

STATE OF MICHIGAN
COURT OF APPEALS

BRANDON FLOOD and MARCEY FLOOD,

Plaintiffs-Appellants,

v

CITY OF GRAND RAPIDS,

Defendant-Appellee.

UNPUBLISHED

April 18, 2024

No. 365927

Kent Circuit Court

LC No. 23-000218-CZ

Before: BOONSTRA, P.J., and FEENEY and YOUNG, JJ.

PER CURIAM.

This action involves the City of Grand Rapids’ denial of Brandon Flood and Marcey Flood’s untimely application (“the application”) for a Neighborhood Enterprise Zone (NEZ) certificate concerning property they owned in the city.¹ The Floods filed a complaint against the City, requesting that the trial court order the City to issue them a NEZ certificate. The trial court granted the City’s motion for summary disposition under MCR 2.116(C)(8) (failure to state a claim). The Floods now appeal by right and argue equitable estoppel precludes the City from relying on the application’s untimeliness. We agree with the Floods that the trial court prematurely granted summary disposition.

Equitable estoppel could have precluded the City’s untimeliness defense, and the Floods therefore presented a legally sufficient claim to seek mandamus relief. Accordingly, we reverse the order granting summary disposition and remand for further proceedings consistent with this opinion.

¹ We refer to plaintiffs individually as Brandon and Marcey, and collectively as the Floods. We refer to defendant as the City.

I. BACKGROUND

Because MCR 2.116(C)(8) considers the legal sufficiency of a claim based on the allegations in the complaint, we present the factual circumstances as alleged in the Floods' complaint.

In February 2020, the Floods purchased a vacant residential lot located in the designated Wealthy Heights NEZ in Grand Rapids, intending to build a home there. Before this purchase, Brandon reviewed "the BS&A Online^[2] page" for the lot, which indicated the lot was *not* in a NEZ. The Floods applied for, and in December 2020 were granted, a building permit to construct a single-family residential home on the lot. However, the Floods later realized for the first time in January 2021 that the lot was in a NEZ, and they applied for a NEZ certificate. The City denied the application as untimely because the Floods submitted it after already receiving a building permit.³ They filed the instant complaint soon after.

Attached to the complaint was a BS&A page for their purchased lot as of February 25, 2021, which displayed the response "No" under the section "Neighborhood Enterprise Zone." The Floods asserted this was also how the page appeared before they purchased the lot, and that this statement on the BS&A page was a false representation by the City. The Floods asserted further that equitable estoppel precluded the City from rejecting their application "that resulted from [the City]'s publication of the false representation," and they requested a writ of mandamus ordering the City to issue a NEZ certificate.

In lieu of answering, the City moved for summary disposition under MCR 2.116(C)(8), asserting there were no legal grounds to issue a NEZ certificate or a related writ of mandamus under the undisputed facts. The City specifically argued the application was indisputably untimely under the governing ordinance because the Floods submitted it after already receiving a building permit, leaving the City with no authority to grant the NEZ certificate. The City also argued it was not estopped from enforcing its ordinance, even if the lot's BS&A page included a misrepresentation.

The trial court granted the City's motion, concluding the Floods' claim was legally deficient "because there is no clear legal duty to perform the act of granting the NEZ certificate nor is there any clear legal right to a NEZ certificate [when the application] was untimely." The trial court elaborated that the City could not be "estopped from enforcing its ordinance" even assuming the City made a misstatement of fact, and the Floods could not justifiably rely on any misstatement because they "were presumed to know the provisions of lawfully enacted

² BS&A Online is a product of BS&A Software, which provides software for local governments. The Floods describe BS&A Online as software the City employs to display information regarding public records. The City notes on appeal that the BS&A page was a "third party's website," and the Floods "failed to establish that they received any information directly from the City," but it does not contest that the City utilized BS&A's services as alleged.

³ See Grand Rapids Code, § 5.554 ("[A NEZ] application must be filed before a building permit is issued for the work proposed.").

ordinances,” including “that they were required to apply for an [sic] NEZ Certificate prior to receiving a building permit.” The trial court determined the City had no discretion “to process and grant an untimely certificate” and, therefore, there was no way to justify mandamus relief even with further factual development. This appeal followed.

