

CONCURRENT SESSION

“What Do You Mean I Can’t Develop?” Vested Rights, Development Agreements, Annexation Agreements

3:00 p.m.—4:15 p.m.
Friday, April 22, 2005
Sturm College of Law

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**USE OF DEVELOPMENT AND
ANNEXATION AGREEMENTS IN
GENERAL AND CALIFORNIA'S
EXPERIENCE**

WHAT DO YOU MEAN I CAN'T DEVELOP

April 22, 2005

**ROCKY MOUNTAIN LAND USE INSTITUTE'S
Fourteenth Annual Land Use Conference**

April 21 - 22, 2005

University of Denver College of Law
Denver, Colorado

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Daniel J. Curtin, Jr. concentrates his practice on local government and land use law representing both private and public-sector clients. He is a member of the firm of Bingham McCutchen LLP in the Walnut Creek office.

Mr. Curtin served as Chair of the State and Local Government Law Section of the American Bar Association, 2001-2002. He was Past Chair of the Land Development, Planning & Zoning Section of the International Municipal Lawyers Association (formerly NIMLO). He is past Vice-Chair of the Executive Committee of the Real Property Law Section of the State Bar of California. Mr. Curtin has also served as President of the City Attorneys' Department of the League of California Cities, as a member of the Board of Directors of the League, and as Regional Vice President of the International Municipal Lawyers Association.

In honor of his outstanding contributions to the practice of state and local government law for over 45 years, the State and Local Government Law Section of the American Bar Association awarded Mr. Curtin with the Jefferson Fordham Lifetime Achievement Award.

In recognition of his extensive contributions to NIMLO and to the entire municipal law community nationwide, as well as his years of leadership and service to the legal profession, Mr. Curtin was honored with NIMLO's Charles S. Rhyne Award for Lifetime Achievement in Municipal Law. He is the recipient of the American Planning Association's National Distinguished Leadership award for 20 years of writing, teaching, encouraging and supporting planning ideas. He also was named Honorary Life Member of the California Park and Recreation Society in recognition of his exceptional service to the field of parks and recreation.

Mr. Curtin is the author of numerous publications on California land use and subdivision law, which have been cited frequently by the California Courts, including "Curtin's California Land Use & Planning Law," published and revised annually by Solano Press, "Subdivision Map Act Manual," published by Solano Press and "Subdivision Map Act and the Development Process," published by California Continuing Education of the Bar, Berkeley, California. He is a frequent lecturer for the University of California Extension and Continuing Education of the Bar (CEB) and was an adjunct professor for the University of San Francisco Law School teaching Land Use Law.

Mr. Curtin received his A.B. from the University of San Francisco and his J.D. from its School of Law. He has served as assistant secretary of the California State Senate, Counsel to the Assembly Committee on Local Government, Deputy City Attorney of Richmond, and City Attorney of Walnut Creek.

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**USE OF DEVELOPMENT AND
ANNEXATION AGREEMENTS IN GENERAL
AND CALIFORNIA'S EXPERIENCE**

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I. VESTED RIGHTS¹

One of the most important objectives a developer must achieve is to protect its ability to complete a land use project once all land use and discretionary approvals have been obtained from the City or County. For example, after the developer has received a general plan amendment, rezoning, tentative and final subdivision map, and then has obtained all other various discretionary land use permits in order to develop over a period of time, the developer should try to guarantee its rights to complete the project as approved, especially if the project will be built out over a period of time. Land use laws affecting the project might change while the project is underway, either because of a switch in local government legislative policy or by revisions made by the people through the initiative process. This is becoming more common in very recent years because city, county, state, and national governmental leaders have jumped on the anti-sprawl bandwagon. Today, many cities and counties have adopted strict land use regulations under banners of "Smart Growth," "Sustainable Growth," "Livable Communities," "New Urbanism," and "Stopping Sprawl." When this occurs, a developer many times cannot rely on common-law vested rights and, therefore, must secure the

¹ See David L. Callies, Daniel J. Curtin, Jr. and Julie A. Tappendorf, *Bargaining for Development: A Handbook on Development Agreements, Annexation Agreements, Land Development Conditions, Vested Rights and the Provision of Public Facilities* (Environmental Law Institute, Wash. D.C. 2003); Daniel J. Curtin, Jr., *Developer Claims of Vested Rights*, Current Trends and Practical Strategies in Land Use Law and Zoning (Sec. of State & Local Gov't Law, ABA, Patricia E. Salkin, editor, 2004); Thomas G. Pelham, Adam U. Lindgren and Lisa D. Weil, *What Do You Mean I Can't Build!? A Comparative Analysis of When Property Rights Vest*, 31 Urb. Law. 901 (1999).

protection of a development agreement or some other document to ensure vested rights to develop.

In general, in order to obtain a successful vested right, usually the developer must have obtained and acted on all of the approvals, including all the building permits, and done substantial work in reliance on them. Nearly all authorities agree that the granting of a building permit vests rights. *See, Bargaining for Development, supra*, at 135. This is late in the project approval stage and further many building permits might need to be issued in various stages over months or years depending on the timing and size of the development project.

Since common law vesting rules are usually locked in quite late in the development process, they normally do not give much assurance to a developer in proceeding with his or her project when development rules changes. This was highlighted in California by the famous seminal vested right case entitled *Avco Community Developers, Inc. v. South Coast Reg'l Comm'n*, 17 Cal. 3rd 785 (1976) case which has been cited several times nationwide.

A. The Avco Rule --- California

The basic rule is that if a city or county changes its land use regulations, a property owner cannot claim a vested right to build out a project unless it has obtained a building permit, and performed substantial work and incurred substantial liabilities in good faith reliance upon the permit. This common law vested rights rule in California was reaffirmed when the California Supreme Court stated:

It has long been the rule in this state and in other jurisdictions that if a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in

accordance with the terms of the permit. [Citations omitted.] Once a landowner has secured a vested right the government may not, by virtue of a change in the zoning laws, prohibit construction authorized by the permit upon which he relied.

Avco Community Developers, Inc. v. South Coast Reg'l Comm'n, Id. at 791.

The *Avco* court stated further, however, that:

[N]either the existence of a particular zoning nor work undertaken pursuant to governmental approvals preparatory to construction of buildings can form the basis of a vested right to build a structure which does not comply with the laws applicable at the time the building permit is issued.

Id. at 793.

Plaintiff *Avco* owned approximately 8,000 acres of land in Orange County, a small portion of which was located within the coastal zone. Prior to February 1, 1973, the date on which the coastal zoning permit requirement became effective, *Avco* had obtained zoning, tentative, and final subdivision map approval and had completed or was in the process of constructing storm drains, improvements of utilities, and similar facilities for the subdivision tract. However, no building permits had been issued for unit construction. The company had spent \$2,000,000 and had incurred additional liabilities of \$750,000 for the development of the subdivision tract. *Avco* argued that it was not required to obtain a coastal zoning permit because it had a vested right to proceed with its development based upon the fact that it had obtained all discretionary entitlements and had installed extensive utility improvements. The California Supreme Court held that *Avco* had no vested right to proceed:

By zoning the property or issuing approvals for work preliminary to construction the government makes no representation to a landowner that he will be exempt from the zoning laws in effect at the subsequent time he applies for a building permit or that he may construct particular structures on the property, and thus the government cannot

be estopped to enforce the laws in effect when the permit is issued.

Id. at 793.

In summarizing the policy behind the vested right rule, the Court stated:

Our conclusion that Avco has not acquired a vested right under the common law to proceed with its development absent a permit from the commission is not founded upon an obdurate adherence to archaic concepts inappropriate in the context of modern development practices or upon a blind insistence on an instrument entitled “building permit.”

If we were to accept the premise that the construction of subdivision improvements or the zoning of the land for a planned community are sufficient to afford a developer a vested right to construct buildings on the land in accordance with the laws in effect at the time the improvements are made or the zoning enacted, there could be serious impairment of the government’s right to control land use policy. In some cases the inevitable consequence would be to freeze the zoning laws applicable to a subdivision or a planned unit development as of the time these events occurred.

Thus tracts or lots in tracts which had been subdivided decades ago, but upon which no buildings have been constructed could be free of all zoning laws enacted subsequent to the time of the subdivision improvement, unless facts constituting waiver, abandonment, or opportunity for amortization of the original vested right could be shown. In such situations, the result would be that these lots, as well as others in similar subdivisions created more recently or lots established in future subdivisions, would be impressed with an exemption of indeterminate duration from the requirements of any future zoning laws.

Id. at 797–98.

This decision led to the adoption of the development agreement statute in California in 1979.

B. Other Statutory Solutions

Some state legislatures have adopted laws addressing vested rights directly, and others have followed California using the development agreement approach.

Colorado has adopted a statute which provides in part:

Each local government shall specifically identify, by ordinance or resolution, the type or types of site specific development plan approvals within the local government's jurisdiction that will cause property rights to vest as provided in this article.

Colorado Rev. Stat. § 24-68-103.

II. DEVELOPMENT AGREEMENTS²

Approximately thirteen states have now adopted legislation authorizing development agreements.³ The basic legal issue that arises is the contracting away the police power. Those courts that have addressed this issue in recent years have upheld

² Bargaining for Development, *supra*, *Development Agreements*, ch. III, at 91, *et seq.* See Daniel J. Curtin, Jr., *Effectively Using Development Agreements to Protect Land Use Entitlements: Lessons from California*, 25 Zoning and Planning Law Report, no. 5 (West Group, May 2002); also see Development Agreement Manual: Collaboration in Pursuit of Community Interest (Institute for Local Self Government, 2002). See also *Development Agreements: Contracting for Vested Rights*, 28 Boston College Envtl. Affairs L. Rev., ch. 4 (Summer 2001); David L. Callies and Julie A. Tappendorf, *Annexation Agreements and Development Agreements*, Trends in Land Use Law From A to Z, ch. 14 (Sec. of State and Local Gov't Law, ABA, 2001); David L. Callies, *Development Agreements, Zoning and Land Use Controls*, ch. 9 (Matthew Bender, 1997); Daniel J. Curtin, Jr., *Protecting Developers' Permits to Build: Development Agreement Practice in California and Other States*, 18 Zoning and Planning Law Report 85 (1995); Daniel J. Curtin, Jr. & Scott A. Edelstein, *Development Agreement Practice in California and Other States*, 22 Stetson Law Review 761 (1993); reprinted in 1994 Zoning and Planning Handbook 491 (Kenneth H. Young, ed., Clark, Boardman, and Callaghan).

³ See Ariz. Rev. Stat. Ann. § 9-500.05 (West 1996 & Supp. 2000) (amended 1997); Cal. Gov't Code § 65864 (West 1997); Colo. Rev. Stat. § 24-68-101 to -106 (2000); Fla. Stat. Ann. § 163.3220 (West 2000); Haw. Rev. Stat. § 46-123 (1993); Idaho Code § 67-651 1A (1995 & Supp. 2000) (amended 1999); La. Rev. Stat. Ann. § 33:4780.22 (West 1988 & Supp. 2000); Nev. Rev. Stat. § 278.0201 (1997); N.J. Stat. Ann. § 40:55D-45.2 (West 1991); Or. Rev. Stat. § 94.504 (1999) (enacted into law in 1993 by the Legislative Authority but not made a part of the Oregon Revised Statutes until much later); S.C. Code Ann. § 6-31-10 (Law. Co-op. Supp. 2000); Va. Code Ann. § 15.2-2303.1 (Michie 1997) (applies only to counties with a population between 10,300 and 11,000 and developments consisting of more than 1000 acres); Wash. Rev. Code Ann. § 36.70B.170 (West 1991 & Supp. 2000). Also, in Texas development agreements are used but there is no general statute so authorizing. See R. Alan Haywood and David Hartman, *Legal Basics for Development Agreements*, 32 Tex. Tech. L. Rev. 955 (2001).

such type of agreements especially in California. *See* Bargaining for Development, *supra*, at 91, *et seq.*; M. Ziska, T. Hollister, M. Larson, P. Curtin, State & Local Government Land Use Liability, § 2.13 (West, 2004). Since California is the leader in this field where hundreds of development agreements have been adopted and has had some judicial experience, some detailed discussion as to that process is helpful and provides guidance to other jurisdictions. Many of the development agreement statutes of other states have statutory procedures very similar to California's.

A. California's Statute and Judicial Experience

In 1979, in an attempt to soften the impact of the *Avco* decision, *supra*, the California Legislature enacted a statute establishing a property development agreement procedure. Gov't Code § 65864 *et seq.*

In adopting the new law, the State Legislature set forth clearly the policy behind the law in part as follows:

The Legislature finds and declares that:

(a) The lack of certainty in the approval of development projects can result in a waste of resources, escalate the cost of housing and other development to the consumer, and discourage investment in and commitment to comprehensive planning which would make maximum efficient utilization of resources at the least economic cost to the public.

(b) Assurance to the applicant for a development project that upon approval of the project, the applicant may proceed with the project in accordance with existing policies, rules and regulations, and subject to conditions of approval, will strengthen the public planning process, encourage private participation in comprehensive planning, and reduce the economic development. . . .

Gov't Code § 65864.

The principal provisions of the statute are as follows:

- Cities and counties are given express authorization to enter into a development agreement and may adopt procedures to do so by resolution or ordinance. Gov't Code § 65865. This authorization is based on a strong public purpose, findings and declaration contained in Government Code section 65864. Florida and Hawaii also have similar language.
- The development agreement shall specify the duration of the agreement, the permitted uses of the property, the density or intensity of use, the maximum height and size of proposed buildings, and provisions for reservation or dedication of land for public purposes. The development agreement may include conditions, terms, restrictions, and requirements for subsequent discretionary actions, provided that such conditions, terms, restrictions, and requirements for subsequent discretionary actions shall not prevent development of the land for the uses and to the density or intensity of development set forth in the agreement. The agreement may provide that construction shall be commenced within a specified time and that the project or any phase thereof be completed within a specified time. Also, the agreement may also include terms and conditions relating to applicant financing of necessary public facilities and subsequent reimbursement over time. Gov't Code § 65865.2.
- The development agreement is enforceable by any party to the agreement, notwithstanding a change in any applicable general or specific plan, zoning, subdivision, or building regulation adopted by the city or county. Gov't Code § 65865.4. *See also City of West Hollywood v. Beverly Towers*, 52 Cal. 3rd 1184, 1193, n.6 (1991); *Native Sun v. City of Escondido*, 15 Cal. App. 4th 892, 910 (1993); *Midway Orchards v. County of Butte*, 220 Cal. App. 3rd 765, 773 (1990).
- Unless otherwise provided by the development agreement, the applicable rules, regulations, and policies are those that are in force at the time of the execution of the agreement. Gov't Code § 65866.
- A city's or county's exercise of its power to enter into a development agreement is a legislative act. *Santa Margarita Area Residents Together ("SMART") v. San Luis Obispo County*, 84 Cal. App. 4th 221, 227-28 (2000). It must be approved by ordinance, be consistent with the general plan and any specific plan, and is subject to repeal by referendum. Gov't Code § 65867.5. Note: In some other states such as Hawaii, development agreements are not legislative acts, but nearly all states require consistency or conformity with the local general plan.

- There is a 90-day statute of limitation to challenge the adoption or amendment of a development agreement approved on or after January 1, 1996. Gov't Code § 65009 (c)(1)(d).
- A city or county may terminate or modify a development agreement if it finds, on the basis of substantial evidence, that the applicant or successor in interest thereto has not complied in good faith with its terms or conditions. There shall be a periodic review at least every twelve months of the agreement to determine compliance. Gov't Code § 65865.1.
- A city is authorized to enter into a development agreement for property outside the city limits but within its sphere of influence; the development agreement, however, does not become operative until annexation proceedings are completed within the period of time specified by the agreement. Gov't Code § 65865(b).
- A city or county shall not approve a development agreement that includes a residential subdivision of more than 500 dwelling units, unless the agreement provides that any tentative map prepared for the subdivision will comply with Government Code section 66473.7 relating to the availability of water supply. Gov't Code § 65867.5(c).
- If, prior to incorporation of a new city (or annexation to a city), a county has entered into a development agreement with the developer, that development agreement shall remain valid for the duration of the agreement, or for eight years from the effective date of the incorporation or annexation, whichever is earlier, or for up to 15 years upon agreement between the developer and the city. Gov't Code § 65865.3. This statute applies to incorporations where the development agreement was applied for prior to circulation of the incorporation petition and entered into between the county and the developer prior to the date of the incorporation election. The statute also allows the newly incorporated or annexed city to modify or suspend the provisions of the development agreement if it finds an adverse impact on public health or safety in the jurisdiction. However, as to annexations, if the proposal for annexation is initiated by a petitioner other than a city, the development agreement is valid unless the city adopts written findings that implementation of the development would create a condition injurious to the public health, safety, or welfare of the city's residents.

The California Supreme Court described the rights that may be vested pursuant to a development agreement as follows:

[D]evelopment agreements . . . between a developer and a local government limit the power of that government to apply newly enacted ordinances to ongoing developments. Unless otherwise provided in the agreement, the rules, regulations, and official policies governing permitted uses, density, design, improvements, and construction are those in effect when the agreement is executed.

