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WHEN REAL PROPERTY RIGHTS VEST IN CALIFORNIA: WHAT HAPPENS WHEN A PLAINTIFF HAS NOT SECURED REQUIRED GOVERNMENTAL APPROVALS?

I. INTRODUCTION

The conflict between individual rights and the need for regulation and control by government is one of the most pervasive legal issues in our country's history.¹ On one side of the conflict are the individual rights and freedoms guaranteed by the Constitution and our democratic government. On the other is the government's need to retain its ability to govern and control society through use of the police power. The late Justice Lennon of the California Supreme Court summarized this conflict well:

The police power of a state is an indispensable prerogative of sovereignty and one that is not to be lightly limited. Indeed, even though at times its operation may seem harsh, the imperative necessity for its existence precludes any limitation upon its exercise save that it be not unreasonably and arbitrarily invoked and applied. It is not, however, illimitable and the marking and measuring of the extent of its exercise and application is determined by a consideration of the question of whether or not any invocation of that power . . . is reasonably necessary to promote the public health, safety, morals or general welfare of the people. . . .²

A good example of this ongoing dispute arises when a property owner's expectations for development or use of existing improvements conflict with the government's concerns of ensuring the pub-

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1. *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (rights of ownership in real property versus governmental interest in preserving open space and the quality of life in the community); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) (rights of ownership in real property versus government's interest in preserving historical landmarks); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (state legislation interfering with existing contracts and property rights requires compensation for resulting diminution in value); *Lochner v. New York*, 198 U.S. 45 (1905) (right to contract versus state's interest in protecting the population through use of labor laws).

2. *Miller v. Board of Pub. Works of the City of Los Angeles*, 195 Cal. 477, 484, 234 P. 381, 383 (1925).

lic's health, safety and welfare through the use of zoning and other land use controls. This issue frequently arises when a land development project is planned or constructed, and a new regulation interferes with or prevents completion of the project. New regulations affecting existing uses of land present the same dilemma.

In these situations, courts must determine whether a vested right to develop property or to continue a nonconforming use³ of property can be established. Vested rights are defined as "[r]ights which have so completely and definitely accrued to . . . a person that they are not subject to be defeated or canceled [sic] 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. . . ."⁴ If a plaintiff constructs improvements in good faith reliance on governmental authorization, a vested right to complete the improvements may exist. Once a vested right is created, the government may not prevent completion of planned improvements through changes in zoning laws.⁵ Likewise, if a plaintiff secures a vested right to continue a nonconforming use of existing improvements, the government may not prohibit the present use of the property.⁶

There must be overt governmental action to establish a vested right. The rule in both California and other jurisdictions has long been that if a building permit issues, the requirement of overt governmental action is fulfilled. If, in reliance on the issued building permit, a plaintiff performs substantial work and incurs substantial liabilities, a vested right accrues to his benefit.⁷ This rule parallels the common law prerequisites for establishing a vested right.⁸

3. BLACK'S LAW DICTIONARY 948 (5th ed. 1979). A "nonconforming use" is defined as:

A structure the size, dimension or location of which was lawful prior to the adoption, revision or amendment of a zoning ordinance, but which fails to conform to the requirements of the zoning district in which it is located by reasons of such adoption, revision or amendment. A use which does not comply with present zoning provisions but which existed lawfully and was created in good faith prior to the enactment of the zoning provision.

Id.

4. *Id.* at 1402.

5. *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).

6. *Halaco Eng'g Co. v. South Central Coast Regional Comm'n*, 42 Cal. 3d 52, 720 P.2d 15, 227 Cal. Rptr. 667 (1986).

7. *Avco Community Dev.*, 17 Cal. 3d at 791, 553 P.2d at 550, 132 Cal. Rptr. at 390 (citing *Dobbins v. City of Los Angeles*, 195 U.S. 223 (1904)); *Trans-Oceanic Oil Corp. v. City of Santa Barbara*, 85 Cal. App. 2d 776, 194 P.2d 148 (1948); *Shamrock Dev. Co. v. City of Concord*, 656 F.2d 1380 (9th Cir. 1981); *City of Hollywood v. Hollywood Beach Hotel Co.*, 283 So. 2d 867, 869 (Fla. Dist. Ct. App. 1973), *aff'd in part, rev'd in part*, 329 So. 2d 10

California courts have articulated that issuance of a building permit satisfies the governmental act requirement.⁹ However, in a renowned vested rights decision, the California Supreme Court failed to address the issue of whether a building permit is actually mandatory. In *Avco Community Developers Inc. v. South Central Coast Regional Commission*,¹⁰ the court suggested that a permit which affords essentially the same specificity and definition to a project as a building permit may be the basis of a vested rights claim.¹¹ Faced with the actual facts of *Avco*, however, the court denied the plaintiff a vested right to construct improvements because the approvals inadequately defined the scope of the project.¹²

Recently, the California Supreme Court implicitly extended the rationale of *Avco* by upholding a trial court decision granting a vested right to continue nonconforming uses of property. In *Halaco Engineering Co. v. South Central Coast Regional Commission*,¹³ the court recognized a vested right to continue nonconforming uses of existing improvements even though permits received by the plaintiff did not specifically authorize the judicially protected operations. Although the governmental approvals did not specifically define these nonconforming uses, the court exempted some of the plant's operations from further governmental regulation.¹⁴ Unfortunately, the opinion fails to describe what governmental actions, other than issuance of a building permit, enable plaintiffs to assert vested rights claims.

This comment examines when courts recognize the existence of

(1976); *Reichenbach v. Windward at Southampton*, 80 Misc. 2d 1031, 364 N.Y.S.2d 283, 291-93 (Sup. Ct. 1976), *aff'd*, 372 N.Y.S.2d 985 (A.D. 1975). See also *Delaney & Kominers, He Who Rests Less Vests Best: Acquisition of Vested Rights in Land Development*, 23 St. Louis U.L.J. 220 (1979).

8. *Avco Community Dev.*, 17 Cal. 3d at 791-93, 553 P.2d at 550-51, 132 Cal. Rptr. at 390-91.

9. See, e.g., *id.* at 785, 553 P.2d at 546, 132 Cal. Rptr. at 386; *Spindler Realty Corp. v. Monning*, 243 Cal. App. 2d 255, 53 Cal. Rptr. 7, *cert. denied*, 385 U.S. 975 (1966); *Anderson v. City Council of the City of Pleasant Hill*, 229 Cal. App. 2d 79, 40 Cal. Rptr. 41 (1964); *Wheat v. Barrett*, 210 Cal. 193, 290 P. 1033 (1930); *Brougher v. Board of Pub. Works of the City and County of San Francisco*, 205 Cal. 426, 271 P. 487 (1928); *Pelham View Apartments Inc. v. Switzer*, 130 Misc. 545, 224 N.Y.S. 56 (1927); *Brett v. Building Comm'r of Brookline*, 250 Mass. 73, 145 N.E. 269 (1924).

10. 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976).

11. *Id.* at 793-94, 553 P.2d at 551, 132 Cal. Rptr. at 391.

