2012 IL App (1st) 111288-U

SECOND DIVISION
May 1, 2012

No. 1-11-1288

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ELIO VIVACQUA,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant and	)	Cook County
Cross-Appellee.	)	
	)	
v.	)	Case No. 10 M3 3961
	)	
THE VILLAGE OF NORRIDGE,	)	
	)	Honorable
Defendant-Appellee and	)	Sandra Tristano,
Cross-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Quinn and Justice Cunningham concur in the judgment.

O R D E R

¶1 *Held*: The administrative hearing officer's decision that the plaintiff violated the Village's zoning ordinance was against the manifest weight of the evidence where the Village presented insufficient evidence to sustain its claim. The hearing officer's decision that equitable estoppel did not prevent the Village from enforcing its zoning ordinance was clearly erroneous.

¶2 Plaintiff Elio Vivacqua appeals from a judgment of the circuit court confirming an

administrative decision that found Vivacqua liable for violating a zoning ordinance promulgated by defendant Village of Norridge. On appeal, Vivacqua contends that the Village should be estopped from asserting that he violated the ordinance because the Village previously approved the house for a legal nonconforming use. The Village cross-appeals from the circuit court's order, arguing that the court abused its discretion in reducing the fine imposed by the administrative hearing officer. For the following reasons, we reverse the decision of the circuit court, set aside the ruling of the administrative hearing officer, and remand this matter to the Village with instructions to dismiss the citation.

¶3 I. BACKGROUND

¶4 The parties in this case have been in conflict for nearly ten years. It began when Vivacqua purchased a house at 4126 Oketo (the house) in the village of Norridge in December of 2002 that previously had been converted from a single-family home into a "two-flat" building. The house was located in an area zoned as an R-1 single family residential district. However, at the time the house was transferred to Vivacqua, the Village's building commissioner issued an inspection certificate permitting the house to be used for a legal nonconforming use. See Village of Norridge Ordinance, sec. 18-31 (codified July 27, 2011).

¶5 Approximately three months later, Vivacqua received a citation from the Village for remodeling his basement without proper permits. Apparently as a result of that citation, the assistant building commissioner, Kenneth Radicke, inspected the house at least three times over the next year. Each time, Radicke noted different deficiencies in the house that Vivacqua was required to remedy.

¶6 In July of 2004, the Village president and building commissioner met with Vivacqua and indicated that the house was not in "compliance" and that Vivacqua had to make additional changes within two weeks or he would receive citations requiring "a mandatory court appearance." Vivacqua's house was inspected three more times, with each inspection resulting in more required repairs in the basement. By April 29, 2005, Radicke determined that Vivacqua's house was at last in compliance with applicable ordinances. However, he noted that the basement could only be used for storage and laundry because the ceiling height was lower than required by the building code. Additionally, although Radicke did not inspect the first or second floors on that visit, his report concluded that those floors were "approved for occupancy as per agreement."

¶7 In February of 2008, Radicke again inspected the basement because "there was suspicion that the basement was being occupied." After another inspection, Radicke concluded that the basement was in fact being occupied. Subsequently, on May 1, 2008, Radicke cited Vivacqua for violating article 4, section 1.1 of the Village's zoning ordinance because his "single family zoned property [was being] used as a multi-family residence." The May 1, 2008, ticket is the subject of this appeal.

¶8 Vivacqua requested a hearing before an administrative hearing officer, who determined that he was liable for the violation. Vivacqua then appealed to the circuit court, which reversed and remanded the matter for additional proceedings. After the second hearing, Vivacqua was again found liable for the violation and, on appeal, the circuit court again reversed and remanded the matter for an entirely new hearing. Vivacqua was once again found liable and the hearing

officer imposed the maximum fine of $750 per day since the day of the violation, which amounted to $624,000. The ruling was affirmed by the circuit court; however, the court reduced the fine to $100.

¶9 Vivacqua now appeals, arguing that the Village is estopped from asserting that he improperly used the house as a multifamily residence because the Village's building commissioner approved the property for a legal nonconforming use as a "two-flat." In response, the Village argues that Vivacqua failed to establish that the house was approved for a legal nonconforming use, but if it was, then Vivacqua abandoned that use for more than one year and the nonconforming use designation expired. Furthermore, the Village cross-appeals, arguing that the circuit court abused its discretion by reducing Vivacqua's fine to $100.

¶10 The following relevant evidence was adduced at the third hearing before an administrative hearing officer. The Village called one witness in its case: Kenneth Radicke. Radicke has been the assistant building commissioner and supervisor for code enforcement in Norridge for 13 years. He testified that the May 1, 2008, ticket resulted from his inspection of Vivacqua's house following a complaint made to his department that the house was being rented out to more than one family.

