ZONING ESTOPPEL: APPLICATION OF THE PRINCIPLES OF EQUITABLE ESTOPPEL AND VESTED RIGHTS TO ZONING DISPUTES

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Property owners in zoning controversies with local governments often attempt to establish that the government estopped itself by some prior act. Typically, the local government issues a building permit to the owner, and he begins construction. Before he completes construction, however, the government adopts an amendment to the zoning ordinance changing the applicable requirements and in turn revoking his permit. The owner argues that the government estopped itself by issuance of the building permit because the permit apparently granted the right to complete construction, he relied upon this, and he would be injured if the government were allowed to enforce the new zoning.

Despite the historical rule that a government cannot be estopped while acting in a governmental capacity,[1] as a local government does

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1. This rule has been characterized as "a prerogative fallacy" because it is nothing more than a general statement subject to numerous exceptions. Berger, *Estoppel Against the Government*, 21 U. CHI. L. REV. 680, 683 (1954). This characterization generally reflects the status of the rule with respect to zoning cases. Many of the courts still hold that the principle of estoppel should be applied sparingly against local governments exercising their zoning powers. However, they will generally find some way to give relief if the owner would otherwise suffer a hardship. *Compare* Mazo v. City of Detroit, 9 Mich. App. 354, 156 N.W.2d 155 (Ct. App. 1968) *with* Township of Pittsfield v. Malcom, 375 Mich. 135, 134 N.W.2d 166 (1965). In *Mazo*, the court denied relief to a landowner who had relied on a permit that violated the spacing requirements for taverns and who would have suffered a loss of $6,500, on the ground that non-estoppel of municipalities in the enforcement of zoning ordinances is the rule in Michigan. At the same time, it acknowledged that it had granted relief in *Township of Pittsfield*, where an owner had built a dog kennel costing $45,000 in reliance upon

while exercising its zoning powers, it appears that a majority of the courts now hold that the defense of equitable estoppel may be raised against local governments in this and certain other kinds of zoning disputes. Some of the same courts, and apparently all of those which continue to hold that a government cannot be estopped in a zoning controversy, recognize a legal defense cast in terms of whether the property owner acquired "vested rights" to use his land without governmental interference. The origins of the two defenses are quite different. The defense of estoppel is derived from equity,[2] but the de-

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an erroneously issued permit, because the case presented such "exceptional circumstances." On the other hand, some courts seem as willing to apply the principle of estoppel against local governments as against private individuals. *See* note 38 and accompanying text for a discussion of the approach taken by the Illinois courts resulting in the frequent application of the principle of estoppel. Nevertheless, there are certain kinds of zoning cases in which a majority of the courts still refuse to grant relief to property owners.

For other material dealing with the application of the principle of estoppel to zoning cases see, HAGMAN, CALIFORNIA ZONING PRACTICE §§ 5.48-61 (1969); 9 E. MCQUILLIN, MUNICIPAL CORPORATIONS §§ 26.213-14 (3d ed. 1964); 1 METZENBAUM, ZONING 162-77 (2d ed. 1955); Note, *The Building Permit and Reliance Thereon in South Carolina,* 21 S.C.L.Q. 70 (1968); Comment, *The Effect of Pending Legislation on Application for Building Permits in California,* 3 U. SAN FRANCISCO L. REV. 124 (1968).

2. The following often cited statements by Pomeroy will be used to demonstrate the differences between zoning estoppel and equitable estoppel. He defines equitable estoppel as:

> the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of conduct, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy. 2 POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 804 (4th ed. 1918) [hereinafter cited as POMEROY].

In addition, Pomeroy identifies six elements which must generally be present before a party will be estopped. The elements are:

> (1) There must be conduct—acts, language, or silence—amounting to a representation or concealment of material facts. (2) These facts must be known to the party estopped at the time of his said conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him. (3) The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when such conduct was done, *and at the time when it was acted upon by him.* (4) The conduct must be done with the intention, or at least with the *expectation,* that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon. There are several familiar species in which it is simply *impossible* to ascribe any *intention* or even *expectation* to the party estopped that his conduct will be acted upon by the one who afterwards claims the benefit of the estoppel. (5) The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it. (6) He must in fact act upon it in such a manner as to change his position for the worse; in other words, he must so act that he would suffer a

fense of vested rights reflects principles of common and constitutional law.[3] Similarly, their elements are different. Estoppel focuses upon whether it would be inequitable to allow the government to repudiate its prior conduct; vested rights upon whether the owner acquired real property rights which cannot be taken away by governmental regulation. Nevertheless, the courts seem to reach the same results when applying these defenses to identical factual situations.

At first glance, the decisions setting forth the circumstances under which the defenses of either estoppel or vested rights will be allowed appear confused and conflicting. The difficulty in attempting to make sense out of these decisions lies in two facts. First, they are generally written in the traditional language of the principles of estoppel and vested rights, and second, they are understandable only when analyzed in light of a principle of law—characterized here as zoning estoppel—which is hardly ever fully articulated. This could be another example, in a field already too full of such examples, of the courts' either not understanding what they are saying or saying something other than what they mean.[4] It also could be an example of the courts', consciously or unconsciously, attempting to adapt the historical principles of estoppel and vested rights to the exigencies of

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loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct and to assert rights inconsistent with it. *Id.* at 1644-45.

Pomeroy then goes on to note numerous qualifications and exceptions to the six elements. As will be discussed, these exceptions are often more relevant to the cases in which zoning estoppel was applied than are his six general elements.

3. The principle of vested rights is less precise and is based upon concepts of common and constitutional law.

When it is said that the legislature ought not to deprive parties of their "vested rights" all that is meant is this: that the rights styled "vested" are *sacred* and *inviolable,* or are such as the parties ought not to be deprived of by the legislature. Like a thousand other propositions which sound speciously to the ear, it is either purely identical and tells us nothing, or begs the question in issue. This use of "vested" has passed from the domain of politics to that of law, by reason of the provisions of the 14th Amendment to the Constitution of the United States, and in most of the State Constitutions, that no one shall be deprived of his property "without due process of law," or "but by the law of the land." GRAY, THE RULE AGAINST PERPETUITIES 98 & n. 1 (3d ed. 1915).

4. The warning given in Kiker v. City of Riverdale, 223 Ga. 142, 143, 154 S.E.2d 17, 18 (1967) is apt: "Estoppel arises under a variety of circumstances and generally the cases rather than any rule must be reviewed and applied."

Another author has expressed similar feelings about the way in which the courts dispose of substantive issues in zoning cases which purport to determine whether property owners have standing. Ayer, *The Primitive Law of Standing in Land Use Disputes: Some Notes from a Dark Continent,* 55 IOWA L. REV. 344 (1969).

contemporary zoning litigation. In any event, the so-called principle of zoning estoppel appears to provide a generally reliable means of analyzing and explaining those decisions in which either equitable estoppel or vested rights were raised as a defense.

I. The Principle of Zoning Estoppel

A synthesis of the cases in which either equitable estoppel or vested rights were asserted and allowed as a defense[5] reveals the following principle of zoning estoppel:

> **A local government exercising its zoning powers will be estopped when a property owner,**
> **(1) relying in 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 ostensibly had acquired.**

This black letter statement of the principle of zoning estoppel is the core of this article. The remaining sections will be devoted to the four factual categories of cases in which zoning estoppel is most often invoked and allowed as a defense; the meaning of each of the three elements of zoning estoppel relative to each of the four factual categories; and, an evaluation of whether the interests of property owners and the public are adequately protected by the principle, as well as some recommendations for change.

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5. The relationship between the principles of equitable estoppel and vested rights in the zoning cases is indeed curious. Apparently those courts unwilling to hold that a government can be estopped while exercising its governmental powers apply the principle of vested rights to avoid the hardships their position on estoppel could promote. The danger inherent in this stance is apparent: if the landowner's attorney chooses the wrong argument, *i.e.*, estoppel, his client will be denied relief.

The courts also confuse the two principles and use the terminology of both interchangeably. Thus it is not unusual to find a court holding the city "estopped" because the property owner acquired "vested rights." *See, e.g.*, District of Columbia v. Cahill, 54 F.2d 453 (D.C. Cir. 1931). In addition, there are cases in which the courts have held that a local government cannot be estopped, but which, nevertheless, held that the government could not enforce the zoning ordinance on the basis of other unidentified equitable principles. *See, e.g.*, Town of Marblehead v. Deery, —— Mass. ——, 254 N.E.2d 234 (1969). Similarly, in State *ex rel.* Humble Oil & Ref. Co. v. Wahner, 25 Wis. 2d 1, 130 N.W.2d 304 (1964), the court held that an oil company had never acquired any vested rights —its application having been rejected three times—but, nevertheless, granted relief on equitable principles because the town had given the company a "fast shuffle."

II. The Four Categories of Cases

The cases in which zoning estoppel is most often invoked and allowed as a defense fall into four factual categories. They involve reliance upon (1) a validly issued permit; (2) the probability of issuance of a permit; (3) an erroneously issued permit; or (4) the non-enforcement of a zoning violation. Under the laws of zoning and building permits which normally govern these cases, a property owner would have no right to relief if, for example, he relied upon a validly issued permit which was subsequently revoked, regardless of the extent to which he incurred expenses and obligations in reliance upon it. To avoid the harsh results to which the rules governing these cases could lead, the courts increasingly allow zoning estoppel to be asserted as a defense.

A. Category One: Reliance upon a Validly Issued Permit

This category of cases occurs most frequently. In most of the cases in category one, the property owner initiated development relying on a permit validly issued by the local government. Before he had completed his development, however, the local government amended the zoning ordinance to prohibit his intended use or structure. This terminated his permit. Also falling into category one are a number of cases in which the owner began the development of a use or structure in the absence of any applicable zoning ordinance. Here, too, the local government prohibited the use or structure before the owner had realized his intentions.

There are numerous decisions sustaining the power of the local government to prohibit the owner from proceeding in these situations. The general rule is that building permits are not protected, per se, against revocation by subsequent legislation, because a permit issued under the police power confers no rights upon the permittee.[6] Thus, if one begins construction relying on a permit, only to have the zoning changed and his permit revoked before construction is completed, the new zoning will control, not the zoning in effect when the permit was issued.[7] Similarly, a development begun in the absence of any

6. 8 McQuillin, *supra* note 1, at § 25.156.

7. *See, e.g.*, Geneva Investment Co. v. City of St. Louis, 87 F.2d 83 (8th Cir. 1937); Town of Lebanon v. Woods, 153 Conn. 182, 215 A.2d 112 (1965); Cline v. City of Boulder, —— Colo. ——, 450 P.2d 335 (1969); North Redington Beach v. Williams, 220 So. 2d 22 (Fla. Dist. Ct. App. 1969); People *ex rel.* Nat'l Bank v. County of Cook, 56 Ill. App. 2d 436, 206 N.E.2d 441 (1965); Brett v. Building Comm'r, 250 Mass. 73, 145 N.E. 269 (1924); Pearce v. Lorson,

zoning must conform to a subsequently adopted zoning ordinance if it is not completed as of the date of the ordinance.[8]

However, in most of the decisions denying relief in category one, the owner did not incur such extensive expenses or obligations that he would have suffered an indisputable hardship if the new zoning were enforced.[9] In other cases, the owner did not act in good faith.[10] In short, the owners in these cases did not make an appropriate case for the application of the principle of zoning estoppel. Thus, it is doubtful if these cases hold that a landowner can never secure relief in a category one situation. Instead, the law seems to be that all of

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393 S.W.2d 851 (Mo. Ct. App. 1965); County of Sanders v. Moore, 182 Neb. 377, 155 N.W.2d 317 (1967); Bosse v. City of Portsmouth, 107 N.H. 523, 226 A.2d 99 (1967); Winn v. Lamoy Realty Corp., 100 N.H. 280, 124 A.2d 211 (1956); Town of Lloyd v. Kart Wheelers Raceway, Inc., 28 App. Div. 2d 1015, 283 N.Y.S.2d 756 (1967); Warner v. W & O, Inc., 263 N.C. 37, 138 S.E.2d 782 (1964); Howe Realty Co. v. City of Nashville, 176 Tenn. 405, 141 S.W.2d 904 (1940).

