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ON VESTED RIGHTS TO LAND USE AND DEVELOPMENT

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AND
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I. INTRODUCTION—THE ISSUE OF VESTED RIGHTS

The interface between a government's right to exercise police power and a citizen's right to use private property is one of the most celebrated topics in American constitutional jurisprudence.¹ Judicial attempts to establish "bright lines" marking the boundaries of this interface have produced inconsistent

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1. See *Nollan v. California Coastal Commission*, 483 U.S. 825, _____, 107 S. Ct. 3141, 3146-47 (1987) (nexus required between police power exaction sought and legitimate policy objective); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, _____, 107 S. Ct. 2378, 2386 (1987) (police power exercise over land use rights can give rise to taking of private property); *Agins v. City of Tiburon*, 447 U.S. 255, 260-63 (1980) (police power exercise over land use rights do not amount to taking of private property); *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130-31 (1978) (police power exercise that does not cause "physical invasion" onto private property is not taking); *Miller v. Schoene*, 276 U.S. 272, 279 (1928) (destruction of private property to protect public health, safety, and welfare is not taking); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (zoning classifications do not affect taking of private property); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (police power exercise that goes "too far" effects taking of private property); *Mugler v. Kansas*, 123 U.S. 623, 644-45 (1887) (police power exercise that renders existing legal business illegal does not affect taking of private property); *Dainese v. Cooke*, 91 U.S. 580, 583-84 (1875) (police power exercise that renders previously issued building permit invalid effects taking of private property). Compare *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, 501-02 (1987) (Pennsylvania statute that requires fifty percent of coal deposits located under public buildings to remain undisturbed does not affect taking of private property) with *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415-16 (1922) (Pennsylvania statute forbidding coal mining that may cause subsidence of any public building effects taking of private property). See generally B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977); N. BOWIE, *TOWARDS A NEW THEORY OF DISTRIBUTIVE JUSTICE* (1971); R. EPSTEIN, *TAKINGS, PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); E. FREUND, *THE POLICE POWER* (1904) [hereinafter FREUND]; Humback, *A Unifying Theory For the Just-Compensation Cases: Takings, Regulation and Public Use*, 34 *RUTGERS L. REV.* 243 (1982); Michelman, *Property As A Constitutional Right*, 38 *WASH. & LEE L. REV.* 1097 (1981); Ragsdale, *Guide to Regulatory Takings Jurisprudence: A Synthesis and Integration of Supreme Court Precedent Regarding the Regulatory Taking of Land*, 55 *UMKC L. REV.* 213 (1987) [hereinafter Ragsdale]; Sax, *Takings and the Police Power*, 74 *YALE L.J.* 36 (1964) [hereinafter Sax I]; Sax, *Takings, Private Property and Public Rights*, 81 *YALE L.J.* 149 (1971) [hereinafter Sax II].

rulings and confusing pronouncements of law.² Constitutional law professors

2. See *supra* note 1 (citations to United States Supreme Court cases); McGinley, *Regulatory "Takings": The Remarkable Resurrection of Economic Substantive Due Process Analysis in Constitutional Law*, 17 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10369, 10370-89; Ragsdale, *supra* note 1, at 216-19; Sallet, *Regulatory "Takings" and Just Compensation: The Supreme Court's Search for a Solution Continues*, 18 *URB. LAW.* 635-57 (1986); Stoebuck, *Police Power, Takings, and Due Process*, 37 *WASH. & LEE L. REV.* 1057 (1980) [hereinafter Stoebuck]. One scholar aptly noted that "the collection decisions of the Supreme Court, and all other courts, leave the subject as disheveled as a ragpicker's coat." See Stoebuck, *supra* at 1059 n.11.

In the celebrated case of *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922), Justice Holmes provided an unimpeachable but difficult to apply definition of "bright line" between the legitimate exercise of police power and the unconstitutional taking of private property through governmental regulations. He reasoned that "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal*, 260 U.S. at 415. In articulating his "bright line," however, Justice Holmes did not distinguish, contrast, or even cite a previous "bright line" rule articulated by Justice Harlan thirty-five years earlier in the case of *Mugler v. Kansas*, 123 U.S. 623 (1887).

In *Mugler* Justice Harlan stated that "[a] prohibition simply upon the use of property for purposes that are declared by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit." *Mugler*, 123 U.S. at 668-69. Justice Brandeis, in a dissent from the *Pennsylvania Coal* opinion, chastised the majority for failing to apply the *Mugler* test and for refusing to recognize that the Pennsylvania statute at issue was basically a nuisance-preventive measure. See *Pennsylvania Coal*, 260 U.S. at 417-20 (Brandeis, J., dissenting).

Six years after the *Pennsylvania Coal* decision, the United States Supreme Court partially vindicated Justice Brandeis' position and ruled that private property rights do not exist in declared nuisances and that governments possess the unfettered right to obliterate declared nuisances without paying compensation. See *Miller v. Schoene*, 276 U.S. 272, 279-80 (1928). Interestingly enough, Justice Holmes later claimed that his *Pennsylvania Coal* "bright line" rule harmonized with the Supreme Court's later pronouncement concerning the law of nuisance abatement. See M. HOWE, *HOLMES-POLLOCK LETTERS—THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874-1932* (1941).

As a confusing but appropriate footnote to the *Pennsylvania Coal* debate, the United States Supreme Court, in the 1987 *Keystone Bituminous Coal* decision, effectively overruled Justice Holmes' holding that the Pennsylvania soil subsidence statute at issue caused a taking of private property, but three months later issued another land use opinion premised indirectly upon Justice Holmes "bright line" rule. Compare *Nollan v. California Coastal Commission*, 483 U.S. 825, —, 107 S. Ct. 3141, 3148 (1987) (requiring nexus between government-imposed land use prohibition and government's justification for prohibition) with *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 481-85 (1987) (explaining that *Pennsylvania Coal* analysis does not apply to facts in *Keystone*). See also Roberts, *Mining with Mr. Justice Holmes*, 30 *VAND. L. REV.* 287 (1986); Stewart, *Overruling Oliver—Fifth Amendment Challenge to State—Imposed Limited on Coal Mining*, 73 *A.B.A. J.* 55 (May 1987); Comment, *Keystone Bituminous Coal Association v. DeBenedictis and the Status of Coal in Pennsylvania*, 11 *HARV. J.L. & PUBL. POL'Y* 227 (1988). See generally Berger, *The Year of the Taking Issue*, 1 *B.Y.U. J. PUBL. L.* 261, 187-303 (1987); Hippler, *Reexamining 100 Years of Supreme Court Regulatory Taking Doctrine: The Principles of "Noxious Use," "Average Reciprocity of Advantage," and "Bundle of Rights" from Mugler to Keystone Bituminous Coal*, 14 *B.C. ENVTL. AFF. L. REV.* 653 (1987). As is demonstrated by *Pennsylvania Coal* and its progeny, even the best of "bright lines" lose their luminosity over time. Justice Blackmun, in a 1985 opinion, described the *Pennsylvania Coal* "bright line" test as "the lawyer's equivalent of the physicist's hunt for the quark." See *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 199 n.17 (1985).

teach our nation's first year law students that American citizens hold all private property rights subject to the valid exercise of the government's police power and that the diminishment of these private property rights caused by this valid exercise of government police power is not subject to just compensation under the Fifth and Fourteenth Amendments.³ Yet, these same law professors also teach that the government cannot use its police power to effect a taking of private property. This action, they teach, is regulation that goes "too far" and becomes instead a *de facto* exercise of eminent domain power requiring just compensation.⁴ Inevitably, some of these first year students become our nation's judges and are called upon to decide land use regulatory cases. As judges, these former students recall the lectures of their first-year professors and attempt, in actual case scenarios, to determine when certain land use regulations possessing facial validity go "too far." These attempts have fostered the development of an area of land use law commonly referred to as "vested rights."⁵

3. See 1 R. ANDERSON, *AMERICAN LAW OF ZONING* § 3.06 (3d ed. 1986) [hereinafter ANDERSON]; C. ANTIEAU, *MODERN CONSTITUTIONAL LAW: THE INDIVIDUAL AND THE GOVERNMENT* §§ 3:1-3:8 (1969) [hereinafter ANTIEAU]; F. BOSSELMAN, D. CALLIES, & J. BANTA, *THE TAKINGS ISSUE* 208-10, 318-19 (1973); FREUND, *supra* note 1; D. MANDELKER, *LAND USE LAW* § 2.01 (1988) [hereinafter MANDELKER]; A. RATHKOPF & D. RATHKOPF, *THE LAW OF ZONING AND PLANNING* §§ 2.01-.03 (5th ed. 1987) [hereinafter RATHKOPF]; P. ROHAN, *ZONING AND LAND USE CONTROLS* § 1.05 (1988) [hereinafter ROHAN]. See also Van Alstyne, *Taking or Damaging By Police Power; The Search For Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1970).

The so-called "police power" of government is an inherent, unspecified power to protect public health, safety, and welfare. As an incident of sovereignty, this police power is neither expressly mentioned or defined in the United States Constitution or in the constitutions of the various states. See, e.g., *Berman v. Parker*, 348 U.S. 26, 32 (1954); *Miller v. Board of Pub. Works*, 195 Cal. 477, 484, 234 P. 381, 383 (1925); *Marshall v. Kansas City*, 355 S.W.2d 877, 882 (Mo. 1962); *Stickley v. Givens*, 176 Va. 548, 557, 11 S.E.2d 631, 636 (1940). See generally FREUND, *supra* note 1; Stoebuck, *supra* note 2.

4. See ANDERSON, *supra* note 3, at § 30.17; ANTIEU, *supra* note 3, at § 3.2; MANDELKER, *supra* note 3, at §§ 2.01, 2.16, 2.23, 2.34; RATHKOPF *supra* note 3, at §§ 6.01-6.06; ROHAN, *supra* note 3, at §§ 52A.01, 52A.02, 52A.03. See generally Michaelman, *Takings*, 1987, 88 COLUM. L. REV. 1600 (1988).

As discussed in note 3, *supra*, Justice Holmes originated the "too far" test in his *Pennsylvania Coal* opinion. Despite the apparent overruling or distinguishing of *Pennsylvania Coal* in *Keystone*, the United States Supreme Court still finds merit in the "too far" test. See *Nollan*, 483 U.S. at —, 107 S. Ct. at 3148. Indeed, the *Nollan* court provided additional gloss onto the test by stating that a land use regulation mandating dedication of private land interests for public purposes goes too far and becomes "an out-and-out plan of extortion." *Id.*

5. See *infra* notes 6-10 and accompanying text. As used in this article, the term "vested rights" refers to those rights to use or develop real property that cannot be stripped by regulatory action or governmental edict without payment of just compensation. The term is also used, in a slightly different sense, in employment law and welfare rights law to define a right or interest the infringement of which would violate public policy or "shock" society's sense of justice. See Comment, *The Variable Quality of a Vested Right*, 34 YALE L. J. 303, 307 (1925).

Black's Law Dictionary defines "vested rights" as those "[r]ights which have so completely and definitely accrued to . . . a person that they are not subject to be defeated or canceled by the act of any other private person, and which it is right and equitable that the government should recognize and protect, as being lawful in themselves. . . ." BLACK'S LAW DICTIONARY

A vested right to use private property is a right that is immune to the governmental exercise of its police power.⁶ The exercise of regulatory police power that causes the diminishment of a vested right is one that goes "too far."⁷ Implicit in the past two sentences is the basis for much of the confusion in the law of vested rights.⁸ Some of our judges examine the nature of the power exercised by government when adjudicating vested rights cases while other judges examine the nature of the private property rights affected. This

1402 (5th ed. 1979). One scholar has defined "vested rights" as those rights that are "sacred and inviolable," or are such as the [benefitted] parties ought not to be deprived by the legislature. J. GRAY, *THE RULE AGAINST PERPETUITIES* 98 & n.1 (3d ed. 1915) [hereinafter GRAY]. As noted below, the term "vested rights" in the context of land use and development rights may be analyzed as pure proprietary rights deserving Fifth and Fourteenth Amendment protections and as specific areas into which governmental regulation may not be extended. See *infra* notes 31-51, and accompanying text (discussing "pure vested rights" and "zoning estoppel" approaches).

6. See C. SIEMON, W. LARSEN, & D. PORTER, *VESTED RIGHTS—BALANCING PUBLIC AND PRIVATE DEVELOPMENT EXPECTATIONS* 49 (1982) [hereinafter SIEMON]; Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes*, 15 *URB. L. ANN.* 63, 65 (1971) [hereinafter Heeter]; see, e.g., *Avco Community Developers, Inc. v. South Coast Regional Comm'n*, 17 Cal. 3d 785, 791, 553 P.2d 546, 550, 132 Cal. Rptr. 386, 390, cert. denied, 429 U.S. 1083 (1977); *Pure Oil Div. v. City of Columbia*, 254 S.C. 28, 34, 173 S.E.2d 140, 143 (1970); *Board of Supervisors v. Medical Structures, Inc.*, 213 Va. 355, 358, 292 S.E.2d 799, 801 (1972); see also *infra* notes 43-51 and accompanying text (discussing "pure vested rights" doctrine).

7. See *Pennsylvania Coal*, 260 U.S. at 415; *Fred F. French Investing Co. v. City of New York*, 39 N.Y.2d 587, 593-94, 385 N.Y.S.2d 5, 8, 350 N.E.2d 381, 384-85, cert. denied, 429 U.S. 990 (1976); SIEMON, *supra* note 6, at 49; Heeter, *supra* note 6, at 64-65; see also *infra* notes 35-42 and accompanying text (discussing "zoning estoppel" doctrine). As noted in SIEMON, a scholarly debate exists regarding whether or not the difference between a valid police power exercise and one which goes "too far" is one of degree or one which involves discrete distinction in kind. See SIEMON, *supra* note 6, at 57-58. Justice Brennan, in his dissent to the United States Supreme Court's opinion in *San Diego Gas & Electric Co. v. City of San Diego*, considered Justice Holmes "too far" analysis and stated that "[t]he determination of a 'taking' is 'a question of degree.'" 450 U.S. 621, 649 (1981). The authors in SIEMON suggest that Justice Brennan misconstrues the "too far" analysis and state that Justice Holmes considered a police power exercise that goes "too far" as one that is wholly distinct in kind from one which does not. See SIEMON, *supra* note 6, at 58-59. Justice Holmes, they state, believed that a police power exercise that goes "too far" metamorphoses into an exercise of eminent domain requiring just compensation. *Id.* See *Pennsylvania Coal*, 260 U.S. at 416. But see Beuscher, *Notes on the Integration of Police Power and Eminent Domain by the Courts: Inverse Condemnation* in J. BEUSCHER & R. WRIGHT, *CASES AND MATERIALS ON LAND USE* 722, 724 (1969) ("those writers who emphasize the separate air-tight, non-overlapping character of the two basic powers—police power and eminent domain—have been too glib").

8. See SIEMON, *supra* note 6, at 49. The authors in SIEMON describe a phenomenon which they term "the vesting paradox." They note that "[e]ven though all property rights are held subject to the police power, a vested right to develop is immune from exercises of the police power." *Id.* As described below, proponents of the "pure vested rights" doctrine solve the paradox by determining that a vested right is a very special legal interest that possesses more constitutional proprietary "weight" than a mere property right; it is, they believe, a "super property" right. Proponents of the "zoning estoppel" doctrine do not distinguish between vested rights and other property rights. They solve the paradox, however, by determining that a police power exercise that impacts a vested right loses its police power status and becomes instead an exercise of eminent domain power.

divergence has produced two different theoretical approaches to the vested rights issue that have, through imprecise application, become hopelessly muddled.⁹ We term these two theoretical approaches the "zoning estoppel" approach and the "pure vested rights" approach, respectively.¹⁰ Basically, the former approach considers the police power exercised while the latter considers the private property interest affected.

