

Oklahoma City University School of Law

From the Selected Works of Charles Cantrell

1971

Application of the Doctrine of Estoppel to Land Use Control and Municipal Taxation

Charles Cantrell, *Oklahoma City University School of Law*



Available at: https://works.bepress.com/charles_cantrell/48/

APPLICATION OF THE DOCTRINE OF ESTOPPEL
TO
LAND USE CONTROL AND MUNICIPAL TAXATION

INTRODUCTION

By its very nature, the doctrine of estoppel is limited in its application to instances in which one party has induced another party to act to his prejudice.¹ The traditional guideline for determining whether estoppel is applicable is whether the aggrieved party justifiably relied, in good faith, to his detriment on misleading declarations or statements by the party to be estopped.² In the light of the unique circumstances that must be attendant to invoke the doctrine, it is particularly interesting to examine the situations in which estoppel has been applied to municipal corporations.

This paper will proceed on the postulate that when a municipality engages in a governmental function, rather than a proprietary function³, the governmental unit becomes omnipotent, and consequently its actions under the veil of the municipal police power are presumed to be valid⁴. This is especially true when the administrative procedural steps of appeal in zoning are followed⁵.

¹Citizens State Bank of Thedford v. United States Fidelity & Guaranty Co. of Batimore, Md., 130 Neb. 603, 266 N.W. 81, 84 (1936), 103 A.L.R. 1401.

²Stanolind Oil & Gas Co. v. Midas Oil Co., 173 S.W.2d 342, 345 (Tex. Civ. App. 1943), *reversed on other grounds* at 179 S.W.2d 243.

³There are numerous definitions of governmental and proprietary functions available. The following one is used because of its conciseness and simplicity. [Municipalities] exercise powers which are governmental and powers which are of a private or business character. In the one character a municipal corporation is a governmental subdivision, and for that purpose exercises by delegation a part of the sovereignty of the state. In the other character it is a mere legal entity or juristic person. . . . In the latter character it stands for the community in the administration of local affairs wholly beyond the sphere of the public purposes for which its governmental powers are conferred. *Vilas v. City of Manila*, 220 U.S. 345, 356, 31 S.Ct. 416, 418, 55 L.Ed. 491 (1911).

⁴This is subject to the condition that the regulation must be reasonable, weighing the individual hardship against the expected benefit to the public. *City of West University Place v. Ellis*, 134 Tex. 222, 134 S.W.2d 1038 (1940). With respect to zoning this reasonableness test could be tending toward a change with the emergence of the "issuable fact" doctrine. For an excellent discussion see *Elias, Reasoning: The End of Judicial Review?*, 14 BAYLOR L. REV. 179 (1962).

⁵*Id.*, at 180.

On the other hand, when a municipality engages in a proprietary function, it is treated as any other corporate entity engaged in the pursuit of a profitable business⁶. This article will deal only with the governmental functions of land use control and municipal taxation. Texas case law will be emphasized herein in an attempt to analyze instances when a municipality may be estopped in the conduct of the two aforementioned governmental functions.

ZONING

It is generally accepted that estoppel will not constitute a defense to a suit for injunctive relief against violations of zoning ordinances⁷, unless there are extenuating circumstances present.⁸ To trace the evolution of the Texas law regarding estoppel of a municipality in zoning or land use control, it is necessary to review the leading Texas cases.

The first case that considered the doctrine of estoppel was *Oriental Oil Co. v. City of San Antonio*⁹, which concerned the establishment of one of the first gasoline service stations in Texas. The owners of the station had obtained a valid building permit from the inspector and had made known their plans for remodeling the curbs and sidewalks to city officials. While the remodeling was substantially under way, the city was approached by numerous local residents fearing for their safety and property value.

The City of San Antonio obtained an injunction against the remodeling of the curbs and sidewalks and avoided estoppel by

⁶McQUILLIN, *MUNICIPAL CORPORATIONS*, Sec. 10.05 (3rd ed. 1949). For a case dealing with the maintenance of a city garage and a subsequent injury to an employee therein, see *City of Houston v. Shilling*, 150 Tex. 387, 240 S.W.2d 1010 (1951). To review the leading Texas cases involving municipal tort liability and the proprietary function of a municipality, see ELIAS, *LAW OF TEXAS MUNICIPAL CORPORATIONS*, Ch. 6, Sec. 2 (2nd ed. 1969).