¶11 Radicke issued one prior citation to Vivacqua in March of 2003 because Vivacqua remodeled the kitchen, bedroom, and bathroom in the basement of the house without having obtained the necessary permits. Radicke testified that he was not aware at that time how many families were living in the house. However, he did explain that on March 1, 2003, he encountered a woman outside the house who told Radicke that "[she] and her family were

moving in." According to Radicke, the woman, whose name he did not know, indicated that "she [was] renting the house with her family," meaning the "entire building." Radicke testified that that would have been a "legal use" of the house because they were a "single family." Nevertheless, he did not know whether the woman and her six or eight family members held separate leases for the two units.

¶12 Pursuant to the March 2003 citation, Radicke inspected the house again one month later. Although Vivacqua sought to apply for the necessary permits after that inspection, Radicke recommended rejecting the application because the ceiling height was only 6 feet, 5 inches high, rather than 7 feet high, as required for occupancy under the building code.

¶13 Radicke inspected the house again in August of 2003. As a result of that inspection, Radicke recommended that Vivacqua remove the basement kitchen, "cap" the water and gas to that area, and remove a door so that the basement would not be used as an apartment; however, the basement bathroom could remain. Radicke inspected the house again one month later to ensure that Vivacqua removed the kitchen and converted the bedroom area to storage. He testified that this inspection was "in reference solely to the basement" and that he did not have "any reason to inspect either the first or second floor[s] of the property."

¶14 Radicke was then asked about a July 7, 2004, letter sent to Vivacqua by Brian Gaseor, the Village's building commissioner, requesting an in-person meeting to discuss alleged violations of the Village's zoning ordinance. Radicke testified that the allegations were based on a complaint made by a person whose identity he did not know. He stated that "this was the first indication *** that in fact there had been multifamily usage" at Vivacqua's house.

¶15 According to Radicke, Gaseor sent another letter to Vivacqua on August 2, after Vivacqua met with Gaseor and Village President Earl Field. The letter stated that Vivacqua must remedy certain problems within the next two weeks or he would receive citations from the Village that required a "mandatory court appearance." The letter indicated that: (1) "[t]he kitchen on the second floor must be removed and the gas and water lines capped"; (2) "[t]he basement cannot be used for living, sleeping, eating or cooking because it does not meet with the seven-foot ceiling height requirement"; and (3) "[t]he garage cannot be rented out by you so that the occupants of 4126 Oketo can park their vehicles in the garage." Radicke testified that the purpose of removing the second floor kitchen and utilities was to prevent it from being "a second floor apartment." Additionally, he stated, the basement was not to be used as living quarters.

¶16 On cross-examination, Radicke admitted that he did not draft either the July 7 letter or the August 2 letter and was not a named recipient on either of them. Nor was he present for the meeting between Vivacqua, Gaseor, and Field. However, he did state that he was given a copy of the August 2 letter for his record keeping.

¶17 Radicke testified that he inspected the house again on November 5, 2004, with Vivacqua present and consenting to the inspection. Radicke stated that this inspection was to address "life safety issues" after he received a complaint of a gas smell and flickering lights in the building. However, Radicke also discovered that the "basement was not secured," which condition he did not explain. Vivacqua was then "instructed to secure the basement due to code violations and the rear stairway was not to be used because of its construction and it was unsafe."

¶18 Radicke inspected Vivacqua's house again on December 23, 2004, and Vivacqua was

again present. At this inspection, Radicke noted additional repairs Vivacqua needed to perform because the baluster rails on the rear staircase were not properly spaced according to code. Vivacqua also was instructed to remove a wall in the basement and install a fire door on the furnace room. Radicke noted that the basement could only be used for storage and laundry because the ceiling height was only 6 feet, 5 inches high, rather than 7 feet high, as required for occupancy under the building code. Radicke testified that at this time, "based on [his] inspection [he] would have determined that [the basement] was going to be used as occupiable space" because the "amenities of the basement were still present inasmuch as the availability for sleeping, dining, and bath facilities."

¶19 Radicke returned to perform a "final inspection" of Vivacqua's house on April 29, 2005, at which Vivacqua was present. Radicke determined that the basement was in compliance with all applicable codes at that time. He stated that he did not inspect the first or second floors of the house at that time.

¶20 Radicke had no contact with the building again until early 2008. At that time, Radicke followed up on another anonymous complaint indicating that the basement of Vivacqua's house was being occupied. Radicke arranged to meet Vivacqua at the house on February 20, 2008. Radicke testified that "the basement showed that it was occupied, but it was also in preparation [for] the appointment. So the beds, sofa, table and chairs, TV, clothing, everything was in preparation [for] or broken down for the inspection."

¶21 Radicke stated that he took one photograph of the basement before Vivacqua refused to allow more. The picture showed that "there is furniture in the basement. [It showed] a bed and

some overturned chairs, and in the darkened corner there is some furniture covered." When Radicke asked Vivacqua who was living there, Vivacqua stated that no one lived there and that "by making that remark [Radicke] was calling [Vivacqua] a liar." Radicke subsequently issued Vivacqua the May 1, 2008, zoning violation citation.

