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## SHOPPING CENTERS

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### Was the zoning officer wrong? A guide to equitable relief

Nobody is perfect. Everybody makes mistakes, even zoning officers. Sometimes a permit is issued in error. Sometimes an ordinance interpretation ends up being incorrect. Sometimes that permit or interpretation is challenged by a neighbor. But what if you relied on that permit or that interpretation and started your project? What is your recourse? The Commonwealth Court of Pennsylvania recently reiterated its position on this area of the law in *Daniel A. Vaughn and Cheryl T. Vaughn v. Zoning Hearing Board of the Township of Shaler, Township of Shaler, Anthony and Roseanna Febraro*, 947 A.2d 218 (April 2, 2008).

In *Vaughn*, the Febraros wanted to construct a wall along the rear of their property. The Zoning Officer, after meeting with the Febraros at the property multiple times and reviewing the plans advised the Febraros that it was his opinion that no permits were required. The Febraros confirmed that opinion to the Zoning Officer in writing. Construction of the wall began on November 18, 2003 and was essentially completed on November 25, 2003, with only a cap and a fence remaining to



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be installed. Their neighbors, the Vaughns, complained to the Township about the wall and a stop work order was issued by the Township manager in December, 2003. After the Zoning Officer advised the Township manager that no permit was required, the Vaughns filed an appeal to the Zoning Hearing Board ("ZHB") in January, 2004, arguing that the wall violated the zoning ordinance. Meanwhile, the Febraros finished the project. The Febraros paid \$27,987 to install the wall and \$5,587 for the cap and the fence. If required, it would cost the Febraros \$20,000 to remove the wall.

Instead of continuing with the litigation initiated by the Vaughns, the Febraros applied to the ZHB in 2006 and requested a variance to permit the wall, arguing that they were entitled to a variance

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by estoppel because they had relied on the Zoning Officer's determination prior to the commencement of construction. The ZHB granted the variance by estoppel. The trial court reversed, finding that the ZHB did not have jurisdiction to grant equitable relief.

The Commonwealth Court upheld the ZHB's decision and confirmed the jurisdiction of a zoning hearing board to grant equitable relief. The court stated that "Pennsylvania courts have held for decades that equitable relief is available in zoning cases to rectify inequities created by a landowner's good faith reliance on government action which results in the expenditure of substantial unrecoverable funds by the landowner ..."

There are three related theories of equitable relief in cases such as these, variance by estoppel, vested rights and equitable estoppel. Each requires that the landowner have

acted in good faith and relied to its detriment on the actions or inaction of the municipality. That reliance can be evidenced by the expenditure of significant funds. The landowner must have "clean hands," his actions based upon the innocent belief that what he has done was permitted. Also, the municipality's subsequent enforcement of its ordinance after the landowner has acted in reliance must create hardship on the landowner, such as the loss of the monies expended on the project. The Commonwealth Court in *In re Kreider*, 808 A.2d 340 (2002), noted a variance by estoppel is usually found where "there has been municipal inaction amounting to active acquiescence in an illegal use", vested rights "where the municipality has taken some affirmative action such as the issuance of a permit" and equitable estoppel "where the municipality intentionally or negligently

misrepresents its position with reason to know that the landowner would rely upon that misrepresentation." Often, as the Court in *Kreider* pointed out, the facts that warrant equitable relief combine elements of two, or even all three, of these categories and "to a large extent, the different labels impose an analytical rigidity that is not helpful."

While the granting of such equitable relief is never guaranteed, with the analysis by the court in these situations being very fact sensitive, landowners can take comfort in knowing that, in the interest of fairness and under the right circumstances, the initial error does not have to result in the revocation of a permit or removal of improvements.

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