8. *See, e.g.,* Town of Lebanon v. Woods, 153 Conn. 182, 215 A.2d 112 (1965); City of Syracuse v. Farmers Elevator, Inc., 182 Neb. 783, 157 N.W.2d 394 (1968); Cahn v. Guion, 27 Ohio App. 141, 160 N.E. 868 (1927); City of Harrisburg v. Pass, 372 Pa. 318, 93 A.2d 447 (1953).

9. The extent of the owner's reliance in the cases cited in notes 7 and 8 *supra* was as follows: *Geneva Investment Co.,* note 7 (had not done any substantial work); *Town of Lebanon,* note 8 (although the developer had completed 14 homes which were allowed to remain, the court found that the entire subdivision tract was not irrevocably committed so as to constitute a nonconforming use); *Cline,* note 7 (service station was still in the "dream state"); *North Redington Beach,* note 7 (had not acted on permit for a year and a half); *People ex rel. Nat'l Bank,* note 7 (merely some $1,600 or so paid in wages to regular employees who would have been paid anyway to do some work on designing apartments); *Brett,* note 7 (did some excavation and entered into construction contracts); *Pearce,* note 7 (one hour before the ordinance was adopted, a chiropodist hung a sign in the window, installed a treatment chair, and treated one or two persons); *City of Syracuse,* note 8 (made no substantial expenditures); *County of Sanders,* note 7 (expenditures of $3,000 in preparing site for trailer park); *Bosse,* note 7 (invested some $7,000 towards construction but after he was warned that he was taking a "calculated risk" in going ahead); *Winn,* note 7 (spent less than $1,000); *Town of Lloyd,* note 7 (spent $487 of $33,000 projected cost); *Warner,* note 7 (soil borings and felling of six of seven trees after adoption of ordinance); *Cahn,* note 8 (purchase of land only); *City of Harrisburg,* note 8 (invested $14,580 in architect's fees, excavation work and building materials, but the court implied that it was the defendant's fault that he had not begun construction before the prohibitory ordinance was adopted); *Howe Realty Co.,* note 7 (had not begun construction).

10. The attempt of the chiropodist in Pearce v. Lorson, 393 S.W.2d 851 (Mo. Ct. App. 1965) to establish a nonconforming office was described as a "sham effort." *Id.* at 854. Under the analysis of the good faith requirement, *infra,* the owner would have undoubtedly lacked good faith.

the courts, or at least the vast majority, will allow zoning estoppel to be raised as a defense in the category one cases when appropriate.[11]

For example, in *Town of Hillsborough v. Smith*,[12] the defendants were issued a building permit on May 3 for the construction of a dry cleaning plant. At that time there was no ordinance prohibiting the plant. On May 22, they paid $9,400 for the lot on which the plant was to be located and also signed a contract for the construction of the building for $15,000. On the following day they ordered stakes driven into the ground to indicate the three corners of the building, and a day later they placed an order for dry cleaning equipment. The town adopted a zoning ordinance on May 27 establishing a rural-residential zone only for that area of the town which included the defendants' lot; defendants' cleaning plant was not allowed in the zone. It was not until June 11, however, that they were advised that their building permit had been revoked by the rezoning. In the interim after adoption of the ordinance, they also had contracted for the purchase of more equipment and for a franchise to operate a "martinizing" plant. Defendants refused to terminate their plans. They made additional payments totaling nealy $11,000 on the contracts they had entered into and had the building on the lot demolished and the lot graded. Finally, the town filed suit to enjoin them from proceeding with the excavation of the foundation.

On appeal, the Supreme Court of North Carolina held for the defendants. It acknowledged that the general rule is that the issuance of a building permit does not confer rights which cannot be taken away by a subsequent ordinance. However, the court held that such rights may be acquired if a property owner, in good faith and in reliance upon a lawfully issued permit, makes expenditures or incurs contractual obligations, substantial in amount, prior to the adoption of the ordinance. Although the defendants' good faith had been called into question (the city claimed that defendants had been notified on several occasions that the ordinance was in the process of adoption), the court held that the jury's verdict for the defendants

11. *See, e.g.*, Wheat v. Barrett, 210 Cal. 193, 290 P. 1033 (1930); Pratt v. City & County of Denver, 72 Colo. 51, 209 P. 508 (1922); City of Gainesville v. Bishop, 174 So. 2d 100 (Fla. Dist. Ct. App. 1965); Renieris v. Village of Skokie, 85 Ill. App. 2d 418, 229 N.E.2d 345 (1967); Krekeler v. Board of Adjustment, 422 S.W.2d 265 (Mo. 1968); Baker v. Somerville, 138 Neb. 466, 293 N.W. 326 (1940); Collins v. Magony, 31 App. Div. 2d 597, 294 N.Y.S.2d 860 (1968); Town of Hillsborough v. Smith, 276 N.C. 48, 170 S.E.2d 904 (1969); Gallagher v. Building Inspector, 432 Pa. 301, 247 A.2d 572 (1968).

12. 276 N.C. 48, 170 S.E.2d 904 (1969).

was conclusive of this question. In response to the town's argument that the defendants had not changed the physical appearance of their land until after having been notified of the ordinance, which the town claimed was the correct test of substantial reliance, the court held that entering into contracts for the purchase of the land and the equipment and the construction of the building was sufficient reliance. According to the court, the town's argument missed this crucial point:

> It is not the giving of notice to the town, through a change in the appearance of the land, which creates the vested property right. . . . The basis of his right to build and use his land, in accordance with the permit issued to him, is his change of his own position in bona fide reliance upon the permit.[13]

In addition to the courts which apply the principle of zoning estoppel to category one cases, a number of courts have held, with varying degrees of explicitness and consistency, that a permit once issued cannot be revoked by a rezoning, even though the owner does not incur any expenses or obligations in reliance upon it. However, as will be discussed *infra,* it remains to be seen whether these decisions actually mean what they say.

B. Category Two: Reliance upon the Probability of Issuance of a Permit

In the second category of cases, a property owner applies for a permit and initiates development before it is issued, relying on circumstances indicating a probability that it will be issued. The circumstances relied on might be that his use or structure is permitted of right under the zoning ordinance,[14] that a government official has assured him that he will be granted a permit,[15] or that he has obtained

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13. *Id.* at 53, 170 S.E.2d at 909.

14. Grayson v. City of Birmingham, 277 Ala. 522, 173 So. 2d 67 (1963); Anderson v. City Council, 229 Cal. App. 2d 79, 40 Cal. Rptr. 41 (Dist. Ct. App. 1964); Edelstein v. Dade County, 171 So. 2d 611 (Fla. Dist. Ct. App. 1965); Clairmont Dev. Co. v. Morgan, 222 Ga. 255, 149 S.E.2d 489 (1966); Dato v. Village of Vernon Hills, 91 Ill. App. 2d 111, 233 N.E.2d 48 (1968); Smith v. M. Spiegel & Sons, 31 App. Div. 2d 819, 298 N.Y.S.2d 47 (1969); Verratti v. Township of Ridley, 416 Pa. 242, 206 A.2d 13 (1965); Pure Oil Div. v. City of Columbia, —— S.C. ——, 173 S.E.2d 140 (1970).

15. *See, e.g.,* Southern Rock Prod. Co. v. Self, 279 Ala. 488, 187 So. 2d 244 (1966); Building Inspector v. Werlin Realty, 349 Mass. 623, 211 N.E.2d 338 (1965).

a favorable court[16] or appeals board decision[17] reversing the denial of an earlier application. To his dismay, his application nevertheless is rejected because his proposed use or structure has been prohibited by a proposed amendment. In situations like this, appeals to the courts for relief generally have been unsuccessful for they have tended to hold that one cannot reasonably expect to acquire any rights until after he has secured a permit.[18] Once again it is difficult to tell how many of these decisions hold that a property owner may never secure relief if he incurred expenses or obligations without first securing a permit. It is probably accurate to read most of them as holding that the owner was not entitled to relief under the circumstances,[19]

16. *See, e.g.*, West Coast Advertising Co. v. City and County of San Francisco, 256 Cal. App. 2d 357, 64 Cal. Rptr. 94 (Dist. Ct. App. 1967); Fiore v. City of Highland Park, 93 Ill. App. 2d 24, 235 N.E.2d 23 (1968); Andgar Associates, Inc. v. Board of Zoning Appeals, 30 App. Div. 2d 672, 291 N.Y.S.2d 991 (Sup. Ct. 1968); Paliotto v. Dickerson, 22 App. Div. 2d 929, 256 N.Y.S.2d 55 (Sup. Ct. 1964); Atlantic Beach Towers Constr. Co. v. Michaelis, 21 App. Div. 2d 875, 251 N.Y.S.2d 794 (Sup. Ct. 1964).

17. *See, e.g.*, West Coast Advertising Co. v. City and County of San Francisco, 256 Cal. App. 2d 357, 64 Cal. Rptr. 94 (Dist. Ct. App. 1967); People *ex rel.* Interchemical Corp. v. City of Chicago, 29 Ill. 2d 446, 194 N.E.2d 199 (1963). Other forms of governmental conduct which have been relied on in category two include: advice of village trustees to delay application for building permits for a trailer park, Dato v. Village of Vernon Hills, 91 Ill. App. 2d 111, 233 N.E.2d 48 (1968); the issuance of a grading permit which the court held entitled one to complete grading but not to the automatic issuance of a building permit, Spindler Realty Corp. v. Monning, 243 Cal. App. 2d 255, 53 Cal. Rptr. 7 (Dist. Ct. App. 1966); passage of a resolution to rezone property for manufacturing which was ineffective because the zoning ordinance could only be changed by amendment, City of Hutchins v. Prasifka, 450 S.W.2d 829 (Tex. 1970).

18. *See, e.g.*, Southern Rock Prod. Co. v. Self, 279 Ala. 488, 187 So. 2d 244 (1966); Grayson v. City of Birmingham, 277 Ala. 522, 173 So. 2d 67 (1963); West Coast Advertising Co. v. City and County of San Francisco, 256 Cal. App. 2d 357, 64 Cal. Rptr. 94 (Dist. Ct. App. 1967); Spindler Realty Corp. v. Monning, 243 Cal. App. 2d 255, 53 Cal. Rptr. 7 (Dist. Ct. App. 1966); Slater v. City Council, 238 Cal. App. 2d 864, 47 Cal. Rptr. 837 (Dist. Ct. App. 1965); Anderson v. City Council, 229 Cal. App. 2d 79, 40 Cal. Rptr. 41 (Dist. Ct. App. 1964); Forrester v. City of Gainesville, 223 Ga. 344, 155 S.E.2d 376 (1967); Weber v. Village of Skokie, 92 Ill. App. 2d 355, 235 N.E.2d 406 (1968); Naumovich v. Howarth, 92 Ill. App. 2d 134, 234 N.E.2d 185 (1968); State *ex rel.* Jacobson v. City of New Orleans, 166 So. 2d 520 (La. Ct. App. 1964); Richmond Corp. v. Board of County Comm'rs, 254 Md. 244, 255 A.2d 398 (1969); L.P. Marron & Co. v. Township of River Vale, 54 N.J. Super. 64, 148 A.2d 205 (Super. Ct. 1959); Andgar Associates v. Board of Zoning Appeals, 30 App. Div. 2d 672, 291 N.Y.S.2d 991 (Sup. Ct. 1968); Penn Twp. v. Yecko Bros., 420 Pa. 386, 217 A.2d 171 (1966); City of Hutchins v. Prasifka, 450 S.W.2d 829 (Tex. 1970).