⁷McQUILLIN, *MUNICIPAL CORPORATIONS*, Sec. 25.349 (3d ed. 1965). *Moore v. Pettus*, 260 Ala. 616, 71 So.2d 814 (1954); *Newman v. Smith*, 217 Ga. 465, 123 S.E.2d 305 (1961); *Beatrice v. Williams*, 172 Neb. 889, 112 N.W.2d 16 (1961); *Weber v. Pieretti*, 72 N.J. Super 184, 178 A.2d 92 (1962).

⁸McQUILLIN, *MUNICIPAL CORPORATIONS*, Sec. 25.349 (3rd ed. 1965). *Donovan v. Santa Monica* 88 Cal. App.2d 386, 199 P.2d 51 (1948); *Fairlawns Cemetery Assoc. v. Zoning Commission of Town of Bethel*, 138 Conn. 434, 86 A.2d 74 (1952) (City was not estopped to enforce zoning ordinance prohibiting the use of a particular zone for a cemetery).

⁹208 S.W. 177 (Tex. Civ. App. 1918, *n.w.h.*).

having the station declared a nuisance. The station was declared a nuisance on the dubious ground that pedestrians would constantly have been in danger from automobiles if forced to walk along the sidewalks where the station's remodeled curbs were located. The court of civil appeals stated that the determination of a nuisance was completely within the province of the trial court which could properly make judgment on the merits of the case. The court then stated that a city could *never* be estopped to abate a nuisance.

This rule apparently enjoyed some measure of successful enforcement because of the small number of litigated cases at the appellate level. It was some nineteen years later before cases reached the court of civil appeals involving estoppel of a municipality in land use control.¹⁰

The first of two cases that considered the doctrine of estoppel in 1937 was *City of Amarillo v. Stapf*.¹¹ In that case, Stapf was operating a machine shop at the time the City of Amarillo adopted a comprehensive zoning plan which classified his business place within the "first manufacturing district". Across the alley from Stapf's machine shop was property on which he wished to locate a foundry to be used in connection with his business. The property across the alley was also classified as "first manufacturing". A short time later, Stapf requested the City Manager to grant a permit to move the foundry to his desired location. The City Manager gave Stapf a note addressed to the building inspector which read as follows: "It is O.K., it seems to me for a permit to be issued for a foundry at 13th and Johnson Streets". Relying upon this note, Stapf purchased the foundry and made arrangements to lease it out. One day after the permit was issued it was revoked because of a determination that the foundry would be properly classified as a "second manufacturing" entity.

Stapf filed a suit for injunctive relief and claimed as follows:

That, on account of his reliance upon the action of the city manager in advising him that there was no objection to the issuance of a permit for the construction and operation of a foundry at 1210 Johnson street, and his expenditure of money in purchasing the foundry and in obtaining the lease

¹⁰Note 11, *infra*.

¹¹129 Tex. 81, 101 S.W.2d 229 (1937).

for the property, the building inspector, The Board of Adjustment, and the city and its officials were estopped from revoking the permit issued to him.¹²

The commission of appeals held that since foundries properly come within the second district, a valid permit could not be issued for a foundry in the first district. The court held that since the permit was void, the appellee could acquire no rights, and estoppel would not be applicable.

Following this decision, the Texas courts apparently took the position that the procedural requirements of the city charter respecting enacting ordinances must be followed to the letter before the estoppel question would even be considered. In other words, estoppel could never be predicated upon the reliance of an individual upon a void permit.

The first case holding that a municipality would be estopped was *City of San Angelo v. Neilon*.¹³ Decided in the same year as was *Stapp*¹⁴, this case concerned a controversy in which a landowner was granted a permit for improvements only on the condition that he would build the curb and gutter inside the street line. Neilon agreed to do this, and constructed the improvements at his own expense. Six years later, the city undertook to pave the street back to its original curb lines. In making the improvements on Neilon's property, the city destroyed his prize rose bed and rendered his driveway useless. The city promised to pay for their actions, but later refused to do so. Justice Baugh wrote the following:

Clearly the city would be estopped to assert as a defense that it could destroy the original improvements of the owner without compensation, on the ground that part of same had been placed within the lines of the street, when the city had therefore required him to so locate same at his own expense, instead of placing same on the street line where he sought to place them.¹⁵

Apparently the attorneys for the city did not advocate that the

¹²*Id.*, at 231.

