

151 So.2d 433

Supreme Court of Florida.

A. H. SAKOLSKY, Petitioner,

v.

The CITY OF CORAL GABLES, Florida,
a municipal corporation, Respondent.

No. 31842.

|

Feb. 20, 1963.

|

Rehearing Denied March 19, 1963.

Synopsis

Action by holder of permit authorizing building of 12-story luxury apartment building against city to enjoin rescission of building permit. The Circuit Court, Dade County, dismissed complaint, and holder appealed. The District Court of Appeal, Third District, 139 So.2d 504, affirmed the judgment, and the holder brought certiorari. The Supreme Court, Drew, J., held that holder acted in good faith, and municipality was precluded under doctrine of equitable estoppel from rescinding permit, even though holder might have had reason to believe that municipality's official mind might be changed by municipal election and political controversy regarding high rise zoning, where holder materially changed his position and incurred substantial expense in reliance on permit which had been intentionally and lawfully issued by proper municipal officers.

Decision of District Court quashed, and cause remanded with directions.

Attorneys and Law Firms

*433 A. H. Sakolsky, in pro. per.

Edward L. Semple, Coral Gables, and William M. Burton, Jr., Fort Lauderdale, for respondent.

Opinion

DREW, Justice.

Writ of certiorari has issued in this cause on the ground that the decision of the district court, ¹ denying injunctive relief against rescission of a building permit, is in direct conflict ²

with decision of this Court that municipal action in such situations is governed by the doctrine of equitable estoppel. ³

*434 The facts of the case are basically undisputed. In August, 1960, the petitioner Sakolsky testified he became interested in erecting a 12-story luxury apartment building in Coral Gables. He went to see the mayor of the City to discuss with him the best location for such a project. The mayor suggested that a portion of Biltmore Way in the City of Coral Gables, west of the business district, was the most logical place and arranged a conference with a landowner in the area. The suggested site fronted on a one hundred foot boulevard in an area zoned for apartments where other multistory buildings already existed. After negotiations with the landowner, Sakolsky entered into options to purchase the land, on the basis that if he could erect a 12-story apartment building thereon, he would purchase the land. ⁴

At the suggestion of the mayor, Sakolsky had preliminary plans prepared for the apartment house, which were submitted to the City of Coral Gables Planning and Zoning Department and Board of Architects for approval, and tentative approval was granted.

Under the zoning code of the City of Coral Gables, the permission of the City Commission was required ⁵ for the erection of an apartment house in excess of three stories. There was no requirement under the zoning code that public notice be given on application for permission to erect such a structure. A preliminary conference with all of the Commissioners was held in November 1960, at one of the Commission meetings, at which time it was suggested that a courtesy notice be given to the apartment house owners in the area and that the matter be put on the agenda of the City's Commission meeting on December 6, 1960.

Upon notice and public hearing on that date, Mr. Sakolsky and some 100 objectors, represented by counsel, were fully heard and the Commission by a majority vote enacted an ordinance granting the permission requested. On December 22 the Commission approved traffic flow and fire hazard conditions and the public works department issued a foundation permit authorizing commencement of construction. ⁶

It is uncontroverted that petitioner changed his position materially and incurred very *435 substantial expense in reliance upon the permission granted and permit issued by the respondent City. At a meeting on January 10 the City Commission, upon motion by a member whose opposing vote had at the December meeting been overridden, passed an

ordinance rescinding petitioner's permit. This proceeding for injunctive relief ensued, based upon the theory of equitable estoppel. The record fails to reflect the course of ultimate disposition of an independent action instituted on December 21, 1961, against the respondent City by an association of apartment owners, but it is clear that petitioner was not joined by service until after enactment of the rescinding ordinance contested in this proceeding.

The import of the final decree entered against petitioner, and the decision affirming same, is that estoppel does not prevent rescission by the respondent City because at the time petitioner obtained his permit and thereafter he 'had good reason to believe' the official mind might change because 'strenuous objection was present and made known, suit was threatened and the political issue made apparent.' Although petitioner denied personal knowledge, the court referred to widespread public notice that City Commission membership was to be altered by an election for a post coming vacant early in January, the campaign being conducted at this time on the issue of high rise zoning controversy.

Aside from petitioner's contention that the record evidence refutes such notice or knowledge on his part, we believe the decision collides with earlier cases on the basic point of law in question. The law is clearly established that the doctrine of equitable estoppel may prevent arbitrary rescission of a permit by a municipality in such a situation 'as it would be invoked were [the municipality] an individual.'⁷ To deny application of the doctrine to the facts of this case on the ground of circumstantial notice that the 'official mind' might change amounts, in our opinion, to a rejection of the quoted ruling and creates an irreconcilable conflict of principle. The basic concepts of equitable estoppel, held by the prior cited case to be applicable to municipalities as to individuals, preclude the notion of such instability in municipal action merely because its business is conducted through a body whose membership is subject to change.

The opinion in the case of [Miami Shores Village v. Wm. N. Brockway Post](#), 156 Fla. 673, 24 So.2d 33, which respondent regards as controlling in its favor, does state that one acts at his peril in relying upon a building permit when he is

warned by the 'red flags' of a political contest in which the success of certain candidates may alter the voting pattern of the governing municipal body. While that case might be distinguished from the one at bar and its conclusion justified on the basis of a number of factual differences,⁸ we believe that the rule there pronounced, that an impending change of municipal officers can prevent reliance on an act of the current governing body, is in error and inconsistent with precedent condemning arbitrary action by these public bodies.⁹ Such a permit as that here involved, intentionally and lawfully issued by the *436 proper municipal officers, can have no other purpose than to authorize action by the permittee in reliance on its terms. Notice or knowledge of mere equivocation independent of actual infirmities or pending official action,¹⁰ cannot in this situation operate to negative or prevent reliance on the official act.

The effect of pending litigation directly attacking the validity of a permit or zoning ordinance, or the effect of an eventual determination that such permit was invalid, may present a very different problem.¹¹ The decision in the instant case was not rested on any showing that petitioner, at the time he acted in reliance on the permit granted him, was a party defendant in legal action directly attacking its validity, that he had any notice that his permit might have been invalid in its inception, or that its revocation was in fact required in the public interest. We conclude consequently that he acted in good faith and should not be denied the benefit of the estoppel doctrine upon which his complaint is founded.

The decision of the district court is quashed and the cause is remanded to that court with directions to enter an order directing the trial court to enter a final decree consistent with this opinion.

ROBERTS, C. J., and THORNAL, O'CONNELL and CALDWELL, JJ., concur.

All Citations

151 So.2d 433

Footnotes

1 Fla.App., 139 So.2d 504.

2 Art. V, Sec. 4, Fla.Const., F.S.A.

3 [Texas Co. v. Town of Miami Springs, Fla.1950, 44 So.2d 808](#); [Bregar v. Britton, Fla.1954, 75 So.2d 753](#); [Gross v. City of Miami, Fla.1953, 62 So.2d 418](#); [Sharro v. Dania, Fla.1955, 83 So.2d 274](#); [City of Fort Lauderdale v. Lauderdale Industrial Sites, Inc., Fla.App.1957, 97 So.2d 47](#); [City of Miami v. State ex rel. Ergene, Inc., Fla.App.1961, 132 So.2d 474](#); [City of Jacksonville v. Waldrep, Fla.1953, 63 So.2d 768](#); [Voelker v. Combined Ins. Co. of America, Fla.1954, 73 So.2d 403](#). See also [Frink v. Orleans Corp., 159 Fla. 646, 32 So.2d 425](#).

