
RECOGNIZING VESTED DEVELOPMENT
RIGHTS AS PROTECTED PROPERTY
IN FIFTH AMENDMENT DUE PROCESS
AND TAKINGS CLAIMS

JOHN J. DELANEY*

EMILY J. VAIAS**

I. INTRODUCTION

In *Lucas v. South Carolina Coastal Council*,¹ the Supreme Court held that South Carolina's Beach Front Management Act effectuated a "taking" of Lucas's private property without just compensation during the time period when the restrictive legislation prevented construction on his

* John Delaney, partner, Linowes and Blocher LLP of Silver Spring, Greenbelt and Annapolis, Maryland, and Washington, D.C. B.S.S., Georgetown University, 1954; LL.B., Georgetown University Law Center, 1960; Adjunct Professor of Land Use Law and Local Government Law, The American University, Washington College of Law.

** Emily Vaias, Associate, Linowes and Blocher LLP of Silver Spring, Greenbelt and Annapolis, Maryland, and Washington, D.C. B.U.P., University of Cincinnati, College of Design, Architecture, Art and Planning, 1989; J.D., University of Maryland School of Law, 1992.

1. 112 S. Ct. 2886 (1992).

beachfront property.² Writing for the majority, Justice Scalia included a significant footnote discussing the need for clarity in regulatory takings cases as to the actual “property interest” against which the [claimed] loss of value is to be measured.”³ This footnote and the ensuing opinion suggest that when determining takings claims, courts should consider how the “owner’s reasonable expectations have been shaped by the State’s law of property”; that is, “whether and to what degree [state law] has accorded legal recognition and protection to the particular interest in land” which the claimant contends has been eliminated or diminished in value.⁴

The purpose of this article is to demonstrate that a landowner possessing vested development rights⁵ under state law has a property interest and reasonable expectations which are entitled to great weight when determining the viability of the landowner’s Fifth Amendment takings claim or substantive due process claim.⁶

II. THE ROLE OF DEVELOPMENT EXPECTATIONS

The premise that validation of a takings claim depends in large part upon the “expectations” of the landowner, and whether such expectations are sufficiently justified to constitute “property” in a constitutional sense, has its genesis in *Penn Central Transportation Co. v. New York City*.⁷ The Supreme Court, speaking through Justice Brennan, held that even

2. *Id.* at 2901-02.

3. *Id.* at 2894 n.7. The difficult task of defining the requisite “property interest” was avoided in *Lucas* because the “interest in land” that Lucas pleaded was a fee simple estate which has long enjoyed protection at common law. *Id.*

4. *Id.* In *Lucas*, the Court held that a regulation “eliminating all economically beneficial use[]” is a taking unless the landowner did not have an interest in the proscribed use. *Id.* at 2902 n.18. David Lucas bought two oceanside lots on which to build homes. *Id.* at 2889. At the time of his purchase there were few restrictions on the use of his property. *Id.* Two years later, the State passed the Beachfront Management Act which included regulations that barred Lucas from building any permanent habitable structure on his land. *Id.* at 2889-90. Lucas sued, asserting that the regulation constituted a taking without just compensation under the Fifth and Fourteenth Amendments because it effected a “complete extinguishment of his property’s value.” *Id.* at 2890.

5. See *infra* part III for a discussion of the concept of vested rights.

6. The Fifth Amendment states, “No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

7. 438 U.S. 104 (1978).

though a government regulation may cause economic harm, it would not constitute a taking unless it interfered with "interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes."⁸ The viability of the landowner's expectations apparently is enhanced if they are "investment-backed."⁹

Thus, to successfully pursue a takings claim, one must possess development expectations recognized by state law which are reasonable enough to form a property interest. One must also have a cognizable property interest under state law to support a due process claim, at least in federal court. As the Supreme Court stated in *Board of Regents v. Roth*,

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.¹⁰

8. *Id.* at 125.

9. *Id.* at 124. See also *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) (holding that when owners of a marina dredged it and connected it to a bay the government could not force the owners to open the marina to the public without compensation); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494-95 (1987) (recognizing *Kaiser* as stating that investment-backed expectations are a factor to consider when examining the "taking" question).

10. 408 U.S. 564, 577 (1972). Roth was an untenured professor hired for one year to teach at the University of Wisconsin. *Id.* at 566. The University did not rehire him for the next year and did not give cause. *Id.* Roth brought suit arguing that he had a "property interest" in continued employment and was therefore entitled to procedural due process under the Fourteenth Amendment. *Id.* at 568-69. The Supreme Court held that Roth's property interest in continued employment, if any, was defined by the terms of his employment which were that he teach for one year with no guarantee of rehiring. *Id.* at 578. Therefore, the Court found no property interest. *Id.*

Confusion has reigned in federal courts as to whether the *Roth* analysis is applicable to land regulation cases; *i.e.*, whether the plaintiff's property interest lies in the land he owns or in the development permit he seeks. For cases adopting the latter (and apparently the minority) view, see *Gardner v. City of Baltimore*, 969 F.2d 63 (4th Cir. 1992) (noting that failure to issue a permit did not deprive the developers of their due process rights because there was no property interest in the permit); *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911 (2d Cir. 1989) (same); *Chongris v. Board of Appeals*, 811 F.2d 36 (1st Cir. 1987) (holding that revocation of a building permit did not deny applicants due process); *Yale Auto Parts v. Johnson*, 758 F.2d 54 (2d Cir. 1985) (holding that an auto junkyard proprietor lacked a protectable property interest under the Due Process Clause because he was not entitled to a Zoning Board of Appeals certificate of

Prior to making this statement, the Court discussed what was required to demonstrate a "property interest in a benefit" (in the instant case, an assistant professor's tenure rights). The Court concluded that one must have more than an "abstract need or desire" for the benefit, and more than a "unilateral expectation" of it. Rather, one must have a "legitimate claim of entitlement to it" under state law.¹¹

With the myriad of state, local, and federal regulations now thrust upon landowners, the exact definition of "property" for Fifth Amendment purposes will become increasingly important. The physical tract of land alone does not sufficiently represent the "bundle of rights"¹² that one acquires by land ownership. The right to use and develop that land is most often a more important interest.¹³ Consequently, as plans are prepared and zoning and often numerous post-zoning development approvals are obtained,¹⁴ the landowner's expectations are increased. The landowner's interest in completing the project becomes just as imperative as maintaining the actual land itself. Once the landowner spends large sums of money in reliance upon development approvals, by installing roads, utilities, and other infrastructure improvements, or dedicating amenities such as parkland or school sites to public use, the expectations of the developer become "investment backed."¹⁵ Accord-

location approval as a matter of right and there was not a strong likelihood the certificate would have been granted).

In *Hartland Sportsman's Club v. Town of Delafield*, 35 F.3d 1198 (7th Cir. 1994), the Seventh Circuit held that the denial of a site plan, although unlawful under state law, did not give rise to a federal substantive due process claim. The court asserted this, despite the fact that development rights had vested, because the plaintiff had not pursued its state remedies or shown that they were inadequate. *Id.* at 1202-03.

11. *Roth*, 408 U.S. at 577. See Kenneth B. Bley & Tina R. Axelrod, *The Search for Constitutionally Protected "Property" in Land Use Law* 18 (July 4, 1995) (unpublished manuscript, on file with the *Washington University Journal of Urban and Contemporary Law*).

12. *Lucas*, 112 S. Ct. at 2899; *Keystone*, 480 U.S. at 479.

13. *Lucas*, 112 S. Ct. at 2894. See also *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

14. Post-zoning development approvals may include subdivision, adequacy of public facilities, site plan, special exceptions, variances, and a variety of permits, including wetlands, storm-water management, sewer and water connections, demolition, grading, foundation, and building permits.

15. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). In 1967, New York City's Landmarks Preservation Board designated Penn Central Terminal as a protected site. *Id.* at 115-16. Shortly thereafter, Penn Central leased the property above

ingly, it is reasonable for the landowner to expect that subsequent changes in zoning or post-zoning land use regulations will not hinder or prevent completion of the project.¹⁶

III. THE CONCEPT OF VESTED RIGHTS

Extensive and often conflicting caselaw regarding "vested rights" demonstrates that it is not always reasonable for developers to expect that changes in zoning or post-zoning land use regulations will not affect the completion of their projects. Only after landowners acquire vested rights under state law are they free to continue a project in the face of subsequent changes to land use regulations that would otherwise preclude continuing the project. Vested rights are defined as "a right which the law recognizes as having accrued to an individual by virtue of certain circumstances and that as a matter of constitutional law cannot be arbitrarily taken away from that individual."¹⁷ In a very real sense, this definition suggests that a type of property interest exists that cannot be denied or eradicated by governmental regulation. In fact, many state courts use the words "vested right" and "property right" interchangeably. This lends further support to the notion that a vesting inquiry will prove beneficial to courts when they decide Fifth Amendment takings or due process challenges to land use regulations.

Generally, the black-letter rule for acquisition of vested rights provides that a landowner will be protected when: (1) relying in good faith, (2) upon some act or omission of the government, (3) he has made substantial changes or otherwise committed himself to his substantial disadvantage prior to a zoning change.¹⁸ Similarly, as noted, a court will consider a Due Process or Takings Clause challenge to the retroactive application of new land use regulations to previously

the terminal to a development company. *Id.* at 116. Penn Central and the development company applied for a permit to construct an office building above Penn Central which the Landmarks Preservation Commission denied. *Id.* at 118. The Supreme Court held that the landmark designation did not constitute an unlawful taking because Penn Central had not been deprived of its ordinary use of the terminal, even though the value of the property may have been greatly limited. *Id.* at 138.

16. See Robert M. Washburn, "Reasonable Investment-Backed Expectations" as a Factor in Defining Property Interest, 49 WASH. U. J. URB. & CONTEMP. L. 63 (1996), for a full discussion of this subject.

17. BRIAN W. BLAESSER ET AL., LAND USE AND THE CONSTITUTION: PRINCIPLES FOR PLANNING PRACTICE 8-9 (Brian W. Blaesser & Alan C. Weinstein eds., 1989).

18. *Sgro v. Howarth*, 203 N.E.2d 173, 177 (Ill. App. Ct. 1964).

approved (and often in progress) construction projects only when a landowner can prove the existence of a protectable "property interest."¹⁹

It is not the purpose of this Article to fully explore how development rights become vested in each state. Rather, the goal is to identify those states whose courts have equated vested rights with "property rights" or "property interests" which are constitutionally protected under state law. Landowners possessing vested rights in these states who pursue federal court Substantive Due Process or Takings Clause challenges to regulatory actions that affect their land should have less difficulty establishing standing. However, a few general comments on the prevailing vesting tests are offered.²⁰

Suffice it to say, few, if any, bright-line tests have emerged concerning vested rights, and the caselaw is often inconsistent and confusing. Most states require the issuance of a building permit and physical acts of construction in order to vest one's rights.²¹ Other states decide vesting disputes based upon an ad hoc case-by-case analysis, using highly subjective tests to determine what constitutes substantial reliance or a material change in position. One such test, known as the "proportionate ratio test," compares the percentage of monies spent or obligations incurred before the regulatory change to the expected total

19. *Board of Regents v. Roth*, 408 U.S. 564, 577-78 (1972). Whether the "property interest" lies in the land itself or in plaintiff's development approval is not entirely clear. See generally Bley & Axelrod, *supra* note 11. However, this issue is not central to this Article's principal thesis that a cognizable property interest arises when a project is vested under state law.

20. See Appendix I, Part A, *How Vesting Occurs in Each State*, and Appendix II, *State-by-State Synopsis of Vested Rights Cases in Alphabetical Order*, *infra*.

For in-depth discussions of the law of vested rights and the various tests used by state courts, see DANIEL R. MANDELKER, *LAND USE LAW* §§ 6.11-6.22 (2d ed. 1988); CHARLES L. SIEMON & WENDY U. LARSEN, *VESTED RIGHTS: BALANCING PUBLIC AND PRIVATE DEVELOPMENT EXPECTATIONS* (1982); John J. Delaney & William Kominers, *He Who Rests Less, Vests Best: Acquisition of Vested Rights in Land Development*, 23 ST. LOUIS U. L.J. 219 (1979); Wendy U. Larsen & Steven M. Elrod, *An Update on Vested Rights*, *LAND USE LAW & ZONING DIG.*, Aug. 1983, at 4.

21. See, e.g., *Prince George's County v. Sunrise Dev. Ltd.*, 623 A.2d 1296, 1304-05 (Md. 1993) (holding that construction of a concrete footing for apartment building were insufficient to vest rights where developer's only building permit was for the column footings); *Avco Community Developers v. South Coast Regional Comm'n*, 553 P.2d 546, 550-54 (Cal. 1976) (holding that subdivision and grading of property and installation of certain utilities were insufficient to vest rights where developer did not have a building permit).

cost of the completed project.²² Another is the “balancing test,” where the public interest is weighed against the expenses and obligations incurred toward the proposed development.²³ These subjective tests lend little predictability to the process, particularly in court adjudications, and bring scant comfort to developers and their lenders.²⁴

As a result of these problems, some states have attempted to deal with the issue of vested rights through legislation or have enacted laws allowing local governments and landowner-developers to enter into “development rights agreements” as part of the land use approval process.²⁵ One of the major features of the development agreement is a provision for a “freeze period” during which subsequent changes to the law or regulations will not affect the developer’s right to complete the project, except under exigent circumstances affecting public health and safety.

22. See, e.g., *Reichenbach v. Windward at Southampton*, 364 N.Y.S.2d 283, 288 (N.Y. Sup. Ct. 1975) (holding that expenditures of \$6,495 were not “substantial in relation to the total cost of the project,” and therefore were insufficient to vest the developer’s rights); *Clackamas County v. Holmes*, 508 P.2d 190, 192-93 (Or. 1973) (stating that the ratio test should be considered along with other factors when determining whether a landowner’s right to develop has vested).

23. See, e.g., *Nott v. Wolff*, 163 N.E.2d 809, 812 (Ill. 1960) (“When one challenges the validity of a zoning ordinance which has been adopted pursuant to legislative grant, it is incumbent that he prove by clear and convincing evidence that it is, as applied to him, arbitrary and unreasonable and without substantial relation to the public health, safety or welfare.”).

24. See *supra* note 20.

25. Colorado and Texas have enacted vested rights legislation. See COLO. REV. STAT. ANN. §§ 24-68-101 to 24-68-106 (West 1990 & Supp. 1995); TEX. GOV’T CODE ANN. §§ 481.141-481.143 (West 1990). The City of Greensboro, North Carolina has amended its zoning ordinance pursuant to state law (N.C. GEN. STAT. § 160A-385.1 (1994)) to establish vested rights in approved Site Specific Development Plans.