¹³104 S.W.2d 895 (Tex. Civ. App. 1937, *n.w.h.*).

¹⁴Note 11, *supra*.

¹⁵Note 13, *supra* at 896.

improvements constituted a governmental function by the city. If they did, at least the court of civil appeals chose to ignore this defense.

Emphasis was placed on the reliance by Neilson on the instructions and assurances of the city officials. To be sure, the city officials were acting within their proper sphere of authority. If they had made promises outside their job authority, then the case could have been decided on the principle that estoppel will not be applied against a principal (the municipality) because of unauthorized acts of its agent.¹⁶

A case involving unauthorized acts by municipal officials was *Eckert v. Jacobs*¹⁷ in 1940. This case arose when city officials quietly allowed the plaintiff to accept a transfer of a non-conforming permit to sell beer in an area that had recently been re-zoned dry. In holding for the city the court wrote the following:

Nor was the ordinance rendered discriminatory by the fact, if such were true, that by acquiescence by some city officials in some particular violation of it, by permitting a transfer of a non-conforming permit or license to sell beer from one person to another in some other restricted area; The City cannot be estopped to enforce its valid zoning ordinances, merely by the failure of some of its officials to do so on other occasions, or in other instances. Nor would the acts of some of its officials in attempting to authorize its violation, or failure [to] enforce such ordinances, render them invalid or in-operative.¹⁸

Perhaps the most interesting case involving the granting of a liquor permit was *Robinson v. City of Dallas*.¹⁹ Robinson bought property near a church and wished to open a package store thereon. He requested a measurement to be taken of the distance between his door and the church door. When the official measurement was performed, he was informed that his door would have to be relocated to a distance of more than 300 feet from the church.

¹⁶*Community Natural Gas Co. v. Northern Texas Utilities Co.*, 13 S.W.2d 184 (Tex. Civ. App. 1928, *writ dismissed*). However, a municipality may subsequently ratify the unauthorized act of its agent, and be subject to estoppel. *Dallas v. Cluck & Murphy*, 234 S.W. 582 (Tex. Civ. App. 1921, *writ dismissed*).

¹⁷142 S.W.2d 374 (Tex. Civ. App. 1946, *n.w.h.*).

¹⁸*Id.*, at 378.

¹⁹193 S.W.2d 821 (Tex. Civ. App. 1946, *writ refused*).

This he did and subsequently obtained a certificate from the building inspector signifying that the new door location was proper. After some confusion, the method of measuring was changed and Robinson's door was found to be within the prohibited distance. Suit was brought by Robinson to enjoin the city from canceling the liquor permit.

The court tersely stated that the permit was void and that estoppel would not lie against the city because reliance could not be based on the invalid permit. Even though Robinson expended \$1,000.00 on a new door and \$4,200.00 for licenses and stock, the court awarded no compensation for the mistake of the city building inspector.²⁰

In the case of *Edge v. City of Bellaire*²¹, The Galveston Court of Civil Appeals continued to adhere to the proposition that estoppel is not applicable to a municipality while performing a governmental function. The controversy arose when Edge began the construction of a business addition to the house located on his residential property. He had made no attempt to secure a building permit. The construction was stopped by the city, but later a building permit was issued to him with the express condition that the permit would not dedicate the residence to business purposes. Edge accepted the permit and made the statement that he would take his chances.

When Edge claimed that the city should be estopped, the court said the following:

While it is unfortunate that the officials of the City of Bellaire issued a permit to appellant, Gordon Edge, to erect a business establishment within the zoning area, the conduct of these officials, however harsh and unjust its effect might have been on appellants, cannot be used to prejudice or destroy the rights of the public to require the enforcement of the zoning ordinance, which was valid on its face (*City of San Antonio v. Humble Oil & Refining Co.*, Tex. Civ. App., 27 S.W.2d 868), since in enforcing an ordinance valid in all respects, the

²⁰See also *Davis v. City of Abilene*, 250 S.W.2d 685 (Tex. Civ. App. 1952, writ ref'd.), where the city building inspector's knowledge, at the time of the granting of a permit that the owners intended to use the lot to establish a garment factory in violation of an ordinance, and the city's subsequent failure to appeal from granting of the permit, did not estop the city from canceling the permit.

