

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0168**

Town of Denmark,
Respondent,

vs.

Kenneth C. Cordes, et al.,
Appellants,

DZ Trucking LLC, et al.,
Defendants.

**Filed November 22, 2021
Affirmed
Smith, Tracy M., Judge**

Washington County District Court
File No. 82-CV-19-4297

Robert A. Alsop, Kennedy & Graven, Chartered, Minneapolis, Minnesota; and

Paul D. Reuvers, Andrew Wolf, Iverson Reuvers Condon, Bloomington, Minnesota (for respondent)

Kevin S. Sandstrom, Chris T. Nelson, Eckberg Lammers, P.C., Stillwater, Minnesota (for appellants).

Considered and decided by Smith, Tracy M., Presiding Judge; Johnson, Judge; and Hooten, Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

In this zoning-enforcement action, appellants Kenneth and Karen Cordes¹ seek reversal of the district court's grant of summary judgment to the Town of Denmark (the township) declaring that the Cordeses are engaging in commercial activities on property in violation of the township's zoning ordinance and enjoining further commercial activities on that property absent a conditional-use permit.

The Cordeses argue that the district court erred because (1) their commercial use should be considered a legal nonconforming use and the township should be collaterally estopped from asserting otherwise; (2) even if their use was not lawful, the township should be equitably estopped from enforcing its zoning ordinance because it acted wrongfully; and (3) the zoning ordinance should be determined to be unenforceable because it conflicts with the township's 2030 and 2040 comprehensive plans. Because we disagree with the Cordeses on each point, we affirm.

FACTS

The Cordeses own property located in the township. The Cordeses purchased the property in 1977, and, since that time, they and their children have used the property for various commercial purposes. The Cordeses do not dispute that the township's current zoning ordinance does not permit commercial activities on the property.

¹ DZ Trucking and US Bank National Association, co-defendants in the district court, did not join this appeal.

In 2018, the Cordeses entered into an agreement to sell the property to DZ Trucking, owned by Crystal and David Zeverino, contingent on the Cordeses' obtaining both a rezoning of the property to commercial/industrial use and a conditional-use permit from the township. The Cordeses and Mr. Zeverino applied for the property to be rezoned and applied for a conditional-use permit. After taking public comment, the township declined to rezone the property or grant the conditional-use permit. As a result, the sale to DZ Trucking did not go through.

Following the denial of the rezoning application, the township received complaints that the property was being used to operate a trucking business. In 2019, the township brought a criminal action against Mr. Cordes, alleging one misdemeanor count of unlawful use of land. Shortly thereafter, the township initiated this civil suit, seeking declaratory judgment that the Cordeses' use of the property violated the township's zoning ordinance and seeking to enjoin the Cordeses from continuing their business operations on the property.

In the criminal action, Mr. Cordes moved to dismiss the charge against him for lack of probable cause. After an evidentiary hearing, the district court granted the motion. For purposes of the motion, the township did not claim that there was an ordinance prohibiting commercial activity in 1977 and conceded that Mr. Cordes used the property for commercial trucking prior to the township's enactment of a law prohibiting it. The township instead argued that the current commercial use was no longer a lawful nonconforming use either because Mr. Cordes had previously abandoned the use or because the current amount of trucking activity constituted an impermissible expansion of

the legal nonconforming use. The district court rejected the township's arguments, concluding that, based on the evidence, a reasonable jury would have reasonable doubt as to whether the commercial trucking activity was ever abandoned or whether the current use constituted an expansion of the legal nonconforming use.

Thereafter, in this civil action, the parties filed cross-motions for summary judgment. In making those motions, the parties agreed that the Cordeses used the property for business purposes, including commercial trucking, vehicle repair, and outdoor storage of trucks and other commercial vehicles. The Cordeses conceded that these activities violated the township's zoning ordinance but argued that they should be allowed to continue because the activities were legal nonconforming uses. The Cordeses also argued that the township should be collaterally estopped from arguing—based on the district court's ruling in the criminal action—that the commercial use was not a legal nonconforming use. Finally, the Cordeses argued that the township should be equitably estopped from enforcing the zoning ordinance because of the township's inaction in enforcing the ordinance and its dealings with the Cordeses over the years showing that the township knew of their commercial use of the property.

