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WASHINGTON'S ZONING VESTED RIGHTS DOCTRINE

INTRODUCTION

The zoning doctrine of vested rights[1] enables the holder of, or applicant for, a building permit to complete a proposed land development despite a subsequently effective zoning change barring that development.[2] Under Washington's minority[3] view of the doctrine, a vested right to develop land accrues when a party makes a timely and complete building permit application that complies with the applicable zoning and building ordinances in effect on the date of the application.[4] The traditional justification for the Washington rule is that it provides a "date certain"—the date of application—on which the right to develop land vests.[5] In contrast, the majority of jurisdictions follow a vested rights rule of zoning estoppel; a vested right to develop land accrues only when a developer substantially changes position in reliance on a building permit application prior to the legislative change of the zoning ordinance.[6]

The Washington vested rights doctrine evolved in the context of Euclidean zoning.[7] In the past two decades, however, planned unit

1. This comment is solely concerned with the vested rights doctrine as applied to zoning. Historically, vested rights analysis was used to determine the validity of retroactive civil legislation, although it has generally declined in importance in modern retroactivity law. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 696 (1960). Washington courts, however, still use vested rights analysis to determine the validity of retroactive civil legislation. Pape v. Department of Labor & Indus., 43 Wn. 2d 736, 264 P.2d 241 (1954). For a further analysis of the vested rights concept see note 11 *infra*.

2. The doctrine enables the building permit holder or applicant to obtain a vested right to develop land in accordance with the zoning ordinance in effect at the time the application is made. Mere application, or even permit issuance, does not automatically vest the right to develop; other requirements of the doctrine must still be met. Cunningham & Kremer, *Vested Rights, Estoppel, and the Land Development Process*, 29 HASTINGS L.J. 623, 625–26 (1978).

3. The minority doctrine is followed in four other states: Georgia, Gifford-Hill Co., Inc. v. Harrison, 229 Ga. 260, 191 S.E.2d 85 (1972); Idaho, Ready-to-Pour, Inc. v. McCoy, 95 Idaho 510, 511 P.2d 792 (1973); Indiana, Knutson v. State, 239 Ind. 666, 160 N.E.2d 200 (1959); and Ohio, Gibson v. City of Oberlin, 171 Ohio St. 1, 167 N.E.2d 651 (1960). The Florida cases are split; some support the minority view. *See, e.g.*, Aiken v. E.B. Davis, Inc., 106 Fla. 675, 143 So. 658 (1932). The positions taken by American jurisdictions are listed in Annot., 50 A.L.R.3d 596 (1973).

4. *See* note 21 and accompanying text *infra*.

5. Hull v. Hunt, 53 Wn. 2d 125, 130, 331 P.2d 856, 859 (1958). *See also* text accompanying notes 46–47 *infra*.

6. *See* note 14 *infra*.

7. This name comes from the leading Supreme Court zoning case, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). Euclidean zoning is characterized by a reliance on the individual lot as the basic regulatory unit. Size and placement of structures on the lots are controlled by minimum setback from the street requirements and structure size to lot area ratios. Overall development density is constrained by minimum lot size regulations. A second hallmark of Euclidean zoning is a

development (PUD) zoning schemes have introduced greater flexibility to land development regulation. PUD zoning differs substantially from the Euclidean model, which segregates various land uses into different zones. Under a PUD scheme, developments are larger in scope and are characterized by variations in the intensity of land use.[8] In *Mercer Enterprises, Inc. v. City of Bremerton,*[9] the Washington Supreme Court applied the vested rights doctrine to a large scale, multistage PUD project. The court held that Mercer's right to develop had vested even though its building permit application for the first phase of the development was incomplete, and complied with the prior zoning ordinance only if it was considered in light of the entire development.[10] The court's analysis, however, failed to acknowledge the shift in zoning from a Euclidean to a PUD context, and the impacts of that shift on the vested rights doctrine.

Part I of this comment reviews the judicial analysis underlying the Washington doctrine, and outlines the elements and scope of the vesting rule. Part II analyzes the *Mercer* decision and questions whether that decision promotes the purposes of the Washington doctrine in the PUD zoning context. This comment contends that the *Mercer* court's rule for vesting rights to develop land on the basis of incomplete building permit applications fails to consider important public policy interests. In conclusion, Part III proposes a modified vesting rule that addresses the problems inherent in the *Mercer* decision.