Other states have enacted development agreements legislation. See ARIZ. REV. STAT. ANN. § 9-500.05 (1990); CAL. GOV’T CODE §§ 65864-65869.5 (West 1983 & Supp. 1995); FLA. STAT. ANN. §§ 163.3220-163.3243 (West 1991 & Supp. 1995); HAW. REV. STAT. §§ 46-121 to 46-132 (1985); MD. CODE ANN. art. 28, § 7-121 (1995) and MD. CODE ANN. art. 66B, § 13.01 (1995); MINN. STAT. ANN. § 462.358 (West 1991); NEV. REV. STAT. § 278.0201 (1991); N.J. STAT. ANN. §§ 40:55D-45.2 (West 1991).

For helpful discussions of development agreements, see Daniel J. Curtin, Jr. & Scott A. Edelstein, *Development Agreement Practice in California and Other States*, 22 STETSON L. REV. 761 (1993); Theodore C. Taub, *Development Agreements*, 1991 A.L.I.-A.B.A. LAND USE INST. 555.

IV. THE RELATIONSHIP OF A VESTED RIGHT TO A PROPERTY INTEREST IN STATE COURTS

The "vested rights" doctrine essentially is a state law concept, while "due process" and "takings" principles are federal constitutional protections. Claims founded upon these premises are made by landowners who are faced with halted construction or increased regulation of approved or "in progress" development. Due process and takings analyses require an initial determination that a liberty or property interest is at stake.²⁶ A property interest is defined as "more than a unilateral expectation . . . [there must be] a legitimate claim of entitlement to it."²⁷ Additionally, this interest is created by "existing rules or understandings that stem from an independent source such as state law," and not by the federal Constitution.²⁸

Some courts look not only to state regulations, but also to whether the granting of nondiscretionary permit approvals creates a cognizable property interest.²⁹ This analysis may suffice when tangible or easily identifiable property is at stake. However, when the interest is something less definite and springs from the concept that landowners should be free from the retroactive application of land use regulations, which are prima facie valid exercises of the police power, it is evident that courts may need the additional guidance suggested by Justice Scalia.³⁰

A significant portion of this guidance may be found in the existing caselaw on vested rights, which, as noted, has developed primarily in state courts.³¹ A review of the state caselaw on vested rights reveals that a substantial majority of states, thirty in number, expressly or impliedly consider a vested right to be the equivalent of a property interest or right. Of these thirty, twenty-two states expressly equate a

26. Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972).

27. *Id.* at 577.

28. *Id.*

29. See Gardner v. City of Baltimore, 969 F.2d 63, 68 (4th Cir. 1992); RRI Realty Corp. v. Incorporated Village of Southampton, 870 F.2d 911, 917 (2d Cir. 1989); Yale Auto Parts v. Johnson, 758 F.2d 54, 60 (2d Cir. 1985).

30. See Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2894 n.7 (1992).

31. See Appendix I, Part A, *How Vesting Occurs In Each State*, and Appendix II, *State-by-State Synopsis of Vested Rights Cases in Alphabetical Order*, *infra*.

vested right with property or a property interest,³² while eight states implicitly suggest that a vested right is equivalent to a property right.³³ Therefore, if under applicable state law a landowner acquires a vested right, and thus a property interest deserving protection, an intervening regulation or government action that purports to cut-off that right will almost certainly precipitate a substantive due process claim and arguably a takings claim as well.

V. APPLYING VESTED RIGHTS TO FIFTH AMENDMENT CLAIMS

A. *Due Process*

A landowner bringing a Fifth Amendment due process or takings claim would first cite the governmental approval action or series of actions which heightened the claimant's reasonable development expectations and gave rise under state law to the claimant's vested right and subsequent property interest. In a due process case, the burden then falls upon Government to show how it "could rationally have decided" that its action, which purports to cut off the vested right, was related to a valid public purpose.³⁴ Respected authority exists for the proposition that courts, when examining Fifth Amendment claims, should employ

32. States expressly equating a vested right with a property interest include:

Arizona	Hawaii	Oklahoma	Rhode Island
Arkansas	Iowa	Nebraska	South Carolina
California	Kentucky	New York	Washington
Delaware	Michigan	North Carolina	West Virginia
Florida	Minnesota	Ohio	
Georgia	Missouri	Pennsylvania	

See Appendix I, Part B, *Courts Equating Vesting With A Property Interest*, and Appendix II, *State-by-State Synopsis of Vested Rights Cases in Alphabetical Order*, *infra*.

33. States implicitly suggesting that a vested right is equivalent to a property right include:

Alabama	Illinois	Kansas	Tennessee
Connecticut	Indiana	Maryland	Virginia

See Appendix I, Part B, *Courts Equating Vesting With A Property Interest*, and Appendix II, *State-by-State Synopsis of Vested Rights Cases in Alphabetical Order*, *infra*.

34. See the discussion of the distinction between due process and takings analyses, as set forth in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 n.3, 843 (1987) (Brennan, J., dissenting) (emphasis omitted) (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981)).

strict or "active" scrutiny in their review of a new regulation.³⁵ At the very least, the Government should bear a heavy burden as it attempts to provide a rational basis for an action that directly contradicts its prior police power approval actions. These approval actions may have been numerous and occurred over a period of years, and all are presumed to have promoted valid public health, safety, or welfare goals. Accordingly, these approval actions, alone or cumulatively, create a vested right and thus a property interest belonging to the claimant under state law.

B. *Takings: Failure to Substantially Advance
a Legitimate State Interest*

Similarly, in a Fifth Amendment takings case, the plaintiff must first recite the facts that establish the project's vested status under state law. The plaintiff then would show how the challenged regulation either fails to "substantially advance legitimate state interests" or denies the plaintiff "economically viable use of his land."³⁶ If the claim is based primarily upon the failure of the regulation to achieve the asserted legitimate state interest,³⁷ the plaintiff must proceed by detailing the history of development approvals he received for his project which reflect a prior valid exercise of the police power to substantially advance legitimate state interests. The burden then shifts to Government to demonstrate how the

35. Under this approach, a new or changed regulation would be valid even though it destroys a development expectation or right to develop unless:

- the development expectation was *reasonable and final* when it was formulated;
- the expectation is *investment-backed*;
- impairment of the investment-backed expectation is *substantial*; and
- the new or changed regulation cannot bear strict or active judicial scrutiny by which the court determines whether the law in question is necessary to promote a compelling governmental interest.

See CHARLES L. SIEMON & WENDY U. LARSEN, WITH DOUGLAS R. PORTER, *VESTED RIGHTS: BALANCING PUBLIC AND PRIVATE DEVELOPMENT EXPECTATIONS* 4, 48-69 (The Urban Land Institute 1982).

36. *Lucas*, 112 S. Ct. at 2894 (emphasis omitted) (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)).

37. See *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994) and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) for analyses of this type of claim. Unlike *Lucas*, where the court conducted a "total takings" inquiry, 112 S. Ct. at 2901, the analysis in *Dolan* and *Nollan* focused upon the nexus between the challenged action and the public purpose asserted to justify it and upon the degree of proportionality between the action and the impact of the project.

new regulation, which reverses its prior approvals and purports to divest the project of its vested status, nevertheless substantially advances a legitimate state interest.

C. *Taking: Denial of Economically Viable Use*

If the takings claim is based upon the denial of economically viable use of land, the claimant would not necessarily have to demonstrate that she has obtained vested rights under state law.³⁸ A compensable taking still may have occurred, unless under the state's common law of property and nuisance the proscription of development rights preceded the claimant's acquisition of title.³⁹ If a developer's project also has acquired vested rights under state law, her economic deprivation claim would be enhanced.