II. OVERVIEW—THE NATURE OF VESTED RIGHTS

Vested rights issues arise more frequently today than in the past because of ever increasing volatility of land use regulations.¹¹ In Virginia and elsewhere, local governments have become extremely creative in extending the scope of their police powers to address real and perceived concerns relating to population, transportation, and public facilities. Local governments generally are not reluctant to use these powers to mollify complaints sounded by the electorate.¹² In rapidly developing jurisdictions, government-sponsored initia-

9. See MANDELKER, *supra* note 3, at § 6.12; Heeter, *supra* note 6, at 66 n.5; Stoebeck, *supra* note 2, at 1059; see, e.g., District of Columbia v. Cahill, 54 F.2d 453, 454 (D.C. Cir. 1931) (city estopped because landowner had acquired vested rights); Raley v. California Tahoe Regional Planning Agency, 68 Cal. App. 3d 965, 977, 137 Cal. Rptr. 699, 707 (1977) ("vested rights rule" is simply "a special expression of the general estoppel doctrine"); Allen v. City & County of Honolulu, 58 Haw. 432, 435, 571 P.2d 328, 329 (1977) (both doctrines applied with identical results); Marziani v. Lake County Zoning Board of Appeals, 87 Ill. App. 3d 425, 429, 409 N.E.2d 118, 122 (1980) (estoppel relief granted in jurisdiction that did not recognize doctrine of zoning estoppel); Town of Marblehead v. Deery, 356 Mass. 532, 537-38, 254 N.E.2d 234, 237-38 (1969) (town estopped because of unspecified equitable principles); see also Cunningham & Kremer, *Vested Rights, Estoppel, and the Land Development Process*, 29 HASTINGS L. J. 623, 626 (1978) [hereinafter Cunningham & Kremer].

10. See *infra* notes 35-42 and accompanying text (discussing doctrine of zoning estoppel); *infra* notes 43-51 and accompanying text (discussing doctrine of pure vested rights).

11. See Campanella, Elliott, & Merriam, *New Vested Property Rights Legislation: States Seek to Steady a Shaky Judicial Doctrine*, 11 Zoning & Plan. L. Rep. 81, 81-82 (1988) [hereinafter Campanella]; Cunningham & Kremer, *supra* note 9, at 626-28; Delaney & Kominers, *He Who Rests Less, Vests Best: Acquisition of Vested Rights in Land Development*, 23 St. Louis U. L. J. 219, 219-20 (1979) [hereinafter Delaney & Kominers]; Witt, *Vested Rights in Land Uses—A View From the Practitioner's Perspective*, 21 REAL PROP., PROB. & TR. J. 317, 317-18 (1986) [hereinafter Witt]; Witt and Sammartino-Gardner, *Growth Management v. Vested Rights: One City's Experience: A Case Study of San Diego*, 20 URB. LAW. 647, 647-56 (1988) [hereinafter Witt & Sammartino-Gardner]. See generally Cable & Hauck, *The Property Owner's Shield—Nonconforming Uses and Vested Rights*, 10 WILLAMETTE L. J. 404 (1974); Note, *Good Faith Expenditures in Reliance on Building Permits as a Vested Right in North Carolina*, 49 N.C.L. REV. 197 (1970); Note, *Vested Rights and Land Use Development*, 54 ORE L. REV. 103 (1975); *Recent Cases, Building Permits—Vested Rights Thereunder In Pennsylvania—A New Rule*, 73 DICK. L. REV. 578 (1968-69).

12. See, e.g., Board of Supervisors v. Fralin & Waldron, Inc., 222 Va. 218, 229, 278 S.E.2d 859, 865 (1981) (Henrico County Board downzoning of property zoning for multi-family uses because of intense citizen opposition held invalid); Board of Supervisors v. God, 216 Va. 163, 165, 217 S.E.2d 801, 803 (1975) (Arlington County Board refusal to rezone property for multi-family uses because of "serious water problems" held invalid), *cert. denied*, 423 U.S. 1088 (1976). Board of Supervisors v. Rowe, 216 Va. 128, 148, 216 S.E.2d 199, 212 (1975) (James City County Board rezoning of general commercial property to "Business Tourist Entry District"

tives to amend zoning ordinances and zoning maps frequently occur in the months before elections.¹³ These legislative acts often diminish the land use rights held by certain affected landowners. Therefore, arguments by affected landowners that their property should be exempted from the new legislative acts under vested rights theories soon arise before, during, and after enactment of zoning ordinance and map changes.

While these affected landowners may either support or oppose the questioned zoning ordinance or zoning map amendment on general "good planning" grounds, they undoubtedly will claim that their existing or planned land uses should receive exemption from the new legislation. If local govern-

zoning district to improve highway corridor aesthetics held invalid); Board of Supervisors v. Horne, 216 Va. 113, 122, 215 S.E.2d 453, 459 (1975) (Fairfax County Board enactment of moratorium on filing of site plans and subdivision plats to halt development because of growth management concerns held invalid); Board of Supervisors v. Williams, 216 Va. 49, 61, 216 S.E.2d 33, 41 (1975) (Fairfax County Board refusal to rezone property to denser single-family detachment residential zoning district because of inadequate public facilities held invalid); City of Richmond v. Randall, 215 Va. 506, 514, 211 S.E.2d 56, 62 (1975) (Richmond City Council refusal to grant special use permit allowing limited office uses because of intense citizen opposition held invalid); Board of Supervisors v. Allman, 215 Va. 434, 446, 211 S.E.2d 48, 55 (1975) (Fairfax County Board refusal to rezone property to denser single-family detached residential zoning district because of inadequate public facilities and crowded schools held invalid), *cert. denied*, 423 U.S. 940 (1975); Board of Supervisors v. Snell Constr. Corp., 214 Va. 655, 661, 202 S.E.2d 889, 894 (1974) (recently elected Fairfax County Board piecemeal downzoning of property zoned for high and medium density residential uses because of previously made political promises to limit growth held invalid); Board of Supervisors v. DeGroff Enters. Inc., 214 Va. 235, 238, 198 S.E.2d 600, 602 (1973) (Fairfax County Board enactment of zoning requirement mandating large residential development projects to provide minimum of 15% low and moderate income housing because of inadequacies in local housing stock held invalid); Boggs v. Board of Supervisors, 211 Va. 488, 492, 178 S.E.2d 508, 510-11 (1971) (Fairfax County Board refusal to rezone low density residentially zoned property surrounded by commercially zoned and high density residentially zoned property because of growth management concerns held invalid); Board of Supervisors v. Carper, 200 Va. 653, 662, 107 S.E.2d 390, 396-97 (1959) (Fairfax County Board rezoning of western portion of county to large lot, low density residential zoning district to restrict growth held invalid); *see also* Aldre Properties, Inc. v. Board of Supervisors, Chancery No. 78,463-A (Fairfax County Circuit Ct. Jan. 7, 1985) (Fairfax County Board downzoning of 400,000 acres to protect source of drinking water held valid by trial court); Camelot Builders, Inc. v. Board of Supervisors, Chancery No. 38,968 (Fairfax County Circuit Ct. June 6, 1973) (Fairfax County Board enactment of moratorium on issuance of sewer taps held invalid by trial court). *See generally* Hazel, Growth Management Through Litigation: Urban Land (Nov. 1976) [hereinafter Hazel] (manuscript available at Washington & Lee University Law Review Office); Witt & Sammartino-Gardner, *supra* note 11.

13. *E.g.*, Fairfax County, Va., Proposed Zoning Ordinance Amendment to Reduce Maximum Allowable Floor Area Ratios (FAR's) for High Traffic Generating Uses in the I-3, I-4, I-5, and I-6 Zoning Districts (proposed Nov. 17, 1986, defeated Dec. 29, 1986); Fairfax County, Va., Proposed Zoning Map Amendment to Rezone 40,000 Acres in Occoquan Basin Watershed to R-C (Rural-Conservation) Zoning District (Rezoning Application RZ 82-W-054 July 26, 1982); Fairfax County, Va., Proposed Zoning Ordinance Amendment to Require Fifteen Percent of All Units Constructed in Residential Projects Containing Fifty or More Units to be Dedicated for Low and Moderate Income Families (Zoning Ordinance Amendment 156, Sept. 1, 1971), *declared unconstitutional*, Board of Supervisors v. DeGroff Enters. Inc., 214 Va. 235, 238, 198 S.E.2d 600, 602 (1973).

ments are sympathetic to the claims raised by the affected landowners or concerned about potential litigation regarding the legality of the new legislation in question, the governments may choose to "grandfather" certain land uses by providing specific exemptions from the new legislation.¹⁴ While grandfathered rights may allow affected landowners the same exempted land uses as would true vested rights, grandfathered rights are simply the result of legislative grace and do not possess the constitutional underpinnings of vested rights.¹⁵

The success that these affected landowners will encounter in court should they choose to press forward on vested rights claims hinges on a multitude of distinct but interrelated factors. Some of these factors are within the control of the affected landowners, but others are not. The most important factor is the nature of the controlling statutory and case law in the jurisdiction in which the land subject to the new legislation is located. This factor, which is beyond the landowners' control in most circumstances, determines the point at which zoning estoppel attaches or vested rights accrue. Additionally, the nature of controlling statutory and case law determines the legal adequacy of the landowners' development actions prior to the new legislation, which may give rise to zoning estoppel or vested rights claims. Regrettably, this factor varies in extreme degrees from jurisdiction to jurisdiction.¹⁶ As one writer correctly noted, there exists within American states and territories "an amorphous body of vested rights and estoppel law that determines when developers are protected from land use regulations."¹⁷

Vested rights and estoppel law are so amorphous that attempts to delineate majority and minority rules are practically useless.¹⁸ Writers who have at-

14. *E.g.*, FAIRFAX COUNTY, VA. ZONING ORDINANCE § 2-103 (1978) *deleted* Dec. 29, 1986. Prior to a December 29, 1986 action by the Fairfax County Board of Supervisors, the Fairfax County Zoning Ordinance possessed the following "grandfather" provision:

2-103 Plans, Buildings Previously Approved. Nothing in this Ordinance shall be deemed to require any change to the plans or buildings approved prior to the effective date of this Ordinance as set forth in the Fairfax County Public Facilities Manual.

Id. The term "grandfather clause" originated from the constitutions of several southern states that exempted lineal descendants of those registered to vote before 1867 from poll taxes and literacy and property requirements. *See* SIEMON, *supra* note 6, at 73 n.4.

15. *See* SIEMON, *supra* note 6, at 73-77. In some jurisdictions, a landowner possessing grandfathered development rights must diligently pursue development in accordance with these rights or face the possibility of losing these rights. *See, e.g.*, Fairfax County Public Facilities Manual § 1-0500 *et seq.* (as amended 1985) (due diligence standards), *deleted* Dec. 29, 1986.

16. *See infra* notes 31-56 and accompanying text (discussing state vested rights and zoning estoppel standards).

17. MANDELKER, *supra* note 3, at § 6.11.

18. *See* SIEMON, *supra* note 6, at 12-13; Cunningham & Kremer, *supra* note 9, at 626-28; Hagman, *The Vesting Issue: The Rights of Fetal Development Vis a Vis the Abortions of Public Whimsy*, 7 ENVTL. L. 519 (1977). The courts themselves have contributed to this degree of amorphousness by handing down opinions that conflict with previously rendered opinions. *See* SIEMON, *supra* note 6, at 50-52 (describing two Florida District Court of Appeals decisions handed down by same trial judge, involving same contested land use regulation, in which one Sanibel Island developer was found to possess vested rights and another Sanibel Island developer was found not to possess vested rights).

tempted to craft such a delineation have discussed the distinction between "building permit required" and "building permit not required" jurisdictions and between "early vesting" and "late vesting" jurisdictions.¹⁹ Although these attempts are helpful to the practitioner in providing a general overview of the law in this area, they fail in providing exact categorization.

While affected landowners cannot control the nature of the controlling organic law in their respective jurisdictions, they can control other factors that assist in determining whether a zoning estoppel or vested rights claim may succeed. For example, a landowner may control the nature and extent of prelegislation development planning and execution, the amount of expenditures dedicated toward ultimate development, and his or her own indicia of good faith reliance upon existing local law prior to the new legislation. The modern "critical path"²⁰ landowners must follow to build on their land involves a formidable array of legislative and administrative approvals that can involve years of effort prior to issuance of a building permit. A basic appreciation of this critical path is fundamental to understanding the concepts of zoning estoppel and vested rights.

The critical path is well demonstrated in Fairfax County, Virginia. The land development processes in Fairfax County undoubtedly reflect the processes adopted in other jurisdictions bordering major urban centers that have undergone tremendous growth in the post-World War II era.²¹ Moreover, Fairfax County is representative of other "urban fringe" jurisdictions that have utilized both legal and illegal land development ordinances and procedures in attempts to control growth.²² These jurisdictions have proved to be fertile breeding grounds for much of the modern case law involving vested rights. In fact, the two major vested rights decisions handed down by the Supreme Court of Virginia have both originated in Fairfax County.²³

19. See MANDELKER, *supra* note 3, at §§ 6.14, 6.15 (describing "building permit required" and "building permit not required" jurisdictions); Campanella, *supra* note 11, at 85-86 (distinguishing majority and minority rules); Curtin & Zischke, *Development Agreements: Securing Vested Rights and Project Completion Benefits*, 11 ZONING & PLAN. L. REP. 25, 26-27 (1988) [hereinafter Curtin & Zischke] (distinguishing majority and minority rules); Note, *Developers' Vested Rights*, 23 URB. L. ANN. 489 (1982) [hereinafter *Developers' Rights*] (describing "late vesting" and "early vesting" rules).

20. See generally DEPARTMENT OF ENVTL. MANAGEMENT, COUNTY OF FAIRFAX, VIRGINIA, A GUIDE TO THE DEVELOPMENT PROCESS IN FAIRFAX COUNTY (1983) [hereinafter FAIRFAX DEVELOPMENT PROCESS] (describing "critical path" in Fairfax County land development process). The "critical path" is basically the sequence of approvals a landowner must obtain to commence construction of a proposed development project.

21. See generally FAIRFAX COUNTY ECONOMIC DEVELOPMENT ADMINISTRATION, FAIRFAX COUNTY—DEMOGRAPHIC TRENDS (1986). In 1940, the Fairfax County population was 40,929. Between 1940 and 1950, the population more than doubled to 98,929. Between 1950 and 1957, the population again doubled to 207,004. *Id.*

22. See *supra* note 12 (listing Virginia Supreme Court decisions involving Board of Supervisors of Fairfax County); Hazel, *supra* note 12.

23. See Board of Supervisors v. Medical Structures, Inc., 213 Va. 355, 355, 192 S.E.2d 799, 800 (1972); Board of Supervisors v. Cities Serv. Oil Co., 213 Va. 359, 359, 193 S.E.2d 1, 2 (1972).

In Fairfax County, as in other jurisdictions, the first step along this critical path involves the acquisition of legislative approval for the specific land use desired. If the land sought to be developed already possesses a zoning designation that allows the specific land use desired as a matter of right, *i.e.*, as a "permitted" use, then the landowner does not require any further legislative approvals. The landowner seeking to establish this "by-right" use needs only to obtain certain ministerial approvals which, unlike legislative approvals, do not involve discretionary governmental review. Alternatively, if the land use sought to be established is not allowed by-right, the landowner must obtain a rezoning of the land to a zoning district which allows the sought use either as a permitted use or as a "permissible" use that may be established only upon acquisition of a conditional or special use permit. If a permissible use is desired, the landowner must obtain the necessary special use permit approval. With all needed legislative approvals in hand, the landowner has the right to believe that he has cleared the major hurdles along the critical path to developing his property. He feels confident that his development plans are now removed from the legislative arena and that the only remaining approvals needed for ground-breaking are the nondiscretionary ministerial approvals.²⁴ The landowner at this juncture normally begins the financing of his project and develops investment-backed expectations for profit and the ultimate success of his development.²⁵

After obtaining all needed legislative approvals, the landowner moves forward on his development by obtaining ministerial approvals as needed. These ministerial approvals include subdivision plan approval, site plan approval, and finally, building permit issuance.²⁶ To obtain these ministerial approvals, the landowner must conform his proposed development to certain specific and published ordinances and regulations. Although compliance with these ordinances and regulations is often expensive and time consuming, the landowner knows that compliance will ensure the issuance of needed ministerial approvals. He also knows that mandamus will lie to compel issuance, if necessary, and that negative public and political opinions, which may have adversely affected the proposed development in the legislative arena, are now legally irrelevant.²⁷

24. See 2 FAIRFAX DEVELOPMENT PROCESS, *supra* note 20, at 1-109. Depending upon the type of development proposed, these nondiscretionary ministerial approvals could involve subdivision plan approval, site plan approval, rough grading plan approval, public improvements plan approval, landscaping plan approval, building permit issuance, residential/non-residential use permit issuance, and certificate of completion issuance. *Id.*

25. See Board of Supervisors v. Fralin & Waldron, Inc., 222 Va. 218, 222-23, 278 S.E.2d 859, 861 (1981) (landowner's development of investment-backed expectations after acquisition of all zoning approvals); Board of Supervisors v. Snell Const. Corp., 214 Va. 655, 658, 202 S.E.2d 889, 893 (1974) (development of investment-backed expectations).