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strict separation of land uses into different zones such as classifying one area as single-family residential and another as commercial. Note, *Administrative Discretion in Zoning*, 82 HARV. L. REV. 668, 669–71 (1969).

8. "Planned unit development" means an area of land, controlled by a landowner, to be developed as a single entity for a number of dwelling units, and commercial and industrial uses, if any, the plan for which does not correspond in lot size, bulk, or type of dwelling or commercial or industrial use, density, lot coverage and required open space to the regulations established in any one or more districts created, from time to time, under the provisions of a municipal zoning ordinance enacted pursuant to the conventional zoning enabling act of the state.

D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 431 (1971) (quoting U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, ACIR STATE LEGISLATIVE PROGRAM 31-36-00, at 5 (cum. supp. 1970)).

PUD zoning is designed to preserve flexibility in the design, arrangement, and mix of housing and other land uses. Unlike Euclidean zoning, it is not "self-administering," that is, development approvals are not automatically issued once compliance to the zoning ordinance has been demonstrated. Instead, the PUD zoning ordinance is general; the details of each proposed development are then reviewed by the local zoning authority. The goal of the review is to assure that the development is adequately "matched" to the site and the needs of the community. Normally, the process requires the exercise of administrative discretion by the local zoning authority. *See* Krasnowiecki, *Legal Aspects of Planned Unit Development in Theory and Practice*, in FRONTIERS OF PLANNED UNIT DEVELOPMENT: A SYNTHESIS OF EXPERT OPINION 99, 100–02 (R. Burchell, ed. 1973).

9. 93 Wn. 2d 624, 611 P.2d 1237 (1980).

10. *Id.* at 626, 631, 611 P.2d at 1239, 1241.

I. THE PRESENT DOCTRINE

A. *Vested Rights: Two Approaches*

The term "vested rights" sums up a judicial determination that the property interests of a party have become sufficiently fixed so that it is inequitable to divest them through the retroactive application of subsequent legislation.[11] The purpose of a zoning vested rights doctrine is to establish the point in the land development permit process after which the right to develop land[12] is judicially protected from legislative termination by rezoning.[13]

Under the majority rule of zoning estoppel, the right to develop land vests when a party substantially changes its position in reliance upon an act or omission of the government in the permit process.[14] In the absence of a developer's change of position, a later change in the zoning ordinance that bars the proposed use revokes a building permit or

11. The term "vested rights" has little meaning as an independent concept, because it is the product of circular reasoning. Retroactive civil legislation is said not to affect rights that are vested, but courts usually define vested rights as rights which "may not be interfered with by retrospective laws." American States Water Serv. Co. v. Johnson, 31 Cal. App. 2d 606, 88 P.2d 770, 774 (1939). Consequently, commentators reject vested rights as a concept. *See, e.g.*, Hochman, *supra* note 1, at 696. The better view is to regard the term "vested rights" as a conclusory description of a right or interest that is sufficiently secure so that it is unfair or a violation of due process to take it away. Cunningham & Kremer, *supra* note 2, at 662.

12. The Washington Supreme Court has held that "[a]lthough less than a fee interest, development rights are beyond question a valuable right in property." Louthan v. King County, 94 Wn. 2d 422, 428, 617 P.2d 977, 981 (1980). The concept of the right to develop as an interest inherent in land ownership is not new. Historically, such rights have been thought of as coming up from the land itself. W. REILLY, THE USE OF LAND 140 (1973). Until the end of the 19th century, the right to develop was restricted only by nuisance considerations. In the 20th century, however, the scope of the right has been further reduced by zoning, building, land use, and environmental regulations. At present, the right to develop may be conceived of as a property interest derived from land ownership, but exercise of the right is conditioned upon compliance with socially-imposed regulations. Cunningham & Kremer, *supra* note 2, at 630–33.

13. Comment, *Vested Rights to Develop Land: California's* Avco *Decision and Legislative Responses*, 6 ECOLOGY L.Q. 755, 756 (1978).

14. Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes*, 1971 URB. L. ANN. 63. Heeter has stated the majority rule as follows:

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

Id. at 66.

The elements necessary to establish a zoning estoppel vary from state to state. *See* Annot., 50 A.L.R.3d 596 (1973).

application.[15] Thus, vesting of the right to develop land under the zoning estoppel rule depends largely upon the acts of the parties in the permit process.

