ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION

DIVISION II
No. CA08-68

DRAGAN VICENTIC and THE MEDITERRANEAN TRUST APPELLANTS	**Opinion Delivered** SEPTEMBER 3, 2008
V.	APPEAL FROM THE GARLAND COUNTY CIRCUIT COURT [NO. CV-07-30-1]
	HONORABLE JOHN HOMER WRIGHT, JUDGE
CITY OF HOT SPRINGS, ARKANSAS APPELLEE	AFFIRMED

DAVID M. GLOVER, Judge

On January 12, 2007, appellee, City of Hot Springs, filed its petition for mandatory injunction, contending that appellants, Dragan Vicentic and the Mediterranean Trust,[1] were parking, storing, and/or selling motor vehicles on certain designated property in violation of a Hot Springs zoning ordinance. At a hearing on the petition, appellant denied that he was in violation of zoning ordinances because he had followed the advice and instructions of the planning director for the City of Hot Springs and had combined the two properties into one with the larger portion of the land zoned C-4, which allows storing and selling vehicles. On September 25, 2007, the trial court entered an order granting appellee's petition for mandatory injunction. Appellant raises two points of appeal: 1) estoppel, whether classified

[1]As the Mediterranean Trust is an entity created by Mr. Vicentic, for ease of reference, we will simply refer to Mr. Vicentic as the appellant.

as judicial or promissory, prohibited the City of Hot Springs from enjoining the appellant from selling and storing automobiles and other vehicles on his property, 2) appellant's use of the lands in question was proper in view of the existence of a split-zoning provision in the Hot Springs Code of Ordinances. We affirm.

Background

The facts of this case are essentially undisputed. There are two contiguous tracts of land involved in this case: 1) one tract located in the Holley subdivision, consisting of approximately 7.55 acres, was conveyed by Vicentic to the Mediterranean Trust by deed dated February 4, 1997, and is zoned C-4 (the "Holley tract"); 2) the other tract, consisting of lots 5, 6, 7, and 8 of Block One of the Roseland Subdivision, was conveyed by Vicentic to the Mediterranean Trust by warranty deed dated May 10, 2004, and is zoned R-4 (the "Roseland lots"). Permitted uses in R-4 areas do *not* include the selling or storing of automobiles. C-4 areas *do* permit such uses. Appellant stores and sells vehicles on *both* tracts of land.

On August 18, 2004, appellant was cited for violation of a local zoning ordinance. In early 2005, he was found guilty of that violation in district court. By letter to the district court dated February 14, 2005, Jerry Raetz, the city planning director at that time, wrote:

> Mr. Vicentic offered a revised plat of this property for my review reversing all parcels to acreage. The plat being in order, I signed it in acceptance of being in compliance with our subdivision and zoning codes. Mr. Vicentic is now able to file this plat with the proper county authority for recording purposes. *Once filed and recorded, it is my contention that the parcel does meet the standard of our zoning code for use as per the majority area zoning.* [Appellant's Exhibit No. 2]

(Emphasis added.) A February 16, 2005 entry in the "judgment transcript" provided:

RECEIVED LETTER FROM JERRY RAETZ THAT DEFT HAS HIRED AN ENGINEERING FIRM TO PREPARE DOCUMENTS ABOUT ISSUE OF ZONING
PER CITY ATTORNEY (ALBRIGHT) – – PROPERTY HAS BEEN REZONED
CODE APPEARS – – 25/C
APPEAL BOND 125 CASH [Appellant's Exhibit No. 1]

It was two years after the above district-court action that the City filed its petition for mandatory injunction that has given rise to the instant case. Appellant Vicentic relies upon the district court action in contending that the City should now be estopped in the circuit court action from claiming that he was in violation of the zoning ordinance under either a theory of judicial estoppel or promissory estoppel. He claims that he combined his two tracts of land into one tract, and the City of Hot Springs, acting through its duly authorized representative and agent, acknowledged that he had come into compliance with the Hot Springs zoning ordinance. Specifically, appellant contends that because the larger Holley tract was zoned C-4 and because he combined it with the smaller Roseland lots into one contiguous platted piece of property, the zoning which applied to the larger portion would apply to the entire tract.