In an interesting footnote in the *Lucas* opinion, the Court stated that the right to compensation is not necessarily limited to those circumstances where the landowner has been deprived of *all* economically beneficial use of property.⁴⁰ Even where the deprivation may be somewhat less than complete, the landowner may be entitled to compensation, based upon the economic impact of the regulation on the landowner and "*the extent to which the regulation has interfered with distinct investment-backed expectations.*"⁴¹ The Court described the existence of such expectations as "keenly relevant" to the takings analysis.⁴² Thus, a landowner whose rights have vested under state law clearly would have expectations of a highly developed nature. This arguably would entitle the landowner to compensation, even in the absence of a complete wipeout or "total take."

38. For example, in *Lucas*, there is no indication that the successful plaintiff possessed vested rights, because plaintiff did not possess a building permit, and under South Carolina law, vesting occurs only upon issuance of a building permit and expenditures in reliance thereon. 112 S. Ct. at 2889. See Appendix I, Part A, *How Vesting Occurs In Each State*, and Appendix II, *State-By-State Listing Synopsis of Vested Rights Cases in Alphabetical Order*, *infra*.

39. *Lucas*, 112 S. Ct. at 2900.

40. *Id.* at 2895 n.8.

41. *Id.* (emphasis added) (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

42. *Id.* The concept of a compensable "partial taking" was also recognized in *Florida Rock Indus. v. United States*, 18 F.3d 1560, 1568 (Fed. Cir. 1994) (denial of a Clean Water Act permit).

A court formulating its takings analysis should first consider whether there has been a categorical taking under *Lucas*. This requires the court to determine whether the governmental action falls within one of the two categories of land use regulations which require compensation without a "case-specific inquiry into the public interest advanced in support of the restraint."⁴³ If the action involves a physical "invasion" of the landowner's private property, it would come under the first *Lucas* category and compensation would be required.⁴⁴ The second category encompasses situations where a regulation "denies all economically beneficial or productive use of land."⁴⁵

If the government action does not result in a per se taking under the *Lucas* categorical rule, the court would then conduct a *Penn Central*-type case-specific inquiry into the public interest advanced in support of the action.⁴⁶ Under this approach, the court first considers the character of the governmental action; *i.e.*, its intended purpose as an exercise of police power to promote public health, safety, or welfare. As noted, where the landowner has attained vested rights and thus a property interest under state law, judicial scrutiny might be more active where the public interest allegedly advanced in support of the new regulation operates to rescind prior development approvals.⁴⁷

Having reviewed the character of the governmental action, a court would then analyze its economic impact upon the claimant and the extent to which the action has interfered with the claimant's distinct investment-backed expectations.⁴⁸ Again, one whose project has achieved vested status under state law would have high expectations which are both reasonable and investment-backed. This should obviously affect a court as it evaluates the economic impact of the challenged regulation upon the landowner.

43. *Lucas*, 112 S. Ct. at 2893.

44. *Id.* See also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) (holding that New York's law requiring landlords to allow cable television companies to install cable facilities constituted a taking).

45. *Lucas*, 112 S. Ct. at 2893.

46. *Penn Central*, 438 U.S. at 124, 127.

47. See *supra* note 34.

48. *Penn Central*, 438 U.S. at 124.

VI. CONCLUSION

When a court evaluates Fifth Amendment takings and substantive due process claims, it must inquire whether the landowner has a cognizable property interest under state law, and to what extent the landowner's reasonable development expectations have been shaped by state law. The answer to these inquiries can often be gleaned from the state's law on vested rights. Where, under state law, a claimant's project has acquired vested rights, the court should find that the requisite property interest and development expectations exist to sustain such Fifth Amendment claims.

APPENDIX I: PART A
HOW VESTING OCCURS IN EACH STATE

STATE	BUILDING PERMIT APPLICATION	PROBABILITY OF BUILDING PERMIT ISSUANCE PLUS EXPENDITURES AND OFFICIAL ASSURANCE	BUILDING PERMIT ISSUED (NO CONSTRUCTION)	BUILDING PERMIT ISSUED PLUS RELIANCE/ EXPENDITURES	BUILDING PERMIT ISSUED PLUS SUBSTANTIAL CONSTRUCTION	EQUITABLE ESTOPPEL INCURRING EXPENSES	BALANCING INTERESTS
AL							X
AK							
AR				X			
AZ				X			
CA				X			
CO				X			
CT					X		
DE				X			
FL						X	
GA		X	X				
HI		X					

STATE	BUILDING PERMIT APPLICATION	PROBABILITY OF BUILDING PERMIT ISSUANCE PLUS EXPENDITURES AND OFFICIAL ASSURANCE	BUILDING PERMIT ISSUED (NO CONSTRUCTION)	BUILDING PERMIT ISSUED PLUS RELIANCE/ EXPENDITURES	BUILDING PERMIT ISSUED PLUS SUBSTANTIAL CONSTRUCTION	EQUITABLE ESTOPPEL INCURRING EXPENSES	BALANCING INTERESTS
ID	X						
IL		X					
IN					X		
IA							X
KS					X		
KY				X		X	
LA					X		
ME						X	
MD					X		

"recognizable, on inspection of the property by a reasonable member of the public"

STATE	BUILDING PERMIT APPLICATION	PROBABILITY OF BUILDING PERMIT ISSUANCE PLUS EXPENDITURES AND OFFICIAL ASSURANCE	BUILDING PERMIT ISSUED (NO CONSTRUCTION)	BUILDING PERMIT ISSUED PLUS RELIANCE/ EXPENDITURES	BUILDING PERMIT ISSUED PLUS SUBSTANTIAL CONSTRUCTION	EQUITABLE ESTOPPEL INCURRING EXPENSES	BALANCING INTERESTS
MA	X according to legislative provisions						
MI					X		
MN	X (if not discretionary)						
MS					X		
MO				X			
MT	(no cases)						
NE					X		
NV				X			
NH					X		
NJ				X			X

STATE	BUILDING PERMIT APPLICATION	PROBABILITY OF BUILDING PERMIT ISSUANCE PLUS EXPENDITURES AND OFFICIAL ASSURANCE	BUILDING PERMIT ISSUED (NO CONSTRUCTION)	BUILDING PERMIT ISSUED PLUS RELIANCE/ EXPENDITURES	BUILDING PERMIT ISSUED PLUS SUBSTANTIAL CONSTRUCTION	EQUITABLE ESTOPPEL INCURRING EXPENSES	BALANCING INTERESTS
NM						X	
NY					X		
NC				X			
ND				X			
OH	X (if complied with all legislative requirements)			X			
OK				X			X
OR							X
PA					X (unless act in bad faith)		
RI				X			

STATE	BUILDING PERMIT APPLICATION	PROBABILITY OF BUILDING PERMIT ISSUANCE PLUS EXPENDITURES AND OFFICIAL ASSURANCE	BUILDING PERMIT ISSUED (NO CONSTRUCTION)	BUILDING PERMIT ISSUED PLUS RELIANCE/ EXPENDITURES	BUILDING PERMIT ISSUED PLUS SUBSTANTIAL CONSTRUCTION	EQUITABLE ESTOPPEL INCURRING EXPENSES	BALANCING INTERESTS
SC				X			
SD	(no cases)						
TN					X		
TX					X		
UT	X						
VT	X						
VA					X		
WA	X (by legislation)						X
WV							X
WI				X			
WY				X		X	

APPENDIX I: PART B
 COURTS THAT EQUATE VESTING
 WITH A PROPERTY INTEREST

STATE	DEFINITIVE LANGUAGE	SUGGESTIVE LANGUAGE	NO INDICATION
AL		"vested right in the property"	
AK			X
AZ	"protectible property right"		
AR	"a kind of property right"		
CA	vested property right which cannot be taken away except by eminent domain		
CO			X
CT		"vested property right"	
DE	"acquired real property rights"		
FL	development permit is a "species of property for due process and taking clause purposes"		
GA	vesting rules deal with the time that "property rights in property as zoned vest"		
HI	focus of vested rights is whether one "acquired real property rights"		
ID			X
IL		"vested property right"	

