

DEVELOPERS' VESTED RIGHTS

Modern, mixed use, multistage developments cost millions of dollars and take years to complete.¹ Before a developer commits resources irretrievably he wants assurances that he will be able to complete such a project.² Conversely, municipal officials wish to reserve a veto power for as long as possible to protect against unforeseen threats to the public welfare.³ At some point between the application for a permit and the final stages of construction, the developer acquires a "vested right"⁴ to complete the project and gov-

1. *See, e.g.*, *Snake River Venture v. Board of County Comm'rs.*, 616 P.2d 744 (Wyo. 1980) (developer purchased 50.7 acres for \$225,044.44 in 1972 and had spent \$56,422.74 in formulating development plan by time of suit); *Oceanic Cal., Inc. v. North Cent. Coast Regional Comm'n*, 63 Cal. App. 3d 57, 133 Cal. Rptr. 664 (1976) (developer purchased 5,200 acres in 1963 and expended \$26,900,000 in development prior to seeking a building permit); *DeKalb County v. Chapel Hill, Inc.*, 232 Ga. 238, 205 S.E.2d 864 (1974) (developer purchased 1,078 acres in 1962 and expended \$50,000 in developing lake and recreation area).

2. *See Avco Community Developers, Inc. v. South Coast Regional Comm'n*, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), *cert. denied*, 429 U.S. 1083 (1977) (where county zoning ordinance required developer to satisfy all governmental requirements before a building permit would issue, newly enacted California Coastal Zone Conservation Act caused denial of permit).

3. *See, e.g.*, *People v. County of Kern*, 39 Cal. App. 3d 830, 115 Cal. Rptr. 67 (1974) (owner denied vested right to a permit despite investment of \$45,000, where county had not adequately addressed significant environmental objections raised by public to owner's environmental impact statement).

4. The term is a powerful one that is often used in a conclusory manner that preempts reasoned analysis. *See, e.g.*, *Trans-Oceanic Oil Corp. v. City of Santa Barbara*, 85 Cal. App. 2d 776, 784, 194 P.2d 148, 152 (1948) ("[I]f a permittee has acquired a vested property right under a permit, the permit cannot be revoked."); *see also* *Cunningham & Kremer, Vested Rights, Estoppel, and the Land Development Process*, 29 HASTINGS L.J. 623, 640-41 (1978); J. GRAY, *THE RULE AGAINST PERPETUITIES* 98 n.1 (3d ed. 1915).

The development potential of land is not a property interest protected by the fifth and fourteenth amendments. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124-25 (1978). *See also* 8 E. McQUILLEN, *MUNICIPAL CORPORATIONS* § 25.157 (3d ed. 1976). Thus, there is no property right in an existing zoning classification. *Cf. Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915) ("A vested interest cannot be asserted against [a land use regulation] because of conditions once obtaining."). It is instead a privilege that a developer enjoys only after he has secured

ernment loses the power to stop it.⁵ This section summarizes the traditional vested rights tests,⁶ analyzes their inability to deal adequately with multi-phase land use projects,⁷ and examines legislative attempts to rationalize the multiple permit approval system.⁸

I. THE APPROVAL PROCESS

There is no common law right to develop land unimpeded.⁹ According to the accepted view, development is at best an inchoate right, a mere potentiality that does not harden into a reality until

a permit on terms set by the municipality pursuant to its police power. *See* note 11 and accompanying text *infra*.

Few court cases discuss the constitutional dimensions of permit procedures. *See* C. SIEMON, W. LARSEN, D. PORTER & W. WATTS, *THE RIGHT TO DEVELOP: PROTECTING DEVELOPMENT EXPECTATIONS BY VESTING RIGHTS* 19 (July 1981) (unpublished manuscript at Ross, Hardin, O'Keefe, Babcock & Parsons, Chicago, Ill. and The Urban Land Institute, Washington, D.C.); *but see* P. BUCK, *MODERN CONTROL OF LAND DEVELOPMENT* 271-75 (1980). Instead, challenges to permit revocations proceeded on an estoppel theory. The developer argues that he has reasonably relied on a government act—the issuance of a permit—to his detriment. *See* notes 40-43 and accompanying text *infra*. If the developer can show sufficient good faith reliance on the permit, the city will be estopped from revoking it and the court will declare that a right to develop has vested. Thus, the courts use an equitable doctrine to bridge the legal abyss and establish a protected development right despite the settled rule that the development of land is not a constitutionally protected property interest.

5. *See* text at notes 40-52 *infra*.

6. *See* text at notes 53-121 *infra*.

7. *See* text at notes 122-133 *infra*.

8. *See* text at notes 134-141 *infra*.

9. The idea that rights in land are rooted in a natural law, eroded by the judicial interest in the public welfare, may nevertheless have a basis in reality. 1 R. POWELL, *THE LAW OF REAL PROPERTY*, 91-135 (1977). Bosselman terms this the "American fable or myth that a man can use his land anyway he pleases regardless of his neighbors." F. BOSSELMAN, *THE TAKING ISSUE* 318-19 (1973). The romanticized ideal lives on, however. *See, e.g.,* *Kitmar Builders, Inc. v. Zoning Bd. of Adjustment*, 439 Pa. 466, 478-81, 268 A.2d 765, 771 (1970) (concurring opinion of Bell, C.J.); *TASK FORCE ON LAND USE AND URBAN GROWTH, THE USE OF LAND* 140 (1973).

The physical presence of land may underlie its special place in our folklore: "The fact that tangible property is also visible tends to give rigidity to our conception of our rights in it that we do not attach to others less concretely clothed." Justice Holmes in *Block v. Hirsch*, 256 U.S. 135, 155 (1921). *See also* 3 P. SIMKO, *PROMISED LANDS: SUBDIVISIONS AND THE LAW* 9 (1978); Berger, *To Regulate or Not to Regulate, Is that the Question? Reflections on the Supposed Dilemma Between Environmental Protection and Private Property Rights*, 8 *LOY. L.A.L. REV.* 253, 265 (1975) (finding deep psychological origins for the territorial instinct that leads citizens to oppose government controls on land use).

catalyzed by government's permission to build.¹⁰

A building permit¹¹ certifies that a project satisfies all the substantive and procedural safeguards designed to protect the public welfare.¹² Simple Euclidean zoning systems are meant to be self-executing.¹³ The criteria for securing a permit are largely objective; hence, the issuance of a permit is a ministerial function.¹⁴ Once a developer meets all the criteria imposed by a governmental unit, the building commissioner¹⁵ must issue the permit as of right.¹⁶ The de-

10. Since the Supreme Court upheld the regulation of land use by zoning in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), courts have come to regard the restrictions imposed by zoning laws on land use as common knowledge. See *HFH, Ltd. v. Superior Court*, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), *cert. denied*, 425 U.S. 904 (1976) (possibility of change in classification inherent in zoning law, hence foreseeable by purchasers of property); 8 E. McQUILLIN, *supra* note 4, at §§ 25.147, -.150, -.152.

11. Permits required by zoning ordinances are administrative devices. 8 E. McQUILLIN, *supra* note 4, at § 25.147. They derive from the general municipal police power authority to license and regulate business activity, which predates zoning. *Id.* at § 25.152. See also *San Diego Bldg. Contractors Ass'n v. City Council*, 13 Cal. 3d 205, 529 P.2d 70, 118 Cal. Rptr. 146 (1974), *appeal dismissed*, 427 U.S. 901 (1976) (discounting idea that a permit to develop land is any different from a license to conduct a business).

Authorities diverge on whether a building permit is personal or runs with the land. Compare *Brougher v. Board of Pub. Works*, 205 Cal. 426, 271 P. 487 (1928) (permit is a personal privilege) and *Brett v. Building Comm'r of Brookline*, 250 Mass. 73, 145 N.E. 269 (1924) (same) with *Cohn v. County Bd. of Supervisors of Los Angeles County*, 135 Cal. 2d 180, 286 P.2d 836 (1955) (special use permits run with land) and 3 A. RATHKOPF, *LAW OF ZONING AND PLANNING* 55-13 (4th ed. 1975) (building permits run with land). See also 101A C.J.S. *Zoning* § 221 (1979) (discussing both views).

12. Early zoning regulations were an outgrowth of nuisance laws. Their aim was to protect property values. 3 P. SIMKO, *supra* note 9, at 11.

13. *E.g.*, *Bills v. Township of Grand Blanc*, 59 Mich. App. 619, 229 N.W.2d 871 (1975) (determination that the use met applicable zoning standards sufficient to insure the public welfare, no further review needed or allowed).

14. *Palmer v. Fox*, 118 Cal. App. 2d 453, 258 P.2d 30 (1958) (persons employed by city to process applications and issue permits have no right to withhold a building permit after realty owners had complied with prerequisites for its issuance). See 8 E. McQUILLAN, *supra* note 4, at § 25.147 n.12; 3 A. RATHKOPF, *supra* note 11, at 55-3.

