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Vesting Verities and the Development Chronology: A Gaping Disconnect?

John J. Delaney*

PROLOGUE

*“The law of vested rights and estoppel must strike a fine balance between the competing interests of the developer and the municipality. A developer needs some protection from changes in land use requirements that prevent him from completing his project or that make completion more expensive. Municipalities need the freedom to revise their land use requirements to meet new land use problems or to implement new land use policies.”*¹

INTRODUCTION

From time immemorial, or at least since *Hadacheck v. Sebastian*,² courts have wrestled, often unsuccessfully, with the uneasy task of striking this “fine balance” when newly adopted land use laws or regulations are applied retroactively against ongoing development projects. The result has been a hodgepodge of *ad hoc* analyses giving rise to rules based mostly on subjective standards and providing little in the way of reliable guidance to landowners and agencies involved in the development process. Even worse, case law provided mostly by state courts over the past quarter-century is generally insensitive to the uncertainties faced by landowners who must cope with an increasingly complex land use approval process. Doubters need only

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1. DANIEL R. MANDELKER, LAND USE LAW § 6.12 (4th ed. 1997).

2. 239 U.S. 394 (1915) (The Supreme Court upheld an ordinance prohibiting the manufacturer of bricks in certain residential areas, even though an existing brick yard’s removal caused severe loss to the owners.).

familiarize themselves with the travails endured by Bernadine Suitum and the Del Monte Dunes Development Group on their recent sojourns to the United States Supreme Court.³ In particular, most vesting decisions fail to even acknowledge the critical differences between a single building project and long-term multi-building developments, including planned unit developments, which are subject to numerous regulatory reviews and approvals before obtaining their first building permit.⁴

The purpose of this paper is to identify some of the anomalies arising from the disjointed body of case law on vested rights, particularly as they affect phased developments. An Appendix is provided setting forth the development chronology, with selected court rulings at each step along the way to demonstrate the disparate nature of vesting jurisprudence.

But first, we relate the story of three mythical property owners whose experiences with the law of vested rights may help foster a deeper understanding of the problem.

“THE GREAT TERRAIN ROBBERY”

A TWO ACT PLAY FEATURING LORRAINE LUCKY, PAUL PLODDER AND QUALITY DEVELOPMENT COMPANY

ACT ONE

Lorraine Lucky

Lorraine Lucky, a homebuilder, acquired a recorded single-family residential lot in the Pristine Acres area of Suburban County in the State of Euphoria. It is the last unimproved lot of what was a 3-lot subdivision which is now fully developed, *i.e.*, subdivision streets, sewer and water and utilities are all in place. Lucky paid \$100,000.00 for the lot and applied to Suburban County for a building permit for a duplex dwelling (two dwelling units), as permitted under existing

3. See *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659 (1997); *City of Monterey v. Del Monte Dunes at Monterey Ltd.*, 119 S. Ct. 1624 (1999).

4. See *Avco Community Developers, Inc., v. South Coast Regional Comm'n*, 553 P.2d 546 (Cal. 1976), a leading case on vested rights.

zoning. The costs and filing fees were \$7,000. The building permit was issued, but two weeks later the newly elected Suburban County Council enacted a “Revised Zoning Ordinance” (“RZO”) which, among other things, prevented duplex residences in all single-family residential zones. By this time, Lucky had commenced construction of footings for the duplex units.

Paul Plodder

Meanwhile, just a few blocks away from Lucky’s lot, Paul Plodder, a small homebuilder, has nearly completed development of his 5-lot residential subdivision in Pristine Acres. He had finished grading and paving the subdivision street in front of his lots and was installing sewer and water connections pursuant to County-issued permits. Several months ago, after conducting due diligence in which he confirmed that under applicable zoning ten duplex units could be built on the five lots and that the lots had received preliminary subdivision plan approval, Paul purchased the lots for \$400,000.00. His engineering costs for obtaining record plat approval, requisite permits for required street, utility and stormwater management improvements, together with construction costs for these facilities, amounted to \$200,000.00. Building permit applications had been filed with Suburban County two months behind schedule due to an unexplained delay in issuing sewer and water permits. As of the date of enactment of the RZO, no building permits had been issued to Plodder, nor had he received any building permits or commenced any construction of the planned duplexes.

Quality Development Company

On the date that Suburban County enacted the RZO, Quality Development Company (“Quality”) was heavily involved in development activity for Phase 2 of its approved 500-acre mixed use residential community in the Flower Valley area of Suburban County. Quality had acquired the land over a decade ago, after the County had adopted a new master plan designating the property for “planned community residential-mixed use” development. A new zoning category was created by the County Council to accommodate the proposed PUD at an overall density of five dwelling units per acre,

for a total of 1,300 single-family detached residences, 600 attached dwellings (duplexes or townhomes) and 600 apartment units. A 15-acre community shopping center was also authorized. The master plan and zoning ordinance called for set-asides of 80 acres for parkland, recreation areas and school sites.

In reliance upon these actions, Quality purchased the property for a price of \$50 million, and obtained County approval of a Concept Plan for the PUD. Thereafter, Quality incurred over \$3 million in development costs for Phase 1 of five planned phases including lot layouts, construction of roads, utility lines and related infrastructure, and dedication of 12 acres for recreational uses and park areas. All of this work was conducted pursuant to approved site and subdivision plans for Phase 1, which consisted of 200 detached single-family homes and 60 apartment units. In addition to development activity on Phase 1, grading, base course road construction, and dedication of 50 additional acres for park/recreation space was completed for Phases 2, 3 and 4 of the PUD in accordance with the approved Concept Plan. (Phase 5, the commercial component, was to be built last.) Stormwater management plans and permits for road construction for the first four phases had also been approved.

The newly enacted RZO reduced residential densities in all planned unit developments in the County by 60%, leaving Quality with a density of two dwelling units per acre. As of the date of enactment of the RZO, Quality had obtained 100 building permits for Phase 1 and had started or completed construction of 70 dwellings. It had received no building permits for any other phase of its PUD.

THE DOCTRINES OF VESTED RIGHTS AND EQUITABLE ESTOPPEL

Much has been written on the law of vested rights and equitable estoppel, and it is not the purpose of this article to delve deeply into the evolution of these doctrines.⁵ Generally speaking, courts have

5. See, e.g., MANDELKER, *supra* note 1, at §§ 6.12-6.23; G.P. Hanes & J.R. Minchew, *Vested Rights to Land Use and Development*, 46 WASH. & LEE L. REV. 373 (1989); Benjamin A. Kudo, *Nukolii: Private Development Rights and the Public Interest*, 16 URB. LAW. 279 (1984); Wendy U. Larsen & Steven M. Elrod, *An Update on Vested Rights*, LAND USE LAW & ZONING DIG., Aug. 1983, at 4 (1983); Greg Overstreet & Diana M. Kirchheim, *The Quest for the Best Test to Vest: Washington's Vested Rights Doctrine Beats the Rest*, 23 SEATTLE U. L.

applied two basic standards in determining whether a right has been acquired to complete a development conceived before the proposed or actual change in regulations. One of these, the “vesting rule,” reflects principles of common and constitutional law and focuses on whether real property rights that cannot be taken away by government regulation have been acquired. The second standard, known as the “estoppel rule,” derives from equity and focuses on whether it would be equitable to allow the government to repudiate its prior conduct.⁶ Under either the vested rights or estoppel standard, the landowner must demonstrate (1) the existence of a valid government act, (2) substantial reliance on the governmental act, (3) good faith and (4) that the acquired rights are substantial enough to make it fundamentally unfair to eliminate them.⁷

Generally, the developer must identify a specific governmental act that authorized the particular course of action or development activity and seek to establish that he has achieved a vested right to continue the development. At least 30 state courts have used the issuance of a building permit as the principal benchmark for the required governmental act, but virtually all of these courts also require that other actions be taken in reliance upon the permit, such as construction or expenditure of funds to implement the permit. States requiring building permit issuance, plus substantial construction and/or other reliance, such as expenditures include:⁸

REV. (Summer 2000); Charles L. Siemon & Wendy U. Larsen, with Douglas Porter, *Vested Rights: Balancing Public and Private Development Expectations*, URBAN LAND INSTITUTE, 1982; Thomas G. Pelham, Adam U. Lindgren & Lisa D. Weil, “What Do You Mean I Can’t Build?” *A Comparative Analysis of When Property Rights Vest*, 31 URB. LAW. 901 (Fall 1999); John J. Delaney & William Kominers, *He Who Rests Less, Vests Best: Acquisition of Vested Rights in Land Development*, 23 ST. LOUIS U. L.J. 219 (1979).

6. MANDELKER, *supra* note 1, at § 6.13; Frank Schnidman, Stanley D. Abrams & John J. Delaney, *Land Use Practice and Forms, Handling the Land Use Case*, Chapter 35, Clark Boardman Callaghan (2d ed. 1997).

7. MANDELKER, *supra* note 1, at §§ 6.12, 6.13 and 6.14.

8. See John J. Delaney & Emily J. Vaias, *Recognizing Vested Rights As Protected Property in Fifth Amendment Due Process and Takings Claims*, 49 WASH. U. J. URB. & CONTEMP. L. 27 (1996); see also *Cymbidium Development Corp. v. Smith*, 519 N.Y.S. 2d 711 (1987); *Town of Hillsborough v. Smith*, 170 S.E. 2d 904 (N.C. 1969). (Purchase of land after issuance of a building permit, followed by purchase of a equipment for a dry cleaning plant and entering into a contract for construction, held to have vested the owner’s right to continue in the face of restrictive ordinance amendment.) One other state, Georgia, recognizes vested rights upon issuance of a building permit even where there is no construction; Delaney & Vaias,

Arizona	Kentucky	New Hampshire	Rhode Island
Arkansas	Louisiana	New Jersey	South Carolina
California	Maryland	New York	Tennessee
Colorado	Michigan	North Carolina	Texas
Connecticut	Mississippi	North Dakota	Virginia
Delaware	Missouri	Ohio	Wisconsin
Indiana	Nebraska	Oklahoma	Wyoming
Kansas	Nevada	Pennsylvania	

One reason for reliance on the issuance of a building permit is the fact that it presents an objective basis for everyone to understand that the land is being devoted to the particular use,⁹ thereby allowing the court to avoid protracted analysis of subjective criteria such as the landowner's "good faith" in relying upon the governmental actions and whether the owner's reliance was "substantial." However, the building permit test has limited usefulness in many instances. For example, on the issue of substantial reliance, the existence of a single building permit is nowhere near as significant in a large scale multiple-building project as it might be in a development involving only a single building.

Courts have used two tests in their "substantial reliance" inquiry, the first being the "proportionate/ratio test," which examines the percentage of money spent or obligations occurred as compared to the total cost of the completed project.¹⁰ A second test, known as the "balancing test" evaluates the public interest against the right of the property owner to make use of the land, as well as the land owner's expenses and obligations already incurred.¹¹ While the proportionate/ratio test and the balancing test offer greater opportunity for

Recognizing Vested Rights As Protected Property in Fifth Amendment Due Process and Takings Claims, Id.

9. See *Prince George's County v. Sunrise Dev. Ltd. Partnership*, 623 A.2d 1296, 1304 (Md. 1993).

10. See *Town of Hempstead v. Lynne*, 222 N.Y.S. 2d 526 (1961); 8 McQuillin, *Municipal Corporations* § 25.157 3d ed. rev. (1991).

