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Governments: Inapplicability of the Doctrine of Estoppel as Applied to a City in the Exercise of Governmental Functions

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One final observation may be made concerning the overall motive for reversal of *Betts v. Brady*.[21] From the decisions since 1942 the Supreme Court has as a matter of policy expressed some distaste for attempted interference with the administration of justice in the state courts unless obvious constitutional violations are brought to its attention. The flexible rule set forth in Betts maintained the integrity of state judicial systems by limiting the amount of federal interference, and at the same time achieving the purpose of due process by assuring that the characteristics of fundamental fairness will prevail.[22] In 1963 it is clear that this policy, at least in relation to right to counsel, is no longer a controlling factor in the Court's reaching its decision in *Gideon v. Wainwright*,[23] by virtue of the fact that twenty-four Attorneys General filed briefs amici curiae seeking reversal of the conviction of petitioner Gideon. Thus practically one-half the states of the Union appear to be in accord with the view that the *Betts* decision should be overruled. It would appear then that the Supreme Court did not feel hesitant in deciding this far reaching rule as applicable to the states in light of the obvious approval of state judicial officers.

Although at first glance it appears that the Court has enunciated a principle which will tend to avoid future litigation as far as the "special circumstances" rule is concerned, nevertheless because many collateral areas are left untouched by the decision, much litigation must follow before a clear statement of the law in this area is established. When state courts are faced with the problem of indigent defendants in non-capital criminal cases where the question of appointment of counsel must be determined, there must be a workable rule under which they can operate, especially in light of the fact that many states have their own statutes operating in this area.

ROBERT L. HERSH

Governments: Inapplicability of the Doctrine of Estoppel as Applied to a City in the Exercise of Governmental Functions— Plaintiff, the owner of two duplex apartment buildings and a cottage situated on a single lot, converted the duplexes to four family units in 1931 without obtaining a building permit as required by municipal ordinance. The zoning regulations permitted nothing larger than two family dwellings. In their new form the buildings had 7,000 square feet of liv-

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[21] *Supra* note 2.

[22] This theory was cogently expressed by Justice Frankfurter writing the majority opinion in Foster v. Illinois, 332 U.S. 134, 139 (1947);" . . . (the concept of due process) . . . is not to be turned into a destructive dogma in the administration of systems of criminal justice under which the states have lived not only before the Fourteenth Amendment but for the eighty years since its adoption. . . ."

[23] Gideon v. Wainwright, *supra* note 1.

ing area or about 777 square feet per family. This amount was insufficient to comply with minimum square foot requirement of the zoning ordinances. The city, however, issued building permits for remodeling purposes in 1940, 1947, 1948 and 1949, and also taxed the building on the basis of a nine unit property. In 1961, the city condemned the property and awarded compensation on the basis of its being a five unit property, the maximum units allowed under the zoning law. Plaintiff appealed to the circuit court where a jury awarded the considerably higher figure of $41,000 which was approximately the same as expert testimony had indicated the land was worth as a nine unit property. The city appealed and the supreme court remanded the case for retrial because of errors committed by the trial court in the admission of testimony. In a concurring opinion, Justice Currie raised the issue as to whether estoppel could be applied against governments in the exercise of governmental functions, an issue not raised by the majority. Justice Currie argued that estoppel could not be applied against the city in such a capacity. *Schober v. City of Milwaukee.*[1]

In this case the trial court followed previous Wisconsin decisions in computing the amount of damages to be awarded. Terming the theory the "most advantageous use" theory, the supreme court has, on previous occasions, referred to this concept as the "highest and best use" theory.[2] According to such a concept, damages are to be given for the value of property as determined, not only from its present use but from other future and foreseeable uses to which the land could be put. In Wisconsin this is included within the concept of "fair market value,"[3] which some courts use as a separate theory for determining damages. This inclusion seems proper, since the fair market value of a piece of land includes future uses, such being in the contemplation of buyers who bid up or force down prices of land with such uses in mind. The two concepts, as a result, are intertwined, and both are properly considered in determining damages for condemnation of property.

On the facts of the instant case, the question then arises as to whether compensation is to be given at the property's highest and best use which is also an existing use if such use is in violation of local zoning ordinances. The concurring opinion argued that damages could not be awarded on the basis of such a highest and best use because the property did not conform to zoning ordinances and that estoppel could not be applied against the city in the exercise of governmental functions.[4] Previous holdings, while in agreement that estoppel will lie against

[1] 18 Wis.2d 591, 119 N.W.2d 316 (1963).
[2] Alexian Bros. v. City of Oshkosh, 95 Wis. 221, 70 N.W. 162 (1897); Watson v. Milwaukee & M. Ry. Co., 57 Wis. 332, 15 N.W. 468 (1883).
[3] See Alexian Bros. v. City of Oshkosh, *supra* note 2.
[4] Eau Claire Dells Imp. Co. v. City of Eau Claire, 172 Wis. 240, 179 N.W.2d (1920).

a government when carrying out its proprietary functions, are in hopeless confusion as to when estoppel will lie, if ever, against the government when it acts in a non-proprietary or governmental capacity. Two non-proprietary activities dealt with by the cases include the taxation and zoning.

