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Estoppel

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ESTOPPEL

At some time in the future, you or your city council inevitably will confront the problem of the wrongful or erroneous issuance of a permit by a city inspector. For example, sign permits or building permits may be issued in error by an inspector and, not surprisingly, the permit recipient relies upon the permit and either constructs a sign or commences construction of a building. When it is determined that the sign or building permit should not have been issued, the permit recipient *always* protests that he/she received a permit and now the city cannot prohibit him/her from constructing a sign or a building. It is even more problematic if revoking the permit results in financial harm to the permit recipient. Although it may appear inequitable to the permit recipient, the wrongful or erroneous issuance of a permit does not estop a city from enforcing its zoning and land use regulations.

The general rule in Texas is that a municipality is not estopped from enforcing its zoning ordinances unless the zoning violator has detrimentally relied upon an authorized act of the municipality. *See, e.g., City of Hutchins v. Prasifka*, 450 S.W.2d 829, 835 (Tex. 1970); *City of Amarillo v. Stapf*, 129 Tex. 81, 101 S.W.2d 229 (1937); *City of San Angelo v. Deutsch*, 126 Tex. 532, 91 S.W.2d 308, 311-312 (1936); *Davis v. City of Abilene*, 250 S.W.2d 685 (Tex.Civ.App.-Eastland 1952, writ ref'd); *Edge v. City of Bellaire*, 200 S.W.2d 224 (Tex.Civ.App.-Galveston 1947, writ ref'd); *Robinson v. City of Dallas*, 193 S.W.2d 821, 823 (Tex.Civ.App.-Austin 1946, writ ref'd); *City of Corpus Christi v. Jones*, 144 S.W.2d 388 (Tex.Civ.App.-San Antonio 1940, writ dism'd judgment cor.).

The doctrine of estoppel, in its simplest form, applies against a party who knowingly misrepresents a fact to an innocent party, intending that the listener rely on the statement. If the innocent party does rely on the false statement to his detriment, estoppel acts to prevent the party who made the false statement from raising as a defense the falsity of the statement, or from denying its truth. *See, e.g., Gulbenkian v. Penn*, 151 Tex. 412, 252 S.W.2d 929 (1952); *Moore v. Carey Bros. Oil Co.*, 269 S.W. 75, *reh 'g denied*, 272 S.W. 440 (Comm'n Appeals 1925).

A strict application of the estoppel doctrine to the administration of zoning ordinances would hold municipalities accountable for the chance misstatements or errors of its administrative officials, which would in turn destroy the integrity of the enforcement system and defeat the zoning policies undergirding the zoning ordinances. Municipalities are created and exist to perform public purposes, and they possess only the precise and limited governmental power that has been delegated to them. *Southwestern Telegraph & Telephone Co. v. City of Dallas*, 104 Tex. 114, 134 S.W. 321 (1911). Municipalities must act within the limits set by constitutions, statutes, charters and their ordinances when exercising their police powers. These restrictions are designed to protect both individual rights and public interests. *Prasifka*, 450 S.W.2d 829. Conversely, all persons who deal with local governments are charged with notice of those governmental limitations and requirements. *Zachry v. City of San Antonio*, 296 S.W.2d 299, 305 (Tex.Civ.App.-San Antonio 1956), *af'd*, 157 Tex. 551, 305 S.W.2d 558 (1957).

Since citizens are charged with constructive notice of all city ordinances, an estoppel claimant cannot easily show reasonable and innocent reliance on administrative misstatements. *See City of Fort Worth v. Johnson*, 388 S.W.2d 400, 404 (Tex. 1964); *Davis*, 250 S.W.2d at 688. Moreover, since administrative actions that violate the

fundamental commands or limitations established by constitution, statute, charter or ordinance are void and cannot bind the municipality by either contract or estoppel, the traditional application of estoppel has no place in the administration of zoning ordinances. See Black & Daniel, *The Texas Rule of Estoppel in Zoning Cases*, 33 Baylor L.Rev. 241 (1981). With the exception of one aberration, *Rosenthal v. City of Dallas*, 211 S.W.2d 279 (Tex.Civ.App.-Dallas 1948, writ ref'd n.r.e.), and on retrial, *City of Dallas v. Rosenthal*, 239 S.W.2d 636 (Tex.Civ.App.-Dallas 1951, writ ref'd n.r.e.), Texas courts have recognized the strong policy reasons that justify insulating municipalities from estoppel when they exercise their governmental powers to enforce and administer zoning ordinances.