11. See *American Nat'l Bank & Trust Co. of Chicago v. City of Chicago*, 311 N.E. 2d 325 (Ill. 1974); *Tremarco Corp. v. Garzio*, 161 A.2d 241 (N.J. 1960).

achieving an equitable result than the building permit test, they are totally subjective in character and thus less reliable as precedent.¹²

“THE GREAT TERRAIN ROBBERY”

ACT TWO

Lucky Wins

Returning to our intrepid developers, we find that the State of Euphoria follows the majority “late vesting rule”, *i.e.* that one must have received a building permit and commenced construction (or taken other actions in reliance on the building permit) in order to acquire vested rights. Thus, Lucky’s two duplex units are allowed to proceed. Lucky throws a party.

Plodder Loses

However, Plodder is not so “lucky.” Despite having spent \$200,000 in reliance upon subdivision and record plat approvals, issuance of permits for stormwater management and grading of the five lots, as well as permits for street construction and sewer and water connections to the lots, Plodder is told by Suburban County that he cannot proceed further because duplexes are no longer permitted in single-family residential zones.

“But wait,” says Plodder, “my competitor, Lorraine Lucky, was allowed to proceed even though she spent only \$7,000 to obtain her building permit, whereas I have spent over 25 times as much in reliance upon the County’s approvals.”

“Alas,” says the County, “that is not the test, Mr. Plodder. The test is whether you have received building permits for the duplexes and started construction, which you have not.”

Plodder doesn’t understand. After all, aren’t sewer and water connections, stormwater facilities and streets just as essential to the viability and habitability of a dwelling as walls, floors, and a roof? The County has long known from its approvals that he would be

12. See Delaney & Kominers, *supra* note 5.

building duplexes, and that he was spending money in reliance on the County's actions. Besides, but for that mysterious two-month delay in processing his sewer and water permit applications, Plodder would have received his building permit before the RZO went into effect. Back to the County he goes.

"Ah," says the County, "we feel your pain, but Euphoria's courts allow us to draw the line at the building permit stage because we have more complete information at that point as to what will be constructed on your property. Thus, you should not have relied upon our prior approvals to exempt you from zoning laws that may be in effect when your building permit application is reviewed."¹³

"But," says Plodder (not knowing when to shut up), "didn't you know more than two years ago—and certainly five months ago when you approved my sewer and water connection permits—that there were likely to be ten duplex dwellings on these five lots? Based on your approvals, I have put infrastructure in place for ten units, half of which I now cannot use."

"Sorry, Mr. Plodder. The law doesn't support your case. Have a good day."¹⁴

Lucky's Luck Turns

Thus, Plodder is left with no option but to sue the County (with little likelihood of success) or to accept a 50 percent reduction in unit yield as well as monetary losses attributable to his having provided too much infrastructure for the project. He is deliberating this Hobson's Choice when lo-and-behold, there is more news about Lucky, who by now has passed the foundation stage in constructing her duplex. Suburban County's watchdog civic group, "People United to Respect the Environment ("PURE") has discovered that Lucky's lot lies within 500 feet of a "sensitive stream," *i.e.*, a stream

13. *Avco*, 553 P.2d 546; *see also Oceanic California, Inc. v. N. Cent. Coastal Region Commission*, 134 Cal. Rptr. 664 (Cal. 1976); *Marina Plaza v. California Coastal Conservation Comm.*, 139 Cal. Rptr. 249 (Cal. App. 1977, *aff'd.*) 140 Cal. Rptr. 725 (Cal. 1977).

14. Plodder might have gotten a different response if he were in Vermont. *See Preseault v. Wheel*, 315 A.2d 244 (Vt. 1974) (construction of a retaining wall to support 38 dwelling units was sufficient to vest developer's right to complete construction, even though only four units had been constructed at the time of the zoning change.).

known to harbor species of spawning fish, including endangered species. Under a recently enacted County ordinance pertaining to Sensitive Stream Protection Areas (SSPAs), namely, properties located within 500 feet of designated sensitive streams must be reviewed and approved by the County's Sensitive Stream Protection Area Unit prior to development, in order to ensure that no additional sedimentation or other pollutants will affect the stream in question. Lucky's engineers were unaware of the lot's location in an SSPA and thus did not submit the building permit application for such review. PURE demands that the County suspend or revoke Lucky's building permit, and the County promptly complies.

Lucky is stunned. She and her civil engineering firm have acted in complete good faith and no one in the County or elsewhere ever told them of the SSPA requirement or that Lucky's building permit was subject to such further review.

"Tsk, Tsk." says the County, as it hands Lucky a Stop Work Order. "In Euphoria, you don't vest in an invalidly issued building permit, whether or not you have acted in strict good faith. Our state courts have so held."¹⁵

Suddenly, Lucky is faced with at least a two-month delay, while the SSPA Unit reviews her building permit, and thereafter, the likelihood of long administrative and judicial appeal processes. If the permit is reissued, PURE will almost certainly appeal to the County's Board of Appeal and thereafter to state courts—at least a two-year process. If the permit is denied, Lucky faces the same prospect, unless she abandons her construction effort. Maybe Plodder has some thoughts.

A Second Chance for Plodder?

Lucky has lunch with Plodder and describes her fate. Plodder, of course, knows very well how she feels.

"Lorraine," he says, "I have good news and bad news. The bad news is that I can't help you. But the good news is that only last week I learned that the mysterious two-month delay in processing my

15. See, e.g., 8 McQuillin, *Municipal Corporations*, § 25.153 (3d ed. 1991); Zoning Hearing Board v. Petrosky, 365 A.2d. 184 (Pa. Commw. Ct. 1976).

sewer and water permits was purposefully carried out by the County review section because it had received word from an ‘unidentified high ranking County official’ that a zoning ordinance amendment deleting duplexes as a permitted use in all single-family residential zones was about to be filed by the County and that it would be helpful if pending sewer and water permit applications for duplex units “did not see the light of day for the next two months.”

Plodder wonders aloud: “Lorraine, if an unlawfully issued building permit like yours does not confer vested rights, would not the opposite be true in my case? If the failure to *approve* my building permits and the consequent denial of vested status were due solely to the County’s unlawful delay in processing my sewer and water permits, shouldn’t I be entitled to relief?”

Lorraine had left.

Plodder’s lawyer isn’t sure.

“Maryland courts certainly don’t think that way, Paul. They have consistently denied vested status in such circumstances, even when the sole reason for the landowner’s inability to timely obtain a building permit or commence construction is due to prior *adjudicated* illegal actions of government agencies.¹⁶ In another case, a Maryland county actually acknowledged that its own inadvertence or misconduct was the cause of a year-long delay in processing the approval of a subdivision application filed more than two years previously, before an intervening comprehensive downzoning reduced the density on the applicant’s property nearly in half. The county proceeded to approve the subdivision under the original density (*i.e.*, the density in effect at the time of filing), but its good intentions were trumped by its own People’s Zoning Counsel who shamelessly argued to the court that the harried applicant had no vested rights because it had not yet obtained building permits or commenced construction.¹⁷ The court agreed with the People’s

16. See *District Land Corp. v. Washington Suburban Sanitary Commission*, 292 A.2d 695 (Md. 1972) (“District Land No. 1); *County Council for Montgomery County v. District Land Corp.*, 337 A.2d 712 (Md. 1975) (District Land No. 2”); *Rockville Fuel and Feed Co. v. Board of Appeals of the City of Gaithersburg*, 262 A.2d. 499 (Md. 1970) (“Rockville Fuel & Feed No. 1”); *Rockville Fuel and Feed Co. v. City of Gaithersburg*, 291 A.2d 672 (Md. 1972) (“Rockville Fuel & Feed No. 2”); *Prince George’s County v. Blumberg*, 418 A.2d. 1155 (Md. 1980).

17. See *Sycamore Realty Co., Inc. v. People’s Counsel of Baltimore County et al.*, 684

Counsel.”

“That’s outrageous,” says Plodder. “How come the county wasn’t estopped by its own wrongdoing?”

“The applicant actually tried to invoke zoning estoppel,” answers the lawyer, “but the court said that it was loath to impose estoppel against the government when it is acting in a governmental capacity.”¹⁸

“I can’t believe it,” says Plodder.

“As I recall,” says the lawyer, “even the Supreme Court doesn’t seem sympathetic to vesting claims.¹⁹ But some states make an exception from the strict late vesting rule where there is evidence of bad faith on the part of the government.²⁰ Perhaps Euphoria’s courts will follow those precedents instead of Maryland’s. We’ll have to wait and see. In any event, it is likely to be a long, difficult road.”

Quality and the Avco Virus—But What About the “Whole Parcel” Theory?

The door to the office of Alan Alpha, Quality’s CEO, had been closed for a long time.

“What do you mean,” roars the CEO to Sylvia Sharp, Quality’s Senior Counsel? How can the County retroactively cut our density in half when it has repeatedly approved our development plans for several years and accepted our dedications of land for roads and open spaces? We’ve lost 1,500 units with the stroke of a pen! How can that be legal?”

“Well, Al, the State of Euphoria follows the California rule as set

A.2d. 1331 (Md. 1996).

18. *Id.* at 1335.

19. *See Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (The Court ignores lower court’s finding of vested rights for an applicant whose density entitlement in a planned unit development had been abrogated by a change in law and who had successfully pursued administrative appeals to the County Board of Appeals as suggested by the County Planning Commission, only to have the Planning Commission ignore the Board’s decision in favor of the landowner and against the Planning Commission and maintain the new density restrictions.)

20. *See, e.g., Whitehead Oil Co. v. City of Lincoln*, 451 N.W.2d 702 (Neb. 1990); *Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d 390 (Neb. 1994); *Hock Investment Co., Inc. v. City of San Francisco*, 263 Cal. Rptr. 665 (Cal. App. 1989); *PMC Realty Trust v. Town of Derry*, 480 A.2d 51 (N.H. 1984).

forth a quarter century ago in the *Avco* case.²¹ *Avco* involved a very large planned unit development of over 5,000 acres that had been approved and partially developed several years before a change in law required non-grandfathered developments in the Coastal Zone to obtain building permits from the Coastal Commission. The effect was to cut off *Avco*'s development rights even though it had spent well over \$2 million in planning and site improvements and had conveyed parkland to the County at a below-market price."

"Sounds like our situation, says the CEO. How could they have lost?"

"It was like us, perhaps even worse," says Sharp. "The case focused on a 74-acre parcel of the PUD where a subdivision for apartments had been approved, grading permits issued and construction had been underway on streets, utilities and the like before the permit requirement was imposed."

"That sounds exactly like us," says Alpha. "How could the court rule against them after the County issued all of those permits?"

"Well, Al, it came down to *building* permits, and *Avco* had not received any. The California Supreme Court said that *Avco*'s claims of 'substantial reliance' were unavailing because they related only to preliminary approvals rather than to building permits for identifiable structures. Thus, the Court ruled that *Avco* had no vested right to continue with its PUD."

"But we and our lender have relied on the County's approvals," says the CEO. "Aren't they important? All of that engineering work which we have done on Phases 1 through 4 was specifically designed to support 2,500 dwellings. The County has known for years what was to be built here. It's outrageous and unfair what they have done."

"Fairness has nothing to do with it, Al. In fact, the lower court in *Avco* actually stated that if fairness was the issue, *Avco* would have been allowed to complete its development.²² It was all about the lack of 'a building permit'."²³

"Sylvia," thunders the CEO, "we're not going to take this lying down. I can't believe that a court in the 21st Century would allow all

21. *Avco*, *supra* note 4, at 546.

22. *Id.* at 549.

23. *Id.*

of the development approvals we have relied upon to be lost for the lack of a building permit. Take another look at that *Avco* case and see what authority the court cites to support its ruling.”