4 Petitioner testified:

'That is exactly the way the conversation went. I said, 'It's a lot of money for and land, but I wouldn't dispute with you five, six or seven or eight thousand in one direction or another.' I said, 'If I can possibly build an apartment building with the proper number of units, I'm willing to pay the price for the land. The only thing I'm asking of you is an option for that property running until the date that I receive a consideration from the Coral Gables City Commission, a favorable action in that respect.' * * *

'The going price for land in the area was approximately \$200 to \$250 a front running foot, and I had agreed to purchase the land for almost \$400 a front running foot. But I felt that if I could necessarily build the type of development that I was interested in, that the number of units as opposed to the amount of land would be absorptive enough so it would be a feasible deal.'

5 Petitioner has not at any point in the litigation contested, on constitutional or other grounds, the validity of the provision requiring approval by the Commission of any structure exceeding three stories in height.

6 Some emphasis in argument is placed on the fact that the foundation permit did not contain a height description of the projected building. It was, however, issued after high rise zoning clearance had been obtained and must be construed as authorizing the first stages of construction of the structure as planned. For distinctions between the vesting of rights under permits and under zoning ordinances generally, see [McQuillin, Munic. Corporations, 3rd ed. rev., Vol. 8, Sec. 25.133, 25.156-158](#).

7 [Texas Co. v. Town of Miami Springs, note 3 supra, 44 So.2d p. 809](#).

8 The permit in that case was issued on authority of an ordinance granting a use variance which was enacted without benefit of an adversary hearing and argument. Public dispute over such action might in that situation provide an ore reasonable basis for inferring notice of impropriety or unreliability of the variance ordinance and permit. But to attribute to that decision, as did the court below, a controlling effect in the instant case gives rise to additional decisional conflict supporting certiorari jurisdiction in this Court. [Pinkerton-Hays Lmbr. Co. v. Pope, Fla.1961, 127 So.2d 441](#); [McBurnette v. Playground Equip. Co., Fla.1962, 137 So.2d 563](#).

9 Text treatments of this decision in relation to the general body of law indicate some difficulty in reconciling the reasoning underlying the ruling in that case.

'It is generally held that a building or zoning permit may be changed or entirely revoked if it becomes necessary so to change or revoke it in the exercise of the police power, * * *.

'Once the permittee's rights have vested, however, the adoption of an ordinance under which the permit would not be authorized should not be given a retroactive effect * * *. Similarly, when the proper authorities grant a permit for the erection or alteration of a structure, after the permittee has acted on the faith of the permit and made contracts and incurred expenses or obligations thereon, he acquires a kind of property right on which he is entitled to protection; and the permit cannot be revoked in the absence of fraud or deceit or other fault on the part of applicant or in the absence of any public necessity for such action, although it has

been held that the permit may be revoked where the elements of equitable estoppel are not present. [citing the Miami Shores decision]

[62 C.J.S. Municipal Corporations § 227\(7\)](#).

- 10 Sharrow v. City of Dania, note 3 supra.
- 11 City of Miami v. State ex rel. Ergene, Inc., footnote 3 supra.

329 So.2d 10

Supreme Court of Florida.

The HOLLYWOOD BEACH HOTEL COMPANY,
an Ohio Corporation, et al., Petitioners,

v.

The CITY OF HOLLYWOOD, a Municipal
Corporation, organized and existing under
the laws of the State of Florida, Respondent.

No. 44642.

|

Jan. 21, 1976.

|

Rehearing Denied April 13, 1976.

Synopsis

Landowners brought action to enjoin city from rezoning property and from applying proposed density ordinance to it and to compel return of building permit fee. The Circuit Court for Broward County, Lamar Warren, J., rendered judgment in favor of landowners, and city appealed. The District Court of Appeal, 283 So.2d 867, reversed and remanded, and petition for writ of certiorari was granted. The Supreme Court held that in view of plaintiffs' good faith reliance on rezoning for multiple family use and their expenditure of considerable funds on preliminary planning plaintiffs had acquired a vested right in continuation of the multiple use zoning and continuance of building permit, that plaintiffs did not forfeit such rights either by failure to build or their request for return of permit fee until economic conditions improved where city's actions in delaying for approximately one year question of lower density zoning and repeal of motion which had extended life of building permit until completion of litigation and, instead, mandating that construction proceed within 90 days were arbitrarily taken and plaintiffs actively proceeded with litigation.

Affirmed in part and reversed in part.

England, J., dissented and filed opinion, in which Overton and Sundberg, JJ., concurred.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

*11 Judson A. Samuels and Hugh S. Glickstein of the Law Offices of Judson A. Samuels and Hugh S. Glickstein, Hollywood, and Howard M. Neu, North Miami, for petitioners.

J. Bart Budetti, City Atty., and Myron H. Burnstein, Special Asst. City Atty., for respondent.

Opinion

PER CURIAM.

This cause is before us on a petition for writ of certiorari to review the decision of the Fourth District Court of Appeal.¹ We have jurisdiction pursuant to [Article V, s 3\(b\)\(3\), Fla.Const.](#)

As a general rule, an outline of the sequence of events in chronological order is not of vital importance. However, the instant case represents a significant exception to this rule.

*12 Petitioners-plaintiffs owned a 105 acre plot of real property in the City of Hollywood which was zoned RA—5 (golf course use) except for a 40 400-foot portion in the southwestern corner of same which was zoned RC—12 (multiple family). In late 1968, the petitioners decided to develop the property into a 6,000 unit complete community and petitioned the Hollywood Planning and Zoning Board to zone the entire plot as RC—12 (multiple family). This change was recommended to the Hollywood City Commission by the Planning and Zoning Board, whereupon the City Commission adopted Ordinance 0—69—46, hereinafter referred to, with the preamble reading in part, as follows:

WHEREAS, the City Commission, after several public hearings and only after an independent investigation and study, recognizes that The character of the neighborhood has gone through a series of changes so as to require the granting of the change of zone as hereinafter provided in order to properly preserve and protect the public interest, and

WHEREAS, The City Commission, after careful study of all aspects of the petitioner's application, including traffic patterns, population density, aesthetic considerations, effect upon single family residences in the area, as well as the effect upon the business establishments in the downtown area, Considers that the public interest not only justifies but requires that the change of zone be granted so as to permit construction of the complex in accordance with the circumstances recited herein and as the same appears on the

site development plan, attached hereto and made a part hereof as though fully recited herein.' (Emphasis supplied.)

On April 2, 1969, after numerous public hearings and conferences between the City and the petitioners, a comprehensive site plan was approved and the City Commission by a 4 to 1 vote adopted Ordinance 0—69—46 which rezoned said property to RC—12 uses. In early December of 1969 in a City election, two commissioners who voted for the ordinance were defeated by candidates publicly opposed to same. On December 17, 1969, at the second meeting following their election, the two newly elected commissioners joined with the commissioner who had originally voted against the ordinance and passed a motion to petition the Zoning Board to reevaluate the rezoning affected by the foregoing ordinance. This petition did not contain and was not grounded upon Any allegations necessitating rezoning.

On December 30, 1969, petitioners obtained a building permit from the State for the construction of the first five million dollar building. The Zoning Board met on January 12, 1970, and considered the Commission's petition to reevaluate the zoning affected by the above ordinance. At this meeting, the Board stressed the need for zoning stability and stated that the Commission had never 'come back' with a request for a change in a duly enacted zoning ordinance. The motion was tabled and the Board at its February 9th meeting requested clarification from the Commission.

In the meantime, on January 23, 1970, the City issued a building permit for same. At this point, it must be noted the uncontroverted testimony established that it had taken some nine or ten months (April 1969—Jan. 1970) for the petitioners to complete the necessary preparations to begin construction. During this period and subsequently, petitioners expended some \$191,269.66.

On February 18, 1970, the Commission in response to the request for clarification by the Zoning Board passed a motion to petition the Zoning Board to rezone the western one-third of the tract to multiple family and the eastern two-thirds to single family golf course use. On February 19 the City filed this petition with the Zoning Board.