STATE	DEFINITIVE LANGUAGE	SUGGESTIVE LANGUAGE	NO INDICATION
IN		"vested property interest"	
IA	legitimate expenditures before the change in regulation "may create a property right"		
KS		"vested property rights"	
KY	"acquired real property rights"		
LA			X
ME			X
MD		vested rights as rights protected by the Takings Clause	
MA			X
MI	"property rights can vest"		
MN	"constitutionally protected property interest" in a building permit		
MS			X
MO	"acquires a property or vested right"		
MT (no cases)			
NE	"nor does the permittee acquire a property right in the permit absent a showing substantial construction had already been undertaken"		

STATE	DEFINITIVE LANGUAGE	SUGGESTIVE LANGUAGE	NO INDICATION
NV			X
NH			X
NJ			X
NM			X
NY	"vested right" constitutes a "property interest"		
NC	"to acquire a property right"		
ND			X
OH	"in essence, a vested right is a property right"		
OK	vested right is "substantially a property right"		
OR			X
PA	"a property interest arises"		
RI	"property interest in the building permit"		
SC	"acquired a property right"		
SD (no cases)			
TN		property right comparable to vested right	
TX			X
UT			X
VT			X

STATE	DEFINITIVE LANGUAGE	SUGGESTIVE LANGUAGE	NO INDICATION
VA		"vested property right"	
WA	"property development rights constitute 'a valuable property right'"		
WV	no protectible property interest where no vested rights		
WI			X
WY			X

APPENDIX II

STATE-BY-STATE SYNOPSIS OF VESTED RIGHTS CASES
IN ALPHABETICAL ORDER*Alabama*

Grayson v. City of Birmingham, 173 So. 2d 67, 70 (Ala. 1963) (discussing “vested right in the property” and determining that whether there is a vested right depends on the existence of equitable fairness to the landowner and general public).

Alaska

Anchorage v. Sandberg, 861 P.2d 554, 561 (Alaska 1993) (holding that municipality’s activities did not constitute a taking of a speculative developer’s “vested rights”).

Arizona

Town of Paradise Valley v. Gulf Leisure Corp., 557 P.2d 532, 540 (Ariz. Ct. App. 1976) (finding that refusal to extend special use permit and building permits by the town was “arbitrary and capricious,” and that “no actual physical constriction need be commenced but that substantial monetary expenditures, the invocation of considerable contractual commitments, and extensive preparatory proceedings will give rise to a protectible property right”).

Neal v. City of Kingman, 810 P.2d 572, 578 (Ariz. Ct. App. 1990) (finding vested right arises where permit has been legitimately issued and permittee has substantially relied upon permit and incurred considerable expense, or permittee in good faith substantially has commenced construction).

Fidelity Nat’l Title Ins. Co. v. Pima County, 831 P.2d 426, 428 (Ariz. Ct. App. 1992) (“The general rule is that any substantial change of position, expenditures, or incurrence of obligations under a building permit entitles the permittee to complete the construction and use the premises for the purpose authorized irrespective of subsequent zoning or changes in zoning.”) (quoting Deer Park Civic Ass’n v. City of Chicago, 106 N.E.2d 823, 825 (Ill. App. Ct. 1952)).

Arkansas

Tankersley Bros. Indus. v. City of Fayetteville, 296 S.W.2d 412, 415 (Ark. 1956) (holding that where a building permit was issued and business was lawfully operating, owner had acquired “a kind of property

right on which [it] was entitled to protection” from arbitrary governmental action).

W.C. McMinn Co. v. City of Little Rock, 516 S.W.2d 584, 588 (Ark. 1974) (holding that where owner-company incurred substantial expense in upgrading its property without any objections from the City, “[t]o uphold [the city’s] action would result in a substantial loss of [company’s] investment, making such action inequitable and unjust”).

California

Trans-Oceanic Oil Corp. v. City of Santa Barbara, 194 P.2d 148, 152 (Cal. Dist. Ct. App. 1948) (“[A valid] permit ripens into a vested property right which may not be taken from him against his will other than by proceedings in eminent domain with the payment of just compensation.”).

Goat Hill Tavern v. City of Costa Mesa, 8 Cal. Rptr. 2d 385, 392 (Cal. Ct. App. 1992) (noting the trial court’s use of the independent judgment test and determining the owner had a vested fundamental right to continue operating the tavern).

AVCO Community Developers v. South Coast Regional Comm’n, 553 P.2d 546, 550 (Cal. 1976) (“[I]f 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.”).

Colorado

Ficarra v. Dep’t of Regulatory Agencies, 849 P.2d 6, 17 (Colo. 1993) (“No fixed formula . . . measures the content of all the circumstances whereby a party is said to possess ‘a vested right.’”) (citing *Incorporated Village of Northport v. Guardian Fed. Sav. & Loan Ass’n*, 384 N.Y.S.2d 923, 928 (N.Y. Sup. Ct. 1976)).

Van Sickle v. Boyes, 797 P.2d 1267, 1271 (Colo. 1990) (“A building permit can form the basis for a vested right if the permit holder takes steps in reliance on the permit.”).

P-W Investments v. City of Westminster, 655 P.2d 1365, 1371 (Colo. 1982) (“A city [building] permit can provide the foundation for a vested right, and thus be constitutionally protected from impairment by subsequent legislation, if the permit holder takes steps in reliance upon the permit.”).

Connecticut

Brady v. Town of Colchester, 863 F.2d 205, 212 (2d Cir. 1988) (discussing “vested property rights” and suggesting that they may amount to “protectible fourteenth amendment property rights”).

Graham Corp. v. Board of Zoning Appeals, 97 A.2d 564, 566-67 (Conn. 1953) (holding that beginning work not substantially related to construction and possessing building permit are insufficient to establish a vested right).

Parker-Quaker Corp. v. Young, 184 A.2d 553, 556 (Conn. Super. Ct. 1962) (finding that developer had a vested right where, in reliance on issuance of valid building permits, developer had performed considerable work in demolishing existing building and in construction of new building before building inspector notified him of inspector's intention to revoke permits).

Delaware

Miller v. Board of Adjustment, 521 A.2d 642, 645 (Del. Super. Ct. 1986) (describing the vested rights doctrine as focussing on "whether the owner acquired real property rights which cannot be taken away by government regulation.") (quoting Allen v. City & County of Honolulu, 571 P.2d 328, 329 (Haw. 1977)).

Shellburne, Inc. v. Roberts, 224 A.2d 250, 254 (Del. 1966) (stating that issuance of building permit for a particular use alone does not create a vested right in a particular zoning classification).

Florida

Villas of Lake Jackson, Ltd. v. Leon County, 796 F. Supp. 1477, 1478 (N.D. Fla. 1992) ("[A] development permit duly issued by a Florida local government is a species of property for due process and taking clause purposes, especially if the property owner has taken actions in reliance upon the permit to his detriment.").

Hollywood Beach Hotel Co. v. City of Hollywood, 329 So. 2d 10, 17-18 (Fla. 1976) (holding that plaintiffs had a vested property right because they acted in good faith reliance on rezoning for multiple family use dwellings and made considerable financial investment on preliminary plans).

Key West Harbour Dev. Corp. v. City of Key West, 987 F.2d 723, 729 n.4 (11th Cir. 1993) (distinguishing *Villas* on the basis that in *Villas* the landowner detrimentally relied on assurances from the County whereas in this case "the only agreement that the appellees signed clearly stated that the appellant would not acquire vested property rights to redevelop the property").

