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MEMORANDUM

TO: Howard N. Tipton, Town Manager
Allen Parsons, Director Planning, Zoning and Building

FROM: Maggie Mooney, Town Attorney
Amy Farrington, Esq.

DATE: September 18, 2024

RE: Equitable Estoppel Principles in Land Use /Permitting Matters

The purpose of this Memorandum is to provide the Planning, Zoning and Building Department guidance on equitable estoppel principles and the ability of that argument to be raised by property owners. Florida courts have used the concepts of vested rights and equitable estoppel interchangeably in determining property rights cases. Vested right is a legal concept where a property owner is able to rely on regulations in existence at the time of permitting and construction. The doctrine of equitable estoppel is based on the "rules of fair play."[1] A property owner can claim equitable estoppel against the local government to stop the government from imposing new regulations or changing a prior decision. Equitable estoppel is an affirmative defense meaning that it is raised by a property owner to avoid liability or provides a basis to prevent a strict application of law.

[1] *Castro v. Miami-Dade County Code Enforcement,* 967 So.2d 230, 234 (Fla. 3rd DCA 2007).

To prevail on an equitable estoppel argument, the burden is on the property owner to affirmatively establish the following three central elements:

1. The property owner acted in good faith;
2. Upon an act or omission of the government; and
3. Has made a substantial change in position or incurred extensive obligations and expenses that it would be inequitable and unjust to take that acquired right.[2]

In addition to the above elements, a party seeking to invoke estoppel against a government must also establish affirmative government conduct going beyond mere negligence.[3] However, affirmative government conduct does not necessarily have to "prove intentional deceit" by the government either. [4] Further, the doctrine of equitable estoppel is infrequently applied against the government and "only in rare instances and under exceptional circumstances."[5]

Ignorance of the Applicable Law is Not Grounds for Estoppel

The caselaw evaluating whether or not property owners should be held to strict municipal codes indicates that property owners (and their agents) are on constructive notice of the applicable regulations in effect at the time of application. *See, Town of Lauderdale-By-The-Sea v. Meretsky*, 773 So.2d 1245 (Fla. 4th DCA 2000) (finding that the municipality was not estopped from requiring the removal of a newly constructed wall located on the public right of way because the property owners were on constructive notice of the contents of the ordinance had constructive knowledge of the permit process); *see also, City of Delray Beach vs. DeLeonibus,* 379 So.3d 1177 (Fla. 4th DCA 2024) (denying property owner estoppel arguments and finding that property owners are on constructive notice of the legal obligations and procedural processes in city code regarding their property when the homeowners received building official approval for a rooftop terrace that exceeded the (then) height limitation without the prior approval by a review board). Courts have repeatedly found that estoppel arguments are not applicable when property owners fail to follow city land use procedures because property owners are legally obligated to examine the public records of the zoning authority and are on "constructive notice of the ordinances, resolutions, and filed plans and restrictions governing a parcel of property."[6]

Legal Reliance Is Dependent Upon An Actual Right

Principles of legal reliance by a property owner are contingent upon the property owner having a right to rely on a government action.[7] A permit obtained in violation of an ordinance or other legal requirement does not support an equitable estoppel argument. The issuance of a building permit does not eliminate the government's authority from enforcing its ordinances and revoking a permit

[2] *The Hollywood Beach Hotel Company v. City of Hollywood,* 329 So.2d 10 (Fla. 1976).
[3] *Alachua County v. Cheshire*, 603 So.2d 1334 (Fla. 1st DCA 1992).
[4] *Id.* at 1337.
[5] *Calusa Golf, Inc. v. Dade County*, 426 So.2d 1165, 1167 (Fla. 3rd DCA 1983).).
[6] *Delray* at 1181 (citing *Palm Beach Polo, Inc. v. Village of Wellington,* 918 So.2d 988, 992-993 (Fla. 4th DCA 2006)).
[7] *See Calusa Golf.*

which has been obtained in violation of its laws.[8] Generally, a "building permit issued in violation of law or under mistake of fact may be rescinded although construction may have commenced."[9]

In *Town of Lauderdale-By-The-Sea,* the property owners applied for, and received a building permit, based on an inaccurate application that failed to include all relevant information pertaining to the construction. Upon the discovery that the construction was on the right-of-way and not in compliance with the city ordinances, the city delivered a cease-and-desist order. The property owners completed the construction against the order. The Fourth DCA held that the city could not authorize an act that was against its own ordinances (e.g., approving a building permit over a right-of-way).