*13 On February 21, the petitioners brought an action for a permanent injunction with an accompanying request for a temporary injunction against the City. At the hearing on the temporary injunction and the City's motion to dismiss on March 4, the following pertinent testimony was given: The

architect for the project testified that the entire site plan would be destroyed by rezoning part of the property; a member of the Zoning Board testified that the City's petition for rezoning did not contain any allegations that a change in the area where the property was situate necessitated rezoning; and the petitioner, Ben Tobin, testified as to the amount of money expended and that all activities had been brought to a halt because of the City's petition to rezone.

The trial court denied the temporary injunction on the grounds that the application was premature on March 5th. On March 13th, the City's Motion to Dismiss was denied. The City then voted to file an interlocutory appeal on March 16th and such appeal was filed on March 19th.

On March 23rd, the Zoning Board denied the petition to rezone.

The Commission next voted on March 25, 1970, to appeal this denial to the Zoning Board of Appeals, the members of which were comprised solely of the City Commissioners. Such appeal was filed but no definitive action was taken by the Board of Appeals until Feb. 17, 1971. However, at its April 5, 1970, meeting, the Board of Appeals voted to table the appeal for thirty to sixty days. On June 17th, the Board of Appeals discussed the tabled appeal and voted that it be tabled no longer than the first meeting in August.

On July 15th, the City Commission, in response to a request for an extension of the building permit, Voted to extend the building permit indefinitely until the litigation was completed.

At the August 8th meeting of the Board of Appeals, the appeal was left tabled due to the possibility that the City might purchase the property in dispute.

Then, on August 21st, the District Court affirmed the trial court's denial of the City's motion to dismiss.

At its September 2nd meeting, the City Commission voted to petition the District Court for rehearing and if unsuccessful, to petition the Supreme Court for certiorari. Prior to the taking of this vote, one of the Commissioners who voted in the majority, stated that these actions should be taken since 'the City could operate with more leverage as to the purchase of the property if the case remains in Court.' The District Court denied rehearing on September 29, 1970; this Court denied certiorari on January 7, 1971; and the City filed its answer to petitioner's complaint on February 17, 1971.

On the same day the Board of Appeals (City Commissioners) Without prior notice to the petitioners, affirmed the Zoning Board's denial of petition to rezone; and then the (same people sitting as) City Commissioners rescinded its motion of July 15, 1970 which had extended the permit until the end of the litigation between the parties and mandated that the petitioners exercise their rights under the building permit within ninety days.

Prior to the vote on the petition for rezoning and the ninety-day motion, one of the Commissioners who voted for the petition by the City to rezone, stated that he would 'now vote' to affirm the Zoning Board's denial since he did not think the project would ever be built without deviations which would have to come before the Commission for approval. On March 17th, the petitioners requested the return of the permit fee until building conditions improved. This was denied.

In regard to the City's repeal of the building permit allowing an extension to the end of the litigation, it is important to note that during the ninety-day period referred to above, the injunction suit was *14 actively prosecuted by both parties, to-wit: on March 12, 1971, petitioners moved to strike parts of City's Answer; on March 29, 1971, the petitioners moved to amend Complaint; on April 12, City moved for judgment on the pleadings; and on April 20, City's motion for judgment on pleadings was denied and the petitioners' motion for leave to amend was granted.

From June 23, 1971 to January 5, 1972, the City negotiated with the petitioner for the purchase of the property. In the December 1971 City elections, the remaining two Commissioners who had voted for Ord. 0—69—46 were defeated by candidates publicly opposed to it. At its January 5, 1972 meeting, the Commission voted not to buy the property even though a verbal understanding had been reached as to both price and method of financing. The Commission again then passed unanimously a motion requesting the Zoning Board to reconsider the zoning implemented by Ord. 0—69—46, and, in addition thereto, to recommend suitable rezoning (a matter which was not raised in its first request for re-evaluation). The Commission also then took the first vote on a new density ordinance which would have the effect of rendering the petitioners' site plan useless. Petitioners sought a 'temporary injunction' (incorporating all prior pleadings before the court) on February 12. On February 14, the Zoning Board approved a rezoning plan and recommended same to the City Commission.

It is significant to note that at the Zoning Board meeting there was no allegation of a change in the neighborhood as basis for the rezoning.

At the hearing on the temporary injunction, the petitioners submitted testimony: that during the almost one year that the Commission had considered action on the petition to rezone, this delay coupled with newspaper coverage of same made it impossible to obtain financing and discouraged investors; that no prior notice had been given of the City's decision on January 5, 1972, not to purchase the property; and that due to these prolonged negotiations, the development had been kept in limbo; that the proposed new density ordinance destroyed the site plan and rendered the building permit useless.

The temporary injunction filed on February 12, 1972, was denied on February 18, 1972. The density ordinance received final passage on March 1, 1972, and on March 15, the Commission voted unanimously to petition the Zoning Board to rezone the property in question. The Zoning Board approved same on April 17 and on June 28, the Commission enacted the rezoning ordinance.

On April 27, the trial court held a hearing at which the petitioners submitted the following testimony: \$191,269.66 had been expended in reliance on the rezoning and the permit; that the density ordinance and proposed rezoning completely destroy the site plan; and that if the injunction was granted, the petitioners intended to build if financing and the market were suitable. The City Planner testified that the disputed ordinances did not destroy the site plan; however, at the continuation of the hearing on May 11, the City Planner then admitted that said ordinances did destroy the petitioners' site plan.

On July 19, the trial court issued a permanent injunction enjoining the City from enforcing both the density and subsequent rezoning ordinances against the petitioners and ordered that the City return the building permit fee.

The District Court of Appeal, Fourth District, reversed and remanded with instructions and this Court granted certiorari.

Three issues require our attention: First, whether the Fourth District Court of Appeal reevaluated the evidence and substituted its judgment for that of the chancellor; Second, whether the principle of equitable estoppel precluded the City of Hollywood from enacting the disputed ordinances; and Third, whether the chancellor *15 erred in finding as a matter of law that the City's retention of the petitioners'

permit fee constituted a forfeiture? All three queries must be answered in the affirmative. Accordingly, the decision of the Fourth District Court of Appeal is quashed as to the first and second issues and affirmed as to the third.

It is the prevailing rule in this jurisdiction that an appellate court cannot reevaluate the evidence and substitute its judgment for that of the trial court. *Westerman v. Shell's City, Inc.*; ² *Greenwood v. Oates.* ³ After comparing the chancellor's findings with the recital of facts by the Fourth District, it is only too clear that the District Court violated this rule. The chancellor found that because of the delays caused by the City the developer was unable to build within the required ninety days due to the economic conditions which precluded same. Whereas, the District Court in its reevaluation stated that the developer 'elected not' to proceed and 'surrendered' his building permit. ⁴

'To elect' is defined as to choose by preference a course of action. ⁵ In turn, 'choice' is defined as the 'voluntary and purposive or deliberate action of picking, singling out, or selecting from two or more that which is favored or superior.' ⁶ Petitioners 'chose' not to build within the ninety-day period; correspondingly, it is undisputable that the trial court found this 'choice' to be due to the unstable economic and financial conditions which faced the petitioners because of the delays caused by the City, and not because of a 'voluntary choice' by the petitioners. The petitioners' situation is best described in the proverbial terms of being put between a 'rock and a hard spot' by the City. The trial court also found that the petitioners had not surrendered the permit, whereas the District Court in effect found that such a surrender had been made on the basis of its reevaluation. Thus, the principles enunciated by this Court in *Westerman*, supra, and *Greenwood*, supra, require reversal on this point alone.