26. See *supra* note 24.

27. See Board of Supervisors v. Hylton Enters., Inc., 216 Va. 582, 585, 221 S.E.2d 534, 537 (1976) (holding that subdivision plan approval is ministerial action and mandamus will lie to compel approval); Board of Supervisors v. Horne, 216 Va. 113, 119, 215 S.E.2d 453, 457 (1975) (holding that approval of site plan and issuance of building permit are ministerial rather

The issuance of a building permit is normally the final government approval required prior to the start of construction.²⁸ Armed with a building permit, the landowner grades the terrain on his property, constructs needed infrastructures, such as sanitary sewer lines, public water facilities, and on-site roads, lays footings and foundations, and finally constructs a building. In some instances, this preconstruction work is allowed to take place prior to final issuance of a building permit under a preliminary grading or excavation permit. Following completion of the building and passing of all required inspections, the landowner obtains a final ministerial approval, namely issuance of a Certificate of Occupancy or other document that legally allows the sought land use to commence on his land.²⁹ The proposed land use acquires increased certainty as the landowner moves through the legislative approval—ministerial approval—final completion process. At some point in this process, the landowner obtains a right to complete his project and commence the specific land use sought regardless of contravening legislative action. In other words, he acquires a “vested” right. Once a landowner’s land development rights have vested, a legislative attempt to reduce or eliminate these rights will fail or will require payment of just compensation.³⁰ The following sections will attempt to identify this point of vesting under the zoning estoppel and pure vested rights doctrines.

III. THE DOCTRINES OF ZONING ESTOPPEL AND PURE VESTED RIGHTS

Many writers have decided that attempts to distinguish the doctrine of zoning estoppel from the doctrine of pure vested rights are predestined for failure or, at best, are purely academic exercises because of the lack of practical distinctions between the two doctrines.³¹ These writers make a good

than discretionary acts); *Planning Comm’n v. Berman*, 211 Va. 774, 776-77, 180 S.E.2d 670, 672 (1971) (holding that site plan approval is ministerial action and mandamus will lie to compel approval); VA. CODE ANN. § 8.01-184 (1984) (granting circuit courts authority to issue declaratory judgments interpreting municipal ordinances); VA. CODE ANN. § 15.1-475 (1989) (providing that landowner who wishes to subdivide property may petition circuit court for review of plat of proposed subdivision and site plans). *But see Developer’s Rights*, *supra* note 19, at 490 (assertion, not true in Virginia, that “[d]iscretionary review underlies the subdivision review process”).

28. *See* 3 FAIRFAX DEVELOPMENT PROCESS, *supra* note 20, at 7-17; SIEMON, *supra* note 6, at 26-27; *see also* Fairfax County Zoning Ordinance §§ 18-600 *et seq.* (1978) (building permit regulations).

29. *See* FAIRFAX COUNTY ZONING ORDINANCE § 18-700, 18-800 (1978) (providing for Residential and Non-residential Use Permits and Certificates of Completion respectively); 3 FAIRFAX DEVELOPMENT PROCESS, *supra* note 20, at 111-121 (final ministerial approvals requiring prior to occupancy).

30. *See supra* notes 2-4 and accompanying text (infringement upon vested rights requires just compensation).

31. *See* MANDELKER, *supra* note 3, at § 6.12; SIEMON, *supra* note 6, at 9; Witt, *supra* note 11, at 320. Other writers suggest that while the doctrine of pure vested rights and the doctrine of zoning estoppel are distinguishable on theoretical grounds, courts have chosen to merge the two doctrines for ease in application. *See* Rhodes, Hauser & DeMeo, *Vested Rights: Establishing Predictability in a Changing Regulatory System*, 13 STETSON L. REV. 1, 2 (1983) [hereinafter

point in suggesting that whatever distinction that may have existed is now hopelessly muddled by imprecise judicial application. Nonetheless, we believe that the underlying theoretical differences between the two doctrines make for worthy examination in helping the student or practitioner understand the bifurcated nature of vested rights.³² The doctrine of zoning estoppel protects property rights by restricting certain exercises of governmental power. The doctrine of pure vested rights protects property rights by providing the means by which inchoate land development rights become true constitutional proprietary rights protected by the United States Constitution and certain state constitutions.³³

Through judicial application, both doctrines have developed sets of elements that a landowner-plaintiff must show to establish a prima facie case for maintenance of a vested rights claim. Many courts, however, have blurred the distinction between these two doctrines, often to the point where one is unable to tell from written opinions which doctrine the court has chosen to apply.³⁴ Therefore, one should not be surprised to find a strong degree of similarity between the elements necessary to establish a zoning estoppel claim and the elements necessary to establish a pure vested rights claim.

Zoning estoppel, like other forms of estoppel, arises out of equity and is derived from fundamental concepts of justice and fairness.³⁵ The Florida

Rhodes] (Florida courts have merged the two doctrines); Note, *When Real Property Rights Vest in California: What Happens When a Plaintiff Has Not Secured Required Government Approvals?*, 28 SANTA CLARA L. REV. 417, 425 (1988) [hereinafter *California Vested Rights*] (California courts have merged the two doctrines).

32. See *infra* 33-51 and accompanying text (exploring underlying theoretical differences between the two vested rights doctrines); see also *Reichenback v. Windward at Southampton*, 80 Misc. 2d 1031, 1038-41, 364 N.Y.S.2d 283, 291-94 (N.Y. Sup. Ct.), *aff'd*, 48 A.D.2d 909, 372 N.Y.S.2d 985 (N.Y. App. Div. 1975) (two vested rights doctrines stand upon distinct and separate legal foundations).

33. See *infra* notes 35-51 and accompanying text; see also MANDELKER, *supra* note 3, § 6.12; SIMON, *supra* note 6, at 12-13; Heeter, *supra* note 6, at 65; Rhodes, *supra* note 31, at 2-3; Witt, *supra* note 11, at 319-21; *California Vested Rights*, *supra* note 31, at 424-25.

34. See, e.g., *District of Columbia v. Cahill*, 54 F.2d 453, 454 (D.C. Cir. 1931) (city "estopped" because landowner had acquired vested rights); *Raley v. California Tahoe Regional Planning Agency*, 68 Cal. App. 3d 965, 977, 137 Cal. Rptr. 699, 707 (1977) ("vested rights rule" is simply special expression of general estoppel doctrine"); *Marziani v. Lake County Zoning Board of Appeals*, 87 Ill. App. 3d 425, 429, 409 N.E.2d 118, 122 (1980) (estoppel relief granted in jurisdiction that did not recognize doctrine of equitable estoppel against government). See generally, SIMON *supra* note 6, at 9, 40; *Cunningham & Kremer*, *supra* note 9, at 626; Heeter, *supra* note 6, at 66 n.5.

35. See P. BUCK, *MODERN CONTROL OF LAND DEVELOPMENT* 261 (1980) [hereinafter BUCK]; *Cunningham & Kremer*, *supra* note 9, at 648-49; Heeter, *supra* note 6 at 64-66; Annotation, *Retroactive Effect of Zoning Regulations, In Absence of Savings Clause, on Validly Issued Building Permit*, 49 A.L.R.3d 13, 26-39 (1973 & Supp. 1988); see also *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 488-89; 91 Cal. Rptr. 23, 42, 467 P.2d 423, 422 (1970); 3 J. POMEROY, *A TREATISE ON EQUITY JURISPRUDENCE* §§ 802, 804, 805 (5th ed. 1941). Professor Pomeroy identified six distinct elements of equitable estoppel. See *id.* § 804, at 1644-45.

One writer has noted that, although the use of estoppel theories against the government violates a historical rule that a government cannot be estopped when acting in its governmental capacity, this rule is a "prerogative fallacy" because it has been riddled with many exceptions. See *Berger, Estoppel Against the Government*, 21 U. CHI. L. REV. 680, 683 (1954).

District Court of Appeal has provided a useful description of this doctrine with a helpful illustration by stating that "the theory of [zoning] estoppel amounts to nothing more than an application of the rules of fair play" and that "[o]ne party will not be permitted to invite another onto a welcome mat and then be permitted to snatch the mat away to the detriment of the party induced or permitted to stand thereon."³⁶ While most attempts to provide definitive restatements of equitable principles have been unsuccessful, Professor David G. Heeter, in an often-cited 1971 article,³⁷ provides a concise definition of the doctrine of zoning estoppel. He writes:

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 substantive change in position or incurred such extensive obligations and expenses that it would be inequitable and unjust to destroy the rights which he ostensibly had acquired.³⁸

Noticeably missing from Professor Heeter's definition is a reference to the concept of balancing that underlies all equitable standards. Professor Heeter correctly deleted the concept of balancing from his restatement of the law because, quite simply, many courts have refrained from such balancing in considering zoning estoppel cases.³⁹ Balancing, by its very nature, requires some judicial intrusion into the legislative process and a weighing of government and public prerogatives against private landowning interests.⁴⁰ Although courts have no reluctance in making an intrusion into the legislative process on constitutional grounds, they understandably are wary of intruding solely on equitable grounds.⁴¹ In fact, some courts have found the very idea of

36. *Town of Largo v. Imperial Homes Corp.*, 309 So. 2d 571, 573 (Fla. Dist. Ct. App. 1975). See generally Comment, *Never Trust a Bureaucrat: Estoppel Against the Government*, 42 So. CAL. L. REV. 391 (1969).

37. Heeter, *supra* note 6, at 63.

38. Heeter, *supra* note 6, at 66.

39. See SIMON, *supra* note 6, at 9; Kudo, *Nuckolii: Private Development Rights and the Public Interest*, 16 URB. LAW. 279, 284 (1984); see, e.g., *Grayson v. City of Birmingham*, 277 Ala. 522, 173 So. 2d 67 (1963); *Clairmont Dev. Co. v. Morgan*, 222 Ga. 255, 149 S.E.2d 489 (1966), *overruled by Keenan v. Acher*, 226 Ga. 896, 178 S.E.2d 196 (1970); *Town of Hillsborough v. Smith*, 276 N.C. 48, 170 S.E.2d 904 (1969); *Pure Oil Division v. City of Columbia*, 254 S.C. 28, 173 S.E.2d 140 (1970). But see *Nott v. Wolff*, 18 Ill. 2d 362, 367, 163 N.E.2d 809, 812 (1960) (balancing used in Illinois); *Tremarco Corp. v. Garzco*, 32 N.J. 448, 457, 161 A.2d 241, 245 (1960) (balancing used in New Jersey); *Western Land Equities, Inc. v. City of Logan*, 617 P.2d 388, 396 (Utah 1980) (balancing used in Utah).

40. See SIMON, *supra* note 6, at 38-40; *Developers' Rights*, *supra* note 19, at 498-501.

41. See, e.g., *Town of Largo v. Imperial Homes Corp.*, 300 So. 2d 311, 312 (Fla. Dist. Ct. App. 1974) (no balancing of public interests with private interests); *Town of Hillsborough v. Smith*, 276 N.C. 48, 170 S.E.2d 904 (1969) (applying zoning estoppel without balancing); *Parkridge v. City of Seattle*, 89 Wash. 2d 454; 573 P.2d 359 (1978) (balancing of public interest is avoided); see also SIMON, *supra* note 6, at 13 (balancing often is avoided in adjudication of vested rights cases).

using equitable estoppel against the government unappealing or, at best, a harbinger of reversible error.⁴² This reluctance may explain the muddling of zoning estoppel with the doctrine of pure vested rights and also may explain why many courts prefer to use the constitutionally based doctrine of pure vested rights rather than the equity-based doctrine of zoning estoppel.

The doctrine of pure vested rights stems directly from property protections contained in the Fifth and Fourteenth Amendments to the United States Constitution and from similar provisions found in most state constitutions.⁴³ These protections provide that property shall not be taken for public purposes without just compensation.⁴⁴ Some states, such as the Commonwealth of Virginia, include in their respective state constitutions the provision that private property shall not be taken *or damaged* without payment of just compensation.⁴⁵ The fundamental word in these constitutional passages is "property". Certain privileges, claims, interests, powers, choses-in-action, or inchoate rights that do not rise to "property" status are not protected and may be taken by government action.⁴⁶ Development rights must become vested

42. See, e.g., *Harrell v. City of Lewiston*, 95 Idaho 243, 247-51, 506 P.2d 470, 474-78 (1973) (estoppel against government is disfavored); *Lewis Cox & Son, Inc. v. High Plains Underground Water Conservation Dist. No. 1*, 538 S.W.2d 659, 663 (Tex. Ct. App. 1976) (estoppel against government is unconstitutional); *Metro. Park Dist. v. State Dept. of Natural Resources*, 85 Wash. 2d 821, 827, 539 P.2d 854, 858 (1975) (estoppel against government is disfavored). See generally Annotation, *Applicability of Doctrine of Estoppel Against Government And Its Governmental Agencies*, 1 A.L.R.2d 338 (1948) (Supp. 1988).

43. See U.S. CONST., amends. V, XIV, § 2; VA. CONST. art. 11, § 1; see also MANDELKER, *supra* note 3, § 6.12; SIEMON, *supra* note 6, at 58-61; Heeter, *supra* note 6, at 64-65; see, e.g., *Billings v. California Coastal Comm'n*, 103 Cal. App. 3d 729, 163 Cal. Rptr. 288 (1980); *Department of Transp. v. P.S.C. Resources, Inc.*, 175 N.J. Super. 447; 419 A.2d 1151 (1980). Professor Gray provides the following description of the constitutional base underlying the doctrine of pure vested rights:

[the term] "vested" has passed from the domain of politics to the 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, *supra* note 5, at 98 n.1.

44. See U.S. CONST., amends. V, XIV § 2. The "takings" clause of the Fifth Amendment was determined to be applicable to the states through the "due process" clause of the Fourteenth Amendment in the very early part of the twentieth century. See *Chicago, Burlington & Quincy Ry. v. Illinois ex rel. Drainage Comm'rs*, 200 U.S. 561, 593 (1906). But see N.C. CONST. art. I, § 17. The North Carolina Constitution is the only state constitution that does not have a "takings" clause. See *id.*; Stoebuck, *supra* note 2, at 1058, n.8.

45. See VA. CONST. art. 1, § 11; see also A.E. HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 218-225 (1974).

46. See SIEMON, *supra* note 6, at 48-53, 56-61; Cunningham & Kremer, *supra* note 9, at 629, 638-41; Delaney & Kominers, *supra* note 11, at 219-21; see, e.g., *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (reduction in value of property is not taking of "property"); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978) (taking of air rights is not taking of "property"); *In re Marriage of Bouquet*, 16 Cal. 3d 583, 592, 546 P.2d 1371, 1376, 128 Cal. Rptr. 427, 432 (1976) (revocation of license is not taking of "property"); *Alcoholic Resocialization Conditioning Help, Inc. v. State*, 206 Neb. 788, 791-92, 295 N.W.2d 281, 284 (1980) (revocation of statutory licenses, permits, or privileges is not taking of "property");

rights to warrant "property" status.⁴⁷ Once this process occurs, vested development rights are immune from exercises of governmental police power. These rights still are subject to taking by eminent domain action that must entail the payment of just compensation by the government to the landowner.⁴⁸

The process by which inchoate development rights become vested and acquire the status of protected property rights is subject to a variety of judicial definitions and theoretical descriptions. In actual application, however, the elements involved in this process are almost identical to the elements of zoning estoppel.⁴⁹ We believe that the doctrine of pure vested rights could be summarized as follows:

A landowner obtains a vested right to complete construction on a specific development project when the landowner

- (1) obtains or is the beneficiary of an affirmative governmental act allowing development of a specific project, and,
- (2) relying in good faith upon the affirmative governmental act,
- (3) makes a substantial change in position or incurs extensive obligations or expenses in the furtherance of the specific project in accordance with the affirmative governmental act.⁵⁰

The doctrine of pure vested rights differs on theoretical grounds from the doctrine of zoning estoppel. But, as a comparison of Professor Heeter's definition of zoning estoppel with our definition of pure vested rights demonstrates, the prima facie case elements of both doctrines are almost identical.⁵¹ Before we discuss these elements in greater detail, however, we would like to make two remarks about the proprietary nature of pure vested rights.