In *Dade County v. Gayer,* homeowners applied for a permit after a wall was partially constructed. The application contained a setback of ten feet inside the property line. After approval of the permit, construction exceeded the authorized setback allowance and entered into the right-of-way, which was not in accordance with the permit. Homeowners applied for, and received, a variance recommendation that was ultimately denied by the County Commission. The Third DCA upheld the variance denial and ordered the remove the wall finding that "it would be inconceivable that public officials could issue a permit, either inadvertently, through error, or intentionally, by design, which would sanction a violation of an ordinance adopted by the legislative branch of the government."[10]

Inaccurate/False Permit Information Negates Estoppel Principles

In many of cases evaluating estoppel arguments raised by property owners, a permit was deemed illegally issued due to an inaccurate permit application or incorrect information about the project. These types of issues resulted in determinations by the courts that the permits were issued for projects that were in violation of existing ordinances, thereby causing the permit itself to be determined to be illegal.

In *Dade County vs. Bengis Associates,* the court held that the County was not estopped from requiring the removal of a sign that was approved and installed based on incorrect zoning information provided by the applicant in the permit. The size of the sign was too large based on actual zoning requirements and the court held that the city "is not estopped from the enforcement of its ordinances by an illegally issued permit which is issued as a result of mutual mistake of fact."[11]

Even if construction has already commenced, a building permit issued under mistake of fact may be rescinded.[12] In *Godson vs. Town of Surfside,* the size of the property diminished due to changes in the shoreline, which impacted the buildable area on the lot. The Florida Supreme Court found that the owner knew that the facts in the permit application were accepted as true and that any deviation would result in a permit revocation. Ultimately, the city was not estopped from rescinding

[8] *Town of Lauderdale-By-The-Sea* at 1248.
[9] *Id. (*citing *Godson v. Town of Surfside*, 150 Fla. 614, 8 So.2d 497, 498 (1942)).
[10] *Dade County v. Gayer*, 388 So.2d 1292, 1294 (Fla. 3rd DCA 1980).
[11] *Dade County v. Bengis and Associates, Inc.,* 257 So.2d 291, 292 (Fla. 3rd DCA 1972).
[12] *Godson vs. Town of Surfside*, 150 Fla. 614 (1942).

the permit due to the fact that the continued building would "result in a violation of one of the city ordinances which it was their duty to enforce."[13]

In *Meretsky*, the city issued a cease-and-desist ordering work to stop on a wall that was encroaching on the right of way. The permit application did not refer to the right of way and discussion was limited to setbacks (the survey map indicated a side lot encroachment onto the right of way). The court held that "whether through mistake on the part of the parties or through misrepresentation" by the property owners the approval of the permit based on inaccurate information was against the city's ordinances and the city was not estopped from revoking the permit.[14]

Based upon the above, it is important for the Town to understand that the property owners assertions of equitable estoppel are difficult to prove particularly when applicable zoning, land use and permitting requirements are ignored and/or violated by property owners or their representatives. Even if elements of equitable estoppel are met, misrepresentations (intentional or unintentional) generally diminish property owners' estoppel assertions. Nevertheless, we would encourage Town Staff to notify property owners of discovered violations of applicable codes and permitting requirements found during construction processes at the earliest opportunity available so that property owners can correct and mitigate the issue at the earliest opportunity. We hope that the principles summarized above provide guidance should assertions of equitable estoppel present themselves in the Planning, Zoning and Building Department. Should you have any questions or concerns regarding this Memorandum, please do not hesitate to contact us.

[13] *Id.* at 619.
[14] *Meretsky* at 1249.