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Supreme Court of Texas.
CITY OF WHITE SETTLEMENT, Texas, Petitioner,
v.
SUPER WASH, INC., Respondent.
No. 04-0340.

April 13, 2005

Appearances:

Michael R. Burkett, Garrett & Burkett, Fort Worth, for petitioner.
Hal R. Ray Jr., Pope, Hardwicke, Christie, Harrell, Schell &
Kelly, L.L.P., Fort Worth, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Priscilla R. Owen, Harriet
O'Neill, David M. Medina, Paul W. Green, Nathan L. Hecht, Dale
Wainwright, Phil Johnson, Scott A. Brister, Justices.

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CHIEF JUSTICE JEFFERSON: Be seated please. The Court is ready to
hear argument in 04-0340 City of White Settlement, Texas v. Super Wash,
Inc.

SPEAKER: May it please the Court. Mr. Michael Burkett will present
argument for the petitioner. The petitioner has reserve five minutes
for rebuttal.

ORAL ARGUMENT OF MICHAEL R. BURKETT ON BEHALF OF THE PETITIONER

MR. BURKETT: May it please the Court. This primarily used in the
estoppel case requested being "are you going to allow City to be
estopped from the governmental function." Alexander Hamilton in the
Federalist Papers wrote that "it is inherent in the nature of
sovereignty, not to be amenable to the suit of an individual without
its consent. This is a general sense and general practice of mankind."
This Court in 2003 in Wichita Falls State Hospital v. Taylor case said,
to waive immunity, consent to suit must ordinarily be found in a
constitutional provision or a legislative enactment. Courts in other
jurisdictions have occasionally abrogated sovereign immunity by
judicial decree.

JUSTICE BRISTER: Well, they don't want money from the suit?

MR. BURKETT: No, [inaudible] this and I'll tell you where I'm
going. The Court continue to say we have held, however, that the

legislature is better suited to balance the inflicting policy issues associated with waiving immunity. The doctrine of sovereign immunity and the doctrine of estoppel of governments from exercising their sovereign immunity are just flipped side of the same coin [inaudible] -

JUSTICE OWEN: In jurisdictions, where they haven't -- the courts have not waived sovereign immunity, what do they do in these situations?

MR. BURKETT: They have the bright line rule quite frankly that say you shall not estop the government from exercising its government functions period.

JUSTICE O'NEILL: The problem we've got of course is our decision in Prasifka and we seemed to be saying that a estoppel can be applied against municipalities when justice requires it and then --

MR. BURKETT: Well --

JUSTICE O'NEILL: -- what do we -- do we need to overturn that decision to go through? --

MR. BURKETT: No, I think Prasifka, with all due respects stands for little more than that. Prasifka says and I'll read it, there is authority for the proposition that a municipality may be estopped in those cases where justice requires its application and there is no interference with the exercise of its governmental functions. Prasifka tossed that statement out at the end of its opinion. It had already decided and made clear in that particular case, and it wasn't going to estop the city. Right at the end of the decision it just said, "oh by the way there are some jurisdictions or there is some authority for this proposition, but it doesn't apply here."

JUSTICE OWEN: How long would this apply and let's suppose that no one discovered this. The car wash was completely built. The curb opening was there for five years and then the City comes up and says, "wait a minute you violated ordinance, you have to build [inaudible]" -

MR. BURKETT: I think -- I think there are three options available to Super Wash at that point. But, first it should -- this should be aligned, this should be followed in all of these depositions -- Super Wash case and any other kind of case that's similar to this. But first number one step that can be taken is to engage in the same process that got the political process of zoning or rezoning of this property. That's a wide open process. Anything goes. Anything can be said as opposed to this. For instance variances where you're a little bit more restrict. The process -- the political process of zoning or rezoning of this property is wide open. It's open to public but they in its decision is finally made. There is no reason why someone in Super Wash's case couldn't take at that time in that particular instance.

JUSTICE OWEN: Then you are [inaudible] --

MR. BURKETT: Including one of the reasons that you go to the legislative body.

