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ZONING AND LAND USE PLANNING

When a Municipality Makes a Mistake

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Local government officials are no different from the rest of us—they can, and they do, make mistakes. Generally speaking, however, a municipality does not have to suffer the consequences of its errors.

That is because New York law is well settled that estoppel typically cannot be invoked against a municipality to preclude it from enforcing its zoning laws, to ratify administrative errors, or to prevent it from discharging its statutory duties.[1] Of course, in those rare instances where a municipality has engaged in "fraud, misrepresentation, deception, or similar affirmative misconduct" upon which there was "reasonable reliance,"[2] an estoppel defense may lie.

Over the years, these general principles have been applied by courts to a broad range of local government actions.

The Paradigm

In *McGannon v. Board of Trustees for Village of Pomona*,[3] a building inspector for the village of Pomona erroneously issued a property owner a building permit to construct an accessory building on his residential lot that exceeded the size permitted by the village's zoning code and that was for a purpose not permitted by the code. After the owner commenced construction, a stop-work order was issued, and the owner went to court.

The Appellate Division, Second Department, affirmed a decision by the Supreme Court, Rockland County, in favor of the village. The appellate court rejected the property owner's contention that the village was estopped from enforcing its zoning code. It explained that estoppel generally may not be invoked against a municipality to prevent it from discharging its statutory duties or for the purpose of preventing the municipality from rectifying an administrative error. Here, the Second Department added, the issuance of the permit did "not confer rights in contravention of zoning laws."

> Estoppel may be applied where government fraud, misrepresentation, deception, or similar affirmative misconduct is involved. That is a difficult standard to meet.

Moreover, the appellate court said, had the property owner exercised reasonable diligence and reviewed the code, it would have been clear that his contemplated commercial use was illegal and that the size of the structure required a special permit that he had not sought.

Estoppel Rejected

Other local government actions also have been challenged on the ground of estoppel. In *Matter of County of Orange v. Al Turi Landfill*,[4] a landowner contended that a county should be estopped from bringing a supplementary proceeding to collect taxes after having withdrawn a landfill from a foreclosure proceeding on the ground that the property's withdrawal from the foreclosure proceeding was tantamount to an admission that it had little or no value. The Second Department observed that the county had withdrawn the property to avoid potential liability, which could "hardly be characterized as misconduct," and that, in any event, the landowner had failed to show any detrimental reliance or injury caused by the county's action.

In *Lily Pond Enterprises v. City of New York*,[5] a city employee mistakenly indicated that a property owner had paid all past due taxes and that its property would not be sold in an in rem tax foreclosure action. The city scheduled a foreclosure and the property owner, claiming that it spent more than $16,900 to improve the property in reliance on the city employee's statements, went to court to block it. The Supreme Court, Richmond County, granted the city's motion for summary judgment dismissing the complaint on the ground that the property owner's action was untimely.

The property owner contended that the city should be estopped from relying on the statute of limitations, but the Second Department affirmed. It explained

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that where a municipal error had been made, estoppel could not be invoked where "reasonable diligence" would have disclosed the true state of affairs to a "good-faith inquirer." The property owner, the appellate court concluded, could "not sit idly by" and then argue that the city was estopped to enforce the statute of limitations.[6]

Misconduct

As noted above, estoppel may be applied where government fraud, misrepresentation, deception, or similar affirmative misconduct is involved. That is a difficult standard to meet.

In *Matter of Oakwood Property Management v. Town of Brunswick*,[7] a landscaping business obtained site plan approval from the planning board of the town of Brunswick, in Rensselaer County, to operate its business on a five-acre parcel of land zoned for industrial use. Shortly thereafter, the company purchased an adjoining 43-acre parcel that fell within a "schools and cemeteries" zone as depicted on the town's zoning map and it subsequently acquired an abutting 26-acre parcel zoned for agricultural use. As it acquired each parcel, the company expanded its operations and, as its business grew, neighboring property owners began to complain.