Decarion v. Monroe County, 853 F. Supp. 1415, 1419 (S.D. Fla. 1994) ("[E]quitable estoppel may create property interests in obtaining permits even where no permits have been issued, where the statutory

prerequisites have been met and the agency had no discretionary power to deny the permit.”).

Georgia

WMM Properties v. Cobb County, 339 S.E.2d 252, 254-55 (Ga. 1986) (stating that vesting rules deal with the time that “property rights in property as zoned vest” and that these rules include the “Right to Rely upon Building and Other Permits Once Issued,” the “Right to Issuance of a Building Permit,” the “Right to Rely upon Approved Development Plan,” and the “Right to Rely upon Official Assurances that a Building Permit Will Probably Issue”).

Cohn Communities v. Clayton County, 359 S.E.2d 887, 889 (Ga. 1987) (“The rule in Georgia is that where a landowner makes a substantial change in position by expenditures in reliance upon the probability of the issuance of a building permit, based upon an existing zoning ordinance and the assurances of zoning officials, he acquires vested rights. . .”).

Jackson v. Delk, 361 S.E.2d 370, 372 (Ga. 1987) (“[T]he issuance of a building permit, as well as various other forms of administrative approval, vests the right of the permittee to develop his or her property in accordance with existing zoning or regulatory laws.”) (citing WMM Properties v. Cobb County, 339 S.E.2d 252 (Ga. 1986)).

Hawaii

Allen v. City & County of Honolulu, 571 P.2d 328, 329 (Haw. 1977) (stating that to determine vested rights, the court looks to see “whether the owner acquired real property rights which cannot be taken away by governmental regulation”) (quoting David G. Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Right to Zoning Disputes*, 1971 URB. L. ANN. 63, 65).

Kaiser Dev. Co. v. City & County of Honolulu, 649 F. Supp. 926, 937 (D. Haw. 1986) (rejecting developer’s claim of “vested property rights” because developer relied on a general plan that was not an actual ordinance), *aff’d*, 913 F.2d 573 (9th Cir. 1990), *cert. denied sub nom.* Lyman v. City & County of Honolulu, 499 U.S. 954 (1991).

Idaho

Cunningham v. City of Twin Falls, 874 P.2d 587, 592 (Idaho Ct. App. 1994) (refusing to equate a building permit applicant’s rights with property rights).

Illinois

Pioneer Trust & Sav. Bank v. County of Cook, 377 N.E.2d 21, 26 (Ill. 1978) (“[W]here there has been a substantial change of position, expenditures or incurrence of obligations made in good faith by an innocent party under a building permit or in reliance upon the probability of its issuance, such party has a vested property right and he may complete the construction and use the premises for the purposes originally authorized, irrespective of subsequent zoning or a change in zoning classifications.”) (quoting *People ex rel. Skokie Town House Builders v. Village of Morton Grove*, 157 N.E.2d 33, 37 (Ill. 1959)).

Lucas v. Village of La Grange, 831 F. Supp. 1407, 1413 (N.D. Ill. 1993) (following *Pioneer Trust*, 377 N.E.2d 21 (Ill. 1978), and stating that under Illinois law, “there is ordinarily no vested right in the continuance of a zoning law or ordinance” except when “there has been a substantial change of position, expenditures or incurrence of obligations made in good faith by an innocent party under a building permit or in reliance upon the probability of its issuance . . .”).

Constantine v. Village of Glen Ellyn, 575 N.E.2d 1363, 1376 (Ill. App. Ct. 1991) (finding a party has a “vested property right” if the party relied on the probable issuance of building permit in good faith).

Village of Palatine v. LaSalle Nat’l Bank, 445 N.E.2d 1277, 1283 (Ill. App. Ct. 1983) (“A finding that a landowner has acquired a vested right to the issuance of building permits is particularly appropriate where, as here, public officials actively encourage a landowner to change position or incur expense in reliance on such acts.”).

Indiana

Lutz v. New Albany City Planning Comm’n, 101 N.E.2d 187, 190 (Ind. 1951) (holding construction must begin prior to the enactment of the contested zoning law for the owner to have “any vested rights in the property”).

Stuckman v. Kosciusko County, 495 N.E.2d 775, 777 (Ind. Ct. App. 1986) (“[T]he right of a governmental body to enact zoning ordinances is subject to vested property interests acquired prior to enactment of the ordinance.”), *opinion vacated on other grounds*, 506 N.E.2d 1079, 1081 (Ind. 1987).

Iowa

Kasperek v. Johnson County Bd. of Health, 288 N.W.2d 511, 518 (Iowa 1980) (finding legitimate expenditures before the change in regulation “may create a property right which cannot be arbitrarily interfered with or taken away without just compensation”). *See also*

Nemmers v. City of Dubuque, 716 F.2d 1194, 1197 (8th Cir. 1983) (following *Kasperek*).

Kansas

Colonial Inv. Co. v. City of Leawood, 646 P.2d 1149, 1154 (Kan. Ct. App. 1982) (suggesting that if actual construction began before the zoning ordinance change, an owner would have "vested property rights" in the zoning of the land).

Gunkel v. City of Emporia, 634 F. Supp. 345, 348 (D. Kan. 1986) (finding no "vested property right" because permit did not comply with existing law), *aff'd*, 835 F.2d 1302 (10th Cir. 1987).

Kentucky

City of Berea v. Wren, 818 S.W.2d 274, 276 (Ky. Ct. App. 1991) (stating that vested rights and estoppel are distinct theories in that vested rights involve a determination as to "whether the owner acquired real property rights which cannot be taken away by government regulation" while equitable estoppel "focuses on whether it would be inequitable to allow the government to repudiate its prior conduct") (quoting David G. Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Right to Zoning Disputes*, 1971 URB. L. ANN. 63, 64-65).

Louisiana

Palermo Land Co. v. Planning Comm'n of Calcasieu Parish, 561 So. 2d 482, 486 (La. 1990) (finding a Parish could rezone certain property, notwithstanding a developer's equitable estoppel argument).

Lakeshore Harbor Condominium Dev. v. City of New Orleans, 603 So. 2d 192, 196 (La. Ct. App. 1992) (holding developer did not have property right to convert condominium project to hotel project).

Maine

Cumberland Village Housing Assocs. v. Inhabitants of Town of Cumberland, 609 F. Supp. 1481, 1489 (D. Me. 1985) (interpreting 1 M.R.S.A. § 302, Maine's "savings" statute).

Thomas v. Zoning Board of Appeals of Bangor, 381 A.2d 643, 647-48 (Me. 1978) (holding a campground developer had no vested rights sufficient to escape a new stricter zoning ordinance, absent bad faith by the city).

Maryland

Prince George's County v. Equitable Trust Co., 408 A.2d 737, 741 (Md. Ct. Spec. App. 1979) (discussing vested rights as rights protected by the Takings Clause).

Prince George's County v. Sunrise Dev. Ltd. Partnership, 623 A.2d 1296, 1304 (Md. 1993) (“[T]o obtain a ‘vested right’ in the existing zoning use which will be constitutionally protected against a subsequent change in the zoning ordinance . . . , the owner must (1) obtain a permit or occupancy certificate where required by the applicable ordinance and (2) must proceed under that permit or certificate to exercise it on the land involved so that the neighborhood may be advised that the land is being devoted to that use.”) (quoting *Richmond Corp. v. Board of County Comm’rs*, 255 A.2d 398, 404 (Md. 1969)).

Massachusetts

Green v. Board of Appeal, 313 N.E.2d 451, 454 (Mass. 1974) (finding that under the relevant statute, the period of protection extends to “building permit applications filed, but not approved”).