JUSTICE OWEN: Let's assume they're unsuccessful.

MR. BURKETT: Alright. You're unsuccessful. Then step two is if you had hired architects, engineers, attorneys as you should to determine what the proper zoning is, you go look to them. And if you're looking for some dollar relief you go to them. Third and I really -- certain things suggest this is the city attorney, but at some point in time I think you can approach these situations along the lines of almost unconstitutional -- unconstitutional application of the zoning orders. And that is to say, "look the legislative purpose for that zoning is applied to that piece of property simply doesn't exist anymore."

JUSTICE OWEN: Why is that?

MR. BURKETT: It would be unreasonable and arbitrary to now apply it after something has been in place that long without objection from anybody.

CHIEF JUSTICE JEFFERSON: Should --

MR. BURKETT: The property owners, be it the government, be it anybody else who couldn't get immediately in public process with the bank.

CHIEF JUSTICE JEFFERSON: Should we be concerned that your number two answer to Justice Owen's question? Hire architect, lawyers, etc.? Should the Court have any concern that that would truly increase the cost of development and just to get to the process if you cannot rely on top officials, the zoning board or board of adjustment then you've got to do your own research in fact to the city work watch. I mean, why should this Court condone that sort of waste of resources when it's the city -- after all they should know --

MR. BURKETT: Well --

CHIEF JUSTICE JEFFERSON: -- its own organization.

MR. BURKETT: Excuse me, your Honor. I disagree. I don't think it is the city that necessarily has to do the work for the development. Why should it? These are public records. They're open and available to anybody. They are professionals who do this sort of work -- engineers, architect, attorneys why not? Say, look --

CHIEF JUSTICE JEFFERSON: But why should the city --

MR. BURKETT: -- you're a business person. Why --

CHIEF JUSTICE JEFFERSON: Why shouldn't the city be making official determination on a permit's validity if they're not to be relied on?

MR. BURKETT: I didn't catch up.

CHIEF JUSTICE JEFFERSON: Why -- why should -- why should the city be making determination regarding a permit's validity or invalidity if what you're saying now is a developer shouldn't rely on those.

MR. BURKETT: Because it's the city's job or city administration's job to carry thorough and carry forward public policy. That public policy is found in the ordinances and the other regulations and rules setup by the city council. That's their job. The legislative branch for instance sees things and passes the bills. The executive branch carries them out. At some point in time, that branch says and comes to the point of saying "this doesn't meet the legislative policy. Sorry, but you're gonna have to change what you've done." Your question initially or [inaudible] to me is that initially why shouldn't the city and why cannot developer rely on the city initially. And my response is, "why should the city do the developers' work?"

JUSTICE: Well, because the city is issuing the permit. City has the authority to issue or not issue a permit. And why shouldn't Joe -- public citizen will be able to rely on the issuance of that permit, permit to go forward with the construction.

MR. BURKETT: I think the answer is and your -- you know we've come to the heart of the question. There are more people out there that are relying on that policy than just a developer. What you have to remember is that there's a whole another set of people who are also relying on the City. And that's the people who are affected by any change in that zoning regulation. In this instance, to be specific you have the entire neighborhood. The homeowner's of the Longfield Drive, they are relying on the city to protect them and the city passed an ordinance to protect them. They are also relying on the city. So now you have competing reliance. You have the Longfield Drive homeowners, who are relying on a publicly debated and a legislatively passed policy that says, "We will

protect you and you have reliance by a developer on the mistake that's made in a private office."

CHIEF JUSTICE JEFFERSON: Can I ask you, aside from the governmental functions that you talked about from our prior decision in *Prasifka*? What's the equity here, if we were to look just at that side whether it's fair to come back and make them build this fence? Is it fair in this case in your opinion?

MR. BURKETT: In this particular instance, fair is a tough question to address. Because again, I'll go back to the Longfield Drive residents. Is it fair to them to simply abandon without any discussion or without any warning to them? Is it fair to abandon them that policy that was passed to protect them?