12. *Id.* The court never reached this issue because none of the permits secured by *Avco Community Developers* related to identifiable buildings.

13. 42 Cal. 3d 52, 720 P.2d 15, 227 Cal. Rptr. 667 (1986).

14. *Halaco*, 42 Cal. 3d at 60, 720 P.2d at 19, 227 Cal. Rptr. at 670.

governmental action if required approvals have not been secured by a plaintiff. Section II examines the law of vested rights by outlining the development of both the common law and the current laws governing vested rights. Historical and contemporary California case law is discussed in this section. Modern rules governing vested rights are then delineated, and the factors which courts currently examine in determining whether a vested right exists are discussed. Section III analyzes the current status of the law of vested rights in the area of real property, emphasizing that the government action requirement is inadequately defined. Section IV proposes that vested rights cases be adjudicated by examining whether a plaintiff entertained an objectively reasonable, good-faith belief that development or use of real property could continue, rather than by examining only the extent of the government's actions.

II. BACKGROUND

A. *Development of Common Law Rules*

Recognition of a vested right to use or construct improvements under the common law requires that a property owner perform substantial work and incur substantial liabilities in good faith reliance on a valid building permit.¹⁵ When modern rules governing vested rights are discussed, it will be demonstrated that this rule evolved from two common law doctrines: equitable estoppel and constitutional protection of property.¹⁶

One of the first vested rights cases established the requirement that a plaintiff rely in good faith upon governmental authorization when asserting a vested rights claim under the common law. In *Dainese v. Cooke*,¹⁷ the plaintiff obtained a permit to construct improvements and proceeded with substantial construction.¹⁸ The city's building inspector then concluded that the buildings did not conform with municipal regulations. The municipality argued that the materials used in construction were inferior, that the construction was thus in violation of building regulations, and that the buildings were a danger to the community.¹⁹ The United States Supreme Court determined that the city's assertions were not supported by a preponder-

15. See *supra* notes 7-9 and accompanying text.

16. See *infra* notes 43-61 and accompanying text.

17. 91 U.S. 580 (1875).

18. At the time of the revocation of the permit, the foundations for the buildings and the walls had been constructed.

19. *Dainese v. Cooke*, 91 U.S. 580, 580-83 (1875).

ance of the evidence, and estopped the city from interfering with completion of the project.²⁰

Likewise, in one of the earliest cases finding a vested "private property right,"²¹ the court relied heavily on the fact that development began in reliance on a building permit. In *City of Buffalo v. Chadeayne*,²² the plaintiff entered into contracts for materials and proceeded with construction, relying upon a municipal resolution permitting him to construct seven homes. The plaintiff was then given oral notice of a city council decision to revoke the resolution granting him the right to initiate construction. When several of the homes were near completion, a written copy of the resolution was served on the plaintiff. On appeal the court recognized that a "private property right [to develop in accord with the resolution] had . . . vested . . . prior to the rescission of the resolution" because the plaintiff incurred considerable liabilities in reliance on permission originally given by the city.²³

In a similar common law case, the court focused on the requirement that substantial work be completed, and that substantial liabilities be incurred before a plaintiff can successfully assert a vested rights claim. In *Brett v. Building Commissioner of Brookline*,²⁴ the court addressed the issue of whether a building permit conferred a vested right to develop property if the proposed improvements conflicted with a later enacted zoning ordinance.²⁵ The permit's later cancellation by the government was upheld even though the excavation and the initial engineering for the building were completed. By the time the permit was rescinded, progress towards completion was minimal.²⁶ Therefore, the court reasoned that a vested right was not present because the construction did not amount to an "existing structure" within the meaning of a Massachusetts statute.²⁷ These

20. *Id.* at 584.

21. *City of Buffalo v. Chadeayne*, 134 N.Y. 163, 165, 31 N.E. 443, 444 (1892).

22. *Id.*

23. *Id.* at 165, 31 N.E. at 444.

24. 250 Mass. 73, 145 N.E. 269 (1924).

25. Cunningham, *Vested Rights, Estoppel, and the Land Development Process*, 29 HASTINGS L.J. 625, 680 (1978). The authors cite the New York case of *Switzer* as another case which California courts relied on extensively in formulating case law. 130 Misc. 545, 224 N.Y.S. 56 (1927). In *Switzer* a revocation of a permit was also held to be invalid under the general common law rule of vested rights. *Id.*

26. *Brett*, 250 Mass. at 80, 145 N.E. at 270-72.

27. *Id.* at 81, 145 N.E. at 271-72. Before deciding the work on the new structure was insufficient to establish a vested right to develop, the court upheld the government's right to exercise its police power in a reasonable manner. The court determined that the reasonable exercise of the police power for public health or safety reasons extended to the ownership of

cases delineate the factors courts consider when a vested rights claim is litigated, and exemplify the gradual development of the common law rule requiring substantial expenditures in good faith reliance on governmental actions.

B. *Development of Vested Rights Rules in California*

1. *Early California Cases*

Several California vested rights cases partially relied on these Massachusetts and New York rulings.²⁸ The following cases are representative of the evolution of vested rights rules in California.

One of the earliest California cases addressing a vested rights issue emphasized the requirement that there be governmental action before a plaintiff may assert a cause of action. *Brougher v. Board of Public Works of the City and County of San Francisco*²⁹ involved a plaintiff's request for a writ of mandamus requiring the defendant to issue a building permit pursuant to a proper application.³⁰ After the plaintiff filed for a building permit, a height limitation was imposed in the area where the plaintiff's development was planned, making the plaintiff's construction scheme nonconforming under the terms of the new ordinance.³¹ Because the permit and plans were not approved by the proper governmental agencies, the court refused to recognize governmental action or a vested right to build.³²

California courts also considered the extent to which a plaintiff was required to proceed with development before acquiring a vested right to finalize a project. In *Wheat v. Barrett*,³³ the plaintiff chal-

land and upheld the state's right to regulate uses of land through use of the police power in the form of zoning regulations. *Id.* at 77, 145 N.E. at 270-71. *See also* Commonwealth v. Badger, 243 Mass. 137, 137 N.E. 261 (1922).

28. *See* Cunningham, *supra* note 25, at 680.

29. 205 Cal. 426, 271 P. 487 (1928).

30. *Brougher*, 205 Cal. at 428-29, 271 P. at 488.

31. *Id.* at 430, 271 P. at 489. A similar factual situation was presented in *Miller*. 195 Cal. 477, 234 P. 381 (1925). In this case, a valid building permit issued from the Board of Public Works. After the plaintiff learned of a planned ordinance which would effect his right to construct the proposed building, the Board of Public Works revoked the original permit and denied the plaintiff's subsequent application based on the fact that the new ordinance was then in effect. However, the court never reached a vested rights issue because the plaintiff failed to argue that the Board lacked the power to revoke a previously issued permit, or that the Board could not retroactively nullify a previously issued permit. *Id.* at 481-82, 234 P. at 382.