Taxation, being a governmental function,[5] is one activity of government to which the doctrine of estoppel may or may not be applied. In *Libby, McNeill and Libby v. Department of Taxation,*[6] the state, in compliance with a supreme court ruling, permitted the plaintiff to omit payments of a privileged dividend tax during certain years. Later, when the supreme court reversed its prior holding, the Department of Taxation sought collection of taxes for the intervening years from the general funds of the corporation. The Wisconsin supreme court, however, held that having permitted the non-payment of the taxes, the state was estopped from asserting liability on the part of the taxpayer for those years because of detriment which present stockholders would suffer. It noted also, that estoppel would not ordinarily be applied against the state unless an inequitable result ensued.[7] In *Chicago, St. Paul, M. and O. Ry. Co. v. Douglas County,*[8] where the state claimed the same lands as the plaintiff, and yet had taxed plaintiff for them, the court held that the state could not be estopped by so acting, as the exercise of the power to tax privately owned property did not estop the city from asserting its own proprietary interest in the same property. Thus, the rule in Wisconsin appears to be that the government will not be estopped in its power to tax unless an inequitable result ensues.

In the area of zoning, however, the Wisconsin court has not been so reluctant to apply the doctrine of estoppel. Two previous Wisconsin cases in point have held cities estopped from denying their acts of issuing permits on which a party relied to his detriment. In the earlier case,[9] a municipality rezoned an area for hotels and apartments and the plaintiff expended $9,000 in architect fees preparatory to building what was permitted by these zoning changes. Later the municipality revoked the ordinance, but the supreme court allowed estoppel to apply on the builder's behalf. In a more recent case,[10] where the plaintiff began construction of a house and photo studio in reliance on a permit issued by

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[5] McCulloch v. Maryland, 4 Wheat. 316 (1801). See also 51 AM. JUR. *Taxation* §966 (1944).

[6] 260 Wis. 551, 51 N.W.2d 796 (1952).

[7] See also Waterbury Savings Bank v. Danaher, 128 Conn. 78, 20 A.2d 455 (1940).

[8] 134 Wis. 197, 114 N.W. 511 (1908).

[9] Rosenberg v. Village of Whitefish Bay, 199 Wis. 214, 225 N.W. 838 (1929).

[10] On rehearing the court reversed its holding, but only because plaintiff failed to plead estoppel in the lower court. This technicality cannot be regarded as having a substantive effect on the law of estoppel, and the initial hearing in that case can be regarded as the present case law.

a municipality in contravention of the zoning ordinances, the supreme court held that plaintiff had suffered detriment in reliance and the city was estopped.[11] The concurring opinion of Justice Currie however, fails to mention whether detrimental reliance was present in the plaintiff's acts. This leaves only two possible conclusions: (a) there was no detrimental reliance in the instant case and therefore, no estoppel could apply, or, (b) detrimental reliance was not considered as being a factor in determining whether estoppel is to be applied. If the latter of these was intended, Justice Currie formulated a new rule, that estoppel never applies when governments are exercising their governmental powers.

Thus, up to the *Schober* case, detrimental reliance had been a necessary prerequise for the application of the doctrine of estoppel. Determining how much detrimental reliance is needed to invoke the doctrine is another problem. In attempting to solve this, the Wisconsin court has proposed several tests. One test allows a government to be estopped in the exercise of a governmental function if the wrong and injustice that would otherwise result from the government's act or failure to act is clear and distinct and so firmly established that it would be of the nature of a "fraud" on those acting in reliance thereon. This strict test was adopted in *City of Ashland v. Chicago and N.W. Ry. Co.*,[12] an early Wisconsin case, but not mentioned subsequently. Later cases have adopted less strict rules. For instance in *State ex rel Knapp v. Pohle*,[13] the court adopted what might be called the "clearer proof" test of applying estoppel. Here, the court agreed estoppel would apply to governments in the exercise of governmental functions although it commented that a clearer proof was required to estop a government when it acted in a governmental capacity. Another test was enunciated in *Stuart v. City of Neenah*.[14] In the *Stuart* case, the court referred to estoppel as "estoppel in pais" and held that a government would be estopped under two conditions: (a) if irreparable injury resulted to persons who honestly and in good faith relied on the government's act or failure to act and (b) if the conduct under the circumstances was inequitable. Although this case did not require the degree of wrong of the *Ashland* case, it did seemingly impose a greater degree than the clearer proof test. Finally, the Wisconsin court, in *State ex rel Mylrea, v. Janesville Water-Power Co.*[15] used the doctrine of laches, or failure to act over an extended period of time in holding a government estopped by its omission to act in due time.