Sharp re-examines the *Avco* decision, and finds that the two principal cases relied upon by the court in denying vested rights to the PUD developer involved respectively the failure to obtain “a building permit” for a “service station,” and “a building permit” for a “high-rise apartment complex,” each on “a single tract of land.”²⁴ Neither case remotely resembled the factual situation involving a long-term buildout pursuant to multiple approvals as in *Avco* or Quality’s PUD. Yet, the *Avco* court held that “despite *minor* factual variations” its two cited cases were “clearly controlling.”²⁵

Moreover, Sharp wonders whether the *Avco* court’s repeated references to the need for construction pursuant to “a building permit,” leave open the question whether, in the court’s view, a building permit for a single building—such as a house—would have sufficed to vest the PUD developer’s rights. If it does, thinks Sharp, the absurdity of the late vesting rule in PUD cases is amplified since the issuance of a building permit for a single building out of hundreds of buildings yet to be built does virtually nothing to alter the basic equation, *i.e.*, the developer’s significant change of position based upon substantial reliance on repeated prior approvals. On the other hand, if a lone building permit would not suffice to vest the entire project, and if permits for each and every building in the PUD are required in order to vest, the *Avco* court, despite its protestations to the contrary, would seem to be giving “obdurate adherence to archaic concepts inappropriate in the context of modern development practices.”²⁶

Further, Sharp finds that courts in other states, including some which follow the traditional late vesting rule (building permit plus construction), recognize that the developer’s right to complete a large-scale PUD should vest earlier in the process, such as when the

24. *Anderson v. City Council*, 40 Cal. Rptr. 41 (1964); *Spindler Realty Corp. v. Monning*, 53 Cal. Rptr. 7 (1966) (discussed in *Avco* at 553 P.2d at 550-552).

25. 553 P.2d at 551 (emphasis added).

26. *Id.* at 554.

initial approval is implemented.²⁷

Sharp reports her findings to Alpha.

“It all comes down to whether Euphoria’s courts will continue to apply the *Avco* rule, or take into account the factors considered in other state courts, such as the significant difference in the ‘substantial reliance’ factor when relying upon repeated land use approvals in large scale buildouts, as compared to simply having to obtain a building permit for a discrete building on single parcel of land.”

“Well,” says the CEO, “I don’t have much hope that that will happen. But I do have one other question. Do you remember that takings case that I was so upset about a short while back where the court reversed a \$4 million takings award to the landowner?”

“I remember it,” says Sylvia. “It was a Michigan case.”²⁸ “The landowner owned four contiguous parcels comprising over 80 acres, which were in various stages of development. On one of the parcels a wetlands permit was denied, precluding development of that parcel, and the owner won a \$4 million judgment in the lower court, which was reversed. But what’s your point, Al?”

“Well,” says Al, growing more excited, “I remember the court talking about the ‘whole parcel’ theory being applicable where the four parcels were being developed together and treated as a single unit by the owner. The court went on to say that it was wrong to look only at the single parcel when deciding whether a taking had occurred, and that the principle of non-segmentation should be

27. See, e.g., *Milcrest Corp. v. Clackamas County*, 650 P.2d 963 (Or. App. 1982) (developer of 440-acre planned unit development vested its right to complete the development based upon approval of the original PUD plan, notwithstanding the fact that the developer later sought and obtained approval of a revised PUD plan.); *In re Diamond’s Appeal*, 196 A.2d 363 (Pa. 1964) (stating that the time to challenge the validity of an integrated mixed-use plan is at the time of issuance of the initial permits implementing the plan. A court challenge to the commercial portion of the development, filed more than two years after the rezoning was approved and construction of residential areas was commenced, was not allowed. For the purpose of vesting, development will be considered as a single entity if it is so planned and presented.) (Pennsylvania is a late vesting state.) See also *Rockshire Civic Assn., Inc. v. Mayor and Council of Rockville*, 358 A.2d 570 (Md. 1976) (While deciding the issue of vesting in a PUD case on statutory grounds, the court acknowledged that in applying vesting principles to the PUD “we are not dealing with the conventional zoning”) (Maryland is a late vesting state.)

28. *K&K Construction, Inc. v. Dept. of Natural Resources*, 575 N.W. 2d 531 (Mich. 1998).

applied to determine the ‘denominator parcel’ in such cases.²⁹ In other words, *all four parcels had to be considered together* in determining whether there was a taking.”

“Yes, Al, but that was a takings case. How does it apply here?”

“Common sense!” exclaims Alpha. “If contiguous parcels, such as the five that we have been developing in Flower Valley under a County-approved unified development plan, comprise the ‘whole parcel’ for takings purposes, why shouldn’t the same principle of non-segmentation also apply to support our vested rights claim in this case?”

“Good thought, Al. I’ll look into it.”

“Please do,” says the CEO, “I really want to sue those [persons].”

THE NEED FOR REFORM

The law of vested rights has become a minefield which needs to be cleared. The issues are not new, and many commentators have discussed them.³⁰ In today’s world, the land use regulatory review process has become increasingly elongated and complex, with environmental permitting often overlaying the traditional review process, regulations proliferating, more reviewing agencies in the mix and more public hearings. These factors and the increasing uncertainty that accompanies them, have led to a serious problem. In many areas, there is already a crisis of confidence, which will surely deepen if nothing is done to promote more predictability in the system.

When coupled with the inability of many state courts to establish a coherent and consistent body of case law on vested rights, the problem becomes particularly acute for large-scale multi-building developments with long-term buildouts. High quality, environmentally sensitive developments cannot be planned, built or financed in a “gotcha” atmosphere where repeated governmental approvals may not be worth the paper they are written on. The demise of such projects, while possibly perceived as a good thing by some, will ultimately have adverse impacts on the well-being and economic vitality of communities all over the country.

29. *Id.* See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 n.7 (1992).

30. See *supra* note 5.

Smart growth and other worthy growth management goals will never be achieved unless there is also “*smart process*.” One of the keys to achieving smart process is to reform the chaotic state of the law on vested rights. As once observed by two respected commentators, “unfortunately, there are no rules for changing the rules.”³¹ This problem is gradually being cured, as can be seen from the statutory reforms that have been adopted in several states. Statutory remedies and enlightened court decisions can do much to stabilize the situation.

STATUTORY REFORM

Two statutory reforms, namely, state-wide vesting laws and development agreements legislation, are often mentioned as a means of promoting uniformity in this area.³²

Vesting Laws

A number of states have enacted vesting laws, including:³³

Arizona	New Jersey
California	North Carolina
Colorado	Pennsylvania

31. SIEMON & LARSON, *VESTED RIGHTS: BALANCING PUBLIC AND PRIVATE DEVELOPMENT EXPECTATIONS*, *supra* note 5.

32. *See, e.g.*, D.R. MANDELKER, *LAND USE LAW*, § 6.22 (4th ed. 1997); Gregory Overstreet & Diana Kirchheim, *The Quest for the Best Test to Vest: Washington's Vested Rights Doctrine Beats the Rest*, 23 SEATTLE U. L. REV. (Summer 2000); C.L. Siemon et al., *Vested Rights: Balancing Public and Private Development Expectations*, 1982 URB. LAND INSTITUTE 1982; DELANEY & KOMINERS, *supra* note 5.

33. *See* MANDELKER, *supra* note 1, § 6.22; THE AMERICAN PLANNING ASSOCIATION'S OCTOBER 27, 1999, DRAFT GROWING SMARTSM LEGISLATIVE GUIDEBOOK (final ed., Oct. 27, 1999). Citations, as set forth in the *Guidebook* are: Ariz. Rev. Stat. § 9-1201(3)(4) ff. (1997); Cal. Govt. Code § 66498(1)(a) ff. (1997); Col. Rev. Stat. § 24068-102(4) ff. (1997); Fla. Stat. § 163.3167(8) ff. (1997); Kan. Stat. § 12-764(a) ff. (1997); Mass. Gen'l. Law, Ch. 40A § 6 ff. (1997); N.J. Stat. § 40:55D-49(a) ff. (1997); N.C. Gen'l. Stat. § 160A-385.1(b)(5) ff. (1997); Pa. Stat. tit. 53, § 1050808(4)(i) ff. (1997); 1998 Va. Acts, Ch. 801. Washington's vesting statutes are found in Wash. Rev. Code Ann. § 19.27.095 and § 58.17.033. *See* OVERSTREET & KIRCHHEIM, *supra* note 5, § V. Texas' vesting law was inadvertently allowed to lapse in 1997. However, it was re-enacted in 1999. *See* Texas Local Gov't. Code § 245 (1999). The original legislation is found at Texas Gov't. Code § 481.143(a) (1996).

Florida	Texas
Kansas	Virginia
Massachusetts	Washington

A majority of vesting statutes recognize one's right to proceed with development under the law in effect at the time of approval of a site-specific application, such as a preliminary subdivision plan. Colorado, New Jersey and Pennsylvania are among the states having such statutes. Other vesting statutes, such as Washington's and the reinstated Texas law, allow property owners to have their proposed developments proceed under regulations in effect at the time a complete development permit application is filed, regardless of any subsequent changes in land use laws. Washington's law is especially interesting. It has been described as a superior document, worthy of emulation in other states, because "its strong protections benefit both citizens and government by creating certainty and enforcing fairness."³⁴

Development Agreements Legislation

Several states have enacted legislation authorizing their political subdivisions to enter into development agreements with applicants for land use approvals. These include:³⁵

Arizona	Maryland
California	Minnesota
Florida	Nevada
Hawaii	New Jersey

Local governments and developers who rely on implied—as opposed to express—statutory authority to support conditions or exactions negotiated through development agreements do so at their

34. See OVERSTREET & KIRCHHEIM, *supra* note 5, § 245.

35. See Ariz. Rev. Stat. Ann. § 9-500.05 (1990); Cal. Gov't Code §§ 65864-65869.5 (West 1983 & Supp. 1995); Fla. Stat. Ann. §§ 163.3220-163.3243 (West 1991 & Supp. 1995); Haw. Rev. Stat. VV46-121 to 46-132 (1985); Md. Code Ann. Art. 28, V7-121 (1995) and Md. Code Ann. Art. 66B, § 13.01 (1995); Minn. Stat. Ann. § 462.358 (West 1991); Nev. Rev. Stat. § 278.0201 (1991); N.J. Stat. Ann. §§ 40.:55D-45.2 (West 1991).

peril.³⁶ The susceptibility of such *ad hoc* arrangements to collateral attack by other parties to review process is great. Thus, the applicant and local government share an obvious mutual interest in having express authority to act, with uniform standards and procedures, such as provided in development agreements legislation.

The development agreement is essentially a contract between the local government and the landowner/developer, executed as part of the development approval process. One of its major features is a provision for a “freeze period” during which subsequent changes to the law or regulations will not effect the applicant’s right to complete the proposed use at its approved density or intensity. The development agreement is particularly valuable when dealing with multi-building, multi-phased or long-term developments.³⁷ Historically, courts have been reluctant to approve *ad hoc* agreements between local governments and applicants for land use approvals, believing this to be an inappropriate “bargaining away” of police power and against public policy.³⁸ As noted, development agreements legislation attempts to address this issue by providing uniform specific standards and a public process under which an agreement may be negotiated. These include the requirement for a public hearing, specification of the duration of the agreement, and required findings that the proposed development is consistent with the comprehensive plan and development regulations of the jurisdiction.³⁹

Further, the enabling legislation and the development agreement itself should provide that subsequently enacted laws can be applied to affect the approved use, density or intensity of the project if essential

36. See, e.g., *Nunziato v. Planning Board*, 541 A.2d 1105 (N.J. Super. Ct. App. Div. 1988); *Township of Marlboro v. Planning Bd. of Holmdel*, 653 A.2d 1183 (N.J. 1995); *Altman/Glazer P.B. Co. v. Mayor Annapolis*, 522 A.2d 1277 (Md. 1989).