¶22 Radicke inspected the house again on July 9, 2008. Vivacqua was not present for this inspection. Rather, after ringing the doorbell, a woman named Ashley Miller let him inside. She "described herself as the daughter of the lady Melissa Wilson who was renting the first floor, and she allowed me into the basement acknowledging she was occupying the space as living quarters." Radicke determined that Vivacqua "was not compliant with the request of the [c]ourt and that that space was being occupied." He did not explain the nature of any court's request. Radicke did not inspect the second floor and had "no knowledge" of who was living on the second floor.

¶23 Radicke took photographs of the basement and provided descriptions for each one. In the first photograph, he described a "living room area" with a sofa, "a table which could be construed as a desk with a chair," a television, and other items. He also took pictures of the kitchen space showing cabinets, a countertop, and refrigerator. The cabinets contained "eating utensils, china, plates, dishes, [and] cups" and the refrigerator contained "beverages and food stuff." There was a photo of a bed, dressers, and a night stand. He also noted what he described as a "sleeping area." Another photograph showed a closet filled with clothes. Finally, a photograph of the basement bathroom showed personal items, towels, and toilet paper.

¶24 Radicke inspected the basement again on October 1, 2008, at the direction of a hearing

officer in an earlier hearing on this matter. Vivacqua was present and consented to the inspection. According to Radicke, Vivacqua's attorney indicated that the only area to be inspected was basement. Therefore, Radicke testified, he "didn't have any opportunity to inspect the first or second floor[s]" at that time.

¶25 Radicke's report stated that the basement contained a kitchen without a range or a sink, a "full-fixture" bathroom, a dining room table and chairs "in the area to be used as storage," a sofa, a futon bed, and other items. Compared to the last set of photographs, on this occasion, the refrigerator was empty, but the cupboards still contained dishes and the bathroom still contained personal items and towels. Elsewhere in the basement, Radicke saw coolers, a hose reel and hose, a lawnmower, a sofa, a door removed from its hinges propped against a wall, and a dresser. Additionally, Radicke described what he "perceived to be a dining room table with chairs turned over on top of the table." He also described a door in the basement that had a "security" lock on it, which indicated to him that someone occupied the basement.

¶26 Radicke testified that Vivacqua's house was in an area that was zoned "R-1" for single family residential uses and, to Radicke's knowledge, has never been zoned for any other use. He also stated that there have never been any variances or special uses allowed for the house. Radicke stated that Vivacqua's house was originally built in the late 1940s or early 1950s. In 1962, permits were issued for the construction of dormers to enlarge the second floor living space. Some time after that, a separate egress was installed for the second floor; however, Radicke could not say exactly when that was installed because the Village never issued permits for that conversion.

¶27 Radicke stated that he first learned of the separate egress to the second floor when he inspected the house on October 24, 2002, in support of a Real Estate Inspection Certificate required for the seller, Charles Chiparo, to sell the house. See Village of Norridge Ordinance, sec. 18-31 (codified July 27, 2011). Under the ordinance, a seller would notify the Village of a pending sale and register for an available inspection time. Radicke led the team of inspectors and completed the final inspection report. Radicke acknowledged that the ordinance says that no building can be sold without a Real Estate Inspection Certificate. If the inspection revealed that a property was not in violation of the Village's zoning ordinance, then a Real Estate Inspection Certificate must issue. If the inspection showed that the building was not in compliance with the zoning ordinance, then a Real Estate Inspection Certificate would not be issued. If no Real Estate Inspection Certificate issued, the seller could appeal from that denial. Radicke also acknowledged that deeds could not be recorded with the county without the Real Estate Inspection Certificate.

¶28 Radicke testified that during his inspection of the house in 2002, he noted several items that needed repair. He also observed that there was a second-floor apartment with a separate egress. In his report, Radicke twice wrote that the house was a "nonconforming two-flat." He testified that he wrote those notes to himself as a reminder to check the property history for any record of the house having received "some kind of variance." He acknowledged that he did not personally have the authority to issue a variance from the zoning ordinance or give the seller any legal right to use the house as a two-flat. A few days later, Radicke reinspected the house to ensure that the repairs were made. On his inspection report, he wrote "Approved 10-29-02" and

initialed the notation.

¶29 On December 17, 2002, Gaseor, the building commissioner, issued a Real Estate Inspection Certificate for the house bearing the Village's corporate seal. It also contained the typewritten notation "Legal Non-Conforming Use." Radicke testified that he did not know how that notation ended up on the certificate.

¶30 On cross-examination, Radicke testified that the layout of the house was such that there was a second-floor unit with its own external entrance as well as a first-floor unit and basement that shared a separate external entrance. The only way to access the basement was through the first-floor unit. There was no internal access between the first- and second-floor units. There were two separate furnaces and two separate electrical boxes that serviced the first- and second-floor units.