First, the doctrine of pure vested rights seemingly implies something that we believe to be incorrect. The notion of development rights vesting and becoming property implies that landowners have no basic fundamental rights

Golden Gate Corp. v. Town of Narragansett, 116 R.I. 552, 565-66, 359 A.2d 321, 328 (1976) (revocation of zoning rights is not taking of "property"). One scholar has noted that the U.S. Supreme Court's academic movement away from notions of substantive due process that were prevalent in the early twentieth century has led to a "demise" in the protection of property "rights" as constitutionally protected interests. See Van Alstyne, *The Demise of the Right—Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

47. See *Brougher v. Board of Pub. Works*, 205 Cal. 426, 434, 271 P. 487, 490-91 (1928); *Southern Leasing Co. v. Ludwig*, 168 A.D. 233, 235, 153 N.Y.S. 545, 547 (1915).

48. See SIEMON, *supra* note 6, at 53-61; see also ANDERSON, *supra* note 3, § 30.17; RATHKOPF, *supra* note 3, §§ 6.01-6.60; ROHAN, *supra* note 3, §§ 52A.01, 52A.02, 52A.03.

49. See MANDELKER, *supra* note 3, § 6.12; SIEMON, *supra* note 6, at 12-13; see, e.g., *District of Columbia v. Cahill*, 54 F.2d 453, 454 (D.C. Cir. 1931) (city "estopped" because landowner had acquired "vested rights"); *Allen v. City & County of Honolulu*, 58 Haw. 432, 571 P.2d 328, 329 (1977) (elements of both vested rights doctrines are identical).

50. See *Billings v. California Coastal Comm'n*, 103 Cal. App. 3d 729, 735; 163 Cal. Rptr. 288, 291 (1980); *Sgro v. Howarth*, 54 Ill. App. 2d 1, 9, 203 N.E.2d 173, 177 (1964); SIEMON, *supra* note 6, at 13; *Delaney & Kominers*, *supra* note 11, at 222, Witt, *supra* note 11, at 320.

51. Compare text accompanying *supra* note 38 with text accompanying *supra* note 49. The common elements in both vested rights doctrines are: (1) governmental act (or omission), (2) good faith, and (3) substantial change in position. See text accompanying *supra* notes 31-50.

to develop their properties, *i.e.*, that fee simple ownership of land does not necessarily include the right to develop land. The doctrine of pure vested rights suggests that catalysts in the form of the three elements identified above need to be added to inchoate development rights to give these development rights constitutionally protected "property" status. The doctrine also suggests that, prior to the introduction of these catalysts, a landowners' right to develop property is an evanescent, inchoate right that may be nullified without the payment of just compensation by governmental use of police power. We believe that fee simple ownership of property by its very nature includes some kind of development right that does not need introduction of the vesting catalysts to become legally protected property.⁵² Invoking an illustration known to all first year law students, the proprietary "bundle of sticks" that a grantee receives with the conveyance of a fee simple interest in real property contains a true development right "stick." We leave the definition and identification of this inherent primordial development right for other scholars.⁵³

Second, a vested development right cannot exist when the exercise of the development right qualifies as a nuisance under prevailing law.⁵⁴ The government possesses a strong police power to remove or destroy a privately-held

52. See R. POWELL, *THE LAW OF REAL PROPERTY*, 91-135 (1977); W. REILLY, *THE USE OF LAND 140* (1970) [hereinafter REILLY]; TASK FORCE ON LAND USE AND URBAN GROWTH, *THE USE OF LAND 140* (1973); McClaughry, *Farmers, Freedom, and Feudalism: How to Avoid the Coming Serfdom*, 21 S.D.L. REV. 486 (1976) [hereinafter McClaughry]. Perhaps the best judicial proponent of our belief is former Chief Justice Bell of the Pennsylvania Supreme Court. In many of his well-reasoned opinions, Chief Justice Bell noted the existence of a common law right to develop and use land unimpeded by government so long as these activities did not amount to a public nuisance. See, e.g., *Kitmar Builders, Inc. v. Zoning Bd. of Adjustment*, 439 Pa. 466, 478-81, 268 A.2d 765, 771 (1970) (concurring opinion of Bell, C.J.); *Exton Quarries, Inc. v. Zoning Bd. of Adjustment*, 425 Pa. 43, 67, 228 A.2d 169, 182 (1967). Other writers have criticized the belief that we share with Chief Justice Bell as "the fee simple fable that land can be used in any way one pleases." See F. BOSSELMAN, D. CALLIES, & J. BANTA, *THE TAKING ISSUE 318-19* (1973).

In its recent opinion in the case of *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141 (1987), the United States Supreme Court recognized the existence of a true land development right as an incident of fee simple land ownership. The *Nollan* opinion hopefully puts an end to arguments given by some local governments that the right to develop land is a "privilege" and not a true legal or proprietary right. See Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 Urb. Law. 735, 746-748 (1988) [hereinafter Berger].

53. See generally REILLY, *supra* note 52, at 140-55; Babcock & Feurer, *Land as a Commodity "Affected with A Public Interest,"* 52 WASH. L. REV. 289, 291-99 (1977); Berger, *To Regulate or Not to Regulate—Is That the Question?*, 8 Loy. L.A. L. REV. 253, 292-93 (1975); McClaughry, *supra* note 52, at 486-96.

54. See *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 593-94 (1962); *Clarke v. Haberle Brewing Co.*, 280 U.S. 384, 386 (1930); *Miller v. Schoene*, 276 U.S. 272, 279-86 (1928); *Hadachek v. Sebastian*, 239 U.S. 394, 419 (1915); *Mugler v. Kansas*, 123 U.S. 623, 66-70 (1887); *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 108 Ariz. 178, 183-84, 494 P.2d 700, 705-06 (1972); *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 222, 309 N.Y.S.2d 312, 315, 257 N.E.2d 870, 872 (1920); *Miller v. State Entomologist*, 146 Va. 175, 194, 135 S.E. 813, 818-19 (1926), *aff'd*, 276 U.S. 272 (1928).

possession without invoking liability for the payment of just compensation when that possession poses a direct threat to public health, safety, or welfare.⁵⁵ In other words, a possession that is a nuisance cannot be "property" under the Fifth and Fourteenth Amendments. When placed in context with our earlier discussion, these recitations of black letter law pose an interesting question: Can existing vested property rights lose their vested status by becoming nuisances? A few courts have answered this question in the affirmative by invoking a "new peril" exception to the doctrine of pure vested rights.⁵⁶

IV. THE ELEMENTS OF ZONING ESTOPPEL AND PURE VESTED RIGHTS

A. Governmental Act or Omission

The first and most important element of both vested rights doctrines is the existence of a governmental act or omission (doctrine of zoning estoppel) or affirmative governmental act (doctrine of pure vested rights) that allows a landowner to develop his property.⁵⁷ Prior to the advent of sophisticated, multi-staged land use regulations, a landowner wishing to develop or erect structures on his land in conformance with applicable zoning regulations only needed to obtain one governmental approval in the form of a building permit to commence construction.⁵⁸ Therefore, courts adjudicating vested rights claims in those early days looked only toward the issuance or nonissuance of a building permit in determining whether or not the government act element

55. See, e.g., *Goldblatt, Town of Hempstead*, 369 U.S. 590, 594 (1962) (allowing closure of quarry declared nuisance without compensation); *Clark v. Haberle Brewing Co.*, 280 U.S. 384, 384 (1930) (allowing destruction of private apple farm infected with Cedar Rust Disease without compensation); *Mugler v. Kansas*, 123 U.S. 623, 668 (1887) (allowing closure of brewery deemed "public evil" without compensation); *Spur Indus. Inc. v. Del E. Webb Dev. Co.*, 108 Ariz. 178, 183-84, 494 P.2d 700, 705-06 (1972) (allowing closure of cattle feedlot deemed nuisance without compensation); see also *Berger*, *supra* note 52 at 771-72; *Stoebuck*, *supra* note 2, at 1059-62.

56. See, e.g., *Dade County v. Rosell Construction*, 297 So. 2d 46, 48 (Fla. Dist. Ct. App. 1974) (applying "new peril" exception to doctrine of zoning estoppel); *Belle Harbor Realty Corp. v. Kerr*, 35 N.Y.2d 507, 512, 232 N.E.2d 679, 699, 364 N.Y.S.2d 160, 163 (1974) (revocation of building permits to prevent condition dangerous to public welfare); *Ford v. Bellingham-Whatcom County Dist. Bd. of Health*, 16 Wash. App. 709, 711-12, 558 P.2d 821, 824-25 (1977) (questioning whether vested right can be maintained to imperil health and safety of community); see also *Rhodes*, *supra* note 31 at 17-20 (discussing "new peril" rule); *Stoebuck*, *supra* note 2, at 1066-67 (discussing "emergency doctrine").

57. See *MANDELKER*, *supra* note 3, §§ 6.13, 6.15; *SIEMON* *supra* note 6, at 13-29; *Delaney & Kominers*; *supra* note 11, at 226-4; *Heeter*, *supra* note 6, at 82-84; *Rhodes*, *supra* note 31, at 7-11; *Developers' Rights*, *supra* note 19, at 488-94.

58. See *SIEMON*, *supra* note 6, at 13, 26; see, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Dainese v. Cooke*, 91 U.S. 580 (1975); *City of Buffalo v. Chadeayne*, 134 N.Y. 163, 31 N.E. 443 (1892); *Wood v. City of Richmond*, 148 Va. 400, 138 S.E. 560 (1927). Prior to the United States Supreme Court's 1927 decision in *Village of Euclid*, very few jurisdictions possessed comprehensive zoning ordinances. *But see* *Wood v. City of Richmond*, 148 Va. 400, 138 S.E. 560 (1927) (City of Richmond Zoning Ordinance adopted prior to *Euclid* decision).

was satisfied.⁵⁹ In other words, the existence of a validly issued building permit was the principal benchmark of a vested rights claim.

Following World War II, land development became an intensely regulated process requiring compliance with a host of complex land use regulations and the issuance of multiple governmental approvals prior to ground-breaking.⁶⁰ In the wake of these changes, courts adjudicating vested rights claims began to develop divergent opinions regarding the nature of the regulatory approval required to satisfy the governmental act element.⁶¹ The development of this multiple approval process forced landowners to expend substantial resources and crystallized their development expectations far in advance of the issuance of a building permit.⁶² Thus, the courts determined that fundamental fairness

59. See, e.g., *Dainese v. Cooke*, 91 U.S. 580 (1875); *Tucson v. Arizona Mortuary*, 34 Ariz. 495, 272 P. 923 (1928); *Brougher v. Board of Public Works*, 205 Cal. 426, 271 P. 487 (1928); *Brett v. Building Comm'r*, 250 Mass. 73, 145 N.E. 269 (1924); *Ostronsky v. Newark*, 139 A. 911 (N.J. Ch. 1928); *City of Dallas V. Meserole*, 155 S.W.2d 1019 (Tex. Civ. App.) 1941). See also *Cunningham & Kramer*, *supra* note 9, at 677-84 (discussing early vested rights cases); *California Vested Rights*, *supra* note 31, at 420-24 (discussing early vested rights rules).

60. See *SIEMON*, *supra* note 6, at 13; *Cunningham & Kramer*, *supra* note 9, at 696-710; *Hazel*, *supra* note 12; see also Brief for Appellee at 11-14, *Board of Supervisors v. Medical Structures, Inc.*, 213 Va. 355, 192 S.E.2d 799 (1972) (No. 7954). A good illustration of the explosion in regulatory control beyond the building permit may be found in the comparison of two California vested rights cases. Compare *Avco Community Dev. Inc. v. South Coast Regional Comm'n*, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), *cert. denied*, 429 U.S. 1083 (1977) with *Brougher v. Board of Public Works*, 205 Cal. 426, 271 P. 487 (1928). In 1928 a developer desiring to construct a multi-story building in the City of San Francisco only needed to obtain building permit approval to commence construction. See *Brougher*, 205 Cal. at 432, 271 P. at 491. In 1976, a developer desiring to construct a residential community in Orange County needed to obtain (1) a planned unit development (PUD) rezoning approval, (2) preliminary subdivision approval, (3) final subdivision approval, (4) rough grading plan approval, (5) public infrastructure and street improvement plan approval, (6) coastal zone development permit approval, and (7) building permit approval. See *Avco*, 17 Cal. 3d at 789-91, 553 P.2d at 549, 132 Cal. Rptr. at 389. Interestingly enough, the developer in *Avco*, after obtaining approvals (1) through (5) and expending almost three million dollars in obtaining these approvals and performing on-site work thereunder, was denied a vested right to complete the project simply because a building permit had not been issued. See *Avco*, 17 Cal. 3d at 793, 553 P.2d at 551, 132 Cal. Rptr. at 391.

In light of the *Avco* decision, one understands why two noted practitioners of land use law stated, "California has always been notorious for being the first jurisdiction to sustain extreme municipal regulations. Practitioners in other states have joked that a developer should not sue a California community when it would cost less and save much time if he simply slit his throat." R. BABCOCK & C. SIEMON, *THE ZONING GAME REVISITED* 257, 293 (1985).

61. See, e.g., *Board of County Comm'n v. Lutz*, 314 So. 2d 815, 816 (Fla. Dist. Ct. App. 1980) (vested rights found in large-scale PUD Rezoning Approval); *Lampton v. Pinaire*, 610 S.W.2d 915, 921 (Ky. 1980) (vested rights found in final subdivision plan approval); *Board of Supervisors v. Medical Structures, Inc.*, 213 Va. 355, 358, 192 S.E.2d 799, 801 (1972) (vested rights found in site plan approval); *Juanita Bay Valley Community Ass'n v. City of Kirkland*, 9 Wash. App. 59, 85, 510 P.2d 1140, 1155 (1973) (vested rights found in grading permit approval); see also *supra* notes 57-60, *infra* notes 62-105 and accompany text (discussing governmental acts sufficient for vesting purposes).

62. See, e.g., *Avco*, 17 Cal. 3d at 789-91, 553 P.2d at 549, 132 Cal. Rptr. at 389 (reporting that developer expended almost three million dollars in good faith prior to building permit issuance); *City of North Miami v. Margulies*, 289 So. 2d 424, 425 (Fla. Dist. Ct. App. 1974)

dictates that the determinant governmental approval must be some act performed prior to the issuance of a building permit.⁶³

In spite of the development of this multiple approval process, many courts have continued to hold that the validly issued building permit remains as the principal benchmark for satisfaction of the governmental act requirement.⁶⁴ More enlightened courts, such as the Supreme Court of Virginia, recognizing that the building permit is no longer the "most vital document in the development process,"⁶⁵ have concluded that this principal benchmark could be approval of site-specific rezoning application, approval of a conditional or special use permit, approval of a subdivision or site plan, approval of a preliminary permit, or an informal approval given by a public official.⁶⁶

(1) Zoning Approval

There exists a well-established rule that landowners have no vested rights to a continuation of the existing zoning of their properties.⁶⁷ Some courts, however, have found that site-specific rezoning approvals, especially those incorporating specific development plans in the act of legislation, may satisfy the governmental act requirement.⁶⁸ In a modern Planned Unit Development

(reporting that developer expended six hundred thousand dollars in planning and obtaining of preliminary approvals prior to building permit issue); *County Council v. District Land Corp.*, 337 A.2d 712, 721 (Md. 1975) (reporting that developer expended one million dollars in planning and obtaining of preliminary approvals prior to building permit issuance); *Board of Supervisors v. Medical Structures, Inc.*, 213 Va. 355, 357, 192 S.E.2d 799, 801 (1972) (reporting that developer spent two hundred forty-seven thousand five hundred dollars in engineering and site planning prior to building permit issuance).

63. See SIEMON, *supra* note 6, at 13-29; *California Vested Rights*, *supra* note 31, at 428; see also *supra* note 61.

64. See MANDELKER, *supra* note 3, § 6.14; RATHKOPF, *supra* note 3, Chap. 57, § 1; SIEMON, *supra* note 6, at 26; see, e.g., *Avco*, 17 Cal. 3d at 789, 553 P.2d at 555, 132 Cal. Rptr. at 391; *City of Champaign v. Kroger Co.*, 88 Ill. App. 3d 498, 507, 410 N.E.2d 661, 672 (1980); *Town of Hillsborough v. Smith*, 276 N.C. 48, 55, 170 S.E.2d 904, 909 (1969); *R.A. Vachon & Son, Inc. v. City of Concord*, 112 N.H. 107, 110-11, 289 A.2d 646, 648-49 (1972); *Donadio v. Cunningham*, 58 N.J. 308, 317-18, 277 A.2d 375, 382-83 (1971).

