, and (2) evidence failed to establish owners' intent to abandon nonconforming use of barn for commercial storage.
Affirmed.

West Headnotes

[1]  [KeyCite Citing References for this Headnote](#)

↳ [414](#) Zoning and Planning
↳ [414VI](#) Nonconforming Uses
↳ [414k1302](#) k. Existence of use in general. [Most Cited Cases](#)
(Formerly 414k323)

Landowner claiming preexisting nonconforming use had burden to establish that use of premises was legally created prior to restrictive ordinance.

[2]  [KeyCite Citing References for this Headnote](#)

↳ [414](#) Zoning and Planning
↳ [414VI](#) Nonconforming Uses
↳ [414k1302](#) k. Existence of use in general. [Most Cited Cases](#)
(Formerly 414k323)

Testimony by predecessor in interest that barn had been used for commercial storage prior to residential zoning ordinance established that use of premises as preexisting nonconforming use was created prior to the ordinance.

[3]  [KeyCite Citing References for this Headnote](#)

- ↳ [414](#) Zoning and Planning
 - ↳ [414VI](#) Nonconforming Uses
 - ↳ [414k1317](#) Discontinuance or Abandonment
 - ↳ [414k1318](#) k. In general. [Most Cited Cases](#)
(Formerly 414k336.1, 414k336)

Right of property owner to continue nonconforming use may be lost if use is abandoned.

[4]  [KeyCite Citing References for this Headnote](#)

- ↳ [414](#) Zoning and Planning
 - ↳ [414VI](#) Nonconforming Uses
 - ↳ [414k1317](#) Discontinuance or Abandonment
 - ↳ [414k1319](#) k. Cessation of use. [Most Cited Cases](#)
(Formerly 414k337)

Intention to abandon nonconforming use of property had to be established, where there was no zoning ordinance stating that mere discontinuation of nonconforming use of property for specified period of time constituted abandonment.

[5]  [KeyCite Citing References for this Headnote](#)

- ↳ [414](#) Zoning and Planning
 - ↳ [414VI](#) Nonconforming Uses
 - ↳ [414k1317](#) Discontinuance or Abandonment
 - ↳ [414k1318](#) k. In general. [Most Cited Cases](#)
(Formerly 414k336.1, 414k336)

Evidence failed to establish owners' intent to abandon nonconforming use of barn for commercial storage in residential zone.

[6]  [KeyCite Citing References for this Headnote](#)

- ↳ [414](#) Zoning and Planning
 - ↳ [414VI](#) Nonconforming Uses
 - ↳ [414k1308](#) Enlargement or Extension of Use
 - ↳ [414k1311](#) k. Increase in amount or intensity of use. [Most Cited Cases](#)
(Formerly 414k331)

Although illegal extension of preexisting use is also improper, mere increase in volume or intensity of nonconforming use is not qualitative change of use.
****609** Barney, Grossman, Roth & Dubow ([Nelson E. Roth](#), of counsel), Ithaca, for appellant. Holmberg, Galbraith, Holmberg, Orkin & Bennett ([Dirk A. Galbraith](#), of counsel), Ithaca, for respondent.

Before [MAHONEY](#), P.J., and [CASEY](#), [WEISS](#), [YESAWICH](#) and [HARVEY](#), JJ.



****610 *911** [HARVEY](#), Justice.




Appeal from a revised judgment of the Supreme Court (Ellison, J.), entered June 8, 1990 in ***912** Tompkins County, upon a decision of the court in favor of defendant.

Defendant owns a parcel of land located at 611 Five Mile Drive, also known as 491--491 1/2 Floral Avenue, in the Town of Ithaca, Tompkins County, which he purchased in 1985. Situated upon the property is a barn which defendant uses for commercial storage of his plumbing supplies. Although defendant also initially operated his heating and plumbing business out of the barn, plaintiff informed defendant that such use of the building violated the residential zoning ordinance which governed the area. In 1986, defendant commenced an action against plaintiff seeking a judgment declaring that the use of the barn for business purposes was a preexisting nonconforming use and enjoining plaintiff from enforcing the residential zoning requirements against him. Supreme Court ultimately held that the barn was located within the residential zone and that, while the barn had previously been used for commercial storage, the operation of defendant's business on the property was an "impermissible extension of a nonconforming use" and dismissed the complaint in its entirety. This court affirmed that decision ([Hull v. Town of Ithaca](#), 139 A.D.2d 887, 527 N.Y.S.2d 617). [FN1]

[FN1](#). Although plaintiff had cross-appealed Supreme Court's order and judgment to the extent it indicated that defendant's use of the building for storage was a valid preexisting nonconforming use, this court determined that plaintiff was not an aggrieved party because the complaint against it had been dismissed in its entirety (see, [Hull v. Ithaca](#), 139 A.D.2d 887, 888, 527 N.Y.S.2d 617, *supra*).

