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Zoning Ordinances—Estoppel of Municipality to Enforce

The City of Raleigh had allowed the defendant to conduct a business in her home (located in a residential zone) for a long period of time. Although the building inspector had issued four different permits for improvements or additions with the knowledge that the zoning ordinance was not being observed and that the tax collector had collected a privilege license tax (bakery) for eight years, the North Carolina Supreme Court held that the city was not estopped to enforce its zoning ordinance, and sustained an injunction requiring the defendant to conform.¹

In enacting and enforcing zoning ordinances, the municipality is exercising the police power of the state.² A few courts have held that a municipality is estopped from revoking a permit issued in violation of its zoning ordinance if the permittee has acted in good faith and has incurred expense in reliance on the permit. For instance, one court used language which flatly announced that the doctrine of estoppel applied to a city in the same manner as to an individual or corporation.³ Another decided that to permit the city to revoke a permit would unjustly and inequitably deprive the permittee of rights which the city had granted to him.⁴ Some courts, faced with unique fact situations, have held that the enforcement of the zoning law would deprive the permittee of a vested property interest which is protected by the Fourteenth Amendment.⁵

However, by the majority view, a municipality when exercising governmental functions cannot be estopped from enforcing its laws by unauthorized or illegal acts of its officers or agents.⁶ Every person who obtains and expends money in reliance on a building permit issued by an agent of the municipality is charged with knowledge of the zoning

traced in the usual and ordinary course of events, which from the common experience of humanity is known to be incidental to a particular employment is an occupational disease. . . ." Quoted with approval in *Duncan v. City of Charlotte*, 234 N. C. 86, 91, 66 S. E. 2d 22, 26 (1951) and *McNeely v. Carolina Asbestos Co.*, 206 N. C. 568, 572, 174 S. E. 509, 511 (1923).

¹ *Raleigh v. Fisher*, 232 N. C. 629, 61 S. E. 2d 897 (1950).

² *Kinney v. Sutton*, 230 N. C. 404, 53 S. E. 2d 306 (1949).

³ *Rosenthal v. Dallas*, 211 S. W. 2d 279 (Texas Civ. App. 1948), 28 TEXAS L. REV. 125 (1949).

⁴ *District of Columbia v. Cahill*, 54 F. 2d 453 (D. C. Cir. 1931).

⁵ *Evansville v. Gaseteria, Inc.*, 51 F. 2d 232 (7th Cir. 1931), *Trans-Oceanic Oil Corp. v. Santa Barbara*, 85 Cal. App. 2d 776, 194 P. 2d 148 (1948).

⁶ *Magruder v. Redwood City*, 203 Cal. 665, 265 Pac. 806 (1928); *Gordon v. Surfside*, 150 Fla. 614, 8 So. 2d 497 (1942); *Lipsitz v. Parr*, 164 Md. 222, 164 Atl. 743 (1933); *S. B. Garage Corp. v. Murdock*, 185 Misc. 55, 55 N. Y. S. 2d 456 (Sup. Ct. 1945). Cf. *Henderson v. Gill*, 229 N. C. 313, 49 S. E. 2d 754 (1948) (state not estopped to collect taxes); *Jenkins v. Henderson*, 214 N. C. 244, 199 S. E. 37 (1938) (city not estopped to assert ultra vires contract was void); *State v. Bevers*, 86 N. C. 588 (1882) (estoppel cannot be set up against the state, but the truth of any transaction undertaken in its name may be shown); 23 WASH. L. REV. 51 (1948).

ordinance and that the agent has no authority to disobey or disregard it.⁷ A building permit which is issued in violation of the zoning ordinance is void *ab initio*⁸ and there can be no property rights acquired by making expenditures in reliance on it.⁹

