COURT OF APPEALS
DECISION
DATED AND FILED

May 6, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 97-2348

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

T. WILLIAM COOK AND MARY COOK,

PLAINTIFFS-APPELLANTS,

V.

WALWORTH COUNTY BOARD OF ADJUSTMENT, WALWORTH COUNTY DEPARTMENT OF PLANNING, ZONING AND SANITATION, WALWORTH COUNTY ZONING ADMINISTRATOR, AND WALWORTH COUNTY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. T. William and Mary Cook appeal from a judgment which affirms a decision of the Walworth County Board of Adjustment denying the Cooks' 1996 application for a zoning variance. The Cooks argue that

the Board is estopped from denying the variance when their building plans satisfy the shoreline setback requirement set forth in the Board's 1995 denial of a variance. We conclude that Walworth County had the right to amend its zoning ordinance and require the Cooks' compliance with the stricter setback requirements. We affirm the judgment.

We apply the traditional common law certiorari standard of review in this case. *See* ***Edward Kraemer & Sons, Inc. v. Sauk County Bd. of Adjustment,*** 183 Wis.2d 1, 7, 515 N.W.2d 256, 259 (1994). We may only consider: (1) whether the Board kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question. *See* ***id.***

The Cooks sought to build an addition to their home on Lake Delavan. They first made a variance application in 1995. That application was denied because the applicable ordinance required a minimum 41-foot shoreline setback. No appeal was taken from the denial.

In 1996, the Cooks again applied for a variance with building plans that had a 44.5-foot shoreline setback. The zoning ordinance had been amended and required a 75-foot shoreline setback. The 1996 variance application was denied.

The Cooks argue that by virtue of the Board's 1995 denial of a variance, they had a vested right to build an addition to their home with only a 41-foot shoreline setback. They claim that the Board is estopped from denying

their second application because they spent money to redesign their project in order to satisfy the 1995 requirement.

What is obvious from the outset is that the Board was within its jurisdiction in requiring compliance with the zoning requirements as they existed in 1996. There is no claim that the zoning ordinance was improperly amended. Thus, the Board's action was proper as based on the existing law.

The Cooks did not have a vested right to build the addition with only a 41-foot setback. The Board's statement in 1995 that the Cooks could build if they complied with the 41-foot setback was simply an affirmation that compliance with the applicable setback was required. In order for rights to vest to build under a particular version of a zoning or building code, the applicant must submit an application for a permit which conforms to the zoning or building code requirements in effect at the time of the application. *See* ***Lake Bluff Housing Part. v. City of South Milwaukee***, 197 Wis.2d 157, 177, 540 N.W.2d 189, 197 (1995). The Cooks did not submit an application for a building permit which complied with the 1995 setback requirement before the ordinance was amended.

We reject the Cooks' attempt to distinguish ***Lake Bluff*** on the ground that it involved an action for mandamus relief. The Cooks seek to apply estoppel against the Board. That is also an equitable remedy. *See* ***Milas v. Labor Ass'n of Wis., Inc.*** 214 Wis.2d 1, 11, 571 N.W.2d 656, 660 (1997). ***Lake Bluff*** teaches that there is no reasonable expectation to be able to proceed in violation of the applicable requirements. *See* ***Lake Bluff***, 197 Wis.2d at 175, 540 N.W.2d at 196. Equity will not lie to afford relief in a situation where rights have not vested and the zoning or building requirements are legally changed. *See* ***id.*** at 179, 540 N.W.2d at 198.

We conclude that the Board acted within its jurisdiction in denying the Cooks' 1996 variance application. The Cooks' claim that the circuit court should have considered the record of the 1995 variance proceeding is moot because we sustain the Board's decision. We note that the Cooks argue: "The trial court erred in ruling that the Board of Adjustment did not abuse its discretion in refusing to consider the 1995 proceedings before the Board." This argument is not developed in terms of why or how the Board failed to consider the 1995 proceedings. Indeed, the Board was aware that the 1995 application had been denied, that the Cooks spent money to redesign the project to meet the 41-foot setback requirement, and that the Cooks were unaware that the setback requirement had been increased to 75 feet. Any failure of the Board to review the 1995 proceedings was harmless.

The Board asks that we declare the Cooks' appeal frivolous. The Cooks attempted to distinguish ***Lake Bluff***. We are not convinced that the appeal lacked merit, and the Board's request is denied.

By the Court.—Judgment affirmed.

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