15. The position goes by many titles, e.g., building inspector, building engineer, and zoning administrator. The commissioner's authority is limited to determining whether a proposed project conforms to the applicable zoning. 101A C.J.S. *Zoning* § 193 (1979). The commissioner may not withhold a permit because the proposed use violates some other ordinance, 8 E. McQUILLIN, *supra* note 4, at § 25.149, because he feels it is unnecessary or unwise, 101A C.J.S. *Zoning* § 178 (1979), or because he anticipates added requirements due to a pending change in the zoning ordinance, *Mattson v. City of Chicago*, 89 Ill. App. 3d 378, 381, 411 N.E.2d 1002, 1005 (1980).

veloper whose project does not conform to applicable zoning laws, however, must submit to discretionary review by a board of zoning appeals or the city legislative body.¹⁷

Discretionary review underlies the subdivision review process, as well.¹⁸ Subdivision approval is a two-step process.¹⁹ Preliminary ap-

The role is further defined at R. BURCHELL & J. HUGHES, *PLANNED UNIT DEVELOPMENT: NEW COMMUNITIES*, AMERICAN STYLE 24 (1972).

16. 8 E. MCQUILLIN, *supra* note 4, at § 25.147, n.13; *see also*, General Baking Co. v. Board of Street Comm'rs, 242 Mass. 194, 196-97, 136 N.E. 245, 246 (1922) (once a builder has complied with permit requirements, he may claim protection until further legislation impairs his rights); *accord* Shapiro v. Zoning Bd. of Adjustment, 377 Pa. 621, 105 A.2d 299 (1954).

17. Where a proposed use does not comply with zoning requirements, the landowner may seek a variance. A variance is an extraordinary device whereby an applicant asks to be excused from complying with zoning requirements because unique problems inherent in his land make it unfit for a permissible use. 101A C.J.S. *Zoning* §§ 229(a), 234 (1979). A local zoning board of adjustment or other quasi-judicial body reviews applications on a discretionary, case-by-case basis to minimize potential conflicts between the proposed use and the public welfare. *Id.* at §§ 181, 183. See Otto v. Steinhilber, 282 N.Y. 71, 24 N.E.2d 851 (1939) *rearg. denied*, 282 N.Y. 681, 26 N.E.2d 811 (1940), for a frequently cited discussion of the criteria used in the review. *See also* Green, *The Power of the Zoning Board of Adjustment to Grant Variances from the Zoning Ordinance*, 29 N.C. L. REV. 245, 249 (1951).

A special use permit is a legislative control device. It allows such things as gas stations and churches, which are necessary to every community but can be detrimental to their immediate neighborhood. Such uses are only permitted after a finding that they meet specific criteria set out in the zoning ordinance. *See* 101A C.J.S. *Zoning* § 229(b) (1979). *See also* Tullo v. Millburn Twp., 54 N.J. Super. 483, 149 A.2d 620 (1959) (criteria for schools, hospitals, clubs, community centers, and cemeteries). *See generally* D. MANDELKER & R. CUNNINGHAM, *PLANNING AND CONTROL OF LAND DEVELOPMENT* 655-74 (1979) [hereinafter cited as MANDELKER].

Variances and special use permits are generally held to be permissive rather than mandatory; they issue only after discretionary review when a zoning board or the legislative body determines that the proposed use poses no threat to the public welfare. 101A C.J.S. *Zoning* § 235 (1979).

18. Zoning presupposes that the needs of the community have become sufficiently crystalized to permit the enactment of specific regulations. Subdivision control, on the other hand, establishes more general standards to be specifically applied by an administrative body in order to insure that the change of use will not be detrimental to the community.

Note, *Land Subdivision Control*, 65 HARV. L. REV. 1226, 1227 (1952).

There is no "right" to subdivide land. *See* note 4, *supra*. The prevailing rationale states that because the developer reaps increased profits from subdivided land, he should submit to reasonable police power requirements to pay for the added burdens on community facilities his project will generate. MANDELKER, *supra* note 17, at 809-11. *See, e.g.* Blevens v. City of Manchester, 103 N.H. 284, 286-87, 170 A.2d 121, 122-23 (1961) (statute prohibiting subdivision from selling lots until streets were upgraded to legal minimum held reasonable police power regulation).

proval²⁰ comes from the planning commission²¹ and begins a negotiation process that continues until the commission grants final approval,²² when the right to complete the project vests.²³

Whereas subdivision controls relate only to residential development, Planned Unit Development (PUD) ordinances cover mixed use projects.²⁴ PUD approval merges ministerial zoning approval and

19. 4 A. RATHKOPF, *supra* note 11, at 71-34. *See also*, *Western Land Equities, Inc. v. City of Logan*, 617 P.2d 388, 389 (Utah 1980) (subdivision approval process outlined).

20. A preliminary plat is a disclosure statement that alerts the local government to the broad outlines of a subdivision so it can begin considering the impact on the community. Plat approval lets the owner finalize the street layout, water and sewer lines and open space locations and begin construction on these. 4 A. RATHKOPF, *supra* note 11, at 71-34.

The city may require modifications as conditions to final approval. Because a subdivision creates a need for new local services that are of special value to the subdivision, the planning commission may reasonably require the builder to install his own streets, water mains and sewage plants, and dedicate land for parks and schools. *Id.* at 71-51 to -59.

Courts uphold these exactions where they are attributable to new demand on the grounds that the subdivider's land is made more valuable by the government's permission to subdivide. 3 P. SIMKO, *supra* note 9, at 12-13. *See also* Sternlieb, Burchell, Hughes & Listokin, *Planned Unit Development Legislation: A Summary of Necessary Considerations*, 7 URBAN L. ANN. 71, 75 (1974) [hereinafter cited as Sternlieb & Burchell].

21. 4 A. RATHKOPF, *supra* note 11, at 71-35 to -39. All states now have some form of subdivision control. Every state but Florida gives the local legislature the power to appoint a planning commission. Most states further authorize the locality to delegate to the planning commission the power to approve subdivision plats. Other states require approval solely by the local legislative body, and a few require the approval of both. *Id.* at 71-15.

22. Final approval, of course, is not guaranteed. Unless a subdivision control enabling statute expressly provides for action on a preliminary plat within a specified time, an anti-growth minded planning commission can withhold approval until a developer takes legal action. *Cf.* *Gluckman v. Klipp*, N.Y.L.J. 15 (April 9, 1963); *aff'd* 19 A.D.2d 777, 242 N.Y.S.2d 1019 (1963); *aff'd* 13 N.Y.2d 1122, 196 N.E.2d 554, 247 N.Y.S.2d 121 (1964).

On the other hand, failure to act promptly where a statute requires action in a specified time may be deemed equivalent to approval of the developer's plans. *Callen v. Borg*, 3 Wis. 2d 488, 89 N.W.2d 267 (1958) (failure of planning board to act within stated time gave rise to presumption that plat conformed to city requirements); *cf.* *Dover Twp. Homeowners & Tenants Ass'n v. Twp. of Dover*, 114 N.J. Super. 270, 276 A.2d 156 (1971) (presumption did not arise where planning board did act within the statutory sixty days but acted improperly). *See also* text at note 120 *infra*.

23. 4 A. RATHKOPF, *supra* note 11, at 71-34.

24. *See* R. BURCHELL & J. HUGHES, *supra* note 15, at 1, 34-38 for a definition and brief summary of the PUD review process.

discretionary subdivision review in a single, institutionalized bargaining process.²⁵ Because they progress in stages, with each stage requiring separate approval²⁶ by the city, PUD's maximize discretionary review.²⁷

Early zoning and subdivision control ordinances served to protect property values by insuring the integrity of a local land use plan. Larger and more complex projects, however, overwhelmed the scope and sophistication of local regulatory authorities.²⁸ State,²⁹ regional,³⁰ and federal³¹ governments responded with modern land use

25. While this reduces the number of government entities a developer must deal with, the number of separate approval hurdles may remain burdensome. Cunningham & Kremer, *supra* note 4, at 647. Although discretionary review originally evolved to overcome the restrictions of the rigid, self-determining standards of early zoning enabling acts, *see* notes 12-14 *supra*, and note 27 *infra*, a government may now impose the "option" of negotiation on the developer and use discretionary review as a procedural roadblock rather than a device to achieve flexible, substantive review. J. VRANICAR, W. SANDERS & D. MOSENA, *Streamlining Land Use Regulation* 5 (1980) [hereinafter cited as HUD STUDY]. 3 P. SIMKO, *supra* note 9, at 89. *See also* note 32 *infra*.

26. Sternlieb & Burchell, *supra* note 20, at 93-94. *See also* R. BURCHELL & J. HUGHES, *supra* note 15, at 45; 3 P. SIMKO, *supra* note 9, at 21-22; *see also* Youngblood v. Board of Supervisors, 71 Cal. App. 3d 655, 664-69, 139 Cal. Rptr. 741, 745-48 (1977) (unmet planning requirements make it difficult to argue permit should issue as of right).