City of West Hollywood v. Beverly Towers, Inc., 52 Cal. 3rd 1184, 1193, n.6 (1991).

Highlighting the reasons for development agreements, the Court in *Beverly Towers* noted that their purpose is “to allow a developer who needs additional discretionary approvals to complete a long-term development project as approved, regardless of any intervening changes in local regulations.” 52 Cal 3rd at 1194.

A development agreement may be entered into early in the planning and development process. See *Santa Margarita Area Residents Together (“SMART”) v. San Luis Obispo County*, 84 Cal. App. 4th 221 (2000). In *SMART*, an association comprised of area residents contended that a development agreement entered into by San Luis Obispo County was invalid because the project at issue had not been approved for actual construction. In rejecting this contention, the court stated that the development agreement statute should be liberally construed to permit “local government to make commitments to developers at the time the developer makes a substantial investment in the project.” *Id.* at 228.

In finding the agreement valid, the court noted that it conformed to the statute; by focusing on the planning stage of the project, the agreement fulfilled rather than evaded the statute’s purpose. The County’s agreement maximized the public’s role in final development, increased control over the inclusion of public facilities and benefits, and permitted the County to monitor the planning of the project to ensure compliance with its existing land use regulations.

Also, the court stated that a development agreement is a legislative act and the County's Board of Supervisors had the discretion to determine what legislation is necessary and appropriate. The court further stated that a reviewing court will not set aside a legislative act unless it is arbitrary, capricious, or unlawful.

Since a city's or county's decision to enter into a development agreement is a legislative act, it is subject to repeal by referendum. Gov't Code § 65867.5. However, the opportunity for such referendum expires 30 days after the city's or county's adoption of the ordinance approving the agreement, and thereafter the project is immune to subsequent changes in zoning ordinances and land use regulations that are inconsistent with those provided for in the agreement.

A "fully negotiated" development agreement is a "project" under the California Environmental Quality Act (Pub. Res. Code § 21000 *et seq.*), which is subject to environmental review. This is true even when the development agreement is not directly approved by a city or county but instead is submitted by the city or county to the electorate for approval. *See Citizens for Responsible Gov't v. City of Albany*, 56 Cal. App. 4th 1199, 1215 (1997).

Since entering into a development agreement is a legislative act, a city's or county's decision not to enter into a development agreement need not be supported by findings. *See Native Sun/Lyon Communities v. City of Escondido*, 15 Cal. App. 4th 892, 910 (1993).

B. Contracting Away the Police Power

Not infrequently, those who challenge projects governed by development agreements will argue that such agreements are invalid because the city or county is "contracting away" its police power. The courts, especially in California, have not been

persuaded by this argument. See State & Local Government Land Use Liability, *supra*, § 2.13; David L. Callies and Julie A. Tappendorf, *Annexation Agreements and Development Agreements*, Trends in Land Use Law from A to Z, at 318 *et seq.* (P. Salkin, ed., ABA, 2001).

One of the clearest rejections of the application of bargaining away the police power is found in a Nebraska Supreme Court opinion upholding a development agreement in *Giger v. City of Omaha*, 232 Neb. 676, 442 N.W.2nd 182 (1989). The objectors to the agreement claimed that development agreement was a form of contract zoning and, therefore, illegal on their face. The Nebraska Supreme Court, however, preferred to characterize such agreements as a form of conditional zoning that actually increased the city's police power, rather than lessened it, by permitting more restrictive zoning (attaching conditions through agreement) than a simple *Euclidean* rezoning to a district in which a variety of uses would be permitted of right.

In California, an area residents' association contended that because San Luis Obispo County had entered into a development agreement freezing zoning for a five-year period for a project before the project was ready for construction, the County improperly contracted away its zoning authority. *Santa Margarita Area Residents Together ("SMART") v. San Luis Obispo County*, 84 Cal. App. 4th 221, 232-33 (2000). In holding for the County, the court noted that land use regulation is an established function of local government, providing the authority for a locality to enter into contracts to carry out the function. The County's development agreement required that the project be developed in accordance with the County's general plan, did not permit construction until the County had approved detailed building plans, retained the county's discretionary authority in the future, and allowed a zoning freeze of limited duration only. The court

found that the zoning freeze in the County's development agreement was not a surrender of the police power but instead "advance[d] the public interest by preserving future options."

In another case, the property owners purchased property in 1973 to develop an apartment complex of approximately 140 to 150 units. *Stephens v. City of Vista*, 994 F.2nd 650 (9th Cir. 1993). Subsequently, the City of Vista lowered the access street to the property, frustrating the owners' contemplated use, and downzoned the property. The owners sued. They and the City eventually entered into a settlement agreement providing for a specific plan and zoning that permitted construction of a maximum of 140 units. After rezoning the property, the City denied a site development plan, in part because it wanted the owners to reduce the density. The owners then renewed their lawsuit against the City.

The City argued that the settlement agreement unlawfully contracted away its police power. The court disagreed. It first noted that when the City entered into the settlement agreement, it understood it was obligated to approve 140 units. Further, relying on *Morrison Homes Corp. v. City of Pleasanton*, 58 Cal. App. 3rd 724, 734 (1976), in upholding an annexation agreement, the court held that while generally a city cannot contract away its legislative and governmental functions, this rule only applies to void a contract that amounts to a city's "surrender" of its control of a municipal function. 994 F.2nd at 655. Simply contracting for a guaranteed density and exercising its discretion in the site development process does not constitute surrendering control of all of its land use authority.

C. Dolan/Nollan Test not Applicable

Development agreements are adopted as a result of negotiations between a city or county and a developer; therefore, they are not subject to the *Dolan/Nollan* heightened scrutiny standard relating to a takings challenge. *See Leroy Land Dev. Corp. v. Tahoe Reg'l Planning Agency*, 939 F.2nd 696, 697 (9th Cir. 1991). For further discussion on this issue, see David L. Callies and Julie A. Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities After Nollan and Dolan*, 51 Case Western Reserve L. Rev., no. 4 (Summer 2001); also, *Bargaining for Development*, *supra*, at 111-115.

In *Leroy*, the court held that a developer who voluntarily enters into an agreement with a public agency cannot subsequently challenge a mitigation obligation of the agreement as a “taking.” Here, the developer entered into a settlement agreement under which it agreed to certain restrictions on development. After the United States Supreme Court decided *Nollan*, the developer sought to challenge the restriction as a taking. The Ninth Circuit rejected the challenge, holding that regardless of whether the restriction would have violated the Fifth Amendment Takings Clause if imposed as a condition of development, it could not be bound invalid because the developer had voluntarily agreed to the condition. 939 F.2nd at 697.

The court stated:

The threshold issue is whether, assuming arguendo that the mitigation provisions would constitute a taking under *Nollan* if imposed unilaterally by TRPA, they can be viewed as a “taking” when consented to as a part of a settlement agreement. We hold that they cannot. The mitigation provisions at issue here were a negotiated condition of Leroy's settlement agreement with TRPA in which benefits and obligations were incurred by both parties. Such a contractual promise which operates to

restrict a property owner's use of land cannot result in a “taking” because the promise is entered into voluntarily, in good faith and is supported by consideration. Indeed we have found only one case in which an agreement negotiated before *Nollan* was challenged as a “taking” after *Nollan*, and it reached the same conclusion we reach. See *Xenia Rural Water Ass’n v. Dallas County* [citation omitted.] To allow Leroy to challenge the settlement agreement five years after its execution, based on a subsequent change in the law, would inject needless uncertainty and an utter lack of finality to settlement agreements of this kind. We therefore hold that a takings analysis as articulated in *Nollan* is inapplicable where, as here, parties choose to terminate or avoid litigation by executing a settlement agreement supported by consideration.

Id. at 698.

The court in *Meredith v. Talbot County*, 560 A.2nd 599; 80 Md.App. 174 (1989), reached the same conclusion.

These decisions, coupled with the express exemption in the California Mitigation Fee Act for fees imposed under a development agreement (Gov't Code § 66000 *et seq.*), make it difficult to argue that fees imposed under a development agreement must meet statutory requirements in California. Commentators almost uniformly reject the proposition that such fees can later be challenged as excessive, and one of the main attractions of a development agreement for a city or county is that it can negotiate for mitigation it could not otherwise exact.

There is a further problem with attempting to challenge a development agreement fee, especially in California. Under a line of cases starting with *Pfeiffer v. City of La Mesa*, acceptance and use of a land use approval waives any right to challenge the condition. 69 Cal. App. 3rd 74 (1977). In response, the California Legislature enacted the pay-under-protest statute, Government Code section 66020, which allows a developer to protest and challenge a fee or condition without waiving the benefit of the permit.

However, this provision is part of the Mitigation Fee Act and only applies to development fees as defined in Government Code section 66000. Because fees imposed under a development agreement are expressly excluded from that definition, they are not subject to the protection of Government Code section 66020.

In light of *Nollan* and *Dolan*, more cities and counties in California are interested in using development agreements to obtain exactions that might not be valid under the heightened *Nollan/Dolan* standard.

In *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach*, the court held that the developer, who had failed to establish entitlement to vested rights to develop an oil business on property leased from the City of Hermosa Beach, could have protected itself from subsequent regulatory changes by insisting that the City enter into a development agreement. 86 Cal. App. 4th 534 (2001). The court noted that it was likely that the City would have demanded additional consideration for either a risk-adjustment provision in the existing lease or a separate development agreement, and that having at least implicitly decided to forego such protection against future regulatory changes, the developer must accept the consequences of this decision. *Id.* at 558.

In summary, a development agreement offers a developer substantial assurance that its project can be completed “in accordance with existing policies, rules and regulations, and subject to conditions of approval.” Gov’t Code § 65864(b). Since the vested rights continue for some time, from a practical standpoint it is advisable for the developer to retain a complete set of the local ordinances, policies, and standards in effect when the development agreement becomes effective. Otherwise, should a dispute arise years after the agreement has been executed, it may be difficult to piece together the operative law.

D. Annexation Agreements

Some states, such as Illinois, Arizona, North Carolina and Washington, have statutes authorizing annexation agreements which serve the purpose of giving a vested right similar to a development agreement. See discussion on this topic in *Bargaining for Development, supra*, ch. IV, *Annexation Agreements*, at 121 *et seq.*; *State & Local Government Land Use Liability, supra*, § 2.14.

However, in California, there is no statutory authorization for a city to enter into an annexation agreement as there is for entering into a development agreement. However, the California courts have upheld the validity of such agreements. The leading case is *Morrison Homes Corp. v. City of Pleasanton*, 58 Cal. App. 3rd 724 (1976), where the court upheld annexation agreement containing commitments by the City to provide sewer connections for homes to be built in subdivisions to be annexed. The court held that the City had implied authority to enter into such agreements. The court rejected the City's arguments that such agreements violated the rule that a city may not contract away its legislative and governmental functions, especially where there was substantial evidence that the agreements were just, reasonable, fair and equitable as approved by the City at the times of their execution.

III. SUMMARY

A development agreement offers a developer substantial assurance that its project can be completed "in accordance with existing policies, rules and regulations, and subject to conditions of approval." Gov't Code § 65864(b). As a legislative enactment, the court could not interfere with the policies and goals of that body as long as the laws were followed.

Summary of Advantages and Disadvantages of a Development

Agreement:

Advantages for developer:

- Assurance that project may proceed as approved over the term of the agreement.
- “Freezes” land use rules, regulations, policies pursuant to terms of the agreement on the effective date of the agreement.
- Protects developer if community’s attitude changes toward project; e.g., new planning commissioners, new councilmembers, voter initiatives.
- Assists developer in securing financing; make project “marketable” if needed.

Disadvantages for developer and advantages for local agencies:

- Local agency can impose more regulations than permitted by law.
- Exactions (dedications; impact fees); mitigation conditions.
- Land use conditions not set forth in local laws.
- No need for nexus study.
- No need for legislative authorization for the exaction.
- No guarantee that local agency legislative body will approve the agreement after lengthy negotiations.
- In some states, including California, the agreement is subject to referendum.

PRACTICE TIP

Since the vested rights continue on for some time, from a practical standpoint it is advisable for the developer to retain a complete set of the local ordinances, policies, and standards in effect when the development agreement becomes effective. If a dispute should arise years after the agreement has been executed, it may be difficult to piece together the operative law without them.

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DEVELOPMENT AGREEMENTS
NEW MEXICO'S EXPERIENCE

Rocky Mountain Land Use Institute

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I. INTRODUCTION

Most municipal attorneys will probably agree that development agreements are more secure if they are grounded upon explicit state enabling legislation rather than home rule powers. Without such legislation, local elected officials may be impermissibly contracting away their police powers in violation of the Reserved Powers Doctrine¹. Although California and Hawaii and eleven other states² (as of 1999) have development agreement enabling statutes, New Mexico does not. This paper discusses the rationale for drafting and introducing enabling legislation in New Mexico, as well as the outcome of this effort in the 2005 Legislative Session.

II. A FEW DEFINITIONS

But first, what are “development agreements”? In a state without enabling legislation, such as New Mexico, an inquiry about the use of development agreements may raise eyebrows and questions -- “what *type* of agreement?”

Municipalities in New Mexico will typically execute utility line extension agreements with developers, where either the developer is reimbursed by the municipality for the costs of oversizing utility lines needed for future growth in the area, or adjacent and benefitting property owners pay the developer a prorated share of the cost in extending the

¹“The legislature cannot bargain away the police power of a State.” Stone v. Mississippi, 101 U.S. 814, 817 (1880). See also, Judith Welch Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C.L. Rev. 957 (1987).

²ARIZ. REV. STAT. §9-500.05 (1998); CAL. GOV'T CODE §§65864 - 65869.5 (1998); COLO. REV. STAT. §§24-68-101 to -106; FLA. STAT. ANN. §§163.3220 - 163.3243 (1998); HAW. REV. STAT. §§46-121 *et seq.* (1998); IDAHO CODE §67-6511A (1998); LA. REV. STAT. ANN. §§33:4780.22, MD. CODE ANN. ART. 66B § 13.01 (1998); NEV. REV. STAT. §§278.0201 - .0207 (1998); N.J. STAT. ANN. §40:55D-45.2; OR. REV. STAT. §94.504; VA. CODE ANN. § 15.2 - 2303; and Washington RCW 36.70B.170 also have enabling legislation for development agreements.

utility line if they connect to the line within a specific period of time. Both of these agreements are common to utilities in general but neither falls squarely within the rubric of “development agreements.”

The Planner’s Dictionary³ defines Developer’s Agreement as:

“An agreement by a developer with the city that clearly establishes the developer’s responsibility regarding project phasing, the provision of public and private facilities, and improvements and any other mutually agreed to terms and requirements.” (Thornton, Colo.)

“A legislatively approved contract between a jurisdiction and a person having legal or equitable interest in real property within the jurisdiction that “freezes” certain rules, regulations, and policies applicable to development of a property for a specified period of time, usually in exchange for certain concessions by the owner.” (California Planning Roundtable)

Or put another way, “A development agreement is a contract between a municipality and a property owner/developer, which provides the developer with vested rights by freezing the existing zoning regulations applicable to a property in exchange for public benefits.”⁴

Contract Zoning, on the other hand, is “[t]he establishment of conditions in connection with a rezoning that bind the developer and the community to its terms.”⁵

³A Planner’s Dictionary, Edited by Michael Davidson and Fay Dolnick, American Planning Association, April 2004.

⁴Brad K. Schwartz, Development Agreements: Contracting For Vested Rights, Boston College Environmental Affairs Law Review, pp. 719 - 755, 2000-01.

⁵ See, *supra* note 3.

There can be a very fine line between permissible development agreements and impermissible contract zoning.⁶

One last definition is necessary for a discussion about development agreements. A vested right is “[a] right that has been legally established and cannot be revoked by subsequent conditions or changes in law without due process of law.” (Temecula, California)⁷

The right to develop vests (or becomes certain) at various points during the development process. In some states it may be early in the process⁸ but New Mexico is a late vesting state. A property owner must have a written approval or a permit for the proposed subdivision or development, as well as demonstrate that he has made a

⁶Contract zoning has often been invalidated, as it was in New Mexico in 1992, Dacy v. Village of Ruidoso. The New Mexico Supreme Court found that the Village of Ruidoso’s agreement to rezone Dacy’s property in return for his conveyance of property needed for a right-of-way, was an examples of an unenforceable unilateral contract zoning because the village’s agreement was an attempt to commit itself to a specific zoning action without following the required statutory procedures. Dacy v. Village of Ruidoso, 845 P.2d 793, 114 N.M. 699 (N.M. 1992).

⁷ See, *supra* note 3.

⁸In 2003, a bill was introduced in the New Mexico Legislature, but did not pass, that would have vested development rights at the time the development application is submitted to the city, prior to any review or approval of the application. (HB 709 - Representative Thomas Taylor)

substantial change in position upon reliance of that approval, before he can claim a vested right in New Mexico.⁹

Since large projects can often take years of planning, designing and engineering, as well as large expenditures, before any approvals or permits are granted, the practical implication of a late-vesting rule for a developer can be disastrous if the land use regulations change midstream. Consequently, developers are particularly motivated to negotiate development agreements in late vesting states, and lock in the rules and regulations that will apply to their development.