19. The extent of the owners' reliance in the cases in note 18, *supra*, is as follows: *Southern Rock Prod. Co.* (paying of license fees and entering into royalty

although it is likely that the courts are more hesitant to grant relief in this category than in category one. In any event, there are cases in which the courts have applied the principle of zoning estoppel when a local government has refused to grant a permit because of a recently adopted or pending ordinance.[20] Other cases take a somewhat different position and hold that a property owner has a right to use his property as allowed by the zoning ordinance as of the date of his application for a permit.[21]

For example, in *Pure Oil Division v. City of Columbia*,[22] a bank, as trustee of a corner lot, and an oil company proposed to use the property for a filling station, a permitted use under the zoning ordinance. It was the only piece of property zoned for non-residential use within a radius of one mile. Prior to applying for a permit, the bank, over

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agreements and limestone supply contracts); *Grayson* (invested $3,517.60 in preparing lots for sale for business purposes; proposed use would have created traffic hazard at nearby school); *West Coast Advertising Co.* (no expenditures made or obligations incurred); *Spindler Realty Corp.* (incurred expenses in grading property in reliance upon grading permit which gave no right to a building permit); *Slater* (no substantial work or expenditures); *Anderson* (purchase of land, expenditure of $500, and investment of time valued at $2,500); *Forrester* (started construction after being warned that application was not a permit); *Weber* (no reliance on subdivision plat showing three lots, as plaintiff had always treated the parcels as one lot on which his home was located); *Naumovich* (purchase of property conditioned upon obtaining suitable rezoning and expenses amounting to $900); *State ex rel. Jacobson* (installation of plumbing for trailer park); *Richmond Corp.* (had not begun construction); *L.P. Marron & Co.* (only purchased property); *Andgar Associates* (no evidence that landowners had begun construction); *Penn Township* (towed a few wrecked automobiles onto the premises as well as an old bus for an office, and transacted business in the amount of $109.50); *City of Hutchins* (purchased property, stored some old tires on it, and poured foundation for a building for an unknown use).

In most of these cases, the property owner would not have established substantial reliance under the analysis of that requirement, *infra*.

20. *See, e.g.*, Clairmont Dev. Co. v. Morgan, 222 Ga. 255, 149 S.E.2d 489 (1966); People *ex rel.* Interchemical Corp. v. City of Chicago, 29 Ill. 2d 446, 194 N.E.2d 199 (1963); Olsen v. City of Minneapolis, 263 Minn. 1, 115 N.W.2d 734 (1962); Shapiro v. Zoning Bd. of Adjustment, 377 Pa. 621, 105 A.2d 299 (1954); State *ex rel.* Humble Oil & Ref. Co. v. Wahner, 25 Wis. 2d 1, 130 N.W.2d 304 (1964).

21. *See, e.g.*, Sgro v. Howarth, 53 Ill. App. 2d 488, 203 N.E.2d 173 (1964); Verratti v. Township of Ridley, 416 Pa. 242, 206 A.2d 13 (1965); Pure Oil Div. v. City of Columbia, —— S.C. ——, 173 S.E.2d 140 (1970); *cf.* Dato v. Village of Vernon Hills, 91 Ill. App. 2d 111, 233 N.E.2d 48 (1968); United States Home & Dev. Corp. v. LaMura, 89 N.J. Super. 254, 214 A.2d 538 (Super. Ct. 1965) which held that the developer should have been allowed a reasonable period of time between approval of his subdivision and application for building permits. Ten months was not long enough.

22. —— S.C. ——, 173 S.E.2d 140 (1970).

the course of a year, demolished several buildings and altered others to prepare the lot for the station. An application was filed for a zoning permit on January 15 and was approved the following day. Before the permit was issued, however, neighboring residents appealed to the board of adjustment, which on February 11 reversed the decision of the zoning administrator. The bank and oil company were granted a writ of certiorari, requiring that the record of the board be certified on, or before, May 19. In the meantime, the city council scheduled a meeting for May 14 to consider rezoning the lot to prohibit the station. The lower court issued a temporary order restraining the council from rezoning the lot and later ordered that the permit be issued. On appeal, it was held "that vested rights acquired under a zoning ordinance in effect at the time of the application for a permit will be protected even against a change in the zoning ordinance. . . ."[23] The right protected is "the good faith reliance by the owner on the right to use his property as permitted under the Zoning Ordinance in force at the time of the application for a permit."[24]

C. Category Three: Reliance upon an Erroneously Issued Permit

The third category consists of cases in which official misunderstanding, misjudgment, or mistake resulted in the erroneous issuance of a permit for a use or structure that is (1) contrary to the zoning ordinance or (2) lawful but nevertheless contrary to the intentions of the local government. Most of the courts hold that such permits are invalid and confer no rights upon the permittee,[25] although their reasons for reaching this result vary widely.[26] However, there are de-

23. *Id.* at —, 173 S.E.2d at 143.

24. *Id.*

25. *See, e.g.*, Maguire v. Reardon, 255 U.S. 271 (1921); Weiner v. City of Los Angeles, 68 Cal. 2d 697, 68 Cal. Rptr. 733, 441 P.2d 293 (1968); Kiker v. City of Riverdale, 223 Ga. 142, 154 S.E.2d 17 (1967); People *ex rel.* American Nat'l Bank & Trust Co. v. Smith, 110 Ill. App. 2d 354, 249 N.E.2d 232 (1969); Nassau Realty Co. v. City of New Orleans, 221 So. 2d 327 (La. Ct. App. 1969); Harris Used Car Co. v. Anne Arundel County, 257 Md. 412, 263 A.2d 520 (1970); Mazo v. City of Detroit, 9 Mich. App. 354, 156 N.W.2d 155 (Ct. App. 1968); State *ex rel.* Rabenau v. Beckemeier, 436 S.W.2d 52 (Mo. Ct. App. 1968); Chatsworth 72nd St. Corp. v. Foley, 29 App. Div. 2d 522, 285 N.Y.S.2d 426 (1967); Stratford Arms, Inc. v. Board of Adjustment, 429 Pa. 132, 239 A.2d 325 (1968).

26. A city cannot be estopped by an act of its agent which exceeds the authority conferred upon him. Paulus v. Smith, 70 Ill. App. 2d 97, 217 N.E.2d 527 (1965); City of Indianapolis v. Ostrom Realty & Constr. Co., 95 Ind. App. 376, 176 N.E. 246 (1931). City officials have no right to waive the city's power to

cisions holding that a local government may be estopped if a property owner relied upon an erroneously issued permit.[27] For example, in *Dvorson v. City of Chicago*,[28] the plaintiff was issued a building permit for a 56-unit apartment building, which violated the zoning ordinance. Plaintiff had purchased the property for $90,000 in 1963 in reliance upon the R-4 zoning, a classification permitting multiple dwellings. A plan calling for 56 units was submitted to the city and approved in March, 1966. A building permit was issued on March 6, 1968. Early in September of that year, the property was surveyed and staked in preparation for excavating the foundation. Almost simultaneously, the city revoked the permit upon discovering that half of the lot had been rezoned in July, 1967 to R-3, a classification that prohibited the building. In addition to the cost of the land, plaintiff had incurred expenses of $32,670 in architect's fees, $1,672 in permit fees, and $2,811 in examination fees. He also had negotiated a Federal Housing Administration mortgage loan. Both the trial and appeals courts found for the plaintiff because "the fact that the City issued a permit based on the plans justified the inference that the same zoning

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enforce zoning regulations. Boyd v. Donelon, 193 So. 2d 291 (La. Ct. App. 1966). Persons dealing with municipal officers and agents are charged with knowledge of their duties and powers and cannot claim to have relied upon their unauthorized acts. Lipsitz v. Parr, 164 Md. 22, 164 A. 743 (1933); Davis v. City of Abilene, 250 S.W.2d 685 (Tex. Civ. App. 1952). "The enforcement of zoning ordinances would be unravelled if the courts were to allow premature expenditures to force the hand of plan commissions and city councils." Mazo v. City of Detroit, 9 Mich. App. 354, 362, 156 N.W.2d 155, 159 (Ct. App. 1968). "The government or its instrumentalities may not be estopped by acts of its officers or agents in violation of positive law." Fass v. City of Highland Park, 326 Mich. 19, 28, 39 N.W.2d 336, 340 (1949), quoting from 31 C.J.S., Etoppel, § 142.

27. District of Columbia v. Cahill, 54 F.2d 453 (D.C. Cir. 1931); City & County of Denver v. Stackhouse, 135 Colo. 289, 310 P.2d 296 (1957); City of Hialeah v. Allmand, 207 So. 2d 9 (Fla. Dist. Ct. App. 1968); Dvorson v. City of Chicago, 119 Ill. App. 2d 357, 256 N.E.2d 59 (1970); Township of Pittsfield v. Malcolm, 375 Mich. 135, 134 N.W.2d 166 (1965); Rubenstein v. City of Salem, 210 S.W.2d 382 (Mo. Ct. App. 1948); Tantimonaco v. Zoning Bd. of Review, 102 R.I. 594, 232 A.2d 385 (1967); City of Dallas v. Rosenthal, 239 S.W.2d 636 (Tex. Civ. App. 1951).

Although the New York courts hold that one cannot acquire vested rights through expenditures in reliance upon an invalid building permit, they allow such expenditures to be considered pursuant to an application for a variance. The result appears to be the same as if they had applied the principle of zoning estoppel, although this is debatably an improper use of the variance. *See* Jayne Estates, Inc. v. Raynor, 22 N.Y.2d 417, 239 N.E.2d 713, 293 N.Y.S.2d 75 (1968).

28. 119 Ill. App. 2d 357, 256 N.E.2d 59 (1970).

prevailed in 1968 as in 1966 and 1963 . . ."[29] and the plaintiff "had made a large investment and had become liable for substantial sums of money."[30] The court's silence seemed sufficient answer to the city's contention that the plans did not provide for the requisite number of square feet per dwelling unit, an error that had occurred because the city had mismeasured the area of a nearby public park in computing the required number of square feet.

An example of an erroneously issued permit for a use that is lawful but nevertheless contrary to the intentions of the local government is provided by *Township of Springfield v. Bensley*.[31] The owner applied for a permit to erect a garden apartment consisting of 252 units. Through the error of several local officials, who intended to issue a permit for only 182 units, a permit for 252 units nevertheless was issued. Since the project was substantially completed before the error was discovered, the court held that the city was estopped from revoking the permit.

D. Category Four: Reliance upon the Non-Enforcement of a Violation

The fourth category is comprised of cases in which a zoning violation goes unenforced for a considerable period of time before the local government takes action. In response to the government's effort to correct the violation, the owner argues that the city has legitimized, or at least acquiesced in, the violation through its nonenforcement and that he has relied upon this. Most of the courts have held that this is no defense.[32] The most common reason for denying relief is

29. *Id.* at 362, 256 N.E.2d at 61.

30. *Id.*

31. 19 N.J. Super. 147, 88 A.2d 271 (Super. Ct. 1952); *accord,* Nelson Bldg. Co. v. Greene, 5 N.J. Misc. 331, 136 A. 503 (Sup. Ct. 1927). In *Greene,* the landowner demolished a building worth $10,000 in reliance upon a permit for a five-story apartment with 30 units. The building inspector had meant to issue a permit for a four-story apartment with 16 units. The city was estopped to revoke the permit.