The fact that the permittee and the municipal agent have both acted in good faith has no bearing on the result,¹⁰ nor does a certification by the proper agent that the proposed or existing structure is not in violation of the zoning regulations.¹¹ A mistake of fact¹² or an error of a clerk¹³ in issuing a permit does not estop the municipality from later asserting that the structure does not conform to zoning regulations. However, the violation must be an actual one and not merely an anticipated one.¹⁴ Obviously, if there has been fraud, misrepresentation¹⁵ or concealment¹⁶ in the application for the permit, the municipality is not estopped from enforcing the zoning regulations when the truth is discovered. A resolution by the governing body of the municipality that it will not enforce its zoning regulations will not act to estop the municipality from later enforcing the zoning laws.¹⁷ Even though the officers of the municipality knew at the time the permit was issued that the applicant intended to violate the zoning law, there is no estoppel against the municipality.¹⁸ Merely because the municipality has allowed a continued violation¹⁹ or has allowed others to violate the zoning ordinance does not estop it from proceeding against a particular violator.²⁰

It seems to be well established in North Carolina that the payment

⁷ Idaho Falls v. Grimmert, 63 Idaho 90, 117 P. 2d 461 (1941).

⁸ Giordano v. Dumont, 137 N. J. L. 740, 61 A. 2d 245 (1948).

⁹ S. B. Garage Corp. v. Murdock, 185 Misc. 55, 55 N. Y. S. 2d 456 (Sup. Ct. 1945).

¹⁰ W. H. Barber Co. v. Minneapolis, 227 Minn. 77, 34 N. W. 2d 710 (1948).

¹¹ Lipsitz v. Parr, 164 Md. 222, 164 Atl. 743 (1933).

¹² Godson v. Surfside, 150 Fla. 614, 8 So. 2d 497 (1942) (enunciates the general rule). *Contra*: District of Columbia v. Cahill, 54 F. 2d 453 (D. C. Cir. 1931).

¹³ Lipsitz v. Parr, 164 Md. 222, 164 Atl. 743 (1933).

¹⁴ Mitchell v. Barfield, 232 N. C. 325, 59 S. E. 2d 810 (1950); Pendleton v. Columbia, 209 S. C. 394, 40 S. E. 2d 499 (1946).

¹⁵ Godson v. Surfside, 150 Fla. 614, 8 So. 2d 497 (1942).

¹⁶ Valicenti's Appeal, 298 Pa. 276, 148 Atl. 308 (1929).

¹⁷ Maguire v. Reardon, 41 Cal. App. 596, 183 Pac. 303 (1919), *aff'd* 255 U. S. 271 (1921); Snow v. Johnson, 197 Ga. 146, 28 S. E. 2d 270 (1943).

¹⁸ Magruder v. Redwood City, 203 Cal. 665, 265 Pac. 806 (1928).

¹⁹ Leigh v. Wichita, 148 Kan. 607, 83 P. 2d 644 (1938).

²⁰ Valicenti's Appeal, 298 Pa. 276, 148 Atl. 308 (1929). However, in one case where the zoning ordinance was apparently directed at a single party and where the municipality allowed violations of a similar character by others before and after proceeding against the defendant, the court held that it would be a denial of the equal protection of the laws to allow the municipality to enforce the ordinance against the defendant. *Evansville v. Gaseteria, Inc.*, 51 F. 2d 232 (7th Cir. 1931). Where the zoning ordinance was ambiguous and provided that the building inspector should determine whether the use conforms to the ordinance, it was held that the municipality could not revoke a permit issued by such an agent unless his action was clearly erroneous or without basis. *Crow v. Board of Adjustment of Iowa City*, 227 Iowa 324, 288 N. W. 145 (1939), 25 Iowa L. Rev. 383 (1940).

of a privilege license tax only gives authority to exercise that privilege in a lawful manner, and that the payment of a privilege license tax will not estop the state from prosecuting those who violate its laws.²¹

Municipalities in North Carolina are given authority by the General Assembly to enact zoning ordinances.²² The method of making changes in the several zones, once established, is also set out by the statute. A holding by the court that the municipality is estopped from enforcing its zoning ordinance by the acts of its agents would have the effect of allowing the zoning ordinance to be amended by circumvention. It is submitted that the decision of the court in the principal case is sound.

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²¹ *State v. Calcutt*, 219 N. C. 545, 15 S. E. 2d 9 (1941) (license issued by the state revenue department does not authorize violation of the slot machine law); *Hinkle v. Scott*, 211 N. C. 680, 191 S. E. 512 (1937) (payment of state and county license tax on slot machines would not justify the operation of those devices, if unlawful).

²² N. C. GEN. STAT. §160-172 (1943).