

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JULY 16, 1996

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

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

No. 96-0209-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**EAU CLAIRE COUNTY, a
quasi-municipal corporation,**

Plaintiff-Appellant,

v.

**MICHAEL J. ASHER
AND NADINE J. ASHER,**

Defendants-Respondents.

APPEAL from an order¹ of the circuit court for Eau Claire County:
ERIC J. WAHL, Judge. *Affirmed.*

LaROCQUE, J. Eau Claire County appeals an order dismissing its complaint against Michael Asher and Nadine Asher for violating a setback ordinance when they replaced the mansard ² on their commercial building. The building at issue was built before the enactment of the current building code. The current code applies only to alterations on such buildings

¹ This is an expedited appeal under RULE 809.17, STATS.

² A mansard is "a roof having two slopes on all sides with the lower slope steeper than the upper one." WEBSTER'S THIRD NEW INT'L DICTIONARY 1377 (Unabr. 1976).

that "affect the structural strength, fire hazard, exits, required natural lighting or replacement of major equipment." WIS. ADM. CODE § ILHR 50.03(2).³ The trial court held that the ordinance did not apply to the Ashers' repair work because that work did not affect any of the factors listed in § ILHR 50.03(2).

The County argues that (1) the trial court erred by declining to defer to the County building inspector's interpretation of the administrative code, (2) replacing the mansard increased the fire hazard of the building, and (3) the Ashers are barred from arguing that the building code does not apply because they failed to raise the issue in their appeal to DILHR for a variance. This court rejects the County's arguments and affirms the order.

BACKGROUND

The underlying issue in this case is whether the alteration done by the Ashers is the type that invokes the application of the current code. The Ashers' building was built in the 1960s and violates current setback requirements for unprotected wood structures.⁴ WIS. ADM. CODE § ILHR 50.05

³ WIS. ADM. CODE § ILHR 50.03(2) provides that the current code applies to "all remodeling or alterations in any building or structure which affect the structural strength, fire hazard, exits, required natural lighting or replacement of major equipment. ... These provisions do not apply to minor repairs necessary for the maintenance of any building or structure nor to buildings exempt, as listed in s. ILHR 50.04."

The County is prosecuting the Ashers for violation of an Eau Claire County ordinance. The county ordinance incorporates ILHR chapters 50 through 64 of the Wisconsin Administrative Code by reference, with some exceptions not relevant to this appeal.

⁴ WIS.ADMIN.CODE § ILHR 51.03(8) requires that unprotected wood structures are set back from the property line at least 10 feet, unless a fire wall is constructed. On appeal, the Ashers do not contest that their building is not set back from the property line at least 10 feet, or that a fire wall has not been constructed.

provides that buildings must only comply with the code in effect at the time of construction. The parties do not dispute that the building complied with the code in effect at the time it was built. However, WIS. ADM. CODE § ILHR 50.03(2) provides that the current code applies to certain remodeling or alterations on all buildings, even those built before the effective date of the current code.

Michael testified that he decided to replace the mansard because it was rotting. He replaced the rotting wood, applied siding and raised the mansard a third higher.⁵

A County building inspector testified that he observed the construction for the first time after it was substantially completed.⁶ The County notified the Ashers that they were violating the Eau Claire County building code by performing substantial work on a structure that did not conform with the setback provisions and by performing work without submitting adequate documentation to the County. The County informed the Ashers that they could avoid the setback requirements by obtaining either a variance from DILHR or an easement from their neighbors. DILHR denied the Ashers' application for a variance, and the Ashers could not obtain an easement from their neighbors.

The County filed a complaint in circuit court seeking fines and an injunction requiring the Ashers to remove the remodeled mansard. The Ashers argued that the work did not alter the building to the extent necessary to invoke the current building code. After a trial to the court, the court concluded that the current code did not apply and dismissed the County's complaint.

⁵ Prior to beginning the repair, Michael met with an inspector from the Town of Union to obtain a permit. The inspector told Michael that there was no problem with the proposed work. However, the town inspector did not have the authority to issue a permit and did not tell Asher that he lacked that authority.

⁶ At trial, the Ashers also argued that the County waived its right to enforce the building code by failing to take action earlier in the construction process. The Ashers do not develop this argument on appeal; therefore, we need not address it. See *Reiman Assocs., Inc. v. R/A Advertising, Inc.*, 102 Wis.2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981).

I

The County argues that the circuit court erred by failing to grant deference to the County building inspector's interpretation of the building code. Under § 101.02, STATS., DILHR is charged with the primary authority to supervise and proscribe reasonable standards to carry out the building code. DILHR certifies county agents to inspect buildings. See WIS. ADM. CODE § ILHR 50.21. The County concludes that the circuit court and this court should therefore grant deference to its building inspector's interpretation of the administrative code, citing *Jicha v. DILHR*, 169 Wis.2d 284, 290-91, 485 N.W.2d 256, 258-59 (1992).