III. DEVELOPMENT AGREEMENTS - THE GROWING SMARTSM STYLE

The APA GROWING SMARTSM LEGISLATIVE GUIDEBOOK¹⁰ acknowledges the role of development agreements to provide both flexibility and certainty in the development process. “It permits flexibility by allowing terms and conditions that are different from and more detailed than the requirements of land development regulations and the statutes authorizing them. It brings certainty by making all elements of the agreement enforceable, against the local government as well as the developer.”¹¹ States that have a vesting statute,

⁹Sandoval County Board of Commissioners v. Ruiz, 893 P.2d 482, 119 N.M. 586 (N.M. App. 1995), see also, Brazos Land, Inc. v. Board of County Commissioners of Rio Arriba County, 115 N.M. 168 (Ct. App. 1993).

¹⁰ GROWING SMARTSM LEGISLATIVE GUIDEBOOK, 2002 EDITION, APA, p. 8-192 through 8-200.

¹¹ *Id.*, p. 8-192.

which automatically creates enforceable rights for developers, may not need a development agreements statute.¹²

The GUIDEBOOK includes a proposed development agreements statute with the following elements:

- * the development agreement must be consistent with the local comprehensive plan,
- * the development agreement must be subject to a public hearing,
- * the development agreement must be reviewed at least every five years,
- * the development agreement is also a development permit to the extent that it is self-executing,
- * the development agreement creates a vested right in the development it expressly authorizes,
- * the agreement is governed by the land development regulations in effect at the time the property owner sought a development agreement,
- * the development agreement is enforceable by both the local government and the owners or developers of the land,
- * the development agreement that is also the development permit “runs with the land” to the benefit and burden of future owners of the subject property, and so it must be recorded,
- * the development agreement may be terminated in advance either by the consent of the parties, or by the local government if it finds, after notice and a hearing, that public health or safety would be endangered by development under the agreement. But the health and safety provision may not be used if the local government knew of the danger when it executed the agreement.

¹² New Mexico does not have a vesting statute.

In addition to the GROWING SMARTSM LEGISLATIVE GUIDEBOOK, two other good resources for legislative drafting are (1) Bargaining for Development¹³ and (2) Development Agreement Manual.¹⁴

IV. DEVELOPMENT AGREEMENTS - NEW MEXICO STYLE

New Mexico communities do not have enabling legislation for development agreements and so they must rely on their home rule powers and inherent contract authority to provide the basis for such agreements.¹⁵ No comprehensive survey of communities has been undertaken to determine which have executed development agreements; however, an informal inquiry of the N.M. Municipal League elicited responses from several communities. Some mentioned agreements which don't quite fit the definition of "development agreement." For example, the City of Albuquerque routinely uses "subdivision improvements agreements" or SIAs.

"Every time a site plan or a subdivision plat requires infrastructure to be built the city requires that the developer execute a development agreement which is commonly known as a Subdivision Improvements Agreement or (SIA). The SIA contains such things as the time within which the infrastructure has to be built (typically 2 years): a financial guarantee

¹³Callies, Curtin & Tappendorf, Bargaining for Development - A Handbook on Development Agreements, Annexation Agreements, Land Development Conditions, Vested Rights, and the Provision of Public Facilities, Environmental Law Institute (2003).

¹⁴DEVELOPMENT AGREEMENT MANUAL: Collaboration in Pursuit of Community Interests, Prepared by David J. Larsen, City Attorney, Loomis; Berding & Weil, LLP, Institute for Local Self-Government (2002)
http://www.ilsg.org/resource_files/20590.FinalDevAgreement4-5-02.pdf

¹⁵Among the enumerated general powers, municipalities are authorized to enter into contracts Section 3-18-1(b) NMSA 1978.

guaranteeing the construction, insurance coverage for the city, and performance bonds protecting the city after the work has been completed. We execute approximately 200 SIA's every year. In addition to SIA's we also do "Special Development" agreements that are not connected to any particular development project. Typically Special Agreements involve the developer conveying land or right of way in exchange for the city building the improvement. We have done approximately 15-20 special agreements during the last 10 years."¹⁶ In most cases, the city does not bargain for additional exactions.¹⁷

The City of Clovis is presently considering two development agreements for properties that have somewhat unique characteristics which were difficult to address by traditional planning and zoning techniques. The city does not have a specific ordinance that authorizes development agreements, but it may draft one in the future.¹⁸

One of the more extensive, and perhaps controversial, development agreements executed in New Mexico is the "Master Plan Development Agreement" Santa Fe County executed in 1993 governing future development of a 3548 acre tract of land adjacent to and northwest of the City of Santa Fe.¹⁹ The agreement anticipated a large scale mixed use development with 1419 residential lots, two golf courses, a clubhouse, a tennis center, an equestrian center, a sales office, a hospitality house, and a wastewater treatment facility.

Although the agreement enumerated all of the prior approvals (1988 - 1993) given to the project, and all of the applicable conditions required for development contained in those approvals, it failed to explicitly "vest" any rights or limit Santa Fe County from

¹⁶ Correspondence with Kevin Curran, Albuquerque Assistant City Attorney, Feb. 11, 2005.

¹⁷ Correspondence with Kevin Curran, Albuquerque Assistant City Attorney, Feb. 14, 2005.

¹⁸ Correspondence with David Richards, Greig & Richards, P.A., Feb. 16, 2005.

¹⁹ Master Plan Development Agreement for Las Campanas de Santa Fe, March 3, 1993.

imposing new conditions or land use regulations on future phases of the development, although that was probably the implicit intention of the parties. Water was clearly a major concern of the County at the time this development agreement was drafted. The developer was required, among other things, to demonstrate that he had an option to purchase surface water rights for the development, which might increase in the future depending on the historical water usage of the new homes in the development; to require water conservation measures by both design guidelines and restrictive covenants; to construct a waste water reclamation facility; to dedicate one acre for a future fire station; to pay a fire protection fee per residential lot;²⁰ to pay a solid waste disposal fee per residential lot; and to dedicate land for parks. There were traffic mitigation measures required, as well as a contribution to the county's low income housing fund of \$2,000,000.

Remarkably, the agreement set forth many detailed conditions of approval, including an appendix with 19 pages of additional conditions, but it is questionable whether the County is prohibited from imposing new conditions in the future or whether the developer has vested his right to develop solely under the provisions contained in this development agreement.

“It is further understood that the County and its various boards and agencies are by this agreement relinquishing no power they have under law and County ordinances in the continuing oversight and supervision of land use and development in the project area. The County agrees that when the conditions of this Master Plan Development Agreement have been satisfied, any subsequent applications that are in conformance with the Master Plan, including residential phases, recreational amenities, commercial buildings

²⁰This agreement predates the Development Fees Act (5-8-1 NMSA 1978) passed by the N.M. Legislature in 1993 or the Santa Fe County impact fee ordinance passed in 1994, governing impact fees for fire protection facilities.

and/or the wastewater treatment system, will be routinely approved subject only to normal compliance review by the County.”²¹

One of the numerous conditions contained in the appendix to the development agreement states: “All phases of development must meet all applicable State and County regulations and ordinance standards.”²² This development agreement lacks many of the important elements typically associated with development agreements and illustrates why statutory enabling legislation for such agreements is very important.²³

The impetus behind the current effort to pass enabling legislation for development agreements is Mesa del Sol development, a master-planned, proposed mixed use community located on 12,400 acres of state trust lands south of Albuquerque International Airport and east of I-25. The proposed development will include a job center, eight villages, a retail district and urban center, all linked by walking and biking trails. Ohio’s ForestCity Covington LLC, the master planner of the Denver-Stapleton Airport project, is the Mesa del Sol developer. Eventually, Mesa del Sol is expected to be home to almost 100,000 people and will create as many as 80,000 jobs.

²¹ Master Plan Development Agreement for Las Campanas de Santa Fe, March 3, 1993, at p. 24

²²Master Plan Development Agreement for Las Campanas de Santa Fe, March 3, 1993, App. C at p. 15.

²³No authorization for this agreement is cited. No recitation of the benefits and burdens that each side expects from entering into this agreement. No termination date is provide. No provision for periodic review or progress reports. No statement clarifying what remedies the parties have for a breach.

The project will take about 70 years to build out completely. With the uncertainties and unknowns that might appear in that time-frame, the project’s proponents decided it would be wiser to have their development agreements with the City of Albuquerque grounded on explicit enabling authority, rather than the City’s home rule powers. After consulting with “Bargaining for Development”,²⁴ and specifically reviewing the California’s enabling statute (which some drafters thought was too cumbersome) and Washington’s enabling statute,²⁵ a bill was drafted which felt just right for New Mexico.²⁶

V. NEW MEXICO ENABLING LEGISLATION

In January 2005, Representative Al Park and Senator John Grubescic introduced companion bills in the New Mexico House and Senate to provide enabling authority for development agreements. (HB 654 and SB 830)²⁷ These bills define a “development agreement” (an agreement between a county or municipality and a person who owns or controls real property that establishes development standards that will apply to and govern the development and use of the real property during the term of the agreement) and they also:

- * clarify that the execution of a development agreement is a proper exercise of municipal or county police power and contract authority;

²⁴ See, Note 13 *supra*.

²⁵ Both are included in the appendices to Bargaining for Development.

²⁶ Thanks to John A. Myers of Myers Oliver & Price PC; Robert White, City Attorney, City of Albuquerque; Harry Relkin, Mesa del Sol; and Randall VanVleck, Counsel to the N.M. Municipal League who each participated in the drafting.

²⁷ <http://legis.state.nm.us/Sessions/05%20Regular/bills/house/HB0654.pdf>

- * require the county or municipality to conduct a public hearing before entering into a development agreement, as well as adopt an ordinance establishing methods and procedures for establishing development agreements;
- * clarify that the development agreement governs, not amendments to the zoning ordinance or other rules affecting development;
- * state that new rules and regulations may apply to the development if they are required by a serious threat to public health and safety, or they do not conflict with development standards or other provisions of the development agreement;
- * provide that a development agreement is binding and enforceable on all parties and their successors, and must be recorded with the county clerk;
- * ensure that this new enabling authority does not affect the validity of previous agreements;
- * state that “nothing in a development agreement prevents the municipality or county from denying or conditionally approving a subsequent development application on the basis of existing or new ordinances or rules that do not conflict with the ordinances or rules in place at the time of entering into the development agreement.”

The department of finance and administration, in its review of both bills, pointed out the following benefits:²⁸ “[T]he advantages of a development agreement for the developer are:

1. It is assured that the project may proceed as approved over the term of the agreement;
2. Land use rules, regulations, and policies pursuant to terms of the agreement are frozen on the effective date of the agreement;

3. Protection if the community's attitude changes toward the project or when there are new planning commissioners, county commissioners or councilors;
4. Assistance in securing financing and marketing a project.

The advantages for the local government are:

1. It can impose more regulations than permitted by law;
2. Exactions, impact fees, and mitigation measures can be imposed;
3. Land use conditions not set forth in local laws can be recognized;
4. There is no need for legislative authorization for the exaction; and
5. It is not required to approve the agreement, even after lengthy negotiations. "

New Mexico has a part-time citizen Legislature which meets for only 60 days²⁹ in odd-numbered years. This leaves very little time to educate the Legislators on the merits of any legislation that might be unfamiliar to them or controversial. Proponents of HB 654 and SB 830 assumed that the concept of "development agreements" would not be unfamiliar to Legislators since some of the larger municipalities in the state have had experience with development agreements. Proponents also thought that the legislation would not elicit much controversy because, after all, it seemed to be a win-win for everyone. Who would possibly lose if municipalities and counties had enabling authority to execute development agreements?

²⁹ The Legislative Session is only thirty days in even years.

The bills sailed through the first committee hearing but hit a roadblock when they entered the Judiciary Committee. A couple of rural Legislators expressed concerns that the smaller communities might unwittingly be taken advantage of by the more sophisticated developers in negotiating these agreements. They compromised by giving their approval only if the enabling authority was limited to the City of Albuquerque! Although the rural-urban dynamics in the N.M. Legislature often work to the disadvantage of Albuquerque, this time the rural Legislators were undermining their own communities. If explicit enabling authority was given only to Albuquerque then, by implication, no other communities could rely on their general home rule powers to support the development agreements they wished to execute. They were up a creek (or arroyo)!

A simple bill that no one thought would create any indigestion ended up consuming a considerable amount of time and talents of the City of Albuquerque's lobbyist to negotiate amendments to satisfy everyone's concerns. The amendments included:

1. limiting the enabling authority to home rule municipalities, charter municipalities, or municipalities with a population greater than twenty thousand;
2. a provision requiring compliance with the Bateman Act;³⁰

30

6-6-11. Yearly expenditures limited to income; Bateman Act. (1968)

It is unlawful for any board of county commissioners, municipal governing body or any local school board, for any purpose whatever to become indebted or contract any debts of any kind or nature whatsoever during any current year which, at the end of such current year, is not and

3. a requirement that the development agreement be consistent with the comprehensive plan and related sub-area plans of the municipality or county in effect when the development agreement is entered into;
4. the term of the development agreement must be specified in the agreement;
5. periodic reviews of the agreement are required and a provision for termination in the event of a material breach that is not cured within a reasonable period of time;
6. the agreement must provide for a progress review by the municipality or county to ensure that the person who entered into the agreement is proceeding satisfactorily with the terms of the agreement and is meeting any time benchmarks and performance goals. The time for the progress review shall be specified in the agreement but not later than fifteen years after the agreement is executed; and
7. the land subject to the development agreement will have vested rights for a period up to twenty years to the zoning ordinances and rules in place when the development agreement is executed.

cannot then be paid out of the money actually collected and belonging to that current year, and any indebtedness for any current year which is not paid and cannot be paid, as above provided for, is void. Any officer of any county, municipality, school district or local school board, who shall issue any certificate or other form of approval of indebtedness separate from the account filed in the first place or who shall at any time use the fund belonging to any current year for any other purpose than paying the current expenses of that year, or who shall violate any of the provisions of this section, is guilty of a misdemeanor.

Unfortunately, that was not the end of the negotiations. When the legislation made it down to the Senate Floor, additional amendments were considered before the Senate voted to kill SB 830 by a vote of 11 - 27. Unsubstantiated rumors have SB 830 falling victim to the negative press and lobbying against another bill this session pertaining to development impact fees. Legislators might have been confused by the two bills, both pertaining to development. Another rumor has it that a large westside developer grew suspicious of this enabling authority and forcefully lobbied against it because it was drafted by proponents for the Mesa del Sol project, which he views as his competitor in the region. If that's true, it's a clear signal that much more education needs to occur before this bill is introduced next year. As the 2005 Legislative Session came to a close on March 19th, proponents for the development agreements enabling authority chalked up the loss as a learning experience. Perhaps next year?

VESTED RIGHTS

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VESTED RIGHTS

This paper discusses the principles of law and equity that permit a landowner to continue with or complete a land development or land use activity in the face of a change in regulations that would otherwise prohibit or limit that development or activity. Although typically the issue of continuing a use is covered by the general topic of “nonconforming uses” and the issue of completing a development falls under “vested rights,” the two are closely related in equity if not always in law. This issue most typically arises in litigation, either raised as a defense against an enforcement action or used as the basis for a claim for relief. To the extent that landowner and local government execute a development agreement or annexation agreement, the issue of vested rights ought not to arise. After all, a principal purpose of a development agreement is to vest the rights of a landowner to proceed with whatever development is the subject of the agreement, as many development agreement statutes clearly contemplate.³¹

Introduction and Background

The point at which a landowner may continue with a land development project despite new land development regulations that now prohibit such development generates an inquiry

*This paper is a revised version of Ch. V in D. Callies, D. Curtin and J. Tappendorf, *Bargaining for Development, A Handbook on Development Agreements, Annexation Agreements, Land Development Conditions, Vested Rights, and the Provision of Public Facilities*, published in 2003 by ELI and available at orders@eli.org. The author wishes to thank Jennifer Benck, a third-year student at the William S. Richardson School of Law, for her research assistance in the preparation of this paper.

31 See, e.g., Cal. Gov't Code § 65864. See, e.g., David L. Callies and Julie A. Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities After Nollan and Dolan*, 51 Case W. Res. L. Rev. 663 (2001); David L. Callies, Daniel J. Curtin and Julia A. Tappendorf, *Bargaining for Development: A Handbook on Development Agreements, Annexation Agreements, Land Development Conditions, Vested Rights, and the Provision of Public Facilities*, published in 2003 by ELI and available at orders@eli.org.

into vested rights and its close cousin, equitable estoppel. The two legal doctrines arise from very different principles.³² Vested rights technically focuses only upon whether a landowner has acquired sufficient real property rights to proceed with a development project, or some phase thereof, unaffected by subsequently promulgated government regulation. Equitable estoppel, sometimes also called zoning estoppel, focuses on the conduct of government and whether it would be equitable under the circumstances to permit government to repudiate some official action upon which the landowner has relied to proceed with a land development project.³³ The former is often said to be based upon common law and constitutional principles dealing with rights in property, whereas the latter is said to be derived from equitable principles.