¶31 Radicke admitted that the county's tax records indicated that the house has two units. He did not know when the second-floor unit was created, but it must have been after 1962, when the dormers were installed, and before October 2002, when the inspection occurred. When asked whether he believed that the building, with its separate units and their separate utilities and egress, was intended to be used as two separate dwelling units, he stated he did not know how it would be used.

¶32 On redirect, Radicke testified that in his estimation, the subject property was in compliance with the zoning ordinance when he inspected it in 2002. The issues that required repair were corrected. He also stated that the house was empty when he inspected it so he did not know whether multiple families had been or would be living there.

¶33 Radicke acknowledged that the current hearing pertained to the May 1, 2008, ticket, and not for any violations regarding building permits. He testified that the use of the basement as a separate dwelling unit contributed to his conclusion that the house was being used for multifamily purposes. When asked to describe any evidence he had that the basement had been rented out to a tenant, he stated that he had none. He stated that he had seen a "tenant" in the basement: Ashley Miller, the daughter of the first-floor tenant. However, he had no evidence that she or anyone else ever paid Vivacqua rent to live in the basement.

¶34 Radicke testified that he once had a casual conversation with the Miller family, but could not provide a date or context for the conversation. He stated that the first-floor family told him the second-floor family was loud. He believed that the first- and second-floor families were not related.

¶35 Radicke also testified that in 2003, he had received complaints from residents who lived near Vivacqua's house, but did not know their names. The neighbors complained that the residents of Vivacaqua's house were "a bunch of gang bangers" and the neighbors "were worried for their safety." Radicke testified that he "took it upon [him]self along with the police department to check the area on occasion because there were a lot of seniors there and they felt comfortable talking to us." After that group moved out of the house, in late 2003 or 2004, Radicke learned that there were two families living in the house.

¶36 Radicke then testified that he learned that different people applying for village vehicle stickers listed the house as their address, which made him suspect that there were multiple families living in the house. However, he did not remember the names of the applicants or any

identifying information.

¶37 In his case, Vivacqua first called Nancy Jensen to testify. She was Chiparo's real estate agent at the time he sold the house to Vivacqua. Because the property looked like a house rather than a traditional two-flat, Jensen researched its status before agreeing to sell it. She consulted county tax records, which listed the property as a two-flat. She also called the Village's building and zoning department. She spoke to a woman named Lee, who told her that the house was one of two old two-flats in the village. However, on rebuttal, Lee Ferraris testified that she did not recall telling Jensen in 2002 that the house was a two-flat, nor would she have had the authority to give Jensen that confirmation.

¶38 Vivacqua then testified. He stated that he bought the subject property to use as a rental investment property. When he first saw the house, he noted that it had two units, each with its own furnace and electric meter, and a partially finished basement. He testified that he bought the property because he thought it was a two-flat, and would not have bought it if it was not a two-flat.

¶39 Vivacqua stated that he rented the first and second floors separately with separate written leases. He stated that he never rented the whole house to anyone. Vivacqua also stated that he never rented the basement as a separate dwelling unit, but permitted the first-floor tenants to use the space for recreational purposes. He stated that he does not change the amount of the rent he charges the first-floor tenants based on whether they use the basement.

¶40 Vivacqua testified that he met with the mayor and others in 2004 about his house. He stated that Radicke also was present. The outcome of that meeting was that Vivacqua could use

the property as a two-flat, but the basement could only be used by the first-floor tenants. Vivacqua stated that he never agreed to stop renting the second-floor unit. On cross-examination, Vivacqua did not remember whether he received the August 2 letter from Gaseor memorializing that meeting.

¶41 At the time Vivacqua received the May 1, 2008, zoning violation citation, he testified that Wilson was renting the first-floor apartment with her husband. Wilson's daughter, Ashley Miller, would stay there occasionally, as would Wilson's son. However, the daughter was not renting the basement. He stated that he never had a "tenant" living in the basement. He testified that a different family was renting the second-floor unit.

¶42 On cross-examination, Vivacqua testified that he called Radicke before buying the house, some time between October and December 2002, to confirm that he could rent the house as a two-flat and Radicke said yes. He acknowledged that he never sought a variance or special use from the Village's zoning board.

¶43 The parties each tendered their final memorandums of law and delivered closing arguments. The Village concluded its argument by asking the hearing officer to impose a fine of $624,000, representing the $750 daily maximum fine allowed to be levied over each of the 832 days Vivacqua allegedly was in violation.

¶44 The hearing officer then issued his final findings of fact and conclusions of law. Of particular relevance are the following facts and conclusions.

> "7. When the property was constructed and at all times since, it was zoned for single family usage. Those sections of the Village zoning ordinance relating to

Non-conforming Use have no applicability to this factual situation. *** [T]here can be no grandfathering of [Vivacqua's] multi-family usage of the [p]roperty since such usage has always been prohibited and was never legal.