Hearing on Petition for Mandatory Injunction

Three persons testified at the hearing on the City's petition for mandatory injunction. Kathleen Sellman, Director of the Hot Springs Planning Department, explained that appellee's Exhibit No. 1 was a deed for the Holley tract and that appellee's Exhibit No. 2 was a separate deed for the Roseland lots. She pointed out that Exhibit No. 2 showed appellant's Roseland lots are directly north of the commercial development that appellant owns as the Holley tract.

She stated that an aerial photo showed cars parked on the Roseland lots — a use not permitted in this R-4 zone.

Ms. Sellman differentiated the situation presented by appellee's Exhibit Nos. 1 and 2 from the situation contemplated by city ordinance 16-2-38. According to her, ordinance 16-2-38 contemplated a situation where the City would take action legislatively that would have a broad application to more than one situation in the City, such as adopting a new zoning map. As she explained, the only way zoning can be amended is by ordinance after public notice, public hearing, and findings of fact. She thereby rejected the opinion expressed by Mr. Jerry Raetz — her predecessor — in his February 14, 2005 letter to the district judge.

Ms. Sellman testified that the due-process procedure she follows in the planning department when a change in zoning is implemented is 1) public notice is required fifteen days in advance of a hearing to change zoning; 2) public notice goes to all owners within 200 feet of the subject property; and 3) public hearings are then held — first by the planning commission where findings of fact are made and a recommendation is given to the board of directors, and then by the board of directors, at which the commission's recommendations are either adopted or not in the form of an ordinance changing the map.

She further explained that, to her knowledge, the Roseland lots were in a platted subdivision and that the process by which a plat could be vacated was by the action of the board of directors prior to the time that any individual lots were sold by the owner. In this regard, she stated that the mere filing of a survey could not replat a subdivision.

Ms. Sellman stated that appellant's Exhibit No. 3 was a survey, not a plat, which did

not comply with the procedure to vacate a plat because there was no reference to the required board action. Sellman said that it was not clear whether such action would have been possible anyway because not all of the Roseland lots were included in the subject survey. She further explained that she perceived a conflict between ordinance 16-2-38(g) and other provisions she had described to the court.

She testified that Raetz's February 14, 2005 letter to the district judge did not change the zoning; that it established a standard under which a change of zoning could be considered and probably approved; and that she believed she had greater knowledge of the city ordinances than Mr. Raetz. She stated that she was aware appellant Vicentic had been advised by Mr. Raetz to proceed in the manner in which he did, but she did not agree with that advice.

Ms. Sellman testified that she was familiar with ordinance 16-[2]-38 and that appellant would not be able to rezone his Roseland lots pursuant to ordinance 16-2-38(g) because

> if following the requirements to change the zoning map, that section becomes a standard that the planning commission can consider in making their decision to amend the map. We cannot change zoning without an ordinance. And we also have a conflict, as you're explaining it, between the requirements to change the zoning code and this section, and we have a section in our code that clearly applies to situations where we have differing standards, and the higher standard is to be applied in that instance.

Jerry Raetz testified that he had formerly held the position of director of the planning and development department that was currently held by Ms. Sellman, and that he held that position for approximately five years. He stated that he recalled the property at issue in the instant case, and that he had written a letter (Appellant's Exhibit No. 2) to advise the district

judge that appellant had reverted all of his platted property to acreage, thereby making one parcel of ground. He explained that he was of the opinion, both then and now, that "once filed and recorded, ... the parcel [met] the standard of our zoning code for use as per the majority area zoning." He said that he communicated that opinion to the district judge and to Vicentic.