The doctrine of equitable estoppel may be invoked against a municipality as if it were an individual, *Salkolsky v. City of Coral Gables*; ⁷ *Texas Co. v. Town of Miami Springs*; ⁸ *City of North Miami v. Marguiles*; ⁹ and the City's contention that the doctrine is inapplicable where actual physical construction has not yet begun, is without merit. *Salkolsky*, supra; *Bregar v. Britton*; ¹⁰ *Frink v. Orleans Corporation*; ¹¹ *Marguiles*, supra; *City of Hollywood*, supra; *City of Gainesville v. Bishop*. ¹² As correctly stated by the Fourth District in *City of Hollywood*, supra, at 869, the doctrine of equitable estoppel will preclude a municipality from exercising its zoning power where

'... (A) property owner (1) in good faith (2) upon some act or omission of the government (3) has made such a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the right *16 he acquired. *Salkolsky v. City of Coral Gables*, 151 So.2d 433 (Fla.1963).'

This Court has never had the occasion to decide if the exception to the Salkolsky rule alluded to, but not invoked, by the Fourth District should be established, i.e., that a city may revoke a building permit even after good faith reliance by the landowner on the zoning law and even after a substantial change has been made in his position or incurring extensive obligations, '... if the municipality can show that some new peril to the health, safety, morals, or general welfare of the municipality has arisen between the granting of the building permit and the subsequent change (in) zoning ...' ¹³

While we cannot preclude the adoption of such an exception in the future, we have no reason to consider it in the instant case.

In applying the Salkolsky rule, the Fourth District found that, '... (T)he plaintiffs obtained a building permit from the City of Hollywood on January 23, 1970. Without actual or constructive knowledge of any impending zoning change, the plaintiffs spent almost two hundred thousand dollars on a site plan, models of the community, architect's plans and specifications and building permits. This money was spent in good faith reliance on the city's rezoning of the plaintiffs' land to RC—12 multiple family. Under these circumstances the City of Hollywood was equitably estopped from changing the zoning of the plaintiffs' land from RC—12. The plaintiffs had a vested property right in the continuation of the RC—12 zoning.' ¹⁴

With this conclusion we agree. However, the District Court then held that

'...'

'... (W)hen the city commission decided not to change the zoning classification of the plaintiffs' property and notified the plaintiffs that they could start construction under their building permit and the plaintiffs having elected not to proceed or initiate construction on the land and voluntarily surrendering their building permit to the city in March 1971, the plaintiffs thereby relinquished and forfeited their vested

right under the building permit and in the continuance of the RC—12 zoning classification of their land. The city could then validly rezone plaintiffs' property from RC—12 to another classification.¹⁵

It would be unconscionable to allow such a holding to endure since it fails to take into account the unique facts which dominate the instant case. First, it is undeniable that the only circumstance which necessitated the ultimate rezoning was the adverse political climate which wrought the defeat of every commissioner who had voted for Ord. 0—69—46. Second, the delays caused by the City Commissioners in having allowed the appeal from the Zoning Board's denial of its rezoning petition to its own members sitting as the Board of Appeals to languish in limbo for some eleven months, were countenanced with a full understanding that any immediate rezoning would meet with adverse legal consequences. This conclusion is borne out by the City attorney's repeated warnings to the Commission that any such ordinance would be invalidated under this Court's decision in *Salkolsky*, supra. Thus, it is *17 clear that the City sought to accomplish by delay that which it could not effect by an immediate rezoning. Indeed, we must agree with the conclusion of the Fourth District that the City affirmed the Zoning Board's denial of its rezoning petition on February 17, 1971, only

'...
'After it became apparent to the city commission that the plaintiffs could not profitably carry out their project because of the prevalent poor economic conditions'¹⁶

It is only too clear that the City was aware of the adverse effects that the resulting delays were having on the petitioners' projects in light of the testimony adduced at the trial court's March 4, 1970, hearing on the City's motion to dismiss, i.e., that all activities had been brought to a halt until the City made up its mind; that a partial rezoning of the property would destroy the petitioners' site plan; and that a one-year delay in construction would add three quarters of a million dollars to the cost of the first building. It must, therefore, be assumed in light of this and other testimony that the Commission knew that the petitioners could not proceed to build or attract financing from potential investors until the matter of rezoning was definitely decided. It is also reasonable to assume that the City was aware that with each day it deferred action that the building market and the national economy were constantly deteriorating into a recessionary state.

It must also be remembered that at its February 17, 1971, meeting the Commission in one fell swoop Without prior notice to the petitioners: affirmed after an eleven month delay the Zoning Board's denial of its petition to rezone; repealed its motion of July 15, 1970, which had extended the life of the permit until the Completion of the litigation between the parties, and mandated that the petitioner proceed with construction within ninety days.

Under the circumstances, these actions were arbitrarily taken. The affirmance of the Zoning Board's decision had the dual effect of lifting the petitioners out of limbo but casting them into the depths of the inferno. This is especially true when the affirmance is coupled with the repeal of the motion extending the permit. Such an indefinite extension was a municipal action upon which the petitioners in good faith had substantially altered their position from one of readiness to build to one of necessarily dismantling their construction organization in order to actively assert their rights in the prosecution of their suit against the City. Such an action and reliance thereon satisfies the requirements of the *Salkolsky* rule.

The City's contention that the Commission intended this extension to remain in effect only until the end of the litigation on its interlocutory appeal is without merit. The motion was not so worded, but clearly stated that the permit was to be extended until the litigation between the parties was completed. If the City intended to limit this extension, it should have worded the motion accordingly. On this point, the applicable analogy must be drawn to the doctrine of statutory and constitutional interpretation of *Expressio unius est exclusio alterius*. Furthermore, if the motion was so limited, its repeal would have been automatically affected when this Court notified the parties that we had denied certiorari, and there would have been no need for the Commission to expressly repeal the motion.

As noted previously, the suit was actively prosecuted by both parties during the ninety-day period and litigation thereon has continued up until the present time.

The mandated ninety-day period was an unreasonable lack of time in view of the above arbitrary actions by the City and its knowledge that it had taken the petitioners some nine or ten months to complete the necessary preparations to achieve a state of readiness to begin construction on January *18 23, 1970, when they paid some \$15,000.00 for the building permit. Under these circumstances the petitioners' failure to build and even their request for the return of the permit

fee, until economic conditions improved did not constitute a surrender of their permit or a relinquishment of their vested right in the continuance of the RC—12 zoning.

This Court would be undeserving of its equitable powers if we did not enjoin the two disputed ordinances. Indeed, as this Court stated in *Texas Co.*, *supra*, at 809, we find the petitioners' cause to be 'pregnant with equity.' The arbitrary action by the City Commission sub judice has not even produced an embryo and thus will not be countenanced by this Court. *Salkolsky, supra*; *Texas Co., supra*.

Every citizen has the right to expect that he will be dealt with fairly by his government. *Marguiles, supra*, at 425—26. 'Unfair dealing' by a municipality can also serve as the basis for the invocation of equitable estoppel. *City of Jacksonville v. Wilson*.¹⁷ While a City Commission certainly possesses the prerogative of deciding to defer action on such a proposal over a long period of time, it must assume the attendant responsibility for the adverse effect it knows or should know its deliberate inaction will have upon the parties with whom it is dealing. In the instant case, the course of inaction chosen by the City and its subsequent arbitrary actions must necessarily be equated with 'unfair dealing.' *Wilson, supra*; *Marguiles, supra*.

For the reasons expressed in its opinion the District Court correctly reversed the chancellor's finding as a matter of law that the retention of the building permit fee by the City would constitute a forfeiture. *City of Hollywood, supra*, at 871. The case of *City of Miami v. Miller*,¹⁸ relied upon by the petitioners, is inapplicable to the cause now before us. The record does not reveal whether or not the City has returned the fee to the petitioners. In the event the fee is in the petitioners'

possession, it must be returned to the City, and in this regard the District Court is affirmed.