As early as 1937, the Texas Supreme Court held that reliance upon the assurances by city officials would not estop a city to enforce a valid ordinance. In *Stapf*, 101 S.W.2d 229, the plaintiff operated a machine shop at 1211 Lincoln Street in the City of Amarillo. Located at 1505 Johnson Street was a small foundry. The plaintiff determined that the foundry might be operated profitably in conjunction with his machine shop if the foundry could be located at 1210 Johnson Street, a location immediately across the alley from the plaintiff's machine shop. The plaintiff requested a building permit to move the foundry from its then present site to the location adjacent to his machine shop. The city manager sent the plaintiff a note which read: "It is okay, it seems to me, for a permit to be issued for a foundry at 13th and Johnson Streets." The plaintiff relied upon the city manager's representations and purchased the foundry for a substantial sum of money. A building permit was then issued to the plaintiff by the building inspector. The plaintiff's building permit subsequently was canceled by the building inspector when it was determined that a foundry was not a permitted use in the zoning district to which the foundry had been moved. The plaintiff brought suit to restrain the city from interfering with his construction of the foundry at the location adjacent to his machine shop. *Stapf*, 101 S.W.2d at 230-31.

On appeal, the plaintiff asserted

[t]hat, on account of his reliance upon the action of the city manager advising him that there was no objection to the issuance of a permit for the construction and operation of a foundry at 1210 Johnson Street, and his expenditure of money in purchasing the foundry and in obtaining the lease for the property, the building inspector, the Board of Adjustment, and the city and its officials were estopped from revoking the permit issued to him.

Stapf, 101 S.W.2d at 231. The court, however, held that the foundry was not a permitted use pursuant to the comprehensive zoning ordinance and, consequently, a valid permit could not be issued by the building inspector for the building of a foundry in that particular zoning district. *Stapf*, 101 S.W.2d at 232. The court, rejecting the plaintiff's estoppel argument, stated:

It being true, then, that the ordinance did not permit the location of a foundry at 1210 Johnson Street in the first manufacturing district, but permitted such a use only in the second manufacturing district, it follows that the action of the building inspector in granting the permit was unauthorized, and the permit was void. Under such permit [plaintiff] could acquire no rights, and no estoppel would be created.

Stapf, 101 S.W.2d at 232.

In *Jones*, 144 S.W.2d 388, plaintiffs sought to enjoin the City of Corpus Christi from enforcing its zoning ordinance against their property. Plaintiffs, who were in the business of ice manufacturing, purchased land zoned Commercial District. After securing a permit to erect a building on the property from the city engineer's office, plaintiffs erected the building and installed machinery for manufacturing ice. After plaintiffs began manufacturing and selling ice from their newly constructed plant, Corpus Christi officials determined that the plant was in violation of the zoning ordinance and demanded that the plant be closed. *Jones*, 144 S.W.2d at 392.

Plaintiffs asserted that the city was estopped from enforcing its zoning ordinance against their property because the city engineer had issued them a building permit. *Jones*, 144 S.W.2d at 391-92. The court, however, rejected plaintiffs' estoppel arguments.

Appellees contend that the City of Corpus Christi is estopped from enforcing the provisions of the Zoning Ordinance with reference to their property as the City Engineer issued a permit for the erection of the building, and no city official informed appellees that the erection of an ice manufacturing plant would be violative of a zoning ordinance, although there was considerable newspaper publicity as to the proposed construction of the plant. This contention was overruled by the trial court and that holding must be sustained here.

The zoning ordinance, or use regulation, is for the purpose of promoting the health, safety, morals and general welfare of the community. Such regulations represent an exercise of the police power by a municipality in its governmental capacity. The fact that a city official or employee fails in certain particulars to enforce the regulations cannot render it invalid, nor estop the city from asserting its validity.

Jones, 144 S.W.2d at 392.

In *Edge*, 200 S.W.2d 224, a court once again refused to hold that a city was estopped from enforcing its zoning ordinance. Plaintiff sought an injunction restraining the City of Bellaire from interfering with plaintiff's operation of a restaurant and grill. Plaintiff had converted his residential property into a grill and cafe, and shortly thereafter, he began the construction of an addition to his residence in order to accommodate the change from a residence to a restaurant. The city, after erroneously issuing plaintiff a building permit, discovered that the restaurant was in a residential area and revoked the building permit. *Edge*, 200 S.W.2d at 226. On appeal, plaintiff challenged the City's power to revoke the building permit, claiming that the doctrine of equitable estoppel applied. The court rejected plaintiff's estoppel arguments:

While it is unfortunate that the officials of the City of Bellaire issued a permit to [plaintiff] to erect a business establishment within the zoning area, the conduct of these officials, however harsh and unjust its effect might have been on [plaintiff], can not be used to prejudice or destroy the rights of the public to require the enforcement of the zoning ordinance, which was valid on its face, [citations omitted], since in enforcing an ordinance valid in all respects, the officials of the city were discharging a governmental function and the city and its citizens cannot be bound or estopped by unauthorized acts of its officers in the performance of that function.