37. See DAVID L. CALLIES, *DEVELOPMENT AGREEMENTS, ROHAN, ZONING AND LAND USE CONTROLS*, ch. 9A (Kelly Ed. 1997); Daniel L. Curtin, *Protecting Developers’ Permits To Build: Development Agreement Practice in California and Other States*, 18 ZONING AND PLANNING L. REP. 11 (1995). Theodore C. Taub, *Development Agreements*, 1991 ALI-ABA LAND USE INST. 555.

38. See, e.g., *Attman/Glazer P.B. Co. v. Mayor of Annapolis*, 552 A.2d 1277 (Md. 1989); J.J. Delaney, *Development Agreements: The Road From Prohibition to “Let’s Make a Deal!”*, 25 URB. LAW. 49, 56 (Winter 1993).

39. See *supra* note 37. See also J.J. Delaney, *Development Agreements Legislation: The Maryland Experience*, 2 ALI-ABA COURSE OF STUDY 807.

to ensure preservation of the public health and safety. This exception recognizes the right and duty of government to exercise its police power to address exigent situations, while upholding the integrity of the development agreement in all other respects.

As noted, the most significant benefit for the landowner/developer is the provision of a “freeze period” during which the approved development rights (use, density or intensity) cannot be affected by changes in law enacted subsequent to project approval. The length of the freeze period should be negotiable, depending upon the complexity of the project, economic conditions and other relevant factors.

There are also significant benefits for the local government. For example, in times of inadequate public funding for infrastructure, local governments must increasingly rely on private funding mechanisms, such as, the development agreement, to ensure the timely provision of public facilities. Agreements may also provide for protection of sensitive areas, dedications for public amenities and phasing of development. Voluntarily executed agreements also reduce the risk of litigation when permit exactions are simply imposed via exercise of the police power and issues of proportionality are raised.⁴⁰

COMMON LAW REFORM

In states that do not have vested rights statutes or development agreements legislation, particularly states adhering to the late vesting (building permit plus construction) rule, a more enlightened approach by the courts, attuned to the realities of the land-use approval process, would do much to reform the common law of vested rights. This is especially true when the courts are dealing with large scale, multi-building projects with long-term buildouts. In such cases, the courts should conduct the following analysis:

- *Consider all relevant construction.* The late vesting rule is unworkable in long term buildout cases. Of what relevance is “construction” of a building pursuant to a building permit when, in

40. See *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

reliance upon repeated land use approvals, enormous expenditures have been made or obligated by the developer in planning, engineering and *construction* of equally necessary project components, such as lots, roads, infrastructure and public amenities, without which a viable building would not be possible in the first place?

- *Re-examine “substantial reliance.”* Commencement of construction of a single building on a single parcel of land pursuant to a single building permit, when there may be dozens or hundreds of buildings to be built in a phased development, generally adds little to the equation of “substantial reliance” in large scale, segmented development cases. The developer’s position has *already changed* as a result of major land development work required by prior approvals.

- *Scrutinize justifications offered for departing from prior approvals.* Through a series of land use approvals, such as approval of concept plans, subdivision plans, site plans, stormwater management plans, acceptance of dedications for roads and public amenities, and issuance of permits for grading, street and utility construction, the government gains an ever increasing knowledge of the specifics of the project (*e.g.*, the planned use, density and intensity),⁴¹ and with each such exercise of the police power, findings are made that approval of the proposed project will promote the public health, safety and welfare. Therefore, it is blatantly arbitrary and incredible for the government to later argue that its prior approvals should not have been relied upon and that it can repudiate them with impunity at the building permit stage. Such arguments should be rejected except in the very rare instance where a direct and imminent threat to public health or safety is posed by the development, such as when contamination of the public water supply would result. In the alternative, and at the very least, the government should be required to justify its contrary action under a higher standard of judicial review, namely that its change of position is necessary to promote a compelling governmental interest.⁴²

41. *See, e.g.*, *Avco Community Developers, Inc. v. South Coastal Regional Comm’n*, 553 P.2d 546 (Cal. 1976); *In Re Diamonds Appeal*, 196 A.2d 363 (Pa. 1964); *County Council for Montgomery County v. District Land Corp.*, 337 A.2d 712 (Md. 1975).

42. *See* Charles L. Siemon et al., *Vested Rights: Balancing Public and Private*

- *Apply “parcel as a whole” analysis.* In situations where a planned segmented development of contiguous parcels under common ownership has been approved and is being developed as a single unit under a coordinated plan of development, *the principle of “non-segmentation” should be applied* to protect the owner’s property rights, and a claim of vested status based on partial development of the “*parcel as a whole*” should be upheld.⁴³ If a takings case should be evaluated under the parcel as a whole theory, a vested rights claim should receive similar analysis and not be rejected simply because buildings have not yet been constructed in all phases of the project.⁴⁴

- *Do not reward improper government conduct.* Just as a landowner cannot normally claim a vested right, based upon a building permit issued as a result of mistake of fact or in violation of law, neither should a landowner who is unable to timely obtain a building permit or commence instruction because of improper or unlawful government action be denied vested status.⁴⁵

EPILOGUE

Lorraine Lucky, fed up with the uncertainties and stress of the land development business, sold her property and enlisted in the Navy Seals. She later married the Suburban County official who had delayed issuance of Paul Plodder’s water and sewer permits.

“I always liked the guy”, she said. “He has good instincts.”

Paul Plodder sued Suburban County and won, but before he could obtain building permits for his 10 duplex units, successive development moratoria in Pristine Acres based on inadequate roads and sewers, followed by a restrictive school allocation program, put his property on hold for several years. A series of reapplications—

Development Expectations, 1982 URBAN LAND INSTITUTE.

43. See *K&K Constr., Inc. v. Dep’t of Natural Resources*, 575 N.W. 2d 531 (Mich. 1998); *Forest Properties v. United States*, 177 F. 3d 1360 (1999).

44. See *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 130 (1978) (“In deciding whether a particular governmental action has effected a taking, this Court focuses . . . both on the character of the action and on the nature and extent of the interference with rights in the *parcel as a whole*.” (emphasis added)).

45. See, e.g., *Rockville Fuel and Feed Co. v. City of Gaithersburg*, 291 A.2d 672 (Md. 1972); *Prince George’s County v. Blumberg*, 418 A.2d 1155 (Md. 1980).

each successively for a reduced number of dwellings—were rejected. Finally, when the County denied an application for a single estate home on what used to be his five lots, Plodder retained nationally pre-eminent takings attorneys Martin Bergman, and Gilbert Kanfer, to file suit.

“The only thing worse than retroactivity is no activity,” he said.

Euphoria’s courts rejected Plodder’s suit, but his certiorari petition was granted by the United States Supreme court.

The Board of Directors of *Quality Development Company*, overruling its CEO, Alan Alpha, decided not to go to court. The remainder of Quality’s property was sold at a huge loss to the County for parkland. Alpha resigned from Quality and dropped out of sight. Sometime later, he showed up at a Theravada Buddhist monastery in Sri Lanka where every day he pursues the Four Noble Truths, especially the one dealing with the universality of suffering. In a farewell letter to Sylvia Sharp, he wrote:

“There is a fine balance here between the natural and the spiritual. There never was any balance in the State of Euphoria or in Suburban County. They should have listened to that Mandelker fella. He knew what he was talking about.”

APPENDIX

VESTING VERITIES AND THE DEVELOPMENT CHRONOLOGY:
A GAPING DISCONNECT?

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To assist the reader, some leading vested rights cases are examined in the context of the development chronology, beginning with acquisition of land and ending with commencement of construction pursuant to a validly issued building permit.

*Vested
Rights?*

A. ACQUISITION OF LAND WITHOUT USE
(CONTEMPLATED USE)

Generally, the property owner has no vested right in the existing zoning of the property.

- | | |
|-----|---|
| No | Houston v. Bd. of City Comm'rs of City of Wichita, 543 P.2d 1010, 1019 (Kan. 1975). The mere planning of anticipated uses does not vest rights as against a change in zoning. |
| No | Nyczepir v. Town of Naples, 586 A.2d 1254 (Me. 1991) |
| No | Town of Vienna Council v. Kohler, 244 S.E.2d 542 (Va. 1978) |
| Yes | Minch v. City of Fargo, 297 N.W.2d 785 (N.D. 1980);
aff'd 332 N.W. 2d 71 (N.D. 1983). |
| Yes | Zoning Commission of New Canaan v. New Canaan Building Co., 148 A.2d 330, 333 (Conn. 1959).
Reclassification of land zoned for apartments for 15 years to single-family residential did not defeat the vested right of the property owner inasmuch as the rezoning was not in pursuance of a comprehensive plan. |

*Vested
Rights?*

B. PRELIMINARY ACTIVITY:
PLANNING/ARCHITECTURAL DRAWINGS

Generally no vested rights arise from preparation of preliminary plans.

No Gosselin v. City of Nashua, 321 A.2d 593, 596-97 (N.H. 1974). \$100,000 spent on planning, architectural and engineering services to prepare to build a shopping center prior to ordinance amendment deleting shopping centers held not to vest developer's right to continue. There was no government act upon which developer could have placed reliance.

No Cohn Communities, Inc. v. Clayton County, 359 S.E.2d 887 (Ga. 1987). Letter from County Planner, which stated present zoning of multi-family zoned tract, was not the kind of assurance required to create vested rights in landowner.

No See also Whitfield v. Seabrook, 190 S.E.2d 743 (S.C. 1972).

Yes Fifteen Fifty North State Building Corp. v. City of Chicago, 155 N.E.2d 97, 101 (Ill. 1958). \$105,000 architectural contract for an apartment building gave rise to vested rights as against change in zoning.

C. PRELIMINARY ACTIVITY: TESTING OF THE
LAND

The general rule is that test borings and engineering studies do not give rise to vested rights.

No Smith v. Juillerat, 119 N.E.2d 611 (Ohio 1954).

*Vested
Rights?*

D. FILING OF SUBDIVISION PLAT/SITE
PLAN/SPECIAL USE PERMIT

General rule: The filing of a subdivision plat or site plan does not establish a use in which one's rights may vest.