In Washington, the vested rights doctrine is based upon the courts' view of the land development permit process as being fundamentally ministerial, because all discretionary policy issues have been previously decided by the legislative body creating the zoning regime.[16] Under this view, if a developer submits a complete building permit application that complies with the applicable zoning and building ordinances, then the local government lacks discretionary authority to deny the requested permit. Instead, it has a ministerial duty to issue the permit.[17] The existence of the duty to issue the permit gives rise to a corresponding right in the developer to compel permit issuance by writ of mandamus.[18] Once this right comes into existence, the developer also possesses a vested right to develop land, which cannot be terminated by a retrospective application of a subsequently effective change in the zoning ordinance.[19]

15. *See* Hull v. Hunt, 53 Wn. 2d 125, 129, 331 P.2d 856, 858 (1958) (restating and rejecting the majority rule).

16. *See, e.g.*, State *ex rel.* Ogden v. City of Bellevue, 45 Wn. 2d 492, 275 P.2d 899 (1954).

17. *Id.* In *Ogden*, the plaintiff sought to build a produce market. His application for a building permit was denied because the site lacked suitable parking. Plaintiff purchased adjacent land for a parking lot and resubmitted the building permit application. It was rejected on the ground that parking, although permitted by the ordinance, was not the highest use of the property. Plaintiff then brought an action for a writ of mandamus to compel building permit issuance. The city responded by rezoning the property agricultural. The supreme court held that Ogden had a vested right to develop:

> A property owner has a vested right to use his property under the terms of the zoning ordinance applicable thereto. A building or use permit must issue as a matter of right upon compliance with the ordinance. The discretion permissible in zoning matters is that which is exercised in *adopting* the zone classifications with the terms, standards, and requirements pertinent thereto, all of which must be by general ordinance applicable to all persons alike. The acts of administering a zoning ordinance do not go back to the questions of policy and discretion which were settled at the time of the adoption of the ordinance. Administrative authorities are properly concerned with questions of compliance with the ordinance, not with its wisdom. To subject individuals to questions of policy in administrative matters would be unconstitutional. Art. I, § 12, of the constitution of the state of Washington, provides:
>
> "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."

Id. at 495, 275 P.2d at 901-02 (citations omitted).

18. State *ex rel.* Craven v. City of Tacoma, 63 Wn. 2d 23, 26-28, 385 P.2d 372, 374-76 (1963).

19. *Id.* at 27, 385 P.2d at 375. In *Craven*, the supreme court held that the City of Tacoma could not refuse to issue a building permit to the owner of a lot in an illegally platted subdivision. The city's denial of a permit was not permissible because it had, according to the court, a ministerial duty to issue the building permit once the lot owner submitted a building permit application that complied with the zoning and building ordinances. Once these ordinances had been complied with, the court stated it could see the "ready application" of State *ex rel.* Ogden v. City of Bellevue, 45 Wn. 2d 492, 275 P.2d 899 (1954). In other words, when the zoning and building ordinances had been complied with, the lot owner had a vested right to develop.

The Washington doctrine thus equates the vested right to develop land with the developer's right to compel permit issuance.[20]

B. *The Elements of the Washington Vested Rights Rule*

To vest the right to develop land under the Washington doctrine, a party must meet the following three-part test:

> A right to develop land vests if the applicant files a building permit application that:
> (1) Complies with the existing zoning ordinance and building code (Compliance);
> (2) Is filed during the effective period of the ordinance under which the applicant seeks to develop (Timeliness); and
> (3) Is sufficiently complete (Completeness).[21]

1. *Compliance*

The primary purpose of the compliance requirement is to protect the integrity of the land development permit process.[22] Therefore, the compliance test is objectively and strictly applied.[23] A noncomplying permit or application is void and cannot vest the right to develop land.[24] The source and nature of the defect is irrelevant. The source of noncompliance may be the developer, the local government, or their mutual mistake.[25]

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20. The Washington rule appears to be based on the notion of land development as a right. *See* note 12 *supra*. A right to develop exists because a building permit must be issued at the time the zoning and building applications are complied with. The supreme court, in Hull v. Hunt, 53 Wn. 2d 125, 331 P.2d 856 (1958), selected the time of permit application as the time at which the right to develop in accordance with the then existing zoning vests. The right to develop and the right to a building permit thus accrue at the same time.

In zoning estoppel jurisdictions, the emphasis is placed on the conduct of the parties leading to an estoppel, rather than on the building permit. The building permit is essentially a revocable license in these jurisdictions. *See, e.g.*, Brougher v. Board of Pub. Works, 205 Cal. 426, 434, 271 P. 487, 490–91 (1928).