32. *Brougher*, 205 Cal. at 432-33, 271 P. at 491. *See also* Commonwealth v. Atlas, 244 Mass. 78, 138 N.E. 243 (1923); *General Baking Co. v. Board of Commr's of Boston*, 242 Mass. 194, 197, 136 N.E. 245 (1922) (once a permit is acted upon by a property owner it cannot be revoked in the absence of a special power or a change in legislation).

33. 210 Cal. 193, 290 P. 1033 (1930).

lenged the validity of a zoning ordinance, and received a writ at trial stopping city officials from further interference with his development. After entering into contracts for construction and excavating the land, an appellate court stayed the writ, and a new ordinance was passed disallowing completion of the project.³⁴ Since the amount of work performed was deemed inconsequential in proportion to the total cost of the project, the court reasoned that substantial liabilities were not incurred and refused to confer a vested right to complete development.³⁵

The California Supreme Court also examined the issue of whether present land uses should be preserved if new zoning ordinances result in transformation of improvements into nonconforming uses.³⁶ In *Jones v. City of Los Angeles*,³⁷ the city passed an ordinance prohibiting the operation of sanitariums in certain residential zones, and attempted to enjoin the operation of several sanitariums on the grounds that they represented an illegal nonconforming use. The court recognized zoning ordinances as a justifiable exercise of the police power,³⁸ upholding the ordinance as valid and enforceable against future uses. However, the court refused to enforce the ordinance retroactively. Applying equitable estoppel, the court weighed the public benefit of advancing the general welfare against the private interest of preserving an existing, non-nuisance use of the property.³⁹ Because the ordinance only promoted the general welfare and did not involve a health or safety hazard, the court circumscribed the police power.⁴⁰ In effect, it granted a vested right to continue nonconforming uses of property. However, the court failed to set any guidelines to determine when a vested right in a nonconforming use might be recognized.⁴¹

These early California cases emphasize that the government

34. *Id.* at 195, 290 P. at 1035. The ordinance restricted the construction of store buildings to very limited districts, and defendant's proposed structure did not fall within one of these districts.

35. *Id.* at 197, 290 P. at 1035.

36. Cunningham, *supra* note 25, at 683.

37. 211 Cal. 304, 295 P. 14 (1930).

38. *Id.* at 307, 295 P. at 16.

39. *Id.* at 314-15, 295 P. at 19.

40. *Id.* at 315, 295 P. at 19. Police power may be exercised absolutely to abate a nuisance which threatens public health or safety, but the court recognized that the police power, in the form of zoning ordinances, is limited to ordinances which are reasonable in object and not arbitrary in operation. Since the sanitariums posed no health or safety threat, the government's zoning powers were limited. For a development and discussion of constitutional issues concerning limitations on the police power, see *Mahon*, 260 U.S. 393 (1922).

41. *Jones v. City of Los Angeles*, 211 Cal. 304, 295 P. 14 (1930).

must act in a manner sufficient to justify detrimental reliance by a plaintiff. From the above cases, it is clear that without an act or omission by the government, a plaintiff's vested rights claim will almost certainly fail. These cases also exemplify the evolution of California's vested rights laws from the concept of equitable estoppel.⁴² The requirement that the courts weigh and balance the private harm resulting from a new regulation against the public benefit is also demonstrated.

2. *Modern Rules Governing Vested Rights*

Modern interpretations of earlier case law have resulted in courts applying one of two recognized rules when a vested rights dispute is litigated: equitable estoppel or vested rights.⁴³

Equitable estoppel requires that a plaintiff act in good faith on some act or omission of the government, substantially changing his or her position, or incurring large obligations or expenses in reliance on the government's representations.⁴⁴ This standard recognizes that it is inequitable to disallow proposed uses of property when the owner detrimentally relies on the government's actions.⁴⁵ The theory also balances the public interest promoted by the regulation against the injuries sustained by the property owner.⁴⁶ Thus, if all the factors of equitable estoppel are present, courts may determine that public concerns outweigh the private detriment, and retroactively enforce a zoning ordinance.

In contrast, the concept of vested rights is derived from both common law and constitutional law principles.⁴⁷ The vested rights concept is based on essentially identical standards as equitable estoppel.⁴⁸ However, under a vested rights theory, courts usually do not balance the public and private interests involved.⁴⁹

42. *Billings v. California Coastal Comm'n*, 103 Cal. App. 3d 729, 163 Cal. Rptr. 288 (1980) (California's vested rights principles are a manifestation of equitable estoppel, not a common law rule nor a constitutional principle).

43. SIMON, LARSON & PORTER, *VESTED RIGHTS: BALANCING PUBLIC AND PRIVATE DEVELOPMENT EXPECTATIONS* 13 (1982).

44. Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes*, URBAN L. ANN. 63, 66 (1971).

45. SIMON, LARSON & PORTER, *supra* note 43, at 13.

46. *Id.* See also *Shamrock*, 656 F.2d 1380 (9th Cir. 1981); *City of Hollywood*, 283 So. 2d 867, *aff'd in part, rev'd in part*, 329 So. 2d 10 (Fla. Dist. Ct. App. 1976).

47. Heeter, *supra* note 44, at 64-65. See also *Department of Transp. v. P.S.C. Resources, Inc.*, 175 N.J. Super. 447, 419 A.2d 1151 (1980); *Billings*, 103 Cal. App. 3d 729, 163 Cal. Rptr. 288 (1980) (discussing factors examined in determining whether a vested right exists).

48. SIMON, LARSON & PORTER, *supra* note 43, at 13; Heeter, *supra* note 44, at 64-65.

49. SIMON, LARSON & PORTER, *supra* note 43, at 13; Heeter, *supra* note 44, at 64-65.

Although there are two distinct doctrines governing vested rights, courts in both California and other jurisdictions have merged them.⁵⁰ Often, the same result is achieved when applying these theories to identical fact patterns.⁵¹ The merging of these two theories resulted in the examination of four factors when determining whether a vested right is formed.⁵²

The first factor is the requirement of governmental action authorizing a course of activity or development.⁵³ This action usually takes the form of a permit, although a permit is not necessary in all situations.⁵⁴ For example, if a plaintiff acquires a building permit, the governmental act requirement is deemed fulfilled.⁵⁵

The second and third elements are good faith and reliance on governmental action.⁵⁶ The element of good faith is satisfied if a plaintiff commences construction in accord with governmental approvals.⁵⁷ Reliance is evidenced by a plaintiff incurring substantial expenditures and completing substantial work in development or continuing use of property.⁵⁸

Finally, in some situations, courts weigh and balance the public interest against private interests to determine whether fundamental unfairness would result if government actions destroy a significant vested right.⁵⁹

While courts attach importance to the governmental action requirement,⁶⁰ there is often confusion surrounding it. Therefore, this comment discusses various interpretations of this factor.⁶¹

50. SIEMON, LARSON & PORTER, *supra* note 43, at 13; Heeter, *supra* note 44, at 64-65.

51. Heeter, *supra* note 44, at 65.

52. SIEMON, LARSON & PORTER, *supra* note 43, at 13.

53. SIEMON, LARSON & PORTER, *supra* note 43, at 13.

54. See cases collected under 49 A.L.R. 3d, 13 (1973). See also *Avco Community Dev.*, 17 Cal. 3d at 785, 553 P.2d at 546, 132 Cal. Rptr. at 386.

