# Dane County
# Board of Adjustment

**Decision of the Dane County Board of Adjustment**

**Administrative Appeal:** Appeal 3714. Administrative appeal by Alan Birkle (Elizabeth Stephens, Axley Brynelson, LLP, agent) appealing a shoreland zoning permit violation related to the placement of a retaining wall within the vegetative buffer zone of Lake Waubesa at 2784 Waubesa Ave being lot 30, Waubesa Beach 3rd Addition plat, Section 8, Town of Dunn.

FINDINGS OF FACT

In following the Rules and Procedures for an appeal of an administrative determination of the Zoning Administrator, having considered the evidence presented, the Board determines the facts of this case to be:

**Filing Date:** July 6, 2021.

**Meeting notice published:** September 16 and 23, 2021, Wisconsin State Journal.
Affidavit of publication/posting is on file.

**Hearing Date:** September 30, 2021

**Appellant:** Alan Birkle (Elizabeth Stephens, Axley Brynelson, LLP, agent)

1. Alan and Holly Birkle are the owners of the property located at 2784 Waubesa Ave in the Town of Dunn.
2. The property is located entirely within 300 feet of Lake Waubesa and therefore entirely within the shoreland zoning district.
3. On June 26, 2020 the Dane County Zoning Division processed a shoreland zoning permit application submitted by Alan Birkle.
4. During the period between June 26 and August 24, 2020 there were communications between Dane County Zoning, Dane County Land and Water Resources, Alan Birkle, and Mr. Birkle's engineer, Peter Fortlage including submissions of revised site plans.
5. Neither the original nor revised site plans submitted as part of the shoreland zoning permit application included a retaining wall near the shoreline.
6. On August 24, 2020 a shoreland zoning permit review letter was issued to Alan Birkle stating the conditions needing to be met for the permit to be issued, as well as the conditions that would be placed on the permit.
7. On November 6, 2020 Dane County Zoning issued shoreland zoning permit DCPSHL-2020-00063 to Alan Birkle.

8. An inspection was made on May 11, 2021 by Dane County Water Resource Specialist, Jason Tuggle.
9. On May 12, 2021 Jason Tuggle send an e-mail to Hans Hilbert stating that large slab limestone boulders had been installed near the shoreline.
10. A notice of violation letter was sent to the property owner on May 25, 2021 stating that the development of a retaining wall was not included as part of DCPSHL-2020-00063 and corrective action is required.
11. Mr. Birkle's signature acknowledged "I, the undersigned, hereby make application for a shoreland zoning permit and certify to the accuracy of the information. I further certify I am the property owner, or a duly authorized representative, and may sign this permit application on the behalf of the owner(s) of said property."
12. Mr. Birkle's signature acknowledged "I, the undersigned, am the owner of the property…I certify that the work to be performed, as part of this zoning permit, will be constructed as noted on the submitted plans and comply with the applicable zoning ordinances. I understand that failure to comply with any provision or condition of this permit renders this zoning permit null and void and subject to enforcement action."
13. 5. Mr. Birkle's initials acknowledged the two conditions of the shoreland zoning permit: "1. No change of topography within 5 feet of a property line. 2. No disturbance of the vegetative buffer zone unless it is part of an approved shoreland mitigation permit."
14. Appellant writes of estoppel as a legal standard page seven of their brief, "In Wisconsin, a municipal body is not immune from the application of the doctrine of estoppel and it makes no difference whether the activities are governmental or proprietary." Among the cases Appellant cites for authority is Park Bldg. Corp. v. Industrial Comm.(1960) 9 Wis. 2d 78, 100 N.W.2d 571. The court in that case provides helpful background regarding estoppel against a government as follows on pages 88-89 of that decision:

    "There undoubtedly are situations in which equitable estoppel ought to be invoked against a government. We so held in *Libby, McNeill & Libby v. Dept of Taxation* (1952), 260 Wis. 551, 51 N.W.(2d) 796. We deem the following comment by Prof. Kenneth Culp Davis made in his recently published Administrative Law Treatise is apposite as to the trend of the law with respect to invoking estoppel against a government (Vol. 2, p. 541, sec. 17.09):

    'Even though the courts commonly assert without qualification that equitable estoppel does not apply to governmental units, and even though numerous holdings are based upon such assertions, still the number of holdings in which governmental units are estopped is substantial and growing, both in the federal courts and in the state courts.