27. The PUD concept grew out of innovative zoning devices that evolved to free the subdivider from the constraints of lot-by-lot zoning. PUD ordinances therefore resemble variances and special uses, as well as cluster zones and floating zones, in that they are often characterized as quasi-legislative actions and hence qualify for a high degree of discretionary review. *See* MANDELKER, *supra* note 17, at 861-62; Sternlieb & Burchell, *supra* note 20, at 76-77. *See, e.g.*, Todd Mart, Inc. v. Town Bd. of Webster, 49 A.D.2d 12, 370 N.Y.S.2d 683 (App. Div. 1975) (rezoning application for shopping center denied on a "reasonableness" standard after comparing PUD's to special use districts and floating zones and finding the approval process more legislative than administrative).

28. 3 P. SIMKO, *supra* note 9, at 21-22.

29. For example, zoning has proved inadequate to protect Colorado's mountains from recreation homes. The state has responded with three major land use statutes. One requires that all subdivisions comply with regulations promulgated by the state land use commission. COLO. REV. STAT. § 30-28-133 (1973 & Supp. 1981). In addition, the Colorado Land Use Act authorizes the designation of "areas of state interest" where special building permits are required. *Id.* §§ 24-65-101 to -65.1-502. Finally, the Colorado Ground Water Management Act allows development control by means of permits for the use of designated ground water. *Id.* § 37-90-103. *See* 3 P. SIMKO, *supra* note 9, at 227-37.

30. In order to protect its coastal environment, California enacted the California Coastal Act of 1976 (CAL. PUB. RES. CODE §§ 30000-30900 (Deering Supp. 1981) (superseding California Coastal Zone Conservation Act of 1972, CAL. PUB. RES.

laws that seek to achieve many diverse objectives, from area-wide environmental protection to historic preservation.³² Hence, the developer today faces an approval process that has grown from a one-step nuisance control device into a multiple-permit approval system of uncoordinated and overlapping veto points lodged in a variety of agencies, each with its limited sphere of regulatory authority.³³ These agencies may straddle several levels of government.³⁴

CODE §§ 27000-27650 (Deering 1976)). The Act divides the state's coastline into sixteen regions, *id.* at §§ 30150-30174. The California Coastal Commission administers the state's coastal plan, *id.* at §§ 30300-30342. The Commission designates "sensitive coastal resource areas," *id.* at § 30502, and local governments must prepare a "local coastal program," *id.* at § 30500, for the protection of the designated areas. Any development in the coastal zone must obtain a coastal development permit. *Id.* at § 30600. Issuance of a permit may be appealed if the development fails to protect public views, is not compatible with existing physical scale, or may significantly alter natural land forms. *Id.* § 30603. Developments must not significantly degrade environmentally sensitive habitat areas. *Id.* § 30240.

31. The Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. § 1251-1376 (1976 & Supp. III 1979)) set out a permit program for pollution discharge from point and nonpoint sources. Because the Act covers all water impacts, subdivision developers must obtain point source permits for well drilling that may lead to saltwater intrusion and nonpoint source permits for surface runoff. The Act's 1977 amendments specifically direct the Army Corps of Engineers to prevent pollution from dredging and filling via a permit system. *Id.* § 1344(a). Permits are denied for an "unacceptable adverse effect on municipal water supplies, shellfish beds, and fishing areas, . . . or wildlife or recreational areas." *Id.* § 1344(c).

Because the Corps is a federal agency, the dredge and fill permits it grants are "major federal actions," 42 U.S.C. § 4332(c) (1976) within the scope of the National Environmental Policy Act of 1970 (42 U.S.C. §§ 321-4347 (1976 & Supp. III 1979)). Therefore, an environmental impact statement, *id.* § 4332(c), is a prerequisite for dredge and fill permits.

32. Large-scale developments require regulation for more than their impact on adjacent property values. Subdivision controls are a vehicle for such objectives as flood plain preservation, protection of ground water supply and purity, energy conservation, comprehensive planning, protection of fragile ecosystems, consumer protection, coastland preservation, and the conservation of areas of historical and archeological significance. *See generally* 3 P. SIMKO, *supra* note 9, at 77-137.

33. *See* F. BOSSELMAN, D. FEURER & C. SIEMON, *THE PERMIT EXPLOSION* 83-84 (1976) [hereinafter cited as BOSSELMAN] for a representative list of state, regional, and local agencies which must review and approve various aspects of a project, and HUD STUDY, *supra* note 25, at 26, for a typical permit checklist involving up to seventeen steps.

34. *See, e.g.*, The Florida Environmental Land & Water Management Act of 1972 (FLA. STAT. ANN. §§ 380.012-.10 (West 1974 & Supp. 1982)). It declares developments which will affect the health, safety, or welfare of citizens in more than one county to be "developments of regional impact," (DRIs). *Id.* § 380.06(1).

The builder of a DRI must file an "application for development approval" with the local government, the regional planning council, and the Division of State Planning.

Securing all the required permits can take months and even years. The vesting of a right to complete a modern, large-scale, mixed use project tends, therefore, to occur late in the development process. This deprives the developer of the certainty he needs for further business planning.³⁵

Model one-step PUD approval ordinances are one answer.³⁶ In the meantime, the modern developer must negotiate the permit maze armed with several common law estoppel based defenses: he can argue that he has relied on the issuance of a permit, hence the government is estopped from revoking it;³⁷ he can try to compel approval of the project on a nonconforming use theory;³⁸ or he can argue that because his project is a single entity, prior approval of one part of it should vest a right to complete the whole.³⁹

II. ZONING ESTOPPEL

Estoppel is a remedy whose origins are in equity.⁴⁰ The doctrine states that one party may not withhold promised performance when it knows or should have known at the time it acted that another party would rely on the promise to the latter's detriment.⁴¹ As courts apply

Id. § 380.06(6). He must include detailed information on his project's impact on the regional environment and natural resources, public facilities, and the economy. *Id.* § 380.06(2)(a)-(f). The regional planning council makes its findings and then the local government holds hearings and considers the application, the project, the regional council's report, local land use regulations, and the relationship of the proposed project to the state land development plan. *Id.* § 308.06(7), (8), (11)(a)-(c). The local government may then deny, approve, or modify the proposal. *Id.* § 308.06(11).

35. The results can be especially severe for the developer who has begun development and must conform to new regulations not in existence when he began. See Cunningham & Kremer, *supra* note 4, at 645.

36. See AMERICAN LAW INSTITUTE, MODEL LAND DEVELOPMENT CODE § 2-210 (1976) [hereinafter cited as MODEL CODE].

37. See notes 49-51 and accompanying text *infra*.

38. See notes 110-121 and accompanying text *infra*.

39. See notes 122-28 and accompanying text *infra*.

40. 3 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE §§ 802, 804 (5th ed. 1941).

41. The doctrine of estoppel prevents a party from repudiating its prior representations. The vested rights doctrine, on the other hand, focuses on whether the developer has acquired a protectable property right in his project that will withstand a change in government representations. Heeter, *Zoning Estoppel*, 1971 URBAN L. ANN. 63, 64-65; P. BUCK, MODERN CONTROL OF LAND DEVELOPMENT 261 (1980). Confusion arises because the vesting point is measured by the equitable doctrine of reliance. *Id.* at 259. See also *Town of Hillsborough v. Smith*, 276 N.C. 48, 170 S.E.2d

the doctrine to vested rights cases⁴² it is more aptly termed "zoning estoppel."⁴³

In the typical case, a municipality issues a building permit,⁴⁴ then decides to change the applicable zoning and attempts to revoke the permit because the proposed structure does not meet the new zoning standards.⁴⁵ Although a permit must issue once a developer has met all its requirements,⁴⁶ the general rule is that a permit is revocable by subsequent legislation and confers no immunity from a zoning change.⁴⁷

Although the rule serves the public welfare,⁴⁸ it seems manifestly unfair to the developer who has relied in good faith⁴⁹ on a validly

904 (1969) (basis of builder's vested right to the permit issued him is the change of his own position in *bona fide* reliance on the permit).

42. See 3 J. POMEROY, *supra* note 40, at § 805.

43. Heeter, *supra* note 41, formulates the rule as follows:

A local government exercising its zoning powers will be estopped when a property owner, 1) relying on good faith, 2) upon some act or omission of the government 3) has made such a substantial change in position or incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the rights which he obviously acquired.

Id. at 66.

44. See note 11, *supra*, for a discussion of building permits. The discussion that follows deal with single permits for single structures. The principles are the same, however, for large scale, multi-stage projects and multiple permit approval systems.

45. 8 E. MCQUILLIN, *supra* note 4, at § 25.156.

46. See notes 14 & 16 and accompanying text *supra*.

47. *E.g.*, Snake River Venture v. Board of County Comm'rs, 616 P.2d 744 (Wyo. 1980) (developer had no vested right to construct partially approved project where approval was in violation of appellee board's own rules and developer had not commenced construction or entered into irrevocable contractual commitment). 3 A. RATHKOPF, *supra* note 11, at § 57.2.

48. *E.g.*, Town of Lebanon v. Woods, 153 Conn. 182, 215 A.2d 112 (1965) (landowner properly required to proceed in conformity with new ordinance where purpose was to prevent overcrowding and allow space for water and sewer services).