55. *Avco Community Dev.*, 17 Cal. 3d at 785, 553 P.2d at 546, 132 Cal. Rptr. at 386.

56. SIEMON, LARSON & PORTER, *supra* note 43, at 13; Heeter, *supra* note 44, at 66-67.

57. *Switzer*, 130 Misc. at 545, 224 N.Y.S. at 56.

58. *Id.*; *Halaco*, 42 Cal. 3d at 52, 720 P.2d at 15, 227 Cal. Rptr. at 667.

59. *Hilton Hotels Corp. v. District of Columbia Bd. of Zoning Adjustment*, 435 A.2d 1062, 1065 (D.C. 1981); *Goto v. District of Columbia Bd. of Zoning Adjustment*, 423 A.2d 917, 925 n.15 (D.C. 1980).

60. This requirement is important because it must first be established before a vested rights argument will even be considered by the courts. SIEMON, LARSON & PORTER, *supra* note 43, at 13-14.

61. See generally, SIEMON, LARSON & PORTER, *supra* note 43, at 13-14, for a complete discussion and analysis of the other factors courts examine in analyzing whether a vested right has been established.

3. *The Governmental Action Requirement*

The requirement of governmental action is the most unsettled of the aforementioned four factors because courts have failed to develop a succinct definition of actions which will satisfy this element. Without the aid of such a crucial definition, plaintiffs are unable to determine whether this factor has been met.⁶² Additionally, construction projects often mandate an array of governmental approvals,⁶³ and require constant contact with governmental officials at both a formal and informal level. These factors complicate the issue of whether the government has acted in a manner sufficient to justify detrimental reliance by the plaintiff.⁶⁴ Thus, procuring approvals sufficient to constitute governmental action becomes an issue of the utmost importance to plaintiffs pursuing vested rights litigation.

This factor requires approval of a particular use of real property through some form of official action by a governmental entity. Courts in most jurisdictions, including California, use issuance of a building permit as the benchmark to determine whether there is governmental action.⁶⁵ However, if a building permit or other required permit has not been issued, the outcome is more problematic. Decisions regarding vested rights are inconsistent if a plaintiff has not secured required approvals. California's courts have not resolved this issue.⁶⁶

62. SIMON, LARSON & PORTER, *supra* note 43, at 29.

63. SIMON, LARSON & PORTER, *supra* note 43, at 29.

64. SIMON, LARSON & PORTER, *supra* note 43, at 29.

65. *Avco Community Dev.*, 17 Cal. 3d at 785, 553 P.2d at 546, 132 Cal. Rptr. at 386; *Halaco*, 42 Cal. 3d 52, 720 P.2d 15, 227 Cal. Rptr. 667 (1986); *Spindler*, 243 Cal. App. 2d 255, 53 Cal. Rptr. 7, *cert. denied*, 385 U.S. 975 (1966); *Anderson*, 229 Cal. App. 2d 79, 40 Cal. Rptr. 41 (1964); *Town of Paradise Valley v. Gulf Leisure Corp.*, 27 Ariz. App. 600, 557 P.2d 532 (1976); *Raley v. California Tahoe Regional Planning Agency*, 68 Cal. App. 3d 965, 137 Cal. Rptr. 699 (1977); *Dainese*, 91 U.S. 580 (1875). It should be noted that once a vested right to develop is established, expiration of a building permit because of a decision to delay completion of a project will not necessarily result in loss of a vested rights claim to build in accordance with issued permits. *Pardee Const. Co. v. California Coastal Comm'n*, 95 Cal. App. 3d 471, 157 Cal. Rptr. 184 (1979).

66. See, e.g., *Halaco*, 42 Cal. 3d at 52, 720 P.2d at 15, 227 Cal. Rptr. at 667; *Avco Community Dev.*, 17 Cal. 3d at 785, 553 P.2d at 546, 132 Cal. Rptr. at 386.

4. Contemporary Court Decisions

a. *Avco Community Developers Inc. v. South Coast Regional Commission*

The California case which exemplifies the general rule that a building permit is required to satisfy the governmental action element is *Avco*.⁶⁷ In this case, Orange County rezoned 5,234 acres as a planned community development⁶⁸ pursuant to an application by Avco. The county then approved a final subdivision map and issued Avco a rough grading permit. After Avco graded the land, installed improvements, expended over two million dollars, and incurred substantial liabilities,⁶⁹ the California Coastal Zone Conservation Act of 1972⁷⁰ was passed. The Act required permits for any development within the coastal zone⁷¹ unless a vested right was acquired prior to the effective date of the Act.⁷² Although a portion of Avco's proposed development fell within the coastal zone, Avco applied for an exemption from the permit requirement because it had allegedly completed substantial work in grading the land and installing improvements. After the South Coast Regional Commission and the state-wide Coastal Commission denied Avco a waiver, Avco sought a writ of

67. 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1977).

68. The court states that the "Planned Community Development" was to proceed according to "Planned Community District Regulations" which were enacted by the county. Tract 7479 was devoted largely to multiple residential purposes. *Id.* at 789, 553 P.2d at 549, 132 Cal. Rptr. at 389. Such a development scheme is equivalent to a "Planned Unit Development" which "generally refers to a subdivision which provides for a mixture of land uses — residential, commercial, service, industrial — all in a single district but, . . . segregated by the planner." BOYER, *SURVEY OF THE LAW OF PROPERTY* 555 (3d ed. 1981).

69. *Avco Community Dev.*, 17 Cal. 3d at 789-91, 553 P.2d at 549, 132 Cal. Rptr. at 389.

70. CAL. PUB. RES. CODE §§ 27000-27650 (West 1976), *repealed by* CAL. PUB. RES. CODE § 27650 (West 1986).

71. At the time administrative proceedings commenced, California Public Resources Code section 30601 defined the coastal zone in terms of what permits were required from the Regional Commission. The code reads, in pertinent part:

Prior to certification of the local coastal program and, where applicable, in addition to a permit from local government pursuant to subdivision (b) of section 30600, a coastal development permit shall be obtained from the regional commission . . . for any of the following:

(1) Developments between the sea and the first public road paralleling the sea or within 300 feet to the inland extent of any beach or of the mean high tide line of the sea where there is no beach, whichever is the greater distance.

(2) Developments not included within paragraph (1) located on tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, stream, or within 300 feet of the top of the seaward face of any coastal bluff.

CAL. PUB. RES. CODE § 30601 (West 1986).