Thereafter, defendant relocated his business to a new location although he continued to use his barn for storage purposes. In May 1989 plaintiff commenced this action seeking an injunction against defendant requiring him, *inter alia*, to cease any storage on his property "except pursuant to guidelines fixed by [plaintiff's] Board of Zoning Appeals". In his answer, defendant pleaded preexisting nonconforming use of the barn as a storage facility, *res judicata* and collateral estoppel as affirmative defenses. The latter two defenses were later dismissed by Supreme Court because it found that the dismissal of defendant's 1986 complaint against plaintiff (see, *id.*), "did not necessarily require a finding that [defendant] had a prior nonconforming use". A trial was then conducted after which Supreme Court determined that defendant's use of the barn for commercial storage constituted a valid preexisting nonconforming use. This appeal by plaintiff ensued.

[1]  [2]  We affirm. In our view, Supreme Court properly determined that defendant's use of the barn for commercial storage constituted *913 a preexisting nonconforming use. It is undisputed that the area where defendant's property is located has been zoned residential since at least 1954. It was incumbent upon defendant, therefore, to establish that his use of the premises was legally created prior to the restrictive ordinance (see, [Walter v. Harris](#), 163 A.D.2d 619, 558 N.Y.S.2d 266; [Town of Virgil v. Ford](#), 160 A.D.2d 1073, 1074, 553 N.Y.S.2d 554). Defendant met this burden, however, by testimony at trial from one of his predecessors in interest to the effect that the subject barn had been used for commercial storage prior to 1954.

[3]  [4]  [5]  Nevertheless, as plaintiff points out, the right of a property owner to continue a nonconforming use may be lost if, for instance, the use is abandoned (see, [Walter v. Harris](#), *supra*; [Maloy, Inc. v. Town Bd. of Town of Guilderland](#), 92 A.D.2d 1056, 1057, 461 N.Y.S.2d 529; [City of Binghamton v. Gartell](#), 275 App.Div. 457, 459-460, 90 N.Y.S.2d 556). Because there is no indication in this case of a zoning ordinance providing that "**the mere discontinuation of a nonconforming use of the property for a specified period of time constitutes an abandonment, an intention to abandon the nonconforming use of the property must be established**" ([Matter of Marzella v. Munroe](#), 123 A.D.2d 866, 507 N.Y.S.2d 646, *mod. on other grounds* **611 69 N.Y.2d 967, 516 N.Y.S.2d 647, 509 N.E.2d 342). Significantly, "[a] bandonment does not occur unless there has been a complete cessation of the nonconforming use" ([Matter of Marzella v. Munroe](#), 69 NY2d 967, 968, 516 N.Y.S.2d 647, 509 N.E.2d 342). Here, there was nothing adduced at trial that convinces us that there was an intent to abandon the nonconforming use by any of the respective owners of the premises. In fact, taken together,

the testimony from the various witnesses arguably indicates that the use of the barn to store supplies for the businesses of the various owners and lessees was continuous throughout the applicable period.

[6] Plaintiff's remaining contentions have been examined and found to be lacking in merit. Although it is true that an illegal extension of a preexisting use is also improper (see, [Maloy, Inc. v. Town Bd. of Town of Guilderland, supra, 92 A.D.2d at 1057, 461 N.Y.S.2d 529](#)), a mere increase in volume or intensity of a nonconforming use is not a qualitative change of use (see, [Syracuse Aggregate Corp. v. Weise, 72 A.D.2d 254, 424 N.Y.S.2d 556, affd. 51 N.Y.2d 278, 434 N.Y.S.2d 150, 414 N.E.2d 651](#)). Because there is no indication here that there was a variation or alteration in the specific type of use involved (see, [Gilmore v. Beyer, 46 A.D.2d 208, 210, 361 N.Y.S.2d 739](#)), plaintiff's arguments here are unavailing. ORDERED that the revised judgment is affirmed, with costs.