As appears below, the results may often be the same whichever doctrine is applied, leading most courts to treat the two doctrines as interchangeable,³⁴ but there is a critical difference between the two doctrines that should significantly affect the pleading and trial of cases where either might apply, if not their outcomes: good faith. Obviously a landowner proceeding on the basis of equitable estoppel must be proceeding in “good faith.” He who seeks equity must do equity. Pursuing an equitable remedy requires “clean hands,” as every first-year law student knows. But what of vested property rights based upon common law and constitutional principles? Do we legally care whether such a landowner has clean hands?³⁵ Does it matter, legally, what a landowner knows, or should have

32 Robert M. Rhodes & Cathy M. Sellers, *Vested Rights: Establishing Predictability in a Changing Regulatory System*, 20 Stetson L. Rev. 475, 476 (1991); Daniel R. Mandelker, *Land Use Law* (4th ed. 1997); Charles L. Siemon, Wendy U. Larsen & Douglas R. Porter, *Vested Rights: Balancing Public and Private Development Expectations* 9 (ULI 1982).

33 Rhodes & Sellers, *supra* note 2, at 476; David G. Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes*, 1971 Urb. L. Ann. 65; Mandelker, *supra* note 2, at §6.13.

34 *Id.*

35 For a discussion of the distinction between equitable or zoning estoppel and vested rights, particularly the elimination of equitable principles, including reliance, from the latter, see Morgan R. Bentley, *Effects of Equitable Estoppel and*

known, if his theory of the case rests on vested rights and not estoppel? After all, no less an authority than the U.S. Supreme Court recently held that the “notice” of a strict land use regulation does not prevent a purchaser of land so restricted from challenging the restriction as a regulatory taking of property without compensation.³⁶ It would, therefore, seem reasonable to keep the theories separate, though it is likely the caselaw is too far gone in joining the two, as appears in the sections below. Therefore, except where noted, the term vested rights will include, for all practical purposes, equitable estoppel for the remainder of this section.

After a brief description of the elements necessary to establish vested rights, the remainder of this paper sets out the common circumstances under which claims for vested rights arise, together with a selection of cases illustrating each circumstance or situation.³⁷

B. Elements of Vested Rights

There are essentially three parts to a vested rights claim against government interference with respect to a land development project:³⁸

Substantial Deviations to Vested Rights in DRI Projects: A New Approach, 43 Fla. L. Rev. 767, 774 (1991); John J. Delaney, *Vesting Verities and the Land Development Chronology: A Gaping Disconnect*, 3 Wash.U.J.L.& Pol’y 603 (2000).

36 *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *See*, for comment, David L. Callies & Calvert G. Chipchase, *Palazzolo v. Rhode Island: Ripeness and ‘Notice’ Rule Clarified and Statutory ‘Background Principles’ Narrowed*, 33 Urb. Law 907 (2001).

³⁷ For a list of those states that have chosen to deal with vested rights by passing development agreement legislation, and for a discussion generally of development agreements and annexation agreements, see Callies, Curtin and Tappendorf, *supra* n. 1, parts III and IV on development agreements and annexation agreements, and Appendices VII, VIII, IX, and X.

³⁸ Mandelker, *supra* note 2, at §6.13; Rhodes & Sellers, *supra* note 2, at 478.

1. a governmental act or omission;
2. landowner change of position or reliance upon that governmental act or omission; and (in the case of estoppel)
3. in good faith.

1. Governmental Act or Omission

Nearly all commentators and cases are agreed that there must be some governmental act or omission upon which a landowner relies to his detriment in order for there to be a legitimate claim for vested rights,³⁹ and the more recent that act or omission the better. It is, therefore, generally considered to be a matter of black letter law in this area that a landowner has no vested right in an existing zoning classification⁴⁰ unless the classification is either relatively recent, passed at the request of the landowner, or the new classification was passed or created principally to frustrate a land development project permitted in the “old” classification.⁴¹ However, a variety of other acts or omissions by government often serve to vest rights in a landowner with respect to a particular land development project. There are significant differences among the states concerning the kind of governmental action reliance upon which will result in such vesting. These range from the necessity of a building permit, which virtually every jurisdiction recognizes as sufficient,⁴² to an appropriate letter from a city official.⁴³ Even a zone classification has been deemed sufficient.⁴⁴ From the most secure to the least secure in terms of vested rights, these are:

39 Mandelker, *supra* note 2, at §6.14; Rhodes & Sellers, *supra* note 2, at 482-486.

40 Mandelker, *supra* note 2, at §6.14.

41 *Id.* at §6.16. See *Western Land Equities, Inc. v. City of Logan*, 617 P.2d 388 (Utah 1980). In a very few jurisdictions, some measure of vested rights results from a “new” zoning classification, particularly if sought by the landowner now claiming such rights.

42 Mandelker, *supra* note 2, at §6.21.

43 Rhodes & Sellers, *supra* note 2, at 482.

1. a building permit;
2. final subdivision plat approval;
3. preliminary subdivision plat approval;
4. final planned development plan approval;
5. preliminary planned development plan approval;
6. submission of one of the above;
7. special use or conditional use permit;
8. site plan approval;
9. grading or other site preparation, by itself; and
10. newly-enacted zoning classification, particularly if upon application or request of landowner claiming vested rights.

All of the above are discussed in more detail in the following Part C.

2. Detrimental Reliance

Virtually all commentators and cases agree that a landowner must change position or rely on an act or omission of government, however weak, in order to claim vested rights. Most agree, moreover, that the reliance or change in position must have economic consequences for the landowner, which usually means the expenditure of money. Indeed, the amount spent in reliance upon such a government act or omission is often a major factor in deciding whether there has been sufficient reliance to justify a finding of vested rights.⁴⁵ Thus, for example, Florida courts have required expenditures in amounts from \$8,000 to \$600,000 sufficient for “equitable estoppel” to apply, in some instances before the landowner had made any physical changes to the land.⁴⁶ The Supreme Court of New

44 See *Texas Co. v. Town of Miami Springs*, 44 So. 2d 808 (Fla. 1950); *Hough v. Amato*, 212 So. 2d 662 (Fla. 1968). Part C deals with such issues in more detail.

45 Mandelker, *supra* note 2, at §6.20; Rhodes & Sellers, *supra* note 2, at 486-88; Siemon, Larsen & Porter, *supra* note 2, at 32.

46 See *Bregar v. Britton*, 75 So. 2d 753 (Fla. 1954)(\$28,000 for land preparation); *Project Home, Inc., v. Town of Astatula*, 373 So. 2d 710 (Fla. 1979)(\$8,000 for water and sewer improvements); *Town of Longboat Key v. Mezrah*, 467 So. 2d 488 (Fla. 1985) (\$40,000 for plans and permit procurement); Board of

Hampshire explained that the detrimental reliance calculus requires contrasting actual expenditure against the total expenditure anticipated for completion of the project,⁴⁷ but percentage of the whole determination alone does not work to vest rights.⁴⁸

Other jurisdictions have held expenditures in the millions of dollars to be insufficient, without a building permit. The most egregious example of such jurisdictions is California. Thus, in *Oceanic California, Inc., v. North Central Coast Regional Comm'n*,⁴⁹ the court found expenditure of \$26.9 million in direct costs insufficient. Also, in the case of *Avco Community Developers v. South Coast Regional Comm'n*,⁵⁰ which eventually led to the passage of California's development agreement statute. There, despite having all necessary permits but a building permit and having spent over \$2,000,000 in grading, infrastructure,

Commissioners v. Lutz, 314 So. 2d 815 (Fla. 1975) (\$100,000 for planning and other preparatory fees); Town of Largo v. Imperial Homes Corp., 309 So. 2d 571 (Fla. 1975) (\$379,000 for land, architectural fees, interest, taxes and sewer permits); City of North Miami v. Margulies, 289 So. 2d 424 (Fla. 1974) (\$600,000 for planning, architectural, engineering and surveying fees).

17 Dow v. Town of Effingham, 803 A.2d 1059, 1069 (N.H. 2002).

18 AWL Power Inc. v. City of Rochester, 813 A.2d 517 (2003) (holding that the substantial completion test was inappropriate for vested rights and stressing the unfairness of substantial completeness as applied to developers of large projects).

19 63 Cal. App. 3d 57 (1976).

20 553 P.2d 546 (Cal. 1976).

and associated costs for a residential housing development, the California Supreme Court held that Avco still needed a permit from the California Coastal Commission under later-applied coastal regulations. Similarly, in *Pete Drown Inc. v. Town of Ellenburg*,⁵¹ a New York court held that \$850,000 was insufficient under the circumstances to vest development rights.

The *Avco* case illustrates the history of the doctrine of vested rights in land use and development. Early cases focused on the question of whether a builder or owner could complete a building that had proceeded to some stage of planning or actual construction. The necessary governmental action in such a case was, of course, the issuance of a building permit. Thus, the issuance of a building permit was an absolute prerequisite for a determination of vested rights in the early cases. In *Avco*, the California Supreme Court applied that test mechanically, without considering the policy behind the test. Clearly Avco had met the intent of the test--obtaining a valid government approvals and proceeding with substantial expenditures in good faith reliance on that approval.

3. Good Faith

Though technically not part of a vested rights theory, many courts require a landowner to have relied, changed position, or otherwise acted “in good faith” in order for property rights to develop or continue developing a particular project to vest.⁵² Thus, for example, rushing to complete or begin a project in order to knowingly avoid a possible change in zone classification has been held to constitute bad faith.⁵³ So has notice of a pending

51 646 N.Y.S.2d 205 (1996).

52 Mandelker, *supra* note 2, at §6.18; Rhodes & Sellers, *supra* note 2, at 478-482; Siemon, Larsen & Porter, *supra* note 2, at 29-32.

53 Smith v. City of Clearwater, 383 So. 2d 681 (Fla. 1980); Morris v. Postma, 196 A.2d 792 (N.J. 1964); Clackamas County v. Holmes, 508 P.2d 190 (Ore. 1973); Boron Oil Company v. L.C. Kimple, 284 A.2d 744 (Pa. 1971).

election or referendum or knowledge of pending zoning amendments.⁵⁴ One court employed an “objective standard that reflects ‘reasonableness according to the practices of the development industry.’”⁵⁵

On the other hand, landowners have a right to expect fair dealing on the part of elected and appointed officials. Thus, where a local government approved a request for rezoning with knowledge that a landowner's purchase of the subject property was contingent on that rezoning and then attempted to downzone the land to prevent the development, the court held that the local government had acted in bad faith.⁵⁶ Another court has held that a landowner is entitled to rely on the accepted practices of the development industry in the state.⁵⁷ A more difficult case is the issuance of an illegal building permit--or other clear error in official assurance of the legality of a proposed development--upon which a

⁵⁴ Pacific Standard Life Ins. Co. v. County of Kauai, 653 P.2d 766 (Haw. 1982).
See also, 1350 Lake Shore Assocs. V. Mazur-Berg, 791 N.E.2d 60 (Ill App. 2003) (distinguishing situations where property owner is aware of probable zoning changes, and therefore cannot claim a vested right, from situations where property owner knows only of a possibility of a change, and therefore can claim a vested right).

²⁵ Pacific Standard Life Ins. Co. at 777, quoting Cunningham & Kremer, Vested Rights, Estoppel and the Land Development Process, 29 Hastings L.J. 625, 720 (1978).

⁵⁶ Town of Largo v. Imperial Homes Corp., 309 So. 2d 571 (Fla. 1975).

⁵⁷ Pacific Standard Life Ins. Co., *supra* n. 23, at 777.

²⁸ Village of Hobart v. Brown County, 678 N.W.2d 402 (Wis. 2004) (vested rights claim failed because developer's expectations, based upon Village President's assurances and approval by the Village Site Review Committee, was not reasonable in light of the discrepancy of permitted uses under the Village zoning map and zoning code).

landowner in good faith relies.⁵⁸ Allowing the development to proceed may raise significant health and safety issues, as well as violate a “fundamental canon” of local government law that provides wrongfully issued or approvals wrongfully given are void *ab initio*.⁵⁹ On the other hand, courts require that alleged threats to the public good are substantiated with objective and competent evidence.⁶⁰ Once established, many courts will not permit the illegal development to proceed.⁶¹

On the other hand, some jurisdictions estop local government from interfering with a land development project even if proceeding upon invalid assurances and permits provided the landowner reliance is substantial and in good faith, and the permission or approval is sufficiently definite and precise. In *Abbeville Arms v. City of Abbeville*,⁶² the court directed the city to issue a building permit for a project on land erroneously zoned. There,

29 Siemon, Larsen & Porter, *supra* note 2, at 27; *see, e.g.*, *Hunt v. Caldwell*, 279 S.E.2d 138 (Va. 1981); *Town of Blacksburg v. Price*, 266 S.E.2d 899 (Va. 1980); *State v. Missoula*, 533 P.2d 1087 (Mont. 1975). *But see*, *Congregation ETZ Chaim v. City of Los Angeles*, 371 F.3d 1122 (9th Cir. 2004) (affirming lifting of City’s stop work order issued due to building permit being in violation of City building code).

30 *East Hempfield Township v. Brubaker*, 828 A.2d 1184, 1187-1188 (Pa. 2003) (insufficient showing of any threat to public safety combined with developer’s due diligence in complying with the law, good faith throughout the proceedings, and expenditures of substantial and unrecoverable sums permitted vesting of rights).

61 Mandelker, *supra* note 2, at §6.17. *Contra*, permitting the development to proceed anyway: *Town of West Hartford v. Rechel*, 459 A.2d 1015 (Conn. 1983); *Saah v. District of Columbia Bd. of Zoning Adjustment*, 433 A.2d 1114 (D.C. 1981); *City of Peru v. Querciagrossa*, 392 N.E.2d 778 (Ill. 1979); *City of Berea v. Wren*, 818 S.W.2d 274 (Ky. 1991); *Petrosky v. Zoning Hearing Bd.*, 402 A.2d 1385 (Pa. 1979); *Abbeville Arms v. City of Abbeville*, 257 S.E.2d 716 (S.C. 1979).

62 257 S.E.2d 716 (S.C. 1979).

the developer had both purchased the property and made substantial additional expenditures in reliance on both a defective zoning map and a letter of approval from the city's zoning administrator.⁶³

California's experience is instructive. The California Supreme Court held that a developer could not claim a vested right in reliance upon a permit he had reason to know might be defective.⁶⁴ In another case, the court further held that a property owner who had constructed improvements in reliance upon an invalid building permit could be required to remove the structure, even though the permit was regular on its face and the property owner acted without actual knowledge of any defect in it.⁶⁵ The following year, another court held that a property owner could not obtain vested rights in reliance upon an approval obtained in accordance with the requirements of the county where the rules and practices adopted by the county did not conform strictly to the clear requirements of law.⁶⁶

A property owner or applicant also cannot rely on written statements made by a public official unless the official is authorized to make them.⁶⁷ Thus, where the petitioner alleged

63 *See also* City of Peru v. Querciagrossa, 392 N.E. 778 (Ill. 1979) (setbacks); City of Coral Gables v. Puiggros, 376 So. 2d 281 (Fla. 1979).

64 Strong v. County of Santa Cruz, 15 Cal. 3d 720 (1975).

65 Pettitt v. City of Fresno, 34 Cal. App. 3d 813 (1973); *see also*, [Florida Outdoor Advertising, LLC v. City of Boca Raton, Florida, 266 F.Supp.2d 1376](#) (S.D.Fla., 2003) (outdoor advertising company's sign permit was denied under an ordinance that clearly prohibited such signs, court refused to allow advertising company to claim vested rights arising, in part, from the ordinance being unconstitutional); Coral Springs Street Systems, Inc. v. City of Sunrise, 371 F.3d 1320 (under certain circumstances, not evident there, a city's withholding of permit application on the basis of a void ordinance could give rise to a vested right in the permit).

66 People v. County of Kern, 39 Cal. App. 3d 830 (1974).

67 Burchett v. City of Newport Beach, 33 Cal. App. 4th 1472 (1995).

a breach of a "written agreement with Defendant City of Newport Beach whereby said City agreed to allow Plaintiffs to improve said real property with a two story condominium structure and retain the existing driveway to said property"68 The allegation was based on a letter from the Burchetts to the planning department asking for a permit to use an existing, nonconforming driveway, on which letter an assistant planner had marked a notation that the facts were "correct." The court first noted that the city's charter provided that it could not be bound by any contract "unless the same shall be in writing, approved by the city council and signed on behalf of the city by the mayor and the city clerk or by such officer or officers as shall be designated by the City Council."⁶⁹ Second, the assistant planner was neither the person to contact for an "encroachment permit," nor a member of the correct department. The court cited *Horsemen's Benevolent & Protective Ass'n v. Valley Racing Ass'n*,⁷⁰ for the proposition that "no government, whether state or local, is bound to any extent by an officer's acts in excess of his authority."⁷¹ The court held that "one who deals with a public officer stands presumptively charged with a full knowledge of that officer's powers, and is bound at his peril to ascertain the extent of his powers to bind the government for which he is an officer, and any act of an officer to be valid must find express authority in the law or be necessarily incidental to a power expressly granted."⁷²

C. *What Constitutes Sufficient Governmental Action*

⁶⁸ *Id.* at 1479.