Edge, 200 S.W.2d at 228.

In 1948, the sole Texas case to apply the conventional estoppel doctrine against a municipality was *Rosenthal*, 211 S.W.2d 279. In *Rosenthal*, the court held that a building inspector's assurances that a nonconforming ice manufacturing plant could be used for meat processing, coupled with the City of Dallas' failure to object to construction work beyond the monetary limit contained in a building permit, estopped the city from contesting the legality of the use. The court deferred to the building official's interpretation of the city ordinance and held that the permit was lawfully issued. *Rosenthal*, 211 S.W.2d at 291. In reaching that conclusion, the court wrote that the city waived its requirement of a final certificate of occupancy by inspecting the property without complaint as work progressed, and further, that the city was estopped from claiming a substantial variance between the cost stated in the application and the final expenditure as grounds for invalidating the permit because city officials knew about the excessive costs and lodged no complaint. *Rosenthal*, 211 S.W.2d at 292-93.

In addressing the estoppel issue, the court opined that it knew of no reason why cities, acting as they must through authorized agents, should be immune from the estoppel doctrine. *Rosenthal*, 211 S.W.2d at 292. On retrial, the trial court held the city estopped from revoking the permit. In *City of Dallas v. Rosenthal*, 239 S.W.2d 636 (Tex.Civ.App.-Dallas 1951, writ ref'd n.r.e.), the appellate court, upholding the trial court's judgment, determined that the city's silence, until practical completion of all work, justified a finding of estoppel. *Rosenthal*, 239 S.W.2d at 645.

Clearly, the doctrine set forth in *Rosenthal* and the doctrine set forth in *Stapf* clouded the issue of whether a municipality could be estopped from enforcing its zoning ordinances. Fortunately, although not expressly overruled, the estoppel cases decided since *Rosenthal* have distinguished *Rosenthal* and looked upon it with disfavor. In fact, immediately after the *Rosenthal* decision, any viability that the *Rosenthal* doctrine might have had in the application of estoppel against municipalities began to erode.

In *Davis*, 250 S.W.2d 685, the Eastland Court of Civil Appeals was provided an opportunity to choose between *Stapf* and *Rosenthal*. It chose *Stapf*. In *Davis*, plaintiffs applied for a building permit from the City of Abilene to move a building to a lot zoned "B-Dwelling District." The city's comprehensive zoning ordinance required that all buildings in the "B-Dwelling District" be set back at least 25 feet from the front property line. The city, however, granted plaintiffs a building permit that allowed the construction of their building within five and a half feet of the front property line. *Davis*, 250 S.W.2d at 685-86.

When the work on the building was approximately 80% complete, and after substantial sums of money had been expended, the city advised plaintiffs that the building was in violation of the city's set-back requirements and issued an immediate stop work order. *Davis*, 250 S.W.2d at 686. Plaintiffs brought suit to enjoin the city from enforcing its zoning ordinance. The trial court denied plaintiffs' request and granted the city's mandatory injunction to have plaintiffs' building removed and set back the required distance from the street. On appeal, plaintiffs urged that the building inspector's administrative decision was binding upon the city, and that the city was estopped from canceling the building permit and enforcing its zoning ordinances. *Davis*, 250 S.W.2d at 686-87.

The court noted that a permit issued in direct conflict with the city's zoning ordinance was void.

The permit issued to [plaintiffs] was void and without effect from the beginning because it was in violation of the City's zoning ordinance. The building inspector and the Board of Adjustment were without authority to issue a permit or to authorize the construction of a building in violation of such ordinance and to usurp the legislative power expressly conferred upon the legislative body of the City.

Davis, 250 S.W.2d at 687.

The court also discussed plaintiffs' assertion that the city was estopped from canceling the building permit and enforcing the city's zoning ordinance.