32. *See, e.g.,* Donovan v. City of Santa Monica, 88 Cal. App. 2d 386, 199 P.2d 51 (1948); Ackley v. Kenyon, 152 Conn. 392, 207 A.2d 265 (1965); Gregory v. City of Wheaton, 23 Ill. 2d 402, 178 N.E.2d 358 (1961); Leigh v. City of Wichita, 148 Kan. 607, 83 P.2d 644 (1938); City of Maplewood v. Provost, 25 S.W.2d 142 (Mo. Ct. App. 1930); Universal Holding Co. v. Township of North Bergen, 55 N.J. Super. 103, 150 A.2d 44 (Super Ct. 1959); City of Yonkers v. Rentways, Inc., 304 N.Y. 499, 109 N.E.2d 597 (1952); Swain v. Board of Adjustment, 433 S.W.2d 727 (Tex. Civ. App. 1968); Bartlett v. City of Corpus Christi, 359 S.W.2d 122 (Tex. Civ. App. 1962); *cf.* Kelly v. Washington *ex rel.* Foss Co., 302 U.S. 1 (1937).

that some sort of positive act is necessary to give rise to an estoppel and that mere inaction is not enough.[33] A few decisions can be found, however, allowing relief in category four.[34]

In *Westfield v. City of Chicago*,[35] the plaintiff, a widow, purchased, in 1954, property which, six years earlier, had been converted into an apartment in violation of the single-family restriction imposed on it. In 1957 the city ordered her to restore the premises to single-family use. The building was an old, three-story house designed for a large family with several servants. Reconversion would have meant a capital loss of at least $12,000 plus remodeling expenses of $2,000. Furthermore, it would have been impossible for the widow to live there as the sole occupant, due to the high expenses of repairing and heating such an old building. After balancing the hardship she would suffer against the detriment to the public, the court held the ordinance unenforceable against her.

An even more extreme example is provided by *City of Evanston v. Robbins*.[36] In 1954 the defendant purchased a multiple-family dwelling located in a block zoned for single-family dwellings but developed with multiple and single-family dwellings. In 1957 three city building officials inspected the building and advised him to make various alterations to bring it up to the standards for nonconforming multiple dwellings in a single-family dwelling district. He did so at a cost of about $1,200, and in 1959 he received several letters stating that all violations had been corrected. In 1964, however, the city's chief conservation inspector informed the defendant that he would have to restore the building to a single-family dwelling because it was not a legal nonconforming use, having been converted to a multiple-family dwelling sometime after the zoning ordinance was adopted in 1925. When the plaintiff refused, the city brought quasi-criminal charges against him. After hearing the evidence the trial court dis-

33. Ackley v. Kenyon, 152 Conn. 392, 207 A.2d 265 (1965). Another reason which has been given is that no vested right can be acquired to violate an ordinance through continued violations. Donovan v. City of Santa Monica, 88 Cal. App. 2d 386, 199 P.2d 51 (1948).

34. District of Columbia v. Cahill, 54 F.2d 453 (D.C. Cir. 1931); City of Evanston v. Robbins, 117 Ill. App. 2d 278, 254 N.E.2d 536 (1969); Westfield v. City of Chicago, 26 Ill. 2d 526, 187 N.E.2d 208 (1962); Town of Marblehead v. Deery, —— Mass. ——, 254 N.E.2d 234 (1969); Rubinstein v. City of Salem, 210 S.W.2d 382 (Mo. Ct. App. 1948); City of Passaic v. H.B. Reed & Co., 70 N.J. Super. 542, 176 A.2d 27 (Super. Ct. 1961); Town of Highland Park v. Marshall, 235 S.W.2d 658 (Tex. Civ. App. 1950).

35. 26 Ill. 2d 526, 187 N.E.2d 208 (1962).

36. 117 Ill. App. 2d 278, 254 N.E.2d 536 (1969).

missed the complaint, and the appeals court affirmed. The appeals court concluded that "[h]ere the property was so used for 25 years and there is no specific testimony whatsoever as to a tendency to deteriorate the neighborhood."[37] In holding the city estopped, the court noted that "[m]unicipal corporations, as well as private corporations and individuals, are bound by the principles of fair dealing."[38]

III. What Constitutes Good Faith?

The first element of zoning estoppel requires that the property owner "relied in good faith" on the conduct of the government.[39] In essence it focuses upon the mental attitude of the owner when he acted. The way the element is stated here implies the existence of two sub-elements—reliance and good faith. In fact, the owner's reliance, or lack of it, comes into question under element three where the courts attempt to evaluate the hardship he would suffer were the city allowed to proceed.[40]

Good faith is an elusive element, because most of the opinions do not define it. Others define what constitutes a lack of good faith,[41]

37. *Id.* at 285, 254 N.E.2d at 540.

38. *Id.* at 286, 254 N.E.2d at 541, quoting from New-Mark Builders, Inc. v. City of Aurora, 90 Ill. App. 2d 98, 233 N.E.2d 44 (1967).

39. Good faith is a merger of two of Pomeroy's elements. First, the truth concerning the material facts which were misrepresented must have been unknown to the party seeking relief "not only at the time of the conduct which amounts to the representation or concealment, but also at the time when that conduct was acted upon by him." Pomeroy § 810. He adds that if the party seeking relief "had the means by which with reasonable diligence he could acquire the knowledge so that it would be negligence on his part to remain ignorant by not using those means he cannot claim to have been misled . . . ." *Id.* Second, "there can be no estoppel, unless the party who alleges it relied upon the representation, was induced to act by it, and thus relying and induced, did take some action." *Id.* § 812. The combination of these elements is much stricter than the good faith requirement of zoning estoppel, and they would disqualify many owners who are entitled to relief under the principle of zoning estoppel.

40. The requirement of substantial reliance is discussed *infra.*

41. Fraud, misrepresentation, or concealment on the part of the landowner precludes good faith in all four categories. *See, e.g.,* Kiker v. City of Riverdale, 223 Ga. 142, 154 S.E.2d 17 (1967) (the license application for a prohibited automobile wrecking business did not reveal the location nor the nature of the business); People *ex rel.* American Nat'l Bank & Trust Co. v. Smith, 110 Ill. App. 2d 354, 249 N.E.2d 232 (1969) (the plans submitted for a building permit deviated from a court order in that they did provide for a 10 foot side yard, one of the salient issues in the litigation); City of Chicago v. Zellers, 64 Ill. App. 2d 24, 212 N.E.2d 737 (1965) (applicant who had obtained building permit that did not satisfy minimum side-yard requirements by submitting plans containing erroneous information started excavating a few hours later); Boyd v. Donelon, 193 So. 2d

rather than what is good faith. Still, there are a few decisions which give some hints as to the meaning of the element, and the rest can be inferred from the facts presented. However, two things are clear: the meaning of good faith varies among the four factual categories, and there are minority variations.

A. Category One

In category one, the courts will find that a property owner acted in good faith if, knowing that rezoning was at least possible, he did not accelerate his development or increase his investment or obligations in an effort to establish such an apparent degree or amount of reliance as to prevent the rezoning. It is probably accurate to paraphrase this test as requiring that the owner act with honest intentions. On the one hand, the test deems that an owner has acted in good faith if he received his permit and began construction in the absence of any opposition and proceeded at a normal pace of construction.[42] On the other hand, it bars from relief an owner who, in the face of intense public opposition, raced to finish or substantially complete construction before the government could rezone his land.[43] Similarly,

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291 (La. Ct. App. 1966) (developer must have been aware that building permit contained numerous zoning and building code violations as he had more than 25 years experience as an apartment builder in the area); Stratford Arms, Inc. v. Board of Adjustment, 429 Pa. 132, 239 A.2d 325 (1968) (plaintiff discovered error in description of property after the plans had been approved but nevertheless went ahead with construction); Jelinski v. Eggers, 34 Wis. 2d 84, 148 N.W.2d 750 (1967) (defendant obtained a building permit by telling the building inspector that the board of appeals had no objection to his proposed garage which would violate the side lot requirements).

See also Board of County Comm'rs v. Brown, 183 Kan. 19, 325 P.2d 382 (1958); Brady v. City of Keene, 90 N.H. 99, 4 A.2d 658 (1939); City of Dallas v. Rosenthal, 239 S.W.2d 636 (Tex. Civ. App. 1951) (dicta); Wikstrom v. City of Laramie, 37 Wyo. 389, 262 P. 22 (1927) (dicta); *cf.* City of Philadelphia v. Wyszynski, 381 Pa. 153, 112 A.2d 327 (1955) (not a building permit).

42. *See, e.g.,* Murrell v. Wolff, 408 S.W.2d 842 (Mo. 1966); Sautto v. Edenboro Apts., 84 N.J. Super. 461, 202 A.2d 466 (Super. Ct. 1964); Bosse v. City of Portsmouth, 107 N.H. 523, 226 A.2d 99 (1967); Collins v. Magony, 31 App. Div. 2d 597, 294 N.Y.S.2d 860 (1968); Town of Hillsborough v. Smith, 276 N.C. 48, 170 S.E.2d 904 (1969); Price v. Smith, 416 Pa. 560, 207 A.2d 887 (1965); *accord,* Krekeler v. Board of Adjustment, 422 S.W.2d 265 (Mo. 1968); *cf.,* City of Gainesville v. Bishop, 174 So. 2d 100 (Fla. Dist. Ct. App. 1965).

43. Socony-Vacuum Oil Co. v. Mount Holly Twp., 135 N.J.L. 112, 51 A.2d 19 (Sup. Ct. 1947); Stowe v. Burke, 255 N.C. 527, 122 S.E.2d 374 (1961); A.J. Aberman, Inc. v. City of New Kensington, 377 Pa. 520, 105 A.2d 586 (1954); *accord,* Gold v. Building Comm., 334 Pa. 10, 5 A.2d 367 (1939); Graham Corp. v. Board of Zoning Appeals, 140 Conn. 1, 97 A.2d 564 (1953); Rice v. Van Vranken, 132 Misc. 82, 229 N.Y.S. 32 (Sup. Ct. 1928), *aff'd,* 225 App. Div.

it denies relief to an owner who contracts for $50,000 in construction materials to augment his expenses of $5,000 in architect's fees.[44] In most of these cases, the courts seem to apply a subjective test to determine whether the owner acted in good faith.

There are a number of cases, however, which suggest that an objective measure of good faith is applied, *i.e.*, whether a reasonable property owner would have acted in the face of such a high probability that the property would be rezoned.[45] Implicit in this is the conviction that if a reasonable owner would not have acted, the owner in question must have been trying to secure an advantage. It is unclear, however, how great the probability of rezoning must be to establish a lack of good faith. The fact that the local government possessed the power to rezone the owner's property cannot be inconsistent with good faith, for surely many of the owners who were granted relief knew that the local government possessed such power. Neither does it appear that most courts find a sufficient probability established by the fact that an amendment is pending before the local legislature.[46] One court has noted that "an unpassed bill in City Council . . . has

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179, 232 N.Y.S. 506 (1929). *Cf.* Yocum v. Power, 398 Pa. 223, 157 A.2d 368 (1960), where the town raced to rezone the land to prohibit a church, while the religious body raced to secure a permit and begin construction. The church group was held not to have lacked good faith, and the court chastized the city for trying to prohibit the church.

Whether or not the owner acted in good faith is normally a question for the jury and its verdict is conclusive. *See* Town of Hillsborough v. Smith, 276 N.C. 48, 170 S.E.2d 904 (1969).

44. Although these figures are hypothetical, a number of similar cases have arisen. *See* Call Bond & Mortgage Co. v. City of Sioux City, 219 Iowa 572, 259 N.W. 33 (1935) (oral contract for five thousand bricks); Brady v. City of Keene, 90 N.H. 99, 4 A.2d 658 (1939) (entering into lease with oil company).