72. The effective date of the act was February 1, 1973.

mandate to compel the Coastal Commission to grant an exemption. Avco contended that the commission was estopped from denying an exemption since Avco relied detrimentally on several county authorizations issued prior to the effective date of the Act.⁷³ Both the trial court and the California Supreme Court denied Avco's vested rights claim on the basis that no building permit issued, reasoning that the governmental approvals received were insufficient to vest rights to proceed with development.⁷⁴

However, the California Supreme Court failed to address the issue of whether another type of permit might satisfy the governmental action requirement if it provided substantially the same specificity and definition to a project as a building permit.⁷⁵ Thus, the issue of what governmental actions are sufficient to fulfill this element was left unanswered.

b. *Guidelines For Satisfying the Governmental Act Requirement*

Several decisions serve as a guide in determining the question left open by *Avco*; what governmental actions, less than a building permit, will satisfy the governmental action requirement. Courts have determined whether the following factors satisfy this requirement: existing zoning, prior zoning, the absence of zoning, anticipated zoning, rezoning of property, special use permits, informal governmental approvals, non-enforcement of zoning violations, subdivision approvals, receiving permits under mistake of fact or in violation of law and preliminary permits. These decisions are important because they represent a continuum, defining what governmental actions courts may be willing to recognize as sufficient to enable a plaintiff to assert a vested rights claim to complete planned improvements.

Courts have determined that existing or prior zoning of property is not governmental action sufficient to vest rights.⁷⁶ In addition,

73. CAL. PUB. RES. CODE § 27404 (West 1976), *repealed by* CAL. PUB. RES. CODE § 30608 (West 1986). *Avco Community Dev.*, 17 Cal. 3d at 790, 553 P.2d at 549, 132 Cal. Rptr. at 389.

74. *Avco Community Dev.*, 17 Cal. 3d. at 793, 553 P.2d at 551, 132 Cal. Rptr. at 391.

75. *Id.* at 794, 553 P.2d at 551, 132 Cal. Rptr. at 391.

76. *San Diego Gas & Elec. v. City of San Diego*, 450 U.S. 621 (1981); *Agin's*, 447 U.S. 255 (1980); *Gilliland v. County of Los Angeles*, 126 Cal. App. 3d 610, 179 Cal. Rptr. 73 (1981). While these cases did not deal specifically with vested rights, they comport with the principle that the remedy for an inverse condemnation claim is not monetary compensation. This implies no vested right was recognized because if it were, monetary compensation would be required for a taking of property. *See also* *City of Carmel-By-the-Sea v. Monterey County*

neither the absence of zoning⁷⁷ nor anticipated zoning of property will satisfy this element.⁷⁸ The rationale supporting these general rules is that there is no overt governmental action to approve a specific development or use of property.⁷⁹

However, in some jurisdictions, a vested right to develop land according to existing zoning was based partially on the fact that the land's purchase price reflected its expected use as zoned.⁸⁰ California courts follow the general rule, and reject reliance on existing zoning as sufficient to demonstrate governmental action.⁸¹ California law requires compliance with zoning or other land use regulations at the time a building permit is issued, not at the time that the property was initially zoned for a proposed use.⁸²

California courts have also examined whether rezoning of property is adequate to fulfill the governmental action requirement. As a general rule, site specific rezoning of land does not constitute govern-

Bd. of Supervisors, 71 Cal. App. 3d 84, 139 Cal. Rptr. 214 (1977) (landowners have no vested right to develop property under an existing zoning law absent a showing of detrimental reliance on prior governmental approval); *Sierra v. Tahoe Regional Planning Agency*, 79 Cal. App. 3d 439, 144 Cal. Rptr. 776, cert. denied, 440 U.S. 957 (1979) (damages for inverse condemnation denied where rezoning resulted in a seventy-five percent reduction in value of plaintiff's land); *Elam v. Albers*, 44 Colo. App. 281, 616 P.2d 168 (1980) (no vested right to nonconforming use of land where no steps had been taken prior to challenging the zoning of the land to develop land as a mobile home subdivision).

77. *Pasco County v. Tampa Dev. Corp.*, 364 So. 2d 850, 853 (Fla. Dist. Ct. App. 1978); *Beasley v. Potter*, 493 F. Supp. 1059 (Mich. D.C. 1980).

78. *Morse v. County of San Luis Obispo*, 247 Cal. App. 2d 600, 55 Cal. Rptr. 710 (1967).

79. *Avco Community Dev.*, 17 Cal. 3d at 793, 553 P.2d at 551, 132 Cal. Rptr. at 391 (by zoning property, the government makes no representation to property owners that they will be exempt from the zoning laws in effect at the time they apply for a building permit, or that they may construct particular structures on the property). See also *Pasco*, 364 So. 2d at 850.

80. *May Dep't Stores Co. v. County of St. Louis*, 607 S.W.2d 857, 863 (Mo. Ct. App. 1980). The court focused primarily on the fact that the rezoning was done in an arbitrary manner rather than on expenditures made by the plaintiff. See also *Town of Largo v. Imperial Homes Corp.*, 309 So. 2d 571 (Fla. Dist. Ct. App. 1975); *City of Gainesville v. Bishop*, 174 So. 2d 100 (Fla. Dist. Ct. App. 1965) (purchase of land contingent on obtaining rezoning).

81. See *supra* notes 73-74 and accompanying text; see also *San Diego County v. McClurken*, 37 Cal. 2d 683, 234 P.2d 972 (1951) (landowner's purpose in purchasing land must yield to public interest in enforcement of comprehensive zoning plan).

82. *Pardee Const. Co. v. City of Camarillo*, 37 Cal. 3d 465, 690 P.2d 701, 208 Cal. Rptr. 228 (1984). On judicial review of a denial of a building permit, the reviewing court will generally apply the law existing at the time the permit was denied. Thus, after a permit has been issued, it may be revoked on the basis of a subsequent change in the zoning laws unless the permittee has substantial detrimental reliance expenditures, or the amended zoning ordinance is found inapplicable if its enactment was meant to frustrate a particular development. *Selby Realty Co. v. City of San Buenaventura*, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973). See also cases collected under 50 A.L.R. 3d 596, 602 (1973).

mental action.⁸³ Reliance on rezoning is also not adequate to comply with this requirement even if the plaintiff has expended considerable funds in good faith.⁸⁴ However, special use permits have been sanctioned as governmental acts sufficient to vest rights.⁸⁵ A plaintiff is also afforded some protection against unreasonable zoning ordinances by the right to challenge the constitutionality of either an existing zone, or the rezoning of property. The plaintiff's constitutional claim must allege that there is no constitutional basis for either the original zoning or the rezoning,⁸⁶ or that there is no relationship between the ordinance and the public's health, safety and welfare.⁸⁷

Informal governmental approvals of land use are also not equivalent to governmental action. Because these acts are not official, a plaintiff may not reasonably rely on them since knowledge of applicable laws is imputed to the plaintiff.⁸⁸ Conversely, non-enforcement of a zoning ordinance violation is not interpreted as governmental action because no positive steps were taken by the government to enforce compliance with existing regulations.⁸⁹

Subdivision approvals also present the problem of whether the government acted in a manner sufficient for a plaintiff to assert a vested rights claim. Subdivision approval regulations govern only lot sizes and shapes. Courts do not recognize subdivision approvals as governmental actions sufficient to establish a vested right to complete a project.⁹⁰

83. *Trever v. City of Sterling Heights*, 53 Mich. App. 144, 218 N.W.2d 810 (1974); *Avco Community Dev.*, 17 Cal. 3d at 793, 553 P.2d at 551, 132 Cal. Rptr. at 391.