JUSTICE HECHT: They opposed to that abandonment in this case. What if they didn't?

MR. BURKETT: Again, I think, I go to the suggestion that I made, that I'm hesitant to make and that is, is this policy now being applied correctly. Originally, you know, the zoning was passed for some sort of public purpose. Is that public purpose been abandonment or waived?

JUSTICE HECHT: Well, and what -- I'm trying to get what's the answer to that. We have another case in which the estoppel issue is not raised. But it's loony and in that case a resident choose to build higher than it should have been. But the neighbors don't seem to care in fact. They just seem to let it stay the way it was. Is that enough to have relief in that kind of situation or not [inaudible] --

MR. BURKETT: Well, again I think that probably should give you relief not necessarily, only in accordance should give you relief when you go to the city council --

JUSTICE HECHT: But they get --

MR. BURKETT: -- you know they, you don't care. Why don't you change this policy?

JUSTICE HECHT: But they didn't. And if they don't then can you get relief from the court? And that was the situation.

MR. BURKETT: On the theory that I've just enunciated, perhaps sir.

JUSTICE OWEN: Just a [inaudible] I don't know much about finding ordinance. City ordinances say "but this applies." This is the ordinance who just applied the four blocks -- that was a start -- four lots in a single block. How did you -- if you have to find all the city restrictions on a particular lot, how would you find this ordinance?

MR. BURKETT: Okay. You're talking that the four lots that --

JUSTICE OWEN: Yeah that --

MR. BURKETT: -- Super Wash just owned that. I thought you meant the neighborhood --

JUSTICE OWEN: No there's 837. There's an ordinance number 837-86. How do I know that that ordinance applies to this? How do you -- or just a [inaudible] if you're a developer you wanna know "okay, what ordinance applies to this piece of land?" How do you find this ordinance?

MR. BURKETT: You go do it yourself and try to get help from the city folks --

JUSTICE OWEN: I mean how do you do it yourself? The index someway that shows --

MR. BURKETT: Most were index.

JUSTICE OWEN: So, you go through how many ordinances you have to go -- to go through all the ordinances to find out?

MR. BURKETT: How important is your project to you? I would say "yes, that you [inaudible]" --

JUSTICE OWEN: You got all this at index of every city ordinance

just to make sure that they're not gonna apply for any?

MR. BURKETT: No. Because in any case an ordinance like this is a zoning ordinance. So you don't have to go through every ordinance passed by the city council at all times. You don't need to go to the zoning portion of the ordinances. You go to the zoning maps which should have cross references to where you go.

JUSTICE OWEN: But this one --

MR. BURKETT: -- but it doesn't --

JUSTICE OWEN: -- and --

MR. BURKETT: This one did not.

JUSTICE OWEN: Did not.

MR. BURKETT: If it doesn't you say, "the zoning you shown here for commercial where do I go? Show me the ordinance that puts that application on this piece of property." Perhaps you could get estoppel and its hint to that I think in the Roberts case. If in this instance you asked these questions that City people say, I'd check it for you and you're okay.

JUSTICE OWEN: What's the difference if somebody snapped, "I'll check it for you," and you're, "okay," versus the city's official map that says okay?

MR. BURKETT: City official map is there simply as a reference. These are references not only for the city people, but also to anyone else who wants to go in. It's a starting point.

JUSTICE OWEN: And I thought there was someone in this case that said this is okay. It said, "I've read your plans and this is okay."

MR. BURKETT: This is okay as far as I know.

CHIEF JUSTICE JEFFERSON: Well, how is that different from what you just said? And I [inaudible] and the picture that says, "I'd check it for you and you're okay," as opposed to one that said, "You know, look at the map and your okay." I mean is, if the estoppel applies in the letter and sometimes --

MR. BURKETT: Well --

CHIEF JUSTICE JEFFERSON: -- it wouldn't apply here.