In other respects the opinion of the Fourth District Court of Appeal is quashed and this cause is remanded for entry of an opinion consistent with the views hereinabove expressed.

Affirmed in part and reversed in part.

It is so ordered.

ADKINS, C.J., ROBERTS and HATCHETT, JJ., and McCRARY, Circuit Judge, concur.

ENGLAND, J., dissents with an opinion, with which OVERTON and SUNDBERG, JJ., concur.

ENGLAND, Justice (dissenting).

I dissent. There is no direct conflict between the district court's decision and the decision of any other Florida appellate court. The majority below carefully analyzed the decisions alleged by petitioners as a basis for the exercise of our jurisdiction. It found, however, that they did not appropriately apply to command the result which petitioners there sought.

I view our constitutional role as being more narrow than providing litigants with a second appeal in select cases, as is done here, and I would discharge the writ of certiorari.

OVERTON and SUNDBERG, JJ., concur.

All Citations

329 So.2d 10

Footnotes

1 *City of Hollywood v. Hollywood Beach Hotel*, 283 So.2d 867 (Fla.App. 4th 1973).

2 265 So.2d 43 (Fla.1972).

3 251 So.2d 665 (Fla.1971). e.g. *First Atlantic National Bank v. Cobbett*, 82 So.2d 870 (Fla.1955); *In Re Baldrige's Estate*, 74 So.2d 658 (Fla.1954); *Povia v. Melvin*, 66 So.2d 494 (Fla.1953); *Ford Motor Co. v. Waters*, 273 So.2d 96 (Fla.App.3d 1973); *Nixon Construction Co. v. Dover*, 218 So.2d 458 (Fla.App.1st 1969); *St. Paul Mercury Ins. Co. v. Conley*, 201 So.2d 618 (Fla.App.4th 1967); 2 Fla.Jur. Appeals, s 346 (1963).

4 *City of Hollywood, supra*, at 868—870.

5 Webster's Third New International Dictionary 731 (1961).

6 Id. at 395.

7 151 So.2d 433 (Fla.1963).

8 44 So.2d 808 (Fla.1950).

9 289 So.2d 424 (Fla.App. 3d 1974).

10 159 Fla. 646, 75 So.2d 753 (Fla.1954).

11 32 So.2d 425 (Fla.1947).

12 174 So.2d 100 (Fla.App.1st 1965).

13 City of Hollywood, *supra*, at 870 interpreting Texas Co., *supra*, at 809—810. It seems clear that this Court in Texas Co., *supra*, was speaking of the exception in the City's charter for the procedure of enacting emergency ordinances and not to an exception to the rule now under consideration.

14 City of Hollywood, *supra* at 870. (Emphasis added.)

15 Id.

16 City of Hollywood, *supra*, at 868. (Emphasis added.)

17 157 Fla. 838, 27 So.2d 108 (1946).

18 148 Fla. 349, 4 So.2d 369 (1944).

430 So.2d 475

District Court of Appeal of Florida, First District.

FRANKLIN COUNTY, a political subdivision of the State of Florida, and Corey Henriksen, the Building Official of Franklin County, Appellants,

v.

LEISURE PROPERTIES, LTD., a Florida limited partnership, by Gene D. BROWN and John R.

Stocks, as its General Partners and Musgrave Development, Inc., a Florida corporation, Appellees.

Nos. AD-395, AE-227 and AF-112

|

March 9, 1983.

|

As Clarified on Denial of Rehearing April 29, 1983.

Synopsis

County appealed from summary judgments granted developers by the Circuit Court for Franklin County, Kenneth E. Cooksey, J., on certain counts, and one developer cross-appealed from summary judgment on one count. The District Court of Appeal held that: (1) county was equitably estopped to deny building permits for multifamily development; (2) county was not equitably estopped to deny building permits for multifamily development to successor in interest of developer; (3) county did not deny developers equal protection; (4) county failed to comply with procedural requirements in enacting moratoria while adopting new comprehensive plan; and (5) ordinance which eliminated multifamily construction as principal use of tourist commercial zone was invalid because its enactment was not in compliance with statute.

Affirmed in part, reversed in part and remanded.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Attorneys and Law Firms

*476 Jerry W. Gerde of Davenport, Johnston, Harris & Gerde, P.A., Panama City; and Alfred O. Shuler of Shuler & Shuler, Apalachicola, for appellants.

Thomas G. Pelham and David S. Dee of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Tallahassee, for appellees.

Jane Heerema of Roberts, Egan & Rounta, P.A., Tallahassee, for the State Ass'n of County Com'rs, amicus curiae.

Stephen W. Metz, Tallahassee, and Robert M. Rhodes and James Hauser of Messer, Rhodes & Vickers, Tallahassee, for Florida Home Builders Ass'n, amicus curiae.

Opinion

PER CURIAM.

Franklin County appeals summary judgments granted Leisure Properties, Ltd. (Leisure) and Musgrave Development, Inc. (Musgrave) on Counts II, III, IV, and VI of Leisure and Musgrave's consolidated complaint. Musgrave cross-appeals the summary judgment on Count II. We affirm in part and reverse in part.

*477 Leisure purchased approximately 3,000 acres on St. George Island in 1971. Included were the parcels of land which are the subject of this appeal, the "commercial lots" and the "commercial acreage."

In 1972 Franklin County adopted a resolution of intention to establish a land use plan¹ for the county in order to protect the seafood industry. In 1974 Leisure submitted a request for a development of regional impact (DRI),² proposing 3,000 housing units on 800 acres on the island, but not including the "commercial lots" and "commercial acreage." The county found the proposed density level too high. In June of 1975, after lengthy negotiations, the county approved the DRI with 2,200 multi-family units, subject to 30 conditions. Leisure chose not to proceed under this DRI order because of the numerous restrictions.

During the DRI negotiations the county was preparing its land use plan. Leisure requested that the plan allow multi-family construction on St. George Island. The plan provided that "multi-family housing should be encouraged to locate along the waterfront to take advantage of the impressive vistas" and stated that, "[i]ncreased concentration of population in the medium-density housing types will also provide the opportunity for more people to live in shoreline locations, while barring the necessity of utilizing every foot of shoreline for private development." Ordinance 75-7, enacted in late 1975, permitted multi-family housing in the area zoned C-3 Tourist Commercial, of which the subject parcels are a part.

Prior to the enactment of the ordinance, by letter of September 12, 1975, Leisure requested the county's permission to install water pipes on a county right-of-way to connect its property with a proposed 300,000-gallon water tank near the southern end of the bridge and causeway connecting the island with the mainland. Leisure introduced evidence that the system cost at least \$800,000 and was designed to serve multi-family as well as single-family housing.

In March of 1977 Leisure filed a second DRI application, which was approved in September, 1977. It permitted less multi-family construction than had the first DRI. Leisure introduced evidence that it would not have agreed to this DRI had it not secured the favorable zoning for its property in the Tourist Commercial area.

On June 7, 1977, Leisure agreed to sell Roger Newton sixteen lots in Unit I of the Old Subdivision. These lots, like the commercial lots involved in this appeal, were zoned C-3 Tourist Commercial, for which multi-family construction was a permitted use. On June 8, Leisure agreed to sell Musgrave Development, Inc. a large tract of land known as Unit 4 for \$2,300,000, with a down payment of \$50,000. On December 8, 1977, Roger Newton applied for a building permit to build 48 units of multi-family housing on his sixteen lots. His plans at first did not meet building code requirements, and he was permitted to withdraw and resubmit them with revisions. On January 12, 1978, Newton finally was able to satisfy the planning commission's requirements. By a 5-2 count, the commission voted to authorize the building official to issue Newton a permit. On January 17, the county commission approved Newton's permit by a 3-2 vote. Two of the three commission members who voted to approve the permit stated that they were against condominiums but could see no legal way to deny the application. The commission unanimously voted to authorize its attorney to draft an ordinance barring the development of additional condominiums on St. George Island. During the Newton application process Graham Armistead, a local resident, applied for and was granted a permit to construct a motel, the Buccaneer Inn, near the Newton project and the commercial lots.