21. This statement of the rule is the author's synthesis of the cases cited in notes 24–35 *infra*.

22. In Eastlake Community Council v. Roanoke Assocs., 82 Wn. 2d 475, 513 P.2d 36 (1973), which involved a building permit that was issued even though it did not comply with Seattle's building code, the supreme court stated: "We cannot find that a litigant has any right to be a beneficiary of unlawful administrative conduct where the public interest will suffer, by the mere assertion that extensive financial investment is in the balance." *Id.* at 484, 513 P.2d at 43.

23. *Id.* at 484–86, 513 P.2d at 42–43.

24. Steele v. Queen City Broadcasting Co., 54 Wn. 2d 402, 341 P.2d 499 (1959); Nolan v. Blackwell, 123 Wash. 504, 212 P. 1048 (1923).

25. *See* Eastlake Community Council v. Roanoke Assocs., 82 Wn. 2d 475, 483–84, 513 P.2d 36, 42 (1973). *See also* Lewis v. City of Medina, 87 Wn. 2d 19, 548 P.2d 1093 (1976) (permit issued under mutual mistake of facts held void); Nolan v. Blackwell, 123 Wash. 504, 212 P. 1048 (1923) (city officials erroneously issued unlawful building permit; permit held void).

The nature of the defect may be substantive or procedural. A permit or application is substantively defective if it fails to propose a permitted land use under the applicable zoning ordinance.[26] A permit or application is procedurally defective if it is processed or issued contrary to local ordinances.[27]

2. *Timeliness*

The timeliness requirement determines the applicability of the vested rights doctrine. If a building permit application is filed after a rezone has taken effect, no vested rights claim may be raised, and the property is subject to the new zoning ordinance.[28] To be timely, a building permit application must be tendered to the local government during the effective period of the ordinance under which the developer seeks to build.[29]

3. *Completeness*

To serve as the basis of a vested rights claim, a building permit application must be sufficiently complete before the effective date of the zoning

26. City of Mercer Island v. Kaltenbach, 60 Wn. 2d 105, 106–07, 371 P.2d 1009, 1010–11 (1962). In *Kaltenbach*, the city of Mercer Island brought suit to enjoin defendants from operating a commercial art "conservatory" in a residential district. Defendants contended that they had a vested right to the commercial use because their prior building permit authorized a "residence and private conservatory," and they had been assured by city officials that an art school would be within the terms of that permit. The court held that defendants had no vested rights, since a commercial use had never been permitted by any of the prior zoning ordinances, and estoppel could not serve as the basis for a vested rights claim. The court said: "The ultimate question is whether the use is authorized by the ordinance, and this must be determined as a matter of law by the courts and not by informal opinions of county administrative officials." *Id.* at 107, 371 P.2d at 1011. *See also* Lewis v. City of Medina, 87 Wn. 2d 19, 548 P.2d 1093 (1976); Pierce v. King County, 62 Wn. 2d 324, 382 P.2d 628 (1963) (holding that no vested right can be based on an invalid spot zone in a prior ordinance).

27. A test for a procedurally defective permit or permit application may be derived from Eastlake Community Council v. Roanoke Assocs., 82 Wn. 2d 475, 513 P.2d 36 (1973). In *Roanoke*, a developer based its vested rights claim upon a building permit conditionally issued subject to a "structural and ordinance check." *Id.* at 479–80, 513 P.2d at 41. The supreme court held the permit invalid and rejected the vested rights claim. The court identified two procedural defects. First, the permit was issued contrary to a specific building code requirement that plans be checked prior to building permit issuance. *Id.* at 481–82, 513 P.2d at 41. Second, the building code did not authorize issuing conditional permits. *Id.* Thus, under the *Roanoke* analysis, a permit or application is defective if the issuing procedure is: (1) contrary to specific local ordinance requirements; or (2) an extraordinary procedure not authorized by local ordinance.