    'Since the doctrine of equitable estoppel is founded upon ideas of what is a fair adjustment when one party has relied to his detriment upon what the other party has held out, it is hard to see why the ideas of fairness should differ when one of the parties happens to be a governmental unity, especially when the subject matter relates to property or business dealing *and not to the processes of carrying out governmental policies.*' (Emphasis supplied.)

    "There are certain situations in which estoppel should not be permitted to be invoked against a government, or one of its agencies. Strong reasons of public policy exist why estoppel should not be invoked against the government, 88*88 or an agency of government, when it is sought

to exercise the police power for the protection of the publish health, safety, or general welfare. We quote with approval from the comment note entitled, 'Applicability of doctrine of estoppel against government and its governmental agencies,' 1 A. L. R. (2d) 338, 340:
'As a general rule the doctrine of estoppel will not be applied against the public, the United States Government, or the state governments, where the application of that doctrine would encroach upon the sovereignty of the government and interfere with the proper discharge of governmental duties, and with the functioning of the government, or curtail the exercise of its police power;…'"

15. Appellant's Appendix F – Landscape Plan, Alt's Operation Shoreland Plan – Phase One (plan L1.0) refers to items therein as walls, steps, limestone terrace #1, limestone terrace #2, natural limestone steps, and bridge over, connects into terraced walls. The sole indication of riprap on that plan points to a narrow band at water's edge.

**CONCLUSIONS OF LAW**

Based on the above findings of fact the Board concludes that:

1. Appellant argues that the limestone blocks placed near or above the ordinary high water mark are riprap and not a retaining wall structure as the Zoning Administrator claims. Appellant on page nine of Appellant's Brief cites correspondence with Alexandra Kind, Waterway and Wetland Compliance Specialist with the State of Wisconsin Department of Natural Resources, stating: "Indeed, WDNR (The very entity the Zoning Department admits has oversight over such determinations.) concluded that the placement of the limestone riprap were 'substantially compliant' with the placement of riprap and declined to assert any programmatic jurisdiction." We found, first, that Alexandra Kind's email to Mr. Birkle (Exhibit 7 – Alan Birkle Affidavit) that Appellant cites, when read in full, shows Kind felt the site was an exempt riprap replacement project, but she added: "Please note, the main concern with this installation was pipe outlets and terraced rock placement. The placement is above the Ordinary High Water Mark (OHWM), which falls under local shoreland zoning jurisdiction and appears that you have already obtained approval from them." Unfortunately, Mr. Birkle's shoreland zoning permit application did not include the terraced rock placement referred to.
   We also note Appellant's Appendix F – Landscape Plan, Alt's Operation Shoreland Plan – Phase One (plan L1.0) refers to items therein as walls, steps, limestone terrace #1, limestone terrace #2, natural limestone steps, and bridge over, connects into terraced walls. The sole indication of riprap on that plan points to a narrow band at water's edge.
   We find it is not reasonable to refer to the terraced rock placement as riprap and that it is a structure built within the setback from the Ordinary High Water Mark in violation of the Shoreland Zoning Ordinance.
2. Appellant argues the limestone blocks they placed near the shoreline were shown on a shoreland mitigation permit submitted to Dane County Land and Water Resources and the

approval of that permit by Dane County Land and Water Resources granted them approval to place that structure in the vegetative buffer zone.

The Zoning Administrator argues that in Chapter 11.99 of Dane County Code of Ordinances the authority and duties of both the Director of Land and Water Resources and the Zoning Administrator are laid out. He adds it shows the Director of Land and Water Resources or their designee did not have the authority, power, or duty to approve a structure as part of a shoreland zoning permit.