MR. BURKETT: I may have misspoke but the estoppel might apply if this city person knowingly tell someone that I'd check it for you, there is no need for you to check it and I know it's alright when that city person knew that it wasn't. But if you're talking about a basically fraudulent and even then I'm not gonna sit here and suggest to the Court that estoppel should apply on that part, if I'd be permitted to finish.

CHIEF JUSTICE JEFFERSON: Yes

MR. BURKETT: I'm not convinced that the estoppel should even be applied at that point -- perhaps that city official is in trouble.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you Counsel.

MR. BURKETT: Thank you.

CHIEF JUSTICE JEFFERSON: The Court is ready to hear argument from the respondent.

SPEAKER: May it please the Court. Mr. Hal Ray will present argument for the respondent.

ORAL ARGUMENT OF HAL R. RAY JR. ON BEHALF OF THE RESPONDENT

MR. RAY: May it please the Honorable Court. Good morning. I would like to introduce my law partner Liv Christie who's here with me. This

is a case that calls it out on the equity side. What I would like to do with the free time allotted to me is to try to touch on order the law is supporting as I'm able to discern it and why that is the case.

JUSTICE HECHT: Just before you get into that. The current status is that the car wash was completed and is operating.

MR. RAY: That's correct Justice Hecht.

JUSTICE HECHT: But there's still a controversy hearing thing.

MR. RAY: There's a problem and the problem is this is a car wash. It's located on Cherry Lane, Fort Worth. It's a primarily commercial street that is North of the mileage 30 as it goes west of the town, west of Ridgmar Mall and towards the west side of town. The car wash is actually physically located directly across the street from Brewer High School. There is an entrance into this car wash facility and there are about four bases, I think. One thing I learned when you got a case in the Supreme Court is should have done a better job having pictures and diagrams and that sort of thing before we start thinking about trying to describe this to the Court. There about four bases in that car wash and there's a way in off to Cherry Lane. But the exit is what's missing. There's no exit off onto the other corner street Longfield Drive. And so there is a bottle neck and that's the problem.

JUSTICE HECHT: So you have to -- you have to go out the way you came in?

MR. RAY: That's right and if it's a -- if it's a pretty Saturday afternoon, like it was last Saturday afternoon you have people come in. There's a bottle neck trying to get those cars back out. That's why we have a problem here and going to the equity question, the Court below is important rule to remember. The trial court decided this case on a basis of a motion for summary judgment that the city filed and the motion for partial summary judgment that Super Wash filed. The Court of Appeals basically went along with city's motion for summary judgment on all points except for the issue of the estoppel. Let me say that that issue has certain things that should have been decided in trial, not in summary judgment. The Super Wash did not file for motion for summary judgment on the estoppel issue because it leads to this equitable facts and concerns that are present.

We did present evidence to the trial court and its in our record that Super Wash contracted to buy the lot where the car wash is located contingent upon receiving all necessary permits and proofs from the [inaudible] car wash facility there that they would need in that type of instance which is the car wash had an entrance way and an exit way onto the side street. Super Wash approached the city, talked to the person who was in charge with the responsibility in reviewing applications for site plan for commercial facility such as this one and to try to determine if this was a permitted use and also if this was a use that the City would approve. That building official Wayne Carlisle his deposition was taken. I believe his complete deposition is in the record. In this case either from excerpts that we filed or that of the city filed proved that the application after revealing materials of Super Wash submitted, looking at the zoning map that's on the wall -- the city -- if this particular piece of property across Brewer High School will support a car wash facility.

JUSTICE BRISTER: Who is doing this for you?

MR. RAY: I'm sorry.

JUSTICE BRISTER: Who was doing this for you? Hiring an architect as Mr. Burkett --

MR. RAY: No.

JUSTICE BRISTER: -- suggest?

MR. RAY: No, Justice Brister. They had someone who was associated with the company as I understand -- may contact with the city in person and talk [inaudible].

JUSTICE BRISTER: So is that -- is there any equity on the other side or she all of a sudden "do this the cheap way," where the architect would've known that the city person was mistaken?