28. Ford v. Bellingham-Whatcom County Dist. Bd. of Health, 16 Wn. App. 709, 558 P.2d 821 (1977) (septic tank permits).

29. The ordinance under which the applicant seeks to develop must be in effect when the applicant applies for a building permit. If the permit application precedes the effective date of that ordinance or is made after the ordinance has been repealed, no vested right under the desired ordinance may be claimed. State *ex rel.* Kuphal v. City of Bremerton, 59 Wn. 2d 825, 371 P.2d 37 (1962).

change. Filing a complete permit application is the operative act that converts the developer's mere expectation of no zoning change into the vested right to develop, despite a subsequently effective zoning change.[30] The completeness requirement has two purposes. First, the application must be at least sufficiently complete to enable a court to determine whether the building permit application complies with the zoning and building ordinances.[31] Second, the completeness requirement substitutes for a judicial determination that the developer has proceeded in good faith.[32] The rationale is that the difficulty and expense of completing a permit application justifies a presumption that the developer actually intends to build, and is not merely speculating to obtain more valuable land with established development rights.[33]

In *Parkridge v. City of Seattle*,[34] the supreme court created a limited exception to the completeness requirement. In *Parkridge*, the issue was whether a right to develop land could vest despite an incomplete building permit application when the developer's diligent attempts to complete the application prior to the zoning change had been obstructed by the local government.[35] The court held that the development right had vested, notwithstanding the incompleteness of the application, because the developer's good faith conduct merited recognition of the vested right.[36] The *Parkridge* decision indicates some judicial willingness to weigh the acts of the parties in the permit process when determining whether the right to develop has vested but only for the completeness element of the vesting rule.

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30. Hull v. Hunt, 53 Wn. 2d 125, 130, 331 P.2d 856, 859 (1958):

> [T]he right vests when the party, property owner or not, applies for his building permit, if that permit is thereafter issued. This rule, of course, assumes that the permit applied for and granted be consistent with the zoning ordinances and building codes in force at the time of the application for the permit.

See also Mayer Built Homes, Inc. v. City of Steilacoom, 17 Wn. App. 558, 564 P.2d 1170, *review denied*, 89 Wn. 2d 1009 (1977). In *Mayer*, the court held that it is the filing of the permit application that vests the right to develop. *Id.* at 565, 564 P.2d at 1174. However, as *Hull* makes clear, the application must be such that a permit can be issued on it; in other words, it must be complete. 53 Wn. 2d at 130, 331 P.2d at 859.

31. Mercer Enterprises, Inc. v. City of Bremerton, 93 Wn. 2d 624, 633–34, 611 P.2d 1237, 1242–43 (1980) (Utter, C.J., dissenting).

32. Hull v. Hunt, 53 Wn. 2d 125, 130, 331 P.2d 856, 859 (1958).

33. *Id.*

34. 89 Wn. 2d 454, 573 P.2d 359 (1978).

35. *Parkridge* was a consolidation of two separate actions: (1) a challenge to the substantive validity of a rezone; and (2) a writ of mandamus to compel issuance of a building permit on a vested rights theory. The supreme court referred to these as the "rezone case" and the "vested rights case." *Id.* at 456, 573 P.2d at 361. The "rezone case" is discussed in Note, *Rezones: New Standards for Governing Bodies*, 55 WASH. L. REV. 255 (1979). Unless otherwise noted, all references to *Parkridge* in this comment concern the "vested rights case."

36. 89 Wn. 2d at 464–66, 573 P.2d at 365–66.

C. The Scope of the Vested Rights Doctrine

The vested rights doctrine applies to other land development permits, such as shorelines,[37] grading,[38] and septic tank[39] permits. These permit processes, like the building permit process, are generally viewed as ministerial functions. It is unclear whether the doctrine applies to discretionary development permit processes, such as conditional use permit and variance approvals.[40] Since the doctrine is based on a ministerial permit theory, however, it should not be possible to obtain vested rights prior to a developer's acquisition of all necessary discretionary approvals.[41]

A vested right to develop land, once acquired, is not absolute. The doctrine only protects the developer from legislative changes of the zoning ordinance. For example, the doctrine does not prevent denial of a building permit based on adverse environmental consequences under the State Environmental Policy Act (SEPA) for two reasons. First, permit denials based on environmental grounds are discretionary, not ministerial, acts of a local government. Second, SEPA-based permit denials are

37. The Shoreline Management Act of 1971, WASH. REV. CODE ch. 90.58 (1979), requires that development permits be issued before construction can occur on Washington's shorelines. *Id.* § 90.-58.140(2). The vested rights doctrine applies to such permits. Talbot v. Gray, 11 Wn. App. 807, 525 P.2d 801 (1974), *review denied*, 85 Wn. 2d 1001 (1975).

38. Juanita Bay Valley Community Ass'n v. City of Kirkland, 9 Wn. App. 59, 83, 510 P.2d 1140, 1155, *review denied*, 83 Wn. 2d 1002 (1973).