Mr. Raetz stated that he relied upon ordinance section 16-2-38(g) in reaching his opinion. He also acknowledged that when he was the planning director, he told Vicentic that if he would have his property surveyed and a plat filed of record, that he would be in compliance with the laws of the City of Hot Springs and the city ordinances regarding the property that is in dispute. He said that appellant's Exhibit No. 3 was the plat and survey that he advised Vicentic to have prepared at his own expense and to then file that plat with the county, not the city.

Mr. Raetz showed where part of the documents said, "approved by the Hot Springs Planning Commission, date, and place for the date, and my signature." He testified that he did not believe that the documents were ever approved by the Commission or even went before the Commission because "Reversion to acreage, at that time standard practice was when it met all the standards of the subdivision code, for me to sign it and it was ready to file – – be platted – – or filed, excuse me. But it is stamped approved by the Hot Springs Planning Commission, that's the stamp we used on each and every plat to be filed." Mr. Raetz identified appellant's Exhibit No. 1 as the judgment transcript in Docket No. 2-16-05, which references portions of his letter to the district judge.

On cross-examination, Raetz further explained that he formed his opinion that ordinance section 16-2-38(g) applied to the property issue at hand because there were two zones on adjacent parcels. He said his opinion would not change even if the parcels were purchased at different times. He acknowledged that:

> Down at the bottom of the page in this book where it has the editor's note regarding – – it says, "Section 2 of the ordinance number 5158, passed 2/17/03." That was during my tenure there. It goes on to say, "Adopted the official zoning map and provides for the amendments thereof. Amendments are accomplished by ordinance in accordance with 16-2-11."
>
> So, in order to have a zoning change, one would have to comply with section 16-2-11. That's what that reads. But 16-2-11 goes into the public notice, and the application, and the hearings and the recommendations to the boards, and even an appeal to this Court, if someone's not happy with the results at the board level. I would think it describes the entire process, yes.
>
> . . . .
>
> It is required to make a plat anytime you subdivide, that the contiguous subdivisions be listed within that survey. But that's not a subdivision. This is a vacation of a plat.
>
> I should be familiar with 16-4-9, regarding the process that one follows in the vacation of a plat. I'm sure I was familiar with it at one time. I do have the Code in front of me. I have read the requirements for a vacation of a plat and I am familiar with that. It doesn't appear that it has changed at all since the time I was with the City. I don't see anything in here that requires that there be an action by the board of directors, but there possibly could be.
>
> I did just say that this wasn't a re-subdivision. I said that a plat is required when you're subdividing property and that this wasn't a subdivision, that this was a vacation. And once again, I'm not familiar enough with this to get you to the exact terminology. We were looking at reversion to acreage of the property at that time. I cannot tell you if the County Court is the only entity that has the authority to revert to acreage.

Upon examination by the trial court, Raetz stated that it was his opinion at the time

in question that *his* approval of "that plat" would revert a subdivision or a part of a subdivision to acreage. Raetz stated that he discussed the wording of ordinance section 16-2-38(g) with City Attorney Albright; that the ordinance allowed appellant "to legally do what the exhibits reflect"; and that if the City did not like the wording of the ordinance, they should change it.

Dragan Vicentic testified that before the petition for mandatory injunction was filed, he thought his property was in compliance with zoning regulations and that he had relied on Mr. Raetz's assertions. He stated that he had been in district court "over this exact proceeding"; that the earlier proceeding began with the City's code-enforcement department issuing him a ticket for using residential property for commercial purposes; that he defended himself in district court; that he conferred with Raetz regarding what he needed to do to avoid further problems; and that Raetz told him:

> Get a survey which removes the lot lines from the survey and just shows it as one complete parcel. ... [I]f you'll get that survey, I'll inspect it and I'll sign off on it and I believe that you're in compliance with 16-2-38(g) and at that point use it as commercial property because it's contiguous to [your] four acres.

Vicentic stated that he expended money and had a resurvey of the property done; and that he had the survey, appellant's Exhibit No. 3, recorded with the County.