MR. RAY: Well, I'm sure if they know now, they knew then what they know now that maybe they would pay the extra whatever it was to avoid having paid me to pull the iron out of fire. But they don't have the luxury of thinking why lawyers are going into these things. What do they do this day? They do this project as any reasonable operators. This isn't Wal-Mart, it's not Target --

JUSTICE MEDINA: What is the standing -- standard operating procedure to secure permit?

MR. RAY: For Super Wash what it is --

JUSTICE MEDINA: In this -- in this jurisdiction.

MR. RAY: In the city of White Settlement, Justice Medina, Mr. Burkett might -- would've known more than I. But as I understand the process was us go to the city to make application, to have the site plan approved, and to have a building permit issued. And then after that construction was completed, the city would come in and inspect what have been done and the issue certificate of occupancy.

JUSTICE OWEN: We look -- we of course have to look at a bigger picture here.

MR. RAY: Absolutely.

JUSTICE OWEN: And what if this were -- like was a building permit and there was some safety issue that the building inspector has said "okay here is your permit. You don't have to have sprinklers in your high rise," or you don't get some safety issue and the person started the project with that 45% turning. And then building inspector realizes, "oh, what have I done? I made a mistake." Are we gonna estop the city at that point?

MR. RAY: I don't think so, because that goes into the balancing of what the evidence are --

JUSTICE OWEN: So we're gonna have a jury trial on every one of these? That's my --

MR. RAY: Well, not necessarily a jury trial in every one of these. I think there are gonna be cases -- there's gonna be the five-year case that you talked about where I would think everyone, but maybe not everybody but most folks would agree that there is a point beyond which a municipality ought to be estopped.

JUSTICE OWEN: Of what legal theory?

MR. RAY: Of what legal theory?

JUSTICE OWEN: And what -- when you -- when do you reach that point?

MR. RAY: The legal theory is described in the Prasifka case and that is when justice, fairness, and fair dealing requires.

CHIEF JUSTICE JEFFERSON: And when there is no interference with the exercise of governmental function.

MR. RAY: Exactly.

CHIEF JUSTICE JEFFERSON: How is it -- how is it that overriding the city's ordinance, it doesn't interfere with the city's exercise of its governmental function?

MR. RAY: Depends on how nearly defined interference with governmental function, does that mean any action involving zoning [inaudible] can't be touched? Or does that mean there is some of the later cases including the Wire case in this city for arbitrary case

that was the same [inaudible] the Court held? It has to with whether you estop the city in this particular case. Is that somehow set up an impediment for the city later doing the thing? In this case in terms of zoning? Here, there is no interference with governmental function of the city? If the Court or -- affirm the Court of Appeals and if ultimately the city is estopped to enforce the zoning ordinance, the evidence that's in the record at least up to this point as for Mr. Carlile the building official, is this is the only piece of commercial property that he knows that the city of White Settlement that has any kind of fencing requirement such as the one's present here. I think though what you're talking about some sort of overwriting safety, public alter safety concerns, such as what you passed on Justice Owen. But that's not when it comes [inaudible]. It comes much closer to the idea of what the true governmental function --

CHIEF JUSTICE JEFFERSON: Well, and perhaps that example Justice Owen's would be -- would be more consistent with the way we wrote Prasifka to say this estoppel applies only in exceptional cases to prevent manifesting justice. And how does this case hear? I mean that -

MR. RAY: Why does -- why doesn't Prasifka control? That's an excellent question. This case is different. If you look at the facts of the Prasifka case then Justice Greenhill wrote that's the case involving the city of Hutchins outside Dallas and with 44 acres that the Prasifka is far. They bought the property apparently relying on the resolution that had been passed by the board of adjustment, changing the destination of the property from residential to heavy manufactural. Thereafter, there was a dispute between Prasifkas and [inaudible] and the big city hall of Hutchins. And without know all the [inaudible] if it is alluded to by Justice Greenhill. Later the city council fails to carry that resolution forward to change in the ordinance. After the city fails to do that, there is evidence that the Prasifkas then experience the life foundation zone of 44 acres and the most entire out there. It's not entirely for your levels of [inaudible] but there's certainly evidence of that's what happened.