II. STANDARDS OF REVIEW

This Court reviews de novo a trial court’s ruling on a motion for summary disposition. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). MCR 2.116(C)(8) “tests the *legal sufficiency* of a claim based on the factual allegations in the complaint.” *Id.* “When considering such a motion, a trial court must accept all factual allegations as true, deciding the motion on the pleadings alone.” *Id.* at 160. “A motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery.” *Id.*

“This Court reviews for an abuse of discretion a trial court’s grant or denial of a writ of mandamus. An abuse of discretion occurs when the trial court chooses an outcome that falls outside the range of reasonable and principled outcomes.” *Nykoriak v Napoleon*, 334 Mich App 370, 373; 964 NW2d 895 (2020). “We review de novo, as questions of law, whether [a] defendant[] ha[s] a clear legal duty to perform and whether [a] plaintiff has a clear legal right to performance of any such duty.” *Id.*

III. ANALYSIS

The Floods argue that summary disposition was unwarranted and they are entitled to mandamus relief because equitable estoppel precludes the City in defending this action “from making the factual claim that the NEZ application was made after the building permit was issued”—i.e., that the application was untimely. According to the Floods, estoppel applies here because they were prejudiced by relying on the City’s either intentional or negligent publication of a clear misrepresentation of fact. They contend that the City was responsible for the BS&A page’s misrepresentation that the Floods’ lot was not in a NEZ. They argue that they relied on this information and, as a result, filed their application late. We conclude that factual development is required to evaluate whether equitable estoppel should have precluded the City’s untimeliness defense, and that the Floods presented a legally sufficient claim to seek mandamus relief.

A. GENERAL LEGAL PRINCIPLES

This case involves the interaction of three separate areas of law: the requirements for mandamus relief, municipal law regarding NEZ certification, and the doctrine of equitable estoppel. We address each in turn. To begin, to obtain a writ of mandamus,

the plaintiff must show that: (1) the plaintiff has a clear, legal right to performance of the specific duty sought, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial, and (4) no other adequate legal or equitable remedy exists that might achieve the same result. In relation to a request for mandamus, a clear, legal right is one clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal

question to be decided. Even where such a right can be shown, it has long been the policy of the courts to deny the writ of mandamus to compel the performance of public duties by public officials unless the specific right involved is not possessed by citizens generally. [*Rental Props Owners Ass’n v Kent Co Treasurer*, 308 Mich App 498, 518-519; 866 NW2d 817 (2014) (quotation marks and citations omitted).]

The “public duties by public officials” at issue here are outlined in the Neighborhood Enterprise Zone Act, MCL 207.771 *et seq.* Under this statute, local governments may designate areas as NEZs. MCL 207.773(1). Property that has received a NEZ certificate is taxed at a discounted ad valorem rate. MCL 207.779. Under MCL 207.774(1), the application deadline for a NEZ certificate is “before a building permit is issued for the new construction or rehabilitation of the facility,” unless an exception under MCL 207.774(2) applies, or the local government by resolution allows for another deadline “not later than 6 months [after] the building permit is issued.” The local government resolution applicable here provides “[t]he application must be filed before a building permit is issued for the work proposed.” Grand Rapids Code, § 5.554.

Because the language of the ordinance at issue is clear, and neither party debates that the Floods filed their application for a NEZ *after* their building permit was issued, the only way for the Floods to still obtain their NEZ would be through equitable estoppel. “Equitable estoppel is not an independent cause of action, but instead a doctrine that may assist a party by precluding the opposing party from *asserting or denying* the existence of *a particular fact*.” *New Prods Corp v Harbor Shores BHBT Land Dev, LLC*, 331 Mich 614, 627-628; 953 NW2d 476 (2019) (emphasis added). In this case, equitable estoppel would force the City to operate as if the Floods’ NEZ application had been filed timely. However, equitable estoppel is only available where:

- (1) a party by representations, admissions, or silence, intentionally or negligently induces another party to believe facts;
- (2) the other party justifiably relies and acts on that belief; and (3)
- the other party will be prejudiced if the first party is permitted to deny the existence of the facts. [*Twp of Williamstown v Sandalwood Ranch, LLC*, 325 Mich App 541, 553; 927 NW2d 262 (2018) (citation omitted).]

As a general matter, plaintiffs must present “extraordinary circumstances” for a court to consider equitable estoppel. *Lyon Charter Twp v Petty*, 317 Mich App 482, 487; 896 NW2d 477 (2016), vacated in part on other grounds 500 Mich 1010, 896 NW2d 11 (2017).