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[11] State *ex rel* Hynek and Sons Co. v. Board of Appeals of the City of Racine, 267 Wis. 309, 64 N.W.2d 741 (1954).
[12] 105 Wis. 398, 80 N.W. 1101 (1900).
[13] 185 Wis. 610, 202 N.W. 148 (1925).
[14] 215 Wis. 546, 255 N.W. 142 (1934).
[15] 92 Wis. 496, 66 N.W. 512 (1896).

This divergence of tests applicable to estoppel typifies the confusion of case law surrounding the issue raised in Justice Currie's concurring opinion. Under the "fraud" test, the instant case might have been decided for the city, as there was not such an injustice done to the plaintiff as to be of the character of a fraud through the city's mere failure to enforce zoning ordinances and its act of taxing as a nine unit property. Then too, under estoppel *in pais* there was no evidence of irreparable injury done to plaintiff because plaintiff relied on the city's failure to act. On the other hand, the "clearer proof" test might have brought a different result, as might the "laches" test. Under the clearer proof test, there was sufficient evidence through the 32 year period alone which would be sufficient to invoke the estoppel. Thus, in the concurring opinion of the instant case where it is expressly stated that estoppel could not be applied against the government in a governmental capacity, it appears that a test even stricter than the other tests has been enunciated.

The Wisconsin court, however, has been consistent in one area of the application of estoppel to governments. This is found in the unanimous holdings that no estoppel could be applied against a government in the exercise of an ultra-vires act by one of its officials.[16]

In summary, the present status of the law in the fields covered in the concurring opinion is as follows: Regarding taxation, estoppel will not be applied readily in Wisconsin and when applied, inequitable harm to those relying on the government's conduct will have to be shown. Concerning zoning, previous decisions indicate that estoppel can more readily be applied than in the case of taxation, and Justice Currie, in the *Schober* case, by reasoning that estoppel is inapplicable, argues for what may be a significant reversal in the case law on this point.

While it may be difficult to speak of a trend in the decisions as to the applicability of estoppel to zoning and taxation functions due to the paucity of decisions on the subject, there can be detected a trend as to the applicability of estoppel once the field to which estoppel can be applied is determined. The earlier cases seem to apply estoppel quite readily as to all but ultra-vires acts. Later cases, with a few obvious exceptions hold estoppel less readily applied and the concurring opinion in the instant case indicates it never will be applied to governmental functions. This is proper, to the extent that the public treasury and the general public, as taxpayers in turn, should be protected from demands of individuals whose rights become affected by the inevitable and frequently unpreventable results of governmental operations. With the growth of population, the intensification of urban land uses and restrictions and the broadening of governmental controls and functions,

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[16] Town of Humboldt v. Schoen, 168 Wis. 414, 170 N.W. 250 (1919).

an intolerable burden would be placed on governmental units if they were bound by the doctrine of estoppel in their multiplicity of functions, causing the resulting depletion of public funds.

It must be noted, however, that a contradiction of this trend came forth from the Wisconsin court not long ago. In *Holytz v. City of Milwaukee*,[17] the court swept away all remaining vestiges of governmental immunity, exposing governments as a result, to suit in the operation of governmental as well as proprietary powers, thus *expanding* governmental liability for acts of its agents. On the other hand, Justice Currie's view would decrease responsibility by not allowing estoppel for acts done in pursuit of governmental functions, thus *lessening* governmental jeopardy to suit. Although the *Holytz* case reflects the growing tendency to treat governments the same as individuals before the law, Justice Currie's concurring opinion if properly interpreted by this note, marks a change in this trend.

The above analysis of the concurring opinion of the *Schober* case points out the hopeless confusion on the holdings as to whether estoppel applies to the taxation and zoning functions of government, or as to what test is to be applied to determine if the facts in a particular case warrant applicability. The concurring opinion does not serve to clear up the confusion.

SHERIN SHAPIRO

Search and Seizure: Mapp v. Ohio, Prospective or Retrospective—A 66 year old woman was found gagged, bound and stabbed to death in her tavern-residence. A cigar box containing cash, a safe deposit box key, and other keys with a metal tag bearing her husband's name were missing. The defendant was picked up for questioning, and later he guided the police officers to his hotel, telling the officers his room number. The defendant waited outside, knowing that the officers were searching his room. The search, which was conducted without a warrant, produced the missing cigar box, cash, and keys. When informed of the discovery, the defendant admitted robbing the tavern, carrying a loaded gun and binding and gagging the victim, although he could not recall stabbing her.

He was tried, convicted of murder in the first degree, and sentenced to death. At his trial, he made no objection when the articles discovered during the search of his hotel room were offered and admitted into evidence. All his state remedies were denied[1] as was his application for certiorari to the United States Supreme Court.[2]

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[17] 17 Wis.2d 26, 115 N.W.2d 618 (1962).

[1] Hall v. State, 223 Md. 158, 162 A.2d 751 (1960), 224 Md. 662, 168 A.2d 373 (1961).

[2] Hall v. State, 368 U.S. 867 (1961).