Regarding appellant's Exhibit No. 1, the judgment transcript, Vicentic stated:

> I knew that the City Attorney had to agree with Mr. Raetz's letter and, also, I think Mr. Utsey was there from the code compliance department and he agreed also that I was in compliance. And in this case, they didn't come down and cite me again for the same violation. They did not take it through District Court. They just simply filed for a mandatory injunction here in circuit court and bypassed that. And up until then, I believed I was in compliance.

On cross-examination, he acknowledged that he had never applied for a conditional-use permit and that he had never had a hearing before the planning commission or the board of directors.

Upon examination by the trial court, Vicentic stated that he did apply for rezoning of his Roseland lots; that a condominium complex across the street opposed his effort and it was denied; that he then asked the planning director [Raetz] what he could do to utilize his property; and that prior to talking to Raetz someone had told him that there would be a provision in a new zoning law that would allow people who have commercial property and obtain residential property adjoining it to enable them to use the residential property as commercial property.

The trial court summarized its basis for granting the injunction as follows: 1) Mr. Raetz has no authority to sign off on a plat and revert subdivided lots to acreage, 2) this property has not been rezoned and cannot be rezoned in this fashion. We agree.

Standard of Review

In *Bilo v. El Dorado Broadcasting Co.*, 101 Ark. App. 267, 270-71, ____ S.W.3d ____ (2008), our court explained:

> This is a case in equity involving the issuance of an injunction, and our review is therefore de novo. *See generally Ark. Game & Fish Comm'n v. Sledge*, 344 Ark. 505, 42 S.W.3d 427 (2001); *Clark v. Casebier*, 92 Ark. App. 472, 215 S.W.3d 684 (2005). We review the trial court's decision to award injunctive relief for an abuse of discretion, *see United Food & Comm. Workers Int'l Union v. Wal-Mart Stores, Inc.*, 353 Ark. 902, 120 S.W.3d 89 (2003), and we review the court's factual findings leading to the issuance of the injunction under the clearly-erroneous standard. *See So. College of Naturopathy v. State*, 360 Ark. 543, 203 S.W.3d 111 (2005); *City Slickers v. Douglas*, 73 Ark. App. 64, 40 S.W.3d 805 (2001). A finding is clearly erroneous when, although there is evidence to support it, the appellate court, upon viewing the entire evidence,

is left with the definite and firm conviction that a mistake has been committed. *See Ligon v. Stewart*, 369 Ark. 380, ___ S.W.3d ___ (2007).

Estoppel

For his first point of appeal, appellant contends that Jerry Raetz, the former city planning director, told him what to do to come into compliance with the zoning ordinance; that he did what the director told him to do; that now the City wants to renege on its promise that he would be in compliance if he followed the director's instructions; and that the City should be estopped under either judicial or promissory estoppel from enjoining his use of his property to sell and store automobiles.

The City counters by arguing: 1) the Roseland lots have never been replatted; the lots in question remain a part of the Roseland subdivision and are still zoned for residential use; 2) the City's agent's approval of a new plat would be unauthorized and therefore *ultra vires* because only the board of directors can take such action; 3) neither judicial nor promissory estoppel applies in this situation.

1) Judicial Estoppel

In *Dupwe v. Wallace*, 355 Ark. 521, 533-34,140 S.W.3d 464, 472 (2004), our supreme court engaged in a lengthy discussion concerning the doctrine of judicial estoppel and its development in Arkansas. The court summarized its conclusions in the following passage:

> In light of the cited Arkansas precedent, and considering the path taken by foreign jurisdictions, we conclude that the following elements must exist to state a *prima facie* case:
>
> 1. A party must assume a position clearly inconsistent with a position taken in an earlier case, or with a position taken in the same case;

2. A party must assume the inconsistent position with the intent to manipulate the judicial process to gain an unfair advantage;

3. A party must have successfully maintained the position in an earlier proceeding such that the court relied upon the position taken; and

4. The integrity of the judicial process of at least one court must be impaired or injured by the inconsistent positions taken.