Chira v. Planning Board, 333 N.E.2d 204, 209 (Mass. App. Ct. 1975) (stating that protection under Massachusetts law extends to proceedings brought before the appeals board as well as to those brought before the planning board).

Michigan

Seguin v. City of Sterling Heights, 968 F.2d 584, 591-92 (6th Cir. 1992) (reviewing Michigan law and finding that a building permit and substantial construction are necessary before property rights can vest, and that without a vested property right, plaintiffs had no claim of a Fourteenth Amendment procedural due process violation because no liberty or property was at stake).

Triomphe Investors v. City of Northwood, 49 F.3d 198, 203 (6th Cir. 1995) (stating that a city’s knowledge of a property owner’s intent to build on certain land does not itself create a state law property interest in a special use permit).

Minnesota

Littlefield v. City of Afton, 785 F.2d 596, 602 (8th Cir. 1986) (“[A]n applicant for a building permit has a constitutionally protected property interest in the permit. . .”).

Northpointe Plaza v. City of Rochester, 465 N.W.2d 686, 689 (Minn. 1991) (“Minnesota recognizes a constitutionally protected property interest in an application for a land use permit which, as here, is conditioned only upon compliance with the zoning ordinance.”).

Mississippi

Robinson Indus. v. City of Pearl, 335 So. 2d 892, 895-96 (Miss. 1976) (holding restaurant and restaurant’s sign were separate entities, and

although developer had vested rights in the nearly completed restaurant, it had no vested rights in the zoning classification of the mostly uncompleted sign).

Missouri

Ford Leasing Dev. Co. v. City of Ellisville, 718 S.W.2d 228, 232 (Mo. Ct. App. 1986) (holding that where a permittee acts on the faith of a zoning permit, he acquires a property or vested right therein) (citing 101A C.J.S. *Bonding and Land Planning* § 222 (1979)).

Montana

None

Nebraska

Whitehead Oil Co. v. City of Lincoln, 451 N.W.2d 702, 706 (Neb. 1990) (“[N]or does the permittee acquire a property right in the permit absent a showing substantial construction had already been undertaken.”) (citing *County of Saunders v. Moore*, 155 N.W.2d 317 (Neb. 1967)).

Nevada

City of Reno v. Nevada First Thrift, 686 P.2d 231, 233 (Nev. 1984) (holding that where property owner received a permit and, in good faith, made considerable expenditures in reliance on the permit, owner had a vested right against changes in zoning laws).

Kings Castle Ltd. Partnership v. Washoe County, 502 P.2d 103, 104 (Nev. 1972) (holding that developer had no vested rights where new zoning ordinance was passed but not yet enacted when developer applied for a building permit).

New Hampshire

Socha v. City of Manchester, 490 A.2d 794, 795-96 (N.H. 1985) (relying on *Navin v. Exeter*, 339 A.2d 12 (N.H. 1975)), the court held that developer did not have a vested right where, shortly after receiving foundation permit and before any substantial expense was incurred, developer was informed that future permits would not be granted due to rezoning).

PMC Realty Trust v. Town of Derby, 480 A.2d 51, 53 (N.H. 1984) (holding that where property owner incurred no substantial construction expenses, owner acquired no rights).

Navin v. Town of Exeter, 339 A.2d 12, 14-15 (N.H. 1975) (establishing that property owner obtained vested rights where owner made either substantial construction or expenditures on the property in good faith before zoning ordinance was revoked).

New Jersey

Urban Farms v. Borough of Franklin Lakes, 431 A.2d 163, 172 (N.J. Super. Ct. App. Div. 1981) (holding that substantial expenditures made in reliance on zoning ordinance created vested rights which defeated retroactivity of ordinance's subsequent amendment).

Lake Shore Estates v. Denville Township Planning Bd., 605 A.2d 1106, 1111 (N.J. Super. Ct. App. Div. 1991) (stating that developer did not have a vested right where he did not justifiably rely on past municipal approval and the current zoning ordinance was in the process of being changed).

New Mexico

Aragon & McCoy v. Albuquerque Nat'l Bank, 659 P.2d 306, 309 (N.M. 1983) (holding that developer had no vested rights in a particular zoning classification and had no right to additional permits to continue an altered construction project).

Brazos Land v. Board of County Comm'rs, 848 P.2d 1095, 1097 (N.M. Ct. App. 1993) (holding that property owner had no vested rights where city did not approve application and where applicant did not substantially rely on possible application approval).

Sandoval County Bd. of Comm'rs v. Ruiz, 893 P.2d 482, 485 (N.M. Ct. App. 1985) (establishing that permit approval and "a substantial change in position by the applicant in reliance upon such approval" are required for rights to vest).

New York

Town of Orangetown v. Magee, 594 N.Y.S.2d 951, 960 (N.Y. Sup. Ct. 1992) (holding that vested right in building permit constitutes a "'property interest' which is subject to protection under the Fourteenth Amendment").

Burdick v. Bryant, 444 N.Y.S.2d 997, 999 (N.Y. Sup. Ct. 1981) (stating that a property owner with a valid building permit who performs substantial construction on the property in reliance on the permit has a vested right in that property).

Schoonmaker Homes v. Village of Maybrook, 576 N.Y.S.2d 954, 957 (N.Y. App. Div. 1991) (discussing vested rights with regard to the single-integrated-project theory).

North Carolina

Town of Hillsborough v. Smith, 170 S.E.2d 904, 912 (N.C. 1969) ("[The defendants] must have exercised the privilege of the permit 'at a

time when it was lawful' in order to acquire a property right which would be protected from the zoning power of the town.”).

Mays-Ott Co. v. Town of Nags Head, 751 F. Supp. 82, 85 (E.D.N.C. 1990) (declaring that developer's substantial expenditures were sufficient “to create a vested property right which cannot be taken without due process of law”).

Simpson v. City of Charlotte, 443 S.E.2d 772, 776 (N.C. Ct. App. 1994) (holding that a property owner can acquire a vested right in two ways: either by meeting all the statutory requirements necessary for a building permit or by making a “substantial beginning” in construction, if made in good faith).

In re Application of Campsites Unlimited, Inc., 215 S.E.2d 73, 77-78 (N.C. 1975) (holding that where a landowner made substantial expenditures on his property prior to zoning ordinance enactment, a vested right existed).

North Dakota

City of Fargo v. Harwood Township, 256 N.W.2d 694, 700 (N.D. 1977) (holding that a property owner may acquire a vested right where owner made “substantial expenditures in reliance upon existing zoning or otherwise committed himself to his substantial disadvantage before the zoning change”).

Ohio

Washington County Taxpayers Ass'n v. Peppel, 604 N.E.2d 181, 187 (Ohio Ct. App. 1992) (“A ‘vested right’ . . . is generally understood to be the power to lawfully do certain actions or possess certain things; in essence, it is a property right.”).

Zaremba Dev. Co. v. City of Fairview Park, 616 N.E.2d 569, 571 (Ohio Ct. App. 1992) (holding that where property owner complied with all requirements to obtain a building permit, owner obtained a vested right upon filing the permit application) (citing *Gibson v. Oberlin*, 167 N.E.2d 651 (Ohio 1960)).

Torok v. Jones, 448 N.E.2d 819, 822 (Ohio 1983) (holding that the property owner acquired no vested property rights where he made no expenditures and did not substantially rely on building permit).

Gibson v. City of Oberlin, 167 N.E.2d 651, 654 (Ohio 1960) (holding that where property owner complied with all building permit requirements and permit was issued, owner had a vested right regardless of subsequent change in zoning ordinance).