So, you have the city making -- taking a stand, property purchase based on wide zone map. The city changes its mind then the Prasifka states on some step beyond requiring property. It's not what we have here. What we have here in this case was Super Wash buys a property, plans that they're gonna be able to build the facility they want. They start building it. They get it up halfway done and then the city changed its mind. That's it -- that's not the same case. It's a different case. More money -- more reliance is in this case that was in the Prasifka or for that matter that was in the case that Justice Greenhill cited in Prasifka which is the Harvey v. City Seymour case Chief Justice Hickman have when he was on the case on Court of Appeals. And that was the case that was same argument in [inaudible] where some folks want to build a cotton gin. They went to the city council and said we're gonna build a cotton gin on this piece of property now. You just recently establish the requirements. The cotton gins can be placed in this part of town. Well, we want to put it in there. Well, let us do it. The city council initially said, yes. They acquired the property and then at least according to the description based on the court of appeals. They may sound building materials out there onto that lot and then ultimately when the city council voted they did not permit the cotton gin to be built. Again of that -- of this case, that cotton gin was halfway built when the city change his mind.

JUSTICE HECHT: But here it maybe -- supposed we don't know yet

that the neighbors only bought it because they were assured that if anything went on that lot, in those lots, there was gonna be a privacy fence protecting them from exposure to it and how does that -- how do you weigh that in equitable analysis.

MR. RAY: I think you take that in consideration, Justice Hecht. And that goes in to the mix. But we know from precedence that we can't rely on -- we can't necessarily absolutely rely on zoning classifications because they can change overtime.

JUSTICE HECHT: The city could have come back and decided intentionally to change.

MR. RAY: Exactly or zoning -- zoning may be waived or through the course of time, use of the particular property may change. There are different reasons why you can't make -- there are some of the deciding factor in any case why the neighbors objected about. So, I think when you're gonna have car wash, or you gonna be just a cream owner, saying that or it's gonna be something that people really wanna have -- that's not something that you should. It seems to me separate bright letter rule of law in Texas on how it should work, because it does make a difference.

If I could just get back from a moment on Justice Owens' question about how you go about -- how do you go about finding what are these particular uses allowable or not. It makes a big difference. It seems to me that the court is gonna set the rule that burdens on the developer to go in and read every ordinance as opposed to the city who is charged with the responsibility in administering those ordinances and issuing permits. Can you imagine? We obviously can't imagine that burden of building into the city such as Dallas, or San Antonio, or El Paso, some large city whether it be any members on the board that says that you would have come through and the -- the risk of mistake is on the developer.

JUSTICE OWEN: Well, we've got the same issues statewide to that. We're not supposed -- are you coming in with a project that would require that what used to be the TNRCC practically what it is today --

MR. RAY: [inaudible] --

JUSTICE OWEN: What requires some authority in a person that doesn't have the authority says, go ahead. You're [inaudible] give me the permit and it turns out that lots of statutes haven't been complied with and he presented an injunction with I don't think we would've estop this day.

MR. RAY: With the penalty it would not -- would not different side of -- in that situation --

JUSTICE OWEN: Why should we draw this? Help me here. Why should we draw distinctions between state and the city in those kinds of permits? in this permit?

MR. RAY: The state is the [inaudible] of the thing and the [inaudible] of what Alexander Hamilton refers to in the Federalist Papers and the law has long been in Texas. And another jurisdictions to my knowledge that waiver and estoppel did not work against the state because it is the sovereign. There are some limited exceptions. There's a waiver -- in this case, Super Wash sought declaratory relief, declaratory judgment that is, 37s provides for declaratory relief against the municipality for construction of an ordinance so it's that that's one [inaudible] --

JUSTICE OWEN: Well, I mean, certainly you have the form to bring the lawsuit. I mean, that's not an issue here but it's just in substance. Assuming you could -- I'm thinking you could have -- bring declaratory judgment action against the state as well. But in the

substance, why would we say "well we're not gonna let employees to make a mistake at the state level bind the state" But employees who make it mistake at the city level are gonna bind the city.