In their second point, [plaintiffs] contend that the City of Abilene is estopped from canceling the permit. It is urged that the building inspector was informed of the use to which [plaintiffs] expected to put their building and with this knowledge granted the permit; that the issuance of the permit was not appealed from; that the officer issuing the permit was presumed to know the zoning ordinances of the City of Abilene; that [plaintiffs] relied upon such presumption and upon the action of the city official in granting the permit and expended about 80% of the total cost of their building.

Davis, 250 S.W.2d at 688. The court, after reviewing the pertinent facts of the case, wrote that estoppel could not apply in this situation.

The facts in this case are that the building inspector granted [plaintiffs] a permit to place their building upon their lot within 7 feet of their property line on South 6th Street, contrary to the provisions of the City ordinance, and that [plaintiffs] actually placed such building only 5 1/2 feet from the property line. The permit was, therefore, in direct violation of the set-back provisions of the City ordinance and the action of [plaintiffs] in placing the building 5 1/2 feet from their property line was in violation both of the permit granted and of the terms of the ordinance. The permit was absolutely void. No mistaken fact finding was made by the building inspector as a basis for the permit. The question of a reasonable construction of an ordinance is not presented by the facts. The building inspector simply granted a permit which the undisputed facts show was unauthorized and void under the city's zoning ordinance.

* * *

[Plaintiffs] were charged with notice of the provisions of the City ordinance and were not entitled to rely upon the unauthorized action of the building inspector or of the Board of Adjustment taken in direct conflict with such ordinance. In doing so, they acted at their own peril and the city did not become bound or estopped thereby.

Davis, 250 S.W.2d at 688.

The cases which followed *Davis* also adopted the *Stapf* rationale. See, e.g., *City of Corpus Christi v. Lone Star Fish and Oyster Co.*, 335 S.W.2d 621 (Tex.Civ.App.-San Antonio 1960, no writ); *Bartlett v. City of Corpus Christi*, 359 S.W.2d 122 (Tex.Civ.App.-El Paso 1962, no writ); *Johnson, supra*; *Prasifka, supra*; *Marriott v. City of Dallas*, 635 S.W.2d 561 (Tex.App.-Dallas 1982), *af'd*, 664 S.W.2d 469 (Tex. 1983). *Stapf* is still viable and has been applied most recently in two 1985 appellate decisions, *City of San Marcos v. R. W. McDonald Dev. Corp.*, 700 S.W.2d 674 (Tex.App.-Austin 1985, no writ), and *T&R*

Assocs., Inc. v. City of Amarillo, 688 S.W.2d 622 (Tex.App.-Amarillo 1985, writ ref'd n.r.e.).

In *McDonald*, the City of San Marcos appealed the trial court's adverse ruling that the conduct of its city officials estopped the city from insisting upon compliance with the City's Interim Drainage and Erosion Control Ordinance ("Interim Ordinance"). The city's general subdivision ordinance required that all development meet the requirements of the Interim Ordinance. Plaintiff never complied with the Interim Ordinance requirements in its final subdivision plat, and the city filed suit to prevent plaintiff's filing of its final plat with the county clerk. Plaintiff asserted that the city was estopped from enforcing the requirements of its Interim Ordinance. *McDonald*, 700 S.W.2d at 675-76.

Plaintiff's estoppel claim was based on the director of public work's failure to respond to a letter that plaintiff had written to the city stating that the city planning commission had granted plaintiff a variance from all requirements of the Interim Ordinance. The public works director received plaintiff's letter but did not discuss its contents with other city officials, and did not respond to the letter. The city's planning commission subsequently approved plaintiff's final plat without discussion of whether the Interim Ordinance or its requirements had been addressed. *McDonald*, 700 S.W.2d at 675-76.

The district court found that city officials "led [plaintiff] reasonably to believe that the subdivision improvements would not have to comply with the [Interim Ordinance] . . .," and held that the city was estopped from enforcing the provisions of the Interim Ordinance. *McDonald*, 700 S.W.2d at 675-76. The court of appeals, in rejecting the trial court's estoppel findings, noted as follows:

[T]his Court has concluded, as a matter of law, that the City was not estopped to insist upon compliance with its Interim Ordinance. Generally, a unit of government exercising its governmental powers cannot be estopped by its officials' unauthorized or negligent acts. [Citations omitted.]

The rule has been applied in a number of cases involving a City's exercise of its zoning powers. [Citations omitted.]

This Court does not view the conduct of the City officials as supportive of the district court's finding of estoppel.

McDonald, 700 S.W.2d at 676.