- No Hanover County v. Bertozzi, 504 S.E. 2d 618 (Va. 1998). Developer's untimely filing of subdivision/record plat applications pursuant to a grandfather clause allowing applications to be reviewed under junior zoning and subdivision ordinances did not give rise to a vested right.
- No Walsh v. Town of Orono, 585 A.2d 829, 831-32 (Me. 1991). Filing of site and subdivision applications prior to ordinance amendment which rezoned applicant's property to exclude multi-family development did not vest applicant's right to proceed under prior zoning because there had been no "substantive review" of the applications by the Planning Board as of the date of the ordinance amendment. Thus, the applications were not "pending."
- No Bibeau v. Village Clerk of the Village of Tuxedo Park, 535 N.Y.S.2d 106, 108 (1988). Application for final plat approval did not give subdividers a vested right to have the law in effect at the time of their initial application control the final plat approval.
- No See also Matter of Property Developer, Inc. v. Swiatek, 593 N.Y.S. 2d 702 (1993); Brazos Land, Inc. v. Board of County Comm'rs of Rio Arriba County, 848 P.2d 1095 (N.M. App. 1993); Gisler v. County of Madera, 112 Cal. Rptr. 919 (Cal. App. 1974); Sherman-Colonial Realty Corp. v. Goldsmith, 230 A.2d 568 (Conn. 1967).
- Yes Noble Manor Co. v. Pierce County, 943 P.2d 1378 (Wash. 1997). Developer purchased an acre of land with the intent

*Vested
Rights?*

of building duplexes. At that time the County zoning code allowed duplexes on lots with a minimum size of 13,500 feet. On August 2, 1990 the developer filed an application for a short plat to divide the acre into three lots in order to build a duplex on each. On August 15, 1990 the developer applied for building permits but was denied for two of the three duplexes because the short plat had not yet been approved. In October 1990, while the short plat application was still pending, the County adopted an ordinance changing the minimum lot size requirement for a duplex from 13,500 to 20,000 square feet. In July 1991, the County approved the short plat for the three lots. Several months later the County issued all three duplex building permits. However, in January 1992, after substantial construction, the County “red tagged” two of the duplexes and stopped construction. The developer appealed and the County reversed the stop work order. Construction was completed and then the developer sued the County for delay damages.

The Supreme Court of Washington reviewed State case and statutory law on vested rights and determined that the a developer is entitled to have its land development proposal processed under the regulations in effect at the time it filed a complete building permit application. Washington courts had previously not extended the vested rights doctrine to applications for preliminary plat approval or short plat approval. However, in 1987, the legislature enacted a vested rights statute, codifying the State’s vested rights doctrine that allowed vesting upon application for building permits, and expanding it to include short subdivision and short plat applications as well.

Yes Friends of the Law v. King County, 869 P.2d 1056, 1060 (Wash. 1994). Developer’s rights vested at the time of application for preliminary plat approval, and County

*Vested
Rights?*

Council acted properly in approving the application notwithstanding the absence of building setback lines as required by plat application ordinance. State statute extended vested rights to “fully complete” preliminary plat applications. However, local ordinance requirements for a fully completed application at the time of filing the subject application were highly ambiguous, and were clarified only after the application was filed and deemed complete under then-existing regulations. Vesting procedures which are vague and discretionary cannot be used to deny an applicant vested rights.

E. PRELIMINARY APPROVALS: APPROVAL OF
SUBDIVISION PLAN

General Rule: No rights vest, since no use established.

- No L.M. Everhart Construction, Inc. v. Jefferson County Planning Comm’n, 2 F.3d 48 (4th Cir. 1993);
- No Tim Thompson, Inc. v. Village of Hinsdale, 617 N.E.2d 1227 (Ill. App. 2 Dist. 1993)

F. PRELIMINARY APPROVALS: APPROVAL OF
RECORD PLAT

General rule: No vested right, since no use established, but a substantial number of cases are contra.

- No Waste Disposal, Inc. v. Town of Porter, 563 A.2d 779, 782 (Me. 1989). Landowner acquired no vested rights to construct and operate a solid waste disposal site even though its development plan was submitted and reviewed by the planning board prior to the revision of a zoning ordinance, and statute provided that any application “pending” at the time of an ordinance revision was

Vested Rights?

entitled to review under the ordinance in effect at the time it was submitted. The plan was found not to be pending because neither simple presentment to the planning board nor initial review by the board to determine whether the application was complete constituted “substantial review.”

No Scherbel v. Salt Lake City Corp., 758 P.2d 897, 901 (Utah 1988). Property owner had no vested right to build under zoning classification in effect at time of his application for conceptual approval, since his application did not comply with zoning ordinance requirements then in effect as zoning change was pending prior to application and owner and his architect were aware of pending change.

Yes Bleznak v. Township of Evesham, 406 A.2d 201, 219 (N.J. 1979). Owner’s vested right to continue development of a nursery school for three years after site plan approval was protected by statute.

G. PRELIMINARY APPROVALS: SPECIAL EXCEPTION/ SPECIAL USE PERMIT

General rule: No vested right.

No Haher’s Sodus Point Bait Shop, Inc. v. Wigle, 528 N.Y.S.2d 244, 246 (1988); appeal denied, 535 N.Y.S.2d 595 (1988). Property owner did not acquire any vested rights in use of docks, which extended over water belonging to state, and was not entitled to Special Permit to continue certain use of docks, merely because owner’s predecessors obtained necessary permits from Army Corps of Engineers and the Department of Environmental Conservation. These permits did not convey any property interest and owner’s reliance on them as an entitlement to an exemption from local regulation was misplaced.

*Vested
Rights?*

- No Rockville Fuel & Feed Co. v. City of Gaithersburg, 291 A.2d 672, 675 (Md. 1972). See Paragraph L, *infra*. Property owner obtained no vested right in special exception for concrete batching plant, which was found by the Court to have been unlawfully denied, in light of ordinance amendment deleting such use after court ruling.
- Yes Board of Spvsrs. of Fairfax County v. Medical Structures, Inc., 192 S.E.2d 799, 801 (Va. 1972). Approval of special exception for nursing home, followed by approval of site plan, coupled with diligence and good faith plus substantial expenditures by property owner in pursuit of development prior to change in zoning, vested owner's right to continue.
- Yes Board of Spvsrs. of Fairfax County v. Cities Service Oil Co., 193 S.E.2d 1, 3 (Va. 1972). Approval of special use permit constituted government action upon which reliance could be placed, even though building permit not issued.

H. CHANGES TO LAND BEFORE BUILDING
PERMIT(S) ISSUED

Generally no vested rights are recognized where changes are made to the land (demolition of existing buildings, grading, filling, etc.) prior to issuance of building permit.

1. Filling Swampland

- No Morris County Land Improvement Co. v. The Township of Parsipanny-Troy Hills, 193 A.2d 232, 239 (N.J. 1963). Filling of swampland regarded as mere preparation of land for a future use, not a present use.

*Vested
Rights?*

2. Clearing/Grading

- No *Burroughs v. Town of Paradise Valley*, 724 P.2d 1239, 1241-42 (Ariz. 1986). Landowner had no vested right to build a Frank Lloyd Wright-designed house on her property, although prior owner had leveled top of mountain, utilities had been bought, and \$18,000 had been paid for plans, where no building permit was ever issued nor was any application ever filed. Also, previous owner's expenditures to level mountain top to create home site was irrelevant to determination of whether landowner had a vested right to build house, where expenditures by prior owner was with regard to construction he planned to undertake long before Wright plans were created.
- No *Fairlawns Cemetery Assn. V. Zoning Comm'n of Town of Bethel*, 86 A.2d 74, 80 (Conn. 1952). Clearing of land for cemetery gave rise to no vested right.
- Yes *Pingatore v. Town of Cave Creek*, 981 P.2d 126 (Ariz. App. 1998). Town was held to be estopped from halting grading and related activity pursuant to a driveway permit for a residence, based upon alleged violation of a recently enacted zoning ordinance concerning "ridge lines." A building permit had not been obtained, but in approving the driveway permit, the Town had concluded that the proposed home satisfied the yard, lot, height and size requirements of the then current zoning. By proceeding in reliance upon this "zoning clearance" and spending thousands of dollars in so doing, the landowner's right to complete the project was protected, and the Town was estopped from intervening, despite the apparent violation of the ridge line requirement.

*Vested
Rights?*

3. Street/Infrastructure Dedications

Yes H.R.D.E., Inc. v. Zoning Officer of the City of Romney, 430 S.E.2d 341, 346 (W.Va. 1993). Property owner has vested right to complete housing project for elderly and physically handicapped, despite the fact that construction had not begun prior to enactment of zoning ordinance, where landowner's acts went beyond "mere contemplated use or preparation," and mayor had assured owner by letter that its project would be grandfathered under proposed new ordinance. The court noted that the landowner, acting in good faith, had deeded land for streets to the City, given the City storm sewers and culverts which it had installed, and had spent approximately \$95,000 on soil studies, engineering and architectural fees to prepare for construction.

4. Widening of Road

No Town of Hempstead v. Lynne, 222 N.Y.S.2d 526, 530 (Sup. Ct. 1961). \$120,000 spent on road widening not shown to be exclusively for the proposed project.

5. Clearing/Road-Building/Lot Stakeouts

Yes Application of Campsites Unlimited, Inc., 215 S.E.2d 73, 79 (N.C. 1975). Clearing of land, coupled with some road-building and staking out of lots, even with notice of a pending change in the ordinance, did not freeze the developer's right to proceed.

"The right of landowners to develop their properties in ways then lawful cannot be frozen by a county's or a municipality's announcement of its undertaking of a general study of zoning which, at some future date, may or

*Vested
Rights?*

may not lead to the adoption of an ordinance restricting the landowner's proposed use of his land." Id. at 79.

Note: The court's opinion could have been influenced by the fact that no further building activity was contemplated.

6. Ancillary Activities

Yes Clackamas County v. Holmes, 508 P.2d 190, 193-94 (Ore. 1973). Vested rights recognized where property was purchased for development as a chicken processing plant; owner planted cover crops, increased electrical capacity, installed an irrigation system, and prepared a site plan. The court employed a balancing test, taking into account the good faith of the property owner and the nature of the project in construing these rather nebulous activities as vesting the owner's right to continue.

I. SITE DEVELOPMENT WORK WHERE NOT ALL PERMITS ISSUED

Cases in this area turn upon whether the site development work related to the entire project or merely to those units/buildings for which building permits were issued.

No Town of Lima v. Harper, 390 N.Y.S.2d 752, 755-56 (App. Div. 1977); aff'd, 404 N.Y.S.2d 597 (1978). No vested right recognized where only 45 of 300 building permits for mobile home sites had been obtained. Although developer had spent \$16,400 for paving and related work, these expenditures were held to be exclusively for the 45 sites for which permits had been issued.

Yes Ellington Construction Corp. v. Zoning Board of Appeals of the Incorporated Village of New Hempstead, 549

*Vested
Rights?*

N.Y.S.2d 405, 413-14 (A.D.2 Dept. 1989); aff'd 564 N.Y.S.2d 1001 (1990). Landowner acquired vested rights to obtain building permits for the remainder of its lots in accordance with the provisions of the former zoning ordinance both through its irrevocable dedication of parklands upon which the approval of the subdivision was conditioned, and through its substantial expenditures made on roads and utilities prior to, during, and after the expiration of the exemption period. The subdivision was to be built in two phases, and almost all of the building permits had been issued for the first section, and seven houses had been constructed pursuant to those permits. It would have cost over \$2,200,000 to conform the improvements to the amended zoning ordinance, which increased the area requirements for landowner's property.

Yes Preseault v. Wheel, 315 A.2d 244, 247 (Vt. 1974). Developer of 38-unit residential project was held to have obtained a vested right to complete the entire development, even though only 4 of 38 building permits had been issued. The court's holding was based upon the developer's construction of a retaining wall (on the shore of Lake Champlain), which work was deemed to be related to the entire project.

J. VESTED CONTRACTUAL INTEREST

This is a relatively untested issue in vested rights law. However, with the increased tendency of the public sector to rely upon public improvement agreements, developer agreements and other contractual relationships with private developers to acquire public infrastructure, it is likely that additional case law on this subject will soon emerge.

