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## **I. INTRODUCTION**

This is a personal injury case wherein Plaintiff/Respondent Lisa Gates (hereinafter Gates) slipped, fell and was injured on residential real property owned by Defendant/Appellant, Port of Kalama (hereinafter the Port). The real property was being shown to Gates by the Port's agents/managers, co-defendant LAM Management Inc. dba Allen & Associates Property Management (hereinafter LAM Management), for the business purpose of entering into a residential real estate tenancy.

Pursuant to RCW 4.96.020(2) prior to filing suit against the Port, Gates' attorney contacted the Cowlitz County Auditor to obtain the name of the agent for service of the pre-filing claim. Gates' attorney was repeatedly informed by the Auditor that no filing by the Port existed. Therefore, pursuant to RCW 4.96.020(2) further compliance is excused, in that there was no named agent for serving a pre-filing claim. Gates had no alternative but to file suit in reliance on the information provided from the Cowlitz County Auditor.

In the alternative, in retrospect the Port had received all the information necessary regarding Gates' claim. Gates had supplied the required information in a manner and at the direction of the Port more than

sixty days prior to commencing suit. The Port is not harmed by the continuation of Gates' claim.

Based upon the unique facts and circumstances of this case, Cowlitz County Superior Court Judge James Warne denied the Port's motion for summary judgment. Principles of equitable estoppel, and in the alternative, substantial compliance support the trial court's ruling.

## **II. RESPONDENT'S ISSUES**

### **A. Response to Assignments of Error**

The trial court found the unrefuted facts that Gates contacted the Cowlitz County Auditor and relied upon their express representations. The Court went on to conclude that the filing and service of the complaint thereafter was without first complying with RCW 4.96.020(3). In denying the Port's motion for summary judgment the court impliedly concluded that given the unrefuted facts, said compliance was excused or that Gates has substantially complied. Therefore, the correct issue before this court is:

**Taking all the facts in light most favorable to Gates, did the trial court abuse its discretion in denying the Port's motion for summary judgment.**

The trial court cited numerous documents and made eleven (11) findings in ruling that the unrefuted facts supported denying the Port's motion for summary judgment. CP 51. In so far as the court did not reference equitable estoppel or substantial compliance, the unrefuted facts and therefore the clear, cogent and convincing evidence supports the court's ruling. In the alternative, Gates requests the Court of Appeals to remand for further findings.

B. Respondent's Issues

The Port includes inaccurate factual statements and points taken out of context in setting forth its issues pertaining to the assignments of error. It is Gates' position that these statements are made for the sole purpose of setting up straw-man issues. For this reason, Gates sets forth her issues as follows:

1. Where the unrefuted facts are that Gates' attorney contacted the Auditor's office and was informed by the Auditor's office repeatedly that no agent had been listed pursuant to RCW 4.96.020(2), is it an abuse of discretion of the trial court to deny the Port's motion for summary judgment?

2. Given the unrefuted facts of this case taken in light most favorable to Gates, is a denial of summary judgment clearly erroneous and therefore an abuse of discretion?

3. Do principles of equitable estoppel apply requiring affirming the denial of motion for summary judgment?

4. In the alternative, do the unrefuted facts support a denial of the Port's motion for summary judgment based upon substantial compliance by Gates?

### **III. RESPONDENT'S STATEMENT OF THE CASE**

#### **A. Introduction**

The Port has not provided a fair statement of the case without argument as required by RAP 10.3(a)(5). Throughout its statement of the case, the Port makes impermissible argument, omits essential facts and mischaracterizes other facts. For these reasons, Gates sets forth her statement of the case.

#### **B. Facts Regarding Equitable Estoppel:**

On October 22, 2004, Gates met an agent of LAM Management at property owned by the Port for the business purpose of renting said property. CP 35. Gates was injured when she slipped and fell on slippery steps not

properly maintained by, and without any warning of their condition from the Port and their occupiers LAM Management. CP 35.

In October 2007 prior to filing suit, Gates', by and through her counsel, contacted the Cowlitz County Auditor to obtain the name of the agent for service of claims upon the Port<sup>1</sup>. CP 26 and 27. Gates' attorney was repeatedly informed by the Auditor that no agent for service of process for the Port had been recorded with the Cowlitz County Auditor. CP 26 and 27. Thereafter, in reliance thereon Gates filed and served her suit on the Port.

C. Facts Regarding Substantial Compliance:

Following her injury on October 22, 2004, Gates contacted the Port for the specific purpose of obtaining instruction on how to file her claim. CP 35. The Port specifically instructed Gates that all she needed to do was send a letter to the risk management department explaining the circumstances of the injury. CP 35. Gates complied with the Port's instruction by letter dated January 28, 2005. CP 35. Said letter was signed by Gates. CP 31. App. A.

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<sup>1</sup>In addition to the Clerk's representations, Gates' attorney contacted the Auditor twice, including going to the Auditor's office and having the Auditor cross reference their system by locating named agents for other local municipal corporations with similar names. CP 26. In addition, Gates' attorney sent experienced staff to hand search the records. CP 27. Gates' attorney verified the information prior to bringing Gates' CR 12(d) motion for preliminary hearing. CP 26.

As part of the claim filing, the Port requested a recorded statement from Gates and Gates hired counsel. CP 35. Gates provided a recorded verified claim to the Port under oath more than 2 years prior to suit. CP 34 & 35.

On August 10, 2007, Gates' attorney forwarded a letter to the Port supplementing the claim by stating the amount of damages claimed by Gates. CP 31. App. B.

D. Procedural History Response:

Gates relied on the Cowlitz County Auditor's representation that the Port had not recorded with said Auditor the name of an agent for service of claims under RCW 4.96.020(2). Therefore, Gates served her complaint on October 17, 2007. CP1. When no answer was forthcoming from the Port, Gates filed a motion for default. CP 10. Following the Port's answer filed on November 21, 2007, Gates filed a motion for preliminary hearing regarding the Port's defenses. CP 12 and 14. That hearing was originally scheduled for January 7, 2008. CP 15. On January 4, 2008, after first verifying the information and in seeking a declaration of the Auditor, Gates was first informed that the Port may have complied with the filing requirement. CP 26. The preliminary hearing was continued to January 14, 2008. Gates filed a verified claim with all the requisite information on

January 9, 2008. App. C. At the preliminary hearing on January 14, 2008, Cowlitz County Superior Court Judge James Warne reserved ruling for further briefing by the parties, setting the hearing for February 19, 2008. RP 1/14/2008 at 25-26 ll 14-25 and 1-2.

In the interim, the Port filed its motion for summary judgment on January 22, 2008. CP30. The hearing scheduled for February 19, 2008, and the hearing on the motion for summary judgment were combined to be heard on March 3, 2008. At that hearing, Cowlitz County Superior Court Judge James Warne denied the motion for summary judgment and denied Gates' motion to re-serve the Port. RP 3/3/2008 at 27 ll 20-24, CP 51. The Port then filed a motion for reconsideration which was denied. CP 44 and 56.

Without stating how, the Port impermissibly argues that allowing Gates' claim to go forward would significantly harm the Port. RAP 10.3(a)(5). Brief of Appellant (BA) at 7, ¶ 2. The Port goes on to miss-state Gates' position as waiver. Gates' primary argument is that given the unrefuted facts of this case the Port is equitably estopped to deny that Gates was excused from further compliance with RCW 4.96.020(3). Her alternative argument is supported by the facts as set forth above for substantial compliance.

Finally, at page 8 of its brief the Port omitted numerous unrefuted facts. Cowlitz County Superior Court Judge James Warne made eleven findings, only three of which are referenced in the Port's brief. CP 51. BA at 8-9. Those missing unrefuted findings include the fact that prior to filing suit, Gates's counsel contacted the Cowlitz County Auditor. CP 51 at 4 ¶ 3. That the Cowlitz County Auditor's record did not contain the filing required by RCW 4.96.020(2). CP 51 at 4 ¶ 4. Thereafter, in reliance upon the express representations of the Cowlitz County Auditor, Gates filed suit in the Cowlitz County Superior Court. CP 51 at 4 ¶ 5. Gates was not advised that the Port may have complied with the filing requirement until Friday, January 4, 2008. CP 51 at 5 ¶ 10.

#### **IV. ARGUMENT**

##### **A. Standard of Review**

In that this is a case of first impression, Gates believes the standard of review should be that standard adopted in other cases wherein equitable estoppel was applied against forms of the government. In *Kramarevcky v. DSHS*, 64 Wn. App. 14, 82 P.2d 1227 (1992), the court stated the standard of review as follows:

“An agency's determination that the elements of equitable estoppel have not been met presents a mixed question of law

and fact. *Coble v. Hollister*, 57 Wn. App. 304, 308-09, 788 P.2d 3 (1990). In reviewing administrative decisions, we apply a clearly erroneous standard to factual findings and review legal conclusions de novo. *Franklin Cy. Sheriff's Office v. Sellers*, 97 Wn.2d 317 , 324-25, 646 P.2d 113 (1982), cert. denied, 459 U.S. 1106 (1983). When conclusions of law are not supported by or are inconsistent with the findings, the findings control. *Mell v. Winslow*, 49 Wn.2d 738, 747, 306 P.2d 751 (1957); *Riley v. Sturdevant*, 12 Wn. App. 808, 812, 532 P.2d 640 (1975).”

In *Strand v. State of Washington*, 16 Wn.2d 107, 132 P.2d 1011 (1943), the Supreme Court of the State of Washington ruled at page 120 that:

“...it was clearly the responsibility of the state officials to determine what the facts were...”

Based on these cases, the standard of review is a mixed question of law and fact wherein the trial court should be reversed only if the decision was clearly erroneous. Furthermore, the burden shifts to the government to show that it complied with its duty to provide the correct information.

Based on the factual and procedural history as outlined above, together with the standard of review, the trial court’s decision denying the motion for summary judgment dated April 21, 2008, should not be reversed.

CP 51.

B. Equitable Estoppel Applies to Prevent the Port from Denying That Gates Compliance with RCW 4.96.020(3) is excused.

1. Gates complied with RCW 4.96.020(2).

It is the finding of the trial court on unrefuted facts and therefore clear, cogent and convincing evidence that prior to filing suit, Gates contacted the required governmental authority, the Cowlitz County Auditor, for the purposes of determining the Port's compliance under RCW 4.96.020(2).

That statute specifically provides as follows:

“... the identity of the agent and the address where he or she may be reached during the normal business hours of the local governmental entity are public records and **shall be recorded with the auditor** of the county in which the entity is located.”

.... “the failure of the local governmental entity to comply with the requirements of this section **precludes** that local governmental entity from raising a defense under this chapter.” (emphasis added)

The Auditor informed Gates' attorney that the Port had not complied with the filing requirements of RCW 4.96.020(2). CP 26. Gates confirmed this information with the Auditor. CP 26 and 27. Without a named agent, Gates could not serve the pre-claim and is therefore excused from that requirement under RCW 4.96.020(2). Gates can't be expected to do something that is impossible to do. In reliance upon the Auditor's

statements, Gates served suit on the Port. CP 51. The Port is equitably estopped from denying that Gates is excused from the pre-claim filing.

The Port states that Gates deliberately decided to disregard the notice requirements and therefore put herself at the mercy of the Port. BA at 18. The Port's argument ignores the question as to whom Gates was to serve. Was she to serve the claim on the President of the Port, each of the three Port Commissioners, or the executive secretary? In that no alternative is stated in RCW 4.96.020(2), such as serving the Secretary of State, should she have nonetheless served the Secretary of State? Or, should she have served all of the above and waited the sixty day period to file the complaint only to then find out she served the wrong individuals? Is Gates justified in relying on the government's representations? Can the government later set aside their representations at Gates' peril?

In that compliance was impossible, Gates is excused as provided in RCW 4.96.020(2). Clearly, principles of equitable estoppel apply to preclude Gates' loss of her claim against the Port and support the trial court's order denying summary judgment.

2. Equitable Estoppel against the State.

In *Kramarevcky v. DSHS*, 64 Wn. App. 14, 822 P.2d 1227 (1992) at

page 18-19 the court ruled:

The elements of equitable estoppel are:

(1) an admission, statement, or act, inconsistent with the claim afterwards asserted; (2) [an] action by the other party on the faith of such admission, statement, or act; and (3) [an] injury to such other party arising from permitting the first party to contradict or repudiate such admission, statement, or act.

*Shafer v. State*, 83 Wn.2d 618, 623, 521 P.2d 736 (1974). When a party seeks to assert equitable estoppel against the State, that party must also show (1) that equitable estoppel is necessary to prevent a manifest injustice and (2) that the exercise of governmental powers will not thereby be impaired. *Finch v. Matthews*, 74 Wn.2d 161, 175, 443 P.2d 833 (1968). Because equitable estoppel against the government is disfavored, each of the elements must be established by clear, cogent and convincing evidence. *Chemical Bank v. WPPSS*, 102 Wn.2d 874, 901 n.7, 691 P.2d 524 (1984), cert. denied, 471 U.S. 1065, 1075 (1985); *Mercer v. State*, 48 Wn. App. 496, 500, 739 P.2d 703, review denied, 108 Wn.2d 1037 (1987).

Here, the unrefuted facts, the facts found by the trial court and therefore the clear, cogent and convincing evidence is that all the elements of equitable estoppel are met. The statement is the statement of the Cowlitz County Auditor, which was relied upon by Gates. CP 51. The injury would be the dismissal of Gates' claim against the Port and potentially the dismissal

of her entire claim in that the Port was the owner of the subject real property. Said result would be manifestly unjust in that Gates justifiably relied upon the Auditor's statement. Finally, since the Port owns the subject real property in its proprietary capacity and was fully aware of Gates' claim, as later discussed herein, there is no prejudice to the Port by finding equitable estoppel, nor is the exercise of its governmental powers impaired in any fashion. Under the facts of this case, all five elements set forth in *Kramarevcky* are met.

In *Strand v. State*, 16 Wn.2d 107; 132 P.2d 1011 (1943), the Supreme Court of the State of Washington applied equitable estoppel against the Legislature of the State of Washington and the Game Commissioner for acts committed by a third governmental agency, the Public Lands Commissioner. Gates agrees with the analysis by the appellate court commissioner in the ruling granting review that *Strand* is instructive.

What happened in *Strand* is that in 1928 the chief engineer of the land commissioner's office apparently made a mistake and land was improperly sold and deeded to Einarsen. In 1941, the legislature passed an act which designated that tide lands in front of section 7 as public hunting grounds and withdrew them from sale as public lands. Thereafter, the game commissioner

attempted to classify the property as public hunting grounds and to post it as such. Einarsen and successors in title brought suit. The Supreme Court of Washington ruled at page 115 as follows:

“It is our opinion that the principle of equitable estoppel applies and precludes the state, at this late date, from claiming that its officials made a mistake in 1928 and that the land must revert to the state on that account. Respondent Einarsen, the grantee in the 1928 deed, relied on the acts and representations of the state officials that he had taken the proper steps and had done all that was necessary to obtain the property that was involved in this action.”

In not distinguishing between the different governmental entities involved (the Public Land Commissioner, the State Legislature and the Game Commissioner), the Supreme Court went on to rule at page 119-120 as follows:

“In this case, the duly authorized officials of the state executed a deed to Einarsen which was plainly intended to convey the property involved as attached tidelands, after having determined that the lands were in fact attached. The determination of this question was within the line of duty of the state's officials. In fact, the **commissioner was the sole person entitled to determine this question, and the fact that he delegated certain administrative duties to subordinates did not make the decision less his responsibility** (emphasis added).”

“**If the commissioner or his subordinates erred in determining the lands as attached, the state should not have the right many years later to come into a court of equity and set aside the acts of its officials, to the irreparable injury of**

**the citizens who acted in good faith and relied upon the assumption that the commissioner knew what he was doing** (emphasis added). *State ex rel. Washington Paving Co. v. Clausen*, supra; *Eagles v. General Electric Co.*, supra; *Walker v. United States*, 139 Fed. 409; *Ritter v. United States*, 28 F.2d 265. [*State ex rel. Washington Paving Co. v. Clausen*, 90 Wash. 450, 156 P. 554 (1916) ; *Eagles v. General Electric Co.*, 5 Wn. 2d 20, 104 P.2d 912 (1940)]

“Actual knowledge of the state's officials of the falsity of their representations was not necessary. It was their duty and responsibility to investigate and determine the nature of tidelands. The statute, as we have already indicated, placed that duty on the land commissioner..”

Based upon *Kramarevcky* and *Strand*, the law is startlingly clear.

When the governmental agency makes a representation that is relied upon by a third party to their detriment and the government does not show a specific harm, and no other remedy is available, then the government is estopped to deny the previous representation. It matters not that the representation was made by another branch of the government or by a subordinate.

What if an Auditor simply gave the wrong information and a Plaintiff served the wrong individual? The Port argues it has no authority over information that the Auditor provides to the public and cannot control the accuracy of that information. BA at 22. However, it is the Port that submitted the information and Gates has no ability to control what they submit for recording. The government should not be allowed to affect the rights of a

Plaintiff as against other parts of the government. As was determined in *Strand* the court did not distinguish between any of the governmental departments affected by its decision, but simply categorized them all as “the state” and applied equitable estoppel.

Although the *Strand* decision did refer to the length of time, that is not dispositive of the rationale. Just as in *Strand*, Gates relied upon the representations of the government. In her declaration filed January 10, 2008, deputy auditor Chenoweth stated “prior to that point [January 4, 2008], it was my belief no such designation had been recorded in the Auditor’s office”. CP 26 at 2 ll 13-14. Whether that belief was mistaken is immaterial in light of the *Strand* ruling that “Actual knowledge of the state’s officials of the falsity of their representation was not necessary. It was their duty and responsibility to investigate and determine...”. *Strand* at 119.

To rule otherwise invites claims of collusion between governmental entities to deny Plaintiff’s claims. The *Strand* analysis is instructive to prevent government in its totality from such conduct. It is the Port, not Gates, who is attempting to use the Auditor’s misrepresentation as a sword. BA 25. The Port is attempting to dismiss Gates’ claim as to them based on her reliance on the Auditor’s representations. To accept the Port’s analysis would

bring in jeopardy all claims against municipal corporations under RCW 4.96 et seq. Plaintiffs would not be able to rely on the auditor's office and would have to serve everyone who could possibly be the agent for service of claims. Municipal corporations could file different agents on a regular basis, making it difficult for the Auditor to keep track and report accurately the agent for service of process. Chaos would reign until the legislature passed a statute similar to RCW 4.92.100 where claims against the state are required to be served on a statutorily named entity.