45. Sakolsky v. City of Coral Gables, 139 So. 2d 504 (Fla. Dist. Ct. App. 1962), *rev'd*, 151 So. 2d 433 (Fla. 1963); Bosse v. City of Portsmouth, 107 N.H. 523, 226 A.2d 99 (1967); *accord*, Glickman v. Parish of Jefferson, 224 So. 2d 141 (La. Ct. App. 1969); Salisbury v. Borough of Ridgefield, 137 N.J.L. 515, 60 A.2d 877 (Sup. Ct. 1948); Sun Oil Co. v. City of Clifton, 16 N.J. Super. 265, 84 A.2d 555 (Super. Ct. 1951); A.J. Aberman, Inc. v. City of New Kensington, 377 Pa. 520, 105 A.2d 586 (1954); Graham Corp. v. Board of Zoning Appeal, 140 Conn. 1, 97 A.2d 564 (1953); Appeal of A.N. "AB" Young Co., 360 Pa. 429, 61 A.2d 839 (1948). *Contra*, Miller v. Dassler, 155 N.Y.S.2d 975 (Sup. Ct. 1956); Yocum v. Power, 398 Pa. 223, 157 A.2d 368 (1960); Hull v. Hunt, 53 Wash. 2d 125, 331 P.2d 856 (1958).

46. *See, e.g.*, Miller v. Dassler, 155 N.Y.S.2d 975 (Sup. Ct. 1956); *accord*, Yocum v. Power, 398 Pa. 223, 157 A.2d 368 (1960). *But see* Stowe v. Burke, 255 N.C. 527, 122 S.E.2d 374 (1961). In *Miller* the court held that the landowner "had a right to assume that the proposed ordinance might not be carried when put to a vote." 155 N.Y.S.2d at 979.

no more authority than a scribbled note on the back of an envelope in the pocket of a legislator."[47] On the other hand, several courts have found that an owner lacked good faith where he ignored intense public opinion against him or a temporary injunction ordering him to halt construction.[48] For a time the Florida courts took the most extreme position by holding that an owner acted at his peril if he knew, or should have had "good reason to believe," that "the official mind might change as it did."[49] The use of this test proved difficult to apply[50] and has apparently been abandoned for a more conventional one.[51] The Florida cases aside, there is uncertainty whether the decisions under discussion actually applied or meant to apply an objective standard. It seems more likely that they made reference to the high probability of rezoning to substantiate their conclusion that the owner had deliberately tried to thwart the rezoning.

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47. Yocum v. Power, 398 Pa. 223, 226, 157 A.2d 368, 369 (1960).

48. Wheat v. Barrett, 210 Cal. 193, 290 P. 1033 (1930); Sakolsky v. City of Coral Gables, 151 So. 2d 433 (Fla. 1963) (dicta); Bosse v. City of Portsmouth, 107 N.H. 523, 226 A.2d 99 (1967); State *ex rel.* Cities Serv. Oil Co. v. Board of Appeals, 21 Wis. 2d 516, 124 N.W.2d 809 (1963); *accord,* A. J. Aberman, Inc. v. City of New Kensington, 377 Pa. 520, 105 A.2d 586 (1954); *cf.* City of Lansing v. Dawley, 247 Mich. 394, 225 N.W. 500 (1920). *But see* Freeman v. Hague, 106 N.J.L. 137, 147 A. 553 (Ct. E. & A. 1929) (actual fraud required); Yocum v. Power, 398 Pa. 223, 157 A.2d 368 (1960).

49. Sakolsky v. City of Coral Gables, 139 So. 2d 504, 505 (Fla. Dist. Ct. App. 1962), *rev'd,* 151 So. 2d 433 (Fla. 1963).

50. In Sakolsky v. City of Coral Gables, 139 So. 2d 504 (Fla. Dist. Ct. App. 1962), *rev'd,* 151 So. 2d 433 (Fla. 1963), an adjacent landowner sought an injunction to restrain the defendant from proceeding with construction. The suit was eventually dismissed but not before defendant's permit was revoked by a rezoning. Likewise relief was denied in: Sharrow v. City of Dania, 83 So. 2d 274 (Fla. 1955) to an owner who proceeded after the first reading and publication of a proposed rezoning; Miami Shores Village v. William N. Brockway Post 124, 156 Fla. 673, 24 So. 2d 33 (1945) to an owner who acted in the face of strong public opinion that eventually led to the election of new officials who revoked his permit; City of Miami v. State *ex rel.* Ergene, Inc., 132 So. 2d 474 (Fla. Dist. Ct. App. 1961) to an owner who relied upon a resolution passed by a 3 to 2 vote, knowing that one of the commissioners voting for him might be replaced, and the resolution rescinded only 35 days after its passage. In contrast, relief was granted to an owner when the hostility was kept hidden until the resolution authorizing him to build a drive-in theatre was rescinded. Bregor v. Britton, 75 So. 2d 753 (Fla. 1954).

51. With the reversal of the appellate court in Sakolsky v. City of Coral Gables, 151 So. 2d 433 (Fla. 1963), the Florida courts joined the majority view and began to apply a subjective test to measure the owner's good faith. *See* City of Gainesville v. Bishop, 174 So. 2d 100 (Fla. Dist. Ct. App. 1965), where relief was granted to an owner under circumstances substantially similar to those in Miami Shores Village v. William N. Brockway Post 124, 156 Fla. 673, 24 So. 2d 33 (1945).

B. Category Two

It is difficult to discuss the meaning of good faith in category two because very few cases have dealt with the question. The owner's good faith is probably immaterial to those courts which hold that one cannot reasonably expect to acquire any rights until after a permit has been issued.[52] Those courts which are willing to grant relief, under the principle of zoning estoppel[53] or the principle that one has a right to use his property as allowed as of the date of his application,[54] apparently require that the owner possessed a mental attitude equivalent to that required in category one. The controlling question thus is whether the owner deliberately tried to increase his equities in some way. For example, an owner would lack good faith if he applied for a permit with knowledge that a rezoning had been proposed and then brought a court action to speed issuance of the permit.[55] Good faith would likewise be lacking if one hastened to establish the right to operate a junk yard by moving wrecked cars onto his property without any approval or permit a few days before the effective date of a new zoning ordinance.[56] Beyond these examples, the cases offer few insights into the meaning of good faith in category two, but it appears that the "honest intentions" characterization given to the meaning of good faith under category one would generally be applicable.

C. Categories Three and Four

Categories three and four present similar situations with regard to an owner's good faith. Good faith can apparently exist only if the owner in category three was ignorant of the fact that his permit was erroneously issued[57] and in category four that his use or structure violated the zoning ordinance.[58] Actual knowledge of these facts would seem to automatically constitute a lack of good faith.[59] But

52. *See* note 18 *supra,* and accompanying text.

53. *See* note 20 *supra,* and accompanying text.

54. *See* note 21 *supra,* and accompanying text.

55. *See* Slater v. City Council, 238 Cal. App. 2d 864, 47 Cal. Rptr. 837 (Dist. Ct. App. 1965).

56. *See* Penn Twp. v. Yecko Bros., 420 Pa. 386, 217 A.2d 171 (1966).

57. *See* cases cited note 27 *supra.*

58. *See* cases cited note 34 *supra.*

59. *See* the category three cases cited note 41 *supra,* and Ashland Lumber Co. v. Williams, 411 S.W.2d 909 (Ky. 1969) (the fact that the owner started construction within 25 days of the issuance of an invalid building permit was treated as casting doubt upon his good faith); Kent County Planning Inspector v. Abel,

some of the cases which have granted relief can also be read as imposing an even higher requirement for good faith: the owner must have, in effect, been duped by the local government into believing that his permit was properly issued or that his use or structure satisfied the zoning ordinance.[60] Which requirement the courts actually apply remains to be seen, and possibly both are. There are simply too few cases to be sure. Both requirements, however, are apparently subjective and more stringent than the requirements applied in categories one and two.

IV. What Forms of Governmental Conduct May Be Relied On?

The second element of zoning estoppel concerns the conduct of the local government that was relied on. Relative to the other two elements—good faith and substantial reliance—the governmental conduct element is not especially important to the outcome of the case. If a court is willing to allow zoning estoppel and finds that good faith and substantial reliance were present, it will find some sort of governmental conduct upon which the owner can be said to have relied. Nevertheless, discussing this element helps to clarify conceptually the principle of zoning estoppel.[61]

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246 Md. 395, 228 A.2d 247 (1967) (after being informed that his permit was invalid, the owner, nevertheless, proceeded with construction of a bulkhead and covered slips for a marina); Upper Moreland v. Meade, 420 Pa. 613, 218 A.2d 271 (1966) (in issuing a permit for more units than shown on the developer's plans, the town officials relied upon the advice of the township solicitor who was also the developer's attorney).

For a case falling in category four, see City of San Marino v. Roman Catholic Archbishop, 180 Cal. App. 2d 657, 4 Cal. Rptr. 547 (1960) (the owner had long known that use of his property for a parking lot was in violation of the zoning ordinance, and there was no showing that the city intended that its acquiesence should be relied upon).

60. Dvorson v. City of Chicago, 119 Ill. App. 2d 357, 256 N.E.2d 59 (1970); City of Evanston v. Robbins, 117 Ill. App. 2d 278, 254 N.E.2d 536 (1969); People *ex rel.* Beverly Bank v. Hill, 75 Ill. App. 2d 69, 221 N.E.2d 40 (1966); Westfield v. City of Chicago, 26 Ill. 2d 526, 187 N.E.2d 208 (1962); Township of Pittsfield v. Malcolm, 375 Mich. 135, 134 N.W.2d 166 (1965); City of Passaic v. H.B. Reed & Co., 70 N.J. Super. 542, 176 A.2d 27 (Super. Ct. 1961); Tantimonaco v. Zoning Bd. of Review, 102 R.I. 594, 232 A.2d 385 (1967).

61. The governmental conduct requirement of zoning estoppel reflects three of the elements of equitable estoppel identified by Pomeroy. First, he states that "[t]here must be conduct—acts, language, or silence amounting to representation or concealment of material facts." Pomeroy § 805, *supra* note 2. Second, "[t]hese facts must be known to the party estopped at the time of said conduct, or, at least, the circumstances must be such that knowledge of them is necessarily imputed to him." *Id.* Third, "[t]he conduct must be done with the intention, or at least the *expectation,* that it will be acted upon by the other party, or under

Each of the four categories has a predominant form of governmental conduct. In category one, the governmental conduct relied on is generally the issuance of a permit.[62] To the owner, the permit represents a material fact—he can develop his structure or use without fear of permit revocation by rezoning. This is highly fictitious, of course, since the permit does not confer immunity from a zoning change. Nevertheless, it provides a peg on which to hang the owner's reliance. Also falling into category one are those cases in which an owner began development in the absence of any applicable ordinance.[63] Here the governmental conduct relied on is the representation that one could complete construction regardless of a change in the zoning requirements or the imposition of requirements. In category two, the most common basis for the owner's reliance is that his application was for a permitted use or structure and that other applicants always had been granted the same permit.[64] The basis for the owner's reliance is clearer still when he relied on official assurances that his permit would be granted.[65] In other cases, the government's conduct may be viewed as an omission to inform the owner promptly that his intended use or structure had, or might be, prohibited and his application disapproved.[66] In some of the cases, the owner also had secured a favorable court decision[67] or an appeals board order[68] which he

such circumstances that it is both natural and probable that it will be so acted upon." *Id.* However, he points out that, "[t]here are several familiar species in which it is simply *impossible* to ascribe any intention or even expectation to the party estopped that his conduct will be acted upon by the one who afterwards claims the benefit of the estoppel." *Id.*

The first of these elements really presents two questions: (1) what kinds of conduct amount to a representation or concealment upon which an owner may justifiably rely; and (2) what kinds of material facts must have been represented and concealed? Although the courts do not identify the representation or concealment and the material fact in each factual category, this has been done in the text of this article to establish a clearer conceptual framework for understanding the principle of zoning estoppel. The other two elements are even less relevant to zoning estoppel. In many cases the government neither knows the true state of the material facts nor does it intend that the property owner rely upon its conduct.

62. *See* cases cited note 11 *supra,* and accompanying text.