***

12. Radicke's notation ("Non-conforming use/legal") [on the October 24, 2002, inspection report] did not confer any legal rights to [Vivacqua] for a use of the [p]roperty that was prohibited by the Village zoning ordinances.

13. The Real Estate Inspection Certificate [issued by building commissioner Gaseor] did not confer any legal rights to [Vivacqua] for a use of the property that was prohibited by the Village zoning ordinances.

14. Vivacqua has used the [p]roperty for multi-family use consistently throughout the entire time that he has owned the [p]roperty. That multi-family usage has included renting the first and second floor units to separate individuals or families. It has also included allowing the separate usage of the basement by individuals who may or may not have been paying him rent for use of that area of the residence.

15. There has been a long history of zoning violations at the [p]roperty, including illegal usage of the second floor and basement units. [Vivacqua] has repeatedly refused Village inspectors full access to the [p]roperty, which evidences an element of bad faith.

***

18. As a matter of law, the Village is not estopped from enforcing its zoning ordinances at the [p]roperty."

¶45 The hearing officer further ordered that Vivacqua "de-convert" the property by removing all cabinetry from the basement and second-floor kitchens, capping the water and gas running to those kitchen areas and burying the pipes in the wall or floor, removing the basement shower stall, and disconnecting the electric meter heads so that only one electric meter remains for the entire house. Furthermore, the hearing officer imposed the maximum fine of $624,000.

¶46 Vivacqua petitioned for administrative review in the circuit court, arguing that the Village should be equitably estopped from asserting that Vivacqua violated the zoning ordinance by using the house as a two-flat because the Village approved that legal nonconforming use when it issued the Real Estate Inspection Certificate. The court concluded that Vivacqua was entitled to rely on the Village's representation that the house had been approved for a legal nonconforming use. However, the court concluded that the circumstances of this case were not sufficiently extraordinary to warrant application of equitable estoppel. The court then determined that the fine imposed by the hearing officer was unduly harsh under the circumstances. Specifically, it found that the hearing officer assessed fines for the time that the case was appealed and reversed due to the hearing officers' mistakes. The court then reduced the fine to $100, stating that Vivacqua's capital would be better spent on converting the house to a single family home. This appeal followed.

¶47 II. ANALYSIS

¶48 Before we begin our analysis on the merits, we must identify the issues relevant to the

May 1, 2008, citation for Vivacqua's alleged use of the house for multifamily purposes in violation of article 4, section 1.1 of the zoning ordinance. Much of the evidence presented in this case concerns interactions between Vivacqua and the Village that occurred well before the citation was issued or pertains to matters unrelated to the alleged zoning violation. As Radicke testified, the May 1, 2008, citation resulted from his inspection of Vivacqua's house following a February 20, 2008, complaint made to his office. He stated that Vivacqua's use of the first and second floor units, as well as use of the basement as a separate dwelling unit, resulted in the citation. Vivacqua asserted the affirmative defense of equitable estoppel, relying on the Real Estate Inspection Certificate issued by the village, which indicated that the house had a nonconforming legal use and otherwise complied with the zoning ordinance.

¶49 The hearing officer concluded that Vivacqua's house was used for multifamily purposes in violation of the zoning ordinance. Additionally, he concluded that "[a]s a matter of law, the village is not estopped from enforcing its zoning ordinance[ ]" that would prohibit Vivacqua from using the house as a two-flat.

¶50 In reviewing administrative matters, we review the decision of the administrative agency and not the judgment of the circuit court. *Rose v. Board of Trustees of Mount Prospect Police Pension Fund*, 2011 IL App. (1st) 102157, ¶1. Our standard of review of each issue depends upon the type of question presented. *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 210 (2008). An administrative agency's factual determinations are deemed *prima facie* true and correct. *Cinkus*, 228 Ill. 2d at 210. We are limited to reviewing those findings and conclusions to ascertain whether they are against the manifest weight of the

evidence. *Cinkus*, 228 Ill. 2d at 210. When presented with an administrative agency's conclusions on pure questions of law, we give no deference to those determinations and review them *de novo*. *Cinkus*, 228 Ill. 2d at 210. When reviewing mixed questions of fact and law, we apply the clearly erroneous standard of review, which lies between the manifest weight of the evidence standard and a *de novo* standard. *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 392 (2001). Mixed questions are those in which the historical facts are admitted or established, the rule of law is undisputed, and the question is whether those facts satisfy the legal standard. *Cinkus*, 228 Ill. 2d at 211. An agency's decision is clearly erroneous when we are left with a definite and firm conviction that a mistake has been made. *Cinkus*, 228 Ill. 2d at 211.