In *Jicha*, our supreme court granted deference to the decision of a hearing examiner performing the function of an adjudicator. *Id.* at 291-92, 485 N.W.2d at 258-59. The court relied on the fact that then WIS. ADM. CODE § Ind. 86.21(3) provided: "The decision of the ... [hearing examiner] shall be the final decision of the division and the department for purposes of judicial review" *Jicha*, 169 Wis.2d at 292, 485 N.W.2d at 259. In our case the building inspector acted as an enforcement officer, not an adjudicator. Further, WIS. ADM. CODE § ILHR 50.21 merely certifies County agents to act as building inspectors; it does not provide that the County agent's decision represents DILHR's decision for purposes of judicial review. This court concludes that the building inspector's opinion is not entitled to deference.⁷

II

The trial court's decision that the current code did not apply to the alteration of the Ashers' mansard was one of mixed law and fact. A trial court's findings of fact shall not be set aside on appeal unless they are clearly erroneous. Section 805.17(2), STATS. Determining the applicability of a zoning ordinance to a given set of facts is a question of law we review de novo. *County of Sauk v. Trager*, 113 Wis.2d 48, 55, 334 N.W.2d 272, 275 (Ct. App. 1983).

⁷ A county agent's experience in enforcing the building code may bolster the agent's credibility as a witness at trial, but this is a matter for the trial court to evaluate, not this court. Section 805.17(2), STATS.

WIS. ADM. CODE § ILHR 50.03(2) provides that the current code applies to "all remodeling or alterations in any building or structure which affect the structural strength, fire hazard, exits, required natural lighting or replacement of major equipment. ... These provisions do not apply to minor repairs necessary for the maintenance of any building or structure" According to the unambiguous language of this section, the current code only applies to alterations that "affect the structural strength, fire hazard, exits, required natural lighting or replacement of major equipment." The exemption for minor repairs only comes into play if the alteration is one within the scope of the code in the first place.⁸

Thus, the first inquiry is whether the alteration of the Ashers' mansard affects any of the enumerated factors in WIS. ADM. CODE § ILHR 50.03(2). The County argues that replacing the mansard increased the building's risk as a fire hazard. The trial court found that replacement of the mansard did not increase the building's risk as a fire hazard. The County building inspector testified that replacing the mansard made the building a greater fire hazard because the new mansard has a wooden frame. However, the architect on the project and a fire inspector testified that the new mansard did not create a greater fire hazard because the mansard would be covered with metal shingles. Thus, the issue became one of credibility for the trial court to resolve. Section 805.17(2), STATS.

The County argues that the trial court erred by considering testimony other than the building inspector's regarding whether remodeling increased the risk of fire danger. The County reasons that only the building inspector was charged with administering the code. As noted in part I, *supra*, this court defers to an administrative adjudication, not to the opinion of an enforcement officer. The trial court did not err by considering other relevant evidence submitted at trial in its determination that the remodeling did not affect the building as a fire hazard.

⁸ The parties dispute whether replacing the mansard constituted a "minor repair." This court need not address that issue because replacing the mansard did not affect the "structural strength, fire hazard, exits, required natural lighting or replacement of major equipment." WIS. ADM. CODE § ILHR 50.03(2).

When the trial court acts as the fact finder, it is the ultimate arbiter of credibility of witnesses and the weight to be given to their testimony. *Plesko v. Figgie Int'l*, 190 Wis.2d 765, 775, 528 N.W.2d 446, 450 (Ct. App. 1994). Based on the testimony of the architect and fire inspector, this court concludes that the trial court's finding that the repair did not increase the fire hazard of the building was not clearly erroneous. On appeal, the County does not argue that the repair affected the structural strength, exits, required natural lighting or replacement of major equipment. Therefore, this court concludes that the repair did not fall within the scope of the current building code.

III

Finally, in its reply brief, the County suggests that the Ashers are barred from arguing that the remodeling did not affect the building as a fire hazard because the Ashers could have raised the issue at their hearing for a variance. Because the County fails to discuss this in its main brief, it may not do so in its reply brief. See *In re Estate of Bilsie*, 100 Wis.2d 342, 346 n.2, 302 N.W.2d 508, 512 n.2 (Ct. App. 1981). Also, the County does not explain why failure to raise the issue before DILHR bars the Ashers from raising it in the circuit court.

CONCLUSION

In sum, this court rejects the County's argument that the decisions of its enforcement agent should be given the same deference as that of an administrative adjudication. Further, we affirm the trial court's conclusion that the replacement of the mansard did not affect the building as a fire hazard. Finally, we do not address the County's argument that the Ashers were barred from raising the issue that their repair did not affect the building as a fire hazard because the County raised it for the first time in its reply brief.

By the Court. – Order affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.