Building permits are similar to professional licenses. If licensing requirements are changed to reflect a new conception of the public interest, a practitioner who cannot meet the new criteria should lose his license. See, *e.g.*, Packer v. Board of Behavioral Science Examiners, 52 Cal. App. 3d 190, 125 Cal. Rptr. 96 (1975) (upholding refusal to renew license of marriage counselor without first meeting stiffened state licensing requirements).

49. 3 A. RATHKOPF, *supra* note 11, at 57-26 (good faith of the developer is a threshold requirement before estoppel will vest a right to a permit); 8 E. MCQUILLIN, *supra* note 4, at § 25.157 ("[N]o estoppel for previous expenditure where not made in good faith."). Compare City of Evanston v. Robbins, 117 Ill. App. 2d 278, 254 N.E.2d 536 (1969) (trial court refused to enforce zoning where owner expended \$1,200 and

issued permit.⁵⁰ The majority of jurisdictions temper the rule by evaluating the extent of the owner's reliance on the permit.⁵¹ Simply put, the closer the project is to completion, the more substantial the reliance, and the less equitable it is to revoke the permit pursuant to subsequent changes in zoning.⁵²

received written assurances from city officials that all violations had been corrected) *with* *Schneider v. Calabrese*, 5 Pa. Commw. 444, 291 A.2d 326 (1972) (right to permit did not vest where landowner began construction in spite of knowledge of pending change in zoning).

50. Substantial reliance may also vest a right to a mistakenly issued permit as well as a validly issued one. *Compare* *Garnick v. Zoning Hearing Bd. of Bridgeton Twp.*, 58 Pa. Commw. 92, 427 A.2d 310 (1981) (permit issued under mistake of fact confers no vested right despite reliance) *and* *Appeal of Donofrio*, 31 Pa. Commw. 579, 377 A.2d 1017 (1977) (permit issued under mistake of law confers no vested rights despite reliance) *with* *City of Northern Miami v. Margulies*, 289 So. 2d 424 (Fla. Dist. Ct. App. 1974) (city estopped from revoking conditional use permit where owner had incurred substantial financial obligations in reliance thereon) *and* *State ex rel. S.A. Lynch Corp. v. Darner*, 159 Fla. 874, 33 So. 2d 45 (1948) (permit mistakenly issued could not be revoked where construction had already begun).

Substantial reliance may vest a right due to reliance on the expectation of the permit. *Compare* *Mattson v. City of Chicago*, 89 Ill. App. 3d 378, 411 N.E.2d 102 (1980) (mandamus to compel issuance of building permit granted where owner demolished existing structure in reliance on building department approval of proposed use) *with* *Avco Community Developers, Inc. v. South Coast Regional Comm'n*, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), *cert. denied*, 429 U.S. 1083 (1977) (government cannot be estopped to enforce laws enacted before building permit issued).

A municipality's acquiescence in a zoning violation may also create a vested right. *E.g.* *Appeal of Kates*, 38 Pa. Commw. 145, 393 A.2d 499 (1978) (property owner acquired vested right to zoning violation after apparent acquiescence of municipality for twenty-one years).

51. 8 E. McQUILLIN, *supra* note 4, § 25.157 (substantial change of position, expenditure or incurrence of obligation under a permit vests a right to complete the use stated in the permit). *See also* 3 A. RATHKOPF, *supra* note 11, at 57-6, 57-7.

See, e.g., *Petrosky v. Zoning Bd. of Upper Chichester Twp.*, 485 Pa. 501, 402 A.2d 1385 (1979) (vested right to use property in violation of setback requirements where owner had expended \$15,000 in reliance on permits).

52. As a rule of thumb, the farther out of the ground a structure is, the more likely the courts are to allow its completion. *Delaney & Kominers, Events Before the Start of Construction*, 23 St. Louis U.L.J. 219, 240 (1979); Heeter, *supra* note 41, at 85 (majority of courts require physical construction to establish substantial reliance).

III. ESTOPPEL BASED DEFENSES; JUDICIAL ATTEMPTS TO ACCOMMODATE THE LARGE-SCALE, MULTISTAGE DEVELOPMENT

A. *Preconstruction Reliance*

Nearly all courts will estop a city from revoking a permit once a developer commences construction.⁵³ Many courts struggle, however, to make the estoppel rule yield just results when faced with the significant reliance expenditures that occur long before the developer breaks ground on a large-scale project.⁵⁴

The decisional law diverges on how much and what kinds of preconstruction activity will work an estoppel. The mere purchase of land is rarely enough to create a vested right to a subsequently issued permit.⁵⁵ Nevertheless, courts increasingly find reliance where a builder has entered into financial agreements and construction contracts,⁵⁶ or spent irrecoverable sums on engineering and architectural work.⁵⁷ Thus, in *Life of the Land, Inc. v. City Council*,⁵⁸ a nonprofit corporation sought and received a variance to construct a housing project. The developer obtained official assurances that it would be able to complete its project and in reliance on the city council's actions spent \$360,629.12 for planning and design work.⁵⁹ The Supreme Court of Hawaii held that the developer's expenditures

53. See Heeter, *supra* note 41, at 85.

54. *Id.*

55. See, e.g., *Limekiln Golf Course, Inc. v. Zoning Bd. of Adjustment of Horsham County*, 1 Pa. Commw. 496, 276 A.2d 331 (1971) (purchase of land one of many factors, not enough by itself); *Stone Mountain Ind., Inc. v. Wilhite*, 221 Ga. 269, 144 S.E.2d 357 (1965) (purchase of land not enough to create vested right).

Florida is an exception to the rule. See, e.g., *Project Home, Inc. v. Town of Astatulia*, 378 So. 2d 710 (Fla. Dist. Ct. App. 1979) (property purchased in reliance on town clerk's representations sufficient to vest permit).

56. E.g., *Dvorson v. City of Chicago*, 119 Ill. App. 2d 357, 256 N.E.2d 59 (1970) (developer secured an FHA loan); *Town of Hillsborough v. Smith*, 276 N.C. 48, 170 S.E.2d 904 (1968) (owner entered into contracts for construction, franchise, and dry-cleaning equipment); *Cheltenham Twp. Appeal*, 413 Pa. 379, 196 A.2d 363 (1964) (developer secured \$7,500,000 construction loan, engaged a contractor, and entered into lease agreements with prospective tenants).

57. E.g., *City of Northern Miami v. Margulis*, 289 So. 2d 424 (Fla. Dist. Ct. App. 1974) (owner spent \$600,000 in architect's fees, surveying costs, and preparation of engineering data); *Dvorson v. City of Chicago*, 119 Ill. App. 2d 357, 256 N.E.2d 59 (1970) (developer spent \$37,783 in architect's fees, examination fees, and permit fees).

58. 61 Hawaii 390, 606 P.2d 866 (1980).

59. *Id.* at 414, 606 P.2d at 882.

brought the project within the doctrine of equitable estoppel.⁶⁰

Extension of utility lines and sewer hook-ups may or may not constitute substantial reliance.⁶¹ Similarly, the effect of demolition,⁶² grading,⁶³ and excavation⁶⁴ varies from case to case. Some courts reason that the builder can preserve his investment by adapting the improvements to uses that will conform to the new zoning.⁶⁵

B. *The Balance Test*

By focusing on the extent of detrimental reliance, the substantial reliance rule ignores the countervailing public interest.⁶⁶ A change of conditions or new information, however, may justify revocation of a permit.⁶⁷ Sensitivity to environmental and social concerns has made

60. *Id.* at 454, 606 P.2d at 903.

61. *Compare* Cheltenham Twp. Appeal, 413 Pa. 379, 196 A.2d 363 (1964) (vested right to complete entire project where developer had installed electrical and sewerage systems) *with* Calabrese v. Zoning Bd. of Adjustment, 5 Pa. Commw. 444, 291 A.2d 326 (1972) (where developer connected water and sewer lines to lots there was no vested right to permit secured by fraud) *and* Friendship Builders, Inc. v. West Brandywine Twp. Zoning Bd., 1 Pa. Commw. 25, 271 A.2d 511 (1970) (no reliance for installation of water mains where lots did not conform to subdivision ordinance).

62. *Compare* Mattson v. City of Chicago, 89 Ill. App.3d 411 N.E.2d (1980) (vested right to building permit after demolition in reliance thereon); *with* People *ex rel.* Shell Oil Co. v. Town of Cicero, 11 Ill. App. 3d 900, 298 N.E.2d 9 (1968) (no right to permit due to demolition of existing structures where developer knew town trustees were opposed to plan).

63. *Compare* Williams v. Wofford, 220 Ga. 504, 149 S.E.2d 190 (1965) (grading and excavation for footings constitutes commencement of construction for purposes of vesting right to building permit) *with* Spindler Realty Corp. v. Monning, 243 Cal. App. 2d 255, 53 Cal. Rptr. 7 (1966), *cert. denied*, 385 U.S. 975 (1966) (no reliance for grading work where developer had not secured a building permit).

64. *Compare* Morseilles v. Hustis, 27 Ill. App. 3d 454, 325 N.E.2d 767 (1975) (right to permit vested where developer had excavated and poured footings in reliance thereon) *with* Kiges v. St. Paul, 240 Minn. 522, 62 N.W.2d 363 (1953) (excavation without more did not amount to substantial reliance).