⁶⁹ *Id.*

⁷⁰ 4 Cal. App. 4th 1538, 1563-64 (1992).

⁷¹ *Id.*

⁷² *Id.* (quoting *Horsemen's*, 4 Cal. App. 4th, at 1564) (general law city was not bound by oral contract because it did not comply with California Governmental Code §40602 and relevant city code provisions).

There are a variety of acts and omissions by government that have been held sufficient to support a claim of vested rights, assuming that the landowner meets any applicable good faith standard in relying on such act or omission.

1. Building Permit

Virtually all authorities agree that the granting of a building permit vests the land development rights of a landowner.⁷³ This is so because in most jurisdictions, the building permit cannot issue unless the land is otherwise ripe for development and all zoning and other land use permits have been granted. Therefore, for the pertinent government to change its mind at this stage in the land development process is generally considered at least inequitable under an estoppel theory, and except for the fact that the development project is uncompleted, arguably in the same legal category as a nonconformity, as discussed above.⁷⁴ Thus, for example, in *Town of Orangetown v. Magee*,⁷⁵ Bradley Industrial Park, Inc., acquired 34 acres in order to construct an industrial building. The Town's building inspector approved Bradley's plan and issued a building permit. However, as the construction progressed, opposition to the project materialized, and the inspector revoked the permit after Bradley had incurred nearly \$4,000,000 in post-permit expenses, and the town rezoned the property to make such industrial use impossible. Holding that a vested right is 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,"⁷⁶ the court held that Bradley had acquired vested rights. The South Dakota Supreme Court applied the doctrine of equitable estoppel in holding that a property owner's purchase of

73 Mandelker, *supra* note 2; Siemon, Larsen & Porter, note 738, at 26.

74 For discussion and a contrary view on this point, however, *see* Siemon, Larsen & Porter, *supra* note 2, at 54-56.

75 665 N.E.2d 1061 (N.Y. 1996).

76 *Id.* at 1064.

\$4,197 in materials constituted sufficient reliance on a building permit to estop the city from then revoking the permit.⁷⁷

The corollary of the rule that issuance of a building permit may vest certain rights is that application for a building permit is typically a prerequisite for a vested rights claim.⁷⁸ Courts requiring the acquisition of a building permit before a landowner obtains vested rights to proceed can be strict about the application of this requirement. Thus, in the aforementioned *Avco* decision from California, even though the developer had spent hundreds of thousands of dollars in reliance upon grading and other permits, and even though the regulations requiring a shoreline development permit from a state agency were not in effect at the time the landowner made these expenditures, the court held that in absence of a building permit, the landowner had no vested right to proceed and therefore the expenditures and grading operations conducted in reliance on these other permits were irrelevant.⁷⁹

California courts have applied the *Avco* doctrine in a number of later cases, including *Davidson v. County of San Diego*.⁸⁰ In *Davidson*, although the property owner had applied for a building permit, submitted site plans, and made various expenditures in reliance on the building permit, the court declined to find a vested right to continue with the development based on the developer's lack of a building permit. Under the judicial vested

77 *Even v. City of Parker*, 1999 S.D. 72, 597 N.W.2d 670 (1999).

78 *See Lake Bluff Housing Partners v. City of South Milwaukee*, 197 Wis. 2d 157, 540 N.W.2d 189 (1995), *rev'g* 188 Wis. 2d 230, 525 N.W.2d 59 (Ct. App. 1994), in which a developer of proposed low-income housing challenged a down-zoning of the property from multi-family to single-family but lost a vested rights claim because the partners had not applied for a building permit.

79 *Avco Community Developers v. South Coast Regional Comm'n*, 553 P.2d 546 (Cal. 1976).

80 *Davidson v. County of San Diego*, 49 Cal. App. 4th 639, 56 Cal. Rptr. 2d 617 (1996); see also *Shea Homes Ltd. Partnership v. County of Alameda*, 110 Cal. App. 4th 1246, 2 Cal. Rptr. 3d 739 (2003).

rights doctrine in *Avco*, the property owner did not have a right to have his application considered under regulations as they existed at the time he applied for the building permit. The court noted, however, that the county ordinance did, in fact, grant a vested right to the developer. The court emphasized that local ordinances may confer vested rights earlier than available under the judicial vested rights doctrine.

Maryland has adopted a vested rights doctrine similar to California's:⁸¹

For a right to proceed with construction under existing zoning to vest, three conditions must be satisfied: 1) there must be actual physical commencement of some significant and visible construction; 2) the commencement must be undertaken in good faith, to wit, with the intention to continue with the construction and to carry it through to completion; and 3) the commencement of construction must be pursuant to a validly issued building permit.⁸²

The court applied the above rule to confer a vested right on the developer of a communications tower who had significantly commenced construction, in good faith, pursuant to a valid building permit. Therefore, the court held, a newly enacted ordinance, which effectively invalidated West Shore's site plan for the tower, did not apply to the subject property. The Maryland courts apply this vested rights rule strictly, so that if one element is lacking, the court will not confer a vested right. For example, in *Prince George's County, Maryland v. Sunrise Development Partnership*,⁸³ the Maryland court applied the above vested rights rule to hold that, although the developer had obtained a valid building permit, it had failed to commence construction of the proposed apartment building, even though the developer had poured concrete, installed snow fencing, cut down trees, and begun constructing the retaining walls before the county downzoned the property.

⁸¹ *Town of Sykesville v. West Shore Communications*, 677 A.2d 102, 104 (Md. 1996).

⁸² *Id.* at 104.

⁸³ 623 A.2d 1296 (Md. 1993).

If a local government issues a building permit based on a mistake of fact, such as an erroneous plan, much will turn on whether the developer or the local government made the error, and whether the error will result in health or safety hazards. In *Rivera v. City of Phoenix*,⁸⁴ the developer submitted plans that were later found to contain incorrect information. The city council issued the building permit, but subsequently revoked it due to zoning violations. The developer claimed that he had a vested right to continue his project, based on the state vested rights doctrine which vests a property right when a building or special use permit is legitimately issued, and the permittee relies on the permit. The court noted that since the developer did not have a “legitimately issued” permit, it could not argue that it had a vested right to continue with its project.⁸⁵ Also holding that an invalid building permit vest no rights is the Georgia Supreme Court, were such permits were issued for development in an ordinance restricted floodplain.⁸⁶

Some jurisdictions hold that a completed building application is sufficient, but it is important that in those jurisdictions requiring a building permit before rights vest, the application be free of conditions that could be construed as discretionary. Moreover, many such jurisdictions also require that the building permit eventually be issued.⁸⁷ Thus, in *Aspen v. Marshall*,⁸⁸ the Colorado Supreme Court held a landowner was not entitled to vested rights for a hot tub building permit, due to the need to obtain other appropriate permits which were prerequisites to the issuance of the building permit. Under such circumstances, the building permit was neither automatic nor the final permit needed.

84 925 P.2d 741 (Ariz. 1996).

85 *Id.* at 742. The court cited a number of cases that support its view that a building permit that is issued under a mistake of fact or in violation of an ordinance does not vest a developers rights. *See, e.g.*, *Matheson v. De Kalb County*, 354 S.E.2d 121 (Ga. 1987); *Miller v. Board of Adjustment*, 521 A.2d 642 (Del. 1986).

86 *Union County v. CGP, Inc.*, 589 S.E.2d 240 (Ga. 2003).

87 *See, e.g.*, *Smith v. Winhall Planning Comm'n*, 436 A.2d 760 (Vt. 1981); *Ready-to-Pour v. McCoy*, 511 P.2d 792 (Idaho 1973).

88 912 P.2d 56 (Colo. 1996).

Moreover, if a regulation is not newly enacted, but instead a proceeding authorized by regulations existing prior to a building permit application, the Ninth Circuit has held that it will not interfere with a developer's vested right. In *R. C. Hedreen Co. v. City of Seattle*,⁸⁹ a developer applied for a building permit for a property that was designated as a landmark. The city decided not to act on landmark designations for a four-year period, and the developer sought to have this moratorium extended to allow him to develop the property. The court recognized that Washington has a vested rights doctrine that vests the right to develop upon the filing of the permit application. Although the developer was protected from newly enacted regulations, the court found that the landmark ordinance was in place prior to the application, and could not interfere with his vested right.

Applying the Washington vested rights doctrine to find a vested right to develop upon the filing of the permit application is *Mercer Enterprises, Inc. v. City of Bremerton*.⁹⁰ The defendant applied for a building permit application in order to construct a condominium project in Bremerton. Three months later, before it had taken any action on the application, the city placed a moratorium on all permit processing under a previous ordinance allowing condominium developments in residential areas, including Mercer's land. The city repealed the earlier ordinance, and failed to act on Mercer's permit. Mercer brought an action to compel the city to process its permit application under the ordinance in effect at the time of its application. The court applied the Washington vested rights rule to hold that Mercer's rights vested at the time of the application. Therefore, the city's repeal of the ordinance allowing condominium developments did not apply to Mercer's development.⁹¹

The building permit application situation described above should be distinguished from the conditional building permit, which may lead courts to vest rights depending upon the

89 74 F.3d 1246 (9th Cir. 1996).

90 611 P.2d 1237 (Wash. 1980).

61 *See also*, WCHS, Inc. v. City of Lynnwood, 86 P.3d 1169 (Wash. 2004) (holding project development could proceed under regulations in effect at the time of the submission of a completed building application, irrespective of subsequent changes in land use regulations).

conditions. Thus, in *Browning-Ferris Industries v. Wake County*,⁹² a federal district court found that the landowner acquired vested rights under at least two theories, one of which was the granting of a building permit and change of position and expenditure of funds based thereon. Although the landowner had not acquired a National Pollutant Discharge Elimination System (NPDES) permit for the operation of its facility at the time the building permit was issued, the court nevertheless was

convinced that, under North Carolina common law, plaintiffs' rights to develop the subject tract had vested. Plaintiffs incurred substantial expenditures in reliance on the site plan approval and issuance of the building permit. Plaintiffs' efforts following the site plan approval were undertaken in good faith and under reasonable reliance on the validity of the approvals they had been granted. It is of no consequence that the building permit was conditional in nature⁹³

Of course, a statute may also provide for vesting upon reliance on a building permit. In the above *Browning-Ferris* case, a North Carolina statute forbids the application of changes in zoning restrictions and boundaries to uses for which either building permits have been issued or a vested right has been established. Further statutory provisions establish a vested right in the landowner after approval of a site specific development plan, whether or not conditional, provided the conditions are eventually met.⁹⁴

Lastly, some courts have held landowner rights to vest upon the probability of the issuance of a building permit.⁹⁵ Much depends on the extent of reliance of the landowner, coupled

92 905 F. Supp. 312 (E.D. N.C. 1995).

93 *Id.* at 319.

94 N.C. Gen. Stat. §160A-385(b) and (c), *cited in* *Browning-Ferris Industries v. Wake County*, 905 F. Supp. at 317, 318.

95 *See* Siemon, Larsen & Porter, *supra* note 2, at 26-27.

with the kinds of official assurances provided by government.⁹⁶ Thus, for example, Illinois courts have found vested rights when a landowner has purchased land, applied for a building permit, and demolished a relatively valuable building,⁹⁷ or when another landowner had spent substantial funds on architectural, legal, and organizational fees.⁹⁸ Although Hawaii now follows a different rule (as noted below), a series of earlier cases also held vested rights might be found upon the probability of the issuance of a building permit, based upon official assurances.⁹⁹

In one such case, a Nevada district court found for a large company in a vested rights case worth millions of dollars even though the building permits had not been officially issued.¹⁰⁰ In 1999, a Nevada county ordinance precluded businesses larger than 110,000 square feet from having more than 7.5 percent of their retail space allocated to food. Wal-Mart had begun planning a year before to build two “Supercenters” in the county that

66 Constantine Village of Glen Ellyn, 575 N.E.2d 1363 (Ill.App.Ct. 1991)(vested rights established by landowners who made substantial expenditure in good faith reliance, based on numerous assurance by zoning administrator, that a building permit would be issued).

97 Mattson v. City of Chicago, 411 N.E.2d 1002 (Ill. 1980).

98 Cos Corp. v. City of Evanston, 190 N.E.2d 364 (Ill. 1963); *see also*, Furniture L.L.C. v. City of Chicago, 818 N.E.2d 839,846 (Ill. 2004) (explaining that to establish a vested right an owner does not have to show that it received assurances from the City, rather, only that it made substantial expenditures in good faith reliance on the probability that a building permit would issue).

99 Denning v. Maui, 485 P.2d 1048 (Haw. 1971); Allen v. Honolulu, 571 P.2d 328 (Haw. 1977); Life of the Land v. Honolulu, 592 P.2d 26 (Haw. 1979). For discussion of these cases and the general principles applicable to vested rights, *see* David L. Callies, *Herein of Vested Rights, Plans, and the Relationship of Planning and Controls*, 2 U. Haw. L. Rev. 167 (1979).

100 *See* Walmart Stores, Inc. v. County of Clark, 125 F. Supp. 2d 420 (D. Nev. 1999).

would occupy 205,000 square feet with more than 25 percent of the space for groceries. Wal-Mart had obtained unanimous zoning approval from the Clark County Commission eight months before the passage of the new ordinance, and, after gaining zoning approval, had spent more than \$5 million on the property for one site alone, and paid for architects, engineers, utilities, and grading permits. On Oct. 14, 1999, the Clark County District Attorney's office directed the Building Department not to issue the building permits for the two sites, the same day that Wal-Mart had been told that the permits were ready. Thus, without that directive from the District Attorney, a final building permit for one site and the foundation permits for the other site would have been issued, all before the ordinance became effective. The court took into account the fact that Wal-Mart had received all the needed discretionary approvals before the ordinance took effect, while the building permits were merely ministerial.¹⁰¹ "It would be a perversion of the pending ordinance doctrine if it could be used once rights to a particular piece of property had vested."¹⁰² The court granted a preliminary injunction on the new ordinance for Wal-Mart's two projects, noting that monetary damages would not be an adequate remedy when the company was unlikely to recover what could well be a billion dollars of damages from the county, and that the balance of hardships fell on Wal-Mart's side.¹⁰³

2. Subdivision Plats or Plans

As the case that ended the previous section demonstrates, courts often look to other than a building permit to vest land development rights in a landowner, particularly if the permission granted is of a more ministerial nature, even if tinged with some discretion.¹⁰⁴

101 *Id.* at 427.

102 *Id.* at 428.

103 *Id.* at 429.

104 As appears in other subsections of this Part C, many jurisdictions require that a landowner obtain the last discretionary--as opposed to a ministerial--permit before rights to develop vest. Some, like Hawaii, make this requirement explicit. *See County of Kauai v. Pacific Standard Life Ins. Co.*, 653 P.2d 766 (Haw. 1982). Others do so by implication.

Although there are certainly cases to the contrary (particularly with respect to old plats),¹⁰⁵ many courts will vest land development rights upon actions taken in reliance on final plats of subdivision. Increasingly, courts will do so with respect to preliminary plat approvals as well.

a. Final Plats

Government approval of a final subdivision plat is often a ministerial act, and therefore similar to a building permit for the purposes of vested rights. Thus, in *Board of Commissioners of South Whitehall Township, Lehigh County v. Toll Brothers*,¹⁰⁶ the court held that final subdivision approval vested the property owners' right to continue with their development. In *Toll Brothers*, the developers had submitted their final subdivision plan for the township's approval, which the township subsequently granted. The township ordinance in effect at the time the subdivision was approved required a \$500 payment for water and sewer connection to each lot in the subdivision. Subsequent to approving the developer's final subdivision plan, however, the township amended the ordinance, increasing the water and sewer connection fees for each lot to \$4,000. Following the amendment, the developer applied for building permits, which the township refused to grant unless the developer paid the new \$4,000 fee for each lot. The developer challenged the fee, arguing that the township was prohibited from applying the new ordinance to the developer's subdivision because the ordinance in effect at the time the township approved its subdivision plan governed the development. The court agreed, holding that "a municipality may not apply a new ordinance increasing fee schedules to a development for which it has previously granted subdivision approval."¹⁰⁷ The court concluded that the

105 See, e.g., *R. A. Vachon & Son, Inc., v. City of Concord*, 289 A.2d 646 (N.H. 1972). See commentary in Siemon, Larsen & Porter, *supra* note 2, at 24-25.

106 607 A.2d 824 (Pa. 1992).

107 *Id.* See also *Raum v. Board of Supervisors of Tredyffrin Township*, 370 A.2d 777 (Pa. 1977), where a township approved a developer's subdivision plans, but subsequently enacted a new ordinance that increased fee schedules. The court stated, "landowners whose developments have been approved by a municipality have the right to rely upon the fee schedules in effect at the time of the approval of the plan," and held that the township could not apply the new ordinance to the approved development.

township's new ordinance would not apply to the new development and directed the township to issue building permits based on the terms of the ordinance in effect when it granted final subdivision plan approval.