Oklahoma

Oklahoma Water Resources Bd. v. Central Oklahoma Master Conservancy Dist., 464 P.2d 748, 755 (Okla. 1968) (“A ‘vested right’ is the power to do certain actions or possess certain things lawfully, and is substantially a property right.”).

Oregon

Clackamas County v. Holmes, 508 P.2d 190, 192-93 (Or. 1973) (holding, in part, that a landowner acquired a vested right to continue development based upon the ratio of expenses already incurred to the total cost of the project).

Pennsylvania

Herskovits v. Irwin, 149 A. 195, 197-98 (Pa. 1930) (upholding the principle that “a property interest arises where, after permit granted, a landowner begins construction of a building and incurs liability for future work”).

Commonwealth v. Flynn, 344 A.2d 720, 725 (Pa. Commw. Ct. 1975) (articulating five factors to be evaluated in determining whether a landowner has acquired a vested right in a permit: (1) good faith, (2) due diligence in trying to comply with the law, (3) expenditure of substantial, unrecoverable funds, (4) expiration without appeal of period during which an appeal could have been taken from the issuance of a permit, and 5) insufficiency of evidence to prove that individual property rights or public welfare have been adversely affected by use of a permit).

Rhode Island

Lanmar Corp. v. Rendine, 811 F. Supp. 47, 51 (D.R.I. 1993) (holding that even if the building permit had been issued illegally, owner had a “property interest in the building permit” based upon the granting of special exception by the city and demolition of buildings).

South Carolina

Whitfield v. Seabrook, 190 S.E.2d 743, 745 (S.C. 1972) (“The building permit issued to [landowner] created no vested right, it merely authorized him to act if he, at a time when it was lawful, exercised the privilege granted him, he thereby acquired a property right which would be protected.”).

Sherman v. Reavis, 257 S.E.2d 735, 737 (S.C. 1979) (stating that owners have a property right in the permit if they “have incurred expense or substantially changed their position under an issued permit . . . or . . . have relied in good faith on the right to use property as permitted under

the zoning ordinances in force at the time application was made") (citation omitted).

South Dakota

No cases

Tennessee

Nichols v. Tullahoma Open Door, 640 S.W.2d 13, 16 (Tenn. Ct. App. 1982) (inferring that a "constitutionally recognized property right" is comparable to a "vested right").

State *ex rel.* SCA Chemical Waste Serv. v. Konigsberg, 636 S.W.2d 430, 437 (Tenn. 1982) ("[R]ights under an existing ordinance do not vest until substantial construction or substantial liabilities are incurred relating directly to construction.").

Texas

City of Pharr v. Pena, 853 S.W.2d 56, 64 (Tex. Ct. App. 1993) ("Mere preparation for use of property before adoption of a zoning ordinance is not enough to show a devotion of the property to that use [A]n existing use should mean the utilization of the premises so that they may be known in the neighborhood as being employed for a given purpose.") (citations omitted).

City of Dallas v. Crownrich, 506 S.W.2d 654, 659 (Tex. Civ. App. 1974) ("[P]roperty and its owner are subject to a zoning ordinance adopted subsequent to an application for a building permit, and subsequent to his suit after refusal of permit.").

Utah

Scherbel v. Salt Lake City Corp., 758 P.2d 897, 901 (Utah 1988) (holding that because landowner's permit application did not comply with the zoning ordinance requirements then in effect, owner had no vested rights to a zoning classification).

Western Land Equities v. City of Logan, 617 P.2d 388, 396 (Utah 1980) ("[A]n applicant is entitled to a building permit or subdivision approval if his proposed development meets the zoning requirements in existence at the time of his application and if he proceeds with reasonable diligence, absent a compelling, countervailing public interest.").

Vermont

In re Ross, 557 A.2d 490, 491 (Vt. 1989) (holding that "a landowner's right to have his project's permit reviewed vested 'as of the time when *proper application* is filed.") (quoting Smith v. Winhall Planning Comm'n, 436 A.2d 760, 761 (1981)).

Virginia

Holland v. Board of Supervisors, 441 S.E.2d 20, 21-22 (Va. 1994) (“[A] landowner who seeks to establish a vested property right to a particular land use must identify a significant official governmental act that would permit the landowner to conduct a use on its property that otherwise would not have been allowed.”).

Snow v. Amherst County, 448 S.E.2d 606, 608 (Va. 1994) (“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.”) (quoting *Board of Supervisors v. Medical Structures, Inc.*, 192 S.E.2d 799, 801 (Va. 1972)).

Board of Supervisors v. Cities Serv. Oil Co., 193 S.E.2d 1, 3 (Va. 1972) (holding that a landowner’s right to the land use described in the use permit was a vested property right that vested upon the filing of the site plan).

Board of Supervisors v. Medical Structures, Inc., 192 S.E.2d 799, 801 (Va. 1972) (holding that issuance of a special use permit and subsequent filing of a site plan combined with incurred expenses created a “vested right” in the permittee).

Washington

Valley View Indus. Park v. City of Redmond, 733 P.2d 182, 191-92 (Wash. 1987) (“[C]itizens must be protected from the fluctuations of legislative policy, so that they can plan their conduct with reasonable certainty as to the legal consequences. Property development rights constitute ‘a valuable property right.’”) (citations omitted) (quoting *West Main Assocs. v. City of Bellevue*, 720 P.2d 782, 785 (Wash. 1986)).

Adams v. Thurston County, 855 P.2d 284, 287 (Wash. Ct. App. 1993) (stating that “property development rights vest at the time a developer files a complete and legally sufficient building permit or preliminary plat application”).

Erickson & Assocs. v. McLerran, 872 P.2d 1090, 1095 (Wash. 1994) (“Our vested rights doctrine is not a blanket rule requiring cities and towns to process all permit applications according to the rules in place at the outset of the permit review. Instead, the doctrine places limits on municipal discretion and permits land owners or developers ‘to plan their conduct with reasonable certainty of the legal consequences.’”)

(quoting *West Main Assocs. v. City of Bellevue*, 720 P.2d 782 (Wash. 1986)).

West Virginia

L.M. Everhart Constr. v. Jefferson County Planning Comm'n, 2 F.3d 48, 53 (4th Cir. 1993) (inferring that if the developer had acquired a vested right, the developer would have had a protectible property interest requiring due process of law).

H.R.D.E., Inc. v. Zoning Officer of Romney, 430 S.E.2d 341, 346 (W. Va. 1993) (“[T]he following factors are to be weighed when determining whether or not a landowner has acquired a vested right in a nonconforming use: (1) whether the landowner has made substantial expenditures on the project; (2) whether the landowner acted in good faith; (3) whether the landowner had notice of the proposed zoning ordinance before starting the project at issue; and (4) whether the expenditures could apply to other uses of the land.”).

Wisconsin

Lake Bluff Hous. Partners v. City of South Milwaukee, 525 N.W.2d 59, 67 (Wis. Ct. App. 1994) (assessing prior cases and noting various emerging principles: “[A] property owner can have vested rights in a *planned* building before actual construction begins; . . . ‘retrospective effect’ of an ordinance is ‘not favored, and this is especially true where vested rights are affected’; and . . . vested rights can be separated from zoning compliance.”) (citations omitted).

State ex rel. Humble Oil & Ref. Co. v. Wahner, 130 N.W.2d 304, 310-11 (Wis. 1964) (invalidating, on basis of equitable considerations, town zoning amendment that would have prohibited plaintiff’s proposed land use despite the fact that plaintiff had no building permit and thus no vested right).

Wyoming

Croxton v. Board of County Comm’rs, 644 P.2d 780, 784 (Wyo. 1982) (“[A] property owner has no vested right (which will withstand a later zoning regulation) in a development which is merely contemplated.”).