65. *See, e.g.,* State *ex rel.* Green's Bottom Sportsmen, Inc. v. St. Charles County Bd. of Adjustment, 553 S.W.2d 721 (Mo. Ct. App. 1977) (gun club's building permit void *ab initio* where there was no showing land and improvements could not be put to other uses); Friendship Builders, Inc. v. West Brandywine Twp. Zoning Bd., 1 Pa. Commw. 25, 271 A.2d 511 (1970) (right to building permits for homes on nonconforming lots would not vest where developer could easily vary lot size without undue hardship). *Cf.* Hodge v. Zoning Bd. of Appeals of West Bradford Twp., 11 Pa. Commw. 311, 312 A.2d 813 (1973) (city estopped to forbid expansion of mobile home park where materials purchased could not be put to conforming use).

66. *See* Cunningham & Kremer, *supra* note 4, at 651.

67. *Cf.* City of Hollywood v. Hollywood Beach Hotel Co., 283 So. 2d 867 (Fla.

courts increasingly willing to consider the public welfare in the estoppel equation.⁶⁸ Thus one line of cases balances the reliance test against another rule: courts should not estop revocation of a permit where to do so would defeat a policy adopted to protect the public.⁶⁹

Illinois courts frequently resort to a balance approach.⁷⁰ Thus, in *Nott v. Wolff*,⁷¹ a developer began work on a motel in a commercial zone where zoning regulations permitted such a use.⁷² After he had retained an architect and entered into construction contracts, the city amended its zoning ordinance to exclude the motel.⁷³ In holding for the developer, the court weighed the evidence of public harm that would result from erecting the motel in a commercial zone and found the public interest small in relation to the injury to the property own-

Dist. Ct. App. 1973), *aff'd in part, rev'd in part*, 329 So. 2d 10 (Fla. 1976) (city estopped from downzoning land and rescinding developer's permit where no showing made that harm to general welfare required such action); *Tremarco Corp. v. Garzio*, 32 N.J. 448, 161 A.2d 241 (1960) (no sudden change of conditions or events confronted city with threat to public welfare). See generally 8 E. McQUILLIN, *supra* note 4, at § 25.157.

68. Some courts accept neighborhood opposition as a manifestation of the public interest. See, e.g., *State ex rel. Green's Bottom Sportsmen, Inc. v. St. Charles County Bd. of Adjustment*, 553 S.W.2d 721 (Mo. Ct. App. 1977) (despite lapse of sixty day appeal period, neighboring landowners were allowed to appeal decision of zoning board of appeals); *Pittsburg v. Oakhouse Assoc.*, 8 Pa. Commw. 349, 301 A.2d 387 (1973) (residents afforded every opportunity to protest after statutory appeal period had run). *But see Parkridge v. City of Seattle*, 89 Wash. 2d 454, 573 P.2d 359 (1978) (*en banc*) (community protest not synonymous with public health, safety, and welfare); *Town of Largo v. Imperial Homes*, 300 So. 2d 311 (Fla. Dist. Ct. App. 1971) (no public interest asserted where rezoning was at behest of neighbors and not pursuant to findings of planning commission). Cf. *Cunningham & Kremer*, *supra* note 4, at 652 n.17 (noting insofar as traditional zoning disputes are generally conflicts between private parties, the public welfare is usually subordinated to the interests of the groups of litigants).

69. See, e.g., *Western Land Equities, Inc. v. City of Logan*, 617 P.2d 388 (Utah 1980) (applicant for subdivision approval not entitled to favorable action if municipality can show compelling reason to exercise its power retroactively); *Petit v. Fresno*, 34 Cal. App. 3d 813, 111 Cal. Rptr. 262 (1973) (to hold that city cannot be estopped would not hurt city but would certainly injure area residents). See also *Cunningham & Kremer*, *supra* note 4, at 651 (zoning estoppel rule fails to consider a qualification recognized in most discussions of the doctrine of equitable estoppel: estoppel should not be invoked where to do so would defeat a policy adopted to protect the public).

70. See cases collected in Heeter, *supra* note 41, at 88 n.84.

71. 18 Ill. 2d 362, 163 N.E.2d 809 (1960).

72. *Id.* at 364, 163 N.E.2d at 810.

73. *Id.*

er.⁷⁴ In *Pioneer Trust and Savings Bank v. County of McHenry*,⁷⁵ the Illinois Supreme Court held unconstitutional an ordinance requiring a developer to prove that his proposed mobile home park was in the public interest.⁷⁶ Citing the *Wolff* case, the court noted that the gain to the public would be small and the hardship to developers great if it shifted the burden of proof on the impact of a project that otherwise met all the requirements for a special use permit.⁷⁷

Courts in other states have adopted a balance approach as well.⁷⁸ In its first vested rights case,⁷⁹ the Oregon Supreme Court in *Clackamas County v. Holmes*⁸⁰ devised a comprehensive, five-step balance test. The Oregon court considered the developer's good faith as well as his reliance expenditures, and broke down the public welfare question into considerations of the location, type, and cost of the project.⁸¹ The location factor showed that the project would not conflict with long range planning in the area. The type of project under consideration, a chicken processing plant, indicated the type of demands it would make on community services and what benefits it would provide. The cost factor provided a gross estimate of the project's size.⁸² The court weighed these three factors against the developer's good faith reliance expenditures, and held that the developer had acquired a vested right to complete construction despite enactment of an in-

74. *Id.* at 369, 163 N.E.2d at 862.

75. 41 Ill. 2d 77, 241 N.E.2d 454 (1968).

76. *Id.* at 87, 241 N.E.2d at 460.

77. *Id.* at 85, 241 N.E.2d at 459.

78. *See, e.g.,* *Almquist v. Town of Marshan*, 245 N.W.2d 819 (Minn. 1980) (remand for consideration of whether public interest, sought to be protected by moratorium adopted subsequent to application for building permit, outweighed developer's reliance expenditures on existing ordinance); *Western Land Equities, Inc. v. City of Logan*, 617 P.2d 392, 396 (Utah 1980) (modifying rule which required applications for building permits to be considered under zoning regulations in force at time of permit by requiring a consideration of countervailing public policy reasons for amending zoning); *Dimitrov v. Carlson*, 138 N.J. Super. 52, 350 A.2d 246 (1975) (site plan approval denied despite reliance on use variance secured six years earlier where townships had adopted an intervening ordinance in pursuit of the public health, safety and welfare); *Winopol v. Town of Hempstead*, 59 Misc. 2d 768, 300 N.Y.S.2d 197 (1969) (upholding statute which called for balancing public and private interests in issuance of building permits).

79. Comment, *Vested Rights and Land Use Development*, 54 OR. L. REV. 103, 105 (1975).

80. 265 Or. 193, 508 P.2d 190 (1973).

81. *Id.* at 198, 508 P.2d at 193.

82. *Id.* at 198-99, 508 P.2d at 193.

terim zoning ordinance that labelled the property for residential use.⁸³

C. *The Late Vesting Rule*

A final building permit is the *sine qua non* of a vested right to develop land in California.⁸⁴ The California courts consistently refuse to consider liabilities incurred in reliance on the mere expectation of a final permit as part of a developer's substantial reliance.⁸⁵ They treat reliance expenditures on grading and water permits, which routinely issue before the building permit, as made at the owner's risk.⁸⁶

A developer in California cannot make an estoppel argument until he secures *all* the necessary permits.⁸⁷ Thus, a landowner in the Seaside-Salinas-Monterey area must get the approval of fifteen state and regional agencies in addition to the local and county governments.⁸⁸

83. *Id.* at 199, 508 P.2d at 193.

84. *Raley v. California Tahoe Regional Planning Agency*, 68 Cal. App. 3d 965, 977, 137 Cal. Rptr. 699, 707 (1977) (expenditures made before the issuance of a permit will vest a right to the permit only in an emergency situation).

85. *See, e.g., id.* at 975, 137 Cal. Rptr. at 705 ("By issuing approvals preparatory to a building permit, the government makes no representation that the developer will be exempt from changing land use regulations; he must comply with the ordinances in effect at the time he secures a building permit."); *Avco Community Developers, Inc. v. South Coast Regional Comm'n*, 17 Cal. 3d 785, 795, 553 P.2d 546, 132 Cal. Rptr. 386, 392 (1976), *cert. denied*, 429 U.S. 1083 (1977) (government cannot be estopped to enforce laws in effect before a building permit issues). In fact, in *Russian Hills Improvement Ass'n v. Board of Permit Appeals*, 66 Cal. 2d 34, 423 P.2d 824, 56 Cal. Rptr. 672 (1967), the court urged the city to withhold permit approval until the last moment to allow any pending zoning changes to be approved or rejected.

Hawaii employs a similar rule. *See Life of the Land, Inc. v. City Council*, 61 Hawaii 390, 455, 606 P.2d 866, 903 (1980) (\$286,345.67 in preconstruction expenditures expended before the developers received any official assurances for their project were immaterial and did not count toward establishing equitable estoppel).

