

Recent Developments in “Quasi” Vested Rights

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There have been significant developments recently in the law of “quasi” vested rights. The wandering trail of the law of estoppel leads most recently through *City of White Settlement v. Super Wash, Inc.*, 49 Tex. Sup. Ct. J. 404, 2006 WL 508628 (2006), which reversed a decision of the Fort Worth Court of Appeals,¹ permitting the continuation of code violations on the grounds of estoppel. I was in the process of writing an update on the case for this newsletter. But before I could get finished, the Court decided *City of Dallas v. Vanesko*, 49 Tex. Sup. Ct. J. 487, 2006 WL 889722 (Tex. 2006), which reverses a decision of the Dallas Court of Appeals granting a variance denied by the Board of Adjustment to build a roof in violation of local regulations.²

In *Superwash*, the Texas Supreme Court stopped the apparent trend in recent cases toward successful estoppel arguments. It ratifies *City of Hutchins v. Prasifka*, 450 S.W.2d 829 (Tex. 1970) and the earlier case of *City of San Angelo v. Deutsch*, 126 Tex. 532, 91 S.W.2d 308 (1936).

The underlying facts of *Superwash* involve approval of a site plan and issuance of a building permit in error, when the ordinance actually required a continuous six-foot screen fence where a curb cut access was to be built. Although the City notified the owner quickly, the project was already 45% complete when the City took action to “change its mind” on the curb cut and require elimination of the access.

Early in the opinion, the Court takes a detour to demonstrate the consistency of the longstanding Texas rule with decisions of the U.S. Supreme Court involving estoppel of the government. It then returns to prior Texas decisions. The Court emphasizes that it will not often countenance modification of the law by public employee misfeasance or malfeasance. Recognizing the exception established in *City of Dallas v. Rosenthal*, 239 S.W.2d 636 (Tex.Civ.App.–Dallas 1961, writ ref'd n.r.e.), the Court finds that the *Superwash* context “presents an occasion to clarify the exception and reiterate its limited applicability.”

Roberts v. Haltom City, 543 S.W.2d 75 (Tex.1976) and *City of San Antonio v. Schautteet*, 706 S.W.2d 103 (Tex.1986) were both cases involving notice of claim provisions. Along with the land use case of *City of Austin v. Garza*, 124 S.W.3d 867 (Tex.App.–Austin 2003), they fall into the category of “misleading statements” by City officials, inducing a

¹ *Super Wash, Inc. v. City of White Settlement*, 131 S.W.3d 249 (Tex.App.-Fort Worth 2004), review granted (Mar 11, 2005), judgment reversed by *City of White Settlement v. Super Wash, Inc.*, 49 Tex. Sup. Ct. J. 404, 2006 WL 508628 (2006).

² *City of Dallas v. Vanesko*, 127 S.W.3d 220 (Tex.App.-Dallas, 2003), rehearing overruled, review granted (Dec 17, 2004), judgment reversed by *City of Dallas v. Vanesko*, 49 Tex. Sup. Ct. J. 487, 2006 WL 889722 (Tex. 2006).

party to act to its own detriment in a way that benefited the City. The Court also notes that there was no remedy other than estoppel in those cases.

Noting that Appellee Superwash had not sought a variance or repeal of the ordinance, and that other remedies remain, the Court found estoppel inappropriate. The Court also concluded that an increased tax base for the property was too tenuous a benefit for the City to support estoppel.

Most importantly, *Superwash* evaluates and applies the rule of avoiding interference with governmental functions. If “estoppel will affect public safety, bar future enforcement of the ordinance, or otherwise impede the City’s ability to serve the general public,” then estoppel is not appropriate. *Id* at *5. Finding that the application of estoppel would preclude the City from its chosen method of enforcement and remove some of its discretion in determining how best to protect public safety, the Court reversed the summary judgment decision of the trial court. The Court disagreed there was a fact issue about interference with governmental functions, and declined to uphold the district court on the basis of its evidentiary finding, deciding instead that interference with governmental power existed as a matter of law.

Superwash still leaves open the arguments about misleading statements by public officials, and the existence of a benefit to the “government,” but its imprimatur on *City of Hutchins v. Prasifka* is critical. Its emphasis on the standard for interference with governmental functions clearly moves the threshold back in the direction of governmental authority. The case reaffirms that the exception is narrow indeed.

Vanesko also involved a building permit issued in error, but in the context of City staffs special “extensive plan review” of the submitted plans to assure compliance, for which the owners paid an extra fee. The roof was just over 8 feet higher than permitted, and 2 feet higher than the maximum the inspector thought was applicable. This case involved especially difficult facts in terms of a virtually completed improvement and extremely high cost of retrofitting compliance.

The City staff recommended a variance application to the Board of Adjustment, which was supported by 80% of the neighbors, and apparently not opposed by anyone. The Board of Adjustment denied the variance under a provision which expressly precluded variances “to relieve a self created or personal hardship, nor for financial reasons only, ...” This case holds that decisions by a Board of Adjustment may not be set aside because courts disagree with the equity or fairness of the decision. The case concludes that the restrictions in the ordinance sharply curtailed the Board’s authority, and that the showing of “illegality” required under the special statutory remedy of review by certiorari in the district court had not been met. *See* TEX. LOC. GOV’T CODE. ANN. §211.011(a)(Vernon 1999). The Court also found it irrelevant that an assistant city attorney advised the Board that they could not consider: (1) the erroneous issuance of the permit; or (2) that the structure was already built in reaching a decision.

The opinion distinguishes the outcome in prior cases, namely *Board of Adjustment, City of Corpus Christi v. McBride*, 676 S.W.2d 705 (Tex. App.–Corpus Christi 1984) and *Town of South Padre Island Texas ex rel. Bd. Of Adjustment v. Cantu*, 52 S.W.3d 287 (Tex. App.–Corpus Christi 2002), because of the scope of the Board’s authority in those cases. City attorneys should review their variance procedures and address these strategic choices on code and ordinance provisions with their clients. If the ordinance permits broader discretion in granting a variance, in extreme cases property owners may be entitled to relief.