39. Ford v. Bellingham-Whatcom County Dist. Bd. of Health, 16 Wn. App. 709, 558 P.2d 821 (1977).

40. Conditional uses and variances are defined in the Washington Planning Enabling Act, WASH. REV. CODE ch. 36.70 (1979). A conditional use is defined as:

> [A] use listed among those classified in any given zone but permitted to locate only after review by the board of adjustment, or zoning adjustor if there be such, and the granting of a conditional use permit imposing such performance standards as will make the use compatible with other permitted uses in the same vicinity and zone and assure against imposing excessive demands upon public utilities, provided the county ordinances specify the standards and criteria that shall be applied.

Id. § 36.70.020(7). A variance is defined as:

> [T]he means by which an adjustment is made in the application of the specific regulations of a zoning ordinance to a particular piece of property, which property, because of special circumstances applicable to it, is deprived of privileges commonly enjoyed by other properties in the same vicinity and zone and which adjustment remedies disparity in privileges.

Id. § 36.70.020(14).

41. One Washington case has stated in a dictum that the vested rights doctrine applies to the issuance of special (conditional) use permits. Beach v. Board of Adjustment, 73 Wn. 2d 343, 347, 438 P.2d 617, 620 (1968). To the extent that *Beach* may be read as support for the proposition that a vested right may be obtained prior to a necessary exercise of administrative discretion, the dictum is unsound. The Washington vested rights doctrine is premised on the absence of administrative discretion in the issuance of land development permits. State *ex rel.* Ogden v. City of Bellevue, 45 Wn. 2d 492, 275 P.2d 899 (1954). The vested right to develop exists upon application for a building permit because the local government at that time comes under a non-discretionary duty to issue the requested permit. State *ex rel.* Craven v. City of Tacoma, 63 Wn. 2d 23, 385 P.2d 372 (1963). If discretionary

not zoning actions; rather, they are based on state law which overlays the building permit process. The zoning vested rights doctrine therefore does not apply.[42]

Vested rights to develop land may also be terminated by legislation enacted to protect public health or safety which has the effect of prohibiting a proposed development.[43] So long as the legislation is reasonably necessary, substantially related to suppressing a danger, and does not unreasonably discriminate, "[t]here is no such thing as an inherent or vested right to imperil the health or impair the safety of the community."[44]

D. *Rationale: Date Certain Vesting*

The primary rationale for the Washington vested rights doctrine is certainty as to the date of vesting.[45] The certainty rationale may be viewed from two perspectives: it benefits (1) judicial decision-making; and (2) rational land development investment decisions.

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authority to approve or deny the requested permit exists, there is no enforceable duty to issue the permit. A court will not, by writ of mandamus, compel the performance of a discretionary act in a specified manner. It will only require that the discretion be exercised, and a reasoned decision made. Peterson v. Department of Ecology, 92 Wn. 2d 306, 596 P.2d 285 (1979). Therefore, the vested rights doctrine should not apply. This conclusion is supported by the supeme court's decision in Jones v. Town of Woodway, 70 Wn. 2d 977, 425 P.2d 904 (1967). In *Jones*, the court held that the vested rights doctrine did not apply to granting plat approvals, because the town council possessed discretionary authority to approve or reject proposed plats.

The rule on discretionary development approvals and permits should be that no vested right to develop can accrue until the developer has obtained the last discretionary approval necessary prior to issuance of the penultimate building permit. The need to preserve administrative discretion is particularly important in the PUD area. PUD zoning, unlike Euclidean zoning, makes use of administrative discretion to assure that developments approved have the optimum density and mix of uses appropriate to the particular site. Cheney v. Village 2 at New Hope, Inc., 429 Pa. 626, 241 A.2d 81, 87–88 (1968). *See also* note 8 *supra*.

42. Polygon Corp. v. City of Seattle, 90 Wn. 2d 59, 578 P.2d 1309 (1978). *See also* Cook v. Clallam County, 27 Wn. App. 410, 618 P.2d 1030 (1980).

43. Hass v. City of Kirkland, 78 Wn. 2d 929, 481 P.2d 9 (1971).

44. *Id.* at 931, 481 P.2d at 11 (quoting City of Seattle v. Hinckley, 40 Wash. 468, 471, 82 P. 747, 748 (1905)).

