REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL
APPEAL FROM DECISION OF THE BOARD OF ZONING APPEALS - VICTOR AND IRENE VILCHEK (C-19446)

Victor and Irene Vilchek have appealed to the City Council the denial of their request for a fence variance by the Board of Zoning Appeals. The appeal was continued by Council because of questions regarding delays in the filing of the request for variance and the subsequent action. The issues regarding these delays were referred to the City Attorney by Council.

The evidence before the Board of Zoning Appeals indicates that the Vilcheks installed the fence in the late 1970's without a building permit or encroachment permit. The fence was constructed in part in the public right of way. The fence is overheight and fails to conform to zoning requirements. After a complaint was initiated in 1981, the Vilcheks applied for a fence variance. The application was accepted on January 7, 1983. No action was taken until January 9, 1987 due to the applicant's failure to submit plans. The Zoning Administrator then denied the requested variance without a hearing. Applicants appealed the Zoning Administrator's decision. The Board of Zoning Appeals unanimously affirmed the Administrator's denial of the variance on March 18, 1987. Applicant appealed the Board's decision to the Council pursuant to Section 101.0504-C of the San Diego Municipal Code. The Council's initial review on June 1, 1987 raised questions on certain issues propounded by applicant. Our review of the issues follows, insofar as they may arguably relate to any alleged legal impediment to enforcement action by the City.

The applicants alleged that the City is barred from enforcing the zoning ordinance because of the legal doctrines of either laches or estoppel. Applicants first claim that due to the delay between discovery of the violation and the subsequent enforcement action, the City is now barred by a statute of limitations.

Applicants next argue that since the Building Permit office had informed them that no permit was required and had failed to advise them that zoning restrictions might still apply, the City is barred on collateral estoppel grounds from enforcement.

The Zoning Administrator's position is that the continuing violation of the zoning ordinance prevents the running of any statute of limitations. Furthermore, no City office has an

affirmative duty to advise applicants of potential building or zoning requirements apart from the requirements of their own department. It is the duty of the applicant to ensure that all building and zoning requirements are met.

The applicant cited Fontana v. Atkinson, 212 Cal.App.2d 499 (1963), for the proposition that the statute of limitations sometimes applies to cities. However, that case also clearly holds that a continuing violation does not toll the statute of limitations, Id. at 509, and that no vested right to violate a City ordinance may be acquired by continued violation. Ibid. Previous nonenforcement, due in part to applicant's failure to submit the required plans needed to rule on the variance request, therefore does not now prohibit the City from enforcing the ordinance.

Second, applicants have not substantiated their charge that the City is sufficiently culpable to estop the City from enforcing the ordinance. A City will only be estopped from enforcing an ordinance against a party when the city's actions are found to be sufficiently culpable. Fredrichsen v. City of Lakewood, 6 Cal.3d 353 (1971). The culpable conduct requires a City to negligently supply a party with inaccurate information upon which the party then reasonably relies in good faith to its detriment. Id. at 358. The information supplied must be procedural or substantive in nature and more than merely the informing or answering of a party's questions. Fullerton Union High School District v. Riles, 139 Cal.App.3d 369, 380 (1983). The information must also be inaccurate. Id. at 380.

The applicant further cited Donovan v. Santa Monica, 88 Cal.App.2d 386 (1948), to support the allegation of an estoppel against enforcement of the ordinance by the City. That case holds that estoppel is only invoked against a City in rare and unusual circumstances. These rare and unusual circumstances have been found to exist only where a formal report was made to the board of supervisors, determining that the City had no claim or title to property, Los Angeles v. Cohn, 101 Cal. 373 (1894), or where a City disclaimed title to land, City of Long Beach v. Mansell, 3 Cal.3d 462 (1970). Then, the courts have applied

estoppel against a City. No act in affirmation of applicant's building of his fence in violation of zoning requirements has ever been taken by the City in this case. Therefore the City cannot be barred on estoppel grounds.

In the existing case, applicants received accurate and complete answers to all questions asked, but failed to inquire what other ordinances applied. This failure was part of

applicant's affirmative duty and contributed to the present problem. The applicants are trying to equate a negligent advisement of inaccurate information with an accurate answer to a specific question which applicant interpreted as a blanket approval.

We therefore conclude that the City is not precluded from requiring the applicant to correct the violation. However, the City Council has the discretion to grant or deny a variance should it decide to grant a hearing on the appeal.

Respectfully submitted,
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RC-87-20