At the commencement of this action and at the time that both parties moved for summary judgment, the township was unable to locate certain historical versions of the township's zoning ordinances—including the ordinance in effect when the Cordeses purchased the property and began their commercial use in 1977. But, following a request for clarification from the district court after the summary-judgment hearing, the township

located its earlier zoning ordinances.² The zoning ordinance in effect in 1977 did not permit any commercial activity on the property. Following the discovery of the ordinances, the district court reopened the record to permit the parties to submit supplemental briefing. In their supplemental briefing, the Cordeses opposed consideration of the zoning ordinance in effect in 1977 because of its late discovery. The Cordeses also asserted an additional argument in favor of their motion for summary judgment—specifically, that the township’s current zoning ordinance is invalid because it conflicts with the township’s 2030 and 2040 comprehensive plans.

The district court granted the township’s motion for summary judgment and denied the Cordeses’ motion. The district court declared that the Cordeses’ use of the property was unlawful and permanently enjoined the Cordeses from engaging in commercial activities on the property without a conditional-use permit.

The Cordeses appeal.

DECISION

Summary judgment “is appropriate when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law.” *Senogles v. Carlson*, 902 N.W.2d 38, 42 (Minn. 2017). An appellate court reviews a grant of summary judgment de novo. *Com. Bank v. W. Bend Mut. Ins. Co.*, 870 N.W.2d 770, 773 (Minn. 2015). “In conducting

² The missing ordinances, which included the original township zoning ordinance from 1960 and subsequent amendments, were located in a “safe and other filing cabinets that had not previously been searched” at the township office. However, the ordinances were also located on file at the Washington County Law Library, as is required by statute. *See* Minn. Stat. § 415.021 (2020).

this review, [appellate courts] view the evidence in the light most favorable to the nonmoving party and resolve all doubts and factual inferences against the moving parties.” *Fenrich v. Blake Sch.*, 920 N.W.2d 195, 201 (Minn. 2018) (quotation omitted).

The Cordeses do not argue that the current zoning ordinance permits their commercial activities on the property. Instead, they make three other arguments. First, they assert that their commercial activities should be considered a legal nonconforming use for two reasons: (1) because the zoning ordinance in place in 1977 should not be considered since it was discovered late and (2) because, under principles of collateral estoppel, the ruling in the criminal case determined that their use is a legal nonconforming use. Second, the Cordeses argue that, even if their commercial use is not a legal nonconforming use, the township should be equitably estopped from enforcing the current ordinance because of the township’s conduct. Finally, the Cordeses argue that the current zoning ordinance is unenforceable because it conflicts with the township’s comprehensive plans. We address each argument in turn.

I. As a matter of law, the Cordeses’ use is not a legal nonconforming use.

The Cordeses first argue that, as a matter of law, their commercial use should be considered a legal nonconforming use. Use of a property that was lawful prior to a zoning change generally may continue even though it is barred by current zoning law. *See* Minn. Stat. § 462.357, subd. 1e (2020) (authorizing preexisting nonconformities to continue subject to certain exceptions). The Cordeses argue that their commercial use was a legal nonconforming use even though it was not permitted under the zoning ordinance in place in 1977. They make two arguments, neither of which is persuasive.

A. The district court properly considered the ordinance in effect in 1977.

The Cordeses first argue that the district court erred by considering the ordinance in effect in 1977 because the township located it after the parties had submitted their summary-judgment motions. They assert that Minn. R. Civ. P. 37.03(a) precludes consideration of the ordinance because the ordinance was information that the township failed to timely produce in discovery.

“The interpretation of the Minnesota Rules of Civil Procedure is a question of law that [an appellate court] reviews de novo.” *Gams v. Houghton*, 884 N.W.2d 611, 616 (Minn. 2016).

Minn. R. Civ. P. 37.03(a) states:

If a party fails to provide information or identify a witness as required by Rule 26.01 or 26.05, the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.

The rule applies to information or a witness to be disclosed under Minn. R. Civ. P. 26.01 or 26.05. Rule 26.01, in turn, requires parties to produce three categories of information: (1) initial disclosures of the identities of persons with discoverable information, documents that support a claim or defense, a computation of damages, and insurance information; (2) disclosure of expert testimony; and (3) pretrial disclosure of witnesses and exhibits. *See* Minn. R. Civ. P. 26.01. Rule 26.05 describes the obligation to supplement those disclosures. *See* Minn. R. Civ. P. 26.05.