MR. RAY: Justice Owen, I think it's just the difference and the difference in the two sides and the fact that you have different statutory provisions that are implied. There maybe situations that have different causes of action where estoppel might implicate the issue of sovereign immunity. This is not one of them.

JUSTICE OWEN: Have you looked at other jurisdiction/?, surely this has come up where --

MR. RAY: I haven't, your Honor [inaudible].

JUSTICE BRISTER: If this was a taking case where the city have widen the Longworth whatever the side street is so it came right up to the car wash base but no longer exit that way. Since you would still have reasonable access to the property, probably wouldn't have a takings claim. When do you get more by claiming estoppel than you would -- if you wouldn't have any recovery in taking this car -- ?

MR. RAY: It's just a different cause of action, Justice Brister and here it has to do with actions of the city and reliance on their sanctions at which with respect with equity fairness policy that you have --

JUSTICE BRISTER: Well --

MR. RAY: -- [inaudible]

JUSTICE BRISTER: Well, what we're talking about here is whether there should be estoppel. Takings we've got state and national constitutional specific provisions for it. We don't have constitutional provisions for estoppel. Why should we read into the common law or something that's not in the demand to be in the constitution before we'd allow you to do it?

MR. RAY: I guess that's the question of why does the Court [inaudible] --

JUSTICE BRISTER: You client didn't mean -- it may the same case if the zoning prevented any access to the property at all. Then you would've pleaded it's a takings case. But I assume the reason you didn't plead this as a taking case is because you still do have reason like this. It's just that law offered for people pulling in and out of the base.

MR. RAY: What if I had -- I had to tell you "this claim and the petition, that's correct." He had an analysis of the case. You have to do more than you show so that you get recovery for taking the [inaudible] of Texas Constitution or ask the court to show the access that has been impeded.

JUSTICE BRISTER: It's not what I would like.

JUSTICE O'NEILL: Let me ask you. Is there a procedure with the city to obtain to pay a [inaudible] higher level of review? We've recently heard arguments in the Vanesko, City of Dallas v. Vanesko case and there, the homeowner actually paid the city to do a thorough review and inspection and approve the plans. Is there any such procedure here?

MR. RAY: I don't know, Justice O'Neill. Again Mr. Burkett recited that if there is, I'm not aware to that. I think we've got the standard review, the valid form in the small city. And that is review the submittals, to look at the zoning map and proceed from there.

JUSTICE HECHT: Are these cases pretty rare? I mean we have worried about it for 30 years and the Court of Appeals don't seem to worry about it very much. And there's lots of municipalities issuing lots of building permits.

MR. RAY: When asked this thing, Justice Hecht. But they're not

very common. There are cases and they are cited in the briefs before estoppel is gonna apply but they're not in zoning cases.

JUSTICE O'NEILL: But we have two and one week though.

MR. RAY: [inaudible]

JUSTICE O'NEILL: [inaudible]

MR. RAY: I don't have any real feel for the [inaudible]. Certainly, I think there are situations [inaudible]. But most of those cases seem to be worked out. This isn't just a message where it wasn't the case.

JUSTICE BRISTER: Is there any evidence in the record that Super Wash would've built this without the crew car?

MR. RAY: There is evidence in the case in the form affidavit from the Super Wash option that they would not have done that. They would not have done so if they [inaudible].

One of the points that has been raised in the brief -- and I would just like to mention that [inaudible] -- and that is the line of cases have some points to these line of cases and [inaudible] analysis to it. One of those analyses has to do whether city still can be estopped. My time has expired, Chief Justice.

CHIEF JUSTICE JEFFERSON: Are there any further questions? Thank you, Counsel.