84. See generally *Avco Community Dev.*, 17 Cal. 3d at 785, 553 P.2d at 546, 132 Cal. Rptr. at 386; *Halaco*, 42 Cal. 3d at 52, 720 P.2d at 15, 227 Cal. Rptr. at 667; *Spindler*, 243 Cal. App. 2d at 255, 53 Cal. Rptr. at 7; *Gilliland*, 126 Cal. App. 3d 610, 179 Cal. Rptr. 73 (1981).

85. *Trans-Oceanic Oil Corp.*, 85 Cal. App. 2d 776, 194 P.2d 148 (1948). However, the court noted that it was influenced by the special circumstances of the case, and because the special use permit related to extraction of a natural resource. See also *Cohn v. County Bd. of Supervisors of Los Angeles County*, 135 Cal. App. 2d 180, 286 P.2d 836 (1955) (special use permits under a zoning ordinance run with the land).

86. *Oceanic California, Inc. v. City of San Jose*, 497 F. Supp. 962 (N.D. Cal. 1980).

87. *Penn Cent. Transp. Co.*, 438 U.S. 104 (1978); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Existing zoning or zoning change must be based on a tangible reason or bear a relationship to the public welfare or public safety.

88. *SIEMON, LARSON & PORTER*, *supra* note 43, at 17-19.

89. *Donovan v. City of Santa Monica*, 88 Cal. App. 2d 386, 199 P.2d 51 (1948); *Lockard v. City of Los Angeles*, 33 Cal. 2d 453, 202 P.2d 38, *cert. denied*, 337 U.S. 939 (1949); *Markey v. Danville Warehouse and Lumber Inc.*, 119 Cal. App. 2d 1, 259 P.2d 19 (1953).

90. *SIEMON, LARSON & PORTER*, *supra* note 43, at 24-26.

In addition, receiving a permit or approval issued under mistake of fact or in violation of law is not government action because an individual possessing such a permit is deemed to know the terms of the law as well as the authority of the person issuing the permit.⁹¹ Recently, however, one court allowed a recipient of such a permit to finish a proposed project because he expended substantial sums in good faith reliance on the government's representations.⁹²

Likewise, courts reject preliminary permits as being governmental actions sufficient to create a vested right to complete planned improvements.⁹³ Courts justify this reasoning on several bases. First, the purpose of a two-stage approval process requiring issuance of a preliminary permit and a final building permit is to give greater control and flexibility in planning development and use of land.⁹⁴ Additionally, preliminary permits, such as grading or excavation permits, are mandated for most projects. Therefore, a property owner does not suffer substantial injury or detriment if the ultimate proposal differs from development allowed by the final grading permit.⁹⁵ The general rule governing preliminary permits in California is that any work performed on a project pursuant to the permit will vest rights to complete only that stage of the work.⁹⁶

c. *Halaco Engineering Co. v. South Central Coast Regional Commission*

In California, it is possible for a preliminary permit offering the same specificity and definition to a project as a building permit to

91. See, e.g., *Chesapeake Bay Village, Inc. v. Costle*, 502 F. Supp. 213 (D. Maryland 1980); *Sierra Club v. California Coastal Zone Conservation Comm'n*, 58 Cal. App. 3d 149, 129 Cal. Rptr. 743 (1976) (void permit not sufficient to vest rights).

92. *Abbeville Arms v. City of Abbeville*, 273 S.C. 491, 257 S.E.2d 716 (1979).

93. *Avco Community Dev.*, 17 Cal. 3d at 785, 553 P.2d at 546, 132 Cal. Rptr. at 386; *McCarthy v. California Tahoe Regional Planning Agency*, 129 Cal. App. 3d 222, 180 Cal. Rptr. 866 (1982).

94. *SIEMON, LARSON & PORTER*, *supra* note 43, at 19.

95. *SIEMON, LARSON & PORTER*, *supra* note 43, at 19.

96. *McCarthy*, 129 Cal. App. 3d 222, 180 Cal. Rptr. 866 (1982). The court found no vested right to complete construction, even though the foundation for the building was completed in accordance with a properly issued foundation permit. The court determined that there was no detrimental reliance by the landowner because the government expressly advised the plaintiff not to rely on the foundation permit as a right to complete the project, and that the project would be subjected to further governmental scrutiny. See also *Avco Community Dev.*, 17 Cal. 3d at 792, 553 P.2d 550-51, 132 Cal. Rptr. at 390 (citing *Spindler*, 243 Cal. App. 2d 255, 53 Cal. Rptr. 7 (1966) (grading permits)). *Court House Plaza Co. v. City of Palo Alto*, 117 Cal. App. 3d 871, 173 Cal. Rptr. 161 (1981) (first stage of a two-stage building project).

form the basis of a vested rights claim.⁹⁷ This apparent exception to the rule that preliminary permits will vest rights only in defined stages of a project was implicitly confirmed by the California Supreme Court in *Halaco Engineering Co. v. South Central Coast Regional Commission*.⁹⁸ In this case, the court examined whether a vested right existed despite the fact that permits secured by Halaco Engineering Company did not authorize all uses deemed protected from further governmental regulation by the court.⁹⁹

The case arose with the passage of the California Coastal Zone Conservation Act of 1972.¹⁰⁰ The Act required application for a permit from the regional coastal commission for any development within the coastal zone.¹⁰¹ While Halaco's operations fell within the defined coastal zone, it failed to apply for a permit. Halaco believed that no permit was needed since it had been operating its facilities prior to the effective date of the Act.¹⁰²

The principal factual issues in the case were whether Halaco had all the permits required by the City of Oxnard for construction and use of its facilities, and whether Halaco's continuing operation of the plant conformed to operations conducted when the permit application was made.¹⁰³ The Act exempted any development for which a vested right had been acquired.¹⁰⁴ Thus, Halaco would be exempt from the permit requirement if it could establish a vested right to the current use of the property. In pleading its vested rights claim, Halaco contended that improvements on the parcel were constructed pursuant to properly issued permits by the city. Halaco also argued that the city knew of the proposed uses of the land, but advised Halaco that the construction of the contested improvements required no further permits.¹⁰⁵

97. *Avco Community Dev.*, 17 Cal. 3d at 793-94, 553 P.2d at 551, 132 Cal. Rptr. at 391.

98. 42 Cal. 3d 52, 720 P.2d 15, 227 Cal. Rptr. 667 (1986).

99. *Id.* at 59, 720 P.2d at 18, 227 Cal. Rptr. at 670. Halaco Engineering Company asserted a vested right to continue using a settling pond, water disposal site and a propane tank. The intensity and the extent of use of the settling pond and the water disposal site were protected by the court even though the boundaries of these two uses were expanded beyond the boundaries originally approved by the municipality. However, the court found no vested right to use the propane tank, and required Halaco to apply for the proper permits. *Id.* at 75-78, 720 P.2d at 30-32, 227 Cal. Rptr. at 682-84.

