

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 14, 1996

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

NOTICE

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

No. 95-2292

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

VILLAGE OF FREMONT,

Plaintiff,

STATE OF WISCONSIN,

Intervenor-Plaintiff-Respondent,

v.

THOMAS L. MISCHLER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Waupaca County: JOHN P. HOFFMANN, Judge. *Affirmed.*

Before Eich, C.J., Vergeront, J., and Paul C. Gartzke, Reserve Judge.

PER CURIAM. Thomas L. Mischler appeals from a circuit court judgment in which the court found that equitable estoppel had no application in

this zoning ordinance violation case. Because we agree with the circuit court that estoppel has no application, we affirm.

BACKGROUND

In 1986, the Village of Fremont annexed various land along the Wolf River. In late June 1989, Thomas Mischler applied for, and received a Village building permit for a river-front lot in the annexed lands. He twice asked the Village building inspector to measure the setback of his proposed foundation, and was twice told it complied with Village requirements. Near the end of August 1989, DNR Inspector Richard Koch visited the site. Koch informed Mischler that the setback was not correct. However, the Village inspector informed Mischler that the building was within Village specifications. After this meeting, the Village "red-tagged" the building site, stopping construction.

On September 1, 1989, Mischler received a letter from the Village stating that:

the red tag was placed on the home you are building because the Dept. of Natural Resources strongly advised it, as they feel you are in the floodplain.... It is the village's opinion that you are within the required setbacks and the village zoning ordinance. The village attorney has advised us that you should deal directly with the DNR as they are the ones saying you are in violation.

The letter concludes by giving DNR Inspector Koch's address and telephone number. At the time Mischler received this letter, he had completed substantial construction and moving the building would have cost \$50,000. It is undisputed that Mischler never contacted Inspector Koch.

A few days after red-tagging the building, the Village removed the red tag, and Mischler finished the construction. We surmise that he and his family have been living in the building ever since.

On September 14, 1989, DNR commenced an appeal with the Village zoning board of appeals, and on October 3, 1989, informed Mischler that a land survey would be conducted on and near the building site. The DNR zoning appeal eventually led the DNR to intervene as a plaintiff in the case which underlies this appeal.

ANALYSIS

Thomas Mischler argues that the circuit court wrongly decided that estoppel is not a viable theory in zoning disputes. We disagree. Our supreme court has clearly stated that a building permit cannot confer the right to violate zoning ordinances. *Snyder v. Waukesha County Zoning Bd.*, 74 Wis.2d 468, 476-77, 247 N.W.2d 98, 103 (1976). Further, this is true even when, as here, the building inspector has made assurances to the contrary. *Id.*, see also *Jelinski v. Eggers*, 34 Wis.2d 85, 93, 148 N.W.2d 750, 755 (1967). Estoppel will not lie against a municipality so as to bar it from enforcing a zoning ordinance enacted pursuant to the police power. *Milwaukee v. Leavitt*, 31 Wis.2d 72, 77, 142 N.W.2d 169, 172 (1966).

Mischler cites *State v. City of Green Bay*, 96 Wis.2d 195, 291 N.W.2d 508 (1980), for the proposition that equitable estoppel applies against governmental agencies. We agree that this has long been the law of this state. Cf. *Leavitt*, 31 Wis.2d 76, 142 N.W.2d at 171 (governmental units are "not wholly immune from" equitable estoppel). However, *Green Bay* is a forfeiture case, not a zoning case and as such cannot overcome the clear precedent against application of equitable estoppel in zoning cases.

Mischler asks us to consider various out-of-state cases where estoppel has been permitted. We decline to do so. The court of appeals is bound by prior decisions of the Wisconsin Supreme Court. *Livesey v. Copps Corp.*, 90 Wis.2d 577, 581, 280 N.W.2d 339, 341 (Ct. App. 1979).

But even if estoppel had application in Wisconsin, it would not apply in this case for two reasons. First, estoppel only arises where there is action or inaction *by a party* that induces reliance by another to his or her detriment. *Tomah-Mauston Broadcasting Co., Inc. v. Eklund*, 143 Wis.2d 648,

656, 422 N.W.2d 169, 172 (Ct. App. 1988) (emphasis added). This has not occurred here. Mischler was informed by the DNR that his home did not comply with the applicable county set-backs. DNR in no way acted or failed to act in a manner which induced Mischler to rely to his detriment. That Mischler chose to disbelieve the DNR, and instead rely on the Village's assurances to complete his house is not the sort of reliance that can induce estoppel as against DNR.¹

Second, any reliance must be reasonable. *City of Kenosha v. Jensen*, 184 Wis.2d 91, 99, 516 N.W.2d 4, 8 (Ct. App. 1994). In the light of the DNR's statewide responsibility and reputation, Mischler's decision to rely on the Village of Fremont rather than the DNR was unreasonable. This is especially so in light of Inspector Koch's specific representation that Mischler's house failed to comply with the applicable setback requirements.

Because we conclude that estoppel would have no application here, we need not consider Mischler's argument that the circuit court erred in failing to balance the equities prior to granting injunctive relief. *Sweet v. Berge*, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983) (this court need not address other issues when one disposes of the appeal).

By the Court. – Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

¹ Whether it could estop the Village, or provide grounds for a recovery against the Village, or various individuals is not before us.