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MEMORANDUM

TO: Montgomery County Planning Board and Staff

FROM: Stephen Z. Kaufman
Todd D. Brown

DATE: November 17, 2005

RE: Clarksburg Town Center; Equitable Estoppel Arguments

Issue

The developers and builders of the Clarksburg Town Center project have relied on signed Signature Sets, amendments to site plans, and permits issued by the Department of Permitting Services ("DPS"), and signed off on by Park and Planning, in their construction of the project. In numerous cases, the developers have sold units to third parties. The purpose of this memo is to outline the legal arguments that support the application of the principle of equitable estoppel to this case, including estoppel after a permitee has in good faith relied upon approved plans and/or issued building permits.

Argument

I. General Principles of Equitable Estoppel

In 1914, the Maryland Court of Appeals held that the doctrine of equitable estoppel applies to municipal corporations, stating, "the municipality may, in obedience to the demands of justice, be estopped by its own conduct, or the conduct of its officers, from denying the existence or validity of [a grant]." *Mayor and Council of City of Hagerstown v. Hagerstown Ry Co. of Washington County*, 91 A. 170, 174 (1914). According to the Maryland Court of Appeals, equitable estoppel is:

> the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed...as against another person who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse and who on his part acquires some corresponding right, either of property, of contract, or of remedy.

Permanent Financial Corp. v Montgomery County, 308 Md. 239, 247, 518 A.2d 123, 127 (1986), *citing* Pomeroy, EQUITY JURISPRUDENCE, § 804 (5th Ed. 1941). *See also Mona Elec. Co v. Shelton*, 377 Md. 320, 334, 833 A.2d 527 (2003). More recently, the Court of Special Appeals has clarified, "with respect to equitable estoppel in regard to a municipality, 'there must have been some positive acts by such officers that have induced the action of the adverse party' and 'it must appear ... that the party asserting the doctrine incurred a substantial change of position or made extensive expenditures in reliance on the act.'" *Heartwood 88, Inc. v. Montgomery County*, 156 Md. App. 333, 372, 846 A.2d 1096, 1118 (2004), *quoting Anne Arundel County v. Muir*, 149 Md. App. 617,636, 817 A.2d 938 (2003).

As suggested by the above definitions, there are three elements necessary to establish equitable estoppel: "(1) voluntary conduct or representation; (2) reliance; and (3) detriment." *Gregg Neck Yacht Club, Inc., v. County Comm'rs of Kent County*, 137 Md. App. 732, 773, 769 A.2d 982, 1006 (2001). While traditionally, wrongful or unconscionable conduct was an element of estoppel "the rule now to be followed in Maryland is that equitable estoppel may be applied, not only when the conduct of the party to be estopped has been wrongful or unconscientious, and relied upon by the other party to his detriment, but also when the conduct, apart from its morality, has the effect of rendering it inequitable and unconscionable to allow the rights or claims to be asserted or enforced." *Id.*, citing *Zimmerman v. Summers*, 24 Md. App. 100, 123, 330 A.2d 722 (1975).

Whether an estoppel exists "is a question of fact to be determined in each case." *Markov v. Markov*, 360 Md. 296, 307, 758 A.2d 75 (2000) (citation omitted). As noted by the Court of Special Appeals, "the question of estoppel is a question of fact because it involves 'the assessment of conduct by one party and reliance by another.'" *Heartwood 88, Inc. v. Montgomery County,* 156 Md. App at 370, *quoting Allstate Ins. Co. v. Reliance Ins. Co.*, 141 Md. App. 506, 515, 786 A.2d 27 (2001). *See also Grimberg v. Marth*, 338 Md. 546, 556, 659 A.2d 1287 (1995); *Travelers Indem. Co. v. Nationwide Construction Co.*, 244 Md. 401, 414, 224 A.2d 285 (1966).

In the instant case, all three elements of estoppel are met; (1) the Planning Board, via its planning staff, approved plans and amendments and signed off on building permits and DPS issued building permits, (2) the Clarksburg developers and builders, in good faith, relied upon these plans and permit approvals in constructing the project, and (3) the developers and builders, to their detriment, have expended substantial funds on the construction of the project and, in several instances, have sold units to third parties.