The Port attempts to distinguish *Strand* by claiming the case at bar does not involve affirmative actions taken by the state that will cause "irreparable injury to citizens who acted in good faith". BA 25. The action here is the statement by the Cowlitz County Auditor that no agent had been recorded. The elements of equitable estoppel include "an admission, **statement** or act (emphasis added)." *Kramarevcky* at 18-19. As found in *Strand*, equitable estoppel applies to the government in its totality. There will be irreparable injury if citizens who act in good faith on the Auditor's statements nonetheless lose their claims. The trial court's decision is not clearly erroneous and should not be reversed.

3. Gates Was Not Time Pressed but Was Provided No Choice.

The Port argues that Gates' eleventh hour decision, even if on misinformation, is not foundation for equitable estoppel. BA 20. In other words, its acceptable for the Auditor to provide misinformation if a Plaintiff is time pressed. This argument is unconscionable and not supported by the facts of this case or the law in this state.

It is unrefuted that Gates had ample time to file and serve the Port with her claim. At the time of her discussion with the Cowlitz County Auditor, the statute of limitations had not run. Filing a verified claim would have extended the statute of limitations sixty days. RCW 4.96.020(4). In addition, Gates was in the process of serving the claim against co-defendant LAM Management. CP 1. That also had the effect of extending the statute of limitations. See *Bosteder v. City of Renton*, 155 Wn.2d 18, 117 P.3d 316 (2005). Gates had no alternative but to rely upon the Cowlitz County Auditor's representations as repeatedly confirmed by her counsel and counsel's staff and file and serve the complaint.

The Port argues that 83 days after filing the complaint the Plaintiff filed a verified claim, on January 9, 2008. BA 14. Although factually correct, that statement is deliberately misleading. It ignores the facts that the

filing of the verified claim occurred three business days after being notified by the Cowlitz County Auditor that the Port may have, after all, complied with RCW 4.96.020(2). Nevertheless, that filing of the claim occurred within the statute of limitations in that it occurred within the reasonable time limit for adding additional defendants under *Bosteder*. Furthermore, this shows Gates' ability to comply when given the correct information.

At the hearing on March 3, 2008, the court asked the Port, "what if the Auditor refused to give the information?". RP at 12 ll 11-17. Gates' attorney asked, "what if the Auditor gave the wrong information?". RP at 15 ll 12-13. As part of its ruling, the court went on to adopt the rationale of *Bosteder* when it stated:

"If it's tolled when you have service on one party, why shouldn't it be tolled when the auditor gives you bad information? I guess that's another reason to toll the statute. It just seems to me a better reason." RP 03/03/2008 29 ll 2-6.

Tolling the statute to allow things to be done in the order they should have been done is appropriate, given the misrepresentation by the Cowlitz County Auditor. Furthermore, the Port is not harmed by the application of equitable estoppel. The Port received all the relevant information regarding Gates' claim. CP 35. In applying the rules as set forth in RCW 4.96 et seq the

trial court did not commit either obvious or probable error and the trial court's decision should not be reversed.

The Port cites *Fitzgerald v. City of Bangor*, 1999 ME 50, ¶ 15, 726 A.2d 1253, 1256 (1999) as being analogous. App. G. It is not analogous. In *Fitzgerald*, at page 1254 the Supreme Judicial Court of Maine found:

Fitzgerald alleges that he had decided to pay the taxes on the Dakin's building because he had limited resources and because the Dakin's building was occupied by paying tenants, whereas the Freese's building was unoccupied. **He was aware that he would lose the Freese's building to the City** (emphasis added)."

Under Maine law, equitable estoppel cannot be applied against the government in tax cases. Specifically, the Court in *Fitzgerald* stated the rule as follows:

The rationale for the rule precluding the assertion of estoppel against the government in tax cases is to assure that no officer of government has the ability to interfere inadvertently with the government's fundamental sovereign power to tax its citizens. See *A.H. Benoit & Co. v. Johnson*, 160 Me. 201, 207-10 (1964). [*Fitzgerald* at 1256-1257] App. E.

However, the court went on to rule that:

The common law prohibition against the assertion of equitable estoppel against the government or its officials has been relaxed in recent decades, and **we have held unequivocally that application of equitable estoppel based on the discharge of governmental functions is not completely barred** (emphasis added). *Maine School Admin.*

*Dist. No. 15 v. Reynolds*, 413 A.2d 523, 533 (Me. 1980)  
[*Fitzgerald* at 1256-1257] App. H.

Here, we are not dealing with the taxing authority of the government and therefore, *Fitzgerald's* prohibition does not apply. The Maine court would apply the totality of the circumstances and look at the governmental function being discharged by that official or agency to determine if equitable estoppel applies. *Fitzgerald* at page 1256 citing *F.S. Plummer Co., Inc. v. Town of Cape Elizabeth*, 612 A.2d 856 (1992). App. F and G. Here in Washington where the Auditor is charged under RCW 4.96.020(2) with the duty of providing the information, Gates argues even under the Maine law equitable estoppel would support upholding the trial court's decision.

Trying to make the tax payers deliberate decision in *Fitzgerald* match Gates' requirement of going forward with her action, the Port argues that "...Gates failure to comply with the notice provisions of RCW 4.96.020 was not the result of her reliance from the misinformation from the Auditor (original emphasis)". BA 17. Such an argument flies in the face of the unrefuted facts and finding of the trial court. CP 51. Gates had no alternative. Without a named agent for service of claims, Gates would have had to guess as to whom to serve. Gates' act of filing and serving suit was in direct reliance on the Auditor's misinformation. CP 51. This is unlike the

decision the tax payer made in *Fitzgerald*, where he had consciously decided to lose one of his buildings to foreclosure. The fact that he lost the very building to foreclosure is consistent with his expectation. Here Gates' expectation was that the Port had no agent for filing claims. She acted in reliance on that expectation. Gates had no choice but to rely that the Port was precluded from raising defenses under RCW 4.96.020(2).

C. Sovereign Immunity Response

The Port states that Gates argues the misinformation provided by the Cowlitz County Auditor waived the Port's affirmative defenses. BA 21. The Port argues that such an analysis is troubling because it infringes upon their sovereign immunity. BA 21. Gates has not raised waiver. Gates' argument is that the principles of equitable estoppel, given the circumstances of this case, allow Gates' claim to go forward. As discussed later herein, the Port was, and had been for more than two years, fully aware of Gates' claim and therefore not prejudiced by the application of equitable estoppel. Furthermore, in that the Port owned the real property in its proprietary capacity no interference of governmental functions occurs by the application of equitable estoppel in these circumstances. There is simply no harm to the Port in allowing Gates' claim to go forward.

Without citing any cases or explaining its reasoning, the Port argues that *Strand* does not involve whether a governmental entities' sovereign immunity can be waived by an unrelated governmental agency. BA 26. However, *Strand* did decide that principles of equitable estoppel apply. In *Strand*, the Land Commissioner affected the rights of the State Legislature and the Game Commissioner to claim the real estate. Sovereign immunity simply did not apply to defeat equitable estoppel.

In *Shoop v. Kittitas County*, 108 Wn. App. 388, 30 P.3d 529 (2001), the court ruled at page 401-02 as follows:

“Kittitas County argues that the State’s sovereign immunity can be overcome only by a specific statutory grant of ‘jurisdiction’. Claim filing statutes are mandatory and compliance with them is a condition precedent to recovery, because **the State, in waiving its sovereign immunity**, has the right to prescribe limitations on suits brought against it (emphasis added). *O’Donoghue v. State*, 66 Wn.2d 787, 789-90, 405 P.2d 258 (1965). But neither *O’Donoghue* nor other cases cited by the County support the proposition that the Legislature, in granting the right to sue, thereby made a grant of jurisdiction; the cases do not use the word ‘jurisdiction’ and such an analysis would be inconsistent with *Miotke*.” [Miotke v. Spokane, 101 Wn.2d 307, 337; 678 P.2d 803 (1984)]

This is consistent with the trial court’s decision wherein the court stated:

No, let's talk about the sovereign immunity claim. Because it's not - - this is not a sovereign immunity claim. The immunity is immunity of the State. The Port is a subdivision of the State, and the Port has - - the Port doesn't - - the Port doesn't get to declare that it does or does not have sovereign immunity. It doesn't get to - - the State legislature says our following governmental institutions have or do not have sovereign immunity. The Port of Kalama does not have sovereign immunity on tort claims, they don't. That's what the legislature said." RP 03/03/2008 at 31ll 21- 32 ll 7.

In adopting RCW 4.96 et seq. the legislature gave up its sovereign immunity to allow claims against political subdivisions and municipal corporations. The whole point of the statute is to interfere with sovereign immunity. Furthermore, the Port owns the subject real property in its proprietary capacity and Gates' claim for personal injury damages does not interfere with any governmental functions. There is simply no issue with regards to sovereign immunity. The court's ruling that Gates' claim can go forward given the circumstances of this case is supported by principles of equitable estoppel, does not violate sovereign immunity and is not clearly erroneous.

D. In the Alternative, In Retrospect, Gates Substantially Complied with RCW 4.96.020(3):

The unrefuted facts support a denial of the Port's motion for summary judgment based upon substantial compliance by Gates. Although the trial

court found that Gates had not complied with RCW 4.96.020(3), Gates did comply with RCW 4.96.010. The last sentence of RCW 4.96.010(1) reads as follows:

**“The law specifying the content for such claims shall be liberally construed so that substantial compliance therewith will be deemed satisfactory.”** (Emphasis added)

In its brief on page 12-13, the Port cites *Schoonover v. State of Washington*, 116 Wn. App. 171, 64 P.3d 677 (2003) and *Shannon v. State*, 111 Wn. App. 366, 40 P.3d 1200 (2000), for the proposition that a claim must be personally verified. However, there are important distinctions between these cases and the case at issue here.

First, in neither *Schoonover* nor *Shannon* did the Plaintiff sign a claim. Here, the unrefuted facts and therefore the clear, cogent and convincing evidence is that the government (here, the Port) specifically instructed Gates on how to file her claim and she followed those instructions. CP 35. Unbeknownst to Gates’ attorney, Gates complied with the Port’s instructions by signing and sending a letter claim. CP 31 & 35. App. A. Based on her filing, the government investigated the claim, thereby representing that the claim had been properly filed. The government requested a recorded claim of Gates and Gates then hired counsel. CP 35. Gates supplied a verified recorded claim more than 2 years prior to

commencing suit. CP 34 & 35. The government received all information relating to Gates's claim, including verifying Gates' claim. CP 35. Thus, for more than two and a half years from the date of Gates' claim, over two years after the verified recorded claim (both as requested by the governmental entity), more than 60 days after Gates' attorney supplemented the damages requested, and only after the original statute of limitations had arguably run, did the governmental entity complain for the first time that the claim had not been properly submitted.

These distinctions are important because in the cases cited by the Port **only** the attorney signed the claim and no verified statement was provided. This is similar to the cases where no claim was ever filed. *Lewis v. Mercer Island*, 63 Wn. App. 29; 817 P.2d 408 (1991); *Woods v. Bailet*, 116 Wn. App. 658; 67 P.3d 511 (2003); *Andrew v. State of Washington*, 65 Wn. App. 734; 829 P.2d 250 (1992); *Coulter v. State of Washington*, 93 Wn.2d 205; 608 P.2d 261(1980). In that there was **no** compliance with the claim filing statutes, the Court rightfully dismissed the action. Such is not the case here. As directed by the Port, Gates signed and filed a letter claim. CP 31. App. A. As directed by the Port, Gates provided a verified recorded statement. CP 35. Gates' attorney supplemented the amount of damages more than 60 days

prior to commencing suit. CP 31 App. B. The Port had all the information on Gates' verified claim.

Next, the Port cites *Medina V. Public Utility District No. 1 of Benton County*, 147 Wn. 2d 303; 53 P.3d 993 (2002) for the proposition that claimants must comply with the time requirements of RCW 4.96.020(4). Gates agrees. However, this is not a time requirement case.

*Medina* went on to discuss substantial compliance law in Washington at page 316-17 as follows:

“Medina counters that substantial compliance is well established in Washington and should be applied when determining whether a party has met the statutory requirements of RCW 4.96.020(4). *See, e.g., Crosby v. Spokane County*, 137 Wn.2d 296, 971 P.2d 32 (1999) (in some circumstances jurisdictional requirements may be satisfied by substantial compliance); *Union Bay Pres. Coalition v. Cosmos Dev. & Admin. Corp.*, 127 Wn.2d 614, 620, 902 P.2d 1247 (1995) (substantial compliance may apply in cases involving service of process); *In re Saltis*, 94 Wn.2d 889, 896, 621 P.2d 716 (1980) (applies substantial compliance to subject matter jurisdiction service requirements); *Duschaine v. City of Everett*, 5 Wn.2d 181, 105 P.2d 18 (1940) (literal compliance with legislative and charter provisions respecting the presentation of claims for tort against a municipality is not demanded; only substantial compliance is required); *Davis v. City of Seattle*, 37 Wash. 223, 79 P. 784 (1905) (purpose of claim-filing statute was met so notice of claim found sufficient although not in strict compliance with statute); *Durham v. City of Spokane*, 27 Wash. 615, 68 P. 383 (1902) (sufficient compliance with notice claim statute where claim was presented to city clerk instead of city council).”

However, the very next paragraph in *Medina* states as follows:

However, where time requirements are concerned, this court has held that "failure to comply with a statutorily set time limitation cannot be considered substantial compliance" with the statute. *City of Seattle v. Pub. Employment Relations Comm'n*, 116 Wn. 2d 923, 929, 809 P.2d 1377 (1991); *Forseth v. City of Tacoma*, 27 Wn.2d 284, 297, 178 P.2d 357 (1947) ("there can be no 'substantial compliance' with the provision concerning the time within which a claim must be filed, except by filing it within that time"). The purpose of RCW 4.96.020(4) is to establish a period of time for government defendants to investigate claims and settle those claims where possible. Compliance with a waiting period can be achieved only through meeting the time requirements of the statute.

Here Gates complied with any applicable time requirements. With regards to substantial compliance of the other elements of the claim, it is clear that the five justices supporting the majority decision in *Medina* cited the substantial compliance cases in support. The dissent in *Medina*, at page 324 further stated as follows:

"As the court stated in *In re Saltis*, it is unjust to escape liability on a mere technicality. *In re Saltis*, 94 Wn.2d 889, 896, 621 P.2d 716 (1980). "[S]ubstantial compliance' with procedural rules is sufficient, because 'delay and even the loss of lawsuits [should not be] occasioned by unnecessarily complex and vagrant procedural technicalities.'" *Id.* (alteration in original). Substantial compliance is determined on the facts for each particular case. *Santore*, 28 Wn. App. at 327 [*In re Santore*, 28 Wn. App. 319, 623 P.2d 702 (1981)]. In this case, *Medina* substantially complied with RCW 4.96.020(4)."

As stated above, pursuant to the Port's specific instructions, Gates provided a claim by letter that was signed by Gates, described the circumstances which brought about the injury, described the injury, stated the date and place of the injury, identified other persons involved, and listed Gates's address and contact information, all in substantial compliance as provided in RCW 4.96.010(1). CP 31. App. A. Furthermore, Gates provided a verified recorded claim. CP 35. At that point, the Port had all the information required and made no objection to the form of the claim for over two years. The supplemental letter by Gate's attorney on August 10, 2007, supplied the amount of damages. CP 31. App. B. Gates had substantially complied. Supplementing a claim was supported in *Medina* where the court discussed that claimant's first claim. The difference in *Medina* is the first claim dealt with "property damage only" and was settled. See *Medina* where the court ultimately ruled:

"In this case Medina repeatedly specified that the 1995 claim was only for property damage to a vehicle. Thus, Medina's 1995 claim did not give the County the benefit of the waiting period to investigate the 1998 claim because no personal injury claims were made." *Medina* at page 310.

Here, the case at bar is distinguishable because the claim letter as directed by the Port and signed by Gates, the verified recorded statement

conducted by the Port and the supplemental claim letter by Gates' counsel all dealt with the same claim. Therefore, substantial compliance should be found under the analysis of *Medina*.

E. Verification of Claims Should Not Be Required Under RCW 4.96.020.

Although Gates substantially complied by providing a signed letter (CP 31; App. A) and a verified recorded claim (CP 35), Gates disagrees with Appellant's argument that RCW 4.96.020(3) requires verification. BA 13 fn 40. RCW 4.96.020 does not require personal verification. Inasmuch as *Schoonover v. State of Washington*, 116 Wn. App. 171, 183-184, 64 P.3d 677 (2003), is in opposition it should be overruled.

In creating the statute regarding procedures for filing claims and complaints against the government, the legislature created two separate categories: RCW 4.92 "Actions and Claims Against State" and RCW 4.96 "Actions Against Political Subdivisions, Municipal and Quasi-Municipal Corporations", and thereby created a distinction between the two.

RCW 4.92.100, states as follows:

"All claims **against the state** for damages arising out of tortious conduct shall be presented to and filed with the risk management division. All such claims **shall be verified** and shall accurately describe the conduct... (emphasis added)."

RCW 4.96.020(3) states as follows:

“All claims for damages arising out of tortious conduct must locate and describe the conduct...”

The second statute appears to be an exact duplicate of the first statute with the distinct difference that the second statute omits the first sentence regarding filing with the risk management division and it omits the statement “All such claims shall be verified...”.

In *Schoonover* at page 184:

“Here, although *RCW 4.96.020* **does not expressly require verification** of a tort claim against a local governmental agency, it does contain language from which we can **infer** such a requirement (emphasis added).

The problem with this analysis is that it contradicts with the legislative history of RCW 4.96.020. The statute applicable to claims against the state, RCW 4.92.100, was enacted in 1963. The “All claims shall be verified..” language was included in the original statute. The statute applicable to claims against municipal corporations was enacted in 1967, and had identical language stating: “All such claims shall be verified..” However, in 1993, the legislature amended the statute, removed that phrase, and replaced it with the language that is currently in the statute today. The bill from 1993 was HB 1218. App. D. From this history it is clear that the

legislature intended to remove verification from claims against municipal corporations.

There is a rational basis for having separate pre-claim filings requirements as between the state and municipal corporations. There are numerous municipal and local governmental entities that have varying degrees of contact with citizens. Having different claim filing requirements for actions against the State is rational and not a violation of equal protection. Local municipal corporations can include cities, towns, school districts, fire districts, port districts, mosquito districts, diking districts, public utility districts, library districts, cemetery districts and numerous others. Citizen claims for minor damages such as sewer backups or limbs falling on cars are resolved without representation. However, the State because of its sheer size, needs to have more formal requirements followed for citizens to perfect their claim. The worry is that the State will not be made aware of a claim and a default taken. Clearly, the legislature intended claims against local municipal corporations to go forward without the formality of verification. App. D.