On February 6, 1978, Leisure submitted plans virtually identical to Newton's to develop its commercial lots; and at the same *478 time, it submitted plans for condominium development on the commercial acreage. On February 7, the county commission voted to begin immediately advertising a notice of intent to consider the amendment which was to become Ordinance 78-2, barring condominium development.

The building official testified that he did not review Leisure's plans because he had submitted them to the county and planning commissions. The plans for Leisure's two proposed developments were found to be "incomplete and insufficient" by the planning commission on February 9 and were hand-returned to Leisure's office without comment and without calling to Leisure's attention the fact that the plans had been left at the office. Leisure was notified by letter of February 21, 1978, that no more multi-family dwellings would be allowed in the commercial areas. On February 28, 1978, Ordinance 78-2 was adopted. On July 17, 1978, the ordinance was invalidated because it had been enacted without proper notice.³

During the period when Leisure was attempting to acquire the permits, Franklin County officials voiced their opposition to the development of Unit 4 and their desire that it should be publicly owned. Leisure tried to placate the county and worked out a deal with Musgrave, wherein Leisure paid Musgrave \$25,000 and, on July 27, 1978, conveyed the commercial lots to Musgrave along with building plans for the parcel, applying \$25,000 of the \$50,000 Musgrave had paid Leisure on Unit 4 to the down payment on the commercial lots, and giving Musgrave a \$25,000 "kicker for them to get out of the Unit 4 deal." As part of the transaction, Leisure also executed a document entitled "Transfer of Right in Building Permit Application," which purportedly granted Musgrave whatever rights Leisure had in securing a multi-family building permit on the commercial lots. Leisure ultimately sold Unit 4 to the Trust for Public Lands.

On July 31, 1978, Musgrave's agent communicated to the building official his desire to get a building permit for the commercial lots. The application was placed on the agenda for the August 9, 1978, planning commission meeting. On August 1, 1978, the county commission adopted Emergency Ordinance 78-7, providing for a one-year moratorium on the issuance of all building permits for multi-family construction. Musgrave's agent appeared before the planning commission on August 9 to have the plans for the parcel reviewed again. However, the commission refused to discuss the feasibility of the proposal, stating that the application was "insufficient or incomplete, lacking details of sewage plans." On August 17, the county commission readopted Ordinance 78-2 as Ordinance 78-8.

In December of 1978, Leisure and Musgrave sued the county. The consolidated complaint contained six counts, on four of which Leisure/Musgrave were granted summary judgments:

Count II: Musgrave sought declaratory and injunctive relief, alleging that the county's denial of Musgrave's application for a permit constituted a denial of equal protection, and asking the court to order the county to issue Musgrave a permit.

Count III: Leisure and Musgrave asked the court to invalidate the moratorium ordinances.

Count IV: Leisure and Musgrave sought a declaratory judgment invalidating Ord. 78-8, which eliminated multi-family construction as a permissible use of the C-3 Tourist Commercial zone.

Count VI: Leisure and Musgrave asked the court to declare that they had a vested right to use their property for multi-family development, claiming the county was equitably estopped to enforce Ord. 78-8 or to re-zone their property to prohibit multi-family development.

During the period from 1978 through early 1979 the county was seeking funding in order to comply with the Local Government Comprehensive Planning Act, section 163.3177 *et seq.*, Florida Statutes (1975). The money did not come through until October *479 16, 1979. Meanwhile the county adopted two more moratoria, extending the ban on multi-family construction until the new comprehensive plan was finally developed and adopted, effective July 1, 1981.

During the operation of a moratorium in 1980 the county approved Graham Armistead's application for a permit to expand his motel by adding 48 units. Minutes of the May 13, 1980, planning and zoning commission meeting reflect that the plans had been on file many months and that the county boards were aware of plans for the expansion from the time construction was begun on the motel.

In this appeal we are called upon to review the granting of motions for summary judgments and we are mindful that summary judgments should be granted with great caution. *Fontainebleau Hotel Corp. v. Southern Florida Hotel and Motel Association*, 294 So.2d 390 (Fla. 3d DCA 1974). If there are issues of material fact and the slightest doubt remains, the remedy cannot be granted. *Williams v. City of Lake City*, 62 So.2d 732 (Fla.1953). Even where the facts are undisputed, issues as to the interpretation of such facts may

be such as to preclude the award of a summary judgment. *Owens v. MacKenzie*, 103 So.2d 677 (Fla. 1st DCA 1958). However, once the movant for summary judgment tenders competent evidence to support the motion, the opposing party must produce counter-evidence sufficient to reveal a genuine issue in order to defeat the motion; it is not enough just to assert the existence of an issue. *Landers v. Milton*, 370 So.2d 368 (Fla.1979).

The central issue in this cause was raised in Count VI of the complaint in which the trial court was asked to declare that the county was equitably estopped to deny Leisure and Musgrave building permits for multi-family development on the subject property. The elements of an equitable estoppel are:

- (1) a property owner's good faith reliance
- (2) on some act or omission of the government and
- (3) a substantial change in position or the incurring of excessive obligations and expenses so that it would be highly inequitable and unjust to destroy the right he acquired.

Hollywood Beach Hotel Co. v. City of Hollywood, 329 So.2d 10 (Fla.1976); *Smith v. City of Clearwater*, 383 So.2d 681 (Fla. 2d DCA 1980), *rev. dismissed*, 403 So.2d 407 (Fla.1981). In support of its estoppel claim, Leisure argues that it asked the county to zone its property for multi-family development and that the county complied with the request. Leisure introduced evidence that it relied on the favorable zoning of Ordinance 75-7 in building its water system and that it would not have constructed as large or expensive a system had the system not been intended to serve the subject parcels zoned multi-family. Indeed Leisure introduced testimony that it would not have built a water system at all had there been no multi-family construction permitted. There is deposition testimony in the record to support Leisure's reliance on the existing zoning by spending at least \$800,000 to build the water system. The county argues that the percentage of the total cost of the system allocable to servicing the subject parcels is not known. While Leisure has come forward with competent evidence in support of its estoppel claim, the county has come forward with no counter-evidence that substantial expenditures were not allocable to the subject parcels in order to defeat Leisure's motion for summary judgment. Argument without evidence in the record is insufficient. *Landers v. Milton*. We therefore find that the

trial court properly granted Leisure the summary judgment on Count VI.

Musgrave likewise claims an estoppel but is in a different posture from Leisure. Having purchased the commercial lots from Leisure, Musgrave claims that it “stands in Leisure’s shoes,” citing *City of Gainesville v. Bishop*, 174 So.2d 100 (Fla. 1st DCA 1965). This point would be well taken had Musgrave, like the plaintiff in *Bishop*, spent money in substantial reliance on a representation of government. The evidence *480 suggests that Musgrave may not even be obligated to purchase the parcel, and, at this point, has gotten back from Leisure \$50,000, the same amount Musgrave paid as a down payment on Unit 4. Even if Musgrave had purchased the property, it would have had no right to rely on existing favorable zoning. *City of Miami Beach v. 8701 Collins Avenue, Inc.*, 77 So.2d 428 (Fla.1954). Additionally, good faith reliance would be difficult for Musgrave to show in view of the fact that at the time it purchased the parcel, Ordinance 78–2, barring high-density condominium developments, had been passed, and, although the ordinance was subsequently invalidated, Musgrave knew the county was opposed to the multi-family zoning and was attempting to change it. Thus Musgrave was on notice of the local government’s position, regarding the use to which the property should be put, and cannot demonstrate good faith reliance.