86. *See, e.g., Aries Development Co. v. California Coastal Zone Conservation Comm'n*, 48 Cal. App. 3d 534, 551, 122 Cal. Rptr. 315, 327 (1975) ("holder of [grading] permit shall proceed at his own risk . . .", citing Uniform Building Code, §§ 7006(g), 302(a)); *Spindler Realty Corp. v. Monning*, 243 Cal. App. 2d 255, 53 Cal. Rptr. 7, *cert. denied*, 385 U.S. 975 (1966) (owner takes a calculated risk in relying on the grading permit).

87. *See, e.g., Billings v. California Coastal Comm'n*, 103 Cal. App.3d 729, 735, 163 Cal. Rptr. 288, 291 (1980) ("[u]nless the owner possesses *all* the necessary permits, the mere expenditure of funds or commencement of construction does not vest any right in the development.").

88. BOSSELMAN, *supra* note 33, at 83-84.

The whole process may take over a year to complete.⁸⁹ By that time, permits secured at the start of the process may expire or subsequent zoning changes may void them.⁹⁰

Strict application of the late vesting rule can have harsh results. The California Coastal Zone Conservation Act of 1972⁹¹ essentially sought to suspend all development within 1,000 yards of the shoreline.⁹² It contained a savings clause for coastal projects on which the developer had performed substantial work in reliance on building permits issued before November 1, 1972.⁹³ Nevertheless, the courts applied the traditional late vesting rule to find that many of these developers did not make substantial reliance expenditures after a building permit issued. These builders had to seek additional permits from the appropriate regional coastal commission.⁹⁴ The commissions ultimately denied most of these applications in order to prevent irretrievable despoilation of coastal resources during the develop-

89. In a typical case, one California developer spent eighteen months negotiating the permit process in his community. By the end he had given up one-third of his planned number of dwellings and the cost of the remaining units had risen by \$14,000 to \$30,000. *INTERNAT'L COMPARATIVE LAND-USE PROGRAM, CONSERVATION FOUNDATION, GROPPING THROUGH THE MAZE* 16-19 (1977).

90. *See, e.g.*, *Russian Hills Improvement Ass'n v. Board of Permit Appeals*, 66 Cal. 2d 34, 40, 423 P.2d 546, 56 Cal. Rptr. 672, 677 (1967) (builder who proceeds before final approval of permit application runs the risk that the law might change so as to require denial of his application).

A small minority of California cases circumvent the harsh "all permits" rule by resorting to estoppel by privity. The acts of a local office of a state regulatory department may work an estoppel when they are regarded as representing both local and state interests, *Citizens Suburban Co. v. Rosemont Dev. Co.*, 244 Cal. App. 2d 666, 53 Cal. Rptr. 551 (1966); on an agent-principal theory, *Department of Pub. Works v. Volz*, 25 Cal. App. 3d 480, 102 Cal. Rptr. 107 (1972); because they represent the rights of the same government, *Lerner v. Los Angeles City Bd. of Educ.*, 59 Cal. 2d 382, 29 Cal. Rptr. 657 (1963); or because they have a shared identity in the public mind, *id.* Nevertheless, the developer who wishes to extend the privity argument to estop one unit of government due to the prior acts of another unrelated unit will fail where the criteria on which the first agency acted are different from those the latter must use. *See* 2 K. DAVIS, *ADMINISTRATIVE LAW* § 18.05 (1959). *See also* *Coastal S.W. Dev. Corp. v. California Coastal Zone Conservation Comm'n*, 55 Cal. App. 3d 525, 127 Cal. Rptr. 775 (1976) (a small town issues a building permit for reasons vastly different from those of a regional conservation agency).

91. CAL. PUB. RES. CODE §§ 27000-27650 (Deering 1976) (repealed 1977, superseded by the California Coastal Act of 1976, CAL. PUB. RES. CODE §§ 30000-30900 (Deering Supp. 1981)).

92. *Id.* at § 27104.

93. *Id.* at § 27404.

94. *Id.* at s§ 27401, 27402.

ment of a coastal land use plan.⁹⁵

D. *The Pending Ordinance Rule*

As attentive as the California courts are to protecting the public welfare by delaying vesting, the courts of Pennsylvania, Washington, and Idaho are just as predisposed toward early vesting. They employ the pending ordinance rule which gives the developer early assurances that once a building permit issues he can complete his project without fear of being thwarted by a later amendment, unless that amendment was pending at the time of the application.⁹⁶

In *Gallagher v. Building Inspector*,⁹⁷ the Pennsylvania Supreme Court held that where developers secured a valid permit in good faith when no zoning change was pending, the city could not later amend the ordinance to prevent permittees from building their townhouses. A right to the permit vested at the time of issuance, even though the developers had incurred no expenses in reliance thereon.⁹⁸

The Washington Supreme Court takes the rule in *Gallagher* a step

95. See *Cunningham & Kremer*, *supra* note 4, at 696-710 (summarizing the case law that this development and conservation interests created).

96. Nevertheless, the rule can be no more certain than the definition of the word "pending." Thus in *Smith v. City of Clearwater*, 383 So. 2d 681 (Fla. Dist. Ct. App. 1980), the Florida District Court of Appeals held an ordinance was pending when the appropriate administrative department begins actively pursuing it. *Id.* at 689. Similarly, where the city had merely directed the city attorney to draw up an amendment, this was not a pending ordinance. *Lhomer v. Bowen*, 410 Pa. 508, 188 A.2d 747 (1963) (city could not refuse plaintiff a permit to erect a gas station on the ground that a new zoning ordinance was pending). See generally Note, *The Effects of Pending Legislation on Applications for Building Permits in California*, 1968 U.S.F.L. REV. 124, 137-139 (discussing the rule in Pennsylvania).

97. 432 Pa. 301, 247 A.2d 572 (1968).

98. *Id.* at 574. Pennsylvania courts only rely on the pending ordinance test to vest a right to a permit when a developer cannot assert substantial reliance. Otherwise they follow the majority rule. See, e.g., *Friendship Builders, Inc. v. West Brandywine Twp. Zoning Bd.*, 1 Pa. Commw. 25, 271 A.2d 511 (1970) (*Gallagher* not applicable where developer had incurred liabilities in reliance on a permit); *Penn v. Yecko Bros.*, 420 Pa. 386, 217 A.2d 171 (1966) (to acquire vested rights, applicant must obtain a valid permit in good faith and incur substantial liabilities in reliance thereon).

Since *Gallagher*, the Pennsylvania Commonwealth Court has reaffirmed the substantial reliance rule. *Colonial Park for Mobile Homes, Inc. v. Zoning Hearing Bd.*, 5 Pa. Commw. 594, 290 A.2d 719 (1972) (refusing to extend pending ordinance rule where plaintiff argued that because he was entitled to a permit under a prior unconstitutional ordinance, he should be shielded from the effect of a new ordinance requiring larger lots).

further. In *Hull v. Hunt*,⁹⁹ the court ruled that the right to a permit vests at the time of the developer's application, if the permit is thereafter issued.¹⁰⁰ By relating the vesting question back to the time the application was made rather than the time the permit issued, *Hull* prevents city officials from sidestepping the pending ordinance test by delaying action on a permit application until an amendment to the relevant zoning can be initiated.¹⁰¹

Subsequent Washington appellate court cases retreated to the *Galagher* formulation by requiring that a zoning amendment be pending at the time of the permit's issuance, not the developer's application.¹⁰² Nevertheless, *Hull* was recently reaffirmed by the Washington Supreme Court in *Mercer Enterprises, Inc. v. City of Bremerton*.¹⁰³ Although the city council had not yet issued a permit at the time of a zoning change, the *Mercer* court held that the plaintiff developer had a vested right to receive the permit because his forty-nine acre condominium project conformed to the letter of the law in effect at the time of his application.¹⁰⁴ The planning director had initially withheld approval because the project did not conform with the spirit of the law as well.¹⁰⁵ Before the developer could amend his plans, the city council passed a moratorium on processing all applications for building permits.¹⁰⁶

The *Hull* holding can be criticized for tipping the balance too far in favor of the developer. Because a lengthy study period and public hearings typically precede a zoning change, the alert builder can initiate applications as soon as he learns of a proposed amendment. He

99. 53 Wash. 2d 125, 331 P.2d 856 (1958)(*en banc*).

100. *Id.* at 130, 331 P.2d at 859.

101. *See, e.g.*, *Russian Hills Improvement Ass'n v. Board of Permit Appeals*, 66 Cal. 2d 34, 46, 56 Cal. Rptr. 672, 680-81 (1967) (court urged the city to withhold permit approval until the last moment to allow any pending zoning changes to be approved or rejected).

102. *See, e.g.*, *Jones v. Town of Woodway*, 70 Wash. 2d 987, 425 P.2d 904 (1967) (refusal to apply *Hull v. Hunt* where plaintiff wished to subdivide previously unzoned property into 2.5 house lots acre); *Pierce v. King County*, 62 Wash. 2d 324, 382 P.2d 628 (1963) (building permits secured under illegal, spot zoning ordinance not protected from revocation by *Hull v. Hunt*); *Rogers v. City of Toppenish*, 23 Wash. App. 554, 596 P.2d 1096 (1979) (municipality liable for damages to real estate broker who bought land in reliance on inaccurate zoning information).