275 A.D. 457, 90 N.Y.S.2d 556

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Supreme Court, Appellate Division, Third Department, New York.
CITY OF BINGHAMTON
v.
GARTELL.

June 28, 1949.

Appeal from Supreme Court, Broome County; Bertram L. Newman, Justice.

Action by the City of Binghamton against Wolf Gartell. From a judgment of the Broome Trial Term of the Supreme Court enjoining the defendant from maintaining a junk yard on premises in Binghamton, New York, the defendant appeals.

Reversed and complaint dismissed.

West Headnotes

[1]  [KeyCite Citing References for this Headnote](#)

- ↳ 414 Zoning and Planning
 - ↳ 414VI Nonconforming Uses
 - ↳ 414k1317 Discontinuance or Abandonment
 - ↳ 414k1319 k. Cessation of use. [Most Cited Cases](#)
(Formerly 414k337, 268k601(24))

"Abandonment" within general rule that property owner's right to continue non-conforming use may be lost through "abandonment" of such use connotes a voluntary affirmative, completed act, and means something more than mere suspension, temporary nonoccupancy of building or temporary cessation of business, even though discontinuance exists over considerable period of life.

[2]  [KeyCite Citing References for this Headnote](#)

- ↳ 1 Abandoned and Lost Property

- ↳ 1I Abandonment
 - ↳ 1k1 Nature and Elements
 - ↳ 1k1.1 k. In general. [Most Cited Cases](#)
(Formerly 1k1, 1k2)

“Abandonment” in law depends on concurrence of two factors; one, an intention to abandon or relinquish; and two, some overt act or some failure to act which carries implication that owner neither claims nor retains any interest in subject matter of abandonment.

[3]  [KeyCite Citing References for this Headnote](#)

- ↳ 1 Abandoned and Lost Property
 - ↳ 1I Abandonment
 - ↳ 1k1 Nature and Elements
 - ↳ 1k1.1 k. In general. [Most Cited Cases](#)
(Formerly 1k1, 1k2)

Time is not essential element of abandonment, although lapse of time may be evidence of abandonment, and mere non-use of property over period of time, when unaccompanied by any other acts indicating intention to relinquish or abandon title thereto or ownership thereof, does not amount to abandonment.

[4]  [KeyCite Citing References for this Headnote](#)

- ↳ 414 Zoning and Planning
 - ↳ 414VI Nonconforming Uses
 - ↳ 414k1317 Discontinuance or Abandonment
 - ↳ 414k1319 k. Cessation of use. [Most Cited Cases](#)
(Formerly 414k337, 268k601(24))

Unless so stated in zoning ordinance, cessation or discontinuance of non-conforming use without substitution of another use or without evidence of intent to abandon non-conforming use will not prevent resumption of non-conforming use.

[5]  [KeyCite Citing References for this Headnote](#)

- ↳ 414 Zoning and Planning
 - ↳ 414VI Nonconforming Uses
 - ↳ 414k1317 Discontinuance or Abandonment
 - ↳ 414k1318 k. In general. [Most Cited Cases](#)
(Formerly 414k336.1, 414k336, 268k601(24))

Defendant's right to continue nonconforming use of land for junk yard or junk business was not lost under ordinance by abandonment of such use, notwithstanding that during four-year period there was little activity in conduct of business by defendant's predecessor, where there was occasional purchase of junk and during such period barn on premises was packed with tons of stored waste material and rest of premises continued to be used for storage of scrap metals and predecessor employed watchman to guard the property so stored.

****557 *458** James B. Gitlitz, Binghamton, and Chernin & Gold, Binghamton, for appellant.

Robert R. Cotten, II, Binghamton, and Herbert H. Ray, Binghamton, for respondent.

Before HEFFERNAN, BREWSTER, DEYO, SANTRY, and BERGAN, JJ.

HEFFERNAN, Justice.

On December 27, 1937 the City of Binghamton adopted a zoning ordinance which became effective on January 12, 1938 and is still in existence.