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- Yes Mayor & City Council of Baltimore v. Crane, 352 A.2d 786 (Md. 1976). Where property owner had conveyed approximately 5 acres of an 11-acre tract to the city for a future road extension, pursuant to an ordinance which allowed the property owner to develop the remainder of his property at the same density that would have originally applied to the entire 11-acre site, court found a “vested contractual interest” to exist in favor of the property owner some 7 years later when the city declined to approve full development of the remaining 6 acres based upon an intervening change in the law.
- Yes Ward v. City of New Rochelle, 197 N.Y.S.2d 64, 69 (Sup. Ct. 1959); aff’d 197 N.Y.S.2d 128 (N.Y. App.Div. 1959); aff’d 204 N.Y.S.2d 144 (1960). Dedication/conveyance of land to the city pursuant to a bilateral agreement held to have established a vested contractual interest in favor of the property owner.
- Yes Leaf Co. v. Montgomery County, 520 A.2d 732 (Md. App. 1987). A vested contractual interest need not be based upon a formal written agreement, but may arise through the actions of the parties and a well-established course of dealing.
- Yes Farmer v. Jamieson, 354 A.2d 225, 231 (Md. App. 1976). The power of the local legislative body to amend master plans did not empower it to “arbitrarily impair” a previously incurred contractual obligation arising from a public works agreement.

K. APPLICATION FOR BUILDING PERMIT

Generally an application for a building permit does not vest one’s right to the proposed use in the face of a change of law. 8 McQuillin, Municipal Corporations, § 25.155 (1991).

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- No *City of Aspen v. Marshall*, 912 P.2d 56 (Colo. 1996) After the fact application for building permit for hot tub and deck that landowner had constructed on property designated as historic landmark did not give rise to a vested right even assuming that the law in existence at time of permit application—but subsequently amended—could have allowed issuance of the permit.
- No *Whitehead Oil Co. v. City of Lincoln*, 451 N.W.2d 702 (Neb. 1990). Oil Company's filing of a building permit application to construct a gas station, convenience store and car wash, 3 months before a civic association's rezoning application to reclassify the Company's property and 9 months before zoning ordinance was amended to delete said use, did not give Company a vested right to develop under the former ordinance. Company's expenditures on plans (approximately \$5,000) and professional fees (approximately \$10,000) were deemed not substantial enough to avoid retroactive effect of ordinance amendment. Pg. 706 (On remand the trial court found that the City Planning Commission's delay in processing Company's application was arbitrary, unreasonable and in bad faith. Its decision was affirmed with minor modifications in *Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d 390 (Neb. 1994). Damages were awarded in a companion case, *Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d 401 (Neb. 1994).
- No *City of Portland v. Fisherman's Wharf Associates II*, 541 A.2d 160, 164 (Me. 1988) Builder did not have vested rights to pursue project for which a building permit application was filed with knowledge of a pending ordinance that specifically stated it applied retroactively.

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- No Fairmount Township Bd. of Supervisors by Fairmount Township Zoning Bd. v. Beardmore, 431 N.W.2d 292, 295 (N.D. 1988). Ordinance requiring applicants to pay cost of application did not take away or impair vesting rights of applicant whose application was pending because applicants did not have vested rights, but, rather, had mere expectancy of obtaining permit.
- No In Re McCormick Management Co., Inc., 547 A.2d 1319, 1322 (Vt. 1988). Filing subdivision development plan prior to town's adoption of zoning ordinance created no vested right to develop lots in accordance with subdivision plan, where plan was filed and ordinance was adopted 15 years before development permit was sought and developer had done little in reliance on plan.
- No Union Oil Co. of California v. Bd. of County Comm'r of Clackamas County, 724 P.2d 341, 344 (Or. 1986). Purchase price of land on which use was contemplated was properly excluded from substantial expenditure calculation made to determine whether owner had vested rights to begin construction after property was rezoned, absent evidence that owner paid premium as part of purchase price directly related to contemplated use. There is no reasonable basis to allow an expenditure that has no relationship to that use to be considered in determining whether a vested right to continue the use has been acquired.
- No See also Steuart Petroleum Co. v. Bd. of County Comm'rs of St. Mary's County, 347 A.2d 854 (Md. 1975); Boron Oil Co. v. Kimple, 284 A.2d 744 (Pa. 1971).
- Yes Victoria Tower Partnership v. City of Seattle, 745 P.2d 1328 (Wash. 1987). City council violated builder's vested rights in using multifamily policies, which were not yet

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adopted when builder applied for permit to construct tower, and to place condition upon builder's proposal, despite fact that multifamily policies were announced and proposed before builder applied for permit.

The Washington vested rights doctrine protects developers who file a building permit application that (1) is sufficiently complete, (2) complies with existing zoning ordinances and building codes, and (3) is filed during the effective period of the zoning ordinances under which the developer seeks to develop. Once a developer complies with these requirements, a city cannot frustrate the development by enacting new zoning regulations.

Note: Washington's Vesting Statute enacted in 1987 enlarged the protections of the State's common law doctrine. See Greg Overstreet and Diana Kirchheim, *The Quest for the Best Test to Vest: Washington's Vested Rights Doctrine Beats the Rest*, 23 *Seattle v. Law. Rev.* (Summer, 2000)

- Yes *State ex rel Ogden v. City of Bellevue*, 275 P.2d 899, 902 (Wash. 1954). The property owner's right to put his property to a permitted use "accrues at the time an application for a building permit is made."
- Yes See also: *Valley View Industrial Park v. City of Redmond*, 733 P.2d 182 (Wash. 1987); *West Main Associates v. City of Bellevue*, 720 P.2d 782 (Wash. 1986).
- Yes *Barker v. County of Forsyth*, 281 S.E.2d 549 (Ga. 1981). Court adopts the "probability of issuance" rule, based upon informal assurances given to the property owner by county officials to the effect that the proposed use was in accordance with existing zoning.

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Yes See also: *Gallagher v. Building Inspector City of Erie*, 247 A.2d 572 (Pa. 1968); *Bd. of Zoning Appeals of City of Fort Wayne v. Shell Oil Co.*, 329 N.E.2d 636 (Ind. App. 1975); *Zaremba Dev. Co. v. City of Fairview Park*, 616 N.E.2d 569 (Ohio App. 1992).

L. PREVENTION OF BUILDING PERMIT ISSUANCE
(OR PERMIT REVOCATION) DUE TO
GOVERNMENT'S BAD FAITH OR UNLAWFUL
ACTION.

*Where government unlawfully or in bad faith delays
issuance of building permit or revokes same, the courts
are split.*

No *Sycamore Realty Co., Inc. v. People's Counsel of Baltimore County*, 684 A.2d 1331 (Md. 1996). Developer filed a development plan for a 220-unit townhouse complex, which was permitted under applicable zoning. While the project was under consideration the County placed the property in reservation for potential future acquisition and then unlawfully extended the reservation for an additional year, during which time the property was down-zoned by nearly half its density as part of a comprehensive rezoning. However, the County, acknowledging its mistake, processed the development application on the basis of the density to which it was entitled prior to the unlawful extension of the reservation. The County Board of Appeals and the reviewing lower court agreed that the County was estopped from enforcing the new zoning. However, the state's highest court applied the state's late vesting rule, holding that the landowner had not obtain building permits to erect the townhouse complex and thus had acquired no vested rights. The court expressly refused to consider the doctrine of zoning estoppel.

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- No Prince George's County v. Blumberg, 418 A.2d 1155, 1161 (Md. 1980); cert. den. 449 U.S. 1083 (1981). Developer held to have no vested right to continue construction of an apartment building where building and sewer permits were revoked (in bad faith per two lower court opinions), since developer did not first exhaust administrative remedies in appealing permit revocations. [This is a much criticized case. See "Just Compensation of Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations," 29 U.C.L.A. Law Review 711, 740-745 (1982)].
- No Rockville Fuel & Feed Co. v. City of Gaithersburg, 291 A.2d 672 (Md. 1972). Building permit issuance delayed for over a year due to the adjudicated unlawful action of the Board of Appeals in denying special exception for concrete batching plant. Nevertheless, change in law subsequent to reversal of board action by court cut off applicant's rights.
- No County Council for Montgomery County v. District Land Corp., 337 A.2d 712, 721 (Md. 1975). Adjudicated unlawful refusal of sewer agency to approve sewer permit precluded owner from continuing with construction under approved building permit. However, a downzoning following the court's initial ruling terminated the owner's right to continue.
- No Gramiger v. County of Pitkin, 794 P.2d 1045, 1049 (Col. App. 1989). County's wrongful withholding of building permit for a restaurant prior to zoning amendment deleting restaurants as a permitted use in the zone did not give rise to vested right because the owner failed to present evidence that he would have taken substantial steps to

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complete the structure before the amendment became effective.

- Yes *Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d 390 (Neb. 1994), *supra*, Section K. Planning commission, planning director and council found to have delayed action and hearing on landowner's application for a land-use permit in order to allow the neighborhood representative's later filed request for rezoning of landowner's property to be reviewed and passed. Such delays were arbitrary and in bad faith in order to prevent landowner's intended use, rather than reasonable and in good faith to promote the general welfare. Therefore, the new regulation may not be applied retroactively. (Damages awarded to *Whitehead Oil*, based upon a partial taking, in a companion case, *Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d 401 (Neb. 1994).
- Yes *Hock Investment Company, Inc. v. City and County of San Francisco*, 263 Cal. Rptr. 665, 668 (Cal. App. 1 Dist. 1989) If approving agency made an express promise that owner's application for conversion to condominium would be evaluated under the ordinance in effect at the date of submittal, and owner reasonably relied upon that promise to its significant detriment by filing its application prior to notice of any proposed change in the ordinance, the doctrine of equitable estoppel would prevent the city from applying the new ordinance, which put a three-year moratorium on conversions.
- Yes *State ex rel. Casey's Gen. Stores, Inc. v. City of Louisiana*, 734 S.W.2d 890, 896 (Mo. 1987). Where city officials were consulted early and reassured store proprietor that nothing would prevent operation of store on any property acquired in city, city was equitably

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estopped from denying issuance of building permit for construction of store.

Yes PMC Realty Trust v. Town of Derry, 480 A.2d 51, 54 (N.H. 1984). Bad faith enactment of a zoning ordinance for purpose of preventing a legal use by an applicant for a building permit may confer vested rights on the applicant.

Yes See also Dubow v. Ross, 3 N.Y.S.2d 862 (App. Div. 1938).

M. ISSUANCE OF BUILDING PERMIT, WITHOUT COMMENCEMENT OF CONSTRUCTION

Courts are generally split as to whether the issuance of a building permit alone, without commencement of construction, will be enough to vest the permittee's right to continue in the face of a change in law. A slight majority inclines toward no vesting.

See 1 Anderson, *The American Law of Zoning*, § 6.26 (4th Ed. 1996); 8 McQuillin, *Municipal Corporations*, § 25.156 (3d ed. 1991).

No Lakeview Development Corp. v. City of South Lake Tahoe, 915 F.2d 1290, 1298 (9th Cir. 1990). No vested right to proceed where townhouse developer held building permits over a 12-year period without commencing construction, and ordinance amendment placed new restrictions on development.

No Cymbidium Dev. Corp. v. Smith, 519 N.Y.S.2d 711 (N.Y. App. Div. 1987); app. den. 524 N.Y.S.2d 676 (1988). City was not estopped from enforcing zoning amendment limiting development to 8 stories against developers who obtained permit to build 13 story building under existing

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zoning, but who did not carry out necessary foundation work so as to acquire a vested interest.

No City of Pompano Beach v. Yardarm Restaurant, Inc., 509 So.2d 1295 (Fla. 1987). Zoning authority was not equitably estopped from repealing special height exception granted to property owner for construction of building, where owner made no real effort to construct the building and did not incur extensive obligations.