*Schoonover* was an action against the state under RCW 4.92.100. As such, its discussion of actions against municipal corporations, RCW 4.96.020, is dicta. Due diligence after reviewing RCW 4.96, et seq. would

not necessarily lead to the discovery of *Schoonover* and the above ruling wherein the court was ruling on RCW 4.92.100. Is it rational to require a Plaintiff to review the statute relating to “Actions against the State” when their action is not against the state? RCW 4.92.100 is specific in that claimants against the state are put on notice that their claim “shall to be verified”, whereas claimants under RCW 4.96.020 are not, but need to “infer” such a requirement. *Schoonover* at 184. As argued by the Port here, accepting the *Schoonover* dicta elevates an unstated element that was deleted by the legislature to an absolute requirement. That contradicts legislative intent for substantial compliance as clearly stated in RCW 4.96.010 and contradicts the legislative intent of deleting the verification requirement. App. D. As such, that portion of *Schoonover* discussing RCW 4.96.020 should be reversed.

## **V. CONCLUSION**

The undisputed facts and circumstances of this case do not support a finding that the Superior Court of Cowlitz County abused its discretion in denying the motion for summary judgment. Gates attempted to comply with RCW 4.96.020 by contacting the Cowlitz County Auditor’s office. Gates relied on the Cowlitz County Auditor as required by RCW 4.96.020(2). The

Port failed to answer the question as to how or to whom Gates was to file a claim when she was instructed that no agent had been recorded with the Auditor's office. In the alternative, taking all facts in a light most favorable to the non-moving party, Gates substantially complied with RCW 4.96 et seq. Under these circumstances, the Superior Court has not committed obvious error or probable error. Based on the unrefuted facts, the trial court's decision is not clearly erroneous.

For all the foregoing reason, Gates respectfully requests the Court of Appeals Division II to affirm the trial court's order denying motion for summary judgment dated April 23, 2008, and affirm the trial court's order denying motion for reconsideration dated May 20, 2008. In the alternative, Gates requests the court to remand the action to the trial court for further findings.

Respectfully submitted this 6 day of November, 2008.

  
KURT A. ANAGNOSTOU, WSB#17035  
Of Attorneys for Respondent Lisa Gates

08 NOV 10 AM 8:52

CERTIFICATE OF MAILING STATE OF WASHINGTON  
BY \_\_\_\_\_

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 6<sup>th</sup> day of November, 2008, I caused to be mailed upon those listed below, in the manner indicated therein, a true and correct copy of the Brief of Respondent to which this certificate is attached.

Addressed to:

Delivered via:

Washington State Court of Appeals  
Division II  
950 Broadway, Ste. 300  
Tacoma, WA 98402-4454

USPS First Class Mail

Elizabeth Thompson  
2102 N. Pearl St., Ste 400, Building D  
Tacoma, WA 98406-2550

USPS First Class Mail

Dennis J. LaPorte  
Krilich La Porte West & Lockner PS  
524 Tacoma Ave. So.  
Tacoma, WA 98402-5416

USPS First Class Mail

Dated this 6<sup>th</sup> day of November, 2008.

  
\_\_\_\_\_  
JEANNE SKEIE

**Lisa A. Gates  
P. O. Box 706  
Kalama, WA 98625  
(360) 673-3054(h)/(360) 673-2752(w)**

---

January 28, 2005

Port of Kalama  
380 W. Marine Drive  
Kalama, WA 98625

**Attn: Risk Management Department**

Dear Sir or Madame:

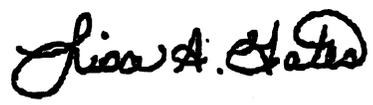
Please be advised that on October 22, 2004, I was shown the rental manufactured home you had for rent at Merz Rd/Old Pacific Highway (near the I-5 freeway and Kalama River Road) by Allen and Associates. I filled out an application to rent it.

While viewing the rental property on that date, I slipped and fell on the back stairs as I was leaving the property. The steps were wet and there were no anti-slip traction guards on the steps.

As a result of the fall, I have incurred medical bills for treatment and at this point I am still treating for my injuries. I have also been very limited in my ability to perform my employment duties, and at times unable to work altogether.

Please have your insurer contact me at the address above regarding my claim. Thank you for your assistance in this matter.

Very truly yours,



Lisa A. Gates

# DAGGY & ANAGNOSTOU, P.S.

---

P.O. BOX 1793  
1801 FIRST AVENUE, SUITE 4-A  
LONGVIEW, WASHINGTON 98632-8110  
(360) 425-6500

JOSEPHO. DAGGY  
KURT A. ANAGNOSTOU

August 10, 2007

Port of Kalama  
Attn: Stuart Shelby  
380 W. Marine Dr.  
Kalama, WA 98625

Lance Miller  
Registered Agent  
Lam Management, Inc., dba  
Allen & Associates Property Management  
830 Washington Way  
Longview, WA 98632

RE: Our Client: Lisa Gates  
Your Insured: Port of Kalama  
Your Claim No.: 183399  
Date of Loss: October 22, 2004

-----  
Dear Port of Kalama and Lam Management, Inc.:

I now have sufficient information to make a preliminary evaluation of the above-referenced case and to commence negotiation for a fair settlement. Please accept this letter and the attached information as a claim on the organization each of you represent as agents. This letter and the information contained therein are supplied for the sole purpose of establishing a claim and entering into negotiations. The material herein is provided on the sole condition that it may not be used by you directly or indirectly if there is a trial of this case. Nothing contained herein should be construed an admission of any fact.

Claim: On or about October 22, 2004, Lisa Gates met an agent of Allen & Associates at a property for rent in Kalama and owned by the Port of Kalama. She was shopping for a home and viewed this home with the agent. As she was walking down the steps to leave the rental, she slipped and fell backwards, landing on her back and hitting the back of her head and neck.

Liability: The negligence of your insured is the sole proximate cause of the accident described above, and the damages sustained by Lisa Gates. The steps had been allowed to deteriorate and become unusually slippery. There was no slip protection strips on these steps as were on other steps to the residence.

Medical Treatment: Immediately following the fall, Ms. Gates was on an "adrenaline high" and did not initially realize she was injured. She was in shock and trying to shake off the embarrassment of her fall. It was not until later that night and the next morning that she realized she received more than just a bruise from the fall. She promptly called her primary care physician and was able to see him the next day. The doctor prescribed Flexeril and physical therapy, and ordered an MRI of her neck

On November 17, 2004, when the MRI results showed C4-5, 506 disk herniation, in addition to generalized degenerative changes, Dr. Moon referred Ms. Gates to a neurosurgeon in Vancouver, Washington.

My client's first visit with Northwest Surgical Specialists' Neurosurgical department was on January 26, 2005. After physical examination and review of my client's MRI, Dr Rokosz's determination at that time was that surgical intervention would likely not improve Ms. Gate's symptoms, and may make her worse. His recommendation was that Ms. Gates begin physical therapy for cervical traction, strengthening and a trial of a TENS unit.

Afer insurance approval was complete, Ms. Gates begin physical therapy through Columbia Rehabilitation on February 23, 2005. Initially, Ms. Gates found physical therapy too painful to attend. She did not return after this initial visit, but did return on June 14, 2005, and completed 11 visits until her physical therapy prescription expired on September 22, 2005. At the time of her last visit, she was still unable to complete work activities and did not see an improvement in her condition from the physical therapy. Dr. Moon did not extend the physical therapy prescription.

Ms. Gates continued to follow-up with her primary care physician as requested. On July 15, 2005, Dr. Moon noted her ongoing neck pain despite physical therapy. He also noted her inability to work more than part-time hours. Dr. Moon decided that if physical therapy did not work, he would refer her back to Dr. Rokosz at the Neurosurgical department of NW Surgical Specialists in Vancouver, Washington. On her visit of October 6, 2005, Dr. Moon noted that she had gone through physical therapy without relief, and that her condition was not improved. He gave her another referral to visit Dr. Rokosz, and noted that if all fails he would set her up with a pain specialists for a possible injection and chronic pain management.

Following Dr. Moon's advice, Ms. Gates again visited Dr. Rokosz on December 5, 2005. Dr. Rokosz X-rayed her cervical spine and noted in his letter to Dr. Moon that the plain x-rays "show significant bridging osteophytes anteriorly at C6-7" and "much smaller anterior osteophytes at C5-6". He also cited mild disc degeneration at 6-7. Dr. Rokosz affirms that Ms. Gates had attempted conservative therapy without much relief. He states that Ms. Gates will need repeat imaging and will require a repeat MRI of the cervical spine and may need a lumbar spine MRI to evaluate her left leg numbness.

Ms. Gates had a follow-up appointment with Dr. Rokosz on February 7, 2007. At that time he reviewed her repeat MRI of the cervical spine and noted that there was no minor surgery that could be performed to help her. He was reluctant to recommend an anterior cervical diskectomy and fusion, and decided to refer her to pain management in Longview to see if they had anything to offer Ms. Gates.

During Ms. Gates follow-up appointment with Dr. Moon on February 27, 2006, Dr. Moon reviewed Dr. Rokosz's results and recommendations. Dr. Moon set her up with a pain clinic for their input and evaluation and noted that she may respond to more physical therapy and massage.

On April 10, 2006, Ms. Gates visited Dr. Robert Arnsdorf at the pain clinic. After evaluation, Dr. Arnsdorf prescribed Topomax for her migraine headaches and neuropathic pain symptoms. He also provided a prescription for a TENS unit. Unfortunately, the medications and tens unit prescribed by the pain clinic doctor were not covered by Ms. Gates insurance, and she was unable to obtain them.

Ms. Gates followed-up with Dr. Moon on April 11, 2006, for assistance in filling out disability paperwork. Dr. Moon reports "patient is disabled at this time until her further workup reveals otherwise".

On May 26, 2006, Ms. Gates followed-up with the pain clinic, Dr. Arnsdorf regarding the insurance denial of the treatment he prescribed. Dr. Arnsdorf noted her physical exam is unchanged and recommended she return to the specialist, Dr. Rokosz to obtain a steroid. He noted, "unfortunately, my ability to render conservative care is markedly impaired by her insurance coverage". He further states that he wants to see Ms. Gates to discuss trigger point injections after she has meet with Dr. Rokosz.

Dr. Moon continued to see Ms. Gates for her regular follow-ups, and on July 31, 2007, he also referred her to Dr. Rokosz.

Ms. Gates contacted Dr. Rokosz to schedule an appointment. The office staff nursing note states that they would attempt to get her evaluated locally at the pain clinic for possible cervical injections for pain, and recommended confirmation of insurance coverage prior to scheduling the appointment. Ms. Gates visited Dr. Moon again on November 22, 2006, wherein he mentions she is waiting on the pain clinic consultation.

On December 26, 2006, Ms. Gates was finally seen at the SW Washington Medical Center Interventional Pain Management Clinic by Dr. Kathy Wang. After examination, Dr. Wang noted decrease in temperature and color changes in Ms. Gates' left hand, in addition to her lumbar radicular symptoms. She recommended that Ms. Gates have a cervical epidural steroid injection to reduce her pain. Dr. Wang also felt that Ms. Gates may benefit from a trail of gabapentin for her neuropathic pain.

In January of 2007, Ms. Gates returned to Dr. Moon's office regarding her left arm numbness and tingling. Dr. Moon reviewed her tests with her and arranged for a referral to Dr. Rokosz and ordered an updated MRI. On January 27, Dr. Rokosz re-examined Ms. Gates and

Demand Letter to Port of Kalama  
August 3, 2007  
Page 4

recommended that Ms. Gates exhaust conservative treatment with Dr. Wang, and if the treatment provided only temporary relief that she should have a repeat MRI and obtain a second opinion with one of his neurosurgical colleagues regarding surgery.

On March 15, 2007, Ms. Gates presented to the SW Washington Medical Center Pain Clinic for the surgical procedure of "cervical epidural steroid injection". The surgical notes report that Ms. Gates tolerated the procedure well and was discharged in stable condition. Dr. Wang noted that Ms. Gates may return in 3 to 4 weeks for her second injection and recommended that she follow-up with her primary care physician. Ms. Gates returned to the pain clinic on March 27, 2007, due to increased in neck pain following the injection.

On April 2, 2007, Ms. Gates had a follow-up with Dr. Moon. In his chart notes, Dr. Moon reports that Ms. Gates was worse since the injection, and that Dr. Wong was asking for an MRI. He ordered a repeat MRI and noted she was pending on a referral to a neurosurgeon.

On June 4, 2007, Ms. Gates was examined by Dr. Hoang Le, a neurosurgeon and colleague of Dr. Rokosz. Dr. Le reviewed her previous MRIs and his suspicions over the left C6-7 area. He recommended and set up a referral for Ms. Gates to receive a CT myelogram of the cervical area, and wanted Ms. Gates to return to review the results of the test.

Ms. Gates was evaluated by SW Washington Medical Center's Physical Medicine and Rehabilitation department on June 4, 2007. Dr. John Hart's report to her primary care physician, Dr. Moon, states that her cervical MRI from April 14, 2007, shows changes "outside of the normal changes that occur with aging" at C6-7 with a left paracentral disc protrusion causing slight displacement of the anterior rootlets coming off the spinal cord. He goes on to describe that Ms. Gate's complaint of discomfort down the middle fingers of the left hand are supportive of a C7 root. In his recommendations, Dr. Hart states he would like to re-check with Ms. Gates in about a month to schedule an EMG/ nerve conduction study. He recommends an intensive training program used for ligamentous and muscular type problems that includes going to the gym and using weights for at least 6 to 9 months. He further states that "passive physical therapy would be predictably of no benefit", which explains the ineffectiveness of the physical therapy she received from Columbia Rehabilitation.

On June 4, 2007, Ms. Gates returned to the Neurosurgeon Dr. Le for review of the myelogram results. Dr. Le states that he did review the myelogram, but that "for the most part" it did not show significant compression of the cervical roots. Dr. Le states that some of the symptoms and history does not make sense to him, and without anything clearcut to focus on with surgery, he would refer her back to Dr. Hart for further evaluation with EMG, and if that did not provide clearcut radiculopathy, there would more than likely not be anything surgical he could do, other than exploratory decompression.

My client's continuing condition includes neck and back pain and problems with nerve damage causing loss of circulation, pain and weakness in her arm. This has been ongoing since the fall. She is unable to work full time. She can work part time, but after working about 4 hours needs 3 days to recoup.

Medical Bills. Lisa Gate's costs for medical treatment have been as follows:

Dr. Moon / Peace Health	\$1,921.00 (approximate and continuing)
Columbia Rehab/Peace Health	\$1,721.11 (approximate)
Northwest Surgical Specialists	\$1,048.00 (approximate and continuing)
SW WA Med. Cntr. Pain Clinic	\$1,000.00 (approximate)
MRI, X-rays, etc.	\$4,264.00 (approximate and continuing)
<b>TOTAL MEDICAL BILLS</b>	<b>\$9,954.11</b>

Lost Wages. Subsequent to the accident Ms. Gates was unable to work. She owns her own business and can work at her own pace, taking breaks as needed, but was unable to work full time. She continues to suffer from pain, numbness and other problems which do not allow her to work full time. Ms. Gate's estimated total wage loss is \$30,000.00.

General Damages. Ms. Gates's pain, suffering, and general damages commenced almost immediately. She suffered intense neck and back pain the next day, and throughout the next few months as she participated in physical therapy and submitted to multiple tests. Lisa was in extreme pain throughout her medical treatment and continues to suffer from pain, numbness, tingling and other sensations caused by the spinal compression in her neck. She will likely never return to her pre-fall status, even if surgery can be performed to repair the bulging discs.

Ms. Gates was disabled around the home beginning the day after the fall and continues to suffer significant losses, as does her family through the loss of her services. She has also suffered permanent injury to her spine.

As a result of the foregoing, on behalf of Lisa Gates, demand is hereby made for settlement of general damages in the amount of \$200,000 for past and present pain and suffering and future pain and suffering from expected surgery to repair bulging discs in back; together with \$30,000.00 in lost wages, and \$10,000.00 current medical bills for special damages totaling \$40,000.00.

I look forward to working with you on this matter. Enclosed please find copies of the medical reports and medical bills which I have received to date.

Demand Letter to Port of Kalama  
August 3, 2007  
Page 6

Very truly yours,

A handwritten signature in black ink, appearing to read "Kurt A. Anagnostou", with a long horizontal flourish extending to the right.

KURT A. ANAGNOSTOU  
DAGGY & ANAGNOSTOU, P.S.

KAA/ls  
Enclosures  
cc: client



CERTIFICATION OF ENROLLMENT

HOUSE BILL 1218

53rd Legislature  
1993 Regular Session

Passed by the House March 9, 1993  
Yeas 97 Nays 0

\_\_\_\_\_  
Speaker of the  
House of Representatives

Passed by the Senate April 12, 1993  
Yeas 45 Nays 0

\_\_\_\_\_  
President of the Senate

Approved

\_\_\_\_\_  
Governor of the State of Washington

CERTIFICATE

I, Alan Thompson, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **HOUSE BILL 1218** as passed by the House of Representatives and the Senate on the dates hereon set forth.

\_\_\_\_\_  
Chief Clerk

FILED

\_\_\_\_\_  
Secretary of State  
State of Washington

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HOUSE BILL 1218

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Passed Legislature - 1993 Regular Session

State of Washington                      53rd Legislature                      1993 Regular Session

By Representatives Ludwig, Edmondson, Mastin, Reams, Scott, Bray, Riley, R. Fisher, Grant, Rayburn, Dellwo, Van Luven, Chandler, Zellinsky, Appelwick, Roland, Fuhrman, Kremen and Johanson

Read first time 01/20/93. Referred to Committee on Local Government.

1            AN ACT Relating to claims against local governmental entities;  
2 amending RCW 4.96.010, 4.96.020, 36.16.134, 6.17.080, 35.31.020,  
3 35.31.040, 35A.31.030, 36.45.010, 54.16.110, and 87.03.440; adding new  
4 sections to chapter 4.96 RCW; creating a new section; recodifying RCW  
5 36.16.134; and repealing RCW 35.31.010, 35.31.030, 36.45.020,  
6 36.45.030, and 53.34.210.

7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

8            NEW SECTION.    **Sec. 1.** This act is designed to provide a single,  
9 uniform procedure for bringing a claim for damages against a local  
10 governmental entity. The existing procedures, contained in chapter  
11 36.45 RCW, counties, chapter 35.31 RCW, cities and towns, chapter  
12 35A.31 RCW, optional municipal code, and chapter 4.96 RCW, other  
13 political subdivisions, municipal corporations, and quasi-municipal  
14 corporations, are revised and consolidated into chapter 4.96 RCW.