45. In Hull v. Hunt, 53 Wn. 2d 125, 130, 331 P.2d 856, 859 (1958), the court stated:

> Notwithstanding the weight of authority, we prefer to have a date certain upon which the right vests to construct in accordance with the building permit. We prefer not to adopt a rule which forces the court to search through . . . "the moves and countermoves of . . . parties . . . by way of passing ordinances and bringing actions for injunctions"—to which may be added the stalling or acceleration of administrative action in the issuance of permits—to find that date upon which the substantial change of position is made which finally vests the right. The more practical rule to administer, we feel, is that the right vests when the party, property owner or not, applies for his building permit.

The *Hull* court also concluded that the cost of securing building permits justified a presumption that developers would not speculate in the enhanced values of land for which building permits had been hurriedly obtained prior to a zoning change. *Id.*

The rule of vesting the right to develop land on the date of application is easy to apply. The Washington doctrine creates a mechanical standard—building permit application compliance, timeliness, and completeness. This standard makes it unnecessary for a court to undertake a case-by-case inquiry into the fundamental vested rights issue of whether it is fair[46] to divest a party of property expectations through retroactively applying a subsequently effective zoning ordinance. By applying the mechanical rule in deciding a case, a court can avoid the difficult inquiry. Rather, it may simply decide on which side of the bright line a developer's permit application falls.

The doctrine's more persuasive social policy justification is that it fosters rational land development investment decisions by providing for relatively early and certain vesting of the right to develop land.[47] In Washington, the development right is secure from later zoning changes once a timely, conforming, and complete building permit application is filed.[48] Under the zoning estoppel rule, however, the vested right to develop land is not established until the developer has substantially changed position in reliance on its building permit or application.[49] Establishing a substantial change of position normally requires that the developer initiate or expand capital investment in the land development project by actual construction or site work prior to the legislative zoning change.[50] Since the circumstances that establish sufficient reliance vary from case to case, the developer is never certain it has "relied enough."[51] From the investment

46. *See* note 11 *supra*.

47. For the purposes of this comment, an early vesting rule is defined as a rule that permits vesting of the right to develop land (1) prior to actual issuance of the building permit; and (2) without requiring a substantial change of position by the developer.

48. *See* note 21 and accompanying text *supra*.

49. *See* notes 14–15 and accompanying text *supra*.

50. In California, the leading majority-rule jurisdiction, a developer must demonstrate a substantial change of position by initiating actual construction in reliance upon a duly issued building permit to obtain a vested right to develop. Avco Community Developers, Inc. v. South Coast Regional Comm'n, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976). In *Avco*, the developer's vested rights claim was denied because the building permits had not yet been issued even though the developer had relied on preliminary grading permits by initiating subdivision developments, such as installation of streets and sewers, and had spent over $3,000,000.

51. Aries Dev. Co. v. California Coastal Zone Conservation Comm'n, 48 Cal. App. 3d 534, 122 Cal. Rptr. 315 (1975). Developer Aries was held to have no vested right to complete construction of a $2,000,000 condominium project even though it had secured all necessary permits. The *Aries* court refused to consider the developer's $353,000 expenditure incurred prior to receiving the final discretionary government approval of the project as action taken in reliance on the government. A later $28,000 expenditure undertaken after the developer received all the necessary permits was labeled "insubstantial" and "merely preparatory " *Id.* at 550–51, 122 Cal. Rptr. at 326–27. For further discussion of the reliance requirements of the zoning estoppel rule, see Cunningham & Kremer, *supra* note 2, at 669–96; and Heeter, *supra* note 14. For a critical analysis of the zoning estoppel rule, particularly in California, see Hagman, *The Vesting Issue: The Rights of Fetal Development vis a vis the Abortions of Public Whimsy*, 7 ENVT'L L. 519 (1977).

decision standpoint, vesting under the zoning estoppel rule is both late and uncertain.[52]

A late and uncertain vesting rule imposes two types of social costs: risk costs and demoralization costs.[53] Risk costs are the direct costs that a developer incurs if it is unable to complete the proposed land development.[54] Examples include the loss of capital expenditures for planning, design, site work, and initial construction. Risk costs are social losses because, once incurred, they are nonrecoverable and do not add to the total social welfare.[55] Demoralization costs are indirect costs that result from the chilling effects of uncertainty upon investment expectations.[56] If the ability to complete land developments is uncertain, then fewer investors and developers will seek to enter the market, thereby reducing production. Thus, demoralization costs can be thought of as the present capitalized dollar value of lost future production.[57]

The zoning estoppel rule exaggerates both risk and demoralization costs. Risk costs expand because a developer cannot establish sufficient reliance to obtain the vested right until actual construction begins.[58] At

52. Hagman, *supra* note 51.

53. *Id.* at 527–38. The concept of risk and demoralization costs employed by Professor Hagman is derived from the work of Professor Michelman. *See* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214–24 (1967).