¶51 A. Use of the Basement

¶52 We first address the hearing officer's conclusion that Vivacqua has used the house for multifamily purposes "consistently throughout the entire time that he has owned the property," which included "allowing the separate usage of the basement by individuals who may or may not have been paying him rent for use of that area of the residence." This conclusion is based the hearing officer's factual findings and we will review the conclusion to determine whether it is against the manifest weight of the evidence. *Cinkus*, 228 Ill. 2d at 210. That is, we must determine whether the opposite conclusion is clearly evident. *Cinkus*, 228 Ill. 2d at 210. We conclude that it is.

¶53 Article 2, section 1.26 of the zoning ordinance defines a multiple family dwelling as a "building which is designed for, or intended to be used as a home or residence for three (3) or

more families living in separate apartments." An apartment is defined as "a room or suite of rooms in a two (2) family or multiple family dwelling *** intended or designed for use as a residence by a single family." Thus, to prove that Vivacqua's house was used for multifamily purposes, the Village would have to have presented evidence establishing that three or more families lived in separate apartments, each living as a single family in their separate residences.

¶54 The Village provided no evidence to support that charge. Radicke testified that he issued the May 1, 2008, citation after his February 20, 2008, inspection of Vivacqua's house following receipt of an anonymous complaint that someone was living in the basement of the house. He stated that the basement was "occupied" but identified only a bed, some covered furniture, and overturned chairs in that space. He said that Vivacqua denied that anyone was living there.

¶55 When specifically asked what evidence he had that the basement was ever rented out to a tenant, Radicke referred to a conversation he had with Ashley Miller in July of 2008 – after the citation had been issued – when she told Radicke that she "was occupying the [basement] as living quarters." However, she also told Radicke at that time that she was the daughter of Melissa Wilson, the first floor tenant. Radicke admitted that he had no other evidence suggesting that she or anyone else was ever paying separate rent for use of the basement. Although Radicke testified that different people applied for parking permits using the house's address in support of his claim that multiple families lived there, he did not provide any details indicating who the families were, whether they were in fact different families, or whether they were actual residents of the house.

¶56 Despite the hearing officer's conclusion that "allowing the separate usage of the

basement" supports a finding of improper multifamily use of a property, mere use of the basement by a family member is not prohibited under the plain language of the ordinance. Rather, there must have been evidence establishing that a separate family intended to live in the basement as a separate residence. Even if Miller "used" the basement as an extension of her family's tenancy in the first floor unit, that is insufficient to establish that she was living there with the intent to "use" the basement as a separate single family residence as required by the ordinance. In fact, elsewhere in his testimony, Radicke testified that if the same family rented the first and second floor units in the house, there would be no zoning violation because the house was being used by a single family. It follows that if the same family rents the first floor unit and "uses" the basement, that is also use by a single family and not a zoning violation. Vivacqua testified that he allowed the first-floor tenants to use the basement for recreational purposes and never separately rented the basement. Additionally, because the basement is only accessible through the first-floor unit, it is unlikely that a separate family would be living in the basement as a single family residence. The Village appears to be bootstrapping its argument of a zoning violation with evidence that use of the basement was prohibited under the building code due to inadequate ceiling height. However, the basement ceiling height has no bearing on Vivacqua's alleged violation of the zoning ordinance and the two conditions are unrelated for the purposes of this citation. Therefore, the hearing officer's conclusion that "allowing the separate usage of the basement" supports a finding of multifamily usage of the house was against the manifest weight of the evidence.

¶57 B. Equitable Estoppel

¶58 We now address Vivacqua's use of the first and second floor units as rentals. Unlike the use of the basement, there is no dispute that Vivacqua rented those units to separate tenants to be used as separate residences. Rather, Vivacqua contends on appeal that the Village is estopped from asserting that he violated the zoning ordinance by doing so. Specifically, he contends that the Real Estate Inspection Certificate issued by the Village established that the house had a legal nonconforming use as a two-flat and the village cannot now contend that using the house for that purpose violates the zoning ordinance.

¶59 One who seeks to assert equitable estoppel against a municipality must establish that: (1) an affirmative act of the municipality induced justifiable reliance on the part of the claimant; (2) the claimant acted on the basis of that reliance; and (3) the claimant substantially changed its position as a result of that reliance. *County of Du Page v. K-Five Construction Corp.*, 267 Ill. App. 3d 266, 273 (1994). Although applying equitable estoppel against a municipality is generally disfavored, the doctrine may be applied in compelling circumstances where it would be highly inequitable or oppressive to enforce such public rights. *K-Five Construction*, 267 Ill. App. 3d at 273; see also *Cities Services Oil Co. v. City of Des Plaines*, 21 Ill. 2d 157, 161 (1961).