We interpret rule 26.01 to require the production of factual information between the parties, not the production to each other of copies of laws such as zoning ordinances.

Although the Cordeses cite to cases where appellate courts affirmed the exclusion of nondisclosed factual evidence, *see Gebhard v. Niedzwiecki*, 122 N.W.2d 110, 116 (Minn. 1963); *Fritz v. Arnold Mfg. Co.*, 232 N.W.2d 782, 785-86 (Minn. 1975); *Thorson v. Zollinger Dental, P.A.*, 728 N.W.2d 261, 267 (Minn. App. 2007), *rev. denied* (Minn. May 15, 2007), they cite no cases where courts refused to consider a governing law because a party had not produced a copy of it.

And, even if a physical copy of the ordinance from 1977 were to be considered information required to be disclosed under rules 26.01 and 37.03(a), the district court did not err by considering it despite its late disclosure. The rules of civil procedure favor a continuance and the inclusion of evidence, rather than its exclusion. *See Gebhard*, 122 N.W.2d at 115 (“In cases where there is an honest mistake and the harm can be undone, it may frequently occur that a continuance or some other remedy would be adequate”); *Whitney v. Buttrick*, 376 N.W.2d 274, 279 (Minn. App. 1985), *rev. denied* (Minn. Jan. 23, 1986) (“Granting a continuance is preferred over exclusion of evidence.”). Here, after the zoning ordinance in effect in 1977 was located, the district court afforded the parties additional time to supplement their briefing, which they did. As a result, the district court did not err by taking into account the ordinance in effect in 1977 that established that the Cordeses’ commercial use was not a legal nonconforming use.

B. Collateral estoppel does not apply.

The Cordeses also argue that, under principles of collateral estoppel, their commercial use of the property must be considered a legal nonconforming use. The Cordeses argue that “the precise issue of whether Appellants’ commercial trucking use on

the property was a legal nonconformity was addressed in the criminal Court’s findings of fact” and thus cannot be relitigated.

Collateral estoppel is the doctrine that “a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction cannot be disputed in a subsequent suit between the same parties or their privies.” *Hauschildt v. Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004) (quotation omitted). For collateral estoppel to apply, the following four elements must be met:

- (1) the issue was identical to one in a prior adjudication;
- (2) there was a final judgment on the merits; (3) the estopped party was a party or in privity with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

Mach v. Wells Concrete Prods. Co., 866 N.W.2d 921, 927 (Minn. 2015) (quotation omitted). Collateral estoppel applies only to “specific legal issues that have been adjudicated.” *Hauschildt*, 686 N.W.2d at 837. It is not to be “rigidly applied.” *See id.*

The core issue here is whether the issue of preexisting nonconforming use was actually litigated. In its ruling on Mr. Cordes’s motion to dismiss in the criminal matter, the district court observed that, “*for purposes of this motion*, the State does not claim that there was any code, ordinance, or other law in effect in 1977, prohibiting commercial trucking activity in the Town on land zoned agricultural or rural residential.” (Emphasis added.) This language reflects that, for purposes of the probable-cause determination, the township conceded that the commercial activity on the property in 1977 did not violate the law.

The township's concession for purposes of Mr. Cordes's motion is akin to a stipulation between parties. "[T]he fact that an issue is the subject of stipulation between the parties does not necessarily mean the issue has been litigated." *G.A.W., III v. D.M.W.*, 596 N.W.2d 284, 287 (Minn. App. 1999), *rev. denied* (Minn. Sept. 28, 1999). "[I]t is always relevant in determining the effect of the judgment to ascertain the intent of the parties in accordance with the usual rule for construing their agreements." *Hentschel v. Smith*, 153 N.W.2d 199, 204 (Minn. 1967). A stipulation can have preclusive effect if the parties have manifested an intent that the stipulation be binding in a subsequent action. *See G.A.W., III v. D.M.W.*, 596 N.W.2d at 287 (citing Restatement (Second) of Judgments § 27 cmt. e (1982)).