B. ADDITIONAL CASELAW

Michigan courts have addressed the applicability of estoppel in various circumstances, including when plaintiffs seek to invoke estoppel against a municipality. “[E]veryone dealing with a municipality and its agents is charged with knowledge of the . . . provisions of lawfully adopted ordinances.” *Hughes v Alma Twp*, 284 Mich App 50, 78; 771 NW2d 453 (2009). “Zoning authorities will not be estopped from enforcing their ordinances absent exceptional circumstances.” *Id.* Further, “[c]asual private advice or assurance of success from township officials does not constitute exceptional circumstances.” *Id.* Instead, a plaintiff must show

a good faith reliance upon the municipality’s conduct, lack of actual knowledge or lack of the means of obtaining actual knowledge of the facts in question, and . . . a change in position to the extent that [the] plaintiff would incur a substantial loss were the local government allowed to disaffirm its previous position. [*Sau-Tuk Indus, Inc v Allegan Co*, 316 Mich App 122, 146; 892 NW2d 33 (2016) (quotation marks and citation omitted; omission in original).]

The circumstances of the present case—a party filing an application untimely—are analogous to a party invoking equitable estoppel to avoid a period of limitations. Relief under those circumstances can be afforded on the basis of “fraud or mutual mistake,” *Devillers v Auto Club Ins Ass’n*, 473 Mich 562, 590; 702 NW2d 539 (2005),⁴ “intentional or negligent conduct designed to induce a plaintiff to refrain from bringing a timely action,” *Cincinnati Ins Co v Citizens Ins Co*, 454 Mich 263, 270; 562 NW2d 648 (1997), or a defendant having “induced the plaintiff to believe the limitations period would not be enforced,” *Doe v Racette*, 313 Mich App 105, 109; 880 NW2d 332 (2015).

In *Fass v City of Highland Park*, 326 Mich 19, 30-31; 39 NW2d 336 (1949), the defendant municipality mistakenly issued the plaintiffs a building permit and licenses to sell live poultry, and the plaintiffs operated under these licenses for two years. A local ordinance, however, actually prohibited sales of live poultry on the property in question. The defendant city discovered the mistake and started to enforce the ordinance against the plaintiffs, who claimed a vested right to continue selling live poultry under the doctrine of equitable estoppel. *Id.* at 21-22, 25, 27. The Supreme Court specifically addressed “whether [the] defendants are [sic] estopped to enforce the ordinance as properly construed because of the erroneous *opinion* of certain administrative officials of the [defendant] city in prior years.” *Id.* at 27 (emphasis added). The Court denied the plaintiffs’ estoppel claim, ruling that the prior mistake in issuing the plaintiffs’ building permit and licenses did not prevent the defendant from enforcing a valid ordinance because the prior issuance and the plaintiffs’ use of the property were expressly unauthorized under ordinance provisions the plaintiffs were charged with knowing. *Id.* at 30-31.

In *Sau-Tuk*, 316 Mich App at 135-137, we affirmed summary disposition for the defendant county under MCR 2.116(C)(10) and rejected the plaintiff’s claim of estoppel. *Id.* at 124-125, 135, 146-147. *Sau-Tuk* involved the plaintiff’s failure to comply with requirements via statute and local ordinance for exemption of its property from certain utility liens. As particularly relevant here, the plaintiff argued that estoppel precluded the defendant county from asserting noncompliance with the relevant provisions, specifically because the county’s board of public works induced the plaintiff to believe compliance was unnecessary. *Id.* at 124-125, 132-134, 144. We rejected this argument, in relevant part, because the plaintiff “did not produce evidence that it was unaware of the requirements” and was charged with knowledge of lawfully enacted ordinances. *Id.* at 146.

⁴ This case was superseded by statute on other grounds as stated in *Encompass Healthcare PLLC v Citizens Ins Co*, 344 Mich App 248 (2022).

In *Hughes*, 284 Mich App at 78, the plaintiffs attempted to invoke estoppel on the basis of their reliance on a planning commission’s recommendation that the defendant township’s board ultimately did not adopt. We concluded that (1) justifiable reliance on the commission recommendation was lacking because an ordinance clearly made the township board the actual decisionmaker, and (2) no exceptional circumstances warranting estoppel—“such as receiving a permit and making significant expenditures”—existed in any event. *Id.* at 78-79. As explained in the following application section, we find *Fass*, *Sau-Tuk*, and *Hughes* distinguishable from this case.

C. APPLICATION

All well-pleaded facts in the complaint must be taken as true. See *El-Khalil*, 504 Mich at 160. Reading the complaint and accepting the facts therein as true, this case involves the City using third-party software to display incorrect information, which Brandon viewed and accepted at face value. The complete and correct information about the lot’s location in a NEZ would have put the Floods on notice that their next step would be applying for a NEZ certificate *before* obtaining a building permit. But because of the incorrect information displayed, the Floods applied for and obtained a building permit without first applying for a NEZ certificate, all before ever learning that the lot was in a NEZ. Once the Floods discovered the lot was in a NEZ, they applied for NEZ certification. The City then refused to approve the application because the Floods already obtained their building permit, even though it was the City’s misrepresentation that caused this error.