15            **Sec. 2.** RCW 4.96.010 and 1967 c 164 s 1 are each amended to read  
16 as follows:

17            (1) All (~~political subdivisions, municipal corporations, and quasi~~  
18 ~~municipal corporations of the state~~) local governmental entities,

1 whether acting in a governmental or proprietary capacity, shall be  
2 liable for damages arising out of their tortious conduct, or the  
3 tortious conduct of their past or present officers, ~~((agents or))~~  
4 employees, or volunteers while performing or in good faith purporting  
5 to perform their official duties, to the same extent as if they were a  
6 private person or corporation ~~((PROVIDED, That the))~~. Filing a claim  
7 for damages within the time allowed by law ~~((of any claim required))~~  
8 shall be a condition precedent to the ~~((maintaining))~~ commencement of  
9 any action claiming damages. The laws specifying the content for such  
10 claims shall be liberally construed so that substantial compliance  
11 therewith will be deemed satisfactory.

12 (2) Unless the context clearly requires otherwise, for the purposes  
13 of this chapter, "local governmental entity" means a county, city,  
14 town, special district, municipal corporation, or quasi-municipal  
15 corporation.

16 (3) For the purposes of this chapter, "volunteer" is defined  
17 according to RCW 51.12.035.

18 **Sec. 3.** RCW 4.96.020 and 1967 c 164 s 4 are each amended to read  
19 as follows:

20 ~~((Chapter 35.31 RCW shall apply to claims against cities and~~  
21 ~~towns, and chapter 36.45 RCW shall apply to claims against counties.~~

22 ~~(2))~~ The provisions of this ~~((subsection shall not))~~ section  
23 apply to claims for damages against ~~((cities and towns or counties but~~  
24 ~~shall apply to claims against all other political subdivisions,~~  
25 ~~municipal corporations, and quasi municipal corporations))~~ all local  
26 governmental entities.

27 (2) All claims for damages against any such ~~((entities))~~ entity for  
28 damages ~~((arising out of tortious conduct))~~ shall be presented to and  
29 filed with the governing body thereof within ~~((one hundred twenty days~~  
30 ~~from the date that the claim arose))~~ the applicable period of  
31 limitations within which an action must be commenced.

32 (3) All ~~((such))~~ claims ~~((shall be verified and shall accurately))~~  
33 for damages arising out of tortious conduct must locate and describe  
34 the conduct and circumstances which brought about the injury or damage,  
35 describe the injury or damage, state the time and place the injury or  
36 damage occurred, state the names of all persons involved, if known, and  
37 shall contain the amount of damages claimed, together with a statement  
38 of the actual residence of the claimant at the time of presenting and

1 filing the claim and for a period of six months immediately prior to  
2 the time the claim arose. If the claimant is incapacitated from  
3 verifying, presenting, and filing ~~((his))~~ the claim in the time  
4 prescribed or if the claimant is a minor, or is a nonresident of the  
5 state absent therefrom during the time within which ~~((his))~~ the claim  
6 is required to be filed, the claim may be verified, presented, and  
7 filed on behalf of the claimant by any relative, attorney, or agent  
8 representing ~~((him))~~ the claimant.

9 (4) No action shall be commenced against any ~~((such))~~ local  
10 governmental entity for damages arising out of tortious conduct until  
11 ~~((a))~~ sixty days have elapsed after the claim has first been presented  
12 to and filed with the governing body thereof. ~~((The requirements of~~  
13 ~~this subsection shall not affect the applicable period of limitations~~  
14 ~~within which an action must be commenced, but such period shall begin~~  
15 ~~and shall continue to run as if no claim were required))~~ The  
16 applicable period of limitations within which an action must be  
17 commenced shall be tolled during the sixty-day period.

18 **Sec. 4.** RCW 36.16.134 and 1989 c 250 s 1 are each amended to read  
19 as follows:

20 (1) Whenever an action or proceeding for damages is brought against  
21 any past or present officer ~~((or))~~ employee, or volunteer of a  
22 ~~((county))~~ local governmental entity of this state, arising from acts  
23 or omissions while performing or in good faith purporting to perform  
24 his or her official duties, such officer ~~((or))~~ employee, or volunteer  
25 may request the ~~((county))~~ local governmental entity to authorize the  
26 defense of the action or proceeding at the expense of the ~~((county))~~  
27 local governmental entity.

28 (2) If the ~~((county))~~ legislative authority of the local  
29 governmental entity, or the local governmental entity using a procedure  
30 created by ordinance or resolution, finds that the acts or omissions of  
31 the officer ~~((or))~~ employee, or volunteer were, or in good faith  
32 purported to be, within the scope of his or her official duties, the  
33 request ~~((may))~~ shall be granted. If the request is granted, the  
34 necessary expenses of defending the action or proceeding shall be paid  
35 by the ~~((county))~~ local governmental entity. Any monetary judgment  
36 against the officer ~~((or))~~ employee ~~((may))~~ or volunteer shall be  
37 paid on approval of the ~~((county))~~ legislative authority of the local

1 governmental entity or by a procedure for approval created by ordinance  
2 or resolution.

3 (3) The necessary expenses of defending an elective ((~~county~~))  
4 officer of the local governmental entity in a judicial hearing to  
5 determine the sufficiency of a recall charge as provided in RCW  
6 29.82.023 shall be paid by the ((~~county~~)) local governmental entity if  
7 the officer requests such defense and approval is granted by both the  
8 ((~~county~~)) legislative authority of the local governmental entity and  
9 the ((~~prosecuting~~)) attorney representing the local governmental  
10 entity. The expenses paid by the ((~~county~~)) local governmental entity  
11 may include costs associated with an appeal of the decision rendered by  
12 the superior court concerning the sufficiency of the recall charge.

13 (4) When an officer, employee, or volunteer of the local  
14 governmental entity has been represented at the expense of the local  
15 governmental entity under subsection (1) of this section and the court  
16 hearing the action has found that the officer, employee, or volunteer  
17 was acting within the scope of his or her official duties, and a  
18 judgment has been entered against the officer, employee, or volunteer  
19 under chapter 4.96 RCW or 42 U.S.C. Sec. 1981 et seq., thereafter the  
20 judgment creditor shall seek satisfaction for nonpunitive damages only  
21 from the local governmental entity, and judgment for nonpunitive  
22 damages shall not become a lien upon any property of such officer,  
23 employee, or volunteer. The legislative authority of a local  
24 governmental entity may, pursuant to a procedure created by ordinance  
25 or resolution, agree to pay an award for punitive damages.

26 NEW SECTION. Sec. 5. A new section is added to chapter 4.96 RCW  
27 to read as follows:

28 No bond is required of any local governmental entity for any  
29 purpose in any case in any of the courts of the state of Washington and  
30 all local governmental entities shall be, on proper showing, entitled  
31 to any orders, injunctions, and writs of whatever nature without bond,  
32 notwithstanding the provisions of any existing statute requiring that  
33 bonds be furnished by private parties.

34 Sec. 6. RCW 6.17.080 and 1987 c 442 s 408 are each amended to read  
35 as follows:

36 No execution may issue for collection of a judgment for the  
37 recovery of money or damages against a ((~~county or other public~~

1 ~~corporation))~~ local governmental entity. Any such judgment may be  
2 enforced as follows:

3 (1) The judgment creditor may at any time when execution might  
4 issue on a like judgment against a private person, and after  
5 acknowledging satisfaction of the judgment as in ordinary cases, obtain  
6 from the clerk a certified transcript of the judgment. The clerk shall  
7 include in the transcript a copy of the memorandum of acknowledgment of  
8 satisfaction and the entry thereof as the basis for an order on the  
9 treasurer for payment. Unless the transcript contains such memorandum,  
10 no order upon the treasurer shall issue thereon.

11 (2) The judgment creditor shall present the certified transcript  
12 showing satisfaction of the judgment to the officer of the (~~county or~~  
13 ~~other public corporation))~~ local governmental entity who is authorized  
14 to draw orders on its treasury.

15 (3) The officer shall draw an order on the treasurer for the amount  
16 of the judgment, in favor of the judgment creditor. The order shall be  
17 presented for payment and paid with like effect and in like manner as  
18 other orders upon the treasurer. If the proper officer of the (~~county~~  
19 ~~or other public corporation))~~ local governmental entity fails or  
20 refuses to draw the order for payment of the judgment as provided in  
21 this section, a writ of mandamus may be issued in the original case to  
22 compel performance of the duty.

23 (4) As used in this section, the term "local governmental entity"  
24 means a county, city, town, special district, municipal corporation, or  
25 quasi-municipal corporation.

26 **Sec. 7.** RCW 35.31.020 and 1967 c 164 s 12 are each amended to read  
27 as follows:

28 The provisions of chapter 35.31 RCW shall be applied  
29 notwithstanding any provisions to the contrary in any charter of any  
30 city permitted by law to have a charter; however, charter provisions  
31 not inconsistent herewith shall continue to apply. All claims for  
32 damages against a charter city shall be filed (~~within one hundred and~~  
33 ~~twenty days from the date that the damage occurred or the injury was~~  
34 ~~sustained. PROVIDED, That if the claimant is incapacitated from~~  
35 ~~verifying and filing his claim for damages within the time prescribed,~~  
36 ~~or if the claimant is a minor, or in case the claim is for damages to~~  
37 ~~real or personal property, and if the owner of such property is a~~  
38 ~~nonresident of such city or is absent therefrom during the time within~~

1 ~~which a claim for damages to said property is required to be filed,~~  
2 ~~then the claim may be verified and presented on behalf of the claimant~~  
3 ~~by any relative or attorney or agency representing the injured person,~~  
4 ~~or in case of damages to property, representing the owner thereof)) in~~  
5 ~~the manner set forth in chapter 4.96 RCW.~~

6       **Sec. 8.** RCW 35.31.040 and 1989 c 74 s 1 are each amended to read  
7 as follows:

8       All claims for damages against noncharter cities and towns (~~must~~  
9 ~~be presented to the city or town council and filed with the city or~~  
10 ~~town clerk within the period specified in the appropriate statute of~~  
11 ~~limitations)) shall be filed in the manner set forth in chapter 4.96~~  
12 ~~RCW.~~

13       No ordinance or resolution shall be passed allowing such claim or  
14 any part thereof, or appropriating any money or other property to pay  
15 or satisfy the same or any part thereof, until the claim has first been  
16 referred to the proper department or committee, nor until such  
17 department or committee has made its report to the council thereon  
18 pursuant to such reference.

19       (~~All such claims for damages must accurately locate and describe~~  
20 ~~the defect that caused the injury, reasonably describe the injury and~~  
21 ~~state the time when it occurred, give the residence for six months last~~  
22 ~~past of claimant, contain the item of damages claimed and be sworn to~~  
23 ~~by the claimant or a relative, attorney or agent of the claimant.~~

24       ~~No action shall be maintained against any such city or town for any~~  
25 ~~claim for damages until the same has been presented to the council and~~  
26 ~~sixty days have elapsed after such presentation.))~~

27       **Sec. 9.** RCW 35A.31.030 and 1967 ex.s. c 119 s 35A.31.030 are each  
28 amended to read as follows:

29       No ordinance or resolution shall be passed allowing such claim or  
30 any part thereof, or appropriating any money or other property to pay  
31 or satisfy the same or any part thereof, until the claim has first been  
32 referred to the proper department or committee, nor until such  
33 department or committee has made its report thereon to the legislative  
34 body of the code city pursuant to such reference. (~~All such claims~~  
35 ~~for damages must accurately locate and describe the defect that caused~~  
36 ~~the injury, reasonably describe the injury and state the time when it~~

1 ~~occurred, contain the item of damages claimed and be verified by the~~  
2 ~~claimant or a relative, attorney, or agent of the claimant.)~~

3 No action shall be maintained against any code city for any claim  
4 for damages until the ((same)) claim has been ((presented to the  
5 legislative body of the city by filing with the clerk and sixty days  
6 have elapsed after such presentation)) filed in the manner set forth in  
7 chapter 4.96 RCW.

8 **Sec. 10.** RCW 36.45.010 and 1967 c 164 s 14 are each amended to  
9 read as follows:

10 All claims for damages against any county ((must)) shall be  
11 ((presented before the board of county commissioners and filed with the  
12 clerk thereof within one hundred and twenty days from the date that the  
13 damage occurred or the injury was sustained)) filed in the manner set  
14 forth in chapter 4.96 RCW.

15 **Sec. 11.** RCW 54.16.110 and 1979 ex.s. c 240 s 3 are each amended  
16 to read as follows:

17 A district may sue in any court of competent jurisdiction, and may  
18 be sued in the county in which its principal office is located or in  
19 which it owns or operates facilities. No suit for damages shall be  
20 maintained against a district except on a claim filed with the  
21 ((commission)) district complying in all respects with the terms and  
22 requirements for claims for damages ((filed against cities of the  
23 second class)) set forth in chapter 4.96 RCW.

24 **Sec. 12.** RCW 87.03.440 and 1983 c 167 s 218 are each amended to  
25 read as follows:

26 The treasurer of the county in which is located the office of the  
27 district shall be ex officio treasurer of the district, and any county  
28 treasurer handling district funds shall be liable upon his or her  
29 official bond and to criminal prosecution for malfeasance and  
30 misfeasance, or failure to perform any duty as county or district  
31 treasurer. The treasurer of each county in which lands of the district  
32 are located shall collect and receipt for all assessments levied on  
33 lands within his or her county. There shall be deposited with the  
34 district treasurer all funds of the district. ((He)) The district  
35 treasurer shall pay out such funds upon warrants issued by the county  
36 auditor against the proper funds of the district, except the sums to be

1 paid out of the bond fund for interest and principal payments on bonds:  
2 PROVIDED, That in those districts which designate their own treasurer,  
3 the treasurer may issue the warrants or any checks when the district is  
4 authorized to issue checks. All warrants shall be paid in the order of  
5 their issuance. The district treasurer shall report, in writing, on  
6 the first Monday in each month to the directors, the amount in each  
7 fund, the receipts for the month preceding in each fund, and file the  
8 report with the secretary of the board. The secretary shall report to  
9 the board, in writing, at the regular meeting in each month, the amount  
10 of receipts and expenditures during the preceding month, and file the  
11 report in the office of the board.

12 The preceding paragraph of this section notwithstanding, the board  
13 of directors or board of control of an irrigation district which lies  
14 in more than one county and which had assessments in each of two of the  
15 preceding three years equal to at least five hundred thousand dollars  
16 may designate some other person having experience in financial or  
17 fiscal matters as treasurer of the district. In addition, the board of  
18 directors of an irrigation district which lies entirely within one  
19 county may designate some other person having experience in financial  
20 or fiscal matters as treasurer of the district if the board has the  
21 approval of the county treasurer to designate some other person. If  
22 the board designates a treasurer, it shall require a bond with a surety  
23 company authorized to do business in the state of Washington in an  
24 amount and under the terms and conditions which it finds from time to  
25 time will protect the district against loss. The premium on the bond  
26 shall be paid by the district. The designated treasurer shall collect  
27 and receipt for all irrigation district assessments on lands within the  
28 district and shall act with the same powers and duties and be under the  
29 same restrictions as provided by law for county treasurers acting in  
30 matters pertaining to irrigation districts, except the powers, duties,  
31 and restrictions in RCW 87.56.110 and 87.56.210 which shall continue to  
32 be those of county treasurers.

33 In those districts which have designated their own treasurers, the  
34 provisions of law pertaining to irrigation districts which require  
35 certain acts to be done and which refer to and involve a county  
36 treasurer or the office of a county treasurer or the county officers  
37 charged with the collection of irrigation district assessments, except  
38 RCW 87.56.110 and 87.56.210 shall be construed to refer to and involve

1 the designated district treasurer or the office of the designated  
2 district treasurer.

3 Any claim against the district for which it is liable under  
4 existing laws shall be presented to the board as provided in RCW  
5 4.96.020 and upon allowance it shall be attached to a voucher and  
6 approved by the chairman and signed by the secretary and directed to  
7 the proper official for payment: PROVIDED, That in the event  
8 claimant's claim is for crop damage, the claimant in addition to filing  
9 his or her claim within the (~~one hundred twenty day limit~~) applicable  
10 period of limitations within which an action must be commenced and in  
11 the manner specified in RCW 4.96.020 must file with the secretary of  
12 the district, or in (~~his~~) the secretary's absence one of the  
13 directors, not less than three days prior to the severance of the crop  
14 alleged to be damaged, a written preliminary notice pertaining to the  
15 crop alleged to be damaged. Such preliminary notice, so far as  
16 claimant is able, shall advise the district; that the claimant has  
17 filed a claim or intends to file a claim against the district for  
18 alleged crop damage; shall give the name and present residence of the  
19 claimant; shall state the cause of the damage to the crop alleged to be  
20 damaged and the estimated amount of damage; and shall accurately locate  
21 and describe where the crop alleged to be damaged is located. Such  
22 preliminary notice may be given by claimant or by anyone acting in his  
23 or her behalf and need not be verified. No action may be commenced  
24 against an irrigation district for crop damages unless claimant has  
25 complied with the provisions of RCW 4.96.020 and also with the  
26 preliminary notice requirements of this section.

27 NEW SECTION. Sec. 13. The following acts or parts of acts are  
28 each repealed:

- 29 (1) RCW 35.31.010 and 1967 c 164 s 11 & 1965 c 7 s 35.31.010;  
30 (2) RCW 35.31.030 and 1965 c 7 s 35.31.030;  
31 (3) RCW 36.45.020 and 1963 c 4 s 36.45.020;  
32 (4) RCW 36.45.030 and 1973 c 36 s 1 & 1963 c 4 s 36.45.030; and  
33 (5) RCW 53.34.210 and 1959 c 236 s 21.

34 NEW SECTION. Sec. 14. RCW 36.16.134 is recodified as a section in  
35 chapter 4.96 RCW.

1        NEW SECTION.    Sec. 15.    If any provision of this act or its  
2 application to any person or circumstance is held invalid, the  
3 remainder of the act or the application of the provision to other  
4 persons or circumstances is not affected.

--- END ---

## 202 A.2d 1; A.H. Benoit &amp; Co. v. Johnson;

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A. H. BENOIT &amp; COMPANY vs. ERNEST H. JOHNSON STATE TAX ASSESSOR

[Cite as A.H. Benoit &amp; Co. v. Johnson, 160 ME 201]

Cumberland. Opinion, July 1, 1964.

Laches. Taxation. Sales and Use Tax.

In absence of clear manifestation of intention that property or title to garments should pass to buyer, before alteration of garments by retail store, the alterations constituted "services that are part of sale" within sales and use tax definitions of sale price, and charges for the alterations were part of the "sales price."

"Laches" is omission to assert a right for an unreasonable and unexplained period under circumstances prejudicial to adverse party.

For surmounting considerations of public policy, neither the defense of waiver, equitable estoppel, or laches can avail against the State in the instant case.

ON REPORT.