The pertinent provisions of that ordinance which relate to the questions presented for decision are:

'Section 7-Use Regulations

"H' Business District and 'I' and 'J' Light Industrial Districts. In the 'H' Business District and the 'I' and 'J' Light Industrial Districts ****558** all buildings and land, except as otherwise provided in this ordinance, may be used for any use permitted in the Commercial Districts or for any other use except the following:

* * *

'7. Automobile wrecking

* * *

***459** '59. Storage or baling of rags, iron or junk, including junked automobiles.'

'Section 10 provides:

'The lawful use of land existing at the time of the passage of this ordinance although such use does not conform to the provisions hereof, may be continued, but if such non-conforming use is discontinued, any future use of such premises shall be in conformity with the provisions of this ordinance.'

The premises involved in this controversy, which are situated in the 'H' Business District as defined in this ordinance, consist of a lot of land 75 feet wide and 150 feet deep located at and known as 20 Sanford Street in the City of Binghamton. On the rear portion of the lot there is an old barn. At one time there was a house on the front portion but that was demolished many years ago.

Sanford Street is a short highway with ten lots on each side, on some of which there are no structures. In addition to the premises at No. 20 there are four other junk yards on the street.


Defendant purchased this property on July 10, 1944 from one Edelstein who had acquired title thereto in 1919.


On April 24, 1947 the respondent instituted this action to enjoin defendant from using the premises as a junk yard in violation of the ordinance. After a trial of the issues judgment was rendered in favor of respondent and from that determination appellant has come to this court.


It is undisputed that when the zoning ordinance became effective the premises were being used as a junk yard and had been so used continuously since 1919 and the court below has so found.


On this appeal it is the contention of respondent that from 1940 to 1944, when appellant came into possession of the property, the premises were not actively used in conducting the junk business and that consequently the right to operate such an enterprise has been lost by abandonment.

Although other questions are discussed in the briefs of counsel we need not pause to consider them. The decisive issue in this case is what constitutes a discontinuance or an abandonment of a non-conforming use within the meaning of the ordinance. The court below awarded respondent an injunction on the theory that there had been a discontinuance of a non-conforming use, that of a junk yard or junk business.

****559** [1]  The general rule is that the right of a property owner to continue a non-conforming use may be lost through abandonment of ***460** such use. However, an abandonment within the meaning of the rule under consideration connotes a voluntary affirmative, completed act. It means something more than a mere suspension, a temporary non-occupancy of a building, or a temporary cessation of business and this has been held true even though the discontinuance existed over a considerable period of time ([58 Am.Jur. Zoning, § 153](#) and cases there cited).

[2]  Abandonment in law depends upon the concurrence of two and only two factors; one, an intention to abandon or relinquish; and two, some overt act, or some failure to act, which carries the implication that owner neither claims nor retains any interest in the subject matter of the abandonment. [Landay v. MacWilliams, 173 Md. 460, 196 A. 293, 114 A.L.R. 984](#). In the case cited at the time of the adoption of a zoning ordinance the premises involved were devoted to a non-conforming use, namely, a junk shop. The business was carried on by a tenant. After the termination of the tenancy the premises remained vacant for three years, not being used, except casually, for any purpose, when a purchaser sought a certificate of occupancy for a junk shop. The city authorities denied the application. The Baltimore City Court sustained that determination but the Maryland Court of Appeals reversed the judgment of the lower court, directed the issuance of the certificate and held that there was insufficient evidence to prove a legal abandonment and that the mere cessation or discontinuance of the use, without the substitution of another use, or without evidence of an intent to abandon the non-conforming use, did not result in a loss of right to resume such use.

[3]  Time is not an essential element of abandonment although the lapse of time may be evidence of abandonment. It is a universally accepted principle that mere non-use of property over a period of time, when unaccompanied by any other acts indicating an intention to relinquish or abandon title thereto or ownership thereof, does not amount to an abandonment ([1 C.J.S., Abandonment, § 3](#), and cases there cited).


[4]  There is no provision in the ordinance which we are construing that mere non-use for any specified period should be considered a discontinuance. The reasoning as well as the conclusions in the authorities cited is consistent with the principle that unless so stated in the ordinance cessation or discontinuance of a non-conforming use without the substitution of another use, or without evidence of an intent to abandon the non-conforming use, will not prevent its resumption.