Importantly, the Floods are not claiming they did not know what the ordinance here stated, but assert instead that they did not know the lot was in a NEZ and, therefore, that the ordinance applied at all. They did not rely on “casual private advice” from an official or information from a lower-level authority who was not the official decisionmaker—as was the case in *Fass*, *Sau-Tuk*, and *Hughes*—but rather upon a patently false factual representation provided through the City’s allegedly-official method of displaying such information. Nor are the Floods claiming a vested right based on prior failure to enforce an ordinance. See *Fass*, 326 Mich at 30-31. Finally, the Floods needed not produce specific evidence of reliance like in *Sau-Tuk* because this case does not involve summary disposition under MCR 2.116(C)(10).

We acknowledge that caselaw on the uses of equitable estoppel has apparently not covered the precise scenario at issue, but we find the municipal cases summarized earlier distinguishable for the reasons discussed above and conclude that (1) the facts as alleged support estopping the City from relying on the application’s untimeliness and (2) further factual development is therefore necessary to determine the Floods’ ultimate entitlement to estoppel and mandamus relief. Specifically, we hold that the allegations of the complaint, if proven, are adequate to allow a reasonable fact-finder to conclude that the doctrine of equitable estoppel precludes the City from defending this action based on the factual untimeliness of the Flood’s NEZ application (when this defense allegedly only arose because of the City’s own factual misrepresentation—one that, according to the Floods, misled them to file the application late, i.e., after already receiving a building permit).

Relying only on the facts of the complaint, the general elements of equitable estoppel described by *Twip of Williamstown*, as well as the additional requirements for estoppel against a

municipality from *Sau-Tuk*, are all sufficiently present. The Floods allege that the City, by its false representation on the lot's BS&A page, either intentionally or negligently induced them to believe the lot was not in a NEZ and, therefore, that there was no reason to apply for NEZ certification or delay obtaining a building permit. The Floods maintain that they relied in good faith upon the representation that the lot was not in a NEZ, lacked actual knowledge of the lot's correct NEZ status, applied for NEZ certification immediately after learning of the City's misrepresentation, and stood to lose a substantial tax reduction if the City were allowed to treat the application as untimely. Accordingly, we hold that the allegations of the complaint, if proven, would allow a reasonable fact-finder to conclude that the Floods justifiably relied on this alleged misrepresentation when seeking a building permit without first submitting a NEZ application, and that the Floods were then prejudiced when the City denied their admittedly-untimely application for that reason.

The complaint does not specify how the Floods eventually learned of the lot's correct NEZ status, whether this information was readily available apart from the BS&A page before they purchased the lot, and whether the error originated with the City or the software vendor. For example, discovery could reveal there was another official, readily-available source for the lot's correct NEZ status that the Floods neglected to check before their purchase, thus negating any good-faith or justifiable reliance on the BS&A page and precluding the application of estoppel. But whether the City closely enough controlled the BS&A Online representations to attribute those representations to the City, how the misrepresentation at issue came about, and whether the Floods' reliance thereon was indeed justifiable all warrant further factual development, and this case should not have been decided on the City's MCR 2.116(C)(8) motion.

Lastly, it is undisputed that the granting of a NEZ certificate here would not have been discretionary if the application was timely. The Floods, therefore, sufficiently pleaded the elements of mandamus: (1) the right to a NEZ certification, (2) the City's duty to grant valid NEZ applications, (3) ministerial application of the ordinance, and (4) no other available remedy (with the Floods having already exhausted the administrative process). The right involved is possessed by only those with property in a NEZ, and there is a nondiscretionary duty to approve timely and otherwise valid applications. Although the City cites *Moore v Genesee Co*, 337 Mich App 723; 976 NW2d 921 (2021), for the position that writs of mandamus may not be granted on the basis of equity in contravention of a statutory scheme, *Moore* involved neither a false representation by the local government, nor the doctrine of equitable estoppel. *Id.* at 733. A grant of mandamus here would not be based on pure equity, but on an understanding that the only flaw in the Floods' application was brought about by the City's own factual misrepresentation. We reiterate that, similar to the application of estoppel to statutes of limitations, deadlines set forth in an ordinance are not automatically dispositive when missed in the event of a local government's misrepresentation. We also reiterate, however, that further factual development is necessary to determine the Floods' ultimate entitlement to estoppel and, therefore, mandamus relief.

For these reasons, we reverse the order granting the City summary disposition and remand this case to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Kathleen A. Feeney
/s/ Adrienne N. Young