²¹200 S.W.2d 224 (Tex. Civ. App. 1947, writ ref'd.).

officials of the city were discharging a governmental function and the city and its citizens cannot be bound or estopped by unauthorized acts of its officers in the performance of that function. *Rolison v. Puckett et al.*, Tex. Sup. 198 S.W.2d 74.²²

The position of the Texas courts was relaxed in 1951 with the decision in *City of Dallas v. Rosenthal*.²³ This action arose when Rosenthal obtained a permit to enlarge his nonconforming use and continued to build on to his business for almost two years. The city claimed that certain sections of the work were valid enlargements of the nonconforming use while others were in violation of the building code. Specifically these included a new engine room and annex. The city's case was weakened by the infrequent inspection by the building inspector. One inspector came in late 1944 shortly after construction had begun. Another inspection was not made until early 1946 when the various and extensive improvements were discovered. The court of civil appeals came to the following conclusion concerning the estoppel aspect of the case:

While the defendant was at fault in not procuring an additional permit for the improvements later determined upon as necessary, all of the changes and deviations now complained of were well within the purview of initial discussions between building inspector and owner, and doubtless would have been included in the original permit if known. Upon the foregoing background of facts, the City having remained silent until practical completion of all work (and with the element of nuisance excluded), we are not prepared to say that the refusal of mandatory injunction by the trial chancellor was unwarranted. In exceptional cases (and surely this is one), a municipality, even in exercise of a governmental function, may be subjected to the same rules of equitable estoppel as are individuals where right and justice require it. "The opinion is expressed in a number of decisions that a city may be estopped even when it is acting in its public capacity if it has received or accepted benefit from the transaction." *City of San Angelo v. Deutsch*, 126 Tex. 532, 91 S.W.2d 308, 311.²⁴

This case signaled an apparent change in that the court would recognize that a municipality would be estopped in a governmental function where an individual would be. Moreover, this case was

²²*Id.*, at 228.

²³239 S.W.2d 636 (Tex. Civ. App. 1951, *writ ref'd.*, *n.r.e.*).

²⁴*Id.*, at 645.

the first to openly discuss a balancing test between the city's fault and the individual property owner's fault. Thus, an "exceptional case" is one in which the city is guilty of non-action over an extended period of time in derogation of its inspection duties, when such non-action and silence is relied upon by an individual (even though he is at fault too).

The next case concerning the estopping of a municipality was *City of Fort Worth v. Johnson*²⁵, which involved an injunctive suit by the city against the defendants who owned an apartment house in violation of a city zoning ordinance.

In September, 1958, the city granted a permit for the construction of a two-family dwelling. Contrary to the permit, the apartment house was completed on January 2, 1959, as a six-unit house. Shortly after the completion of the dwelling, the city gave a ten-day notice to the owner to discontinue the use of four of the apartments. Some time following completion, Johnson acquired the house and sold the property to Mrs. Hurt.

Mrs. Hurt claimed that she bought the property two and one-half years after its completion and had no notice that it was in violation of the zoning ordinance. Chief Justice Calvert wrote the following concerning Mrs. Hurt's ignorance of the ordinance:

We consider next the second ground, noted above, for the Court of Civil Appeals' judgment of affirmance. Aside from the fact that there is absolutely no evidence in the record that Mrs. Hurt did not know that the structure was completed in violation of the building permit, absence of such knowledge does not constitute a defense to the suit. Were it otherwise, integrity of all zoning could be destroyed by erecting buildings in violation of permits and selling them to persons ignorant of permit terms.²⁶

Justice Calvert continued to expound on the proposition that Mrs. Hurt had to affirmatively prove her ignorance of the zoning regulation. Understandably, this as a practical matter is difficult to accomplish. It should be noted here that this holding may not have been as strict as it first appeared. Mrs. Hurt failed to successfully present her estoppel claim, because there was no evidence of her ignorance in the record.

²⁵388 S.W.2d 400 (Tex. 1964).

²⁶*Id.*, at 403.

The recent case of *City of Hutchins v. Prasifka*²⁷ presented the Texas Supreme Court with an opportunity to discuss at length the applicability of the doctrine of estoppel to municipalities. This case concerned a suit to enjoin the city from interfering with the use of 44 acres of land.

On November 7, 1966, the city council passed a *resolution* reclassifying the 44 acres from residential to manufacturing. The city council used this method of resolution even though the city charter specifically provided that amendments were to be enacted by *ordinance*.