Similarly, in *Ramapo 287 Ltd. Partnership v. Village of Montebello*,¹⁰⁸ the New York state supreme court, appellate division, held that a developer who received subdivision approval to improve his property may acquire a vested right in continuing approval, notwithstanding a subsequent zoning change. In *Ramapo*, the original property owner had applied for and received permission to subdivide its property into four commercial lots. Ramapo purchased the property, and the Village subsequently enacted a zoning regulation increasing yard requirements for the subject property. Ramapo commenced construction on one of the four lots and submitted preliminary site plan applications for the other three lots. The Village rejected the plans, however, because they did not conform to the new zoning regulations regarding yard size requirements. The plaintiff submitted new site plan applications that met the amended zoning requirements that the Village approved. The plaintiff subsequently challenged the Village's new ordinance, arguing that the new requirements should not apply to its property because it had acquired a vested right to develop the subdivision based on the previously granted subdivision approval.

The court examined the state's vesting rights cases, and concluded, "a developer who improves his property pursuant to original subdivision approval may acquire a vested right in continued approval despite subsequent zoning changes."¹⁰⁹ Although the court recognized that the developer had acquired final subdivision approval, it declined to decide whether plaintiff had a vested right to continue its development, and remanded. The court did note, however, that if the proposed development would be "equally useful under the new zoning requirements, a vested right in the already approved subdivision may not be claimed based on the alterations."¹¹⁰ Elsewhere, landowners have successfully resisted lot

108 568 N.Y.S.2d 492 (N.Y. App. Div. 1991).

109 *Id.* at 494 (*citing* Matter of Ellington Constr. Corp. v. Zoning Bd. of Appeals, 549 N.Y.S.2d 405 (1989); Matter of Jaffee v. RCI Corp., 500 N.Y.S.2d 427 (1986)).

110 *Id.*

size increases after spending substantial sums on approved subdivision plats,¹¹¹ and after installation of water, drainage, and road systems, and construction of model homes.¹¹²

Even with such final plat approval, lack of position change may prevent a vested right.¹¹³ In *L.M. Everhart Constr. Inc. v. Jefferson County Planning Commission*,¹¹⁴ a construction company's predecessor submitted a proposed plat to the planning commission that refused to approve it because it was not consistent with the comprehensive plan for the county. The company's predecessor challenged the commission's decision and ultimately the commission approved the subdivision plat. Three years later, however, the county commission, with the planning commission's recommendations, adopted a zoning ordinance, which, if applied to the property in question, would require a side setback that

111 *Kasperek v. Johnson County Bd. of Health*, 288 N.W.2d 511 (Iowa 1980).

112 *Tellimar Homes, Inc. v. Miller*, 218 N.Y.S.2d 175 (1961).

113 *L.M. Everhart Constr. Inc. v. Jefferson County Planning Comm'n*, 2 F.3d 48 (4th Cir. 1993), *see also*, *Gallup Westside Development, LLC v. City of Gallup*, 84 P.3d 78 (N.M. 2003) (final plat approval insufficient to establish vested rights when the extent of developer's substantial change of position was paying an excess purchase price and donating a park to the City); *Monroe Co. v. Ambrose*, 866 So.2d 707 (Fla. 2003) *reh'g en banc denied*, (rejecting trial court's holding, based on plain reading of statute, that vesting occurred solely by virtue of plat recordation, and remanding for determination of whether landowner changed position in good faith reliance).

84 F.3d 48 (4th Cir. 1993).

85 *Id.* at 52.

86 655 P.2d 1365 (Colo. 1982).

was not required prior to the ordinance enactment. After the ordinance was adopted, the construction company purchased the property and applied for building permits. The commission refused to issue building permits, however, based on the new ordinance's side setback requirement. The construction company challenged the ordinance, arguing that based on the earlier approval of the subdivision plans, it had a vested right to continue the development notwithstanding the ordinance's setback requirement.

The court disagreed, holding that a subdivision plat approval does not create a vested right to develop. Moreover, the court continued, "even the issuance of a building permit--a part of the construction process that occurs long after the approval of a subdivision plat--does not vest rights against future changes in zoning regulations."¹¹⁵ The court noted that most jurisdictions require that a landowner make substantial expenditures on a subdivision before rights to complete the subdivision will vest. Since the construction company had expended no resources before the zoning ordinance took effect (in fact it had not even purchased the property before the commission enacted the ordinance), the court concluded that it had no vested right to develop the subdivision without complying with the setback requirements.

The Colorado Supreme Court also rejected a vested rights claim based on final approval for a 2-lot subdivision, with one large apartment building proposed for each lot in *P.W. Investments, Inc. v. City of Westminster*.¹¹⁶ The developer more or less completed one building, defaulted, and left a lender with the problem of completing the first building and then deciding what to do with the rest of the project. Faced with accelerating growth, the city adopted a growth management program several years after the default that required the developer to obtain an allocation of "service commitments" sufficient to support services to a proposed building before obtaining a building permit. Eager to market the property as fully developable, the foreclosing lender claimed that the final subdivision approval and construction of the first apartment building vested rights to complete the project as planned. The court ruled for the city, holding that tap permits did not represent assurances of future availability of water and sewer services and that any such belief was unreasonable.

b. Preliminary Plats

In most jurisdictions, the approval of a preliminary plat or plan of subdivision is a discretionary act. In those jurisdictions in which final discretionary approval vests development rights,¹¹⁷ the approval of a preliminary plat of subdivision is sufficient to vest such development rights, provided it is indeed the last discretionary permit needed.

California courts in particular have vested land development rights following government approval of so-called vesting tentative maps, particularly in the face of changes in local government comprehensive plans.¹¹⁸ In California at least, this common law rule is now recognized by statute¹¹⁹ in what one commentator views as a response to the above-discussed *Avco* decision. Upon approval of a vesting tentative map, a landowner has vested rights to proceed with the land development in accordance with local ordinances, policies, and standards in existence at the time the application for the map is accepted as complete or is deemed complete.¹²⁰

A more difficult situation arises when a landowner submits a preliminary subdivision plat in reliance on existing zoning, but the approving body refuses to approve it after delay and intermediate passage of regulations that would make the plat as submitted nonconforming. At least one court¹²¹ has held that when a landowner's proposed plat conforms to then-existing ordinances, the local planning commission must approve the plat, even though there was some evidence that a number of landowners were submitting plats on "dormant" projects in order to "beat the clock" with respect to new planning regulations. This is, of

117 *See, e.g., Hawaii, as held in County of Kauai v. Pacific Standard Life Ins. Co.*, 653 P.2d 766 (Haw. 1982)

118 *See Youngblood v. Board of Supervisors of San Diego County*, 586 P.2d 556 (Cal. 1978); *Smith v. Winhall Planning Comm'n*, 436 A.2d 760 (Vt. 1981).

119 Cal. Gov't Code §§66498.1-66498.9.

120 Daniel J. Curtin, *Curtin's California Land Use* 209 (20023 ed.); *See also Bright Dev. v. City of Tracy*, 20 Cal. App. 4th 783, 788 (1993).

121 *Lake City Corp. v. City of Mequon*, 544 N.W.2d 600 (Wis. 1996).

course, a recognition that action and good faith have little to do with vested rights, but rather with estoppel, an equitable action.

A few states have enacted legislation protecting a property owner's right to continue with his development once a governing authority has approved the developer's preliminary subdivision plan. In New Jersey, for example, the statute confers upon the applicant a vested right to develop for three years, following either preliminary approval of a major subdivision plan or site plan. The court applied the New Jersey statute in *B & W Associates v. Planning Board of the Town of Hackettstown*,¹²² and held that B & W Associates had a vested right to continue its development. The town had granted preliminary major subdivision approval to B & W to allow the company to build a warehouse. Subsequently, the town amended the zoning ordinance and eliminated warehousing as a permitted use on B & W's property. The court concluded that the statute clearly intended to vest a developer's right to continue its project once the governing authority had approved its preliminary plan, and no subsequent zoning change would apply to the property.

Pennsylvania has also enacted a statute protecting a property owner's right to develop once a preliminary application for subdivision approval has been obtained. The statute protects the property owner from any "subsequent change or amendment in the zoning, subdivision or other governing ordinance or plan . . . [for] five years."¹²³ In *Harwick v. Board of Supervisors of the Township of Upper Saucon*, a property owner had submitted a preliminary subdivision plan to the board of supervisors and received approval of the preliminary plan on July 12, 1983. In July of 1984, the property owner had submitted its final subdivision plan, but it was not approved by the board until October of 1993, nine years after the owner submitted it. In the interim, the township amended its zoning ordinance. The property owner argued that he was protected from the application of the new ordinance based on its statutorily protected vested right. The town objected to the vested rights argument, stating that since the property owner had failed to obtain final approval within the statutorily limited five-year period, its vested rights had expired. The court disagreed, holding that the town had granted an extension of the five-year period to the owner, and therefore he was not subject to the new ordinance enacted after he received

122 575 A.2d 1371 (N.J. 1990).

123 *Harwick v. Board of Supervisors of the Township of Upper Saucon*, 663 A.2d 878 (Pa. 1995) (*citing* Pa. Municipalities Planning Code §508(4)(ii)).

preliminary plan approval. Although the town had not granted an explicit extension, the court found that the course of dealing between the parties evidenced an intent to extend the five year period, so that the developer retained a vested right beyond the statutorily set time limit.

Although most courts require that the subdivision plan be *approved* to confer a vested right, at least two courts have vested the right to develop upon the *submission* of the subdivision plan.¹²⁴ In *Noble Manor*,¹²⁵ the developer submitted a completed subdivision plat application to the county to build three multi-family residential units. At the time Noble Manor submitted its application, the applicable ordinance required a minimum lot size of 13,500 square feet for duplex developments. Before the subdivision plans were approved, however, the county enacted an interim zoning ordinance increasing the lot size for duplexes from 13,500 to 20,000 square feet. The county refused to issue building permits for the project based on the new ordinance's increased lot size requirement.

The court first examined the Washington state vested rights law, noting it was a minority rule. The court observed that the state of Washington does not follow the "building permit" rule followed in many other jurisdictions, and that "[u]nder Washington law, property development rights vest at the time a developer files a complete and legally sufficient building permit or preliminary plat application."¹²⁶ Applying this minority rule to the facts in the case, the court concluded that once Noble Manor had submitted its subdivision plat application, its right to develop had vested and no subsequent ordinance

124 See *Harwick v. Board of Supervisors of the Township of Upper Saucon*, 663 A.2d 878 (Pa. 1995) (Pennsylvania statute protects property owner from newly enacted ordinance while application for approval of a plat is pending); *Noble Manor Co. v. Pierce County*, 913 P.2d 417 (Wash. 1996). *But c.f.* *Brazos Land, Inc. v. Board of County Commissioners of Rio Arriba County*, 848 P.2d 1095 (N.M. 1993) (applicant for preliminary subdivision plat approval had no vested right and was subject to subsequently enacted regulations where no actual approval of application).

95 913 P.2d 417 (Wash. 1996).

126 *Id.* at 420 (*citing* *Valley View Indus. Park v. Redmond*, 733 P.2d 182 (Wash. 1987)).

would apply to its development.¹²⁷ It is, of course, critical in these cases that the application be complete for development rights to vest.¹²⁸

3. Planned Development Plan Approval

The law with respect to planned development plan approval is largely the same as that which applies to subdivision plat approval, except that a sketch plan is almost certainly insufficient to vest land development rights. The usual order of planned development approval is sketch plan, preliminary plan, and final plan, with the latter often processed at the same time as subdivision plats, if any.¹²⁹

One state has enacted a statute that protects a property owner's right to continue its planned development plan (PUD) when a local government approves a PUD plan. In Colorado, the Vested Property Rights Act provides:

A vested property right, once established as provided for in this article, precludes any zoning or land use action by a local government or pursuant to an initiated measure which would alter, impair, prevent, diminish, or

127 *But c.f.*, *Erickson & Assoc., Inc. v. McLerran*, 872 P.2d 1090 (Wash. 1994) (Washington vested rights doctrine does not apply to filing of a completed Master Use Permit application (similar to site plan) as it does to filing of building permit application).

128 Washington has emerged as one of the most liberal states in determining when one's development right has vested. *See, e.g.*, *Friends of the Law v. King County*, 869 P.2d 1056 (Wash. 1994) (holding that the developer's right to complete its project had vested at the time it submitted its "fully completed" application for preliminary plat approval); *Adams v. Thurston County*, 855 P.2d 284 (Wash. 1993) (vesting of development rights occurred at time developer filed a complete and legally sufficient preliminary plat application and subsequently enacted land use regulations do not apply to that development).

129 *See Callies, Freilich and Roberts, Cases and Materials on Land Use* (3d ed. 1999).

otherwise delay the development or use of the property as set forth in a site specific development plan [PUD]. . . .¹³⁰

In *Villa at Greeley, Inc. v. Hopper*,¹³¹ a developer submitted a PUD plan to the Board of County Commissioners (Board) to develop a pre-parole facility in the county. The Board approved it, and subsequently a group opposed to the development called for a referendum to give voters special authority to review decisions on incarceration sites. The developer sought and obtained a ruling that it had a vested property right under the Vested Property Rights Act. The voters amended the home rule charter through the referendum to allow voters to preclude issuance of a certificate of occupancy for pre-parole facilities without voter approval. The developer sued, claiming that the charter amendment violated his statutorily protected vested property right.

The court agreed with the developer, holding that the Act, by its own terms, created a vested property right when the local government approved the developer's planned unit development (PUD) plan. However, the court noted that the Act provides for an exception to the vested right's protection, if the governmental authority gives just compensation for costs incurred subsequent to the receipt of plan approval. Therefore, the court remanded the case to the trial court to determine the proper compensation.

In Washington state, when landowners filed applications for a PUD and an unclassified use permit (UUP) in 1991, the county's 1983 Zoning Ordinance was in effect. During environmental review for the recreational area's development, however, the Growth Management Act was amended, designating certain areas for interim urban growth. The interim zoning ordinance was invalidated in 1994 and revised in 1995, with the final zoning ordinance adopted in 1996. Because the County Hearing Examiner determined that the project had vested while the 1983 Zoning Ordinance was in effect, the examiner recommended approval of the applications subject to 25 conditions.¹³² Following the Land Use Petition Act standard of review, a Washington appellate court found that the PUD had

130 Vested Rights Property Act, Colo. Rev. Stat. §24-68-103 (1988).

131 917 P.2d 350 (Colo. 1996).

132 *North Kitsap Coordinating Council v. Kitsap County*, 2001 Wash. App. LEXIS 2232 (2001).

vested on the date of application, and that case law had established that a complete conditional use permit, which the court found to be similar enough to a UUP, also vests a project.¹³³

The Washington Supreme Court has held that monetary liability may arise where a local government disregards a developer's vested rights.¹³⁴ The case involved vested rights arising under the Washington statute, and, specifically, a denial of a permit necessary to the construction of a recently approved PUD project that had vested rights under Washington law.¹³⁵ The developer did not use the grading permits initially issued to it but

133 *Id.* at *20-*21. *But see*; Pine Forest Owners Assoc. v. Okanogan Co., 2004 WL 2650718 (Wash.App. 2004) (applying Washington's vested rights statute to hold PUD application could not vest rights because it was not accompanied by a preliminary plat application).

134 *Mission Springs, Inc. v. City of Spokane*, 134 Wash.2d 947, 954 P.2d 250 (1998), as corrected.

135 The court summarized the facts and related conclusions:

On August 31, 1992, the Spokane City Council adopted Ordinance No. C-30529 approving Mission Springs' application for a planned unit development (PUD) comprised of 790 apartment units located within approximately 33 separate buildings. This final approval followed submittals by the developer setting forth the nature of the proposed development in sufficient detail to enable the city council to affirmatively determine pursuant to RCW 58.17.110 that the development made adequate provision for "the public health, safety, and general welfare and for such open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies . . .", etc. RCW 58.17.110(2)(a). The record shows a public hearing was held on November 5, 1991, Clerk's papers (CP) at 202, wherein evidence was taken on these matters. Thereafter the hearing examiner concluded on November 25, 1991, that the PUD application should be granted, subject to various conditions. CP at 202.

applied for new grading permits well within the five-year period during which its development rights were vested. That application resulted in a hearing before the city council of which the developer was not apprised, although there were a number of opponents present. After discussion at the meeting, the council voted to delay the issuance of the grading permit until council could obtain additional traffic studies. The court ruled for the developer:¹³⁶ “Simply put, neither a grading permit, building permit, nor any other

The record also demonstrates it was well known to the developer and local government officials the addition of a 790-unit apartment complex at this location would necessarily cause a predictable increase in traffic upon adjacent roads and highways subsequent to ultimate construction and occupancy. That this factor was fully considered by all concerned there can be no doubt as the developer submitted a traffic study detailing the likely traffic increase as a result of the apartment build-out with specific reference to the likely routes of travel. See CP at 245, 304 (describing 1991 traffic impact study). We also note that it was known, or should have been known, to all concerned as of the date of final approval of August 31, 1992, the developer was statutorily vested with the legal right to build out the planned improvements identified in the PUD for a period of five years under the ordinances, statutes, and regulations in effect at the time of the August 1992 approval “unless the legislative body finds that a change in conditions creates a serious threat to the public health or safety in the subdivision.” RCW 58.17.170. No such finding, however, was ever made.