¶60 The hearing officer did not conduct a proper equitable estoppel analysis in this case, but merely concluded that "[a]s a matter of law, the Village is not estopped from enforcing its zoning ordinances at the [p]roperty." On the contrary, whether a municipality can be equitably estopped is not a question of law but is a fact-intensive inquiry that is decided on a case-by-case basis after considering all of the circumstances of the case. *Patrick Engineering, Inc. v. City of Naperville*,

2011 IL App. (2d) 100695, ¶33, appeal allowed, November 30, 2011. Although a fact-intensive inquiry ordinarily would be reviewed under the manifest weight of the evidence standard, in this case, the operative facts necessary for this analysis are undisputed and we are left to determine the legal effect of those facts under the applicable law. See *Cinkus*, 228 Ill. 2d at 211. As such, it is a mixed question of fact and law that we review under the clearly erroneous standard. *Cinkus*, 228 Ill. 2d at 211. An administrative agency's decision is deemed clearly erroneous when this court is left with a definite and firm conviction that a mistake has been made. *Cinkus*. 228 Ill. 2d at 211.

¶61 The question then becomes whether the Real Estate Inspection Certificate issued by the Village justifiably induced Vivacqua to purchase the house and operate it as a two-flat and whether the Village is now estopped from enforcing the zoning ordinance against him. We conclude that it is.

¶62 The Real Estate Inspection Certificate, issued by building commissioner Brian Gaseor and bearing the village's corporate seal, was dated December 17, 2002, the day that Vivacqua closed on the property. That certificate states that the house has a "Legal Non-Conforming Use." According to Radicke's testimony, his October 24, 2002, inspection of the house was the basis for the issuance of that certificate. Radicke's inspection report also twice indicated that the house had a legal nonconforming use.

¶63 Pursuant to Village ordinance, a Real Estate Inspection Certificate must issue before any property in the village may be sold. The certificate itself serves as evidence that the inspected property complies with the permitted uses under the zoning code. Specifically, article 2, section

18-31 of the Village's general ordinances provides:

> "A. No owner *** shall sell, quit claim, trade or otherwise transfer [a structure used as a dwelling] unless the dwelling or structure shall have been inspected and determined to be in compliance with the permitted uses as allowed by the village zoning code *** as evidenced by an inspection certificate issued by the building commissioner.
>
> B. The requirement of obtaining an inspection certificate shall be mandatory on all transfers of ownership *** in all dwellings and structures in the village.
>
> C. ***
>
> 1. If such inspection establishes that the applicant and the property sought to be transferred are not in violation of the [zoning ordinance], the building commissioner shall issue an inspection certificate which must be submitted with the original deed or document of transfer in order to transfer property within the village. ***
>
> 2. If such inspection establishes that the applicant is in violation of the [village zoning ordinance] or the property does not comply with the [zoning ordinance], then no inspection certificate shall be issued."

The Village's ordinance makes clear that the certificate must issue if the property inspected conforms with the zoning ordinance and must not issue if the property violates the zoning ordinance. The fact that the certificate was issued is evidence that the Village, through its

building commissioner, approved a legal nonconforming use for the house as a two-flat under the zoning ordinance and Vivacqua's purchase could not have been completed without such an assurance.

¶64 Although the Village argues that it cannot be bound by the acts of its employees, our supreme court has long recognized that the actions of a municipality's agent may bind the municipality where it was within the agent's authority to do so. For example, in *Cities Services Oil Co.*, 21 Ill. 2d at 161, the supreme court found that a city was estopped from asserting a zoning ordinance violation against a company that was awarded a building permit by the city's building commissioner where the building commissioner was authorized to make such grants. *Cities Services Oil Co.*, 21 Ill. 2d at 159-60. Additionally, in *Kenny Construction Co. v. Metropolitan Sanitary District of Greater Chicago*, a sanitary district was estopped from denying its liability to pay the plaintiff for additional work it performed pursuant to the city engineer's instruction because the district expressly authorized the city engineer to approve such additional work. *Kenny Construction Co. v. Metropolitan Sanitary District of Greater Chicago*, 52 Ill. 2d 187, 197-98 (1971). More recently, the Second District Appellate Court found that letters written by a county's attorney to third parties stating that a company's asphalt operation did not violate the zoning code were sufficient to induce the company's justifiable reliance on that statement and expand its asphalt operation. *K-Five Construction*, 267 Ill. App. 3d at 274. Although the supreme court is currently considering the extent to which a municipality may be bound by the actions of its ministerial employees (*Patrick Engineering, Inc. v. City of Naperville*, 2011 IL App (2d) 100695, appeal allowed, November 30, 2011), that specific issue does not affect our

analysis here. As stated in section 18-31, the Village expressly authorized the building commissioner to grant the Real Estate Inspection Certificate that evidences the property's compliance with the zoning ordinance.