65. *Board of Supervisors v. Medical Structures, Inc.*, 213 Va. 355, 358, 192 S.E.2d 799, 801 (1972).

66. See *infra* notes 67-105 and accompanying text. See generally SIEMON, *supra* note 6, at 13-29.

67. See, e.g., *Gilliland v. County of Los Angeles*, 126 Cal. App. 3d 610, 613, 179 Cal. Rptr. 73, 77-78 (1981); *Elam v. Albers*, 616 P.2d 168, 169 (Colo. Ct. App. 1980); *City of Fort Pierce v. Davis*, 400 So. 2d 1242, 1244 (Fla. Dist. Ct. App. 1981); *Golden Gate Corp. v. Town of Narragansett*, 116 R.I. 552, 560, 359 A.2d 321, 328 (1976); *City of University Park v. Benner*, 485 S.W.2d 773, 778-79 (1972); *Town of Vienna v. Kohler*, 218 Va. 966, 976, 244 S.E.2d 542, 548 (1978); see also SIEMON, *supra* note 6, at 14-15. But see *Minch v. City of Fargo*, 197 N.W.2d 785, 790 (N.D. 1980) (landowner is entitled to rely on existing zoning); cf. *Board of Supervisors v. Fralin & Waldron, Inc.*, 222 Va. 218, 222-23, 278 S.E.2d 859, 861 (1981) (landowner claiming vested right in existing zoning classification against board-sponsored downzoning and Virginia Supreme Court finding downzoning unlawful on other grounds).

68. See, e.g., *Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So. 2d 10, 15-18 (Fla. 1976) (vested rights found in rezoning approved with specific development plan); *Town of*

(PUD) rezoning, a landowner must commit to develop his property in accordance with a specifically approved development plan as a condition of the PUD rezoning approval.⁶⁹ Generally, the approved development plan is the product of close negotiations with government officials and interested members of the community, normally specifies development densities, building footprints and an exact site layout, and quite often mandates particular architectural elevations and landscaping features.⁷⁰ The development of such a plan is not inexpensive or routine and often involves the retaining of sophisticated land planners, engineers, surveyors, and architects. To the untrained eye, a PUD development plan is often indistinguishable from a site plan.⁷¹ Given the amount of expenditures in time and money normally associated with a PUD rezoning and the high degree of specificity inherent in this type of governmental approval, a landowner will rely on and should have the right to rely on the PUD rezoning approval, regardless of subsequent legislative action. Therefore, courts should find that site specific, detailed

Largo v. Imperial Homes Corp., 309 So. 2d 571, 573 (Fla. Dist. Ct. App. 1975) (vested rights found in site-specific rezoning); Benson v. City of DeSoto, 212 Kan. 415, 425-26, 510 P.2d 1281, 1288-89 (1973) (zoning estoppel premised upon site-specific rezoning); May Dept. Stores Co. v. St. Louis County, 607 S.W.2d 857, 870-71 (Mo. Ct. App. 1980) (vested rights found in site specific rezoning); Fasano v. Board of County Comm'rs, 264 Or. 574, 582, 507 P.2d 23, 30 (1973) (vested rights found in rezoning approved with specific development plan). *See generally* SIEMON, *supra* note 6; at 15-17.

69. *See* R. BURCHELL & J. HUGHES, *PLANNED UNIT DEVELOPMENT: NEW COMMUNITIES, AMERICAN STYLE* 24, 34-38 (1972); D. MANDELKER & R. CUMMINGHAM, *PLANNING AND CONTROL OF LAND DEVELOPMENT* 655-674 (1979); Cummingham & Kremer, *supra* note 9, at 644-48; *Developers' Rights*, *supra* note 19, at 491-94; *see also*, Fairfax County Zoning Ordinance (1978), as amended, §§ 6-101 through 6-310 (Planned Unit Development regulations for PDH, PDC, and PRC zoning districts); FREDERICKSBURG VA. CODE (1987) §§ 17.2-10.1 through 15.1 (Planned Unit Development regulations for PDR and PDC zoning districts); HERNDON VA. CODE Articles 12 & 15A (1977) (Planned Unit Development regulations for PDH and PMU zoning districts).

70. *See, e.g.*, FAIRFAX COUNTY, VA. ZONING ORDINANCE § 16-502 (1978) (mandatory submission requirements for Final Development Plan). A landowner seeking to develop property under one of the Fairfax County PUD zoning districts must file a Conceptual Development Plan (CDP) simultaneously with a PUD Rezoning Application, obtain rezoning and CDP approval, and then file and obtain approval of a Final Development Plan (FDP) prior to engaging in the ministerial subdivision plan or site plan approval process. *See id.* at §§ 6-101 through 6-310 (PDH, PDC, and PRC rezoning approval process). A FDP must show in detail the following elements as minimum submission requirements:

- (1) boundary survey with complete metes and bounds closure,
- (2) location and arrangement of all proposed uses,
- (3) height, footprint, and description of all purposed structures,
- (4) parking layout,
- (5) landscaping and transitional screening measures,
- (6) architectural sketches,
- (7) plan for utility installation,
- (8) storm drainage plan and delineation of all floodplain areas,
- (9) notes and tabulations with complete data regarding overall density, square footage, parking, and open space.

See id. at § 16-502.

71. *See id.*

rezoning approvals, especially those involving PUDs, satisfy the governmental act requirement.

Another kind of rezoning approval that should satisfy the governmental act requirement is one legislated concurrent with the acceptance of certain proffered conditions (proffers).⁷² This kind of rezoning approval, known in Virginia as "conditional zoning," allows a local governing body to accept written proffers, voluntarily tendered by a landowner or zoning applicant prior to rezoning action, and to grant a rezoning to a certain zoning district with zoning district regulations as specifically amended by the proffers.⁷³ Once accepted, proffers become part of the zoning district regulations as those regulations apply to the specific property involved in the rezoning.⁷⁴ Although proffers are voluntarily offered, they are also the product of close negotiations with government officials and interested members of the community. Without an offering of proffers that address issues raised by government officials, the rezoning application undoubtedly will face problems during the legislative process.⁷⁵ The acceptance of proffers by a governing body concurrent with a rezoning approval generally is not considered to give rise to contractual duties or obligations on the part of the governing body. However, such action clearly evidences the completion of a mutually beneficial negotiation process between the public and private section. Thus, a conditional rezoning approval should satisfy the governmental act requirement.

(2) Conditional or Special Use Permit Approval

As discussed above, a requested land use may be one that, although not allowed as a by-right permitted use, is allowed as a permissible use upon the

72. See ANDERSON, *supra* note 3, § 9.20 (conditional zoning); MANDELKER, *supra* note 3, §§ 6.60-6.63 (conditional zoning); RATHKOPF, *supra* note 3, §§ 27.44-27.54 (conditional zoning); ROHAN, *supra* note 3, §§ 5.01-5.04 (conditional zoning).

73. See VA. CODE ANN. §§ 15.1-491(a), 15.1-491.1 *et seq.*, (1989) (conditional zoning statutes); FAIRFAX COUNTY, VA. ZONING ORDINANCE § 18-204 (1978) (Fairfax County conditional zoning ordinance). Conditional zoning allows for an applicant to design a rezoning proposal in order to address site specific issues and concerns raised by planning staff, elected officials, and interested citizens. See J. Foote, *Planning and Zoning in Virginia* 8-10 (1988) [hereinafter Foote] (unpublished manuscript available at Washington & Lee University Law Review Office). As the former County Attorney of Prince William County, Virginia noted, "[c]onditional zoning remains an excellent tool for minimizing the impact of [rezoning] proposals." *Id.* at 9. See generally Brown & Shilling, *Conditional Zoning in Virginia*, 16 U. RICH. L. REV. 117 (1981).

74. See Foote, *supra* note 73, at 9.

75. See *id.* at 8-9. As the former County Attorney of Prince William County, Virginia accurately stated, conditional rezoning proffers "permit applicants to tailor proposals to meet site-specific needs that cannot otherwise be addressed and to meet objections that may doom the project and send the parties into years of litigation and delay." *Id.* at 8-9. While the Code of Virginia provides that the submission of conditional zoning proffers is entirely "voluntary," the passage quoted above provides some indication of the "voluntary" nature involved. A conditional rezoning applicant may "voluntarily" submit written proffers to address issues raised by a rezoning application or may "voluntarily" choose to have the application denied because of outstanding issues. Perhaps in determining whether or not proffers are truly voluntary, Virginia courts should consider the advice of Justice Holmes: "[I]n states bound together by a Constitution and subject to the Fourteenth Amendment, great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." *McDonald v. Mabee*, 243 U.S. 90, 91 (1917).

granting of a conditional or special use permit.⁷⁶ The granting of this permit is a legislative act that in many respects is strikingly similar to the granting of a site specific rezoning application.⁷⁷ In many jurisdictions, a landowner seeking the conditional or special use permit must submit a development plan depicting in detail the proposed use and site layout and must agree to conduct the permissible use only in accordance with the development plan.⁷⁸ Additionally, many jurisdictions, including Virginia, allow the governmental body granting the permit to impose development conditions specifying, often in great detail, the manner in which the landowner must conduct the permissible use.⁷⁹

The issuance of a conditional or special use permit indicates the government's approval of a particular use as restricted by the development plan and development conditions. A landowner undoubtedly will rely upon this approval, expend funds, and move forward in obtaining any ministerial approvals required for the commencement of construction.⁸⁰ Therefore, issuance

76. See, e.g., FAIRFAX COUNTY VA., ZONING ORDINANCE (1978) § 3-103 (1978) (church allowed in R-1 (residential-one dwelling unit per acre) zoning district upon granting of special use permit); *id.* § 4-804 (fast food restaurants allowed in C-8 (commercial-highway corridor)-zoning district upon granting of special exception permit); LOUDOUN COUNTY, VA. ZONING ORDINANCE § 760.4.2 (1972) (extractive industries and quarries allowed in A-3 (agricultural-one dwelling unit every three acres) zoning district). See generally MANDELKER, *supra* note 3, at §§ 6.49-6.57 (conditional or special use permits discussed); RATHKOPF, *supra* note 3, at § 41.01 (conditional use permit authorizations).

77. See, e.g., *Cohn v. County Board of Supervisors*, 135 Cal. App. 2d 180, 184, 186 P.2d 836, 838 (1955) (special use permits, like zoning, run with land); *Board of Supervisors v. Southland Corp.*, 224 Va. 514, 522-23, 297 S.E.2d 718, 722 (1978) (special permit granted to quickservice foodstore). See generally MANDELKER, *supra* note 3, §§ 6.49-6.53; RATHKOPF, *supra* note 3, §§ 41.01-41.92; Rohan, *supra* note 3, at §§ 44.01-44.05.

In Fairfax County, conditional use permit authorizations come in two forms: special exceptions, granted by the Board of Supervisors, and special permits, granted by the Board of Zoning Appeals. See FAIRFAX COUNTY, VA. ZONING ORDINANCE §§ 8-001 through 8-909 (1978) (special permits); see also FAIRFAX DEVELOPMENT PROCESS, *supra* note 20 at 93-131; Foote, *supra* note 73 at 23-26.

78. See, e.g., FAIRFAX COUNTY ZONING ORDINANCE § 9-011 (1978) (development plan submission requirement for special exceptions); *id.* § 8-011 (development plan submission requirement for special permits); LOUDOUN COUNTY, VA. ZONING ORDINANCE § 1211-1212 (1972) (development plan submission requirement for special exceptions).

79. See VA. CODE ANN. § 15.1-496 (1989) (authorization for local governing bodies to impose development conditions); *id.* § 15.1-495 (authorization for boards of zoning appeals to impose development conditions); FAIRFAX COUNTY, VA. ZONING ORDINANCE §§ 8-007, 9-007 (1978) (imposition of development conditions on special exception and special permit approvals); LOUDOUN COUNTY, VA. ZONING ORDINANCE § 1211.6 (1972) (development conditions). See generally Foote, *supra* note 73, at 24-26.

80. See, e.g., *Renieris v. Village of Skokie*, 85 Ill. 2d 418, 422-23 229 N.E.2d 345, 348-49 (1967) (reporting that holder of motel special permit made expenditures in reliance upon special permit); *Pure Oil Div. v. City of Columbia*, 254 S.C. 28, 32, 173 S.E.2d 140, 143 (1970) (reporting that service station permit holder made reliance expenditures); *Board of Supervisors v. Medical Structures, Inc.*, 213 Va. 355, 358, 192 S.E.2d 799, 801 (1972) (reporting that holder of nursing home special permit expended \$247,500 in reliance upon approved special permit); *Board of Supervisors v. Cities Serv. Oil Co.*, 213 Va. 359, 362, 193 S.E.2d 1, 3 (1972) (reporting that holder of service station special permit made expenditures in reliance upon approved special permit).

of a conditional or special use permit also should satisfy the governmental act requirement.

In the Commonwealth of Virginia, a landowner upon acquisition of requisite rezoning or special use permit approvals is no longer subject to the legislative discretion by which local government can exercise its discretionary powers on the proposed development. For legal and practical reasons, achieving freedom from government discretion is the most important hurdle. Legally, the Virginia landowner now possesses the right to compel issuance of the remaining ministerial approvals required for ground-breaking by writ of mandamus.⁸¹ The granting of the rezoning application or special use permit is the last discretionary act by government required for development. Many courts have placed great weight on the granting of this last discretionary act in determining vested rights claims.⁸² Practically, the Virginia landowner, cognizant that his proposed project is subject only to ministerial approvals, commences substantial reliance expenditures and develops investment-backed expectations after obtaining this last discretionary act approval.⁸³ In other jurisdictions where approval of a rezoning or special use permit is not the last discretionary government act, *i.e.*, where the subdivision plan, site plan, or building permit processes involve legislative review,⁸⁴ a landowner has not cleared the most important hurdle and should not commence substantial reliance expenditures.

As previously mentioned, a landowner in Virginia has no right to rely on a continuation of permitted by-right land uses allowed under existing zoning,⁸⁵ unless that existing zoning is the product of a PUD or conditional

81. See *Board of Supervisors v. Hylton Enters.*, 216 Va. 582, 585, 221 S.E.2d 534, 537 (1976) (subdivision plan approval is ministerial action and mandamus will lie to compel approval); *Board of Supervisors v. Horne*, 216 Va. 113, 119, 215 S.E.2d 453, 457 (1975) (site plan approval and building permit issuance are ministerial rather than discretionary acts); *Planning Comm'n v. Berman*, 211 Va. 774, 776-77, 180 S.E.2d 670, 672 (1971) (site plan approval is ministerial action and mandamus will lie to compel approval); *May v. Whitlow*, 201 Va. 533, 537, 111 S.E.2d 804, 807 (1960) (mandamus will lie to compel performance of ministerial duty by local officials); VA. CODE ANN. § 8.01-644 (1984) (writ of mandamus allowed to compel ministerial action); *id.* § 15.1-475 (1989) (circuit court may review decision of Planning Commission regarding subdivision plan).

82. See, *e.g.*, *Aries Dev. Co. v. California Coastal Zone Constr. Comm'n*, 48 Cal. App. 3d 534, 122 Cal. Rptr. 315 (1975) (applying last discretionary act test); *Kauai County v. Pacific Standard Life Ins. Co.*, 65 Haw. 318, 653 P.2d 766 (1982) (final discretionary action test applied). See generally, SIEMON, *supra* note 6, at 701-04; Rhodes, *supra* note 31, at 8 n.44.

83. See, *e.g.*, *Board of Supervisors v. Medical Structures, Inc.*, 213 Va. 355, 358, 192 S.E.2d 799, 801 (1972); *Board of Supervisors v. Cities Serv. Oil Co.*, 213 Va. 359, 362, 193 S.E.2d 1, 3 (1972). The United States Supreme Court apparently has adopted a constitutionally mandated vested rights standard that protects investment-backed expectations. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). See generally SIEMON, *supra* note 6, at 62-64; Berger, *supra* note 52, at 765-70.

84. See *Developers' Rights*, *supra* note 19, at 490 (alleging, with supportive citations, that subdivision process in some states, unlike Virginia, involves discretionary review).

85. See *Town of Vienna Council v. Kohler*, 218 Va. 966, 976, 244 S.E.2d 542, 548 (1978).

zoning approval.⁸⁶ The landowner does have a right, however, to rely on a continuation of permissible conditional land uses allowed under a special use permit.⁸⁷ Because permitted land uses are deemed always appropriate in a specific zoning district and because permissible land uses are deemed only sometimes appropriate in that zoning district, a counterintuitive situation appears to exist with regard to vesting; the "sometimes appropriate" land use is vested while the "always appropriate" land use is not. A logical explanation, however, does exist.