Mission Springs, Inc., 134 Wash.2d at 952-53 [footnote omitted]; internal references are to the Revised Code of Washington.

136 The court said:

Without material dispute of fact it appears these defendants abrogated Mission Springs’ right to obtain issuance of a grading permit when the City Council acted to deny issuance of this or any permit and the City Manager acquiesced in the council’s demands.

That the City Manager willfully withheld the permit from issuance upon, or in prevention of, satisfaction of ordinance criteria during the June through

ministerial permit may be withheld at the discretion of a local official to allow time to undertake a further study.”¹³⁷ It concluded:

Mission Springs was entitled to regular administrative processing and issuance of the requested grading permit in accordance with ordinance criteria. The Spokane City Council, contrary to the advice of its own city attorney, deprived the permit applicant of that process lawfully due by instructing its city manager to withhold the permit for reasons extraneous to ordinance, or lawful, criteria. The City Manager did in fact suspend the required process and acceded to the City Council’s demand to withhold the permit without lawful justification, thereby depriving Mission Springs of its property absent the lawful process due under the laws of this State and the ordinances of Spokane. The duration of the deprivation, and the ultimate issuance of the permit after suit had been commenced, does not change the fact that the legal rights of Mission Springs were violated in the first instance.

The trial court’s summary judgment of dismissal is reversed, and the case is remanded for trial consistent with this opinion.¹³⁸

August 1995 period upon the motion of the City Council is not disputed. Nor is it denied the City Council acted contrary to the legal advice of its own city attorney, and in no uncertain terms. The issue here is not whether or not the Spokane City Council can lawfully request its city manager to perform at municipal expense such additional studies as it may see fit but rather is whether the statutory and constitutional rights of Mission Springs were violated when its right to obtain this grading permit upon satisfaction of ordinance criteria was abrogated pending the completion of such additional studies.

134 Wash.2d at 959.

137 *Id.* at 961.

138 *Id.* at 971-72.

4. Site Plan Approval

Some jurisdictions have equated the approval of a site plan with the issuance of a building permit.¹³⁹ In *Board of Supervisors v. Medical Structures, Inc.*,¹⁴⁰ the court so held, observing: “The site plan has virtually replaced the building permit as the most vital document in the development process.”¹⁴¹

In New Jersey, the state vesting rights statute grants to the developer with preliminary site plan approval vested rights for a three-year period from the date of preliminary approval.¹⁴² In *Bleznak v. Township of Evesham*,¹⁴³ a property owner applied for and received

139 Siemon, Larsen & Porter, *supra* note 2, at 22-23.

140 192 S.E.2d 799 (Va. 1972).

141 *Id.* at 801.

142 1 N.J.S.A. 40:55D-49 and 52. *See infra* for discussion of the New Jersey vested rights statute in Subdivision Plan section. *See e.g.*, *Palatine I v. Planning Bd. of the Township of Montville*, 628 A.2d 321 (N.J. 1993) (holding that developer had protected vested right to continue with project following township's grant of preliminary site-plan approval for period of five years. Once time period expired, however, township was not equitably estopped from applying zoning amendments to property).

143 406 A.2d 201 (N.J. 1979).

preliminary site approval to build a nursery school in Evesham Township. One week later, the owner obtained final site plan approval. At the time plaintiffs obtained their site plan approvals, the property was located in the general business zone under the applicable zoning ordinance. Subsequently, the township amended its ordinance, placing plaintiffs' property in a residential district. The township maintained that the ordinance applied to the plaintiff's property, and the nursery school was therefore a nonconforming use, which the plaintiffs could not expand or change unless they complied with the new zoning. Plaintiffs argued that the property was protected against newly enacted ordinances by the New Jersey statute, which confers vested rights for a period of three years upon preliminary approval of a site plan. The court agreed with the plaintiffs, holding that the statute clearly intends to protect properties from newly enacted regulations for a period of three years, and therefore plaintiffs could continue with their nursery school project unaffected by the rezoning.

In *Village of Palatine v. LaSalle National Bank*,¹⁴⁴ an Illinois court held that a municipality may not deny a developer's application for a building permit once the governing authority has approved the site plan application and the property owner has made substantial expenditures or changed his position. There, developers obtained site plan approval for a development containing more than 500 multi-family units, to be completed in three phases. The developers completed Phase I in 1974, the same year that the Village adopted a flood plain ordinance prohibiting virtually all construction in areas designated as Flood Plains. Almost all of the developers' project was located in the Flood Fringe, designated by the Illinois Department of Transportation as an area permitting development. In 1978, the developers applied for building permits for Phases II and III. The Village refused to issue the permits, based on the flood plain ordinance. Then, the Village also adopted a height ordinance, restricting the height of buildings within the development's zoning classification.

The Village subsequently brought an action to have the court declare both ordinances enforceable against the development. The court noted that since the development was no longer in the flood plain, the question of the validity of the flood plain ordinance was moot. The issue, therefore, was whether the height ordinance would apply to the development in question. The court first addressed the developers' vested rights argument, concluding that the Village's approval of the original site plan resulted in a vested right to continue with the project in accordance with the original site plan, and the Village could

144 445 N.E.2d 1277 (Ill. 1983).

not apply its newly enacted height ordinance to the development to divest the developers of that right.

Although site plan approval will vest the right to develop in some jurisdictions, others have refused to extend their vested rights rule to allow such protection to property owners. For example, in *American West Development v. City of Henderson*,¹⁴⁵ the Nevada Supreme Court refused to extend the state vested rights rule to include master plan (site plan) approval. The court emphasized that “[i]n order for rights in a proposed development project to vest, zoning or use approvals must not be subject to further governmental discretionary action affecting project commencement, and the developer must prove considerable reliance on the approvals granted.”¹⁴⁶ Because the developer still had to submit applications for subdivision maps, building permits, and other discretionary approvals, no right to continue its development had yet vested. The court noted that, notwithstanding the developer’s lack of vested rights, the city was still required to give substantial deference to the master plan. Therefore, the court remanded the case to require the city to review the developer’s project with the proper deference to the master plan.

The submission of a site plan application will rarely result in vested rights. In *Town of Stephens City v. Russell*,¹⁴⁷ a developer submitted a site plan application to the town’s planning commission, intending to build three apartment buildings on his property. The planning commission rejected the site plan, based on the developer’s failure to comply with zoning regulations. The developer resubmitted the site plan, but it still failed to comply with the town’s zoning ordinance. While the site plan approval process was pending, the town amended its zoning ordinance, which reduced the number of apartment units the developer could build on his site. The developer then sought a vested rights determination in court. The court reviewed the Virginia case law on vested rights, concluding that a property owner must obtain some type of government permit or approval to acquire a

145 898 P.2d 110 (Nev. 1995).

146 *Id.* at 112.

147 399 S.E.2d 814 (Va. 1991); *see also*, *R.A.W. Investments Trust Inc. v. Town of Warner Planning Board*, 2004 WL 944348 (N.H.Super. 2004) (rejecting as conflating subdivision approval and site plan approval, landowner’s contention that vested rights had arisen due to his submission of a site plan application and completion of substantial construction work).

vested right. Since the developer's site plan had never been approved by the planning commission, the developer had not acquired a vested right, and therefore the amended zoning ordinance applied to the property.

5. Special or Conditional Use Permit

A number of jurisdictions have vested land development rights upon the issuance of a special use permit, particularly if it is the last discretionary permit issued by government.¹⁴⁸ Thus in *Graham Beach Partnership v. County of Kauai*,¹⁴⁹ the Hawaii Supreme Court held a shoreline management permit (SMP) under a state coastal zone management statute administered by Hawaii's counties constituted the last discretionary act necessary to vest land development rights. In a controversial decision, the court held that since objectors filed a certified petition for a referendum on underlying zoning before the county granted the SMP, the referendum itself became the final discretionary permit.

Equating a special use permit and a building permit, one court agreed with a landowner that his rights had vested after spending nearly \$1.5 million after obtaining such a permit.¹⁵⁰ Similarly, in *Cardwell v. Smith*,¹⁵¹ the court held that property owners who relied in good faith on a special use permit previously granted by the zoning board had a vested right to operate a rock quarry. The property owners had applied for a special use permit to operate a rock quarry on its property. The Forsyth County Zoning Board granted the special use permit and the plaintiffs, neighboring property owners, sought review of the Zoning Board's decision. While plaintiffs' suit was pending, the Forsyth County Commissioners adopted an amendment to the zoning ordinance prohibiting the operation of a quarry on property zoned R-6, like the subject property. The plaintiffs argued that the

148 Siemon, Larsen & Porter, note 738, at 23-24.

149 653 P.2d 766 (Haw. 1982).

150 *Town of Paradise Valley v. Gulf Leisure Corp.*, 557 P.2d 532 (Ariz. 1976).
See also Renieris v. Village of Skokie, 229 N.E.2d 345 (Ill. 1967); *Elam v. Albers*, 616 P.2d 168 (Colo. 1980).

151 415 S.E.2d 770 (N.C. 1992).

amendment should apply to the property, and furthermore that the defendants had no vested right to operate a quarry since they did not have a building permit.

The court first examined the vested rights rule as adopted by the state supreme court:

one who, in good faith and in reliance upon a permit lawfully issued to him, makes expenditures or incurs contractual obligations . . . may not be deprived of his right to continue such construction and use by the revocation of such permit, whether the revocation be by the enactment of an otherwise valid zoning ordinance or by other means¹⁵²

Applying the rule to the facts in this case, the court found that the defendants had spent more than one million dollars to begin quarry operations in reliance upon the special use permit. The court concluded that the defendants made substantial expenditures in good faith reliance upon the special use permit, and plaintiffs could not now deprive them of their right to operate the quarry by applying the zoning ordinance amendment.

In *City of Miami v. 20th Century Club, Inc.*,¹⁵³ the City of Miami granted to a property owner a conditional use permit to allow the owner to operate a private club in an apartment building. Later, the owner sought to expand the club and applied for a building permit. The city refused to issue a building permit until the owner applied for another conditional use permit. The owner sued, arguing that the conditional use permit vested his right to expand his club. The court agreed, holding that “the city’s resolution created a vested right of ‘conditional use’ zoning for the appellee and that the appellee had a right to rely on the existing zoning in seeking a building permit for expansion from the city.”¹⁵⁴

¹⁵² *Id.* at 191 (citing *Town of Hillsborough v. Smith*, 170 S.E.2d 904, 909 (N.C. 1969)).

¹⁵³ 313 So. 2d 448 (Fla. 1975).

¹⁵⁴ *Id.*

Other courts have held that a special use permit will suffice to vest land development rights. In *Town of Paradise Valley v. Gulf Leisure Corp.*,¹⁵⁵ the Town of Paradise Valley issued a special use permit to a landowner, authorizing the development of his parcel as a resort hotel. In reliance upon the issuance of the permit, Gulf Leisure Corporation purchased the property from the landowner and obtained a significant loan from the bank. As allowed by the permit, Gulf filed an application to extend the special use permit, which the Paradise Valley Planning and Zoning Commission denied. Gulf sued, arguing that it had a vested right to construct the resort, based on the validly issued special use permit. The court set out the vested rights doctrine as follows:

Once a building permit and/or a special use permit are issued as duly authorized by law, as in this case, and the permittee has materially acted in reliance thereon and the guidelines delimited therein, the right to continue under those rules is vested and a municipality may not arbitrarily revoke or change the rules under which the permit was issued.¹⁵⁶

The court then noted that the landowner had been granted a valid special use permit, and had expended significant amounts of money in reliance of the permit, both in purchasing the property and in subsequent architectural fees, overhead expenses, and the clearing of the land. Based on these facts, the court concluded that Gulf had a vested right to continue construction under the special use permit.

One court has held that a special use permit *application* is not a cognizable property interest and therefore does not vest a right to develop.¹⁵⁷ A company sought to develop a rock quarry on 146 acres purchased in 1984. The property was zoned R-1, and mining was a permitted use in the area if the landowner obtained a special use permit. When county commissioners learned of Teer's mining plans, they moved to delete mining as a permitted use in all residential districts, including Teer's property. The County met with Teer, and told him that the County was preparing a comprehensive land use plan designating Teer's property as a rural industrial zone, and encouraged Teer to apply for a special use permit.

155 557 P.2d 532 (Ariz. 1976).

156 *Id.* at 539.

157 *Nello L. Teer Co. v. Orange County*, 993 F.2d 1538 (4th Cir. 1993).

One month later, however, the county commissioners changed the land use plan to designate Teer's property from R-1 to Rural Buffer, allowing no mining. Teer sued, claiming a vested right based on the special use permit application.

The court applied North Carolina law addressing "cognizable property interests," which states that if a local zoning authority possesses "[a]ny significant discretion in granting a permit, there is no cognizable property interest in the issuance of that permit."¹⁵⁸ Because North Carolina law gives the Board of Commissioners considerable discretion to grant or deny a special use permit, the court concluded that Teer had no assurance that the Board would grant its application for a special use permit and therefore no vested right.

*Town Pump, Inc. v. Board of Adjustment of Red Lodge*¹⁵⁹ involved the purchase of undeveloped property on which Town Pump planned to "operate a gas station, convenience store, and casino, and to sell beer and wine for consumption in the casino."¹⁶⁰ Apparently those uses were permitted by right, but the sale was conditioned on subdivision of the property by the seller. While the subdivision review was pending, the city rezoned the property to a "commercial highway" zoning district that allowed the sale of beer and wine only with a special exception. The board of adjustment denied the company's application for special exception, after which the company appealed to the trial court. While the trial was pending, the city adopted a new "development code," which imposed new restrictions on such applications and which by its terms was intended to apply to any new consideration of an application from Town Pump. The Montana high court held that a local government has the authority to adopt new regulations and to apply them to "pending applications."¹⁶¹ It rejected the company's argument that its application was no longer "pending," because the company asserted it had been wrongfully denied and thus should have been issued by the time the new code was adopted.¹⁶²

158 *Id.*

159 971 P.2d 349, 1205 (1998).

160 *Id.* at 350.

161 *Id.* at 353-54.

162 *Id.* at 354.

One court has created a vested rights rule that requires *both* a validly issued special use permit and the filing of a site plan to vest a property owner's right to develop.¹⁶³ In two factually similar cases decided on the same day, the Virginia Supreme Court addressed the issue of whether the issuance of a special use permit creates a vested right. In the first, the board of supervisors granted a special use permit to the original property owner to build a nursing home in a residential district of Fairfax County. Medical Structures purchased the property from the owner, and on March 7, 1969, filed a site plan as a prerequisite to the issuance of a building permit. The site plan was resubmitted several times, the last submission occurring on November 12, 1969. On October 8 and November 19, the board of supervisors amended the zoning ordinance to prohibit nursing homes with more than fifty beds in certain residential districts, including Medical Structures' property. Medical Structures argued that the issuance of a special use permit and the filing of a site plan created a vested right. The Virginia court agreed:

Where, as here, a special use permit has been granted under a zoning classification, a bona fide site plan has thereafter been filed and diligently pursued, and substantial expense has been incurred in good faith before a change in zoning, the permittee then has a vested right to the land use described in the use permit and he cannot be deprived of such use by subsequent legislation.¹⁶⁴

The court concluded that Medical Structures had a vested right, and the board of supervisors was ordered to approve Medical Structures' site plan and issue a building permit.

Similarly, in *Board of Supervisors of Fairfax County v. Cities Service Oil Co.*,¹⁶⁵ the landowner had applied for and was granted a special use permit authorizing a gasoline

163 Board of Supervisors of Fairfax County v. Medical Structures, 192 S.E.2d 799 (Va. 1972); Board of Supervisors of Fairfax County v. Cities Service Oil Co., 193 S.E.2d 1 (Va. 1972).