Plaintiff argued that the city's planning commission was the authorized body to approve the subdivision plat, and therefore, the authorized act of the city planning commission in approving the subdivision plat would be subject to estoppel. *McDonald*, 700 S.W.2d at 677. The court, even though agreeing that the planning commission was the authorized agency to approve the subdivision plat and that the approval of the subdivision plat was an authorized act of the city, determined that estoppel would not apply.

[Plaintiff's] strongest claim for estoppel is that the planning commission's approval of his final plat was an authorized act which estopped the City. It is true, of course, that the planning commission approved [plaintiff's] final plat and that it was the agency empowered to do so. Furthermore, the City's general subdivision ordinance specifies that all requirements of the Interim Ordinance shall have been met at the time of final plat submission. Yet the planning commission, the body specifically authorized to grant

variances to the subdivision ordinance and to approve final plats, approved [plaintiff's] final plat without considering the requirements of the Interim Ordinance, and when this omission was called to the commission's attention, it made no attempt to revoke the plat.

The failure of the planning commission to address the requirements of the Interim Ordinance must be viewed as a negligent or unauthorized performance of its functions. A municipality may not be estopped by unauthorized acts of its officials which conflict with a City ordinance.

* * *

Although the method, or the lack of it, of the City of San Marcos with regard to enforcing its subdivision ordinances leaves a great deal to be desired, those ordinances may not be thwarted by unauthorized or negligent acts of its officials and agencies.

McDonald, 700 S.W.2d at 677.

Equally persuasive is *T&R Assocs.* where the plaintiff appealed from a summary judgment granted in favor of the City of Amarillo, which had enjoined the continued operation of plaintiff's lounge. The lounge had been found to be operating in violation of the city's zoning ordinance. The case arose when plaintiff acquired retail shopping mall property for the purposes of operating a lounge that sold alcoholic beverages. The original tenant of the property had sold both prepared food and beverages on the premises. The interim tenants who had occupied the property during the period between the original tenant's occupancy and plaintiff's occupancy had operated an establishment that served alcoholic beverages but not food. After plaintiff purchased the property and began operating the lounge, the city notified plaintiff that its operation selling alcoholic beverages without food service was in violation of the city's zoning ordinance. Plaintiff then applied for a specific use permit that would allow the continued operation of the lounge. The city, however, denied the application. *T&R Assocs.*, 688 S.W.2d at 624-25.

Among the points raised on appeal, plaintiff contended that the city was estopped from denying its application for a specific use permit. Plaintiff argued that the city's issuance of certificates of occupancy for the premises during those time periods when prior tenants sold alcoholic beverages without food service activities estopped the city from now denying the legality of the lounge operation and, alternatively, that such actions amounted to a ratification of the unauthorized use sufficient to legalize it. The court found that city inspectors had physically inspected the premises on a routine basis as part of the code enforcement procedures of the city, and that the city issued certificates of occupancy to the tenants that certified that the use of the lounge was in compliance with all applicable ordinances. *T&R Assocs.*, 688 S.W.2d at 628.

In spite of the city's apparent acquiescence, the court rejected plaintiff's estoppel arguments, noting that

[t]he well-established general rule in Texas is that, as a matter of law, a city may not be estopped to enforce zoning ordinances unless a zoning violator has detrimentally relied upon an *authorized* act of the municipality. [Citations omitted.] The exception to the general rule of non-estoppel on the part of the City, *i.e.*, detrimental reliance upon an authorized act of the municipality, is a narrow one. It has been stated that it should be applied only in exceptional cases and with caution.

T&R Assocs., 688 S.W.2d at 629 (emphasis in original). The court, after reviewing and rejecting *Rosenthal*, concluded that equitable estoppel was not appropriate.

The use of the premises by [plaintiff] without food service was admitted to be a clear violation of the zoning ordinance. Even assuming, *arguendo*, that the certificates were issued reflecting a lounge use, the inspectors had no authority to legalize such an unauthorized use. No fact finding by the inspectors of an unauthorized use of the premises is here involved. [Plaintiff] was charged with notice of the provisions of the zoning ordinance and was not entitled to rely upon any action of the building inspectors which was in direct violation of such ordinance. If, in fact, [plaintiff] did rely upon any actions of the inspectors, [plaintiff] did so at its own peril and the City did not become bound or estopped thereby.

T&R Assocs., 688 S.W.2d at 629.

Therefore, except in very limited circumstances, a city is not estopped from enforcing its zoning and land use ordinances.