In this sales tax case, plaintiff appeals judgment favoring tax assessor. Appeal denied; judgment for state tax assessor.

Malcolm S. Stevenson, for Plaintiff.

Ralph W. Farris, Sr., Jon R. Doyle, Sr., Asst. Attys. Gen., for Defendant.

SITTING: WILLIAMSON, C. J., WEBBER, TAPLEY, SULLIVAN, SIDDALL, MARDEN, JJ.

SULLIVAN, J. This case is reported to this court by agreement of the parties for such final decision as the rights of the parties may require. M. R. C. P., Rule 72.

The facts are stipulated as follows:

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"1. A. H. Benoit & Company (hereafter referred to as Benoit's), is a retail store in Portland, Maine, which sells, inter alia, clothing for women and children. In its advertising the store sets forth a sales price for each article of clothing. When clothing is purchased in the store one sales slip is used for the purchase of an article or articles of clothing. A separate sales slip is utilized for any alteration to be made in articles of clothing purchased in the store. At the time the clothing is purchased a sales slip recording the price and sales tax is given to the customer. In the case of charge sales a copy of the sales slip is sent to the store accounting office for billing. The same is true with any sales slip involved for alterations.

"The area and personnel involved in making alterations in articles of clothing constitute a

Appendix E

separate department in Benoit's store. The employees, performing this work are Benoit employees. Charges for alterations are based on a scale according to the functions to be performed but are generally standard for the geographic areas in which the Benoit's store operates. Generally speaking Benoit does not offer these services to the general public. While the clothing which is being altered is in Benoit's possession the risk of loss is upon Benoit's.

"The customer, with the exception of choosing the clothing, relies upon Benoit's for the accuracy of measurements, fit, etc. when they are requested. Benoit's guarantees the fit of altered article to the customer's satisfaction. The customer has the right to refuse to accept the altered clothing if it is in her opinion not satisfactory; if this occurs any monies paid will be refunded.

"2. On September 26, 1963, the State of Maine, Bureau of Taxation, made an assessment of sales tax against A. H. Benoit & Company for \$267.30, which assessment covered the period September 1, 1961 to June 30, 1963. The above tax is attributable to charges for alterations made by Benoit's.

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"3. On October 11, 1963, A. H. Benoit & Company petitioned the State of Maine, Bureau of Taxation, for reconsideration of said assessment.

"4. On November 18, 1963, a hearing was held on said petition before Ernest H. Johnson, State Tax Assessor.

"5. On December 27, 1963, the assessment was reconsidered by the State Tax Assessor and found to be correct.

"6. On January 21, 1964, A. H. Benoit and Company appealed from the decision on reconsideration to the Cumberland County Superior Court in accordance with section 33 of Chapter 17, R. S. of Maine, of 1954, as amended, and in accordance with Rule 80-B of Maine Rules of Civil Procedure."

The following are the issues stipulated by these parties:

"1. Whether charges for alterations of clothing whether separately stated or not, are to be considered part of the taxable sales price, as services that are a part of a sale.

"2. Does the failure, by the State of Maine, Bureau of Taxation, to assess sales taxes against A. H. Benoit & Co., in regards to alteration charges, from the effective date of the Maine Sales and Use Tax Law until September 26, 1963, constitute laches or waiver."

The Sales and Use Tax, R. S., c. 17, § 2, in its pertinence here contains the following definition:

" 'Sale price' means the total amount of the sale - - - - price - - - - of a retail sale including any services that are a part of such sale, valued in money, whether received in money or otherwise, including all receipts, cash, credits, and property of any kind or nature - - - - nor shall 'sale price' include the price received for labor or services used in installing or applying or repairing the property sold, if separately charged or stated - - - - -"

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The Uniform Sales Act, R. S., c. 185, contains this subjoined text:

**"Sec. 18. Property in specific goods passes when parties so intend. ---**

"I. Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

"II. For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case.

**"Sec. 19. Rules for ascertaining intention.---**Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer

"Rule 1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.

"Rule 2. Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing is done."

The Uniform Sales Act, R. S., c. 185, § 76, defines "deliverable state;"

"Goods are in a 'deliverable state' within the meaning of this chapter when they are in such a state that the buyer would, under the contract, be bound to take delivery of them."

"- - - it is not necessary in order to preclude the presumption of an immediate transfer of the property in the goods that the work to be done by the seller shall be such as to change the character of the goods - - -"

Williston on Sales, Revised Edition, § 265, Vol. 2, P. 17.

"- - - If the property has passed, the risk of accidental loss or damage rests upon the buyer. If the property has not passed, the risk still remains with the seller - - -"

Williston, *supra*, § 273, Vol. 2, P. 38.

This court in *Wallworth's Sons v. Daniel E. Cummings Co.* (1937), 135 Me. 267, 269, 194 A. 890, 891, noted:

"The question whether a sale has been completed and title to the property involved has passed depends on the intention of the parties at the time the contract was made. - - - - Where such intent is not expressed, as in the instant case, it must be discovered from the surrounding circumstances and from the conduct and the declarations of the parties - - - -"

The stipulated facts in the instant case relate that there is no delivery of the garment until the alterations have been made by the seller. While the clothing to be altered remains in the seller's possession it is conceded that the risk of loss is borne by the seller. *"The customer has the right to refuse to accept the altered clothing if it is in her opinion not satisfactory; if this occurs any monies paid will be refunded."*

For want of a clear manifestation of an intention that property or title passes to the buyer before alteration of a garment (Williston, *supra*, Vol. 2, § 265, P. 18) the factual concordance of these parties confirms (R. S., c. 185, § 19, Rule 2, *supra*) that the alterations by consensual agreement are accomplished prior to the consummation of the sale of the clothing and constitute *"services that are a part of such*

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*sale."* (R. S., c. 17, § 2, *supra*.) The charge for alterations must be deemed to be a component of the *"sale price."* The seller's practice of recording such a charge separately in its accounting system is not meaningful under the circumstances of this controversy. Nor are we persuaded that the alterations in contemplation here are within an undistended purview of the classification, *"labor or services used in installing or applying or repairing the property sold."* The seller *"guarantees the fit of altered article to the customer's satisfaction."* It thus appears that the customer bargains for a garment which after alteration will not only fit her or the child but will be *"in her opinion"* satisfactory to the customer.

Our considered resolution of the first stipulated issue of these parties is that the charges for clothing alterations as reported and particularized by the parties must be considered a part of the taxable sales price of the clothing and as services which are a part of a sale.

A Sales and Use Tax became statutory law in this State on May 3, A. D. 1951. P. L., 1951, c. 250. No tax which A. H. Benoit & Company was obligated to collect and transmit for alteration charges was assessed by the Bureau of Taxation from May 3, 1951 until the tax here challenged was demanded on September 26, 1963 for alteration charges during the period from September 1, 1961 to June 30, 1963. Benoit & Co. protest that the State has accordingly precluded itself by an imputable waiver or because of chargeable laches from exacting the tax now litigated.

Benoit & Co. argues that the State Bureau of Taxation, as an administrative agency of government, by its inaction through twelve years, by its silence in any regulation relative to "the ambiguous Statutory language, and by its publication in the Information Bulletin of language suggesting non-taxability of the subject matter," "by its delay, coupled with acquiescence through both silence and publication of

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non-taxability" has "in effect precluded itself from now making an arbitrary singular retroactive assessment" against Benoit & Co. to the latter's detriment.

The language of R. S., c. 185, § 76 pertinent to the instant case contains no perceptible or indicated ambiguity. No evidence of arbitrariness in the disputed assessment is discernible or demonstrated.

Benoit's in asserting waiver by the State employs the term waiver much as it was recognized in *Houlton Trust Co. v. Lumbert*, 136 Me. 184, 186, 5 A. (2nd) 921, 922:

" - - - A waiver may be shown by a course of conduct signifying a purpose not to stand on

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a right, and leading, by a reasonable inference, to the conclusion that the right in question will not be insisted upon. And a person who does some positive act which, according to its natural import, is so inconsistent with the enforcement of the right in his favor as to induce a reasonable belief that such right has been dispensed with will be deemed to have waived it.' "

Benoit & Co. also couches in its defense the element of equitable estoppel:

"- - - The doctrine of estoppel rests on an act that has misled one who, relying on it, has been put in a position where he will sustain a loss or injury - - - "

*4 One Box Machine Makers v. Wirebounds Co.*, 131 Me. 70, 78, 159 A. 496, 499.

Benoit's plies the defense of laches, an omission to assert a right for an unreasonable and unexplained length of time and under circumstances prejudicial to the adverse party. *Stewart v. Grant*, 126 Me. 195, 201, 137 A. 63.

For surmounting considerations of public policy neither the defense of waiver, equitable estoppel nor laches can avail against the State in the instant case:

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"There can be no laches, waiver or estoppel imputed to the State."

*In re Moss' Will*, 277 App. Div. 289, 98 N. Y. S. (2nd) 777, 780.

See, also, *People v. Minuse*, 190 Misc. 57, 70 N. Y. S. (2nd) 426, 429.

"It seems to be universally recognized that, generally, a State cannot be estopped by the acts and conduct of its officers or agents in the performance of the governmental functions of collecting taxes legally due. The reason for the rule is obvious: no administrative officer is vested with the power to abrogate the statute law of the State, nor to grant an individual an exemption from the general operation of the law - - - "

*Comptroller of Treasury, Retail Sales Tax Division v. Atlas General Industries*, 234 Md. 77, 198 A. (2nd) 86, 90.

"- - - Collection of a tax is a governmental function in the performance of which a city may not be bound or estopped by unauthorized acts of its officers.

*City of Bayonne v. Murphy*, 7 N. J. 298, 81 A. (2nd) 485, 492.

" ' - - - Beginning with *Wood v. [Missouri] K. & T. Railway Co.*, 11 Kan. 323, 349, there is a long and undeviating line of decisions - - - which holds that laches and estoppel do not operate against the state, that no procrastination of public officials prejudices the state, and that their tardiness neither bars nor defeats the state from vindicating its sovereign rights, except where positive statutes so provide - - - "

*State ex rel. Boynton v. Wheat Farming Co.*, 137 Kan. 697, 22 P. (2nd) 1093, 1101.

See, Vol. 30, C. J. S., Equity, § 114, P. 526; 1 A. L. R. (2nd) § 5, P. 344.

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"Bearing in mind that local, county and State taxes are all included in one tax, it is clear that in this State the town is the State for the purpose of col-

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lecting such taxes. In full realization of the fact that few cases can be found bearing squarely on the point, we are nevertheless of the opinion that an equitable estoppel does not lie against a town in the exercise of its taxing power, which necessarily included the power of collecting taxes lawfully assessed. To hold otherwise would, we believe, be contrary to sound public policy and destructive of a fundamental sovereign right."

*Inhabitants of Town of Milo v. Milo Water Co.*, 131 Me. 372, 379, 163 A. 163.

See, also, *State v. Bean*, 159 Me. 455, 458, 195 A. (2nd) 68.

The subjoined statement of this court in *State v. York Utilities Co.*, 142 Me. 40, 44, 45 A. (2nd) 634, 635-636, is very germane here:

"Counsel for the defendant contends, however, that the state tax department for many years assessed the excise tax against the defendant in accordance with the defendant's present interpretation of it and that such interpretation acted on for many years should be controlling on the court. The presiding justice, who wrote an exhaustive opinion on this subject, has a sufficient answer to this claim. He said: 'While in a doubtful case, such a consideration should have weight, and perhaps great weight as a guide to judicial interpretation of a statute it cannot overcome the clear meaning as expressed in the statute itself. Such consideration is at best but a guide to the ascertainment of legislative intent. To make it a hard and fast rule for the construction of statutes would result in transferring the legislative and judicial functions to administrative agencies, a result fostered elsewhere but which as yet has obtained no foothold here in Maine.'

"Both the wording of the statute in question and its relationship to other provisions show clearly what the legislature intended. The effect is not absurd or unreasonable. Neither an administrative agency nor the court has any right to modify its provisions."

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In *Claiborne Sales Co. v. Collector of Revenue*, 233 La. 1061, 99 So. (2nd) 345, 347, the Louisiana Court states the rule as follows:

" 'The mere failure of public officers charged with a public duty to enforce statutory and constitutional provisions in respect to the levy and collection of taxes, or the acquiescence of public officers in conditions that exempted certain property from its fair share of the burdens of taxation, should not be permitted to stand in the way of the correct administration of the law, or be construed to estop more diligent and efficient public officers when they attempt to perform their duty by bringing in to the revenue proper subjects of taxation that had theretofore been allowed to escape the payment of taxes.' "

*Henderson v. Gill*, 229 N. C. 313, 49 S. E. (2nd) 754, dealt with an affair wherein a tax auditor and collector had given misleading advice and instructions to a retailer who relied thereon and thus became deprived of the opportunity to collect or feasibly recoup sales taxes from purchasers as the law required.

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The retailer was adjudged by the court to be liable for the tax.

"- - - - The imposition and collection of taxes are, of course, governmental functions; and the State cannot, by the conduct of its agents be estopped from collecting taxes lawfully imposed and remaining unpaid; and under the law as we understand it neither can their conduct or advice create an estoppel against the State by these retail merchants on the theory of their mere agency since they are the agents of the law, with a fixed liability to account for the tax imposed - - - - "

49 S. E. (2nd) at 756.

The mandate shall be:

*Appeal denied:*

*Judgment for the State Tax Assessor.*

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**612 A.2d 856; F.S. Plummer Co., Inc. v. Town of Cape Elizabeth;**


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F.S. PLUMMER CO., INC., et al., v. TOWN OF CAPE ELIZABETH, et al.

[Cite as F.S. Plummer Co., Inc. v. Town of Cape Elizabeth, 612 A.2d 856]

Supreme Judicial Court of Maine.

Argued June 16, 1992.

Decided Aug. 20, 1992.

Landowner sought review of denial of zoning change request and also alleged denial of due process, equitable estoppel, taking and excessive regulation. Rezoning was ordered by the Superior Court, Cumberland County, Browne, A.R.J., and town appealed and landowner cross-appealed. The Supreme Judicial Court, Rudman, J., held that: (1) trial court erred in taking direct judicial review in nature of appeal, but judicial review could be obtained by action seeking declaratory judgment; (2) amendment of zoning ordinance, effect of which was to prevent residential development of property containing wetlands, was valid exercise of town's police power; (3) denial of subsequent zone change request was in basic harmony with comprehensive plan; (4) town was not equitably estopped to deny zone change request; and (5) notice

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of zoning amendment was sufficient so that landowner was not denied due process.

Vacated and remanded.

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Peggy L. McGehee (orally), Frederick B. Finberg, Perkins, Thompson, Hinckley &amp; Keddy, Portland, for plaintiff.

Michael H. Hill (orally), Monaghan, Leahy, Hochadel &amp; Libby, Portland, for defendant.

Before WATHEN, C.J., and ROBERTS, GLASSMAN, CLIFFORD, COLLINS and RUDMAN, JJ.

RUDMAN, Justice.

The Town of Cape Elizabeth appeals from a Superior Court judgment (Cumberland County, *Browne, A.R.J.*), in favor of Fred Plummer and F.S. Plummer Co., Inc. (Plummer) ordering the Town to rezone certain property owned by Plummer. On appeal, the Town contends that the court erred in its review of a 1981 amendment to the Town's zoning ordinance. Plummer cross appeals, challenging a summary judgment in favor of the Town on Plummer's due process claim. We vacate the judgment.

Plummer purchased twelve lots in Cape Elizabeth's East Field subdivision, eight in 1969 and the remaining four in 1975. In 1981, Plummer still owned nine lots in the subdivision and all the lots were zoned as Residential A--District. In December 1981, the Town enacted comprehensive zoning

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amendments affecting several different areas throughout the town. The amendments were passed after several months of discussion during which public hearings were held.

The public hearings were advertised by an announcement published in a local newspaper. Four of Plummer's remaining nine lots were affected by the amendments, which reclassified those lots as part of the Resource Protection District (RPD). The reclassification made development of the property for residential purposes impossible. Plummer contends that it was unaware of the reclassification of its property until 1987.

In 1986 and 1987, Plummer improved the four lots, providing them with sewer stubs and water service. Plummer gave the Town an easement along one of the lots so the Town could provide sewer service to certain properties, among them the four lots owned by Plummer. Plummer alleges that Town officials on several occasions told Plummer the lots could be developed.

When Plummer learned that its property was part of the RPD, it filed a formal application for a change of zone with the Town Council. According to ordinance procedure, the matter was referred to the Planning Board. The Planning Board held a public hearing and found that the lots had many wetland characteristics and that the soils on the lots were inappropriate for development. For those reasons the Planning Board recommended that the Town Council not reclassify Plummer's property. The Town Council accepted the Planning Board's recommendation and denied Plummer's application for a zone change. In March of 1989, the Town gave Plummer a building permit for one of the four lots that was only partially located in the RPD.

Plummer filed a seven count complaint against the Town. Plummer sought direct judicial review of the Town Council's decision pursuant to M.R.Civ.P. 80B. Its complaint also alleged denial of due process, equitable estoppel, taking, and excessive regulation; and requested declaratory and injunctive relief. The Town moved to dismiss the Rule 80B complaint, contending the Town Council's decision was a legislative act and therefore not directly reviewable.

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ble by the Superior Court under Rule 80B. The court (Cumberland County, *Lipez, J.*) denied the Town's motion.

Both parties filed motions for a summary judgment and the court (Cumberland County, *Delahanty, C.J.*) granted the Town a summary judgment on Count II (due process) and dismissed Counts IV and V (taking and excessive regulation) because the court found that Plummer had not applied for a variance and therefore had not exhausted its administrative remedies. The parties proceeded with the Rule 80B complaint.

The court (*Browne, A.R.J.*) reaffirmed the earlier order granting the Town a summary judgment on Plummer's due process claim, holding that the earlier order had established the law of the case. The court reinstated Counts IV and V with respect to the Rule 80B complaint and remanded the matter to the Town Council for further findings of fact, holding that the Town Council's failure to issue adequate findings of fact and conclusions of law made intelligent appellate review impossible.

The Town Council submitted its findings, which were similar to those made by the Planning Board and included additional findings of fact supporting the Town's contention that Plummer had no basis for its claims of taking and equitable estoppel. The court found that the Town's reclassification of Plummer's property had been erroneously premised on the belief that the lots contained Sebago Mucky

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Peat. The court held that the Town Council's denial of Plummer's request for a zoning change was not supported by substantial evidence in the record and constituted an abuse of discretion. The court ordered the Town to reclassify the lots as residential. This appeal followed. Plummer cross appeals the court's earlier decision to grant the Town a summary judgment on Plummer's due process claim. Because the court ordered the lots reclassified it did not reach a decision on Plummer's claims of taking and equitable estoppel.