164 Medical Structures, 192 S.E.2d at 801.

165 193 S.E.2d 1 (Va. 1972).

service station. Cities Service then filed a preliminary site plan as a prerequisite to the issuance of a building permit. Before final site plan approval, however, the board of supervisors rezoned the subject property to C-O. The board of supervisors refused to approve the final site plan or to issue a building permit because the service station was not a permitted use under the new zoning designation. Cities Service sued the board of supervisors, arguing that its substantial expenditure in reliance upon an existing zoning classification, together with the special use permit, created a vested property right. The board of supervisors, on the other hand, argued that no vested right arises until a building permit has been issued and substantial expenditures have been made in reliance on the permit. Relying on its holding in *Medical Structures*, the court held that Cities Service had a vested right to the land use described in the use permit and was entitled to approval of the site plan and issuance of a building permit.¹⁶⁶

More recently, the same Virginia court reiterated its vested rights rule to hold that a landowner who had failed to identify a significant official governmental act to support a vested rights claim had no vested right.¹⁶⁷ In *Notestein v. Board of Supervisors of Appomattox County*¹⁶⁸ a landowner challenged the validity of a newly enacted zoning ordinance that prohibited the development and operation of a solid waste landfill on their property. The Notesteins had filed an application for a landfill permit, but had not obtained a special use permit or building permit prior to the board of supervisor's enacting the zoning ordinance at question. The court cited *Medical Structures* and *Cities Service* for

¹⁶⁶ *Id.*

¹⁶⁷ *Notestein v. Board of Supervisors of Appomattox County*, 393 S.E.2d 205 (Va. 1990). *See also* *Snow v. Amherst County Bd. of Zoning Appeals*, 448 S.E.2d 606 (Va. 1994) (reiterating the special use permit vested rights rule and holding that the issuance of a variance is not a "significant official governmental act within the meaning of our established precedent" and does not reach the level required to vest property rights in Virginia); *Board of Supervisors of Chesterfield County v. Trollingwood Partnership*, 445 S.E.2d 151 (Va. 1994) (emphasizing that the special use permit must be followed by filing of a "bona fide site plan." Without detailed plans the court will not consider a special use permit sufficient to vest a developers' right to develop his property).

¹⁶⁸ 393 S.E.2d 205 (Va. 1990).

the rule that a landowner who is granted a special use permit, has filed a site plan, and incurred substantial expenses in good faith before the zoning change, will obtain a vested right to develop its property.¹⁶⁹ The court concluded that because a governmental entity had not acted officially in *Notestein* (either issuing a special use permit or building permit), the Notesteins' vested rights argument.

6. Grading and Other Site Preparation Permits

While many courts would be unlikely to find a vested right based on the granting of preliminary approvals such as grading or other preparation permits, some commentators see a trend in finding such rights.¹⁷⁰ Thus, a landowner withstood a challenge to his proposed development under newly enacted zoning regulations because of actions taken in reliance upon a validly issued grading permit.¹⁷¹ The court held that in the vested rights context, it could see "no rational distinction between building or conditional use permits and a grading permit."¹⁷² In *MKM Partners, LLC. V. Co. of Sacramento*,¹⁷³ the developer received a grading permit and had completed nearly 95% of the project when the County rescinded the permit because it had been issued without a review under the California Environmental Quality Act. After explaining that the vested rights doctrine was a special expression of equitable estoppel,¹⁷⁴ the court remanded the case for a determination of whether the injustice to the developer that would result from not apply equitable estoppel,

169 *Id.* at 208 (citing *Medical Structures*, 192 S.E.2d at 801 and *Board of Supervisors of Fairfax County v. Cities Service[s] [Oil Co.]*, 193 S.E.2d at 3).

170 Siemon, Larsen & Porter, *supra* note 2, at 22-23.

171 *Juanita Bay Valley Community Ass'n v. City of Kirkland*, 510 P.2d 1140 (Wash. 1973).

172 *Id.* at 1155.

173 2004 WL 1510060 (Cal.App. 2004).

174 *Id.* at *3.

would justify the effect on the public from applying the doctrine.¹⁷⁵ Other jurisdictions have found such permits as a foundation permit sufficient to vest land development rights.¹⁷⁶

Other jurisdictions, however, have been less responsive to vested rights claims based on such preliminary permits.¹⁷⁷ Certainly merely preparatory measures on the property, such as test drilling, would fail to rise to the level of vesting a property owner's right to develop. In *Bickerstaff Clay Products Co. v. Harris County*,¹⁷⁸ a brick manufacturing company purchased a 161-acre tract of land in Harris County, and conducted several test drills on the property to determine the extent of mylonite in the land. The company did not immediately mine the property, instead holding it for future use. More than 20 years later, the county board of commissioners adopted a countywide zoning ordinance and land-use plan for the county. The ordinance zoned the subject property A-1, or vacant land, with agriculture and forestry as the permitted uses. In 1993, the mining company applied for a mining permit from the state Environmental Protection Department. The Department granted the permit, and the mining company sought county rezoning to M-2, which would permit mining. The county denied the company's application, based on the zoning designation, and the company sued.

The court addressed the company's argument that it had a vested right to mine the property, and held that in order to acquire a vested right a governmental body must have acted in some way so that the company had a right to rely on the action. Here, the mining company had merely performed preliminary test drilling and had not obtained any permits upon which it could rely. Clearly, the court concluded, the company had no vested right to mine its property and the county's action in denying the rezoning application was valid.

7. Zoning Classifications

145 *Id. at* *9.

176 *Sakolsky v. City of Coral Gables*, 151 So. 2d 433 (Fla. 1963).

177 *Siemon, Larsen & Porter*, *supra* note 2, at 21-22.

178 89 F.3d 1481 (11th Cir. 1996).

While it is generally true that there is no vested right in existing zoning,¹⁷⁹ several jurisdictions have held that it is a different matter entirely with respect to a newly-enacted zoning classification, particularly if the new classification was recently obtained by the landowner claiming vested rights.¹⁸⁰ Thus, several Florida courts have found vested rights upon a landowner change in position following rezonings at the landowner's request. In one, the landowner had spent a year negotiating with the local government and incurred substantial expenditures.¹⁸¹ In another, the developer had paid several times the pre-zoning value of the land, incurring substantial financial obligations to make the purchase.¹⁸² In *Equity Resources, Inc. v. Co. of Leon*,¹⁸³ property owner Pelham, late the president of Equity Resources, entered an option to purchase land in 1972, contingent upon the sellers'

179 *See, e.g.*, *Gilliland v. County of Los Angeles*, 179 Cal. Rptr. 73 (1981); *Town of Stephens v. Russell*, 399 S.E.2d 814 (Va. 1991); *Zealy v. City of Waukesha*, 548 N.W.2d 528 (Wis. 1996); *Pasco County v. Tampa Development Corp.*, 364 So. 2d 850 (Fla. 1978); *Beasley v. Potter*, 493 F. Supp. 1059 (W.D. Mich. 1980); *Golden Gate Corp. v. Town of Narragansett*, 359 A.2d 321 (Fla. 1976); *City of University Park v. Benner*, 485 S.W.2d 773 (Tex. 1972); *City of Gainesville v. Cone*, 365 So. 2d 737 (Fla. 1979); *Town of Vienna Council v. Kohler*, 244 S.E.2d 542 (Va. 1978); *Siemon, Larsen & Porter*, *supra* note 2, at 14-15.

180 *Siemon, Larsen & Porter*, *supra* note 2, at 15.

181 *Board of County Commissioners of Metropolitan Dade County v. Lutz*, 314 So. 2d 815 (Fla. 1975).

182 *Jones v. U.S. Steel Credit Corp.*, 382 So. 2d 48 (Fla. 1980).

153 643 So.2d 1112 (Fla. Dist. Ct. App. 1994).

154 *Id.* at 1118.

obtaining rezoning to multifamily. Pelham showed county officials a model depicting the development concept plan, and explained that the project would be developed over an unspecified number of years. In response to the county's concern about the impact of the development on drainage, Pelham agreed to complete a storm water management system before any development began if the county granted rezoning. The county approved the rezoning, and the bulk of the property was developed over the ensuing years. Equity Resources acquired an interest in the property in 1987, and had since incurred expenses of \$900,000. In 1989, the County down-zoned a portion of Equity's land. Pelham and Equity filed an application with the planning department, requesting a vested rights determination. Both the planning department, and the trial court, denied Equity's vested rights.

On appeal, the court applied Florida's three-pronged equitable estoppel test, and held Pelham and Equity had vested rights to development. "As one who purchased property under a contract contingent on rezoning after the county granted the rezoning conditioned on the construction of a drainage system, Pelham clearly established sufficient acts of reliance."¹⁸⁴ The court also pointed to other actions taken by Pelham and Equity, such as installing sewer facilities, building a road, and receiving county permits for the construction of Phases I and II of the project, as further evidence of Equity's reliance. The court rejected the notion that Equity's expenses had to be incurred exclusively for the undeveloped portion of the property.¹⁸⁵ The property had been zoned and planned as one overall project, so there was no need to show that costs incurred were attributable to every part of the overall project. Finally, the court rejected the lower court's ruling that Equity's reliance had lapsed because it had waited too long complete the development. Pointing to the fact that this was a large-scale development, for which the county had granted permits for over 18 years, the court held denying Equity's vested right to continue development would be grossly unfair.¹⁸⁶

155 *Id.* at 1119.

156 *Id.*

157 *Id.*

Florida is not the only state to find vested rights arising from rezoning. In *City of Suffolk ex rel. Herbert v. Board of Zoning Appeals for the City of Suffolk*,¹⁸⁷ the City had rezoned 310 acres of land at the landowner's request. Approximately fourteen years later the City enacted a Uniform Development Ordinance, which effectively rezoned land throughout the City.¹⁸⁸ The City claimed the landowner had no vested rights in the initial rezoning because no site plan had been filed. The Virginia Supreme Court, examining for the first time changes to the state's subdivision code,¹⁸⁹ held a landowner acquired vested rights by

158 580 S.E.2d 796 (Va. 2003).

159 *Id.* at 797.

160 *Id.* at 799 *applying* Va. Code Ann. § 15.2-2307.

161 *City of Suffolk*, 580 S.E.2d at 799.

virtue of being “the beneficiary of a significant affirmative governmental act ... allowing development of a specific project.”¹⁹⁰ The original rezoning was for a specific use and density, and that was sufficient to vest rights under the Virginia statute.¹⁹¹

Of course, if the rezoning is accompanied by a plan or other similar document, the likelihood of a rezoning vesting land development rights is increased still further.

162 *Id.* at 800.

163 *Town of Largo v. Imperial Homes Corp.*, 309 So. 2d 571 (Fla. 1975).

164 *Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So. 2d 10 (Fla. 1976).

Submission (though not necessarily separate approval) of a master plan¹⁹² and a site development plan¹⁹³ with a successful rezoning request have both been held to vest such development rights.

D. Legislative Solutions

Several legislatures have adopted laws addressing vested rights directly,¹⁹⁴ Colorado's is illustrative.¹⁹⁵ Other states have provided alternative routes to certainty, such as

164 *E.g.*, Arizona, New Jersey, Colorado, North Carolina, Connecticut, Oregon, Florida, Pennsylvania, Kansas, Texas, Maine, Vermont, Massachusetts, Virginia, Washington. See John J. Delaney & Emily J. Vaias, *Recognizing Vested Development Rights As Protected Property In Fifth Amendment Due Process And Takings*, SK002 ALI-ABA 1113, 1121, and citing Daniel R. Mandelker, *LAND USE LAW*, 5th ed., Sec. 6.22, citations omitted.

195 See, e.g., Colorado: Colo. Rev. Stat. §24-68-103, which provides:

(1)(a) Each local government shall specifically identify, by ordinance or resolution, the type or types of site specific development plan approvals within the local government's jurisdiction that will cause property rights to vest as provided in this article. Any such ordinance or resolution shall be consistent with the provisions of this article. Effective January 1, 2000, if a local government has not adopted an ordinance or resolution pursuant to section 24-68-102 (4) specifying what constitutes a site specific development plan that would trigger a vested property right, then rights shall vest upon the approval of any plan, plat, drawing, or sketch,

however denominated, that is substantially similar to any plan, plat, drawing, or sketch listed in section 24-68-102 (4).

(b) A vested property right shall be deemed established with respect to any property upon the approval, or conditional approval, of a site specific development plan, following notice and public hearing, by the local government in which the property is situated.

(c) A vested property right shall attach to and run with the applicable property and shall confer upon the landowner the right to undertake and complete the development and use of said property under the terms and conditions of the site specific development plan including any amendments thereto. A local government may approve a site specific development plan upon such terms and conditions as may reasonably be necessary to protect the public health, safety, and welfare. Such conditional approval shall result in a vested property right, although failure to abide by such terms and conditions will result in a forfeiture of vested property rights. A site specific development plan shall be deemed approved upon the effective date of the local government legal action, resolution, or ordinance relating thereto. Such approval shall be subject to all rights of referendum and judicial review; except that the period of time permitted by law for the exercise of such rights shall not begin to run until the date of publication, in a newspaper of general circulation within the jurisdiction of the local government granting the approval, of a notice advising the general public of the site specific development plan approval and creation of a vested property right pursuant to this article. Such publication shall occur no later than fourteen days following approval.

(2) Zoning that is not part of a site specific development plan shall not result in the creation of vested property rights.

Idaho: Idaho Code § 67-6511, which includes this language:

(d) If a governing board adopts a zoning classification pursuant to a request by a property owner based upon a valid, existing comprehensive plan and zoning ordinance, the governing board shall not subsequently reverse its action or otherwise change the zoning classification of said property without the consent in

development agreements. Massachusetts has adopted a statute providing a developer with protection from zoning changes under specified circumstances:

If a definitive plan, or a preliminary plan followed within seven months by a definitive plan, is submitted to a planning board for approval under the subdivision control law, and written notice of such submission has been given to the city or town clerk before the effective date of ordinance or by-law, the land shown on such plan shall be governed by the applicable provisions of the zoning ordinance or by-law, if any, in effect at the time of the first such submission while such plan or plans are being processed under the subdivision control law, and, if such definitive plan or an amendment thereof is finally approved, for eight years from the date of the endorsement of such approval¹⁹⁶

The Massachusetts high court held that the zoning “freeze” applied even in a case where the town had the authority to “rescind” its approval of the subdivision plat; in short, the effect of the rescission, as interpreted by the court, was to eliminate the approval of the plat but to continue the zoning freeze that it established, apparently allowing the developer to apply again for subdivision approval under the original zoning.¹⁹⁷ The Massachusetts

writing of the current property owner for a period of four (4) years from the date the governing board adopted said individual property owner’s request for the zoning classification change. If the governing body does reverse its action or otherwise change the zoning classification of said property during the above four (4) year period without the current property owner’s consent in writing, the current property owner shall have standing in a court of competent jurisdiction to enforce the provisions of this section.

See, for further commentary, Terry D. Morgan, Vested Rights Legislation, 34 Urb. Law. 131 (2002).

196 Mass. Gen. Laws. ch. 40A, §6, ¶5.

197 *Heritage Park Dev. Corp. v. Town of Southbridge*, 424 Mass. 71, 674 N.E.2d 233 (1997).

appellate court has also considered the statute and given effect to it in a case in which it directed approval of the subdivision by the planning board on remand.¹⁹⁸

The Colorado statute is interesting because it demands certainty from the process, but it allows local governments to choose the stage of the process at which they grant certainty.¹⁹⁹ Some may choose to grant vesting with a very early approval, such as a preliminary plat or even a grading permit. The disadvantage of that to the local government is that it has less data at that point, but it may be offset by the fact that the five-year vesting period will run out sooner. Other local governments may choose to grant vesting at the last possible moment, perhaps at the final plat or even site-plan review stage. That gives the local government much more data on which to base a decision and creates a greater likelihood that the developer will actually complete the project; it also extends the vesting period farther into the future. The Washington Supreme Court has held that a developer has “vested” rights under state statute to pursue an application under the rules in place when the application was filed.²⁰⁰

198 Massachusetts Broken Stone Co. v. Planning Bd. of Weston, 45 Mass. App. Ct. 738, 701 N.E.2d 664 (1998).

199 Colo. Rev. Stat. §24.68-103.

200 Association of Rural Residents v. Kitsap County, 4 P.3d 115 (Wash. 2000), where the court held: “This court has stated that ‘[i]n Washington, ‘vesting’ refers generally to the notion that a land use application, under the proper conditions, will be considered only under the land use statutes and ordinances in effect at the time of the application’s submission.” *Id.* at 119, *citing* Noble Manor v. Pierce County, 133 Wash.2d 518, 522, 869 P.2d 1056 (1994); Vashon Island Comm. for Self-Gov’t v. Washington State Boundary Review Bd., 127 Wash.2d 759, 767-68, 903 P.2d 953 (1995). The case had an unusual set of facts. The county had approved an urban growth area, which would have excluded the proposed development, but a state appellate board had remanded it to the county for further consideration and the county had failed to take timely action on the remand. On those facts, the court held that the former PUD regulations of the county were the applicable regulations, as the urban growth area regulations currently had no effect. *See for additional commentary*, Gregory Overstreet & Diana M. Kirchheim, *The Quest for the Best Test to Vest: Washington’s Vested Rights Doctrine Beats the Rest*, 23 Seattle

In a sense, the choice does not matter. The important thing to both parties is to have certainty for some specified period of time. The Colorado law provides such a specified period of time. Where permitted by law, development agreements also provide a specified period of time.²⁰¹ Finally, and perhaps obviously, government cannot extinguish or modify a landowner's right without the landowner's consent, or without paying compensation.²⁰²

U.L.Rev. 1043 (Spring 2000), lauding Washington's common-law vested rights doctrine and vesting statute.

²⁰¹ See, Callies and Tappendorf, *supra*, n.1, and Callies, Curtin and Tappendorf, *Bargaining for Development, A Handbook on Development Agreements, Annexation Agreements, Land Development Conditions, Vested Rights, and the Provision of Public Facilities, supra*, n. 1.

²⁰² East Hempfield Township v. Brubaker, 828 A.2d 1184 (2003).