REBUTTAL ARGUMENT OF MICHAEL R. BURKETT ON BEHALF OF THE PETITIONER

MR. BURKETT: I would like to express my appreciation in the Court's time but I don't think that I did that earlier. I do want first to focus for just a minute and I understand the questions are -- all of the questions are interesting to me. But to focus for a minute on this particular case -- and I think you know either way but I feel constrained to say that Super Wash, not only has not been denied the use of its property. It hasn't been denied that use with that property as a car wash. It simply doesn't like the way the city of White Settlement said, "you got to configure your property."

JUSTICE OWEN: Let's assume --

JUSTICE BRISTER: On the other hand the fence is not required for the safety of school children or held just to look pretty?

MR. BURKETT: No, it's not to just look pretty. If you look at the record you'll see -- and I'll go back to this in the argument I've made to you, the fence was the result of a political process and a lot of event both through things -- zoning commission and open hearings there and at the city council level, and open hearings there and people having their say and it --

CHIEF JUSTICE JEFFERSON: What was -- what was the purpose of --

MR. BURKETT: The purpose was to insulate the Longfield Drive neighborhood, single family neighborhood, from that commercial intrusion. It wasn't to look pretty --

JUSTICE BRISTER: How was that different -- how was that different from to look pretty?

MR. BURKETT: To think that it cuts down site -- cuts down sound and as Super Wash wants to configure its property. It wants to zip cars out on the Longfield Avenue. And at that point you didn't blame the children who might be blamed in that neighborhood.

JUSTICE BRISTER: But they still zip out the front.

MR. BURKETT: The front is zoned as a very big commercial street

and there is no problem there.

JUSTICE BRISTER: The children have no reason to be protected there.

MR. BURKETT: Well, if the parents aren't paying attention it won't [inaudible].

JUSTICE JOHNSON: Counsel, you mentioned the variance application process available to Super Wash at this time.

MR. BURKETT: Not as a variance, your Honor, because Super Wash is seeking to basically overturn a zoning ordinance and just say it doesn't apply --

JUSTICE JOHNSON: I understand.

MR. BURKETT: -- a big proportion of it and that's not a very --

JUSTICE JOHNSON: Does the zoning ordinance itself provide for it or does the city provide for someone to come in and seek or leave if they are the nonconforming use or if they are at the situation such as Super Wash?

MR. BURKETT: All cities --

JUSTICE JOHNSON: If the neighbors do notice to have hearings -- and at that point in time it's just the equity so to speak.

MR. BURKETT: So, to speak within the variance contest -- context, all of Texas cities have that [inaudible] --

JUSTICE JOHNSON: If they knew --

MR. BURKETT: It's required by --

JUSTICE JOHNSON: Your ordinance has that provision.

MR. BURKETT: Yes. The city setup that way, not that ordinance. But yes it's set up exactly that way. And --

JUSTICE HECHT: Do you have a procedure that Justice O'Neill referred to earlier whereby you give more assurance at the payment of the fee here?

MR. BURKETT: No and if --

JUSTICE HECHT: You are -- are you aware of cities who do?

MR. BURKETT: I'm sorry?

JUSTICE HECHT: Are you aware of the cities who do?

MR. BURKETT: I'm familiar with the Vanesko case and I was shocked quite frankly to find out that thing being done. If anybody in one of my city did that I'm hitting him in the head with sledge hammer.

JUSTICE: And why would you hit him in the head with a sledge hammer?

MR. BURKETT: Because that's not their job.

JUSTICE: What would --

MR. BURKETT: To start representing both city and landowners.

JUSTICE MEDINA: What's the purpose of the city -- what's the purpose of the city having a department that issues permits? That department can be relied upon by the homeowners for protection from intrusion into their neighborhoods or by the developers.

MR. BURKETT: The primary function of that department is to ensure that the legislative policy is carried out. It's not to ensure that developers are being held. It is to ensure that the development matches the legislative policy as enacted by the city councils.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Counsel. The case is submitted and the Court will take a brief recess.

SPEAKER: All rise.

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