The town's code enforcement officer issued a notice of violation alleging that the company was conducting operations on the 43- and 26-acre parcels without the required approvals and, further, that it had exceeded the bounds of the site plan approval with respect to the original five-acre parcel. The code enforcement officer also issued another notice alleging various violations of the town's zoning ordinance.

The zoning board of appeals sustained the notices of violation, and the company went to court. It argued that the town not only had been well aware that it had expanded its operations to the 43- and 26-acre parcels but that it had actively encouraged it to do so.

Among other things, the company contended that the town supervisor had encouraged one of the company's representatives to purchase the 43-acre parcel for use in the company's existing operations and that the town had issued fill permits, a building permit, and a certificate of occupancy for a structure built on the five-acre parcel. The company also cited town resolutions supporting the inclusion of two of the parcels in a New York State Empire Zone and various inspections of the company's properties by town officials.

This alleged conduct did not rise to the level required to estop the town from issuing the notices, the Second Department decided.

Consequences

There can be significant consequences to an individual or company that fails to persuade a court that a local government should be estopped from asserting a violation of its land use laws, as illustrated in the seminal case in New York on equitable estoppel, *Matter of Parkview Assoc. v. City of New York*,[8] where the court of Appeals upheld an order requiring a developer to remove floors of a mistakenly-permitted building.

As the court explained, the New York City Department of Buildings erroneously approved a building application for a building on the southeast corner of Park Avenue and 96th Street in Manhattan even though the application did not meet the city's zoning requirements, and a building permit was issued. After substantial construction, the Department of Buildings issued a stop work order for those portions of the building over 19 stories within 150 feet of Park Avenue. Then, the commissioner of buildings partially revoked the building permit, consistent with the stop work order, on the grounds that the permit, to the extent it authorized a height of 31 stories from 100-feet back instead of 150-feet back, was invalid when issued.

The developer challenged the revocation, but the court ruled in favor of the city. It declared that the commissioner could revoke a permit that had been "issued in error" where the permit "should not have been issued." Estoppel was not available to preclude a municipality from enforcing the provisions of its zoning laws and the "mistaken or erroneous issuance of a permit" did not estop a municipality from correcting errors, even where there were "harsh results," the court stated. Simply put, it ruled, the city "should not be estopped here from revoking that portion of the building permit which violated the long-standing zoning limits."

Conclusion

Courts are not without some degree of sympathy to individuals or companies that take actions on the basis of local officials' zoning and other decisions that governments later contend were made in error. However, in the absence of affirmative misconduct, courts generally will not preclude municipalities from discharging their statutory duties to enforce their zoning and other laws and correcting their mistakes.

1. See, e.g., *Matter of Parkview Assoc. v. City of New York*, 71 N.Y.2d 274 (1988).

2. See, e.g., *Town of Copake v. 13 Lackawanna Props.*, 99 A.D.3d 1061 (3d Dept. 2012).

3. *McGannon v. Board of Trustees for Village of Pomona*, 239 A.D.2d 392 (2d Dept. 1997).

4. *Matter of County of Orange v. Al Turi Landfill, Inc.*, 75 A.D.3d 224 (2d Dept. 2010).

5. *Lily Pond Enterprises, Inc. v. City of New York*, 149 A.D.2d 412 (2d Dept. 1989).

6. Of course, a local municipality will not be estopped from taking action in accord with its regulatory scheme where a property owner has made a material representation to the municipality on which the municipality acted. See, e.g., *Matter of South Path Realty Corp. v. Howe*, 34 A.D.2d 647 (2d Dept. 1970) (in applying for a rezoning, property owner represented that proposed project would not exceed 60 units).

7. *Matter of Oakwood Property Management, LLC v. Town of Brunswick*, 103 A.D.3d 1067 (3d Dept. 2013).

8. *Matter of Parkview Assoc.*, supra n.1; see, also, *Town of Copake*, supra n.2.