63. *Id.*

64. *See* cases cited note 14 *supra,* and accompanying text.

65. *See* cases cited note 15 *supra,* and accompanying text.

66. *See, e.g.,* Cos Corp. v. City of Evanston, 27 Ill. 2d 570, 190 N.E.2d 364 (1963); Illinois Mason Contractors v. Wheat, 19 Ill. 2d 462, 167 N.E.2d 216 (1960); and People *ex rel.* Beverly Bank v. Hill, 75 Ill. App. 2d 79, 221 N.E.2d 40 (1966).

67. *See* cases cited note 16 *supra,* and accompanying text.

68. *See* cases cited note 17 *supra,* and accompanying text.

believed gave him the right to a permit and immunity from rezoning. Although such decisions cannot be attributed to the local government, they can be viewed as a reasonable basis for the owner's false sense of security. In category three, the government's conduct is the issuance of a permit, whether invalid[69] or mistakenly issued,[70] coupled with the government's failure to discover this promptly and inform the owner. Finally, in category four, the conduct relied upon is the government's nonenforcement of the zoning ordinance over a long period of time,[71] thus misleading the owner into believing that there is no violation or that it has been ratified.

It is impossible to impute any intention or expectation to the local government that some of the forms of conduct discussed here would be relied on,[72] especially by the specific owner who did so. In fact, under the laws of zoning and building permits which normally have governed these cases, the owner has no right to rely on the government's conduct, at least to the extent that he did. Still, in most of the cases, it is difficult to argue that it was unreasonable for the owner to rely on the government's conduct, and this is important to understanding the cases. The cases allowing zoning estoppel hold, in effect, that local governments while exercising their zoning powers are accountable for their actions if they lead reasonable men astray. This is not to say that they hold the governments to the same standards as reasonable men, but they represent a definite step away from the immunity long enjoyed by local governments while performing governmental functions.

V. What Is Substantial Reliance?

The third element of zoning estoppel requires that the owner "made a substantial change in position or incurred extensive obligations and expenses."[73] Concern is for the economic hardship which the owner would suffer were the government allowed to have its way. The question which must be answered is: what stage of construction must be reached, or what amount of financial involvement or commitment

69. *See* cases cited note 27 *supra,* and accompanying text.
70. *See* cases cited note 31 *supra,* and accompanying text.
71. *See* cases cited note 34 *supra,* and accompanying text.
72. *See* the discussion of equitable estoppel in note 61 *supra.*
73. The substantial reliance requirement is analagous to Pomeroy's sixth element. He states that the party claiming the estoppel must act upon the conduct of the other "in such a manner as to change his position for the worse; in other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct and to assert rights inconsistent with it." Pomeroy § 805.

must be present, before it would be inequitable to allow the government to proceed? The substantial reliance element is the one which most often determines the outcome of the cases. It is also the element which varies the most between jurisdictions, since at least three different tests have been developed for measuring reliance.

A. The Set Quantum Test

A majority of the courts utilize what may be described as the "set quantum test." Under this test, an owner is entitled to relief if he has changed his position beyond a certain set degree or amount, measured quantitatively. The problem with this test is that the courts have not set the requisite degree or amount with any precision. From a national perspective, it is impossible to state with certainty the degree of involvement that the courts require to establish substantial reliance, although the cases within specific states may be consistent.

The majority of the courts appear to require some physical construction to establish substantial reliance. The courts have found substantial reliance in the initiation of construction of the building itself,[74] the beginning of excavation,[75] the pouring of the foundation,[76]

74. *See* City of Hialeah v. Allmand, 207 So. 2d 9 (Fla. Dist. Ct. App. 1968) (owner had commenced construction of an industrial plant); Collins v. Magony, 31 App. Div. 2d 597, 294 N.Y.S.2d 860 (1968) (work completed included excavation, grading, footings, and some foundation walls of mushroom plant); Jayne Estates, Inc. v. Raynor, 28 App. Div. 2d 720, 281 N.Y.S.2d 644 (1967) (expenditures of over $60,000 for the construction of foundations, pilings, and the completion of two apartment buildings); Friend v. Feriola, 23 App. Div. 2d 822, 258 N.Y.S.2d 807 (1965) (work on building had reached "an advanced state of completion"). *Contra,* Ashland Lumber Co. v. Williams, 411 S.W.2d 909 (Ky. 1966), (building was 90 per cent finished, but the fact that the owner had commenced construction within 25 days after issuance of an invalid permit was treated as casting doubt on his good faith).

In a number of cases in which relief was granted, the building was completed before the city changed its position. Tankersley Bros. v. City of Fayetteville, 227 Ark. 130, 296 S.W.2d 412 (1956); Brett v. Building Comm'r, 250 Mass. 73, 145 N.E. 269 (1924); Township of Pittsfield v. Malcolm, 375 Mich. 135, 134 N.W.2d 166 (1965); Price v. Smith, 416 Pa. 560, 207 A.2d 887 (1965).

75. *See* City of Evansville v. Gaseteria, 51 F.2d 232 (7th Cir. 1931); Graham Corp. v. Board of Zoning Appeals, 140 Conn. 1, 97 A.2d 564 (1953) (dictum); Crow v. Board of Adjustment, 227 Iowa 324, 288 N.W. 145 (1939); Sandenburgh v. Michigame Oil Co. 249 Mich. 372, 228 N.W. 707 (1930); Crecca v. Nucera, 52 N.J. Super. 279, 145 A.2d 477 (Super. Ct. 1958) (dictum); Rice v. Van Vranken, 132 Misc. 82, 229 N.Y.S. 32 (Sup. Ct. 1928) (dictum), *aff'd,* 225 App. Div. 179, 232 N.Y.S. 506 (1929); *In re* W.P. Rose Builders' Supply Co., 202 N.C. 496, 163 S.E. 462 (1932) (dictum).

76. *See* Graham Corp. v. Board of Zoning Appeals, 140 Conn. 1, 97 A.2d 564 (1953) (dictum).

and the installation of underground pipes or tanks.[77] Some courts have granted relief where the only expenses which the owner had incurred were connected with preparing the land for development.[78] Of course, the facts of few cases are this simple. More often there are additional forms of reliance, such as entering into construction contracts and financing arrangements,[79] which the courts undoubtedly take into account even though they state that some physical construction is required.

To add to the confusion, a minority of courts do not require the owner to have begun physical construction. They will grant relief if the owner merely incurred sufficient expenses and contractual obligations. These courts have been equally inconsistent with respect to the requisite amount of financial involvement or commitment that is required.[80] Most courts, however, agree that the mere purchase of land without more is not sufficient reliance.[81] Apparently, they reason

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77. *See* City of Evansville v. Gaseteria, 51 F.2d 232 (7th Cir. 1931); *In re* W.P. Rose Builders' Supply Co., 202 N.C. 496, 163 S.E.2d 462 (1932) (dictum). *Contra,* State *ex rel.* Jacobson v. City of New Orleans, 166 So. 2d 520 (La. Ct. App. 1964).

78. *See* Rice v. Van Vranken, 132 Misc. 82, 229 N.Y.S. 32 (Sup. Ct. 1928), *aff'd,* 225 App. Div. 179, 232 N.Y.S. 506 (1929); Pure Oil Div. v. City of Columbia, —— S.C. ——, 173 S.E.2d 140 (1970). *Contra,* Grayson v. City of Birmingham, 277 Ala. 522, 173 So. 2d 67 (1963); Weiner v. City of Los Angeles, 68 Cal. 2d 697, 68 Cal. Rptr. 733, 441 P.2d 293 (1968); County of Sanders v. Moore, 182 Neb. 377, 155 N.W.2d 317 (1967); Warner v. W & O, Inc., 263 N.C. 37, 138 S.E.2d 782 (1964).

79. *See, e.g.,* Dvorson v. City of Chicago, 119 Ill. App. 2d 357, 256 N.E.2d 59 (1970) (in addition to the cost of the land, the developer had incurred $32,770 in architect's fees, $2,811 in examination fees, $1,672 in permit fees, and had negotiated a Federal Housing Administration loan); Murrell v. Wolff, 408 S.W.2d 842 (Mo. 1966) (developer had invested substantial sums of money in planning a large project which integrated commercial, multi-family, and single-family uses); State *ex rel.* Great Lakes Pipe Line Co. v. Hendrickson, 393 S.W.2d 481 (Mo. 1965) (purchase of land, commencement of grading work, and incurring of financial obligations in excess of $64,000); Tantimonaco v. Zoning Bd. of Review, 102 R.I. 594, 232 A.2d 385 (1967) ($2,899 preparing land, over $1,000 in legal fees, and $39,000 for construction contract).

80. *See* Sautto v. Edenboro Apts., 84 N.J. Super. 461, 202 A.2d 466 (Super. Ct. 1964) (expenses primarily in the form of planning a high-rise apartment building and negotiating FHA insurance commitment for a mortgage loan of $842,000); Town of Hillsborough v. Smith, 276 N.C. 48, 170 S.E.2d 904 (1969) (contracts for construction, franchise, and dry cleaning equipment).

81. *See* Anderson v. Pleasant Hill, 229 Cal. App. 2d 79, 40 Cal. Rptr. 41 (Dist. Ct. App. 1964) (purchase of land, expenditure of $500, and investment of time value at $2,500); Edelstein v. Dade County, 171 So. 2d 611 (Fla. Dist. Ct. App. 1965) (purchase of property); Stone Mountain Industries, Inc. v. Wilhite, 221 Ga. 269, 144 S.E.2d 357 (1965) (purchase of property); Sgro v.

that land is a readily marketable commodity that can always be sold without loss or utilized for some use other than the one in question.

These examples indicate that the courts have experienced difficulty in establishing and applying a quantitative standard. The great variations between the cases probably reflect the fact that the judgment as to the degree of construction or the amount of expenditures or commitments required is ultimately subjective and thus highly variable. The variations may also reflect the fact that courts, despite their efforts to establish a test for all cases, have been unable to avoid the temptation of examining whether the owner in the case before them would suffer a hardship if the government were allowed to proceed. Thus, a $10,000 loss would have little effect on Standard Oil of New Jersey but would be disastrous to the proverbial widow who would lose her life savings, and this is likely to sway a court. To make the set quantum approach more precise, some courts have announced, on occasion, that they will test for reliance by examining whether the completed work amounted to a "substantial" ratio of the contemplated work.[82] However, no instances were found in which the courts of a particular state tried this approach frequently enough to provide any basis for evaluating it.

Another factor which undoubtedly complicates the problem of determining what is substantial reliance is that the measure of reliance may change in many of the states depending upon the factual category of the case that is presented. In other words, less reliance may be required in categories one and two, than in three and four.[83] An

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Howarth, 53 Ill. App. 2d 488, 203 N.E.2d 173 (1964) (purchase of property); Lutz v. City of New Albany Plan. Comm'n, 230 Ind. 74, 101 N.E.2d 187 (1951) (purchase of property); Montgomery v. Board of Zoning Appeals, 135 Ind. App. 437, 193 N.E.2d 142 (1963) (purchase of property and architect's fees); Building Inspector v. Werlin Realty, 349 Mass. 623, 211 N.E.2d 338 (1965) (purchase of property); State *ex rel.* Berndt v. Iten, 259 Minn. 77, 106 N.W.2d 366 (1960) (purchase of one-half of property and option on other half). *Contra,* City of Gainesville v. Bishop, 174 So. 2d 100 (Fla. Dist. Ct. App. 1965) (purchase of property the only reliance).

82. Winn. v. Lamoy Realty Corp., 100 N.H. 280, 124 A.2d 211 (1956); Miller v. Dassler, 155 N.Y.S.2d 975 (Sup. Ct. 1956); Stowe v. Burke, 255 N.C. 527, 122 S.E.2d 374 (1961).