On September 18, 1967, Prasifka purchased the property relying on the city map which showed the manufacturing classification of the property, and the statement of the city secretary that the map's classification was correct so far as she knew. Shortly after the purchase of the land, the mayor notified Prasifka that the property was still residential and that he had to abide by the zoning ordinance.

Before the issue of estoppel was raised, Prasifka claimed that the resolution was a valid means of amending the zoning ordinance of the city.²⁸ He also asserted that the resolution had the same legal effect as an ordinance because of a validating act.²⁹

²⁷450 S.W.2d 829 (Tex. 1970).

²⁸Prasifka's first claim was that the zoning ordinance was effectively amended by the city council's resolution. In response to this assertion, the supreme court quoted the following language from the case of *City of San Antonio v. Micklejohn*, 89 Tex. 79, 33 S.W. 735 (1895):

It takes a law to repeal a law. The act which destroys should be of equal dignity with that which establishes. A resolution proper is not a law. (citation omitted) A legislative body may in that form (by resolution) express an opinion, may govern its own procedure within the limitations imposed upon it by its constitution or character, and, in case it have ministerial functions, may direct their performance; but it cannot adopt that mode of procedure in making laws where the power which created it has commanded that it shall legislate in a different form. Note 27, *supra*, at 832.

The court cited further cases in Texas that adhered to the above rule and held an amending resolution to be insufficient to change an ordinance. See *Red Bird Village v. State ex. rel. City of Duncanville*, 385 S.W.2d 548 (Tex. Civ. App. 1964, *writ ref'd.*); *City of Panhandle v. Bickle*, 31 S.W.2d 843 (Tex. Civ. App. 1930, *writ dismiss.*); *Harvey v. City of Seymour*, 14 S.W.2d 901 (Tex. Civ. App. 1929, *n.w.h.*); *Clesi v. Northwest Dallas Improvement Association*, 263 S.W.2d 820 (Tex. Civ. App. 1953, *writ ref'd., n.r.e.*).

²⁹Prasifka also claimed that the validating act of the legislature had validated the resolution, and thus, it had the same effect as an ordinance would have had. Art. 974d, Sec. 12, TEX. REV. CIV. STAT. 1967.

The statute in question did not specifically mention resolution, but did say "all governmental proceedings performed by the governing bodies of all

Prasifka's main contention, however, was that the City of Hutchins was equitably estopped to deny the validity of their zoning action. The relevant facts concerning the estoppel charge revolves mainly around two instances. The first was that the city map, prepared by experts from Dallas, reflected correctly the change of the 44 acres to a heavy manufacturing district. The second is the fact that Prasifka relied on the statement of the city secretary that as far as she knew, the map's classification was correct.

The supreme court compared the Prasifka case to the earlier decision in *Harvey v. City of Seymour*.³⁰ In that case, the city council passed a motion changing an ordinance which previously had forbidden the erection of cotton gins in a certain area of the city. Before the motion was found to be an invalid amendment of a zoning ordinance, the property was purchased for a substantial sum of money in reliance on the motion. The court found that the injury was attributable to the motion, but was one for which the law provided no relief.

After citing the aforementioned case, the supreme court came to the following conclusion:

There is authority for the proposition that a municipality may be estopped in those cases where justice requires its application, and there is no interference with the exercise of its governmental functions. But such doctrine is applied with caution and only in exceptional cases where the circumstances clearly demand its application to prevent manifest injustice. 28 Am. Jur.2d, Estoppel and Waiver, 128 and 129; *City of Dallas v. Rosenthal*, 239 S.W.2d 636 (Tex. Civ. App. 1951, writ refused, n.r.e.). Under the facts set out above, we find no such exceptional case here. And while the method, or lack

such cities and towns and all officers thereof since their incorporation. . . are hereby in all respects validated as of the date of such proceedings." In disposing of the contention, the court responded:

We agree with the conclusion of law of the trial court that if there had been any irregularity in the adoption of the 1965 comprehensive zoning ordinance, it was the intention of the legislature that it be cured; and such ordinance was validated.

Similarly, if there had been irregularities in the adoption of the November 7, 1966, resolution, they would be cured, and the resolution validated. But we see no intention on the part of the legislature to change a resolution (or motion) into an ordinance, or to give every motion or resolution the force and effect of a law as would be the case in the enactment of an ordinance. The resolution was validated as a resolution.