Although the landowner seeking the "sometimes appropriate" permissible use has fulfilled the governmental act element by obtaining a special use permit, his sought land use will not receive vested status until the other two elements of a vested rights claim are met.⁸⁸ To vest his "sometimes appropriate" permissible land use, the Virginia landowner must expend substantial resources and file a bona fide subdivision plan or site plan in good faith.⁸⁹ The landowner seeking the "always appropriate" permitted use must take the same steps and, by doing so, places his sought land use on par with the special permit use already worthy of reliance.⁹⁰ In other words, permissible

86. See *supra* notes 69-75 and accompanying text (discussing PUD and conditional zoning approvals).

87. See *Board of Supervisors v. Medical Structures, Inc.*, 213 Va. at 358, 192 S.E.2d 799, 801 (1972); *Board of Supervisors v. Cities Serv. Oil Co.*, 213 Va. 359, 362, 193 S.E.2d 1, 3; notes 76-80 and accompanying text (governmental act requirement satisfied by special use permit approval).

88. See *infra* notes 106-112 and accompanying text. Besides showing a governmental act or omission, a landowner seeking a vested rights status must demonstrate good faith reliance and a substantial change in position. *Id.*; see also *supra* text accompanying notes 38 and 50 (elements of two vested rights doctrines).

89. See *Medical Structures*, 213 Va. at 358, 192 S.E.2d at 801, *Cities Service*, 213 Va. at 362, 193 S.E.2d at 3.

90. See *Dominion Lands, Inc. v. City of Alexandria*, Chancery No. 18,106 (Alex. Circuit Ct. Feb. 1, 1988). In *Dominion Lands*, the Circuit Court of the City of Alexandria considered the case of a landowner who filed a bona fide site plan showing a permitted by-right commercial development, acted in good faith, and expended substantial resources in seeking site plan approval. After filing and consideration of the site plan by the Alexandria Planning Commission, the Planning Commission deferred decision on the site plan in order to allow the Alexandria City Council to propose a zoning ordinance amendment that would reduce the permitted height of buildings on the landowner's property below the height proposed in the site plan. See Motion for Declaratory Judgment at 1-4, *Dominion Lands* (No. 18,106).

While the proposed zoning ordinance amendment was pending staff review, the Planning Commission approved the site plan. One week later, the City Council enacted the zoning ordinance amendment without providing any grandfathered rights and immediately thereafter several citizens appealed the site plan approval, claiming that the recently enacted height limitation should apply. After the City Attorney advised the City Council to apply the recently enacted height limitation when considering the appeal, the landowner, *Dominion Lands, Inc.*, filed for declaratory judgment seeking a declaration of vested rights in the approved site plan. See *id.* The Circuit Court granted the relief requested and determined that, under the *Medical Structures/Cities Service* test, the landowner was entitled to vested rights in the approved site plan. See *Dominion Lands* (No. 18,106).

Dominion Lands stands clearly for the proposition that a landowner seeking to develop an "always appropriate," permitted by-right land use, which does not require any kind of special

land uses and permitted land uses deserve the same degree of vesting protection upon the filing of a bona fide subdivision plat or site plan.⁹¹

(3) Subdivision Plat or Site Plan Approvals

In Virginia, the filing of a subdivision plat or site plan "creates a monument to the developer's" intentions.⁹² This monument is, in essence, the physical incarnation of substantial reliance expenditures by the landowner. A Virginia landowner who expends substantial resources in preparing and filing a bona fide subdivision plan or site plan in good faith reliance upon existing zoning obtains a vested right to the land use sought therein.⁹³ The subsequent approval of the subdivision plan or site plan bolsters the Virginia landowner's vested rights assertion, but is not required for vested rights to arise in the sought land use.

In some states that do not follow the Virginia "vesting upon filing" rule, approval of a subdivision plan or site plan will suffice as the requisite government act for vesting purposes.⁹⁴ A few courts in other states appreciate the harshness of requiring a validly issued building permit for satisfaction of the governmental act requirement, but do not believe that subdivision plat or site plan approvals are sufficient governmental acts. These courts apply a "probability of issuance" standard.⁹⁵ Under this standard, the governmental act element is satisfied when a landowner substantially changes his position in reliance upon the probability of building permit issuance.⁹⁶ Because issuance

use permit approval, may obtain a vested rights status if the critical elements in the *Medical Structures/Cities Service* test are met.

91. See *supra* note 90.

92. *Medical Structures*, 213 Va. at 358, 192 S.E.2d at 801.

93. See *id.* at 358, 192 S.E.2d at 801; *Cities Service* at 362, 193 S.E.2d at 3.

94. See, e.g., *Wilcox Assoc. v. Fairbanks North Star Borough*, 603 P.2d 903, 905 (Alaska 1979); *Kasperek v. Johnson County Bd. of Health*, 288 N.W.2d 511, 518 (Iowa 1980); *Lampton v. Pinaire*, 610 S.W.2d 915, 921 (Ky. Ct. App. 1980); *Ward v. City of New Rochelle*, 8 N.Y.2d 895, 204 N.Y.S.2d 144 (1960); *Northbury Estates, Inc. v. Long Island Lighting Co.*, 47 Misc. 2d 134, 139, 261 N.Y.S.2d 773, 776 (N.Y. Sup. Ct. 1963); see also *SIEMON*, *supra* note 6, at 24-26. *But see* *Dawe v. City of Scottsdale*, 119 Ariz. 486, 489, 581 P.2d 1136, 1138 (1978) (no vested rights from subdivision plat approval); *Vachon & Son, Inc. v. City of Concord*, 112 N.H. 103, 106, 289 A.2d 646, 649 (1972) (no protection from new zoning enactments through approved subdivision plan).

95. See, e.g., *Baker v. County of Forsyth*, 248, Ga. 73, 77 281 S.E.2d 549, 552 (1981); *Life of the Land, Inc. v. City and County of Honolulu*, 60 Haw. 446, 592 P.2d 26, 28-29 (1979); *Denig v. County of Maui*, 52 Haw. 653, 485 P.2d 1048, 1051-52 (1971); *Cos Corporation v. City of Evanston*, 17 Ill. 2d 570, 576-77, 190 N.E.2d 364, 367-68 (1963). See generally *SIEMON*, *supra* note 6, at 26-27.

96. See, e.g., *Life of the Land, Inc. v. City and County of Honolulu*, 61 Haw. 390, 459-62, 606 P.2d 866, 902-03 (1980); *Mattson v. City of Chicago*, 89 Ill. App. 378, 381-82, 411 N.E.2d 1002, 1005 (1980). In *Mattson*, the Illinois Court of Appeals considered the case of a landowner who had expended \$1,600.00 to demolish a building valued at \$40,000.00 in order to build a new structure on the same land. *Mattson*, 89 Ill. App. at 381, 44 N.E.2d at 1005. The court found that the landowner had acted in good faith "in reliance upon the probability of the forthcoming [building] permit." *Id.* at 381, 44 N.E.2d at 1005. In *Life of the Land*, the Hawaii

of a building permit is a purely ministerial act,⁹⁷ we find this “probability of issuance” standard an illusory substitute for the governmental act requirement and believe that courts applying this standard really find the governmental act requirement satisfied by some earlier, yet undisclosed, approval.

(4) Preliminary Permit Approvals

In many jurisdictions, landowners are authorized to commence certain development activities prior to approval of a building permit upon acquisition of one or more preliminary permits.⁹⁸ Included in this array of permits are rough grading permits, clearing permits, paving permits, foundation permits, and public improvement permits.⁹⁹ Some jurisdictions will allow issuance of these preliminary permits prior to subdivision plan or site plan approval.¹⁰⁰ Approval of many preliminary permits, issued before site plan, subdivision plan, or building permit approval, will cause landowners to expand substantial resources and develop investment-backed expectations in good faith.¹⁰¹ As use of these preliminary permit approvals increase to allow for construction prior to site plan, subdivision plan, or building permit approval, cases finding

Supreme Court held that, because the landowner had expended substantial resources in designing a project in good faith and because the proposed project was in complete conformance with all zoning requirements, the local building department had no discretion to deny issuance of a building permit. *Life of the Land*, 61 Haw. at 459-62, 606 P.2d at 902-03.

97. See, e.g., *Palmer v. Fox*, 119 Cal. App. 2d 453, 457, 258 P.2d 30, 33 (1958); *Board of Supervisors v. Horne*, 216 Va. 113, 119, 215 S.E. 453, 457 (1975); *Planning Commission v. Berman*, 211 Va. 774, 776-77, 180 S.E.2d 670, 672 (1971); see also *SIEMON*, *supra* note 6, at 26; *Developers' Rights*, *supra* note 19, at 489.

98. See, e.g., *Avco Community Dev., Inc. v. South Coast Regional Comm'n*, 17 Cal. 3d 785, 790-91, 132 Cal. Rptr. 386, 389, 553 P.2d 546, 549 (1976) (public improvement plans and permits, allowing construction of storm drains, sewer systems, and public roads approved prior to issuance of building permit, *cert. denied*, 429 U.S. 1083 (1977); *Sakolsky v. City of Coral Gables*, 151 So. 2d 433, 434 (Fla. 1963) (foundation permit approved allowing below-grade construction prior to issuance of building permit); *Emerald Home Builders, Inc. v. Kolton*, 11 Ill. App. 3d 888, 892-94, 198 N.E.2d 275, 278 (1973) (excavation and footing permits approved prior to building permit issuance); *Hill Homeowners Ass'n v. City of Passaic*, 156 N.J. Super. 505, 508-09, 384 A.2d 172, (1978) (excavation permit approved prior to issuance of building permit); *Juanita Bay Valley Community Ass'n v. City of Kirkland*, 9 Wash. App. 59, 61-62, 510 P.2d 1140, 1142 (1973) (grading permit, allowing site clearing and grading, approved prior to issuance of building permit); see also *FAIRFAX DEVELOPMENT PROCESS*, *supra* note 20, at 1-109; *SIEMON*, *supra* note 6, at 19-24; *Cunningham & Kremer*, *supra* note 9, at 704-10.

99. See *supra* note 98 (citing cases from jurisdictions that allow development activities after issuance of preliminary permits).

100. See *supra* note 98 (citing cases from jurisdictions that allow development activities after issuance of preliminary permits).

101. See *Avco Community Developers, Inc. v. South Coast Regional Comm'n*, 17 Cal. 3d 785, 800-01, 132 Cal. Rptr. 386, 395-95, 553 P.2d 546, 555-56 (1976); *SIEMON*, *supra* note 6, at 20-21; *Cunningham & Kremer*, *supra* note 9, at 704-08; *California Vested Rights*, *supra* note 31, at 427-28. The *Avco* case demonstrates the fundamental unfairness of the government allowing a large scale development to move forward without vested rights status after the landowner receives approval of many preliminary permits and makes many substantial reliance expenditures. See also *supra* note 62 (discussing *Avco* decision).

satisfaction of the governmental act requirement premised upon preliminary permit approval are bound to arise.

(5) Informal Approvals

Prior to and during the land development regulatory review and approval process, informal interactions between landowners and government officials occur on a frequent basis.¹⁰² On many occasions, government officials will give advice on development options, make affirmative representations of law or fact, or issue oral or written opinions.¹⁰³ Although a sophisticated landowner surely would not expend substantial resources toward a development project relying solely upon one or more of these informal actions, less experienced landowners may, in good faith, rely on the word of a government official and proceed accordingly.¹⁰⁴ While a few interesting cases exist in which courts have found satisfaction of the governmental act requirement based solely upon informal approvals, most courts would not find such approvals to be governmental acts sufficient for vesting purposes.¹⁰⁵

B. Good Faith

The second element of both vested rights doctrines is the requirement that the landowner act in good faith when relying upon a governmental act.¹⁰⁶ Good faith in the context of a vested rights claim means that the landowner proceeds with his proposed development plans in accordance with a govern-

102. See SIEMON, *supra* note 6, at 17.

103. See, e.g., *Goto v. District of Columbia Bd. of Adjustment*, 423 A.2d 917, 925 (D.C. Ct. App. 1980); *Project Home, Inc. v. Town of Astatula*, 373 So. 2d 710, 713 (Fla. Dist. Ct. App. 1979); *Konicki v. Village of Hinsdale*, 100 Ill. App. 3d 560, 562, 427 N.E.2d 325, 327 (1981).

104. See *Project Home, Inc. v. Town of Astatula*, 373 So. 2d 710, 713 (Fla. Dist. Ct. App. 1979). In *Project Home*, the Town Council of Astatula, Florida directed the Town Clerk to respond favorably to a landowner's request to use his property for mobile home purposes. Following Town Clerk's response, the landowner drafted a sketch plan showing a six-lot mobile home development and asked if the proposed land use was permitted. Again, the Town Clerk advised the landowner that the proposed use was acceptable. Acting upon this assurance, the landowner, the landowner entered into a contract of sale with a Jesuit priest who desired to provide low income housing to the community. The sale was contingent upon the Town approving a ten-lot mobile home development. The Town Clerk not only advised that the ten-lot development was permitted, but actually assisted the priest in drafting a new sketch plan. *Id.* at 712-13. The priest purchased the property and again sought the advice of the Town Clerk who advised that water and sewer permits would be issued for the project as a "matter of routine." Prior to development, however, the Town Council downzoned the priest's property to a new zoning district that allowed only two mobile homes on the site. The priest sought judicial relief. The Florida Court held that the priest's project was vested and that the governmental act requirement was satisfied by the Town Clerk's affirmative assurances. *Id.* at 713. See generally Comment, *Never Trust a Bureaucrat: Estoppel Against The Government*, 42 S. CAL. L. REV. 391 (1969).

105. See *supra* note 103.

106. See *supra* notes 38, 50 and accompanying text; see also MANDELKER, *supra* note 3, §6.17; RATHKOPF, *supra* note 3, §§50.03-50.04; SIEMON, *supra* note 6, at 29-32; Heeter, *supra* note 6, at 77-82; Rhodes, *supra* note 31, at 4-7.

ment approval without knowledge of a pending change in the zoning ordinance.¹⁰⁷ One obvious problem in determining whether the landowner acted in good faith arises due to the varied manner in which zoning ordinance amendments become "pending."¹⁰⁸ Some zoning ordinance amendments begin as official resolutions adopted by elected officials. Others may arise from citizens' task forces, comprehensive plan revision, political speeches, internal memoranda prepared by staff, or by referendum. In one of the leading cases involving this "pending ordinance" question, the Pennsylvania Supreme Court determined that a zoning ordinance amendment was "pending" when a public hearing before the zoning board had been duly advertised and a printed version of the proposed ordinance was available for public inspection.¹⁰⁹ Another problem in determining good faith arises due to nonuniformities in the dissemination of information concerning pending ordinance changes; some landowners always will learn of pending zoning ordinance changes before others do, and some landowners never learn of the changes prior to actual enactment.¹¹⁰

In light of the difficulty in applying a subjective test for good faith, most courts appear to apply an objective standard. The courts determine whether a reasonable landowner would have acted in the same manner as

107. See, e.g., *City of Tucson v. Arizona Mortuary*, 34 Ariz. 495, 504-06, 272 P. 923, 928 (1928); *Sharrow v. City of Dania*, 83 So. 2d 274, 276 (Fla. 1955); *Sakolsky v. City of Coral Gables*, 151 So. 2d 433, 435 (Fla. 1953); *Von Bokel v. City of Breese*, 100 Ill. App. 3d 956, 960 427 N.E.2d 322, 325 (1981); *Kasperek v. Johnson County Bd. of Health*, 288 N.W.2d 511, 518-19 (Iowa 1980); *Murrell v. Wolff*, 408 S.W.2d 842, 851 (Mo. 1966); *Sautto v. Edenton Apartments*, 84 N.J. Super. 461, 469-72 202 A.2d 466, 472-73 (1964); *Bosse v. City of Portsmouth*, 107 N.H. 523, 531-32, 226 A.2d 99, 106-07 (1967); *Miller v. Dassler*, 155 N.Y.S.2d 975, 979 (N.Y. Sup. Ct. 1956); *Application of Campsites Unlimited*, 287 N.C. 493, 215 S.E.2d 73, 79 (1975); *Clackamas County v. Holmes*, 265 Or. 193, 196-97, 508 P.2d 190, 192-93 (1973); *Yocum v. Power*, 398 Pa. 223, 226, 157 A.2d 368, 369 (1960); *Glazer v. Zoning Board of Worcester Township*, 423 A.2d 463, 465 (Pa. Commw. Ct. 1980); *Sherman v. Reavis*, 273 S.C. 342, 543, 257 S.E.2d 735, 737 (1979); *Utah County v. Young*, 615 P.2d 1265, 1267 (Utah 1980); *Board of Supervisors v. Medical Structures, Inc.*, 213 Va. 355, 192 S.E.2d 799, 801 (1972). See generally *SIEMON*, *supra* note 6, at 29-32; *Cunningham & Kremer*, *supra* note 9, at 718-22; *Annotation, Retroactive Effect of Zoning Regulation, in Absence of Savings Clause, on Validly Issued Building Permit*, 49 A.L.R.3d 43-52 (1973).