83. An attempt was made to test this proposition by surveying those more recent Illinois cases in which the outcome hinged primarily upon whether there was substantial reliance on the part of the owner. Illinois was selected because it is apparently the only state in which the courts are willing to grant relief with any frequency in all four categories of cases. However, the results were inconclusive.

attorney faced with a case in which zoning estoppel may be applicable should carefully study the cases from his jurisdiction to determine whether the measure of reliance shifts between the categories of cases.

B. The Balancing Test

The second test for measuring substantial reliance utilizes the familiar approach of balancing the equities as they appear in the particular case. The Illinois courts use the balancing test the most often,[84] while the courts of a few other states use it occasionally to dispose of really close cases.[85] In utilizing the test, Illinois courts attempt to weigh the right of the property owner to use his land and the expenses and obligations he incurred against the public interests presented. If the owner tips the scale in his favor, he establishes substantial reliance. For example, in *Nott v. Wolff*,[86] the lessees planned to build a motor hotel in an unsuccessful commercial zone. After a substantial fee had been paid to an architect and a construction contract signed, the zoning was amended to prohibit the hotel. On appeal, the court held:

> Little gain is shown to the public by preventing the erection of this motel. The immediate area is commercial and there is little evidence of injury to the area. . . . There is some suggestion of injury to values of residences, but they are, in fact, relatively remote. The gain to the public is small as compared to the hardship of the property owner. Thus there is no valid basis . . . for the exercise of the police power in amending the zoning ordinance and restricting the use of this property.[87]

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84. Nott v. Wolff, 18 Ill. 2d 362, 163 N.E.2d 809 (1960) (discussed at note 86 and accompanying text, *infra*); Westfield v. City of Chicago, 26 Ill. 2d 526, 187 N.E.2d 208 (1962) (discussed at note 35 and accompanying text, *supra*); Dvorson v. City of Chicago, 119 Ill. App. 2d 357, 256 N.E.2d 59 (1970) (discussed at note 28 and accompanying text, *supra*); City of Evanston v. Robbins, 117 Ill. App. 2d 278, 254 N.E.2d 536 (1969) (discussed at note 36 and accompanying text, *supra*); Paulus v. Smith, 70 Ill. App. 2d 97, 217 N.E.2d 527 (1966) (defendant was forced to remove sign located too close to an expressway because it posed a threat to the public health and general welfare).

85. *See* Grayson v. City of Birmingham, 277 Ala. 522, 173 So. 2d 67, (1963); Graham Corp. v. Board of Zoning Appeals, 140 Conn. 1, 97 A.2d 564 (1953); Rubinstein v. City of Salem, 210 S.W.2d 382 (Mo. Ct. App. 1948); Tremarco Corp. v. Garzio, 32 N.J. 448, 161 A.2d 241 (1960); Brady v. City of Keene, 90 N.H. 99, 4 A.2d 658 (1939); Crecca v. Nucera, 52 N.J. Super. 279, 145 A.2d 477 (Super. Ct. 1958); Tantimonaco v. Zoning Bd. of Review, 102 R.I. 594, 232 A.2d 385 (1967).

86. 18 Ill. 2d 362, 163 N.E.2d 809 (1960).

87. *Id.* at 369, 163 N.E.2d at 813.

The merit of the balancing test is that it results in fairer decisions, because the facts of each case are carefully weighed. Its disadvantage is that it creates even more uncertainty than the set quantum test. It is generally difficult to predict whether an owner will be granted relief until his case has been litigated.

C. The Pennsylvania Test

A third test, the Pennsylvania test, has been used occasionally in several states and applies only to the category one and two cases. The rule is: (1) an application for a permit for a permitted use cannot be refused, unless an ordinance prohibiting it is legally pending at the time,[88] and (2) once a permit for such a use is issued, it cannot be revoked, even if the permittee does not incur expenses or obligations in reliance upon it.[89] Furthermore, if a permit is issued for an initial stage of construction, such as excavation, and is relied on, any additional permits necessary to complete the project cannot be refused.[90] This rule was a reaction to the frequent spectacle of a permittee's racing to establish a nonconforming use while the local government raced to amend the ordinance and halt construction. After struggling to determine the outcome of several of these races, the Pennsylvania Supreme Court formulated the present rule.[91] The Washington Supreme Court purports to have adopted the same rule with respect to the category one cases, although it seems to have misread a decision which it rendered earlier.[92] Similarly, the Supreme

88. Gallagher v. Building Inspector, 432 Pa. 301, 247 A.2d 572 (1968); Varratti v. Township of Ridley, 416 Pa. 242, 206 A.2d 13 (1965); Lhormer v. Bowen, 410 Pa. 508, 188 A.2d 747 (1963); Lower Merion Twp. v. Frankel, 358 Pa. 430, 57 A.2d 900 (1948); Herskovits v. Irwin, 299 Pa. 155, 149 A. 195 (1930).

89. Gallagher v. Building Inspector, 432 Pa. 301, 247 A.2d 572 (1968); *cf.* Gold v. Building Comm., 334 Pa. 10, 5 A.2d 367 (1939).

90. Gallagher v. Building Inspector, 432 Pa. 301, 247 A.2d 572 (1968).

91. *Id.* at 304, 247 A.2d at 573.

92. In Hull v. Hunt, 53 Wash. 2d 125, 331 P.2d 856 (1958), the Washington Supreme Court announced a rule that protected a property owner if (1) he applied for a permit for a use or structure which was allowed under the ordinance then in effect and (2) the permit was actually issued. Upon issuance of the permit, the court said that he would have a vested right that related back to the date of the filing of his application. Recognizing that this was not the majority rule, the court stated, "[n]otwithstanding . . . we prefer to have a date certain upon which the right vests to construct in accordance with the building permit." 53 Wash. 2d at 130, 331 P.2d 857. Recently, however, in two cases in which estoppel was not a central issue, the Washington court stated that the right to build accrues when the permit is applied for and approvingly cited a number of Pennsylvania cases. Jones v. Town of Woodway, 70 Wash. 2d 987, 425 P.2d 904 (1967); Pierce v. King County, 62 Wash. 2d 325, 382 P.2d 628 (1963). These rules are not the same. Under the rule in *Hull v. Hunt, supra,* it appears that

Court of South Carolina has recently applied the rule to a category two case.[93]

The Pennsylvania test has the advantage of certainty, since the only question which must be determined is whether the prohibitory ordinance was legally pending at the time of the application. Furthermore, it protects property owners against the ad hoc rejection of applications to use their property, although it apparently only affords protection with respect to permitted uses and not those permitted conditionally. However, there is one serious problem with the rule. It exposes local governments to the threat of a flood of applications for permitted uses whenever an extensive zoning amendment is contemplated. Such an amendment will normally be preceded by a long period of study, and an astute developer should have no difficulty learning of it. He need only file his application before the amendment is formally introduced in the local legislature in order to receive his permit, regardless of whether the long study has demonstrated that his use will pose a threat to the public interest. In a state in which interim zoning is permitted, this problem could possibly be avoided by freezing the status quo during the study period. In Pennsylvania, however, the court's position on the effect of pending ordinances apparently leads to the conclusion that an interim ordinance would have no effect on an application because of the theory that an application can be refused only when the ordinance which will permanently prohibit the use has been formally introduced.[94]

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the permit actually had to be issued before the owner would be protected; under the Pennsylvania rule the owner need only apply for the permit to receive protection. Perhaps the court wisely abandoned the rule in *Hull v. Hunt*. That rule seems vulnerable to delaying tactics by the local government since the permit must in fact be issued before the owner acquires any rights. The local government could apparently delay issuance of the permit long enough to rezone the property, leaving the property owner with no recourse.

93. Pure Oil Div. v. City of Columbia, —— S.C. ——, 173 S.E.2d 140 (1970) (discussed at note 22 and accompanying text, *supra*).

94. This conclusion is also supported by the author's impression of the Pennsylvania courts, especially its supreme court. They are far more protective of the rights of property owners than most of the other state courts. *See, e.g.*, Chief Justice Bell's concurring opinion in Kit-Mar Builders, Inc. v. Zoning Bd. of Adjustment, —— Pa. ——, 268 A.2d 765 (1970), in which he argued that the right to own property and use it as one pleased was "one of the two basic differences between America and Communism. Then along came zoning . . . ." *Id.* at ——, 268 A.2d at 771. Admittedly, Chief Justice Bell does not speak for the entire court, but it is noteworthy that in *Kit-Mar*, in which a majority overturned an ordinance requiring two and three-acre minimum lots, three members of the

VI. An Evaluation of Zoning Estoppel and Some Suggestions for Change

A. The Problem of Determining Substantial Reliance

The element of zoning estoppel most important to the outcome of the cases and the most troublesome for the courts is substantial reliance. This is not to say that the good faith and the governmental conduct elements are not important at times, but only that the requirements that they establish are so minimal that they are generally met with ease. As a result, the cases usually hinge on whether there was substantial reliance.

The courts have encountered two problems in applying the substantial reliance requirement: (1) establishing a test for all cases and (2) applying that test with consistency in subsequent cases.

Those courts which have adopted the set quantum test have, in effect, opted for certainty. The test theoretically guarantees certainty because it measures reliance on the basis of a set degree or amount of reliance which supposedly indicates whether a hardship would be suffered in all cases. Most of the courts utilizing the set quantum test initially established the beginning of construction as the minimum requirement for relief. Sooner or later, they were faced with a case in which this criterion was not met but in which the owner would have suffered a hardship if relief were denied. The tendency apparently has been to solve this dilemma by either somehow fitting the facts of the case into the court's stated test or by disposing of the case in favor of the owner on some basis other than his reliance. Obviously, neither approach does much to promote consistency among cases. This dilemma also seems to have resulted in a tendency over the years toward lowering the test for substantial reliance to encompass the incurring of pre-construction expenditures or obligations. This would, perhaps, have been the more realistic test in the first place. It certainly is more realistic today due to the investment of time and money that is often necessary before modern developments reach the construction stage.[95] In any event, the point is simply that even the

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majority did so because the minimum lot requirements were designed to exclude people, but the Chief Justice seemed to hold that the ordinance unreasonably interfered with the rights of property owners.

95. This proved to be a persuasive factor in Sautto v. Edenboro Apts., 84 N.J. Super. 461, 202 A.2d 466 (Super. Ct. 1964). "In order to conclude such an enterprise successfully [construction of a high-rise apartment building], the facts of business life bespeak the need not only for essential disbursements and financial

set quantum test has not proved to be an especially effective guarantee of certainty.

Those courts which choose to utilize the balancing test opt for fairness. Because they weigh each case on its merits, they achieve fairer results. However, their decisions are a morass of uncertainty. Unless a closely analogous case has already been decided, the parties have to resort to litigation to settle their dispute.

The most promising solution to the problems surrounding the substantial reliance requirement lies in the adoption of legislation setting forth the applicable measure of reliance. The considerations involved in establishing the rights of property owners vis-à-vis the interests of the public are essentially policy questions more appropriately resolved by the legislatures than the courts. The benefit of legislation would lie in the fact that it would promote greater consistency in court decisions. To summarize, all three tests have advantages and disadvantages; it is important to establish one test and apply it consistently. It also would be desirable for state legislation to establish the length of time before which and on which permits are valid and can be relied since these issues arose in a number of cases.[96]

A second solution, less effective than legislation, would be for local governments to adopt provisions in their zoning ordinances spelling out the rights of property owners upon applying for and receiving building permits. One widely circulated model ordinance includes a provision for determining whether a conforming use was established prior to amendment of the ordinance.[97] An apparently increasing number of ordinances contain it. The inclusion of such provisions should help to establish the ground rules on which permits are granted as well as avoid unnecessary litigation. In addition, an abbreviated

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commitments, but also a substantial investment in planning, negotiations, and time-consuming efforts." *Id.* at 473, 202 A.2d at 472.