We have neither been directed to nor found a case in which a successor in interest to the party claiming equitable estoppel has not independently in his own right incurred obligations or expenses in reliance on a representation of government in order to assert a successful equitable estoppel claim. A successor in interest must show his own entitlement to the benefit of an estoppel and may not make such a showing by merely purchasing property. See *Jones v. First Virginia Mortgage and Real Estate Investment Trust*, 399 So.2d 1068 (Fla. 2d DCA 1981). We therefore reverse the summary judgment on Count VI as to Musgrave.

In granting Musgrave a summary judgment on Count II, the trial court found that Musgrave had been denied equal protection because the county cooperated with Newton and processed his application, yet failed to follow the same procedure in Musgrave’s case. An equal protection claim presupposes that the parties receiving disparate treatment are similarly situated. We find that Musgrave may not be compared with Newton, because Newton applied for his permit under Ordinance 75–7, which permitted multi-family construction, and no zoning changes were pending at the

time. Newton’s application was the occasion for the county to initiate change, and therefore the parties were not similarly situated.

When Leisure applied for a building permit on February 6, 1978, the county by then had voted to draft Ordinance 78–2, which was to bar any future condominium developments. This zoning change was therefore pending and was a matter of public record. Leisure was charged with notice of the impending change. See *Smith v. City of Clearwater*. Leisure/Musgrave argue also that Armistead was given a permit in the midst of a moratorium, and that Armistead’s application was for efficiency apartment units with kitchenettes, which are the same as “apartment motels.” Ordinance 75–7 includes the latter within the definition of a multi-family dwelling. The ordinance did allow motels as a permitted use in the C–3 Tourist Commercial zone, however, and this use was never proscribed. We have not found in the record whether Armistead’s permit when issued allowed him to build the addition with the kitchenettes. If it did not, it would appear with certainty that Armistead was not given a permit in violation of the moratorium so that he received preferential treatment. If the permit allowed the kitchenettes, we still are not convinced that such would constitute a denial of equal protection, because the record is unclear as to whether a motel room with a kitchenette is in fact an “apartment motel.” Musgrave having failed to introduce competent evidence to sustain a summary judgment in its favor as having been denied equal protection, we reverse the summary judgment on Count II on that issue.

The summary judgment on Count III invalidated the moratoria as unauthorized by statute, lacking in procedural compliance with the applicable statutes, and unreasonable. We disagree with the trial court that the moratoria were unauthorized by statute, because section 163.3197, Florida Statutes, in our view does not prevent a local government from enacting a moratorium *481 while it is adopting a new comprehensive plan pursuant to the Local Government Comprehensive Planning Act. That section provides in pertinent part:

Legal status of prior comprehensive plan.—Where, prior to the effective date of this act, a local government had adopted a comprehensive plan or element or portion thereof such

adopted plan or element or portion thereof shall have such force and effect as it had at the date of adoption and until appropriate action is taken to adopt a new comprehensive plan as required by this act.

A local government may be confronted with the need to amend its current plan prior to the adoption of a new plan in order to prevent the establishment of undesirable construction which would be inconsistent with the goals of the new plan. Nothing in [section 163.3197](#) prohibits such an amendment. Nevertheless, we affirm the summary judgment on Count III on the ground that the county did not comply with statutory procedural requirements in enacting the moratoria.

The summary judgment on Count IV invalidated Ordinance 78–8. The trial court invalidated the ordinance because its enactment was not in compliance with chapter 163, part II, Florida Statutes. We affirm this judgment also.

The remaining issues raised by the county and the point on cross appeal are affirmed.

AFFIRMED in part, REVERSED in part, and REMANDED for proceedings consistent with this opinion.

LARRY G. SMITH, J., and McCORD, GUYTE, P., Jr., and SHAW, LEANDER, J., Jr., Associate Judges, concur.

All Citations

430 So.2d 475

Footnotes

- 1 Chapter 163, part II, Florida Statutes (1971).
- 2 Chapter 380, Florida Statutes (1973).
- 3 *Franklin County v. Armistead*, No. 78–36 (Fla. 2d Cir.Ct., July 17, 1978).

415 So.2d 1270
Supreme Court of Florida.

CITY OF LAUDERDALE LAKES, a Florida municipal corporation; Howard Craft, Mayor of the City of Lauderdale Lakes; Alfonso Gereffi, Jerome J. Cohan, Morris Klein, Lyman L. Allen, Louis Greenwald, Harry Kaufman, City Councilmen; and Ben Eigner, Building Official, Petitioners,

v.

Herman CORN, Trustee, Respondent.

No. 57247.

I

June 17, 1982.

Synopsis

The Circuit Court, Broward County, Frank Orlando, J., entered order requiring city to post supersedeas bond for potential damages for delay to land developer during pendency of appeal, and city moved for repeal of order. The District Court of Appeal, Anstead, J., [371 So.2d 1111](#), held that city could be required to post bond for damages for delay and certified question to Supreme Court. The Supreme Court, Overton, J., held that city may not be required to post bond for damages for delay in order to secure a stay of a final judgment that requires public body to permit the construction of development project.

Decision quashed; cause remanded.

Adkins, J., dissented and filed opinion in which Sundberg, C. J., joined.

Attorneys and Law Firms

*1271 James C. Brady, Fort Lauderdale, and Mallory H. Horton of Horton, Perse & Ginsberg, Miami, for petitioners.

Gary M. Farmer of Abrams, Anton, Robbins, Resnick, Schneider & Mager, Hollywood, for respondent.

Terrence J. Russell and Kathleen V. McCarthy of Ruden, Barnett, McClosky & Schuster, Fort Lauderdale, for Gulf + Eastern Development Corp., amicus curiae.

Stephen W. Metz, Tallahassee, for Florida Home Builders Association; and Duane Searles, Washington, D.C., for Nat. Ass'n. of Home Builders, amicus curiae.

Opinion

OVERTON, Justice.

The Fourth District Court of Appeal has certified to us, as a question of great public interest, * the following:

May a city be required to post a bond for damages for delay in order to secure a stay of a final judgment that requires the public body to permit the construction of a development project?

City of Lauderdale Lakes v. Corn, [371 So.2d 1111](#), [1112 \(Fla. 4th DCA 1979\)](#). We answer the question in the negative because the city's action is in performance of a legislative "planning-level" function.

In the trial court, respondent, a land developer, succeeded in having a municipal zoning ordinance declared invalid. Petitioner city appealed the adverse ruling. Respondent thereafter moved the trial court to compel the city to post supersedeas bond as a condition of the automatic stay of the trial court's ruling, afforded by [Florida Rule of Appellate Procedure 9.310\(b\)\(2\)](#), pending the city's appeal. The trial court granted the motion and required the city to post a \$1.14 million bond for potential damages for delay. The district court affirmed. We reverse.

[Rule 9.310\(b\)\(2\)](#) provides:

Public Bodies; Public Officers. The timely filing of a notice shall automatically operate as a stay pending review, except in criminal cases, when the State, any public officer in an official capacity, board, commission or other public body seeks review; provided that on motion the lower tribunal or the court may impose any lawful conditions or vacate the stay.

Subsection (c)(2) of the same rule states:

Conditions. The conditions of a bond shall include a condition to pay or comply with the order in full, including costs, interest, fees, damages for delay, use, detention and depreciation of property, if the review is dismissed or order affirmed; and may include such other conditions as may be required by the lower tribunal.