There is no indication in the record in this case that the township intended its concession for purposes of the probable-cause motion to constitute an agreement that would indefinitely bar it from enforcing its zoning law against the Cordeses.³ Instead, the township, for purposes of the probable-cause motion, simply did not dispute that the use of the property was lawful in 1977 and instead argued that Mr. Cordes had abandoned or exceeded the bounds of the nonconforming use. In the present civil matter, which ran parallel to the criminal case, the township consistently asserted that the Cordeses' commercial use of the property was unlawful from the start.⁴

³ The Cordeses did not provide us with any transcript from the criminal matter demonstrating that the township intended its concession to apply in this civil matter.

⁴ The township argued in its initial summary-judgment memorandum that the Cordeses' commercial use in 1977 violated the township's zoning ordinance as well as county zoning ordinance.

The Cordeses argue that a 1946 Minnesota Supreme Court decision supports their argument that this issue was previously litigated and collateral estoppel should apply. *See Amundson v. Cloverleaf Mem'l Park Ass'n*, 22 N.W.2d 170, 172 (Minn. 1946). But that case does not apply here. *Amundson* holds that a litigant cannot on appeal revoke a stipulation made in the same action. *See id.* That is not what the township is trying to do here. In the district court and on appeal, the township's consistent position in this civil case has been that the Cordeses' commercial use was not lawful in 1977.

For collateral estoppel to apply, the issue must be one that was “actually litigated, determined by, and essential to a previous judgment.” *Roseberg v. Steen*, 363 N.W.2d 102, 105 (Minn. App. 1985). Because the question of the lawfulness of the commercial use of the property from the start was not litigated in the criminal proceeding, collateral estoppel does not bar the determination that the Cordeses' commercial use is not a legal nonconforming use.

II. As a matter of law, equitable estoppel does not apply because the township's conduct was not wrongful.

The Cordeses next argue that the district court erred by failing to apply equitable estoppel because, in engaging in commercial activities on the property, they reasonably relied to their detriment on the township's wrongful conduct—most significantly, its failing to recognize that the property was in violation of the zoning ordinance for forty years. The Cordeses also cite the township's collection of commercial taxes and various agreements it made with the Cordeses as examples of alleged wrongful conduct.

For equitable estoppel to apply against the government, the party seeking equitable relief must show that there is “wrongful conduct” on the part of an authorized government agent, that the party reasonably relied on the conduct, that the party incurred a unique expenditure in that reliance, and that the balance of equities weighs in favor of estoppel. *See City of North Oaks v. Sarpal*, 797 N.W.2d 18, 25 (Minn. 2011). A party “seeking to assert estoppel against a governmental entity has a heavy burden of proof.” *Id.* (quotation omitted).

We begin with the first element, “wrongful conduct” by the government. “Wrongful conduct is the most important element of equitable estoppel.” *Id.* It requires “some degree of malfeasance . . . a simple mistake by a government official is not wrongful.” *Id.* at 25-26. Malfeasance is “[a] wrongful, unlawful, or dishonest act; esp., wrongdoing or misconduct by a public official.” *Black’s Law Dictionary* 1145 (11th ed. 2019).

Here, the first allegedly wrongful conduct by the township was its failure to enforce the zoning law at an earlier date—its prolonged inaction, in other words. But a failure to enforce an ordinance will not “effect its repeal or make it unenforceable.” *See McCavic v. DeLuca*, 46 N.W.2d 873, 876-77 (Minn. 1951).

The Cordeses also cite the township’s collection of commercial taxes on the property, its contracting with the Cordeses in constructing a commercial office park on adjacent property, and its approval of a building permit on the property as examples of affirmative misconduct. The Cordeses argue that these actions show that the township “consistently acknowledged and encouraged the commercial activities happening on the Property.”

None of these actions can reasonably be said to constitute malfeasance rising to the level of “wrongful conduct.” There is no indication that township officials acted unlawfully or dishonestly in carrying out any of these actions. Instead, the actions at most suggest that the township was aware of the commercial use of the property but mistakenly believed that the use was lawful. Mistakes do not constitute wrongful conduct. *Sarpal*, 797 N.W.2d at 25-26. Thus, “[w]hile the result may be harsh, a municipality cannot be estopped from correctly enforcing the ordinance even if the property owner relied to his detriment on prior city action.” *Mohler v. City of St. Louis Park*, 643 N.W.2d 623, 638 (Minn. App. 2002) (quotation omitted).