The Maryland case of *Permanent Financial Corp. v. Montgomery County* is most relevant to the facts in the instant case. In *Permanent Financial,* Montgomery County issued a building permit for an office building in Silver Spring. Almost nine months later, after the shell of the building was complete, the County "suspended the building permit and issued a stop work order on the grounds that the building violated statutory height limitations, set-back requirements, and floor area ratio restrictions." *Permanent Financial Corp. v. Montgomery County*, 308 Md. 239, 241-42, 518 A.2d 123 (1986). The developer appealed to the County Board of Appeals and applied for an exemption, but the Board denied relief. *Id.* at 242. The Maryland Court of Appeals held that because the County had shared Permanent Financial's interpretation of "nonhabitable structures" at the time of the issuance of the building permit, and for a significant period of time prior thereto, the principles of equitable estoppel barred the County from requiring Permanent Financial to remove the building's additional story. *Id.* at 252. In so finding, the court stated "[w]e have no doubt that Permanent designed and built its building to a height of 43 feet...in reliance upon the long standing interpretation of the County, and that this interpretation, while subsequently found by the Board of Appeals to be incorrect, was nevertheless reasonable and debatable....it is clear that this portion of the decision to issue the permit was not the result of oversight by the County, but rather was consistent with its practice." *Id.* at 252.

II. Equitable Estoppel Based on Reliance on Issued Permits

The Maryland Court of Appeals has stated, "it has been held that municipalities may be estopped by reason of the issuance of permits," citing "the authorities collected in 2 Metzenbaum, *Law of Zoning,* (2nd ed.) beginning at page 1188." *Town of Berwyn Heights v. Rogers*, 228 Md. 271, 279-80, 179 A.2d 712, 716 (1962). Although there are no Maryland cases, other than *Permanent Financial*, that appear to directly apply to the facts of this case, there is caselaw from other jurisdictions that is on point and directly similar to those instances in which permits have already been issued and relied upon by the Clarksburg developers and builders. For example, in *Congregation Etz Chaim v. City of Los Angeles*, the Ninth Circuit considered whether the City could issue a stop work order in response to neighbors' complaints, when the Congregation had been issued a building permit and commenced construction to more than double the size of one of its buildings. In finding that the City was estopped from halting the construction, the court agreed with the district court that "the City's issuance of the building permit represented its approval of the building project, size and all...the appropriate time for the City to take issue with the size of the remodeling was during the extensive and meticulous review...which preceded the issuance of the permit and the expensive reliance on it by the Congregation." *Congregation Etz Chaim v. City of Los Angeles*, 371 F.3d 1122, 1124 (2004).

The Eleventh Circuit made a similar finding in *Reserve, Ltd. v. Town of Longboat Key*, where the court held that the Town was estopped from revoking a building permit for the construction of a spa. In so holding, the court stated, "Longboat Key issued Reserve a building permit. Thereafter, Reserve spent approximately $6 million in acquiring acreage, designing the spa complex, demolishing pre-existing buildings on the site, site work, and construction costs. As Reserve possessed a building permit and expended large sums of money in reliance thereon...Reserve had a vested property right in its permit." *Reserve, Ltd. v. Town of Longboat Key*, 17 F.3d 1374, 1380 (1994). Similarly, in *Sakolsky v. City of Coral Gables*, the Supreme Court of Florida held, "such a permit as that here involved, intentionally and lawfully issued by the proper municipal officers, can have no other purpose then to authorize action by the permitee in reliance on its terms... We conclude...that [the permitee] acted in good faith and should not be denied the benefit of the estoppel doctrine upon which his complaint is founded." *Sakolsky v. City of Coral Gables*, 151 So. 2d 433, 435-36 (1963).

The Supreme Court of Colorado has also held that the issuance of a building permit, and reliance thereon, can estop a municipality from revoking a permit. *See City and County of Denver v. L.C. Stackhouse,* 135 Colo. 289, 310 P.2d 296 (1957). The Superior Court of Connecticut has made similar findings, holding in *Polatnick v. Westbrook Zoning Board of Appeals* that, "compliance with the zoning permit establishes constructive compliance with the relevant regulations" and "[i]ndividuals have a right to expect that if they submit, in good faith, an application that a town's ZEO subsequently approves, they may, barring timely revocation of approval, rely on the zoning permit as evidence that their property, when built in accordance with the zoning permit, complies with the zoning regulations". *Polatnick v. Westbrook Zoning Board*, 1999 Conn. Super. LEXIS 2746 *23, *25.