The district court concluded that a court could require a public body to post supersedeas ***1272** reasoning that “[u]nder Fla.R.App.P. 9.310(b)(2) a public body is automatically granted a stay upon filing a notice of appeal. The rule further provides that the trial court may impose conditions on the stay or even vacate the stay. Hence, while the stay is automatic, it is not a matter of absolute right” 371 So.2d at 1112.

The district court held that because subsection (c)(2) provided as a condition “damages for delay,” supersedeas bond was justified in the instant case.

While we agree that the court may require a bond of a public body under many circumstances, we cannot agree that supersedeas bond is proper for appellate review of legislative planning-level determinations. Requiring a bond in this situation would clearly chill the right of a governmental body to appeal an adverse trial court decision declaring invalid a legislative act. We distinguished between “operational-level” and “planning-level” governmental functions in *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla.1979). We find that the distinction also applies in supersedeas bond proceedings under [Rule of Appellate Procedure 9.310\(b\)\(2\)](#). To rule otherwise would make cities liable for damages resulting from legislative planning-level decisions. This is clearly contrary to existing law. We, thus, construe [rule 9.310\(b\)\(2\)](#) as allowing trial and appellate courts the discretion to require governmental entities to post supersedeas bonds in suits where the judgment concerns operational-level functions but find that no authority exists to lawfully require such bonds in planning-level governmental functions.

We can conceive no justification for this Court to require the government to pay for judicial review of legislative actions. A contrary decision would prove catastrophic for small municipalities and counties. Even larger governmental entities would be adversely affected. Consider, for example, the situation that was presented in this Court's recent decision in *Graham v. Estuary Properties, Inc.*, 399 So.2d 1374 (Fla.1981). The cost of delaying a proposed project with “26,500 dwelling units with an estimated eventual population of 73,500, eleven commercial centers, four marinas, five boat basins, three golf courses, and twenty-eight acres of tennis facilities” would be immense. *Id.* at 1376. Under respondent's contention, if the Estuary developers had prevailed in the trial court, Lee County could have been required to post a substantial supersedeas bond. That being the case, the ultimate effect could have deprived Lee County of the

ability to appeal. This Court, in turn, would not have had the opportunity to review the decision and establish clear guidelines in an essential area of the law.

It is paramount for governmental bodies to have unrestricted appellate court review of their authority to act in a legislative capacity. Requiring the payment of damages for such review is not justified in other circumstances and cannot be here. The only exception is when no justiciable issue is present and when the record establishes that the governmental body is seeking review in bad faith solely as a delaying tactic. The decision of the Fourth District Court of Appeal is quashed and the cause remanded for further proceedings.

It is so ordered.

BOYD, ALDERMAN and McDONALD, JJ., concur.

ADKINS, J., dissents with an opinion in which SUNDBERG, C. J., concurs.

ADKINS, Justice, dissenting.

Petitioner's contention that it should not be required to post a supersedeas bond is based on comparison of the present rule with Rule 5.12 of the 1962 Appellate Rules. The latter specifically provided that “the court may on motion for good cause shown require supersedeas bond or other security in such amount, form and manner as it may prescribe as a condition for the further prosecution of the appeal or certiorari.”

Petitioner correctly points out that the present rule, unlike the 1962 rule, does not specifically state that a supersedeas bond can be required. Rather it provides that ***1273** the trial or appellate court may “impose any lawful conditions or vacate the stay.” It is noted that the next reference to conditions is found in [Rule 9.310\(c\)\(2\)](#), which describes the conditions of a bond, one of which is a condition to pay damages for delay. Petitioner contends that the furnishing of the bond cannot be a lawful condition under subsection (b)(2) as that term is defined in subsection (c)(2).

In order to avoid any confusion, we should hold that a public body or officer may be required, as a lawful condition, to post a bond for damages for delay in order to secure a stay of a final judgment. We believe that a reading of the entirety of [Rule 9.310](#) leads to this inescapable conclusion. The lawful conditions related in subsection (b)(2) include the

requirement of posting a bond in much the same way as the posting of a bond is a condition under subsection (a). That subsection, which establishes the general rule for obtaining a stay pending review, states that: "A stay pending review may be conditioned upon the posting of a good and sufficient bond, other conditions, or both." Implicit in this statement is the fact that a bond is a condition of the stay. The conditions described in subsection (c)(2) are conditions which are related to the bond, not to the stay.

In addition, there is no valid reason why public bodies should be exempt from the condition of posting a bond under considerations of either statutory law, court rules, or public policy.

These views are not inconsistent with this Court's decision in *State ex rel. Board of Trustees v. District Court of Appeal for Second District*, 261 So.2d 818 (Fla.1972), in which we held that the right to an appeal is a constitutional right which cannot be conditioned by the requirement of a bond. That holding is as compelling under the present rules as it was under the old rules.

There is no language in the present rule concerning "good cause" (see Rule 5.12, 1962 Appellate Rules) or any other standard. Petitioner suggests that a supersedeas should be required only in those exceptional cases where an appeal by the public body would wreak economic havoc or irreparable damage on the prevailing party.

Respondent, on the other hand, proposes that we establish a standard similar to that employed in cases involving private litigants. One such case was *Holgate v. Jones*, 93 Fla. 269, 111 So. 626 (1927), wherein this Court held that the trial judge's exercise of discretion in setting a supersedeas bond would not be disturbed unless there was fraud or an abuse of judicial discretion causing substantial injury or injustice to the complaining party. Concerning the criteria to be applied by the trial judge, we specifically stated in *Carr v. Marion Mortg.*, 99 Fla. 807, 126 So. 776 (Fla.1930), in reference to the setting of a supersedeas bond where the judgment was in whole or part other than a money judgment, that the court should take into consideration the:

various rights adjudicated by the judgment to be superseded and accruing by reason thereof to the party in whose favor it is, and so shape both

the amount and conditions of such bonds as that they will, according to the circumstances of each particular case, fully secure and protect the obligee in all the varied rights accruing to him under his suspended judgment.

Id. 126 So. at 777, (quoting from *Palmer v. Palmer*, 41 Fla. 184, 187, 26 So. 640, 641 (1899).

I believe that the reasoning in *Holgate* and *Carr* is applicable to the instant case. It should be noted that the mere fact that public bodies are to be subjected to a bond requirement does not mean they will be treated in a manner identical with a private party. It may be that the obligee can be fully secure and protected in his varied rights through the mere existence of a solvent public body. The certified question should be answered in the affirmative.

The trial judge, having previously determined the necessity of such a bond after reviewing the file and hearing argument of counsel, conducted a hearing to determine the amount of a bond as a condition for a stay. Respondent presented expert testimony at this time; petitioner declined to *1274 offer any testimony. Under the scope of review established in *Holgate*, we should not hold that the decision of the trial court was such as to mandate a reversal.

The majority holds that a supersedeas bond is improper for appellate review of legislative discretionary/planning level determinations, as it would chill the right of a governmental body to appeal an adverse decision declaring invalid a legislative act. The purpose of requiring a supersedeas bond is to discourage frivolous appeals. See *City of Miami v. Murphy*, 137 So.2d 825 (Fla.1962). I rely upon the wisdom of the trial court, not only in entering the judgment, but also in determining whether a supersedeas bond should be required. Furthermore, the supersedeas bond requirement may chill the governmental body in making unconstitutional determinations at the legislative planning level. I would approve the decision of the Fourth District Court of Appeal.

SUNDBERG, C. J., concurs.

All Citations

415 So.2d 1270

Footnotes

- * Jurisdiction vests under [article V, section 3\(b\)\(3\), Florida Constitution \(1972\)](#).

End of Document

© 2026 Thomson Reuters. No claim to original U.S. Government Works.