## I

[1, 2] Rule 80B does not create judicial authority to review governmental action or inaction. The rule provides the *procedure* when governmental conduct is subject to direct judicial review by statute or when judicial intervention is otherwise available by law. Because the Town Council was performing a legislative function, as opposed to an administrative or quasi-judicial function, the court erred in undertaking a direct judicial review in the nature of an appeal and in remanding the matter to the Town Council for findings of fact.

## II

[3] Judicial review of a zoning ordinance amendment may be obtained by an action seeking a declaratory judgment. *See LaBonta v. City of Waterville*, 528 A.2d 1262, 1263 (Me.1987). Plummer sought a declaratory judgment pursuant to 14 M.R.S.A. §§ 5954 and 5957 (1980) and the issues underlying its petition seeking declaratory relief are the same as those that were argued before the court when the court undertook direct judicial review of the Town Council's action. In the interest of judicial economy, and because we find the record sufficiently complete to permit appellate review, we will address the issues raised by Plummer's request for a declaratory judgment and injunctive relief.

In reviewing Plummer's claim alleging that the zoning ordinance amendment reclassifying its property and the subsequent denial of its zone change request should be found null and void, we must determine whether the ordinance is constitutional and whether the zoning of Plummer's land is in basic harmony with the Town's comprehensive plan. *LaBonta*, 528 A.2d at 1263--1265, *see also* 30--A M.R.S.A. § 4352(2) (Supp.1991).

[4, 5] The ordinance itself is presumed to be constitutional. *Warren v. Municipal Officers, Etc.*, 431 A.2d 624, 628 (Me.1981). The burden is on Plummer to show by "clear and irrefutable evidence that it infringes on paramount law," and to establish "the complete absence of any state of facts that would support . . . the ordinance." *Id.* In order for the ordinance to

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be a valid exercise of the Town's police power it must 1) provide for the public welfare, 2) use means appropriate to the desired ends, and 3) not be exercised in an arbitrary or capricious manner. *Tisei v. Town of Ogunquit*, 491 A.2d 564, 569 (Me.1985).

[6, 7] Among the goals of the RPD is the protection of the environment and water quality. This goal provides for the public welfare and is a valid object of the exercise of the Town's police power. *See Hall v. Board of Environmental Protection*, 498 A.2d 260 (Me.1985). Restricting development in wetland areas is an appropriate means of achieving those objects.

Under the Town's zoning ordinance, the RPD consists of:

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All other areas so designated on the official zoning map, and any apparent wetlands contiguous thereto . . . unless the applicant for a permit for use or development of any land within the foregoing descriptions shall demonstrate by way of an on-site survey that the land does not constitute either "wetlands" . . . or "Sebago Mucky Peat" type soil, or coastal dunes.

Plummer's property was designated as part of the RPD on the official zoning map. The ordinance provides a reasonable mechanism for landowners who feel their property was improperly included in the RPD to petition for its reclassification. Although Plummer was able to demonstrate that its property did not contain Sebago Mucky Peat, the Town found, and Plummer concedes the fact, that its property contains wetlands. Therefore, the Town Council's adoption of the ordinance cannot be said to be arbitrary or capricious and the Town's amendment of its zoning ordinance, the effect of which was the reclassification of Plummer's property, was a valid exercise of its police power.

[8, 9] To successfully challenge the Town Council's denial of its zone change request Plummer must show that the Town's decision was inconsistent with the comprehensive plan. *LaBonta*, 528 A.2d at 1265. The Town Council found that these lots contained wetlands, and that filling the lots could create runoff and flooding problems. The comprehensive plan states that "certain areas of the community should be excluded from development because of the natural conditions of the land. Where these conditions can be shown to have a substantial relationship to the public's health, safety and welfare (i.e., flood hazard or ability to support a subsurface disposal system) severe restrictions on development can and should be sustained." The comprehensive plan further contemplates that no development will occur in the RPD. We conclude that the Town Council's denial of Plummer's zone change request was in basic harmony with the comprehensive plan.

### III

[10, 11] Our review of Plummer's claim of equitable estoppel leads us to conclude as a matter of law that it is insufficiently supported in the record. In Maine, equitable estoppel may be applied to activities of a governmental official or agency in the discharge of governmental functions. *Maine School Admin. Dist. No. 15 v. Reynolds*, 413 A.2d 523, 533 (Me.1980). In assessing a claim of equitable estoppel, we review the totality of the circumstances involved, including the nature of the government official or agency whose actions provide the basis for the claim and the governmental function being discharged by that official or agency. *Id.*

[12] "Proper application of equitable estoppel rests on a factual determination that the declaration or acts relied upon must have induced the party seeking to enforce the estoppel to do what resulted to his detriment and what he would not otherwise have done." *Shackford & Gooch, Inc. v. Town of Kennebunk*, 486 A.2d 102, 103--104 (Me.1984) (citations omitted). The facts must also show that the reliance was reasonable. *Id.* at 104. We have held that a party seeking to estop the enforcement of a zoning ordinance bears a greater burden of proof because of "the [f]orceful public reasons [that] militate against restricting the enforcement of municipal zoning ordi-

nances." *City of Auburn v. Degrosseilliers*, 578 A.2d 712, 715 (Me.1990).

[13] Plummer advances three factual bases for estopping the Town from denying its zone change request. First it claims that its property was taxed as if it were still buildable. While the Town Manager did testify that Plummer's taxes had not changed because the Town Manager was under the impression

that Plummer's property was grandfathered, "equitable estoppel may not be invoked against a government official or agency in the discharge of responsibilities regarding taxation. . . ." *Maine School Admin. Dist No. 5*, 413 A.2d at 533. The proper course of action is an action for tax abatement, not equitable estoppel.

[14] Second, Plummer points to additional testimony by the Town Manager in which he stated that Plummer and anyone else who inquired were told that previously approved building lots had been grandfathered. None of these statements was in writing. Reliance on oral unauthorized representations of a municipal official, where a written building permit is required for a project, is unreasonable as a matter of law. *Shackford*, 486 A.2d at 106.

Finally, Plummer argues that certain unnamed officials told it the lots were buildable in 1986 when Plummer granted the Town an easement across its property for the installation of a sewer system. Plummer claims that it gave the Town the easement and proceeded to provide its lots with sewer stubs and water service in reliance on these officials' misrepresentations. Once again Plummer is relying on the spoken statements of unauthorized, and in this case unnamed, officials. The Town was not estopped from enforcing the RPD ordinance as it applies to Plummer.

#### IV

The Superior Court ordered the Town Council to make findings of fact pertaining to Plummer's allegation that the enactment of the ordinance and the subsequent denial of its zone change request constituted an uncompensated taking. Because the court granted the relief requested in Plummer's Rule 80B complaint it never resolved this issue. We remand this matter to the Superior Court for a determination as to whether the Town's actions constituted an uncompensated taking.

#### V

[15, 16] Plummer cross appeals, arguing that the Superior Court erred when it granted the Town a summary judgment on Plummer's claim of lack of due process. Plummer contends that the notice given was both constitutionally and statutorily deficient because the Town Council was acting as an administrative or quasi-judicial entity when it amended the Town's zoning ordinances.

"Zoning is a legislative act," *Benjamin v. Houle*, 431 A.2d 48, 49 (Me.1981), and the "adoption of a zoning amendment, like [the] enactment of the original zoning ordinance is [also] a legislative act." 1 R. Anderson, *American Law of Zoning* 286 (3d ed. 1986). There is no constitutional requirement of individual notice when a legislative body conducts hearings or enacts laws. *Bi--Metallic Co. v. Colorado*, 239 U.S. 441, 445, 36 S.Ct. 141, 142, 60 L.Ed. 372 (1915).

The Town Council published a legal notice announcing its intention to review proposed amendments to the Town's zoning ordinance. Over a period of ten months, several public hearings and workshops were held and a map showing the proposed changes was posted at the Town Hall. The purpose of the hearings was to decide how the existing zoning laws should be changed to bring them into conformity with the Town's new comprehensive plan, not to rule specifically on the inclusion of Plummer's land in the RPD. Moreover, the Town Council provided all property owners with a remedy if their property was improperly included in the RPD. If a landowner can show that property does not have certain natural features, the Town can reclassify the property. The notice

provided was constitutionally sufficient.(fn1)

There is a statutory notice requirement imposed on the Town by 30 M.R.S.A. § 4962(1) (1978), now amended and recodified at 30--A M.R.S.A. § 4352(1), that provided in 1981 that "in the preparation of the zoning ordinance, the public shall be given adequate opportunity to be heard." This requirement was satisfied when the Town published the announcement advertising the scheduled public hearing.

The entry is:

Judgment vacated. Case remanded to Superior Court for further proceedings consistent with the opinion herein.

All concurring.

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Footnotes:

1. The notice read as follows:

LEGAL ADVERTISEMENT

NOTICE OF

PUBLIC HEARING

NOTICE IS HEREBY GIVEN that the Cape Elizabeth Town Council will hold a public hearing on proposed amendments to the Cape Elizabeth ZONING ORDINANCE and ZONING MAP at the Cape Elizabeth Town Hall at 7:30 p.m. on Monday, December 14, 1981, which amendments would revise provisions regulating removal of topsoil and other earth materials, would alter certain existing zoning districts and designations, and would establish the minimum residential lot size in the less dense Residence A District.

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## 726 A.2d 1253; Fitzgerald v. City of Bangor; 1999 ME 50

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Charles FITZGERALD v. CITY OF BANGOR.

[Cite as Fitzgerald v. City of Bangor, 726 A.2d 1253]

1999 ME 50

Supreme Judicial Court of Maine.

Argued March 3, 1999.

Decided March 30, 1999.

Taxpayer brought action against city challenging city's exercise of eminent domain power to acquire building for which tax lien was deemed foreclosed upon expiration of taxpayer's right to redeem. The Superior Court, Penobscot County, Delahanty, J., entered judgment for city. Taxpayer appealed. The Supreme Judicial Court, Saufley, J., held that city was not equitably estopped from asserting title to building through foreclosure of tax lien, on basis of apparent lack of information given by accounts clerk to taxpayer.

Affirmed.

George Z. Singal (orally), James R. Wholly, Gross, Minsky, Mogul &amp; Singal, P.A., Bangor, for plaintiff.

Erik M. Stumpfel (orally), City Solicitor, Bangor, for defendant.

Richard P. Flewelling, Maine Municipal Association, Augusta, for amicus curiae.

Before WATHEN, C.J., and CLIFFORD, RUDMAN, DANA, SAUFLEY, ALEXANDER, and CALKINS, JJ.

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SAUFLEY, J.

[¶ 1] Charles Fitzgerald appeals from the judgment of the Superior Court (Penobscot County, *Delahanty, J.*) in favor of the City of Bangor on the City's claim of title to real property through the foreclosure of a tax lien. Fitzgerald asserts that he should have been allowed to assert equitable estoppel as a defense to the City's claim. We affirm the judgment.

## I. BACKGROUND

[¶ 2] In 1994, Charles Fitzgerald owned, among others, two properties in Bangor. The properties, known as the "Freese's Building" and the "Dakin's Building," were subject to a first mortgage held by Bruce Slovin. Because Fitzgerald had failed to pay property taxes on both buildings for several years, the City had placed tax liens on each property. At issue in this matter are the liens for tax year 1993. Fitzgerald does not dispute the City's process in placing liens on the property.

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[¶ 3] The 18--month period of redemption on the 1993 liens was to expire as to both properties on December 7, 1994. To prevent the automatic foreclosure of the liens, Fitzgerald was required to pay \$7,996.63 on the Dakin's Building, and \$21,102.01 on the Freese's Building by the end of the business day on December 7, 1994. Unbeknown to Fitzgerald, Slovin paid the full amount due on the Dakin's Building midway through the afternoon of December 7, 1994.

[¶ 4] Fitzgerald arrived at the Bangor City Hall late in the afternoon of December 7, 1994 intending to pay the taxes on the Dakin's building. He asked the accounts clerk to tell him the amount that was due on the two buildings. Because a different clerk had waited on Slovin, and because payments made after noon are not posted until the following day, the clerk told him (incorrectly) that \$7,996.63 was still due on the Dakin's Building. Fitzgerald then paid that amount in full. The City accepted his payment on the Dakin's building and, when the double payment was discovered, Fitzgerald's payment was credited to more recent outstanding tax obligations on the Dakin's building. *See* 36 M.R.S.A. § 906 (1990) (requiring a municipality to apply any property tax payment received against outstanding or delinquent taxes due on that property).

[¶ 5] Fitzgerald alleges that he had decided to pay the taxes on the Dakin's building because he had limited resources and because the Dakin's building was occupied by paying tenants, whereas the Freese's building was unoccupied. He was aware that he would lose the Freese's building to the City. He asserts, however, that on December 7 he had enough money to pay the amount due on either the Dakin's Building or the Freese's Building, but not both. Therefore, he argues, had he been given the correct information, he could have used his money to pay the amount due on the Freese's Building.

[¶ 6] Because no payment was made on the Freese's Building on December 7, 1994, Fitzgerald's right to redeem the property expired by statute, and the City's tax lien was deemed to have been foreclosed. *See* 36 M.R.S.A. § 943 (1990 & Supp.1998).(fn1)

[¶ 7] The present case was commenced when Bruce Slovin brought an action against Fitzgerald and the City of Bangor seeking to foreclose his mortgage on the Freese's Building and requesting the Superior Court to determine the priorities of the parties holding interests in the property. Slovin and Fitzgerald eventually entered into a settlement, and the court denied the City's motion for summary judgment. The City then began administrative proceedings to use its eminent domain power to acquire the Freese's Building.(fn2) Fitzgerald responded by filing an

action challenging the exercise of eminent domain power by the City, and that action was consolidated with the foreclosure action originally filed by Slovin.

[¶ 8] In preparation for trial, the City filed a motion in limine, asking the court to exclude all evidence proposed to be offered at trial in support of Fitzgerald's claim that, as a result of the incorrect information given to Fitzgerald by the clerk on December 7, the City was equitably estopped from asserting that it had acquired title to the Freese's Building through foreclosure of its tax lien. After a hearing, the Superior Court granted the City's motion, holding that Fitzgerald's estoppel theory "may not be invoked against the City of Bangor in the exercise of its responsibilities involving taxation."

[¶ 9] By agreement, Fitzgerald voluntarily dismissed the remainder of his claims with prejudice, facilitating the appeal of his estoppel claim. The Superior Court, pursuant to Fitzgerald's motion under M.R. Civ. P. 54(b)(1), entered an order certifying as a final judgment its decision to grant the City of Bangor's motion in limine, which effectively foreclosed any defense Fitzgerald may have offered to the

City's claim of title and resulted in a judgment for the City. This appeal followed.

## II. DISCUSSION

[1--3] [¶ 10] Fitzgerald argues that the court erred either in determining that a taxpayer may never assert a defense of equitable estoppel against a municipality exercising its taxation authority, or in determining that the City was, in fact, exercising that authority when its accounts clerk gave Fitzgerald incomplete or inaccurate information.<sup>(fn3)</sup> We review the grant of a motion in limine for an abuse of discretion by the trial court. *See Jones v. Route 4 Truck & Auto Repair*, 634 A.2d 1306, 1308 (Me. 1993). To have properly exercised its discretion, the Superior Court must have applied the correct law to facts that were not clearly erroneous. *See Hamill v. Liberty*, 1999 ME 32, ¶ 4, 724 A.2d 616. Thus, we must determine whether the court correctly held that the city clerk was acting in the exercise of the City's taxation authority and, if so, whether the court's conclusion that equitable estoppel will not lie against the government in this matter was correct.

### A. The Clerk's Actions

[¶ 11] In its decision addressing the City's motion in limine, the court held that "[t]he dispensing of information regarding taxes due and the accepting of tax payments by a collections clerk working for the City of Bangor are two duties that serve to further the City's aim of collecting taxes." We agree. The entire process of collecting taxes, from valuation and assessment of property to the provision of information regarding amounts due and the acceptance of the funds for payment are part of a unitary process intended to assure that the government is carrying out its "paramount function [of taxation] by which it is enabled to exist and function at all." *Maine School Admin. Dist. No. 15 v. Reynolds*, 413 A.2d 523, 533 (Me. 1980). Fitzgerald argues that, by giving him accounting information and taking his money, the clerk was not exercising the City's authority to tax but was simply performing the clerical task of receiving funds on behalf of the City.

[¶ 12] In this context, however, there is no principled basis for recognizing a distinction between the actions of a clerical worker responsible for providing information relative to the collection of taxes and the actions of an administrator or official responsible for making discretionary decisions concerning the government's tax power. The dissemination of information and receipt of funds are actions as integral to the collection of taxes as are the actions that result in the assessment of the taxes.

[4, 5] [¶ 13] The rationale for the rule precluding the assertion of estoppel against

the government in tax cases is to assure that no officer of government has the ability to interfere inadvertently with the government's fundamental sovereign power to tax its citizens. *See A.H. Benoit & Co. v. Johnson*, 160 Me. 201, 207--10, 202 A.2d 1 (1964). This rationale should logically apply to the clerk who supplied Fitzgerald with incorrect information. The foreclosure of a tax lien is a procedure governed by statute, *see* 36 M.R.S.A. § 943 (1990 & Supp.1998), which cannot be rescinded because of the misstatements of a government employee to the taxpayer. *See Flower v. Town of Phippsburg*, 644 A.2d 1031, 1031 (Me.1994). We therefore decline to treat the more clerical aspects of the government's taxation activities as distinct from its other taxation activities for purposes of examining the taxpayer's ability to assert a defense of equitable estoppel against the government.

### B. Application of Equitable Estoppel Against the Government

[6] [¶ 14] The common law prohibition against the assertion of equitable estoppel against the government or its officials has been relaxed in recent decades, and we have held unequivocally that application of equitable estoppel based on the discharge of governmental functions is not completely barred. See *M.S.A.D. No. 15*, 413 A.2d at 533. Nonetheless, the ability of a party to assert an estoppel defense against the government may be limited depending upon the "totality of the circumstances involved, including the nature of the government official or agency whose actions provide the basis for the claim and *the governmental function being discharged* by that official or agency." *F.S. Plummer Co. v. Town of Cape Elizabeth*, 612 A.2d 856, 861 (Me.1992) (emphasis added).