108. See, e.g., *Smith v. City of Clearwater*, 383 So. 2d 681, 688-89 (Fla. Dist. Ct. App. 1980) (zoning ordinance amendment is "pending" when active and documented efforts by planning staff to amend zoning ordinance are known to local governing body); *Kasperek v. Johnson County Bd. of Health*, 288 N.W.2d 511, 517-19 (Iowa 1980) (zoning ordinance is not "pending" until official enactment by local governing body); *Boron Oil Co. v. Kimple*, 445 Pa. 327, 331-32, 284 A.2d 744, 747-48 (1971) (zoning ordinance amendment is pending, regardless of landowner's knowledge, when planning staff are authorized to begin work on new amendment); See also *Developer's Rights*, *supra* note 19, at 503-05 ("pending ordinance rule"); *Annotation, Retroactive Effect of Zoning Regulation, in Absence of Savings Clause, on Pending Application for Building Permit*, 50 A.L.R.3d 596, 620-32 (1973) (cases discussing when zoning ordinance amendment becomes "pending") [hereinafter *Pending Ordinance Rule Annotation*].

109. See *Baron Oil Co. v. Kimple*, 445 Pa. 327, 331-32, 284 A.2d 744, 747-48 (1971); *SIEMON*, *supra* note 6, at 30.

110. See *SIEMON*, *supra* note 6, at 330-32; *Heeter*, *supra* note 6 at 77-82; *Pending Ordinance Rule Annotation*, *supra* note 108, at 620-32.

the landowner whose good faith is at issue.¹¹¹ The potential number of factual situations involving application of this objective standard is infinite and a case-by-case determination of good faith is warranted. A review of the factual situations and respective holdings presented in published opinions may prove of assistance to the practitioner or, at the least, will provide interesting reading.¹¹²

C. Substantial Change in Position

The third and final element of both vested rights doctrines is the requirement that the landowner make a substantial change in position or incur extensive obligations or expenses in furtherance of his development project.¹¹³ This element is quite similar to "detrimental reliance" as that term is used in traditional estoppel theories.¹¹⁴ The substantial change in position element involves expenditures of money, the irrevocable commitment of resources, and the acceptance of liabilities in reliance upon the government act.¹¹⁵ The

111. See *supra* note 108 (citing cases in which courts applied objective standard); see also MANDELKER, *supra* note 3, at 218; Heeter, *supra* note 6, at 78-82. One writer has provided a persuasive argument in favor of an objective standard for determining good faith. See *California Vested Rights*, *supra* note 31, at 436-38.

112. See *supra* note 107 (citing vested rights "good faith" cases). In Virginia an interesting memorandum opinion exists in which the Circuit Court of Fauquier County determined that a landowner's attempt to obtain a vested rights status under the *Medical Structures-Cities Service* test failed for want of good faith. See *Costello v. Board of Supervisors*, Chancery No. 83-62 (Fauquier County Circuit Ct. June 22, 1983). In *Costello*, a landowner submitted a site plan for a permitted by-right commercial development in the wake of a well-publicized downzoning of several tracts, including the landowner's property. The landowner's representative stated before the Planning Commission considering the site plan that the landowner "isn't too interested in developing that thing right now, but she'd do it because we have to; we don't have any choice and you put us to the wall. . . ." *Id.* The Circuit Court held that the filing of the site plan was an "ineffectual attempt to acquire a vested right in either the preexisting commercial zoning of the parcel, or in the consideration of the plan in accordance with commercial zoning in effect at the time of the filing of the plan with the County." *Id.*

113. See *supra* notes 38, 50 and accompanying text; see also MANDELKER, *supra* note 3, §§6.18-6.20; RATHKOPF, *supra* note 3, §50.03; SIEMON, *supra* note 6, at 32-38; Delaney & Kominers, *supra* note 11, at 222-41; Heeter, *supra* note 6, at 84-90; Rhodes, *supra* note 31, at 11-13.

114. See J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE, § 805 (5th ed. 1941). According to Professor Pomeroy, the equitable estoppel element termed "detrimental reliance" involves a "change in [one's] position for the worse; in other words [one] must act so that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of [another] party being permitted to repudiate his conduct and to assert rights inconsistent with it." *Id.*

115. See, e.g., *Phoenix City Council v. Canyon Ford, Inc.*, 12 Ariz. App. 595, 473 P.2d 797 (1970); *Aries Dev. Co. v. California Coastal Zone Conservation Comm'n*, 48 Cal. App. 3d 534, 122 Cal. Rptr. 315 (1975); *Town of Largo v. Imperial Homes Corp.*, 309 So. 2d 571 (Fla. Dist. Ct. App. 1975); *City of Hollywood v. Hollywood Beach Hotel Co.*, 283 So. 2d 867 (Fla. Dist. Ct. App. 1973); *rev'd in part*, 329 So. 2d 10 (1976); *Brennan v. Board of Zoning Adjustments*, 371 So. 2d 324 (La. Ct. App. 1979); *Sautto v. Edenboro Apartments, Inc.*, 84 N.J. Super. 451, 101 A.2d 466 (1964); *Town of Hillsborough v. Smith*, 276 N.C. 48, 170 S.E.2d 904 (1969); *Pure Oil Div. v. City of Columbia*, 254 S.C. 28, 173 S.E.2d 140 (1973); *Board of Supervisors v. Cities Serv. Oil Co.*, 213 Va. 359, 193 S.E.2d 1 (1972). See generally SIEMON, *supra* note 6, at 32-38; Heeter, *supra* note 6, at 84-90.

term "substantial" possesses quantitative, qualitative, and relative characteristics. The expenditure must be of a monetary amount that indicates a bona fide commitment to move forward with the project, must be dedicated toward acquisition of those required goods and services that move the project closer to completion, and must bear a reasonable relationship to total project cost.¹¹⁶

Expenses that would not be truly wasted if vested rights were found not to exist would probably not suffice as detrimental reliance expenditures.¹¹⁷ Therefore, land acquisition expenses would not suffice unless the actual cost included some form of premium price representing the value of a transferable special use permit or zoning development right that would be lost if vested

116. See MANDELKER, *supra* note 3, §6.19; SIEMON, *supra* note 6, at 32-38; Heeter, *supra* note 6, at 85-90. Some courts determine whether or not substantial reliance is present by applying a quantitative or "set quantum" test. Under this test, a court gauges a landowner's substantial reliance by the amount of material and cash expended. See, e.g., Board of County Comm'rs v. Lutz, 314 So. 2d 815 (Fla. Dist. Ct. App. 1975) (\$100,000 in expenditures justifies vested rights status); City of Ft. Pierce v. Davis, 400 So. 2d 1242 (Fla. Dist. Ct. App. 1981) (\$4,000 in expenditures does not justify vested rights status); Bregar v. Britton, 75 So. 2d 733 (Fla. Dist. Ct. App. 1954) (\$28,000 in expenditures justifies vested rights status); State *ex rel* Great Lakes Pipe Line Co. v. Hendrickson, 393 S.W.2d 481 (Mo. 1965) (\$64,000 in expenditures justifies vested rights status); Board of Supervisors v. Medical Structures, Inc., 213 Va. 355, 192 S.E.2d 799 (1972) (\$247,000 in expenditures justifies vested rights status).

Other courts determine whether or not substantial reliance is present by applying a qualitative test. Under this test, a court gauges a landowner's substantial reliance by the type of the expenditures made. See, e.g., Graham Corp. v. Board of Zoning Appeals, 140 Conn. 1, 97 A.2d 564 (1953) (costs associated with excavation and pouring of footings do not suffice as substantial reliance expenditures). Petty v. Barrentine, 594 S.W.2d 903 (Ky. Ct. App. 1980) (contractual obligations, including construction loan, suffice as substantial reliance expenditures); County Council v. District Land Corp., 274 Md. 691, 337 A.2d 712 (1975) (land acquisition costs do not suffice as substantial reliance expenditures); May Dep't Stores Co., v. County of St. Louis, 607 S.W.2d 857 (Mo. Ct. App. 1980) (land acquisition cost that includes premium because of purchaser's specific intended use suffices as substantial reliance expenditures); Clackamas County v. Holmes, 265 Or. 193, 508 P.2d 190 (1973) (costs exclusively related to proposed use suffice as substantial reliance expenditures); Raum v. Board of Supervisors, 29 Pa. Commw. Ct. 9, 370 A.2d 777 (1976) (carrying costs may suffice as substantial reliance expenditures); Western Land Equities, Inc. v. City of Logan, 617 P.2d 388 (Utah 1980) (surveying expenses do not suffice as substantial reliance expenditures); Board of Supervisors v. Cities Serv. Oil Co., 213 Va. 359, 193 S.E.2d 1 (1972) (purchase price of land that specifically includes special use permit authorization for specific commercial purpose suffices as substantial reliance expenditures); Board of Supervisors v. Medical Structures, Inc., 213 Va. 355, 192 S.E.2d 799 (1972) (expenses related to preparation of site plans and bond deposits suffice as substantial reliance expenditures).

Other courts determine whether or not substantial reliance is present by applying a relative or "ratio test." Under this test a court gauges a landowner's substantial reliance by considering the relationship between the costs expended and the total costs of the entire project. See, e.g., City of Rochester v. Barcomb, 103 N.H. 247, 169 A.2d 281 (1961) (unspecified ratio test applied and expended costs found insufficient to suffice as substantial reliance expenditures); Town of Hempstead v. Lynne, 32 Misc. 2d 312, 222 N.Y.S.2d 526 (N.Y. Sup. Ct. 1961) (\$15,600 out of \$351,340 total project costs does not suffice as substantial reliance expenditure); Clackamas County v. Holmes, 265 Or. 193, 508 P.2d 190 (1973) (expenditure of costs that are one-fourteenth of total project costs suffice as substantial reliance expenditures).

117. See SIEMON, *supra* note 6, at 32-38; Heeter, *supra* note 6, at 84-88.

rights were not found to exist.¹¹⁸ Landscape maintenance costs, security expenses, carrying costs, and liability insurance premiums also probably would not suffice as detrimental reliance expenditures.¹¹⁹ Similarly, professional fees associated with feasibility studies, market analyses, and environmental tests for soil adequacy, ground water availability, and existence of toxic wastes, would also probably not suffice.¹²⁰ Bona fide expenses for subdivision plat and site plan preparation, filing fees, and nonrefundable bond deposits and utility tap fees generally would suffice as detrimental reliance expenditures, but similar expenses for preparation of metes and bounds survey plats probably would not suffice.¹²¹

In cases of development projects that do not require legislative approvals or ministerial approvals other than a building permit, such as construction of single family detached residential dwelling units on existing platted lots, landowners will not expend much money on their projects prior to actual construction. In such a case, a landowner relying upon a building permit as his sole governmental approval, who has not commenced excavation or poured footings, may fall short of demonstrating detrimental reliance and fail to establish a vested right to complete his project.

In sum, detrimental reliance expenditures must be "real, actual, and considerable in amount".¹²² In one case pertaining to vested rights, the District of Columbia Court of Appeals determined that detrimental reliance expenditures must be "expensive and permanent."¹²³ This definition may be the most useful for the practitioner.

V. MISCELLANEOUS VESTED RIGHTS ISSUES

A. *What Vests?*

While many courts and commentators have discussed in great detail the process by which vested rights in land use and development arise, few have

118. See *SIEMON*, *supra* note 6, at 35; see, e.g., *County Council v. District Land Corp.*, 274 Md. 691, 337 A.2d 712 (1975) (holding land acquisition expenses insufficient); *Gosselin v. City of Nashua*, 114 N.H. 447, 321 A.2d 593 (1974) (holding land acquisition expenses insufficient). *But see*, e.g., *Town of Largo v. Imperial Homes Corp.*, 309 S.E.2d 571 (Fla. Dist. Ct. App. 1975) (holding land acquisition expenses that included premium due to recently acquired zoning rights sufficient); *Board of Supervisors v. Cities Serv. Oil Co.*, 213 Va. 359, 193 S.E.2d 2 (1972) (holding land acquisition expenses which included premium due to special use permit sufficient).

119. See *supra* note 116 (citing substantial reliance cases); *SIEMON*, *supra* note 6, at 33-38.

120. See *supra* note 116; *SIEMON*, *supra* note 6, at 33-38.

121. See *supra* note 116 (citing detrimental reliance cases); *SIEMON*, *supra* note 6, at 33-38; *Rhodes*, *supra* note 31, at 11-13.

122. *SIEMON*, *supra* note 6, at 32.

123. *Saah v. District of Columbia Bd. of Zoning Adjustment* 433 A.2d 1114, 1116 (D.C. 1981). The authors of one in-depth article on vested rights have recommended a "rule of irrevocable commitment." See *Cunningham & Kramer*, *supra* note 9, at 714-28. This rule, they assert, would protect any development project to which a landowner has made a reasonable and irrevocable commitment of resources. *Id.* at 715. This rule would save courts from the inherent arbitrariness in applying the quantitative, qualitative, or relative tests for the substantial reliance element.

provided clear guidance on exactly which kinds of rights become vested when a landowner successfully maintains a vested rights claim. Clearly, those development rights that are critical to the landowner's investment-backed expectations should be vested and protected from diminishment by zoning ordinance text and map amendments.¹²⁴ For instance, in those cases where vesting is premised upon a development plan, approved pursuant to a PUD rezoning or issuance of a special use permit, or upon a subdivision plan or site plan, either filed or approved, the land uses and development densities deserve full protection.¹²⁵ Arguably, the site layout depicted on the plan also deserves protection if that precise layout is central to the landowner's development scheme.

Difficult vesting questions arise, however, regarding whether or not vested development plans should be subject to minor changes or revisions to the zoning subdivision or site plan ordinances. Undoubtedly, government officials will argue that minor zoning ordinance changes, such as new requirements for transitional screening, barriers, and landscaping, which may increase a landowner's development costs but not deprive him of critical development rights, should be applicable to vested development plans.¹²⁶ To avoid these new minor police power requirements, a landowner will have to argue that his vested plan exempts his development from all new zoning, subdivision, or site plan ordinance amendments which are enacted subsequent to this date of vesting. This extreme position would obtain little judicial sympathy. If, however, application of new zoning ordinance amendments to the vested plan would force a fundamental redesign of the proposed project, as would, for instance, increases in minimum yard, open space, or setback requirements, the landowner would have a strong position in arguing that his development should be exempted from the new requirements. In sum, although the landowner may not obtain exemption from all new regulations through the acquisition of a vested plan, his legitimate investment-backed expectations, founded primarily on land use rights and maximum development density rights, deserve full protection.¹²⁷

B. *Large Multi-Phased or Mixed-Use Project Vesting*

During the past twenty years, we have witnessed a great increase in the complexity and average size of development projects.¹²⁸ In response to market

124. See SIEMON, *supra* note 6, at 62-68, Berger, *supra* note 55, at 765-70, Stoebeck, *supra* note 2, at 1083-99.

125. See Board of Supervisors v. Medical Structures, Inc., 213 Va. 355, 192 S.E.2d 799 (1972) (Virginia's "vesting upon filing" rule); *Developers' Rights*, *supra* note 19, at 491-94 (PUD rezoning approval vesting).

126. See Foote, *supra* note 73, at 8-9. The former County Attorney of Prince William County, Virginia has suggested that even vested developments should be subject to minor zoning ordinance amendments. *Id.*

127. See generally SIEMON, *supra* note 6, at 62-68.

128. See Delancy & Kominers, *supra* note 11, at 241-48; Witt, *supra* note 11, at 317-18; Witt & Sammartino-Gardner, *supra* note 11, at 647-53.

pressures for planned, mixed use communities, political pressures for developer funding of large-scale infrastructure improvements, and economic pressures for economy-of-scale cost savings, landowners today frequently propose large mixed-use development projects that will require years and perhaps decades of full-time planning and construction before completion.¹²⁹ Projects of this nature present unique vested rights issues.