100. See *supra* note 70 and accompanying text.

101. See *supra* note 71 and accompanying text.

102. CAL. PUB. RES. CODE § 27404 (West 1976), repealed by CAL. PUB. RES. CODE § 30608 (West 1986); *Halaco*, 42 Cal. 3d at 59, 720 P.2d at 18-19, 227 Cal. Rptr. at 670.

103. *Halaco*, 42 Cal. 3d at 59, 720 P.2d at 19, 227 Cal. Rptr. at 671.

104. CAL. PUB. RES. CODE § 27404 (West 1976), repealed by CAL. PUB. RES. CODE § 30608 (West 1986).

105. *Halaco*, 42 Cal. 3d at 59, 720 P.2d at 19, 227 Cal. Rptr. at 671.

The regional coastal commission denied Halaco's claimed vested right to operate or expand beyond the dimensions of the plant as described in a 1969 blueprint. The commission reasoned that there could be no vested right in expansions beyond the blueprints submitted to the city describing the boundaries of the plant's operation.¹⁰⁶ After application of an independent judgment standard of review,¹⁰⁷ the trial court ruled in favor of Halaco despite the fact that the permits at issue did not specifically describe operations protected from further governmental regulation by the court.¹⁰⁸ The California Supreme Court affirmed the trial court's determination as being supported by substantial evidence.¹⁰⁹

This decision is important because it is contrary to the California rule that tangible governmental approvals must be issued before a vested rights claim may be argued,¹¹⁰ and that a vested right can be found only in those uses or improvements authorized by governmental agencies.¹¹¹ However, because the opinion focused on the applicable standard of judicial review, the question of when courts will recognize a vested right if required approvals have not been secured by a plaintiff was left unanswered.¹¹²

III. ANALYSIS

A. *Inadequate Definition of the Governmental Act Requirement*

A clear majority of jurisdictions require a building permit as the governmental action on which a vested rights claim may be based.¹¹³ While some decisions recognize other preliminary approvals as governmental actions,¹¹⁴ California currently recognizes vested rights only in the stage of work completed pursuant to preliminary per-

106. *Id.*

107. *Id.* at 674-82, 720 P.2d at 22-30, 227 Cal. Rptr. at 673-82. For a discussion of this standard of review and its application see *Strumsky v. San Diego County Employee's Retirement Ass'n*, 11 Cal. 3d 28, 520 P.2d 29, 112 Cal. Rptr. 805 (1974).

108. The trial court protected Halaco Engineering Company's right to continue using a settling pond and a waste disposal site in part because the city knew the full extent of the use of the improvements in determining that no permits were required for these uses. *Halaco*, 42 Cal. 3d at 60-61, 720 P.2d at 20, 227 Cal. Rptr. at 672.

109. *Id.* at 60-61, 720 P.2d at 20, 227 Cal. Rptr. at 672.

110. *See supra* notes 7, 65, 67, 97 and accompanying text.

111. *See supra* notes 94-97 and accompanying text.

112. *Halaco*, 42 Cal. 3d at 674-82, 720 P.2d at 220-33, 227 Cal. Rptr. at 673-82.

113. *See supra* notes 7, 65 and accompanying text.

114. *See supra* notes 81, 86, 93, 99 and accompanying text.

mits.¹¹⁵ However, this strict rule is inequitable in many circumstances.

For example, assume a hypothetical plaintiff is constructing an apartment complex. After receiving preliminary approvals, and applying for a final grading permit from the proper municipal authorities, the plaintiff grades the property and installs other improvements in accordance with the final grading permit. The plaintiff then proceeds to construct the foundation for the project after applying for and receiving a foundation permit from the planning department. In the midst of construction of the foundation, an application for a building permit is submitted. The plaintiff then finds that the property on which the project is constructed is being rezoned to a lower density as part of a change in the city's comprehensive zoning plan. Under California's current laws, this plaintiff has a vested right to complete only the foundation of the project.¹¹⁶ There is no right to complete the entire apartment complex as originally planned. In fact, substantial work must be completed and substantial expenditures must be incurred in constructing the foundation before the plaintiff may claim the right to complete even that stage of the work.¹¹⁷ This strict rule leaves the plaintiff with a burdensome, incomplete project which must be razed if the plaintiff later decides to construct improvements according to new zoning regulations.

The above example epitomizes the general rule that a valid building permit must issue before a right to complete construction of a project vests.¹¹⁸ *Avco*¹¹⁹ exemplifies this rule in terms of California law. As in the above example, the California Supreme Court followed the general rule in denying *Avco* Community Developers a vested right to construct improvements because no building permits were issued for construction of specific buildings.¹²⁰

However, the *Avco* decision also presents the possibility that governmental approvals which provide essentially the same specificity and definition to a project as a building permit may be sufficient to vest rights.¹²¹ The California Supreme Court's recent decision in *Halaco*¹²² implicitly extended the principles applied in *Avco* by find-

115. See *supra* note 97 and accompanying text.

116. See *supra* note 97 and accompanying text.

117. See *supra* note 59 and accompanying text.

118. See *supra* notes 7, 65 and accompanying text.

119. 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976).

120. *Id.* at 793-800, 553 P.2d at 551-56, 132 Cal. Rptr. at 391-96.

121. *Id.* at 793-94, 553 P.2d at 551, 132 Cal. Rptr. at 391.

122. 42 Cal. 3d 52, 720 P.2d 15, 227 Cal. Rptr. 667 (1986).

ing a vested right in nonconforming uses of improvements already constructed.¹²³ This holding is significant because a vested right to use existing improvements was established despite the fact that the permits received by the plaintiff did not specifically define the uses and improvements protected from further governmental regulation.¹²⁴ However, the California Supreme Court failed to articulate any rules governing when a vested right to construct or use existing improvements may be found if required permits have not been received, or if the permits received by a plaintiff inadequately define uses or improvements asserted to be protected from further governmental regulation. This unresolved issue is significant because recognition of a vested right, even though required permits are absent, is an exception to the general rule that a vested right must be based on tangible governmental approvals.¹²⁵ Further definition of this apparent exception should be articulated by the courts. *Halaco* not only fails to set forth an exception to the rule that governmental permits authorizing a particular use or course of development must issue before a vested rights claim is tenable, but the decision further clouds the issue of what governmental actions, short of a building permit, can form the basis of a vested rights claim to construct improvements.

B. *Inconsistent Case Law*

Avco and *Halaco* also fail to address the issue of when a vested right might be recognized if requisite permits have not issued. Additionally, these opinions illustrate the inconsistent decisions which may result if required governmental permits have not been secured by a plaintiff. The cases also demonstrate a broader problem: the failure of California's legal system to articulate more definitive rules explaining the governmental action requirement. While there are decisions which provide guidance,¹²⁶ existing laws require subjective judgments to determine whether the government acted in a manner sufficient for a plaintiff to successfully argue that he or she detrimentally relied on these actions.