96. Some courts have held that a permit is not lawfully granted until all administrative action regarding it has been completed and the period for challenging its issuance has expired. If the ordinance is amended before then, the new ordinance controls. *See* Russian Hills Improvement Ass'n v. Board of Permit Appeals, 66 Cal. 2d 34, 56 Cal. Rptr. 672, 423 P.2d 824 (1967). *But see* United States Home and Dev. Corp. v. LaMura, 89 N.J. Super. 254, 214 A.2d 538 (Super. Ct. 1965) in which it was held that increased minimum lot-size and frontage requirements could not be applied to prevent the development of a previously approved subdivision until a reasonable time had passed. The 10-month period between final approval and application for building permits was not long enough to justify applying the new requirements.

97. F. Bair & E. Bartley, The Text of a Model Zoning Ordinance 25 (American Society of Planning Officials 3d ed. 1966).

warning might be printed on all building permits to the effect that they are subject to revocation, and on all permit applications that they confer no right to proceed unless approved. In several cases in which such warnings were stamped on the permits or the applications, the courts weighed the warnings heavily against the property owners on the theory that they had constructive knowledge of the fact that they had no right to rely on the permit or the application.[98]

B. Protecting the Rights of Property Owners and the Public Interest

The second major problem concerning zoning estoppel is whether the rights of property owners and the interests of the public are adequately protected by the principle as it has evolved. An evaluation of this problem is complicated by a factor not found in most zoning cases: the question of a local government's accountability to property owners for misjudgments, mistakes, and omissions while exercising its zoning powers. This factor is thus presented along with the normal questions of private versus public interests. As a result, an evaluation of the cases often becomes heavily subjective because so much hinges on the standards to which local governments should be held under such circumstances. Evaluation also is complicated by the fact that once again it is necessary to approach the cases through the factual categories, since the considerations which must be weighed vary greatly.

1. Category One

In category one, zoning estoppel adequately protects the rights of property owners and the interest of the public. Generally, the owner will have completed the preliminary preparations for development and will be in the midst of initiating construction when the government orders him to halt—often the first official notification of the rezoning or the possibility of rezoning. These facts coupled with the reliance upon a valid permit make it unfair to force the owner to abandon his project unless the public's interests are seriously threatened. In most cases, they will not be. Because the use or structure

98. In Russian Hills Improvement Ass'n v. Board of Permit Appeals, 66 Cal. 2d 34, 56 Cal. Rptr. 672, 423 P.2d 824 (1967), the court appeared to rely heavily upon the fact that the permit stated that it gave no right to rely until the time for an appeal had lapsed. Most of the other cases in which the permit or application carried a warning are category three cases. Here, the courts have held that the warning gave the owner knowledge that the permit did not authorize a violation of the zoning ordinance. *See, e.g.*, Weiner v. City of Los Angeles, 68 Cal. 2d 697, 68 Cal. Rptr. 733, 441 P.2d 293 (1968); Mazo v. City of Detroit, 9 Mich. App. 354, 156 N.W.2d 155 (Ct. App. 1968).

was allowed under the ordinance a short time before, it would now be detrimental to the community only under exceptional circumstances. Furthermore, the government's change of mind in most of these cases results from citizen opposition which arose after the permit was issued. Such pressures are likely to be a poor basis for rational decision-making and are perhaps not the most desirable avenue for citizen participation in the planning and zoning processes. In short, the balance in category one is generally struck in favor of the property owner, and the courts accept this analysis by granting relief unless the owner sought to secure an advantage.

2. Category Two

In category two, the balance is much closer and may swing either way depending upon the facts presented. Although the owner's investment of time and money may be as great as in category one, his case is considerably weakened because, de jure and de facto, he was generally less justified in relying on the government's conduct. Although he may have relied on circumstances which indeed indicated a strong probability that his application would be approved, he did not in fact possess a permit which was the first requisite for gaining any legal rights. Furthermore, many owners would have realized how vulnerable they were without a permit and would have waited until one was issued, thus avoiding the problem of the owner in question. It was not generally unreasonable for the owner to have relied on the circumstances, but neither was it necessarily reasonable. The owner's appeal for relief, in the final analysis, depends very much on the particular facts of the case.

The same holds true for the government's position. Generally the owner's intended use or structure will not be detrimental to the public interest and the government's change of mind will be the result of citizen opposition. Unless the owner lacked good faith, the government can only argue that he could not reasonably have expected to acquire any rights until he secured a permit. In some cases the government's position will be even weaker, as where it lost the initial round of litigation before the board of appeals or a court and then rezoned the owner's property in retaliation. Still, there may be instances in which the public interest should clearly prevail. For example, if the rezoning had been carefully studied and was not directed at the owner, and he had relied only on the fact that others had always received the same permit, it would seem to be his own fault that he

invested his money before securing a permit. With all other facts the same, the government should probably also prevail if the owner relied solely on the fact that his intended use or structure was permitted as of right under the ordinance.

3. Category Three

In evaluating the cases falling under category three, it seems best to begin by distinguishing between those in which the owner was granted a permit that violated the zoning ordinance and those in which the permit was valid but contrary to the intentions of the government. There is no reason why the owner's investment and obligations would be any greater or any less in either event, but the extent to which the public interest will be affected will probably vary greatly. If the permit violates the zoning ordinance, the public interest is likely to be seriously threatened. If the permit simply exceeds the intentions of the government, the use may or may not be detrimental, since it is allowed under the ordinance but is only subject to the government's discretion. These are, of course, general propositions which may not hold true in individual cases.

The balance should be struck in favor of the owner if the permit is for a valid use or structure, but for the government if for a prohibited one. Another possible consideration to be weighed is the basis for the government's mistaken issuance of the permit. Should it be made accountable for gross mistakes and derelictions of duty which result in the issuance of a permit but not for misjudgments? If the zoning administrator is so inept that he cannot find the latest copy of the zoning ordinance or fails to note a provision that is clearly pertinent, should the owner suffer? Is a different case presented if the zoning administrator simply makes an error in computing the number of units or the floor area that will be allowed? In none of the cases examined did the court openly consider the basis for the government's erroneous issuance of the permit, but in a close case this might be enough to determine the outcome, whether the court admits it or not. Another factor which the courts probably consider is the length of time between the issuance of the permit and the government's discovery of its error. An appreciable delay is probably treated as compounding the government's original mistake or misjudgment.

Under this analysis of the cases in category three, those courts which automatically deny relief on the fictitious ground that everyone is presumed to know the law often acquiesce in the imposition of a hard-

ship that is the fault of the government, not the property owner. It is unfair to summarily dispose of these cases since the public interest may or may not prove seriously threatened upon examination of the facts. It would be far more equitable to resolve these cases on their merits than on the basis of a principle of immunity which automatically renders the government unaccountable for its mistakes and misjudgments.

4. Category Four

In category four, where the owner relied on the nonenforcement of a violation, protection of the public interest seems paramount at first glance, since the relief which the owner is requesting is an exemption from the requirements of the zoning ordinance. Upon closer examination, however, it becomes evident that some owners may be able to make a convincing case. Suppose that when the present owner bought the property the violation was present, having been committed by some prior owner. The present owner is thus in no way responsible for the violation, although perhaps he should have investigated more thoroughly before purchasing the property.[99] Furthermore, the government in a sense contributed to his reliance by failing to detect the violation and order it corrected. The owner's position becomes even stronger if the violation has gone undetected for many years. Such a violation likely is not so great a threat to justify the added expense to the owner. A further consideration would seem to be the government's motivation for now wanting to remedy the violation. If the violation was detected by chance and similar violations exist throughout the neighborhood, then the owner is in a sense being singled out for prosecution and little advancement of the public interest is likely to be gained.[100] If, however, the violation was discovered as the result of a program to bring all properties in the neighborhood up to standards, then prosecution is probably justified unless the owner would suffer an extreme hardship.

99. Anyone who has spent much time trying to discover the zoning classification of a particular property would probably agree that it is no easy task, especially in areas of the central cities which have been rezoned numerous times over the years. This is evidenced by the reluctance of title insurance companies to insure the zoning classification of property. Thus, so long as the owner made a reasonable effort to ascertain the zoning in the category four cases, it is highly fictitious to say that he should have discovered the violation before purchasing the property.

100. Generally, the courts have held that it is no defense that violations have not been enforced against others, although there is some authority for the proposition that the singling out of a particular violator may be contrary to the notion of equal protection. Annot., 119 A.L.R. 1509 (1939).

The few courts which have granted relief in the category four cases seem to accept this analysis. The vast majority of the courts which automatically rule that no right to violate an ordinance can be acquired by continued violations ignore the fact that the public interest may or may not be advanced appreciably by enforcement of the violation. As in category three, it would be far better to try these cases on their merits and dispose of them as fairly as possible.

In the final analysis, the courts generally dispose of the cases in categories one and two in a manner that adequately protects the interests of property owners and the public. However, their mechanistic refusal to grant relief in categories three and four is a problem. Although the number of cases falling in the latter two categories may be small, the hardship imposed on the owner may be great and through no fault of his own. The basic question presented in these cases is that of local government's accountability to landowners for misjudgments, mistakes, and omissions committed while exercising zoning powers. Admittedly, this is a difficult question, but not so difficult as to justify the way the courts have dodged it. Perhaps their reasoning is that overruling the long line of precedent based upon various fictions designed to facilitate the enforcement of the law is ultimately a policy question to be decided by the legislatures. In any event, the time has come for reform in this area, as it has in many others involving the question of governmental accountability. The kind of zoning administration that promoted the cases in categories three and four does not serve the public interest and is not going to be eliminated by allowing local governments to continue to cover up their errors and omissions.

Conclusion

The land-use disputes to which zoning estoppel is applicable provide another illustration of the need for some sort of compensatory land-use controls mechanism. There is a need for compensatory regulations (heretofore unconstitutional) paying damages to the landowner equal to the difference between the value of his property before and after the imposition of the regulation.[101] Payments could be used to

101. The need for some form of compensatory mechanism has been frequently advocated. Awarding compensation is one of the powers which the National Commission on Urban Problems has recommended be delegated to local governments. Similarly, the yet undrafted Article 4 of the American Law Institute's Model Land Development Code is expected to enable local governments to justify otherwise unconstitutional police power regulations through the payment of compensation. ALI, Model Land Dev. Code xxxiv (Tentative Draft No. 1, 1968).

compensate landowners who would suffer a hardship were the local government allowed to change its position but to whom it would be undesirable to grant an estoppel because the public interest would be seriously affected. The interests of property owners and the public could be protected simultaneously by paying damages to the landowner for not proceeding. The damages to be paid might appropriately be the cost to the property owner of restoring the status quo that existed before he relied on the government's conduct. Thus, if he expended $25,000 toward the construction of a gasoline service station before the government revoked his building permit through rezoning, the damages to be paid would be $25,000, the cost of demolishing the uncompleted station, and any other expenses or obligations directly attributable to the government's change of position. Because they are not a cost of restoring the status quo, losses, such as the loss of revenue from the sale of gasoline, would not be compensable. The cost of restoration of the status quo would generally be an equitable measure of damages in categories one through three, but some other measure would normally have to be used in cases falling under category four. There, what the government generally desires, is not restoration of the status quo, but bringing the property into conformity with the applicable zoning regulations. If the owner is entitled to relief, it would be appropriate to assess the damages as the cost of removing the violation or acquiring the property, if removing the violation is economically unfeasible. Regardless of the category of case presented, the government, not the property owner, should have the prerogative of determining whether damages would be paid; if the owner is entitled to relief, only the public interest would suffer were he allowed to continue his violation. Although resort to compensatory payments would probably be infrequent, it is an appealing technique for treating the property owner equitably while protecting the public interest and the government's freedom to exercise its zoning power. If such a mechanism were available, the courts would undoubtedly be more willing to grant relief in the cases discussed in this article.

STATUTORY COMMENTS