103. 93 Wash. 2d 624, 611 P.2d 1237 (1980) (*en banc*).

104. *Id.* at 628, 611 P.2d at 1239.

105. *Id.* at 629, 611 P.2d at 1240.

106. *Id.*

can thereby avoid complying with what may well be compelling public policies. In view of this perceived deficiency, the Utah Supreme Court recently modified its version of the *Hull* rule to allow the city to show compelling reasons for exercising its zoning power retroactively to the application date. In *Western Land Equities, Inc. v. City of Logan*,¹⁰⁷ the Utah court endorsed the pending ordinance rule but expressed concern that the *Hull* formulation affords no protection to intervening public interests that may be compromised by the planned private undertaking.¹⁰⁸ Nevertheless, it refused to find the public interest controlling where the city rejected the developer's subdivision application due to inadequate access for police and fire protection, although the city's preferred manufacturing use suffered from the same problem.¹⁰⁹

IV. NONCONFORMING USES

Zoning is based on uniformity of use within each district. A change in zoning may render existing uses nonconforming. In the interests of preserving neighborhood character within a district, these uses must terminate.¹¹⁰ An abrupt prohibition, however, would constitute a taking and require the municipality to pay just compensation.¹¹¹ Instead a municipality amortizes¹¹² such uses, allowing the owner to maintain his use for a period of time in order to permit a reasonable recovery of his investment.¹¹³ The owner may not, how-

107. 617 P.2d 388 (Utah 1980).

108. *Id.* at 395.

109. *Id.* at 396.

110. See MANDELKER, *supra* note 17, at 209 (discussing the assumption that mixing incompatible uses should be avoided).

111. ". . . nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

112. The term corresponds roughly to the accounting process by which funds are set aside or liabilities gradually extinguished. The idea is to let an owner get the useful life out of a structure to fulfill his investment expectations. The technique has a logical appeal but courts rarely bother to determine with any certainty the true remaining useful life of a structure. See *Cunningham & Kremer, supra* note 4, at 673 n.190; Note, *Removal of Nonconforming Uses: Amortization*, 59 CAL. L. REV. 242 (1971). See also Comment, *Zoning—Principles of Retroactivity and Amortization of the Nonconforming Use—A Paradox in Property Law*, 4 VILL. L. REV. 416, 417 (1959) (amortization as an acceptable substitute for compensation).

113. Structures are given preferential treatment since they represent a more irrecoverable investment than open space uses such as farms or drive-in theaters. See *Harbison v. City of Buffalo*, 4 N.Y.2d 553, 152 N.E.2d 42 (1958) (possible to allow

ever, make any new investment in the use.¹¹⁴

A structure must be "in use" before it can achieve nonconforming use status.¹¹⁵ Nevertheless, a court may determine that a developer has a vested right to complete a project despite an intervening change of zoning where termination of his project in mid-stream would cause the developer to lose his reliance investment. The developer is thus allowed to create a nonconforming use *ab initio*.¹¹⁶ Similarly, courts employ a recovery of investment analysis when they uphold revocation of a permit if the developer can put his investment to a use that conforms to the new zoning.¹¹⁷ Under either analysis, the result is the same: a developer achieves immunity from subsequent changes in zoning due to his prior investment.¹¹⁸

Some courts perceive the underlying similarity between the nonconforming use and completion right doctrines.¹¹⁹ Thus when a developer completes some stages of a large project before a change in zoning, a court may sever the finished parts from the integrated plan and declare them nonconforming uses.¹²⁰ This preserves those parts from the retroactive effect of a new ordinance. Despite the possibility

property owner's cooperation business while abating his outdoor storage use). *See also* MANDELKER, *supra* note 17, at 295.

114. Thus, an owner may not make repairs, *Selligman v. Von Allmen Bros.*, 297 Ky. 121, 179 S.W.2d 207 (1944) (plaintiffs forbidden by ordinance from constructing brick walls to replace rotted wooden ones in nonconforming dairy operation); nor may he extend a nonconforming use, *Martin v. Cestone*, 33 N.J. Super. 267, 110 A.2d 54 (1954) (owner could not extend nonconforming use of one lot for outdoor storage to his other lots). Furthermore, abandonment for a statutory period extinguishes a nonconforming use. *State ex rel. Peterson v. Burt*, 42 Wis. 2d 284, 166 N.W.2d 207 (1969) (city did not have to prove intent to abandon where ordinance provided for relinquishment of nonconforming use if discontinued for more than one year).

115. *See Anderson v. City Council*, 229 Cal. App. 2d 79, 40 Cal. Rptr. 41 (1964) (activity of owner and not his intentions determines the use of his property at the time of a zoning change); 8 E. McQUILLIN, *supra* note 4, at § 25.188.

116. 4 N. WILLIAMS, *AMERICAN LAND PLANNING LAW* § 111.03 (1974) (building in the face of a zoning change is the creation of a nonconforming use).

117. *See* note 65 and accompanying text *supra*.

118. *See* MANDELKER, *supra* note 17, at 294-95 (no justification for treating established nonconforming uses differently or more favorably than potentially nonconforming uses).

119. *See, e.g., Clackamas County v. Holmes*, 265 Or. 193, 197, 508 P.2d 190, 192 (1973) (allowance of nonconforming use applies to uses in various stages of development as well as those actually in existence at the time of a zoning change); *County of San Diego v. McClurken*, 37 Cal. 2d 683, 234 P.2d 972 (1951) (similarity between the two doctrines discussed).

120. *But see* notes 122-27 and accompanying text *infra*.

of merging the two doctrines, however, most courts observe a rigid separation between existing and planned uses.¹²¹

V. THE PROJECT APPROACH

Finally, courts modify the zoning estoppel rule to accommodate the problems of a large-scale development by treating the entire project as a single entity.¹²² In such a case, once a permit issues for a part of the project the rest follows automatically. The normal substantial reliance and public welfare considerations apply, but courts also consider the fact that a development is planned, financed, and represented to the city as a unified project.¹²³

In *In re Diamond's Appeal*,¹²⁴ the developer had a vested right to complete all stages of his multi-unit housing/commercial development where he had planned it as an integrated whole.¹²⁵ Adjacent landowners who were silent when the housing permits were issued could not appeal the subsequent issuance of commercial permits as a means of attacking the entire project.¹²⁶ The Pennsylvania Supreme Court said "[t]o allow complex comprehensive development plans for development of as large a tract as is here involved to be attacked on a piece-by-piece basis would result in the greatest of inequities to the developers."¹²⁷

121. *Cunningham & Kremer, supra* note 4, at 671.

122. *See generally, Delaney & Kominers, supra* note 52.

123. *See, e.g., Mercer Enterprises, Inc. v. City of Bremerton*, 93 Wash. 2d 624, 611 P.2d 1237 (1980) (*en banc*) (planning department's approval process for site plan of project, all negotiations treated project as a whole); *Murrell v. Wolff*, 408 S.W.2d 842 (Mo. 1966) (city officials knew of and acquiesced in developer's project as an integrated whole); *Telimar Homes, Inc. v. Miller*, 14 A.D.2d 586, 218 N.Y.S.2d 175 (1961) (developer repeatedly made known to town planning board and zoning commission that he purchased tract for a single, unified development). *But see, Oceanic California, Inc. v. North Central Coast Regional Comm'n*, 63 Cal. App. 3d 57, 133 Cal. Rptr. 664 (1976), *cert. denied*, 431 U.S. 95 (1977) (specifically rejected project approach).

124. 413 Pa. 379, 196 A.2d 363 (1964).

125. Single use, residential tract developments generally do not fare as well as mixed use projects. Stages that haven't reached the point of completion beyond which improvements can not be equally utilized in conformance with the new zoning classification may be denied a vested right. *See, e.g., Town of Lebanon v. Woods*, 115 Conn. 182, 215 A.2d 112 (1965) (vested right to part of project so close to completion as to be considered "in use," no vested right to smaller lot size where improvements could be put to new lot size after zoning change). *See Delaney & Kominers, supra* note 52 at 243-48.

126. 413 Pa. at 392, 196 A.2d at 369.

127. *Id.* at 394, 196 A.2d at 370.

Courts use the project approach in an *ad hoc* way to grant a developer just so much relief as they feel he merits. In *Henry & Murphy, Inc. v. Town of Allentown*,¹²⁸ subdividers recorded a plat for fifty duplex house lots. The town amended the ordinance to require larger, single family lots, but did not attempt to enforce the change for some time.¹²⁹ After the developer sold thirty-four of the substandard lots, the city attempted to enforce the new lot size.¹³⁰ The New Hampshire Supreme Court found that the amendment would reduce the number of remaining lots from sixteen to four, the price of which would be uncompetitive in the neighborhood.¹³¹ The court held that the developers had a vested right to the smaller lots for the entire project.¹³² Nevertheless, the court would not extend the project approach to include a right to the multiple dwelling unit classification.¹³³

VI. LEGISLATIVE RESPONSES

Courts struggle to adopt the equitable estoppel, vested rights doctrine to accommodate the realities of the modern large-scale development without jeopardizing the public welfare. They can only address the problem after a dispute arises between a developer and a regulatory body, however. Government itself can address the root of the problem by rationalizing the permit process by which it discharges its duty to protect the public welfare.