. . . .

The application of judicial estoppel requires a showing by the party seeking to invoke judicial estoppel that the petitioner acted fast and loose with the courts. *Barton, supra.* In other words, a petitioner's subjective intent in failing to list claims is at issue in Arkansas.

Appellant discusses the factors set out in *Dupwe* and explains why he thinks he satisfactorily established them:

In this case the City of Hot Springs, through both its planning director and city attorney, took the position that Mr. Vicentic had complied with the zoning laws when he combined the tracts into one, contiguous tract. The City of Hot Springs now takes an inconsistent opinion solely for the purpose of seeking relief which it knew, previously, was not available to it, *i.e.*, it is attempting to manipulate the judicial process to its advantage. Obviously, the City successfully maintained in the earlier District Court case that Mr. Vicentic was not in compliance *unless* he created one contiguous tract of land because it was not until Mr. Vicentic did so that the earlier case was dropped against him. Finally, the integrity of both the District Court and the Circuit Court are at issue when the City takes positions in one court in a criminal case that is inconsistent with the position in the civil court which seeks to shut down Mr. Vicentic's business. Judicial estoppel applied to this case and the City should not have been allowed to obtain relief.

We disagree.

Here, appellant contends that the City took the position that appellant "had complied with the zoning laws when he combined the tracts into one contiguous tract [and that it] now takes an inconsistent opinion solely for the purpose of seeking relief which it knew,

previously, was not available to it, *i.e.*, it is attempting to manipulate the judicial process to its advantage." One of the problems with his argument, however, is that the "City" never took the position that appellant had complied with the zoning laws. Any such position taken by Mr. Raetz would have been *ultra vires*, *i.e.*, beyond his authority. *Miller v. Lake City*, 302 Ark. 267, 789 S.W.2d 440 (1990) (city can be estopped to deny authorized acts of officers, but cannot be estopped by unauthorized acts). In addition, the district court judicial transcript is simply not enough of a record to establish that the city attorney took that position, and, even if he did, his action would have been *ultra vires* also. Thus, the actual "City" position has been consistent, *i.e.*, alerting appellant that he was violating zoning ordinances and taking him to court in an effort to stop the violations. Furthermore, no evidence was produced that would establish that the City had the intent to manipulate the judicial process to gain an unfair advantage. Still further, as noted by appellee, the City did successfully maintain an action against appellant in district court concerning the zoning violations, but never took the position that the lots in question had been properly re-zoned. Finally, without satisfactorily establishing the three prior elements, it is difficult to see how the fourth element could be established, *i.e.*, that the integrity of any court was impaired or injured by the City.

2) Promissory Estoppel

Appellant lists the four elements necessary to establish promissory estoppel: 1) the party to be estopped must know the facts; 2) the party to be estopped must intend that the conduct be acted on or must act so that the party asserting estoppel had the right to believe it was so intended; 3) the party asserting estoppel must be ignorant of the facts; 4) the party asserting

estoppel must rely on the other's conduct and be injured by that reliance. He contends that all four elements are present in the instant case, but the only one he addresses at length is detrimental reliance: "Mr. Vicentic proved this element by virtue of the acts he undertook to come into conformity with the zoning laws as per the instructions of the then planning director and as acknowledged by the City Attorney." In addition, one of the cases that he relies upon, *Miller v. Lake City, supra*, has been noted previously in this opinion and does not support his position because, while estoppel can be applied against a city with respect to the *authorized* acts of its officials, it cannot be applied with respect to their *unauthorized* acts. Again, the acts relied upon by appellant were *not* authorized. We conclude that appellant established no basis for applying the doctrine of promissory estoppel to the facts of this case.