Because of uncertainty in this area of law, rights deserving protection are being abridged. Furthermore, inconsistent applications of the law have broader social implications beyond abrogation of the

123. *Id.*

124. *Id.* at 75-76, 720 P.2d at 30-31, 227 Cal. Rptr. at 682.

125. *See supra* notes 7, 67, 96 and accompanying text.

126. *See supra* notes 76-96 and accompanying text.

rights of individuals involved in vested rights litigation. Because of uncertainty in the development process, developers are often unwilling to make substantial investments without a larger rate of return to offset the greater risks involved. Consumers eventually absorb these hidden costs in the form of higher housing prices.¹²⁷ Additionally, municipal agencies suffer more legal challenges concerning vested rights because of the lack of judicial specificity in this area. The resulting time and effort used in costly litigation absorbs more municipal resources than would be necessary if clearer rules existed.¹²⁸ Also, a more specific body of law would hopefully result in municipalities acting more responsibly in denying or approving development projects or variance permits. Responsibility in approving building permits and enforcing zoning ordinances would be encouraged since municipalities could be held accountable for their actions by a landowner demanding just compensation for a taking of property.

California cases not only fail to establish what permits define a governmental action, they also illustrate the failure of California's courts to establish a more practical and equitable body of law governing vested rights. One of the easiest and most logical methods to establish a more cohesive body of law is to modify the governmental act element. What is needed is an equitable rule of law to adequately protect an individual's property rights, while preserving governmental control of land use through zoning to protect the population and the environment.

IV. PROPOSAL

A. Objectively Reasonable Good-Faith Belief by the Plaintiff

Rather than examining the extent of the government's actions, equity would be served by requiring a plaintiff to entertain an objectively reasonable, good faith belief¹²⁹ that he or she could develop or use property in a certain manner. Several factors could be investigated to determine whether a plaintiff exhibited an objectively reasonable, good-faith belief to develop or use property as specified by

127. SIMON, LARSON & PORTER, *supra* note 43, at 3.

128. SIMON, LARSON & PORTER, *supra* note 43, at 3.

129. A good faith belief should be distinguished from a good faith expectancy. A belief is defined as a "[c]onviction of the mind, arising not from actual perception or knowledge, but by way of inference, or from evidence received or information derived from others." BLACK'S LAW DICTIONARY 141 (5th ed. 1979). In contrast, an expectancy refers to a condition of being deferred to a future time or of dependance upon an expected event. *Id.* at 517. Thus, for a reasonable good-faith belief to exist, the landowner must base his or her belief on tangible evidence and information derived from government officials or other governmental actions.

the government. One of the most important factors to scrutinize under this approach is which governmental permits or approvals have been secured by a plaintiff. This factor would not be dispositive of whether a reasonable good-faith belief existed, but would be only one of several elements considered in making this decision. As an example, if a preliminary grading permit has issued, the reasonableness of a belief to build or grade the property is questionable since final approval to grade was not granted. Likewise, a belief that development or a significant change in a property's use could be accomplished without any governmental approvals could not be considered reasonable since the government has a clear interest in regulating land development and land use.

The sophistication of the plaintiff involved in vested rights litigation should also be considered. An experienced developer with an excellent understanding of development procedures could be held to a higher standard than an individual constructing a small project or a small businessman seeking approval of a nonconforming use. Courts should require strict compliance with all regulations if a sophisticated plaintiff is adjudicating a vested rights claim. In contrast, substantial compliance should suffice if the plaintiff is relatively unsophisticated. Analysis of this factor would ensure a more equitable approach in adjudicating vested rights cases since an individual's objective beliefs would be directly relevant in determining the appropriate level of compliance.

B. *Application of the New Standard*

Existing vested rights laws do not adequately protect plaintiffs from governmentally imposed changes in land uses even though such plaintiffs may have a good faith belief that development or existing uses of real property could continue. As an example, the hypothetical plaintiff discussed above could have formed an objectively reasonable good faith belief that construction of the proposed apartment complex would be allowed. Under the proposed change, the plaintiff would prevail; the law would ensure protection of the plaintiff's reasonable beliefs. Existing law, however, would vest in the plaintiff only the right to construct the foundation in accordance with the foundation permit.¹³⁰ This alternative proposal would help protect plaintiffs during the period prior to issuance of a building permit but after preliminary permits such as a final grading permit or founda-

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

tion permit have issued. This alternative proposal would lend equity to current laws which are unduly strict.

Such a system should also adequately protect the government's power to control land use and development since the alternative approach still requires that the plaintiff complete substantial work and incur substantial liabilities before a vested right accrues. Additionally, the government could convey its intention to allow only a specific stage of development by expressly informing the property owner that completion of a project requires further governmental approvals, and that there is no assurance that a permit for completion of the entire building or structure will be granted.¹³¹ In such a case, the plaintiff could not proceed with the planned development in good faith, and would thus be precluded from asserting a vested rights claim.

This alternative proposal is also easily applied to vested rights issues in the context of a nonconforming use of property. Under the facts of *Halaco*,¹³² the reasonableness of Halaco's management in proceeding with operations without a permit would be examined to determine whether a vested right exists. Taking into consideration the fact that valid approvals were received from the proper municipal agencies, and that these agencies knew the full extent of Halaco's proposed operations, it is arguable that Halaco entertained a reasonable, good-faith belief to use improvements in a non-conforming manner. If this were determined, then the substantial expenditures and substantial work completed by Halaco in expanding existing uses would indicate that a vested right should be recognized.

V. CONCLUSION

The issue of when rights in real property vest results from the conflict between individual rights and the government's need to regulate uses of real property through application of the police power. This conflict has manifested itself in laws mandating estoppel of further governmental regulation of real property if a vested right can be established.

As a general rule, a vested right is recognized if a plaintiff performs substantial work and incurs substantial liabilities in good faith reliance on governmental actions. Normally, governmental action is defined by issuance of a valid permit authorizing a specific use of property or course of development. The California Supreme Court's

131. *McCarthy*, 129 Cal. App. 3d at 233, 180 Cal. Rptr. at 873.

132. See *supra* notes 97-111 and accompanying text.

recent decision in *Halaco* realized a vested right to use existing improvements not specifically defined in permits received by the company. This decision is significant because it is contrary to the general rule that a vested right can be found only in uses of property specifically allowed by governmental authorizations. This decision also complicates the issue of when courts may be willing to recognize vested rights in real property if requisite permits have not been issued.

This comment examines the historical evolution of vested rights laws, and analyzes several factors which serve as a guideline to determine when a vested right might be found if required approvals have not been secured by a plaintiff. This comment proposes a new method to adjudicate vested rights cases. This new method examines whether a plaintiff entertained an objectively reasonable good faith belief that the government would allow construction or use of improvements, rather than examining only the extent of the government's actions.

The proposed approach compares favorably to current laws which fail to protect plaintiffs from zoning or other regulatory changes arising after the issuance of preliminary approvals. This proposal may be applied to the adjudication of vested rights suits regarding development or nonconforming uses, resulting in a more equitable outcome for plaintiffs involved in such litigation. Furthermore, this proposal adequately protects the government's interest in regulating land uses by preserving the government's police powers.

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