¶65 We reject the Village's argument that Vivacqua cannot prevail on appeal because he failed to establish that the house was entitled to a nonconforming use designation. It relies on *Welch v. City of Evanston* and other cases to support its claim that "the party requesting a non-conforming use bears the burden of establishing that the use was legally established at the time the zoning ordinance was adopted or amended." *Welch v. City of Evanston*, 87 Ill. App. 3d 1017, 1023 (1980). However, *Welch* was decided under a different procedural posture and its holding is inapposite here. *Welch* was an appeal from the denial of a request for a nonconforming use. The dispute in that case centered around the substantive question of whether the applicant was entitled to a nonconforming use designation. Here, the matter arises from a citation issued by the Village. Vivacqua asserted the Village's approval of the nonconforming use as part of his affirmative defense. Under these circumstances, he need only establish that the Village made an official determination approving the nonconforming use – that is, that the Village acted in a way that induced him to change his position – not whether its approval was substantively appropriate.

¶66 In fact, the Village did not contend at trial that the certificate was issued in error. It did not call Gaseor to testify to any circumstances that could have resulted in the certificate being wrongly issued. Radicke testified that despite his multiple notes indicating a legal nonconforming use on the inspection report, he did not know how that designation ended up on the final certificate issued by the building commissioner. Nevertheless, even if the certificate had

been issued erroneously, the Village never made any attempt to revoke it or the nonconforming use designation. In *Cities Services*, the court suggested that if the municipality had acted more quickly to revoke an erroneously-issued permit in that case, it would not have effectively ratified the actions of its building commissioner that resulted in estoppel. *Cities Services*, 21 Ill. 2d at 163. Here, the Village never sought to revoke the certificate and by the time it cited Vivacqua for violating the zoning ordinance, six years had passed since the certificate had issued.

¶67 As to the remaining elements of estoppel, Vivacqua acted on his justifiable reliance on the certificate and substantially changed his position as a result of that reliance. Generally, estoppel prohibits one from making statements or taking action that induces another to do something he would not have done but for those actions. *Kenny*, 52 Ill. 2d at 197. Here, Vivacqua testified that he bought the house for investment purposes and intended for the rental income to pay the mortgage. He also testified that he would not have purchased the home if it could not be legally operated as a two-flat and that testimony was unrebutted. Consequently, he acquired a mortgage to purchase a property that the Village now asserts cannot be operated for the purpose for which it was approved.

¶68 Finally, we conclude that the circumstances of this case are sufficiently compelling to warrant the application of estoppel. Failing to apply the doctrine here will result in substantial loss to Vivacqua that would be highly inequitable and oppressive for him to bear. If the Village is permitted to now enforce its zoning ordinance, after acquiescing to the house's use as a two-flat for at least six years, Vivacqua will incur an additional, and likely substantial, expense to convert a house that maintains two independent residences into a single family home, as ordered

by the hearing officer. Although there was no testimony as to the exact cost of a conversion, the amount of work ordered to be done was extensive. In addition to removing the kitchen cabinetry and appliances, the hearing officer ordered that the hot and cold water, gas, and waste piping serving the second floor unit be "capped off" and that the electric meter heads be disconnected. That is, Vivacqua was ordered to reconfigure all of the utilities for the house so that it is served by only one set of utilities. Additionally, although not specifically addressed in the hearing officer's order, there was uncontroverted testimony that the house has separate egress for the first and second floor units with no internal access between them. In order for the house to function as a single family home, the access and entry between the first and second floors would have to be reestablished, both internally and externally. Thus, Vivacqua is facing an additional construction expense to make the house comply with the zoning ordinance after having purchased the house in reliance on the Village's representation that the house was compliant.

¶69 Not only does Vivacqua face significant remedial expenses, he is also liable for the $624,000 fine imposed by the hearing officer. We find it particularly inequitable to enforce the zoning ordinance here in light of the fact that the Village's inspector made several inspections of Vivacqua's house over the course of six years and cited him only once for a building code violation based on the ceiling height in the basement. There is no dispute that for six years, Vivacqua openly operated the house as a two-flat and the city never cited him for a single zoning violation or sought to revoke its Real Estate Inspection Certificate. Although the passage of time by itself is not sufficient to warrant estoppel (*City of Chicago v. Unit One Corp.*, 218 Ill. App. 3d 242, 246-47 (1991)), when considering the totality of the circumstances, this fact weighs against

the Village. Therefore, we conclude that the Village is estopped from enforcing its zoning code against Vivacqua and the hearing officer's conclusion was clearly erroneous.

¶70 C. Reduced Fine

¶71 Because we have determined that Vivacqua is not liable for violating the ordinance, we need not reach the question raised in the cross-appeal, which challenges the circuit court's reduction of the fine imposed by the hearing officer.

¶72 III. CONCLUSION

¶73 In conclusion, for the foregoing reasons, we reverse the circuit court's ruling, set aside the decision of the administrative hearing officer, and remand this case to the administrative hearing officer with instructions to dismiss the citation. The hearing officer's conclusion that the use of the basement contributed to a finding of liability for multifamily use of the house was against the manifest weight of the evidence. Additionally, his conclusion that the Village was not estopped from enforcing its zoning ordinance against Vivacqua was clearly erroneous.

¶74 Circuit court reversed; administrative ruling set aside; and cause remanded to the administrative hearing officer with directions.