No Mayor & City Council of Baltimore v. Shapiro, 51 A.2d 273, 279 (Md. 1947). “The mere issuance of a permit where the permittee has not commenced the work or incurred substantial face on the faith of it does not create a vested right.”

No Brackett v. City of Des Moines, 67 N.W.2d 542 (Iowa 1954). No vested right to proceed with a commercial parking lot was recognized where the permittee had notice of a pending ordinance change when the building permit was obtained.

No See also Palatine I v. Planning Board of the Township of Montville, 628 A.2d 321 (N.J. 1993).

Yes Gulf Oil Corp. v. Township Bd. of Spvsrs, 266 A.2d 84 (Pa. 1970). Corporation which had purchased land one week after issuance of a building permit held to have vested rights where the subsequently enacted restrictive zoning ordinance was not pending or known of at the time of purchase.

Yes Town of Hillsborough v. Smith, 170 S.E.2d 904 (N.C. 1969). Purchase of land after issuance of a building permit, followed by purchase of equipment for a dry cleaning plant and entering into a contract for

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construction, held to have vested the owner's right to continue in the face of a restrictive ordinance amendment.

N. "CONSTRUCTION" FOLLOWING ISSUANCE OF
A BUILDING PERMIT

Determination of what constitutes "commencement of construction" can be a vexing issue. A few scenarios will be treated here.

1. Clearing of Land/Site Preparation

- No Prince George's County v. Sunrise Development Co., 623 A.2d 1296 (Md. 1993). Construction of a concrete footing for apartment building was insufficient to vest rights where the developers only building permit was for the column footings. Construction must proceed under the permit so that the neighborhood may be advised that the land is being devoted to the planned use.
- No Landquest, Inc. v. Planning Board of Hoosick, 538 N.Y.S. 2d 666 (A.D. 3 Dept. 1989) Where 15 lots were to be developed, costing approximately \$675,000, developer, holding building permits for all 15 lots, acquired no vested rights to build because rough grading of the parcel, installing a gravel roadway servicing 12 of the lots, and starting construction of one two-family residence on one lot, costing \$35,000, were neither substantial construction undertaken nor substantial expense incurred, both of which were required to vest rights. In the interim, planning board, which had previously expressed objections in an advisory capacity, had been granted authority to pass on plats already filed of subdivisions on which 20% or more of the lots were unimproved, and sought to review the subdivision.

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- No Russ Bldg. Partnership v. City and County of San Francisco, 750 P.2d 324 (Cal. 1988). City ordinance, requiring all building owners within downtown area to pay special assessment for maintenance of city mass transit system, was not retroactively applied in violation of vested rights doctrine to office buildings currently under construction. The new buildings, which had begun construction before the ordinance was enacted, contained a clause in the building permit that owners agreed to belong to special assessment district for maintenance of augmentation of city's transit system.
- No Gramatan Hills Manor, Inc. v. Manganiello, 213 N.Y.S.2d 617, 622 (Sup. Ct. 1961). A single day's work on grading and providing access roads was held not to have vested the developer's right to continue.
- No Verner v. Redman, 271 P.2d 468 (Ariz. 1954). Demolition of an existing building and excavation work held not to have vested the developer's right to continue.
- No F.L.D. Construction Corp. v. Walsh, 357 N.Y.S.2d 112 (App. Div. 1974). Clearing of land in preparation for a trailer park held not to have vested developer's right to continue.
- Yes Town of Orangetown v. Magee, 665 N.E.2d 1061 (N.Y. 1996). After the landowner obtained a building permit for a 184,000 square feet industrial building and expended over \$4 million on site development and improvements, intensified citizen opposition led the Town to revoke the permit, halt construction, and amend the zoning code to preclude construction of commercial buildings on the subject site. (Although the permit was limited to "land clearing, footings, and foundations," the court treated it as entitling the landowner to construct the the entire building

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so long as subsequent work on ceilings, walls and electrical comported with plans already approved by the building inspector.) Ruling that a vested right can be acquired when, pursuant to a legally issued permit, the landowner demonstrates a commitment to the purpose for which the permit was granted by effecting substantial changes and incurring substantial expenses to further the development, the court found that the owner's right to develop had vested, thus establishing a protected property interest. Accordingly, the Town's actions denied the landowner substantive due process of the law, and an award for over \$5 million in damages to the landowner under 42. U.S.C. § 1983 was upheld.

Yes Deer Park Civic Assn. v. City of Chicago, 106 N.E.2d 823 (Ill. App. 1952). Court uses a balancing test to uphold owner's vested right to continue development where a building permit had been issued for a manufacturing use in the face of a pending ordinance amendment to change the zoning of the property to residential. The permittee's expenditures (\$22,000) and contracts (approximately \$600,000) although antedating the permit's issuance were held sufficient to vest the owner's rights under a balancing analysis.

2. Pouring of Footings Pursuant to a Validly Issued Building Permit and Continued Good-Faith Pursuit of Construction Work will Vest the Permittee's Right as Against a Change in the Law.

No Palatine I v. Planning Board of the Township of Montville, 628 A.2d 321 (N.J. 1993). Commencing construction of the central core and one wing of a 60,000-square-foot office building pursuant to site plan approval and a building permit did not give rise to an equitable estoppel claim against the Township when construction on

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the second wing was suspended for over a year and in the interim new zoning regulations had been enacted reducing the permitted size of the office building to 45,000 square feet. Both the original site plan and the building permit were deemed to have expired in view of the work stoppage for over six months.

- No Ross v. Montgomery County, 250 A.2d 635 (Md. 1969). Pouring of a single \$190 footing for a \$1.8 million apartment hotel on the last day of the permit's life, followed by termination of all further construction activity, held not to be a good-faith commencement of construction. (Permittee had demolished three buildings worth approximately \$75,000, performed test borings and incurred \$56,000 of expenses in preparing the building permit application.)
- No HWK, Inc. v. County of Kendall, 621 N.E.2d 246 (Ill.App. 2 Dist. 1993). A building permit acquired by permittees to construct a cement plant did not extend to property acquired by the permittees after permit was issued.
- No See also Prince George's County v. Sunrise Development Co., supra, Section N1.; Prince George's County v. Blumberg, supra, Section L.
- Yes Aransonian Oil Co. v. City of Portsmouth, 612 A.2d 357 (N.H. 1992). City was estopped from enjoining the operation of a convenience store where the owner, relying on an issued building permit, incurred \$45,000 in remodeling costs.
- Yes Kolesar v. Zoning Hearing Bd. of Borough of Bell Acres, 543 A.2d 246 (Pa. 1988). Operator of automobile repair and towing business was entitled to a variance by estoppel

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allowing him to continue operation of business in a residential zone. Substantial evidence supported conclusion that operator showed due diligence and good faith throughout the proceedings, and that operator made substantial expenditures in reliance on building permits previously granted for garage building out of which business operated.

Yes Jaffee v. RCI Corp., 500 N.Y.S.2d 427 (1986). Company which obtained necessary approval of town planning board pursuant to law then in effect and lawfully completed construction of transmission tower acquired vested rights which were not affected by subsequent amendment of zoning ordinance which eliminated transmission towers as permitted use. Furthermore, company which constructed transmission tower and then agreed to remove tower if town planning board's approval was annulled did not waive vested rights acquired by obtaining necessary approval pursuant to law then in effect.

Yes Pemberton v. Montgomery County, 340 A.2d 240 (Md. 1975). Obtaining a building permit and pouring of footings for a retaining wall for a gas station on the last day of the life of a special exception, followed by continued construction activity, held to be good-faith commencement of construction even though the footing was poured in the wrong location. The court laid out a two-step test for determining commencement of construction, as follows:

“[T]here must be (i) a manifest commencement of some work or labor on the ground which everyone can readily see and recognize as the commencement ... and (ii) the work done must have been begun with the intention and

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purpose to continue the work until completion of the building ...” (Id. at 244.)

Note: The fact that the gasoline station was completed by the time the case was heard by the court may have influenced the outcome based upon an “economic waste” theory.

- Yes Emerald Home Builders, Inc. v. Kolton, Jr., 298 N.E.2d 275 (Ill. App. 1973). Vested rights in a building permit were recognized where the city in bad faith first ordered the permittee to stop construction and then, six months and one day later, revoked the building permit for lack of construction activity.

O. INVALID OR UNLAWFULLY ISSUED BUILDING PERMIT

1. Generally, the holder of a building permit which is unlawfully or mistakenly issued obtains no vested right in same, even where construction has occurred. See 8 McQuillin, Municipal Corporations, §25.153 (3rd Ed. 1991).

- No McClure v. Davidson, 373 S.E.2d 617 (Ga. 1988). Illegal building permit issued to landowners after their subsequent expenditures on property did not give them vested right to develop property. Issuance of a building permit results in a vested right only when permit is legal and valid.
- No Parkview Associates v. City of New York, 519 N.E.2d 1372 (N.Y. 1988). City was not estopped from revoking that portion of property owner’s building permit which violated long standing zoning limits, although property owner had already engaged in substantial construction in

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reliance thereon; where property owner could have discovered city's error in issuance of building permit by reasonable diligence in examining enabling legislation.

- No Gunkel v. City of Emporia, 835 F.2d 1302 (10th Cir. 1987). Kansas state law does not recognize property rights in building permits which have been issued by mistake or in violation of state law. Once a permit is found to have been issued by mistake or in violation of the law, the city may revoke it without notice of hearing.
- No City of Lamoni v. Livingston, 392 N.W.2d 506 (Iowa 1986). Property owner, who was erroneously issued building permit for construction of sawmill when zoning ordinance did not allow that use in district, and who continued to build after receiving notice of revocation of permit, did not have vested right in permit which would prevent its being revoked by city.
- No Miller v. Bd. of Adjustment of Town of Dewey Beach, 521 A.2d 642 (Del. 1986). Property owner did not acquire any vested rights in erroneously issued building permits as a result of moving to cottages in reliance thereon. Generally, permit issued illegally or in violation of the law does not confer vested right upon person to whom it is issued.
- No Center Township v. Zoning Hearing Bd. of Center Township, 522 A.2d 673 (Pa. 1987). Mere delay in enforcement of zoning ordinance does not create a vested right in an "established" unlawful use of property in violation of zoning regulations.
- No Dege v. City of Maplewood, 416 N.W.2d 854 (Minn. 1987). City was not estopped from enforcing terms of special use permit allowing customer parking but

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prohibiting truck or trailer storage in parking lot by revoking building permit issued to landowner for construction of a trailer garage on parking lot. Since landowner was charged with constructive notice of special use permit, it was unreasonable for him to claim reliance on building permit issued in violation of special use permit.

- No LaFollette v. Board of Adjustment of City of Lakewood, 741 P.2d 1262 (Col. 1987). Where applicant applied for building permit for “storage barn” in zoning area that permitted barns used for agricultural purposes, but application made no mention of what he planned to store, permit issued was not a communication that unmistakably misled applicant into believing the city approved storage of excavating equipment on site. Thus, city was not estopped from subsequently claiming that use of structure for such storage was in violation of zoning ordinance.
- No Township of West Pikeland v. Thornton, 527 A.2d 174 (Pa. 1987). Landowner cannot acquire a vested right in permit issued by local government by reliance on statements of appointee, such as chairman of zoning hearing board, who acted merely as ministerial officer rather than in adjudicative capacity. A landowner making expenditures for construction in reliance on those statements does so at his own peril.
- No See also City of Chicago v. Unit One Corp., 578 N.E.2d 194 (Ill. App. 1991); Randolph Vine Assoc. v. Zoning Bd., 573 A.2d 255 (Pa. Commw. 1990); Glazer v. Zoning Bd. of Worcester, 423 A.2d 463 (Pa. Commw. 1980); Flood v. Zoning Hearing Bd. of Hampden Township, 338 A.2d 789 (Pa. Commw. 1975).