³⁰14 S.W.2d 901 (Tex. Civ. App. 1929, n.w.h.).

of it, of the City of Hutchins with regard to its zoning ordinance, regulations and maps, leaves a great deal to be desired, the zoning laws of a city may not be changed by unauthorized resolution or by the unauthorized changing of zoning maps.³¹

Upon this logic, the supreme court found that the municipality was not estopped. This case seems to be the strictest application of governmental immunity yet. Prasifka spent some \$70,000.00 on the 44 acres he purchased on the reliance of the official city map and a statement by the city secretary. It is difficult to determine exactly what would constitute "exceptional circumstances" under the exception to governmental immunity. Apparently spending \$70,000.00 on the reliance of a resolution, official city zoning map and statement of a city secretary is not in that category.³²

An examination of the zoning cases which have been reviewed here leads to the conclusion that the municipality will be estopped only in circumstances in which all enactments are valid and the city is at greater fault than the aggrieved party.³³

TAXATION

Municipalities can levy taxes only through express or implied delegation of power to them from the state.³⁴ The delegation of authority to tax is accomplished by either the Constitution³⁵ or the statutes.³⁶ Despite the lack of inherent power to tax,³⁷ the collection of taxes by a municipality is a governmental function.³⁸

This section will discuss the two leading Texas cases which have considered the applicability of the doctrine of estoppel to

³¹Note 27, *supra*, at 836.

³²It should be noted that Prasifka was a member of the city zoning commission and familiar with the various requirements of the city ordinances. Exactly what emphasis, if any, the court placed on this fact is unclear.

³³Note 17, *supra*. This case has been the main contention for aggrieved property owners, although the Texas Supreme Court has apparently put the greater stress on basic principles of governmental immunity rather than on the equitable considerations of the landowners.

³⁴Ollivier v. Houston, 93 Tex. 201, 54 S.W. 943 (1900).

³⁵Town of Pleasanton v. Vance, 277 S.W. 89 (Tex. Comm. App. 1925).

³⁶Dallas Consol. Elec. St. R. Co. v. City of Dallas, 260 S.W. 1034 (Tex. Comm. App. 1924).

³⁷COOLEY, THE LAW OF TAXATION, Vol. I, Sec. 57 (4th ed. 1926); Texas & P. Ry. Co. v. El Paso, 126 Tex. 86, 85 S.W.2d 245 (1935).

³⁸Philadelphia Mortgage & Trust Co. v. Omaha, 63 Neb. 280, 88 N.W. 523 (1901).

municipal corporations. The first case to consider the question in detail was *City of San Antonio v. Deutsch*.³⁹

This case centered around the question of whether the city would be estopped to assert a lien for unpaid taxes on certain real property where the tax collector erroneously entered in the records that taxes had been paid. The collector had accepted a draft from the prior owner, and before it was returned for lack of funds, the plaintiff had checked the city tax records and relied on the erroneous entry to loan money to the property owner. Subsequently, the owner defaulted on the plaintiff's note, and the plaintiff purchased the property at a sale only to discover a \$5,436.25 tax lien held by the city.

The court came to the following conclusion concerning the estoppel question:

Since the action of the tax collector in causing the tax records to show that the taxes were paid when in fact they were not paid was unauthorized, and since the tax collector in collecting taxes and in keeping the records essential to their collection was exercising for the city powers essentially public and governmental, it follows that the city is not estopped by the acts of the tax collector from asserting its lien for the taxes, unless exception is made to the well-settled rule that cities are not liable for the unauthorized or negligent acts of their officials in the performance of the city's governmental functions.⁴⁰

The court continued its discussion and stated that when the rights of an individual and the governmental functions of the city conflict, the city's business must, of necessity, prevail. In setting forth the holding, the court stated that the only time estoppel could be invoked against a municipality would be when it acted in a proprietary, rather than a governmental function.⁴¹ In concluding the case, Commissioner Smedley wrote that since

³⁹126 Tex. 532, 91 S.W.2d 308 (1936).

⁴⁰*Id.*, at 309.

⁴¹The court continued to state that there are probable exceptions to the rule, as where the city retains benefits. It appears that this requisite of a retention of benefits is required only in the tax cases where estoppel is claimed. The zoning cases make no mention of a retention of benefits.

the city had not accepted any benefit from the unauthorized entries, it would not be estopped.⁴²

The next case to consider estoppel as applied to taxation by a city was *Rolison v. Puckett*.⁴³ This case concerned a situation where the city had acquired a title to certain real property by foreclosure of a tax lien, but had permitted the former owners to occupy the premises. In addition, the city never made a demand for the property, and the city attorney and tax assessor promised the former owners that they would recommend to the city commissioners that the property be deeded to them if they paid their back taxes.