[7] [¶ 15] When the governmental function at issue is the discharge of responsibilities regarding taxation, we have consistently held that estoppel may never be invoked. See *Town of Freeport v. Ring*, 1999 ME 48, ¶ 13, 727 A.2d 901; *Flower*, 644 A.2d at 1031; *A.H. Benoit & Co.*, 160 Me. at 210, 202 A.2d 1; *Dolloff v. Gardiner*, 148 Me. 176, 186--87, 91 A.2d 320 (1952); *Town of Milo v. Milo Water Co.*, 131 Me. 372, 378--79, 163 A. 163 (1932).(fn4)

[¶ 16] Notwithstanding the consistent application of the prohibition in past cases, Fitzgerald urges us to relax the rule. Even if we were to consider a relaxation of the rule, however, we would not do so on the facts presented here.(fn5)

[8] [¶ 17] Equity will not protect a party who has slept on his rights or failed to act with reasonable diligence. See *Searles v. Bar Harbor Banking & Trust Co.*, 128 Me. 34, 40, 145 A. 391 (1929).(fn6) Fitzgerald simply did not act with the reasonable diligence necessary for us to consider a change in our longstanding rule that the government can-

not be estopped from exercising its power of taxation. Fitzgerald neither claims that he was misled as to the status of the lien on the Freese's building, nor that he made an attempt to pay the taxes on the Freese's building. Rather, he made a calculated decision to allow the City to foreclose the lien on the Freese's building, and chose instead to wait until the very last minute to pay the taxes on the Dakin's building.

[¶ 18] Although Fitzgerald correctly asserts that the law allows him to pay the taxes in the last hour of the final day in the period of redemption, if he chooses to delay until that time, he may do so to his detriment. His eleventh hour decision, even if based on misinformation obtained from the city clerk, is not the solid foundation which we would require before considering the application of the doctrine of equitable estoppel in this context. On these facts, we decline to reexamine the rule that equitable estoppel may not be applied against the government when it is acting to discharge its responsibilities regarding taxation.(fn7)

[¶ 19] Fitzgerald may not, therefore, invoke equitable estoppel to challenge the City of Bangor's claim of title to the Freese's Building through foreclosure of its tax lien. The Superior Court properly applied the correct law to the facts and did not exceed the bounds of its discretion in granting the City's motion in limine.

The entry is

Judgment affirmed.

## Footnotes:

1. Approximately six weeks later, Fitzgerald attempted to recover the Freese's Building by tendering the total amount owed to the City in back taxes and other charges, but the Bangor City Council declined to allow Fitzgerald to redeem the property.
2. The Bangor City Council approved a resolution initiating the exercise of the City's eminent domain power to "complete" its acquisition of the Freese's property. The City Council appears to have decided to institute eminent domain proceedings because efforts to confirm its title to the property through court action had been delayed on the Superior Court calendar, and city plans to convert the building into elderly low-income housing required the City to obtain marketable title to the property expeditiously.
3. The doctrine of equitable estoppel requires proof that the plaintiff relied upon declarations or acts of the defendant and was thereby induced to do something to his detriment, something which he otherwise would not have done. *See Shackford & Gooch, Inc. v. Town of Kennebunk*, 486 A.2d 102, 105--06 (Me. 1984).
4. We first announced this rule in 1932, holding that estoppel cannot be raised to challenge the collection of taxes lawfully assessed, because to hold otherwise would impair the fundamental sovereign right of a state to assess and collect taxes. *See Town of Milo*, 131 Me. at 378--79, 163 A. 163. In 1964, we expanded on this rationale, noting with approval cases from other jurisdictions holding that an administrative officer charged with the duty of collecting taxes had neither the power to abrogate the state's sovereign power to tax nor the power to grant an exemption to a taxpayer; thus, estoppel could not lie against the municipality for the administrator's actions. *See A.H. Benoit & Co.*, 160 Me. at 207--10, 202 A.2d 1. This rationale was reaffirmed in 1980 and 1994, when we concluded that the government could not be estopped in tax matters because taxation was "the paramount function of government by which it is enabled to exist and function at all." *M.S.A.D. No. 15*, 413 A.2d at 533. *quoted in Flower*. 644 A.2d at 1031.
5. Although many states continue to apply the traditional rule that estoppel does not apply to state or local governments in tax matters, *see, e.g., Westminster-Canterbury of Hampton Roads, Inc. v. City of Virginia Beach*, 238 Va. 493, 385 S.E.2d 561, 566--67 (1989), it appears that the trend among state courts is to relax or abandon the rule. *See, e.g., Valencia Energy Co. v. Arizona Dept. of Revenue*, 191 Ariz. 565, 959 P.2d 1256, 1267 (1998) (en bane); *Illinois Comm'l Men's Ass'n v. State Bd. of Equalization*, 34 Cal.3d 839, 196 Cal.Rptr. 198, 671 P.2d 349, 359 (1983) (citing *United States Fidelity & Guar. Co. v. State Bd. of Equalization*, 47 Cal.2d 384, 303 P.2d 1034 (1956)); *see also* Michael A. Rosenhouse, Annotation, *Estoppel of State or Local Government in Tax Matters*, 21 A.L.R.4th 573 (1983).
6. *See also* 2 JOHN NORTON POMEROY. EQUITY JURISPRUDENCE §§ 418, 419, 419c at 169--72, 175--77 (5th ed.1941).
7. The United States Supreme Court's jurisprudence concerning the invocation of estoppel against the federal government in tax cases appears to be consistent. Indeed, the Court has "come close to saying that the government can never be equitably estopped based on a false or misleading statement of one of its agents no matter how much an individual has relied on that statement to her detriment or how reasonable her reliance." 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 13.1 at 229 (3d ed.1994). The rationale for this approach is as follows:

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Estopping the government based on the misrepresentations of its agents would have a series of adverse effects. The most immediate result would be a financial loss of some magnitude to the government. If the government began to lose much money as a result of estoppel cases, agencies would respond by limiting severely the availability of information and advice from government employees. That, in turn, would cause extreme harm to the public for four reasons: (1) All citizens need advice concerning a variety of complicated government programs; (2) most of the advice provided by government employees is accurate and helpful; (3) advice from government employees is free; and (4) advice from alternative sources that may be more reliable is often very expensive.

*Id.* § 13.1 at 230.

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**413 A.2d 523; Maine School Administrative District No. 15 v. Reynolds;**


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**MAINE SCHOOL ADMINISTRATIVE DISTRICT NO. 15 et al. v. Harold RAYNOLDS, Jr.,  
Commissioner, et al.**

Supreme Judicial Court of Maine.

April 16, 1980.

Argued Jan. 14, 1980.

Decided April 16, 1980.

The Superior Court, Cumberland County entered judgment against two school districts which sought to retain interest earned as the result of the temporary investment of proceeds of school construction bonds, and districts appealed. The Supreme Judicial Court, Wernick, J., held that policy relating to allocation of such interest was valid and was not retroactively applied to sale of bonds occurring prior to adoption of policy, and that record was inadequate to permit determination as to whether Board should be estopped from invoking policy against one district.

Affirmed in part, set aside in part, and remanded.

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Verrill & Dana, Michael T. Healy (orally), Portland, for School Administrative Dist. No. 15.

Drummond, Woodsum, Plimpton & MacMahon, P. A., Harry R. Pringle (orally), Portland, for School Administrative Dist. No. 24.

Waldemar G. Buschmann, Asst. Atty. Gen. (orally), Augusta, for defendants.

Before MCKUSICK, C. J., and WERNICK, GODFREY and ROBERTS, JJ.

WERNICK, Justice.

We have before us appeals from a judgment of the Superior Court (Cumberland County) taken by plaintiff, Maine School Administrative District No. 15 (MSAD No. 15) and intervenor plaintiff, Maine School Administrative District No. 24 (MSAD No. 24).<sup>(fn1)</sup> The judgment adjudicated that the plaintiff and the intervenor plaintiff lacked legal right to retain for their own unrestricted use the income earned from the temporary investment by each of them of the unused portion of proceeds derived from capital outlay school construction bonds issued under the statutory program of state aid for school construction (20 M.R.S.A.

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§§ 3457--61). The judgment also denied the permanent injunction sought by the Districts to enjoin the defendants, Harold Reynolds, Jr., Commissioner of the Department of Education and Cultural Services,

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and the State Board of Education, from reducing, by the amount of the net income each District had earned by its temporary investment of bond proceeds, the school construction aid the state was obligated to pay to the plaintiff and the intervenor plaintiff.

The principal issues raised by the appeals focus upon the provisions of 20 M.R.S.A. § 3457, and of related legislation and regulations, regarding the financing of those public school construction projects approved by the State Board of Education prior to July 1, 1977.

We deny the appeal of plaintiff MSAD No. 15 and affirm the judgment insofar as it adjudicated against MSAD No. 15 and in favor of defendants, although our reasoning in support of this conclusion differs from that of the Superior Court Justice.

However, because of special circumstances in regard to the intervenor plaintiff MSAD No. 24 indicating that it might have the benefit of an equitable estoppel, we set aside the judgment of the Superior Court insofar as it adjudicated against MSAD No. 24 and remand the case as to it to the Superior Court for further proceedings concerning the issue of equitable estoppel.

The pertinent facts have been stipulated.

In January 1974, plaintiff MSAD No. 15 received from the State Board of Education the approvals making it eligible, pursuant to 20 M.R.S.A. § 3457, to receive financial aid from the state in the construction of a new high school. The inhabitants of the District subsequently authorized the directors of the District to issue bonds to raise up to \$2,800,000 for use as capital outlay. On October 11, 1974, the State Board, in accordance with 20 M.R.S.A. § 3458, granted the application of MSAD No. 15 for state school construction aid of \$2,800,000, and the District thereafter issued capital outlay bonds in the amount of \$2,575,000. During the period the school was being constructed, the District made temporary investments of the bond proceeds not being used to defray expenses. As of December 16, 1977, the investment had produced interest of \$116,928.78 and subsequently additional interest has been earned. None of the income thus realized has ever been spent by MSAD No. 15.

Intervenor plaintiff MSAD No. 24 received the State Board of Education approvals rendering it eligible for state school construction aid, pursuant to 20 M.R.S.A. § 3457, during January of 1974. In elections held in February and December of that year the inhabitants of the District authorized the directors of the District to issue capital outlay bonds for school construction totalling \$5,650,000. By March 28, 1975, the State Board of Education, in accordance with 20 M.R.S.A. § 3458, had issued approvals to MSAD No. 24 for school construction aid totalling \$5,498,700. On March 19, 1975 and October 15, 1975, the District issued capital outlay bonds in the amounts of \$5,310,000 and \$185,000 respectively. During the period of school construction MSAD No. 24 made temporary investments of the bond proceeds while they were not being used. It had realized \$289,927.09 in interest as of December 28, 1978 when it intervened in this action. Having credited this income to its general budget, MSAD No. 24 spent most of it---all but approximately \$57,000---in budget years 1976--77 through 1978--79.

In February, 1977 the State Board of Education notified the plaintiff, and sometime later the intervenor, that upon the filing of final construction reports and the completion of audits, (conditions precedent to the payment of any financial assistance under 20 M.R.S.A. § 3457), the Board would reduce the state aid payments to each District, respectively, by the amount of the income it had earned by its temporary investment of unused bond proceeds. The State Board relied on its "Policy XII", which was issued January 15, 1976, effective the following day, as the basis for requiring such reduction. Included in Policy XII were the following provisions:

"C. . . . Proceeds from the bond sale shall be used immediately to pay short term principal and interest costs. Unused portions of the bond proceeds shall be reinvested at all times in such manner as to be fully secured with as high rate of return as possible. Income from the reinvestment of unused bond proceeds shall be applied toward the interest costs of temporary borrowing.

"D. The difference between the income from reinvesting unused portions of bond proceeds and the interest costs for temporary borrowing shall be applied toward the next interest payment or principal and interest payment listed on the debt retirement schedule filed with the Department until the difference is depleted. "H. Interest earned from the time the SBA--1 is filed to the next interest or principal and interest payment is due may be retained for local school use. "I. Effective Date: This policy shall be effective January 16, 1976 except that the Commissioner is authorized to grant exceptions to this policy in cases where its implementation causes hardships on individual projects."

The Districts challenge the legality of these provisions of Policy XII, contending that (1) they lie outside the scope of such regulatory power as was lawfully delegated to the State Board by the legislature, and (2) they are inconsistent with the purposes manifested generally in the state program of financial aid for school construction, as well as with those purposes particularly reflected in 20 M.R.S.A. § 3457. In addition, the Districts claim that Policy XII must be held inapplicable to them; to apply it to them would make the regulation retroactive and in this instance the legislature has not conferred power on the State Board of Education to regulate with retroactive effect. A further contention, made by the intervenor plaintiff MSAD No. 24, is that because it spent most of the income it derived from the temporary investment of the bond proceeds (while they were not being used) in reliance on written representations of the Associate Commissioner of Education that Policy XII was inapplicable to it, defendants should be held equitably estopped to apply the policy to the amounts of interest thus spent.

1.

The Superior Court Justice concluded that the correct interpretation of the statutes under consideration is that the *legislature itself mandated* the reduction in school construction aid imposed here by defendants. In support of this view defendants call to our attention various provisions in the comprehensive statutory scheme for school aid construction. They refer, for example, to the express statement in 20 M.R. S.A. § 3457 that the allocating of financial assistance shall be to

"provide further incentive for the establishment of larger School Administrative Districts."

This statement, they argue, implies that the interest derived from the temporary investment of construction bond proceeds while they are not being used must be applied to reduce the amount of reimbursement from state funds, since thereby state funds are made available to be spread to more districts and construction projects. In addition, defendants maintain that the overall statutory scheme manifests legislative intent that the state program of financial assistance for school construction projects should not result in a "windfall" to a particular District which receives state assistance. This objective is reflected in the requirement, in Section 3457, that all federal funds (other than federal revenue sharing funds) be deducted before "computing the eligible expenditure of any administrative unit for construction aid", as well as in the statutory directives that units receiving state construction aid shall carry fire insurance and allied coverage on the completed project, shall use the insurance proceeds for repairs in the event of damage, and shall not receive subsidy on those proceeds. Similarly, specifically as to projects with financing approved under 20 M.R.S.A. § 3460, the legislature has expressly mandated that those units receiving "advance" payments shall invest any portion of the

advances not required for immediate disbursement, as well as that an amount equal to any interest earned on such investment "shall be deducted from any balance of construction aid payable to the unit on the project."

However, we regard these arguments as cutting against, rather than supporting, the point the defendants seek to make. The arguments show that where it was the legislature's purpose to establish *its own mandate* for reductions in particular instances and respects in the amount of state construction aid to be paid to a local administrative unit, the legislature knew how to accomplish its objective by resort to language which expressly, directly, plainly and specifically conveyed the legislative intent. We deem the particular subject of the temporary investment by school districts of the proceeds of capital outlay bonds not required for immediate disbursement for project expenditures, as well as the reduction of state financial assistance by the amounts earned from such investments, to be matters too important, were it the legislative intent to impose its own mandate regarding them, for the legislature to have left such intent to be derived by implication, indirection or analogy. We think that were it the legislative intent to impose *this particular* mandate, the legislature, having abundantly demonstrated in similar contexts that it knew precisely how to do it, would have stated the mandate in express, direct, specific and plain language.

[1] We conclude, therefore, that defendants' argument that Policy XII as promulgated by the State Board of Education, is harmonious with, and would tend to effectuate the overall purposes of, the entire legislative program of state aid for school construction fails to establish that the legislature itself mandated that policy *to the exclusion of any other*. In the absence of language expressly, plainly and specifically stating such a particular legislative mandate, the point that Policy XII is consonant with, and tends to effectuate, the purposes of the state's program of financial assistance for school construction shows at most that the legislature may have authorized the promulgation of Policy XII as a *permissible administrative implementation* of that generalized statutory program.

Moreover, we disagree with an alternative rationale relied on by the Superior Court Justice, that "general principles governing bonding for public purposes *dictate*" (emphasis added) application of the investment income as Policy XII prescribes. In two of the cases cited by the Justice in this regard the issue of investment income was not involved. We look upon another case cited, *Union County Park Commission v. Board of Chosen Freeholders of Union County*, 6 N.J.Misc. 654, 142 A. 428 (1928), as tending to support the position of the School Districts insofar as it holds that where bonds were sold through the County for the benefit of the Park Commission, the Park Commission---not the County---was entitled to the income derived from investment of the bond proceeds.

The last case relied on by the Superior Court Justice, *Lynn v. Longview*, 15 Wash.2d 528, 131 P.2d 164 (1942) we find plainly distinguishable from the case at bar. There, for the making of localized improvements, municipalities were empowered by statute to create local improvement districts which were authorized to issue bonds to raise the proceeds to finance the improvements. Statute further required that at the time of the creation of a local improvement district and of the issuance of bonds therefor, assessments be levied and apportioned against the real property within the district, payable annually, to raise monies to be applied to retire the bonds. Statute further required that the monies produced by the assessments be

"kept in special funds for the sole purpose of paying principal and interest of . . . [the bonds issued by the] local improvement district." *Id.*, 131 P.2d at 166.

In addition, statute provided that bonds issued by a local improvement district

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"shall not be general obligations of the city [which created the local improvement district], and . . . the holders

thereof must look exclusively to the funds made up of payments of the local improvement district assessments." *Id.*, 131 P.2d at 167.

Because of these statutory provisions establishing the monies derived from the assessment as a special fund dedicated to the "sole purpose of paying principal and interest of . . . [the bonds of a] local improvement district", Washington case law had settled that the

"local improvement district assessments collected by the municipality constitute a trust fund for the benefit of the holders of the bonds." *Id.*, 131 P.2d at 166.

The issue involved, and decided, in *Lynn v. Longview*, *supra*, was whether the City of Longview or the bondholders were entitled to interest earned from the investments of monies constituting *this trust fund* for the benefit of bondholders. The Court decided the issue, fundamentally, on basic principles of trust law, saying:

"Since the assessments collected in each local improvement district constitute a trust fund held by the city, as trustee for the benefit of the bondholders of that district, it seems . . . , logically, to follow that the interest earned on such assessments is also impressed with a like trust. All increase in the value of a trust fund derived from investment or reinvestment returns or from interest earned on the fund, belongs to, and becomes a part of, the corpus of the trust estate in the absence of some specification to the contrary in the instrument or the statute creating the trust." *Id.*, 131 P.2d at 166.

The situation in the case at bar is obviously far different. Here, the issue relates *only* to the interest earned on the proceeds produced by the bonds themselves, as derived from the bondholders' purchase of the bonds, *not* to any *independent special fund otherwise derived and required to be held, as a form of security*, against default in payment of the principal and interest due bondholders. Plainly, here, the proceeds raised by the issuance of the bonds are intended to be *spent*, to pay for the costs of the projects which were financed by issuance of the bonds, *not* to be retained as a security fund to protect either the bondholders against default in the payment of the principal and interest due them under the bonds, or anyone else.

Patently, then, the factor which is the foundation of the *Lynn v. Longview* decision is absent in the case at bar. Here, we have *no special trust fund* at all to call into play the "logic" of trust law that in the absence of special provisions to the contrary, as the court correctly stated in *Lynn v. Longview*,

"interest earned on the fund, belongs to, and becomes a part of, the corpus of the trust . . ."  
*Id.*, 131 P.2d at 166.