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2. *A minority of courts recognize vested rights in unlawfully/mistakenly issued permits where there is evidence of good faith and due diligence coupled with substantial expenditures by the permittee.*

Yes *Koziel v. Zoning Hearing Bd. of Borough of Waynesboro, 551 A.2d 383 (Pa. 1988)* For property owners whose combined income was \$47,000, the expenditure of \$2,000 in modifying property pursuant to an erroneously issued building permit constituted substantial, unrecoverable sums, as required for them to acquire vested rights in use of property.

Yes *Jones v. City of Aurora, 772 P.2d 645 (Colo. App. 1988)* Doctrine of equitable estoppel applied to prevent city from claiming that property was not zoned for day-care center after city employee told prospective buyer that property for sale was zoned for that use, despite fact that prospective buyer gave employee the incorrect address (as supplied to him by the seller). Buyer justifiably relied on city's zoning representation in purchasing the property, and equitable relief was appropriate because city was in a superior position to discover the true facts giving rise to the action.

Yes *Nowak v. Bridgeville Borough Zoning Bd., 534 A.2d 165 (Pa. 1987)*. Property owner acquired a vested right in garage building permit issued in violation of zoning ordinance's side yard setback requirements. Although the general rule in Pennsylvania is that illegal building permits confer no vested rights, if the facts of a case so dictate, the vested rights doctrine may be applied as an exception to the general rule. Here, the property owner exhibited due diligence in attempting to comply with the law, acted in good faith throughout the proceedings, and completed 90% of construction at the time the permit was revoked.

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Therefore, the property owner acquired vested rights in the building permit.

- Yes J. & B. Dev. Co. v. King County, 669 P.2d 468 (Wash. 1983). “There is nothing discretionary about the duty [of the County to exercise reasonable care in issuing building permits and conducting inspections]. The response is in the nature of a ‘ministerial’ or ‘operational’ function; one which each member of the public has a right to expect will be made accurately.” (Id. at 474.)
- Yes Abberville Arms v. City of Abberville, 257 S.E.2d 716 (S.C. 1979). A property owner’s reliance upon informal city approvals (based upon city officials’ mistaken impression of the zoning status of the subject property) gave rise to vested rights where the property owner had made substantial expenditures pursuant to the permit.
- Yes Commonwealth Dept. of Environmental Resources v. Flynn, 344 A.2d 720 (Pa. Commw. 1975). Property owner who had spent \$50,000 toward construction of personal residence, which was 75% complete, held to have obtained a vested right to continue even though permit had been issued in error. The court was persuaded by the due diligence and good faith of the property owner, the expenditure involved, the nature of the improvement, and the expiration of the period in which any appeal could have been filed.
- Yes See also Aranosian Oil Company Inc. v. City of Portsmouth, 612 A.2d 357 (N.H. 1992), supra, § N 2.

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P. CONSTRUCTION WHILE COURT CHALLENGE IS
PENDING

Generally, one who proceeds with construction in the face of a court challenge to his permit is deemed to have proceeded at his own risk and will not be accorded vested rights in the event of a subsequent court reversal.

Determination of these cases often depends upon the good faith of the challenger (i.e., was the challenged project allowed to continue for an undue length of time before the appeal was noted), the good faith of the permittee; and local statute. The filing of an appeal will in some jurisdictions by statute stay the permittee's right to proceed. In other jurisdictions, one desiring to challenge an approved project must post a bond or risk having the appeal become moot in the event the challenged construction proceeds to completion during the pendency of the appeal.

- No *Conneen v. Speedy Muffler King, Inc.*, 568 A.2d 700 (Pa. Cmwlth 1989). Building was held not to be “lawful” where owner obtained building permit and constructed the building pursuant to a variance after trial court upheld zoning hearing board’s variance, but before appellate court reversed. Owner was not entitled to benefit of nonconforming use provision of ordinance which was amended after the construction but before appeal was decided because owner had “built at his own risk” by obtaining building permit and constructing with knowledge that an appeal had been taken.
- No *Grandview Baptist Church v. Zoning Bd. of Adjustment of City of Davenport*, 301 N.W.2d 704 (Iowa 1981). To allow the permittee to obtain vested rights in these circumstances would render the appeal process meaningless.

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- Yes *Petty v. Barrentine*, 594 S.W.2d 903 (Ky. App. 1980). Court upholds permittee's right to continue in view of the circumstances of the case and its analysis of the *lis pendens* doctrine in relation thereto.
- Yes *Goto v. D.C. Bd. of Zoning Adjustment*, 423 A.2d 917 (D.C. 1980). Laches held to bar intervenor from pursuing zoning violation claim against property owner.

Q. STAGED/SEQUENTIAL LARGE-SCALE
DEVELOPMENTS

As stated in the text of this article, traditional late vesting tests are inappropriate in cases involving large-scale developments.

It is in this area most of all that a new standard - one not anchored to building permits - is needed. Clearly, the "use" in a large-scale development is established long before the last building permit is issued. Equally clear is the existence of numerous governmental actions in the development chronology upon which substantial reliance has been placed by the developer.

A. The following cases are illustrative of the problem and provide some hint as to possible solutions.

- No *Williamson County Regional Planning Comm'n., et al. v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105, S. Ct. 3108 (1985).

This case involved a major reduction of development rights for a large planned unit development by way of intervening regulations substantially reducing density, enacted several years after initial zoning approval. The developer had spent approximately \$3.5 million for

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improvements, including a golf course and sewer and water facilities. The principal issues presented to the court involved whether a compensable “taking” of the developer’s property under the Fifth Amendment had occurred and whether the developer was entitled to relief under Section 1983 of the Civil Rights Act. The Supreme Court declined to address the taking issue, finding that the case was not ripe in view of the fact that no variance had been sought by the developer from either the County Board of Appeals or Planning Commission.

However, it is important to note that the issue of vested rights was a significant component of the decision of the United States Court of Appeals for the Sixth Circuit in favor of the developer [729 F.2d 402 (1984)], which was reversed by the Supreme Court. The issue of vested rights receives only peripheral comment in the Supreme Court’s opinion. One may conclude from the court’s opinion that in addition to requiring that exhaustion of administrative remedies and state judicial remedies must occur before a Fifth Amendment taking claim will be considered in Federal Court, substantive questions of vested rights must also give way to technical procedural deficiencies. Support for this view may also be found in *United States v. Locke*, 105 S.Ct. 1785, 1797 (1985).

No *Avco Community Developers, Inc. v. South Coast Regional Comm.*, 553 P.2d 546 (Cal. 1976). Avco, owner and developer of a large (5,000-acre) planned unit development, was held not to have achieved vested rights regarding a 74-acre parcel designated for multiple-family use, even though the PUD had been approved years before and nearly \$2.8 million had been expended or obligated by Avco in planning and site improvements, including the conveyance of parkland to the county at a below-market price. The court’s ruling that Avco had no vested right to

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continue was based upon the traditional vesting rule that work performed and liabilities incurred must be pursuant to a building permit. However, the court's analysis is seriously flawed, in that cases cited in support of its decision involved conventional single-building developments, such as an apartment building site in one instance and a gas station in another. The court's reaction was that there were only "minor factual variations" between Avco's PUD and these prior cases.

- No Kaiser Dev. Co. v. City and County of Honolulu, 649 F. Supp. 926 (D. Haw. 1986). Although developer spent over \$8 million in building a large hotel/ resort complex, developer held to have no vested rights in the property. Court stated that developer had the right, but not the obligation, to develop property at its own expense and risk. The investment represented a business risk undertaken by the developer, and he could not turn a contract right into a property right simply by investing in the subject matter of the contract. (Affirmed Kaiser Dev. Co. v. City and County of Honolulu, 898 F.2d 112 (9th Cir. 1990). Further unpublished opinion at 899 F.2d 18 (9th Cir. 1990)).
- No Landquest, Inc. v. Planning Board of Hoosick, 538 N.Y.S.2d 666 (A.D. 3 Dept. 1989).
- Yes Milcrest Corp. v. Clackamas County, 650 P.2d 963 (Or. App. 1982). Developer of 440 acre planned unit development vested its right to complete the development, based upon approval of the original PUD plan, notwithstanding fact that developer later sought and obtained approval of a revised PUD plan.
- Yes In Re Diamond's Appeal, 196 A.2d 363 (Pa. 1964). The time to challenge the validity of an integrated mixed-use

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plan is at the time of issuance of the initial permit implementing the plan. Thus, a court challenge of the commercial portion of the development, filed more than two years after the rezoning was approved and construction of residential areas commenced, was not allowed. The development, even though accomplished in stages, may be considered as a single entity for the purpose of vesting rights if it is so planned and presented.

Yes Preseault v. Wheel, 315 A.2d 244 (Vt. 1974), *supra*, which, although not a large-scale development, stands for the premise that development work related to the entire project (as opposed to only the completed portion) may be sufficient to vest the developer's right to complete.

B. At least one court has recognized that traditional vesting tests may be inapplicable to large-scale developments.

In *Rockshire Civic Assn., Inc. v. Mayor and Council of Rockville*, 358 A.2d 570, (Md. 1976), the court noted:

“[T]he question of vested or contract rights in planned residential unit development is an interesting and difficult question, which will no doubt return to the Courts of this State While it is entirely clear that in conventional zoning applications, the property owner acquires no vested interest in the continuation of existing zoning, in the absence of improvement of the property pursuant to such zoning, it is equally true that we are not dealing with the conventional zoning. The landowner invariably dedicates to the public use substantial amounts of valuable property, and improves other areas in a manner perhaps not most desirable to him, in return for the privilege of more intensive development, or commercial development, in other areas of the tract. Reduction of the initially approved

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commercial areas would clearly result in financial detriment to the owner of the property, but unless it would deprive the owner of all reasonable use of his property, such action may not be constitutionally impermissible.” (Id. at 579. Emphasis added.)

However, it should be noted that the decision in Rockshire was based primarily upon a grandfather statute which allowed the challenged portion of the PUD (a commercial use) to stay intact.

No *C. One of the most significant vested rights and referendum cases involving large-scale developments is County of Kauai v. Pacific Standard Life Insurance Co., 653 P.2d 766 (Ha. 1982).*

The case is important in several respects:

1. Where the piecemeal rezoning proceeding is deemed to be legislative, rather than quasi-judicial, the risk of the referendum/ initiative process being invoked in any controversial case must be taken into account.

- a. See *Hyson v. Montgomery County Council*, 217 A.2d 578 (Md. 1966), and *Fasano v. Bd. of County Comm’rs*, 507 P.2d 23 (Ore. 1973), for espousal of the concept that the piecemeal rezoning proceeding is “quasi-judicial” in character.

2. Once a referendum petition is certified, i.e., approved for placement on the ballot, the referendum itself - not the building permit - becomes the final discretionary act in the permitting process.

3. The developer in Kauai, who began construction the day after the referendum was held (but three weeks before

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the results of the referendum were certified), assumed known risks and could make no claim of vesting or equitable estoppel.

a. Note, the building permits themselves had been previously held to have been validly issued. Nevertheless, in the circumstances of the referendum, the building permit was not the final discretionary act in the permitting process.

4. Although at the time of the court's decision, several condominium buildings in the resort project had been completed and sold and a hotel was partially completed, the court in remanding directed that demolition of the buildings would not be an appropriate remedy, absent a showing of intent to violate the county's zoning laws.