On appeal, the Cordeses argue that the “Township engaged in a concerted pattern of affirmative malfeasance” because it “intentionally chose to disregard and not enforce its ordinance,” which “goes beyond mere inaction, inadvertence, or mistake and constitutes wrongful conduct of [sic] the Township.” But, at the district court, the Cordeses did not claim that the township intentionally chose to disregard and not enforce the ordinance and they provided no evidence to support such a claim. Because our review is limited to the record in the district court, *see Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988), the Cordeses’ argument of intentional misconduct is unavailing.

Because wrongful conduct requires more than simple mistakes by government officials, based on the undisputed facts, the Cordeses failed to meet their burden of

establishing the first element of equitable estoppel. As a result, equitable estoppel does not apply, and we need not address the remaining elements.⁵

III. The township's zoning ordinance does not conflict with its comprehensive plans.

Finally, the Cordeses argue that the township's zoning ordinance conflicts with the township's 2030 and 2040 comprehensive plans and that therefore the comprehensive plans control and the zoning ordinance is unenforceable. The township counters that there is no conflict and that, even if there were, the courts cannot dictate how the township resolves it.

The township is required by the metropolitan land-planning act (MLPA) to produce a comprehensive plan. *See* Minn. Stat. § 473.851-.871 (2020). Under the MLPA, “[i]f the comprehensive municipal plan is in conflict with the zoning ordinance, the zoning ordinance shall be brought into conformance with the plan by local government units in conjunction with the review and, if necessary, amendment of its comprehensive plan.” Minn. Stat. § 473.858, subd. 1. Further, a local government subject to the MLPA cannot adopt a zoning ordinance “which is in conflict with its comprehensive plan” *Id.*

In support of their assertion that the township's zoning ordinance and its comprehensive plans are in conflict, the Cordeses submitted existing-land-use maps that

⁵ On appeal, the Cordeses argue that a dispute of material fact exists regarding the issue of equitable estoppel, precluding summary judgment. At the district court, though, the Cordeses argued that the facts were undisputed and that judgment as a matter of law was appropriate on the issue, although in their favor. From our review of the record, we discern no disputes of fact regarding the issue and conclude that, as a matter of law, equitable estoppel does not apply.

are included in the 2030 and 2040 comprehensive plans. The 2030 comprehensive plan includes a map entitled “Existing Land Use (2005),” which depicts the existing use of the property in 2005 as “Rural Commercial/Industrial.” The 2040 comprehensive plan includes a map entitled “Generalized Land Use (2016),” which depicts the property’s land use in 2016 as “Retail and Other Commercial.” The Cordeses argue that, because these maps show the existing use of the property in 2005 and 2016 as “commercial,” the comprehensive plans conflict with the zoning law.

The argument is unpersuasive. The comprehensive plans include not only existing-use maps but also two other categories of maps: zoning maps and planned use maps. The “Zoning Districts” map in the 2030 comprehensive plan depicts the property as zoned “Rural Residential” in 2008, and the “Zoning Map” in the 2040 comprehensive plan depicts the property as zoned “Rural Residential” in 2011. The zoning maps thus consistently depict the property as zoned other than commercial. As to planned use, the 2030 comprehensive plan includes a “2030 Planned Land Use” map depicting the property as “Rural Residential,” and the 2040 comprehensive plan’s “Future Land Use Plan” map depicts the property in a category other than commercial. Both comprehensive plans thus contain planned-use maps that reflect noncommercial use for the property. Considered in context, the maps relied on by the Cordeses show only the existing use of the property, not the authorized use under the zoning laws or the planned future use for the property, and thus do not demonstrate a conflict with the current zoning ordinance. The Cordeses

submitted no other evidence of a conflict between the comprehensive plans and the ordinance.⁶ As a matter of law, the evidence in the record does not establish a conflict.

Because, as a matter of law, the zoning ordinance does not conflict with the township's comprehensive plans, the Cordeses' argument that the ordinance is not enforceable fails. We need not address the township's argument that its zoning ordinance remains enforceable even if there were a conflict.

Affirmed.

⁶ Again, although the Cordeses argued for summary judgment on this issue in the district court, on appeal, they contend that there at least is a dispute of material fact regarding the existence of a conflict, making summary judgment inappropriate. We discern no factual dispute. The parties agree as to the contents of the comprehensive plans and instead disagree over the legal significance of the maps in those plans. On this record, there is no factual dispute to resolve, and summary judgment is appropriate.