A state can amend its planning and zoning enabling act to establish the point in the development process at which a right to a building permit vests.¹³⁴ A less comprehensive alternative is to draft a savings

128. 120 N.H. 910, 424 A.2d 1132 (1980).

129. *Id.* at 911, 424 A.2d at 1133.

130. *Id.* at 912, 424 A.2d at 1133.

131. *Id.* at 914, 424 A.2d at 1134.

132. *Id.* at 914, 424 A.2d at 1135.

133. *Id.*

134. This would relieve the courts of choosing between tests that emphasize different policies by establishing criteria for courts to apply to the facts of each case. *See, e.g.*, MASS. GEN. LAWS. ANN. ch. 40A, § 6 (West Supp. 1977) (vested right to permit at time of application or issuance); 1968 PA. LAWS, Act No. 247 § 505(4) (applicant entitled to decision based on ordinances in effect at time of application). *See also* Rockshire Civic Ass'n, Inc. v. Mayor & Council of Rockville, 32 Md. App. 22, 358 A.2d 570 (1976) (savings clause in intervening legislation provided that previously approved applications continue in full force and effect); *Comparo v. Township of Woodbridge*, 91 N.J. Super. 585, 589, 222 A.2d 28, 30 (1966) (subsequent amendment

clause into any regulatory measure that requires a permit.¹³⁵ The effect in either case would be to treat affected projects as nonconforming uses.¹³⁶

Using another approach, Vermont consolidates the permit process itself by bringing together in a single application all the requirements for five of the agencies whose approval a developer must secure before starting construction.¹³⁷ A less comprehensive variation of this approach is the "permit register." A permit register collects the requirements of pertinent government agencies in a central office. Developers who must comply with more than one permit may request a joint hearing. Rather than individual hearings on each permit, a panel of agency representatives convenes and makes a certified record on which the agencies must base their permit decisions.¹³⁸

Another legislative technique mandates a statute of limitations for permit decisions. Where an agency fails to act on an application in a specified number of days, the project acquires presumptive approval.¹³⁹

As a final solution, one writer suggests totally eliminating building permits. Instead, a builder could create any sort of a development he chose but, like a manufacturer of an unsafe automobile, he would be

exempted permits from effects of previous zoning change). *See generally* 8 E. McQUILLIN, *supra* note 4, at § 25.156.

135. *See, e.g.*, CAL. PUB. RES. CODE § 27404 (Deering 1976) (repealed January 1, 1977) (exempted from requirements of the California Coastal Zone Conservation Act projects for which developer had performed substantial work on a permit issued before November 8, 1972).

136. *See* notes 122-28 and accompanying text *supra*.

137. *See generally* BOSSELMAN, *supra* note 33, at 22; Senecal, *Regulatory Coordination in Vermont*, in URBAN LAND INSTITUTE, THIRTEEN PERSPECTIVES ON REGULATORY SIMPLIFICATION 55 (1979) [hereinafter cited as URBAN LAND INSTITUTE].

138. *See, e.g.*, MODEL CODE, *supra* note 36, §§ 2-401, -402 (permit register and joint hearing provisions); *see also*, San Francisco Planning & Urban Renewal Ass'n, v. Central Permit Bureau, 30 Cal. App. 3d 920, 106 Cal. Rptr. 670 (1973) (central permit bureau coordinates application review); Washington Environmental Coordination Procedures Act of 1973 § 6, WASH. REV. CODE ANN. §§ 90.62.060 (Supp. 1981) (joint hearing procedure).

139. *See, e.g.*, MEDICAL CODE, *supra* note 36, at § 2-403(5) (presumptive approval if agency fails to comment in a specified time); 19 OKLA. STAT. ANN. tit. 19, § 863.18 (West 1962 & Supp. 1981) (presumptive approval in no action in forty-five days); Vermont State Land Use Development Plan Act of 1969, VT. STAT. ANN. tit. 10, § 6086(b) (and—ten days); Washington Environmental Coordination Procedure Act of 1973 § 4, WASH. REV. CODE ANN. § 90.62.040 (Supp. 1981) (and—fifteen days).

liable in tort for any resulting harm.¹⁴⁰ This is not as farfetched as it sounds. New York currently has a law allowing a developer to post a bond as security against environmental damage rather than requiring him to seek a permit.¹⁴¹

VII. SUMMARY AND CONCLUSIONS

All things considered, it is not unfair to say that in attempting to reach just results in applying the vested rights doctrine, courts pick the test that fits their notions of due process and fair play,¹⁴² emphasizing facts that support the desired conclusion.¹⁴³ The quality of the resulting decisional law is uneven. The outcome of any given case is uncertain since courts manipulate the tests they have developed to reach decisions that are fair both to the developer and to the public.¹⁴⁴ Even the pending ordinance rule, which purports to promote certainty and reduce litigation, requires judicial analysis to determine

140. Babcock, *The Permit Explosion: The Final Solution*, in URBAN LAND INSTITUTE, *supra* note 137, at 141-44.

141. N.Y. ENVIR. CONSERV. LAW § 17-1501 (McKinney Supp. 1977).

142. *See, e.g.*, *Western Land Equities Inc. v. City of Logan*, 617 P.2d 388 (Utah 1980) (bad faith for city to reject application for the very project that triggered zoning reconsideration); *Largo v. Imperial Homes*, 398 So. 2d 571 (Fla. Dist. Ct. App. 1975) ("estoppel is nothing more than fair play"); *Gallagher v. Building Inspector*, 432 Pa. 301, 306-07, 247 A.2d 572, 574 (1968) (the civil law frowns on making illegal that which the law has already recognized as legal).

143. *See* note 51 *supra*. Most courts measure reliance against the total project cost. *See Aries Development Corp. v. California Coastal Zone Conservation Comm'n*, 48 Cal. App. 3d 534, 122 Cal. Rptr. 315 (1975) (grading cost was \$2,263,333); *Town of Hempstead v. Lynn*, 32 Misc. 2d 312, 222 N.Y.S.2d 526 (1961) (\$15,600 de minimis where total project cost estimated to be \$400,000).

Other courts gauge the extent of reliance expenditures by their impact on the developer's financial ability. *See, e.g.*, *Friendship Builders, Inc. v. West Brandywine Twp. Zoning Bd.*, 1 Pa. Commw. 25, 271 A.2d 511 (1970) (financial hardship to builder not great).

One Florida court even found substantial reliance by comparing the developer's outlay to the city's annual budget. *Project Home, Inc. v. Town of Astatula*, 373 So. 2d 710 (Fla. Dist. Ct. App. 1979) (\$8,300 substantial because it was more than the town's entire annual budget).

144. *See, e.g.*, *Henry & Murphy, Inc. v. Town of Allenstown*, 120 N.Y. 910, 424 A.2d 1132 (1980) (developers found to have a vested right to previously approved lot size, but denied a vested right to previously approved multi-family use); *Jayne Estates, Inc. v. Raynor*, 22 N.Y.2d 417, 239 N.E.2d 713, 293 N.Y.S.2d 75 (1968) (tortured use of variance to allow owner to continue use already begun in violation of existing zoning). *Cf. Note, Administrative Discretion in Zoning*, 82 HARV. L. REV. 668 (1969) (noting the overwhelming number of variances approved).

when an ordinance is "pending."¹⁴⁵ Since some litigation is inevitable over when a right to develop land vests, an administrative body which applies statutory criteria in formal adjudicatory hearings may be a better forum.¹⁴⁶

The building permit is a necessary administrative tool for the protection of the public welfare.¹⁴⁷ The growth of single purpose agencies whose regulatory shadows fall on some phase of development may be a healthy response to public demands for a better living environment. The resulting unpredictability and delay, however, is not necessary.¹⁴⁸

Legislative attempts to simplify and coordinate the approval process are welcome additions to the vested rights conundrum. Consolidation of the permit process represents a desirable evolution in the administration of land use regulations. Codifying criteria for determining when a development right vests may conflict with the flexibility that characterizes the equitable principles courts often use in vested rights cases. Nevertheless, statutory guidelines provide a degree of certainty not available under the former approach. As construction projects increase in size and complexity, requiring a concomitant increase in the commitment of capital, that trade-off may become necessary.

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145. See note 96 and accompanying text *supra*.

146. Thus, in Vermont subdivision approval is in the hands of nine district environmental review boards that apply ten statutory criteria to permit applications. The boards hold public hearings and make decisions in a quasi-judicial manner with interested agencies and the developer in adversarial roles. Proceedings are conducted according to Vermont's Administrative Procedures Act.

147. See note 11 and accompanying text *supra*.

148. See note 32 and accompanying text *supra*.