461** In [State ex rel. Schaetz v. Manders, 206 Wis. 121, 124, 238 N.W. 835, 837](#), the premises in question had been operated for many years as a dairy in a residential zone. The corporate owner became insolvent and *560** the receiver did not continue the business. A buyer sought a permit to use the premises as a dairy and this was refused on the ground that

there had been a discontinuance of a non-conforming use. The wording of the zoning order in the case with respect to discontinuance of non-conforming uses was identical with that of the zoning ordinance of the City of Binghamton. In holding that the permit should have been issued, the Supreme Court of Wisconsin stated:

'It was plainly the intent of the ordinance to permit the continuance of nonconforming uses. While we have found no authority construing the legal meaning of the word 'discontinue,' we think that, as used in this ordinance, it means something more than a mere suspension. It was not the intention of the ordinance to destroy that right of an owner to continue the use of his premises by the mere fact that his tenant became insolvent. We agree with the circuit court that 'discontinuance, as it is used in the ordinance, cannot mean a temporary non-occupancy of the building or a temporary cessation of the business. * * * The word 'discontinuance' * * * is synonymous with abandonment. It connotes a voluntary, affirmative, completed act.' We think the right secured to the owner * * * is not lost by either accident or unpropitious circumstances over which he has no control which brings about a mere suspension of the nonconforming use. It is a right * * * to be enjoyed by him until he voluntarily relinquishes or abandons it.'

In [Lehmaier v. Wadsworth, 122 Conn. 571, 576, 191 A. 539, 541](#), the defendant owned land used as an airport, but at the time the ordinance affecting the property was passed that use had been discontinued. The trial court found such discontinuance, but held that the non-conforming use had not been lost because the property had not been devoted to a conforming use before the resumption of the non-conforming use. In reviewing that conclusion, the appellate court said: 'The temporary interruption or suspension of a nonconforming use without substitution of a conforming one or such a definite and substantial departure from previously existing conditions and uses as to signify an abandonment of the latter does not terminate the right to resume them. [[Town of Darien v. Webb, 115 Conn. 581, 586, 162 A. 690](#); [State ex rel. Schaez v. Manders, 206 Wis. 121, 238 N.W. 835](#). Even if the defendant had in mind the possibility of a future change in use, so long as his operations had a legitimate present purpose and *462 utility appropriate to the existing uses there would not be such departure from the latter as to require a finding of a present change terminating his right to continue them. No such substantial change can be made in the finding as would vitiate the conclusion that the property has not been devoted to a conforming use in substitution for those which were nonconforming.'

[5]  Tested by these principles the record in this case contains no substantial evidence to establish legal abandonment. From 1940 to 1944 Edelstein did nothing which was inconsistent with an intention to **561 continue the non-conforming use. It is true that during this period there was very little activity in the conduct of the business. However there was an occasional purchase of junk and the court below has so found.

Edelstein was a very elderly man whose health was impaired and his son who had assisted him was in the military service. When the son returned he was ill and unable to work and the premises and the junk were sold to defendant. During all this time the barn was packed with tons of stored waste materials and the rest of the lot continued to be used for storage of scrap metals. During his son's absence Edelstein employed one Pristi to watch the property stored in the barn and yard in return for permission to use a part of the yard as a garden.

The evidence clearly shows that the material stored on the premises had not been abandoned, but had been retained by the owner waiting for a favorable market. The fact that he employed a watchman to guard the property is definite proof that there was no intention to abandon it. Whether the business was actively operated or not during these years is of little moment. There was always the 'storage' prohibited by the ordinance.

The judgment appealed from is reversed on the law and facts and the complaint dismissed on the law with costs to appellant.

This Court reverses findings of fact Nos. 5, 6 and 7 of the decision of the Court below.

This Court finds that prior to and since the adoption of the zoning ordinance the premises in question have been used as a junk yard and for the sale of junk and that defendant and his predecessors in title have continuously conducted a junk yard on such premises; that defendant and his predecessors in title have *463 never discontinued the operation of a junk yard or junk business and that the right to continue such use has not been lost through abandonment.

The Court annuls the decretal provisions contained in the decision.

The Court makes the following conclusions of law:

(1) That plaintiff is not entitled to maintain this action;

(2) That defendant is entitled to continue the operation of a junk yard and junk business on the premises in question and that the right to operate and continue such use has never been lost or abandoned by defendant or his predecessors in title.

(3) That defendant is entitled to recover from plaintiff costs in this Court and in the Court below.

BREWSTER, DEYO, SANTRY and BERGAN, JJ., concur.