Zone-Splitting

For his remaining point of appeal, appellant contends that the use of the property in question was proper in view of the existence of a split-zoning provision in the Hot Springs Code of Ordinances. Appellant acknowledges that the ordinance section he relies upon, § 16-2-38(g), has been repealed; however, he contends that it was in effect during the time in question and that it applied to his situation. He contends that the trial court made two errors that serve as a basis for reversal of the mandatory injunction: 1) the trial court erred in reaching the conclusion that the Roseland lots still exist as separate lots; 2) that even if those lots still technically exist, appellant availed himself of a specific ordinance that allowed him to combine the two tracts and to use the zoning for the larger tract to apply to the entire tract. We do not agree with either basis.

1) The lots

With respect to the Roseland lots, it is clear that appellant did not take the necessary steps to vacate the original plat, and that those four lots are still lots, and not acreage. City ordinance 16-4-9, Vacation of Plats, provides in pertinent part:

> (a) Any plat or any part of any plat lying within the city may be vacated by the owner at any time *before the sale of any lot therein*. Vacation of a plat shall be subject to the *approval of the board of directors*. The board of directors may reject any proposed plat vacation which abridges or destroys any public rights in any public use areas, improvements, streets or alleys. Any plat lying outside the city limits and within the extraterritorial jurisdiction may be vacated by action of the appropriate county authority.
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> . . . .
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> (d) *When lots have been sold*, the plat may be vacated in the manner established herein, *provided the owners of all lots join the plat vacation application*.

(Emphasis added.) Thus, not only did appellant not take the appropriate steps, the approval for what he was trying to do came from the city planning director, *not* the board of directors. On this point, to the extent the city planning director gave such approval, he was clearly without authority to do so.

2) Ordinance 16-2-38

This ordinance provided in pertinent part:

> (g) Where a parcel, lot, or development site is divided into two or more areas by a zoning district or other boundary line the following applies:
>
> (1) The subject rules shall be applied to each section of property separately; or
>
> (2) At the owner's discretion, rules governing that portion of the largest area of the parcel or lot, or development site shall be applicable to the entire property.

As the trial court explained, "The ordinance in question provides, in my opinion, that if a zoning line cuts through an existing lot, that you can – – the owner can apply the majority zoning to the entire tract. But you cannot bootstrap property into a new zone and bypass the rezoning procedures in this fashion." We agree with the trial court's construction.

The City summarizes the point in its brief:

> This ordinance was enacted in an attempt to correct any zoning issues caused by the original zoning map. The city directors believed that some arbitrary zoning lines might split individual's property and this ordinance was enacted to correct these possible issues. The ordinance was not intended nor does it apply to the case at hand. Appellants purchased the first tract of land in February of 1997. The second tract of land was transferred to appellant's trust in May of 2004. It is clear from these deeds presented at trial that the city did not split appellant's property with a new zoning of the property. Appellants purchased a parcel of property knowing it was zoned for residential use, rather than a commercial use. As the rule clearly states, where a parcel, lot, or development site is divided ... at the owner's discretion the rules may be applied in the owner's choice. Appellant's property was not divided, it was part of two separate subdivisions. The lots in question are part of the Roseland Subdivision and the larger and older piece of property is part of the Holley Subdivision. Thus, the City did not arbitrarily split appellants' property.

The City's interpretation makes much more sense than appellant's interpretation. Application of the ordinance in the manner urged by appellant, *i.e.*, solely between Vicentic and the city planning director, with no notice to anyone else and no approval by the commission/board, is legally invalid as an *ultra vires* act by the planning director. The stamp of approval on the survey was clearly a rubber stamping by the planning director, with no real commission approval. And, as the City noted, ordinance 16-2-33 provides: "In the case of conflict between these regulations and others in force in the planning area, the most restrictive standard shall apply." That is, in effect, what the trial court did.

In summary, we find no clear error in the trial court's factual underpinnings and no

abuse of discretion in its issuance of the injunction.

Affirmed.

BIRD and MARSHALL, JJ., agree.