First, large mixed-use development projects almost always require rezoning legislation, normally of a PUD nature. Few projects of this nature are accomplished under existing zoning.¹³⁰ In many jurisdictions, an amendment to the adopted comprehensive plan to provide for language supporting the project will be a practical or political requirement.¹³¹ Thus, a landowner desiring development rights to construct a large mixed-use project will be forced to expend large amounts of money toward planning and feasibility studies, professional fees, and other "soft" costs prior to rezoning.¹³² Second, after rezoning, the landowner will need to direct his project through a complicated array of secondary approvals, possibly spending years, before the first building permit for the project is issued.¹³³ Third, the landowner undoubtedly will be unable to complete the project in one phase given financial and resource limitations and market saturation constraints.¹³⁴ Incremental, phased development is necessary. In light of these unique characteristics, the landowner developing a large mixed-use project faces a tremendous risk of loss should a government entity amend the zoning ordinance text or map prior to completion of the project.

In response to these concerns, many courts have found that landowners of large mixed-use projects deserve greater protection from ordinance changes, in the forms of earlier vesting standards, than do landowners developing

129. See Witt, *supra* note 11, at 317-18; *Developers' Rights*, *supra* note 19, at 497-508; see also URBAN LAND INSTITUTE, *LARGE-SCALE DEVELOPMENT* 3 (1977).

130. See, e.g., *Town of Paradise Valley v. Gulf Leisure Corp.*, 17 Ariz. App. 600, 557 P.2d 532 (1976); *Avco Community Dev., Inc. v. South Coastal Regional Comm'n*, 17 Cal. 3d 785, 132 Cal. Rptr. 386, 553 P.2d 546 (1976); *SIEMON*, *supra* note 6, at 73-75 (synopsis of *Hollywood, Inc. v. Broward County*, "Flamingo West" vesting case); see also *Cunningham & Kremer*, *supra* note 9, at 627-28.

131. See generally Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955); Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899 (1976).

132. See, e.g., *Town of Paradise Valley v. Gulf Leisure Corp.* 27 Ariz. App. 600, 557 P.2d 532 (1976); *Board of County Comm'rs v. Lutz*, 314 So. 2d 815, (Fla. Dist. Ct. App. 1975); *Cheltenham Township appeal*, 413 Pa. 379, 196 A.2d 363 (1964); see also *Delaney & Kominers*, *supra* note 11, at 241-42.

133. See, e.g., *Avco Community Developers, Inc. v. South Coastal Regional Comm'n*, 17 Cal. 3d 785, 132 Cal. Rptr. 386, 553 P.2d 546 (1976); *DeKalb County v. Chapel Hill Inc.*, 232 Ga. 238, 205 S.E.2d 864 (1974); see also *SIEMON*, *supra* note 6, at 19-24.

134. See, e.g., *Life of the Land, Inc. v. City Council*, 61 Haw. 390, 606 P.2d 866 (1980); *Rockshire Civic Assn, Inc. v. Mayor of Rockville*, 32 Md. App. 22, 358 A.2d 570 (Md. Ct. Spec. App. 1976); *Henry & Murphy, Inc. v. Town of Allentown*, 120 N.H. 910, 424 A.2d 1132 (1980); see also *Developers' Rights*, *supra* note 19, at 497-508.

smaller, less complex projects.¹³⁵ The Supreme Courts of the States of Georgia, Pennsylvania, and Maryland have determined that the realities of large, mixed-use developments mandate the use of "entire project" vesting standards.¹³⁶ In one well-publicized case, however, the California Supreme Court found that the developer of a 5,234-acre mixed-use project who had expended years and millions of dollars in obtaining a PUD rezoning and a host of preliminary approvals possessed no vested development rights to construct his planned project and could obtain vested rights only on a unit-by-unit basis upon acquisition of building permits.¹³⁷ As discussed below, the blatant unfairness of this decision led directly to a statewide legislative response.

VI. VESTED RIGHTS IN VIRGINIA

The Commonwealth of Virginia possesses a proud history of supporting private property rights against governmental interference.¹³⁸ The Virginia Constitution exceeds the United States Constitution in protecting property rights. The Virginia Constitution prohibits the damaging of private property by government without the payment of just compensation¹³⁹ Moreover, the Virginia Supreme Court, perhaps in recognition of the propensity of local governing bodies to derogate private property rights in satisfaction of public concerns, routinely applies "Dillon's Rule" of strict construction toward the exercise of local governmental power.¹⁴⁰

In Virginia, the test for vested development rights may be found in two Virginia Supreme Court Opinions handed down on the same day in 1972. The two cases, *Board of Supervisors of Fairfax County v. Medical Structures, Inc.*¹⁴¹ and *Board of Supervisors of Fairfax County v. Cities Service Oil*

135. See generally URBAN LAND INSTITUTE, *LARGE-SCALE DEVELOPMENT 3* (1977); Heyman, *Planned Unit Development: The Bargaining Process and Environmental Impact Statement* in *FRONTIERS OF PLANNED UNIT DEVELOPMENT 154* (1973); Delaney & Kominers, *supra* note 11, at 241-48, *Developers' Rights, supra* note 19, at 497-508.

136. See *DeKalb County v. Chapel Hill, Inc.*, 232 Ga. 238, 205 S.E.2d 864 (1974); *Cheltenham Township Appeal*, 413 Pa. 379, 196 A.2d 363 (1964); *Rockshire Civic Ass'n, Inc. v. Mayor of Rockville*, 32 Md. App. 22, 358 A.2d 570 (1976); see also *Delaney & Kominers, supra* note 11, at 241-48.

137. See *Avco Community Devs., Inc. v. South Coastal Regional Comm'n*, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976). See generally *SIEMON, supra* note 6, at 20-21; *Cunningham & Kremer, supra* note 9, at 704-08.

138. See generally *V. DABNEY, VIRGINIA: THE NEW DOMINION* (1983); *A.E. HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA* (1974); *T.R. MORRIS, THE VIRGINIA SUPREME COURT: AN INSTITUTIONAL AND POLITICAL ANALYSIS* (1975).

139. See VA. CONST., art. 1, § 11.

140. See, e.g., *Board of Supervisors v. Horne*, 216 Va. 113, 215 S.E.2d 453 (1975); *Gordon v. Board of Supervisors*, 207 Va. 827, 153 S.E.2d 270 (1967). "Dillon's Rule" provides that municipal corporations have only those powers expressly granted, those necessarily or fairly implied therefrom, and those that are essential and indispensable. *City of Richmond v. County Board*, 199 Va. 679, 684-85, 101 S.E.2d 641, 645 (1958). By corollary, "Dillon's Rule" also applies to county boards of supervisors. *Horne*, 216 Va. at 117, 215 S.E.2d at 455.

141. 213 Va. 355, 192 S.E.2d 799 (1972).

Company,¹⁴² both involved Fairfax County landowners who filed bona fide site plans to establish permissible land uses pursuant to previously issued special use permits. The Fairfax County Board of Supervisors, however, voted to downzone both landowners' properties subsequent to and probably as a result of the two site plan filings. In articulating the Virginia rule, Chief Justice Snead writing for a unanimous court stated:

[W]here, as here, a special use permit has been granted under a zoning classification, a bona fide site plan has thereafter been filed and diligently pursued, and substantial expense has been incurred in good faith before a change in zoning, the permittee then has a vested right to the land use described in the use permit and he cannot be deprived of such use by subsequent legislation.¹⁴³

The fact that the landowners in *Medical Structures* and *Cities Service* sought to establish permissible land uses pursuant to special use permits rather than permitted land use allowed by-right has led to some difficulty in applying the Virginia rule. Local governments, seeking to restrict the scope of the Virginia rule, have argued that the governmental act requirement of both vested rights doctrines is not satisfied in the case of landowners seeking permitted by-right land uses until the site plan approval.¹⁴⁴ In one particular case, which demonstrates the lengths to which government entities will reach in order to defeat vested rights, a local government argued that site plan approval does not suffice as a governmental act until all potential appeals from that approval are decided.¹⁴⁵

As previously discussed, a counter intuitive situation appears to exist if permissible land uses, which are deemed "sometimes appropriate" and allowed only upon issuance of a special use permit, are allowed vested status upon site plan filing while permitted land uses, which are deemed "always appropriate" and allowed by-right under existing zoning, are not allowed vested status upon site filing.¹⁴⁶ While local governments may admit that their arguments appear counter intuitive, they stress in support of their arguments

142. 213 Va. 359, 193 S.E.2d 1 (1972).

143. *Board of Supervisors v. Medical Structures, Inc.*, 213 Va. 355, 358, 192 S.E.2d 799, 801 (1972); *Board of Supervisors v. Cities Serv. Oil Co.*, 213 Va. 359, 360, 193 S.E.2d 1, 3 (1972).

144. See Memorandum in Support of Defendants' Motion For Partial Summary Judgment at 50-60, *Potomac Greens Assocs. Partnership v. City of Alexandria*, Civil Action No. 87-831-A, (East. Dist. Va., Alex. Div. Oct. 29, 1987). In *Potomac Greens* the City of Alexandria argued that a complete bona fide site plan submission for a permitted by-right development was not vested under the *Medical Structures-Cities Service* rule because a special permit approval or like governmental use approval had never been granted. *Id.*

145. See Defendant's Motion for Partial Summary Judgment at 16, 23, *Dominion Lands, Inc. v. City of Alexandria*, Chancery No. 18,106, (Alex. Circ. Ct. Jan. 5, 1988). In *Dominion Lands*, the City of Alexandria argued that an approved preliminary site plan was not vested under the *Medical Structure-Cities Service* rule because an appeal was filed from the site plan approval and, during pendency of the appeal, the subject property was lawfully downzoned. *Id.*

146. See *supra* notes 85-91 and accompanying text.

that this counter intuitive situation is mandated by a body of Virginia case law holding that a landowner has no vested rights to the continued existence of applicable zoning.¹⁴⁷

We believe that Virginia law will not countenance this counter intuitive situation. As recognized by the Virginia Supreme Court in *Medical Structures*, "the site plan has virtually replaced the building permit as the most vital document in the development process"¹⁴⁸ and "[t]he filing of such a plan creates a monument to the developer's intention. . . ."¹⁴⁹ The critical meaning of these passages suggests to us that a filed site plan for a permitted use is no different from a filed site plan for a permissible use and that both uses deserve the same degree of vesting protection upon bona fide site plan filing.

Notwithstanding the foregoing analysis, we believe that a Virginia landowner seeking a permitted by-right use will stand a better chance of achieving vested status upon the filing of a bona fide site plan if his property (1) was recently rezoned on an applicant-sponsored zoning map amendment,¹⁵⁰ (2) is subject to proffered conditions accepted pursuant to a conditional rezoning,¹⁵¹ or (3) possesses a PUD zoning designation legislated concurrent with approval of a development plan.¹⁵²

One Virginia circuit court has had the opportunity to consider the case of a landowner who sought vested rights to a permitted by-right use pursuant to a bona fide site plan filing. The court determined that vested rights did not exist because the landowner, by her own admission, filed the site plan two days before her property was downzoned with full knowledge of the pending downzoning, for the sole purpose of obtaining vested rights, and not for proceeding forward with actual site development.¹⁵³ The circuit court premised its holding solely upon the landowner's lack of good faith and did not address whether or not a site plan filing for a permitted by-right use could service as a basis for vesting under the *Medical Structures-Cities Service* rule.¹⁵⁴

VII. EPILOGUE—ON CLARIFYING VESTED RIGHTS

As may be self-evident from the proceeding discussions, the law of vested rights is both unclear and uncertain. Both landowners and governments are ill-served by the current uncertainty in the law and often are forced to make business and policy decisions involving land use without knowing what the

147. See, e.g., *Town of Vienna v. Kohler*, 218 Va. 966, 244 S.E.2d 542 (1978); *Cole v. City Council*, 218 Va. 827, 241 S.E.2d 765 (1978); *Nusbaum v. City of Norfolk*, 151 Va. 801, 145 S.E. 257 (1928).

148. *Medical Structures*, 213 Va. at 358, 192 S.E.2d at 801.

149. *Id.* at 358, 192 S.E.2d at 801.

150. See *supra* notes 67-71 and accompanying text.

151. See *supra* notes 69-71 and accompanying text.

152. See *supra* notes 69-71 and accompanying text.

153. See *Costello v. Board of Supervisors*, Chancery Mo. 83-62 (Fauquier County Circuit Court, June 22, 1983); see also *supra* note 112.

154. See *supra* note 112 (discussing *Costello* holding).

ultimate effect these decisions will be.¹⁵⁵ To provide clarity and certainty to the law, state governments should enact legislation expressly providing when and how vested rights arise.¹⁵⁶ One noted Virginia practitioner suggested:

Such legislation should take the form of a statute providing that vested rights to the uses of land shall not be abridged and a statute providing that rights in land uses shall vest upon the filing or applications for approval of a subdivision plan, a site plan, or a request for a building permit.¹⁵⁷

In Virginia, vested rights to land uses already are protected from impairment by a statute that regrettably does not specify when and how vested rights arise.¹⁵⁸ A simple, legislative cure to the vested rights quandary in Virginia would involve amending this statute to codify the *Medical Structures-Cities Service* rule.¹⁵⁹ Until such legislation is enacted, landowners seeking to protect their property rights should be observant of all proposed zoning

155. See, e.g., Chesapeake Bay Protection Act, VA. CODE ANN. § 10.1-2100-10.1-2115 (1988). During its 1988 term, the Virginia General Assembly enacted a new law empowering a commission of Virginia citizens to promulgate regulations to protect the Chesapeake Bay. *Id.* at § 10.1-2102. Because this new act mandates that no vested rights may be impacted by the forthcoming regulations, the commission will be unable to gauge the net effect of its new regulations due an inability to determine which tidewater lands hold vested development rights. See *id.* at § 10.1-2115 (protecting vested rights).

156. See SIEMON, *supra* note 6, at 70-86 (discussing legislative remedies); Campanella, Elliott & Merriam, *New Vested Rights Legislation: States Seek to Steady a Shaky Judicial Doctrine*, 11 URB. L. 81 (1988); Rhodes, *supra* note 31, at 20-23; Witt, *supra* note 11, at 327-29; *Developers' Rights*, *supra* note 19, at 508-11; see, e.g., CAL. GOV'T CODE §§ 65,684-65,864.5 (West 1988) (allowing development agreements); COLO. REV. STAT. §§ 24-68-101 through 24-68-110 (1988) (vested rights law); MASS. GEN. LAWS ch. 40A, § 6 (1988) (vested rights law); N.J. STAT. ANN. §40:55D-49 (vested rights law); 1988 WASH. LAWS ch. 104 (vested rights law); see also MODEL LAND DEV. CODE §2-309 (1976) (model vested rights law).

157. Witt, *supra* note 11, at 329.

158. See VA. CODE ANN §15.1-491 (1989).

159. For example, Section 15.1-492 could be amended, as follows, to add the following italicized sentence:

Section 15.1-492. *VESTED RIGHTS NOT IMPAIRED: NONCONFORMING USES.*

Nothing in this article shall be construed to authorize the impairment of any vested right, except that a zoning ordinance may provide that land, buildings, and structures and the uses thereof which do not conform to the zoning prescribed for the district in which they are situated may be continued only so long as the then existing or a more restricted use continues and such use is not discontinued for more than two years, and so long as the buildings or structures are maintained in their then structural condition; and that the uses of such building or structures shall conform to such regulations whenever they are enlarged, extended, reconstructed or structurally altered and may further provide that no "nonconforming" building or structure may be moved on the same lot or to any other lot which is not properly zoned to permit such "nonconforming" use. *An owner, contract purchaser, or optionee of property shall be deemed to have acquired vested rights in the land uses and development densities allowed under the zoning classification applicable to such property when such owner, contract purchaser, optionee, or agent therefor has in good faith filed or caused to be filed with the county or municipality a site plan, plan of development, or plat of subdivision proposing a use allowed under such classification.*

ordinance changes and be honest and vigilant in securing land use approvals. As two other land use lawyers noted in a 1979 article, landowners should abide by the "general rule of thumb that in the development process, 'he who rests less, vests best.'"¹⁶⁰

160. See Delaney & Kominers, *supra* note 11, at 248.