Although caselaw is clear that a municipality may not be estopped from revoking illegally issued permits, where the law is unclear or ambiguous courts have tended to side with the party to whom the permits are issued. For instance, in *Howland & Sons, et al v. The Borough of Freehold*, the Superior Court of New Jersey held that the Borough was estopped from rescinding a building permit after 90% completion of a project constructed pursuant to the permit. In so holding, the court noted that a permit would be found to be properly issued, and reliance thereon found to estop the issuing municipality, when there is an "appearance of an issue of construction of the zoning ordinance or statute, which, although ultimately not too debatable, yet was, when the permit was issued, sufficiently substantial to render doubtful a charge that the administrative official acted *without any reasonable basis* or that the owner proceeded without good faith." *Howland & Sons, et al v. The Borough of Freehold,* 143 N.J. Super. 484, 489, 363 A.2d 913, 916 (1976) (emphasis in original). This case was cited favorably by the Maryland Court of Appeals in *Permanent Financial*, where the court noted, "[t]he development of

Maryland law has proceeded along similar lines." *Permanent Financial*, 308 Md. 239 at 250. *See also, City of Hagerstown v. Long Meadow*, 264 Md. 481, 493, 287 A.2d 242 (1972).[1]

In the instant case, Section 8-25 of the Montgomery County Code, concerning the issuance of building permits, states, "[t]he Director must examine or cause to be examined each application for a building permit or an amendment to a permit....If the proposed work conforms to all requirements of this Chapter and all other applicable laws and regulations, the Director must issue a permit for the work as soon as practicable." One such requirement in the chapter is contained in Section 8-26(g), which states, "[t]he building or structure must comply with all applicable zoning regulations, including all conditions and development standards attached to a site plan approved under Chapter 59." Section 8-26 states, "[t]he permit shall be a license to proceed with the work...." Based on the foregoing, in those instances in which the developers and builders have constructed units, or have obtained validly issued building permits, there is a strong argument to be made that DPS, or any other entity that administers permit approval within the County, due to the issuance of the permits, is estopped from revoking the permits or halting construction. Accordingly, like DPS, the Park and Planning Board and Commission, due to their approval of the site plans and amendments upon which the building permits were based, and their confirmation via the sign-off required by this agency during the processing of the building permits, is equally estopped from denying the validity of the plans and amendments.

III. Good Faith Reliance

Finally, although "good faith" is not a stated element of estoppel in Maryland (whereas in other jurisdictions good faith must be found as an element of estoppel), nor is it the focus of much discussion in Maryland's equitable estoppel cases, it could be argued to be an implied element of equitable estoppel. In this regard, it could be expected that complainants will likely

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[1] It will likely be argued by complainants that Maryland has never adopted the doctrine of "zoning estoppel." *See Sycamore Realty Co., Inc. v. People's Counsel of Baltimore County, et al.*, 344 Md. 57, 684 A.2d 1331 (1996). However, *Sycamore Realty* is clearly distinguishable from the instant case and, in fact, demonstrates Maryland courts' disfavor for adopting a black-letter zoning estoppel rule and preference for the general doctrines of equitable estoppel and vested rights. *Id.* p. 66, 69-70. Moreover, the applicability of equitable estoppel against municipalities has been reconfirmed in later Maryland cases. *See Heartwood 88, Inc. v. Montgomery County*, 156 Md. App. 333, 846 A.2d 1096 (2004); *Anne Arundel County v. Muir,* 149 Md. App. 617, 817 A.2d 938 (2003).

challenge the Clarksburg developers' "good faith" reliance on the building permits and Park and Planning approvals, given the inconsistencies in many of the approval documents. However, the Clarksburg developers and builders have submitted ample evidence of their good faith and explanations concerning how they handled the inconsistencies, and the acts of Planning Staff can be shown to have invited good faith reliance, even in the face of these inconsistencies.