Here, rather, the issue we face concerns interest earned on the monies raised by the issuance of the bonds as to which---absent, as here, special provisions of the bonds themselves or in the statutes governing the issuance of the bonds---the controlling "logic" derives from the law of debtor and creditor; in usual effect the bondholder, by purchasing an issued bond, becomes a lender of money to the issuer of the bond as debtor. Just as a debtor, absent particular arrangements, has no legal obligation arising from his status as debtor specially to retain and dedicate for the benefit of the creditor, or anyone else, any of the money borrowed, so the debtor has no such legal obligation regarding any increment he derives from his

investment of the borrowed money.

[2] We therefore agree with the School Districts that absent a mandate prescribed by statute or by lawful administrative regulation to the contrary, they would be entitled to the benefit of the interest earned on the temporary investment of bond proceeds while they are not being used to defray construction expenses. See *Easterling v. Cook*, 175 Ark. 574, 299 S.W. 1009 (1927); *Marr v. Southern California Gas Co.*, 198 Cal. 278, 245 P. 178 (1926).

Since we have already concluded that there is no statutory mandate to the contrary, we turn to consider whether such a mandate has been imposed by lawful administrative action.

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2.

It is beyond dispute that Policy XII promulgated by the State Board of Education expressly and plainly establishes an administrative mandate that construction aid payments to a School Administrative District shall be reduced by the amount earned from that District's temporary investment of proceeds of the bonds. The issues, then, are: (1) whether Policy XII was lawful administrative action, as lying within the scope of powers actually delegated by the legislature, consistent with constitutional requirements; and (2) whether Policy XII is lawful as applied to the instant Districts whose school construction projects were in process prior to January 16, 1976, the effective date of Policy XII.

[3] The constitutional requirements for a valid legislative delegation of regulatory power to an administrative body have been discussed by this Court on several occasions, e. g., in *Kovack v. Licensing Board*, 157 Me. 411, 173 A.2d 554 (1961); at length in *City of Biddeford v. Biddeford Teachers Association*, Me., 304 A.2d 387 (1973); and most recently in *State v. Dube*, Me., 409 A.2d 1102 (1979). The basic requirement, as articulated in *Biddeford Teachers Association*, is that there be "sufficient standards---specific or generalized, explicit or implicit" to guide the agency in its exercise of authority, *id.*, at 400, so that (1) regulation can proceed in accordance with basic policy determinations made by those who represent the electorate and (2) some safeguard is provided to assist in preventing arbitrariness in the exercise of power.

Here, the State Board of Education was granted regulatory authority under 20 M.R. S.A. § 223. At the time Policy XII was adopted the statute provided:

"Subject to this chapter and sections 1901, 1902, 3456, 3457 to 3460 and 3711 to 3716, the State Board of Education may make such reasonable regulations as it may find necessary for carrying out the purposes, provisions and intent of these sections."(fn2)

The utilization of this regulatory power is specifically limited by 20 M.R.S.A. § 51(3), which enumerates among the powers and duties allocated to the State Board of Education the responsibility to "approve projects for state construction aid." Findings the Board must make in issuing such approvals are set out at 20 M.R.S.A. § 3458. Among them is a finding that:

"[t]he proposed project and the authorized method of financing it are in the best interest of the State and the administrative unit."

In making that determination, as well as the other findings required, the Board may be guided by the language of the provisions explaining the alternative methods of financing through state construction aid.

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In this case, the School Districts received approval for construction aid under 20 M.R.S.A. § 3457. That section includes provisions to the effect that the allocation of state financial assistance on school construction be in accord with the purpose to "provide further incentive for the establishment of larger School Administrative Districts . . ." The section also requires that before any such assistance shall be paid, the School District must file a report with the Commissioner, in a form specified by him to include certain financial information, some of which is listed in the statute, the rest to be determined by the Commissioner. These reports are to provide the information necessary for the Commissioner to determine the total amount of funds to be paid to the Districts and to apportion them out of the "moneys appropriated" in accord with the statute.

These, and other, standards to guide the State Board in determining the content of its regulations, are supplemented by the statutory requirement that the Board comply with certain procedural safeguards in promulgating regulations. Although the Maine Administrative Procedure Act, 5 M.R.S.A. §§ 8001 *et seq.* was not in effect

at the time Policy XII was adopted, the provisions of 1 M.R.S.A. §§ 401, *et seq.* requiring notice and open meetings were in effect, and there is no evidence that these were not complied with in the promulgation of Policy XII.

[4] All of the foregoing statutory provisions provide adequate standards for administrative regulation and make the delegation of power in 20 M.R.S.A. § 223 consistent with constitutional requirements.

We must address, then, whether Policy XII, as promulgated, was within the authorized scope of the powers the legislature conferred on the State Board of Education.

20 M.R.S.A. § 223 gives ample authority to the State Board of Education to fill in the interstices of the school construction finance legislation by regulations effectuating "the purposes, provisions and intent" of the comprehensive statutory program of state aid for school construction.

In our prior analysis rejecting the contention of defendants that the legislature mandated what Policy XII purports to effectuate administratively, we discussed the purposes and intent of the statutory program. *Ante*, at 526--527.

[5] In light of those purposes and intent we conclude that it is an authorized, and reasonable, administrative implementation of the program to tie the state's offer of payment of all debt service costs to a requirement that the unit receiving that benefit reduce the state's burden by the amount of interest yielded by the temporary investment of bond proceeds while they remain unused to pay for project costs--the bond proceeds being funds the unit would not have had available to it were it not for the state's promise of reimbursement as the foundation for the issuance of the bonds. Even though the possibility cannot be excluded that the legislature might fail to appropriate sufficient funds to meet the state's reimbursement obligations, *see Cohen v. Ketchum*, Me., 344 A.2d 387, 399 (1975), it is nevertheless the basic reality that

"[o]nce approval is forthcoming, reimbursement is contemplated as mandatory and automatic", *id.*, at 399,

and that were the legislature to refuse to make necessary appropriations, the courts may be called upon to enforce the state's obligation. *Cohen v. Maine School Administrative District No. 71*, Me., 369 A.2d 624, 626 (1977). Given such enforceable obligation of the state, it would be far-fetched to hold Policy XII

unreasonable because it would prevent the Districts from keeping the interest earned on the unused bond proceeds as a reserve for payment of the principal and interest due the bondholders---more particularly since the Districts have no legal obligation, and indeed have made no commitment, to hold the interest earned on the temporary investment of bond proceeds (while they are unused) as a dedicated reserve to protect against the eventuality that the legislature may not appropriate the funds to enable the state to honor its assistance obligation.

In sum, by requiring the investment of unused bond proceeds and the deduction of the amount any interest thus earned from the funds reimbursed, Policy XII not only assures the full payment of debt service without reliance on any of the usual revenue sources or existing funds of the School Districts; it also prevents any individual unit from obtaining a "windfall": a benefit accruing only to the individual District but paid for by all the state's taxpayers.(fn3)

[6--8] The Districts make a further contention that Policy XII is unauthorized because the State Board failed to make a prior formal finding under 20 M.R.S.A. § 223, which grants the State Board authority to

"make such reasonable regulations as it may find necessary for carrying out the

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purposes, provisions and intent of these sections."

This issue may not be open for review in these appeals since nothing is before us showing that it was raised in the Superior Court. Assuming arguendo, however, that the question may be considered, we see no violation of the section. Although a formal statement as to why the Board deemed the Policy "necessary" might be desirable, we conclude that the section does not require express formal findings to that effect. The promulgation of the regulation implies that the agency found the rule "necessary" to carry out the provisions involved---"necessary" in this context meaning not "indispensable" but rather "convenient" or "helpful" in effectuating the purposes of the Act. And, as we have already explained, our conclusion is that as a matter of law Policy XII meets this requirement.

The remaining question, within the general challenge of the instant Districts against the lawfulness of Policy XII, is whether it is in excess of the State Board's delegated authority to apply Policy XII to them. They maintain that such application of Policy XII gives it retroactive effectiveness, and the Board lacks authority to regulate retroactively. The Districts supplement this contention with the argument that in the original promulgation of Policy XII the Board indicated that it did not intend the Policy to apply to them, lest it thereby be rendered of retroactive effect, as shown by the language of Policy XII itself and the Statement in Administrative Letter No. 64 (issued to the School Districts along with Policy XII) that: "This policy will not apply to projects for which bonds were sold as of January 16, 1976."

[9] Putting aside for the moment Administrative Letter No. 64, we find nothing in the language of Policy XII itself indicating that it would not apply to the income from temporary investments of bond proceeds of MSAD No. 15 or No. 24. Policy XII states that it shall be effective January 16, 1976, and provision D provides that

"[t]he difference between the income from reinvesting unused portions of bond proceeds and the interest costs for temporary borrowing shall be applied toward the next interest payment or principal and interest payment listed on the debt retirement schedule filed with the Department until the difference is depleted."

As of January 16, 1976, MSAD No. 15 and MSAD No. 24 still had in possession the interest each had

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earned from the temporary investment of bond proceeds while not yet used to defray construction costs. Thus, the application of Policy XII to require that the investment income *still in the possession* of the Districts be applied to reduce debt retirement payments to *be made by the State after the effective date of the regulation* does not cause the regulation to be improperly retroactive in effect merely because the interest affected had been earned prior to the effective date of Policy XII.

[10] The simultaneous issuance of Administrative Letter No. 64 suggesting an interpretation which would exempt certain projects from the operation of the regulation, although it was an indication of the opinion of at least one state education official at the time, did not have the force of law. An administrative official's statement as to the intendment of a regulation may be entitled to deference if it is not obviously inconsistent with the regulation or otherwise plainly erroneous. *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413--414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945); Davis, *Administrative Law Treatise*, 2d Ed. Vol. 2 § 7.22. In the present case, however, we are presented with conflicting expressions of intendment: one as indicated by Associate Commissioner Pineo's Administrative Letter No. 64, issued January 16, 1976, and his letter of January 29, 1976 to the Superintendent of MSAD No. 24; the other stated in the letter to MSAD No. 15 of February 18, 1977 and another letter of similar import to MSAD No. 24, and asserted in these proceedings by the defendants as the definitive administrative position. To the extent, therefore, that the Associate Commissioner's expression of intendment may

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ever have had any validity, it must now be taken as having been superseded. Since we conclude that the State Board's now definitive position is consistent with the textual language of Policy XII, which we have determined to be lawfully authorized, we hold that it may lawfully be applied to MSAD No. 15 and MSAD No. 24, unless, and except to such extent as, equitable estoppel may be invoked against defendants to preclude such result.

3.

We turn, then, to the issue of equitable estoppel asserted only by the intervenor plaintiff MSAD No. 24 on the ground that after Policy XII became effective it relied upon official representations of Associate Commissioner Pineo that Policy XII would not apply to it and, so relying, spent most of the net interest it had earned from its temporary investment of school construction bond proceeds.

At the outset of analysis, we stress that the 'estoppel issue comes before us on appeal in a posture in which we lack the benefit of any findings by the Justice of the Superior Court as to the *facts* that in this case would bear upon those elements the law holds essential to give rise to an equitable estoppel. *See Baker v. Associated Transport, Inc.*, Me., 411 A.2d 384, 386 (1980); *Roberts v. Maine Bonding & Casualty Company*, Me., 404 A.2d 238, 241--42 (1979); *Pino v. Maplewood Packing Company*, Me., 375 A.2d 534, 539 (1977); *Milliken v. Buswell*, Me., 313 A.2d 111, 119 (1973). Neither do we have the benefit of the Superior Court Justice's evaluation, as a mixed factual and legal determination, of how those essential legal elements would apply to facts found.(fn4)

In this case, then, we can finally dispose of the merits of the equitable estoppel issue at the appellate level only if we can decide it on the merits in favor of one side or the other *as a matter of law*.

[11] We conclude that the record before us does not permit such a disposition. Although further fact-finding evaluation may not be necessary as to reliance by MSAD No. 24 since that has been stipulated, we think the record leaves open to factual assessment in light of the totality of the circumstances whether the reliance was justified. Moreover, even though it is undisputed that MSAD No. 24 spent most of the net interest it had earned by its temporary investment of school construction bond proceeds, the record

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indicates issues of fact that remain unresolved regarding exactly for what purposes the interest was spent and, more particularly, whether or not it was spent either (1) in discharge of obligations that, in any event, MSAD No. 24 was otherwise legally required to meet or (2) in other ways for which MSAD No. 24 would not have chosen to spend the monies were it necessary that they be raised by increasing taxes. All of these unresolved matters are factual issues bearing on whether MSAD No. 24 suffered a real detriment in consequence of its reliance on the official representations by Associate Commissioner Pineo.(fn5)

Since we thus conclude that we cannot decide the merits of the equitable estoppel issue in favor of one or the other of the opposing sides as a matter of law, we must address a separate issue which could result

in a disposition of the equitable estoppel issue, as a matter of law, in favor of the defendants. This other issue arises because the defendants are a government official and a governmental agency acting in the discharge of governmental functions. The question arises, then, whether under the law of Maine application of equitable estoppel is prohibited *absolutely* wherever it is sought to be applied to the actions of any governmental official or agency in the discharge of any governmental function.

If in the development of the common law it was held that equitable estoppel could never be applied against any governmental official or agency acting in the discharge of any governmental function, the law now prevailing in most jurisdictions rejects so absolutistic an approach. See appropriate cases collected in Davis, *Administrative Law of the Seventies*, §§ 17.01 *et seq.* (1976 and 1980 Supp.).

This Court has previously decided that equitable estoppel may not be invoked against a governmental official or agency in the discharge of responsibilities regarding taxation, the paramount function of government by which it is enabled to exist and function at all. *A. H. Benoit & Company v. Johnson*, 160 Me. 201, 202 A.2d 1 (1964); *Dolloff v. Gardiner*, 148 Me. 176, 91 A.2d 320 (1952); *Town of Milo v. Milo Water Company*, 131 Me. 372, 163 A. 163 (1932). This Court, however, has not previously decided that equitable estoppel may never be applied solely on the ground that the activity against which it is invoked is that of some governmental official or agency discharging some governmental function. To the contrary, there have been intimations by this Court that equitable estoppel may be asserted against particular governmental officials or agencies acting in the discharge of particular governmental functions. See *Roussel v. State, Me.*, 274 A.2d 909, 926 (1971); *Boutet v. Planning Board of City of Saco, Me.*, 253 A.2d 53, 56 (1969).

[12, 13] We now squarely decide that under the law of Maine the application of equitable estoppel is *not absolutely* precluded solely because it is invoked against activity by a governmental official or agency in the discharge of a governmental function. The law of Maine is, rather, that depending on the totality of the particular circumstances involved, which will include the nature of the particular governmental official or agency acting and of the particular governmental function being discharged as precipitating particular considerations of public policy, equitable estoppel may be applied to activities of a governmental official or agency in the discharge of governmental functions.

With the law of Maine in this regard thus definitively established we, as an appellate tribunal, cannot say on the record before us that as a matter of law equitable estoppel should, or should not, be applicable to the particular governmental activity involved in this case and the particular governmental official and agency named as the defendants. This is so, first, because more extensive fact-finding regarding all the circumstances, as previously discussed herein, will assist in the general judgmental balancing of public policy considerations relative to fairness and justice. Second, more particularly since the intervenor plaintiff MSAD No. 24 seeking to impose equitable estoppel is itself a governmental agency sharing a

common responsibility with defendants to discharge the governmental function of furthering public education, the public policy considerations, and the public interest, could weigh in the balance on both sides and thereby cancel out, leaving the application of equitable estoppel for determination in accordance with the demands of fairness and justice as if the controversy were between non-governmental parties.

[14] We, therefore, conclude that as to intervenor plaintiff MSAD No. 24, the case must be remanded to the Superior Court for its consideration, guided by this opinion, of the question whether, and if so to what extent, equitable estoppel should bar defendants from enforcing Policy XII against intervenor plaintiff MSAD No. 24.

Moreover, since it is in this case that this Court has had occasion for the first time to discuss in some detail the issue of the appli-

cation, in general, of equitable estoppel against governmental officials or agencies acting in the discharge of governmental functions and, more particularly, the scope of the problem where, as here, it is a governmental agency which is seeking to apply equitable estoppel against governmental action of another governmental official and agency, we conclude that in fairness to all parties, as well as for the benefit of the Justice who will preside over the further proceedings on remand, the consideration of the equitable estoppel issue on remand need not be confined to the evidentiary record as heretofore made. In those proceedings plaintiff MSAD No. 24, and the defendants may, as any of them may see fit, present additional relevant evidence.

The entry is:

(1) The appeal of plaintiff MSAD No. 15 is denied, and as to plaintiff MSAD No. 15 the judgment of the Superior Court in favor of the defendants is affirmed.

(2) The appeal of intervenor plaintiff MSAD No. 24 is sustained; as to intervenor plaintiff MSAD No. 24 the judgment of the Superior Court in favor of the defendants is set aside, and the cause is remanded to the Superior Court for further proceedings confined to the issue of equitable estoppel in accordance with the opinion herein.

All concurring.

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Footnotes:

1. MSAD No. 15 instituted action, seeking a declaratory judgment and an injunction, on December 19, 1977. MSAD No. 24 was permitted to intervene in the action on January 18, 1979.

2. Compare the grant of regulatory power in issue in *State v. Dube*, Me., 409 A.2d 1102 (1979).

3. For example, debt service for MSAD No. 15's construction project is funded in part by the Uniform Property Tax. The District was assessed only \$121,000 for debt service for fiscal year 1976 and fiscal year 1977, but it was entitled to \$609,927.08 in reimbursement for the same period. See letter from Associate Commissioner Larry N. Pineo to Superintendent Gerald K. Burns, MSAD No. 15, February 18, 1977.

4. On the Superior Court Justice's rationale of decision, which we have not accepted, that the legislature itself had mandated what Policy XII purports to effectuate administratively, it was not necessary that the Justice address the equitable estoppel claim on its factual and legal merits. He was able to dispose of it on the independent legal ground that equitable estoppel cannot be invoked to require a governmental official or agency to take action in violation of law established by the legislature.

5. We may note, too, that Policy XII itself provides that "the Commissioner is authorized to grant exceptions to this Policy in cases where its implementation causes hardships on individual projects." Depending upon what a fact-finding inquiry may reveal regarding the nature of the detriment to MSAD No. 24, if any, it might be that further fact-finding inquiry could indicate that any detriment suffered could be ameliorated by a flexible application of Policy XII to MSAD No. 24, thereby to avoid the necessity of bringing to bear so extreme a remedy as the bar resulting from the application of an equitable estoppel.

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