Fifteen years after the city had obtained a tax foreclosure, it advertised the property for sale. The former owners bid the amount of the back taxes, but Rolison bought the property with a bid of some \$523.00 higher than their's. As a result, the former owners brought suit to enjoin the sale on the basis of estoppel. The question before the court was whether the city's conduct between 1930 and 1945 was such as to call for the application of estoppel.

In considering the estoppel question, the court stated :

It is not shown that the city attorney and the tax assessor were authorized to waive the rights of the city acquired under the foreclosure proceedings. . . . Nor are there any facts in the record to show how the acts of the city in any way misled the Neagles or the Pucketts, or caused them to materially change their position to their detriment. . . . The city received no material benefit from the land or its occupants during that period. The only official acts of the city commission in connection with this matter were that they caused the property to be advertised for sale in 1945, accepted the highest bid, and, by resolution, caused a special warranty deed to the property to be executed and delivered to the petitioner C. L. Rolison. The promise of the city attorney and the tax assessor to recommend to the city commissioners that the property be deeded by the city to the Pucketts upon their payment of all taxes charged against the property could not bind the city.⁴⁴

One situation involving a statement made by the city attorney

⁴²For other cases propounding this rule see: *Payne v. First National Bank*, 291 S.W. 209 (Tex. Comm. App. 1927); *City of Dublin v. H. B. Thornton & Co.*, 60 S.W.2d 303 (Tex. Civ. App. 1933, writ ref'd.).

⁴³145 Tex. 366, 198 S.W.2d 74 (1946).

⁴⁴*Id.*, at 78.

to the effect that the plaintiff need not file his claim to recover taxes within the six months limitation period was held not to create an estoppel on the city where it merely presented the limitation provision as a defense to the action.⁴⁵ This case again turned upon the rule that an unauthorized act by an agent of the municipality will not give rise to estoppel.

In summing up the tax section, it may be seen that the governmental function theory controls when the individual citizen chooses to contest the claim for taxes. Because of the small number of cases in Texas the reader is referred to other jurisdictions to observe the various approaches to the question.⁴⁶

CONCLUSION

The history and theory of municipal corporations is shrouded in the cloak of governmental sovereignty. Using the public welfare and necessity as a basis for their decisions, the courts have infrequently invoked the doctrine of estoppel against municipalities. This has at times resulted in substantial hardship and injustice for individual citizens.

The reader should take cognizance of the fact that Texas courts have created a double obstacle to the application of estoppel against a municipality. The first is that the plaintiff has an unusually heavy burden of proof to establish an act within the particular agent's power to perform.⁴⁷ The second (assuming the plaintiff can prove the elements of estoppel) is that the act is often within the performance of a governmental function and therefore immune to estoppel.

With the demise of charitable immunity in Texas,⁴⁸ the next logical standard of declining immunity would be governmental. Such is not the case, however, — it has seldom, if ever, been stronger. Perhaps it is because the theory of governmental im-

⁴⁵First Trust & Savings Bank v. Pasadena, 21 Cal.2d 220, 130 P.2d 702 (1942).

⁴⁶McQUILLIN, MUNICIPAL CORPORATIONS, Sec. 44.173 (3rd ed. 1963).

⁴⁷Upon a review of the above cases, it can be seen that the municipality merely has to plead the city charter or that the act was outside the employee's scope of employment to set up an *ultra vires* defense. In the majority of cases, this is the defense.

⁴⁸Watkins v. Southcrest Baptist Church, 399 S.W.2d 530 (Tex. 1966); Howle v. Camp Amon Carter, 14 Tex. Sup. Ct.J. 445 (July 7, 1971).

munity has its roots in necessity and not in beneficence that the courts have chosen to adhere strictly to its precepts.

Whatever the reason(s) for its continuance, it is herein recommended that the courts decide each case on its own merits according to its particular equities. Instead of a strict adherence to governmental immunity principles, the courts could indulge in a strong presumption against estoppel and relax their posture with regard to the finding of "exceptional circumstances". This approach would hopefully combine the presumption against estoppel with the lesser burden of proof for the claimant and would form more equitable criteria for determining whether the doctrine of estoppel should be invoked against the municipality.

Charles L. Cantrell