We agree with the Zoning Administrator given the plain language of Chapter 11.99 of Dane County Code of Ordinances.

3. Appellant contends in Appellant's Brief, pages seven and eight, that a municipal body is not immune from the doctrine of estoppel. A review of the seven cases cited there shows a lack of factual similarity with this appeal. The one that may be closest to the facts of this appeal is Park Bldg. Corp. v. Industrial Comm. (1960) 9 Wis. 2d 78, 100 N.W.2d 571

   In that case a City of Milwaukee building inspector approved a building plan but failed to notice it should have had two stair wells enclosed for fire safety reasons. As the building inspector was working under the authority of the Wisconsin Industrial Commission, Park Building Corporation asked that the Wisconsin Industrial Commission be estopped from requiring the stair wells be enclosed as they had relied on the approval of the building inspector to their detriment. The court was concerned that the doctrine of estoppel not be applied against government so as to "encroach upon the sovereignty of the government and interfere with the proper discharge of governmental duties, and with the functioning of the government, or curtain the exercise of its police power;…"

   The court in the Park Bldg. Corp v. Building Comm. held as to the issue of estoppel:

   "Order 5711 of the 1918 state building code, which required that stair wells in buildings such as petitioners be inclosed, was promulgated by the commission to protect public safety. Therefore, there can be no estoppel invoked against the commission, or its deputized agent, in enforcing such safety order."

   We find that's a little like our situation where Appellants thought they had submitted permits and changes to permits to the Land and Water Resources Department that also satisfied the shoreland zoning permit requirements on the Zoning Department end of things. No indications of the changes and the limestone block retaining wall built next to the riprap were submitted as required in the shoreland zoning permit application to the Zoning Department. Estoppel should not be invoked in this situation.
4. A retaining wall is a structure for purposes of shoreland zoning regulation and is required to be setback per DCCO 11.03.
5. Mr. Birkle constructed a retaining wall within the required setback to the ordinary high water mark of Lake Waubesa on this property.
6. Appellant argues that because the May 25th, 2021, violation notice did not cite specific sections of Chapter 11 of the Dane County Code of Ordinances they were not provided sufficient explanation that what they were building was a retaining wall structure requiring a setback from the Ordinary High Water Mark. The Zoning Administrator argues the violation notice stated: "Your development does not comply with the approved shoreland zoning permit." He adds that

Mr. Birkle signed the approved shoreland zoning permit on November 7th, 2020, which stated, "I certify that the work to be performed, as part of this zoning permit, will be constructed as noted on the submitted plans and comply with the applicable zoning ordinances. I understand that failure to comply with any provision or condition of this permit renders this zoning permit null and void and subject to enforcement action." The Zoning Administrator maintains that should suffice as adequate notice.

We find in favor of the Zoning Administrator and note, additionally, that intent of the legislative body was discernable in their ordinances and failure to include specific sections in a violation letter should not thwart their enforcement.

7. The limestone block retaining wall is an unpermitted, illegal structure located within the required setback to the ordinary high water mark of Lake Kegonsa.
8. The retaining wall must be removed to bring the property in to compliance with Dane County Shoreland Zoning Regulations.

**O**n the basis of the above findings of fact and conclusions of law the Board upholds the directive from the Zoning Administrator.

Appeals. This decision may be appealed by a person aggrieved by this decision or by any officer, department, board or bureau of the municipality by filing an action in certiorari in the circuit court for this county within 30 days after the date of filing of this decision. The municipality assumes no liability for and makes no warranty as to reliance on this decision if construction is commenced prior to expiration of this 30-day period.

Written Decision prepared by: Hans Hilbert, Assistant Zoning Administrator.

I certify that this is the decision of the Dane County Board of Adjustment:

Al Long, Chairman Sign:_____ Date: _____

Filed with the Dane County Planning and Development Department, Zoning Division:

Todd Violante, Director Sign:_____ Date: _____