54. Hagman, *supra* note 51, at 534. Risk costs are a subset of what Michelman labels demoralization costs. By Michelman's analysis, what Hagman calls risk costs can be quantified as the dollar value necessary to offset the disutilities incurred by the developer as a "loser" when the vested rights claim is not recognized. Michelman, *supra* note 53, at 1214.

55. Hagman, *supra* note 51, at 527. When a partially completed land development is stopped, the investment up to that point is wasted. In addition, there is a further efficiency loss, since the graded, partially developed land has a reduced environmental value, and, in fact, further investment is necessary to restore the land.

An example of the risk costs in one project, the Roanoke Reefs Condominium, is found in Eastlake Community Council v. Roanoke Assocs., Inc., 82 Wn. 2d 475, 513 P.2d 36 (1973), where the developers were found to have no vested rights even though they had spent over $2,000,000. Subsequently, the developers sued the city of Seattle in Haslund v. City of Seattle, 86 Wn. 2d 607, 547 P.2d 1221 (1976), for its negligence in issuing an invalid building permit. The supreme court upheld a damage award of $2,896,534. Of that amount, $2,362,554 was invested prior to terminating the project. Brief for Appellant at 52, Haslund v. City of Seattle, 86 Wn. 2d 607, 547 P.2d 1221 (1976).

56. Hagman, *supra* note 51, at 527–29. As Hagman suggests, a vested rights doctrine should not be concerned with the gains and losses from speculations in the value of unimproved land since these losses are not social costs. Hagman is instead concerned with a vested rights doctrine that, in his view, deters the construction of adequate housing supplies at reasonable prices.

Quantification of risk and demoralization costs is presently unavailable. However, the magnitude of the problem may be indicated by one commentator's estimate that changes in land development standards and expansion of permit requirements added between $1,000 and $3,000 to the cost of a house in 1976. Priest, *Foreword* to F. BOSSELMAN, D. FEURER & C. SIMON, THE PERMIT EXPLOSION at v (1976).

57. Michelman, *supra* note 53, at 1214.

58. *See* note 50 *supra*.

this late stage in the development permit process, capital investment at risk is substantial. Demoralization costs are high because even this heavy investment yields little certainty that recognition of a vested right to develop land will enable completion of the project.[59] Both of these costs are borne by consumers of developed land. Developers must include risk costs in their price structures since they can avoid risk only by not developing at all. As market entry is deterred by uncertainty, supply declines. Assuming constant demand, prices may be expected to rise to reflect relative scarcity.[60]

Utilitarian economic factors are but one aspect of the social value of a rule of law. Nonetheless, the Washington vesting doctrine offers substantial advantages over the rule of zoning estoppel. The early vesting decision reduces risk costs since capital investment need not be expanded to establish the vested right. The certainty the rule fosters may reduce, at least in part, demoralization costs.

II. THE DOCTRINE IN CONFUSION: ANALYSIS OF *MERCER ENTERPRISES, INC. V. CITY OF BREMERTON*

A. *The* Mercer *Case*

1. *The Facts*

Plaintiff-developer Mercer Enterprises, Inc. applied on September 3, 1976 for a building permit to construct Phase I of a projected 443-unit housing development on forty-nine acres zoned R–1 in the City of Bremerton.[61] Under Bremerton Ordinance 3210, the R–1 zoning class allowed a maximum density of 9.075 units per acre in a PUD-type scheme.[62] The building permit application was for only the 196 multi-family units on 12.31 acres in Phase I, but was accompanied by a site plan proposal, as required under the ordinance, showing 408 multi-family units on 30.81 acres and thirty-five single family units on 18.5 acres.[63] Overall project

59. *See* notes 50–51 *supra*.

60. *See* Hagman, *supra* note 51, at 534.

61. Mercer Enterprises, Inc. v. City of Bremerton, 93 Wn. 2d 624, 625, 611 P.2d 1237, 1239 (1980).

62. Bremerton, Wash., Ordinance 3210 (Mar. 5, 1975) (repealed 1977). The ordinance is not labeled a PUD ordinance. However, the Kitsap County Superior Court construed Ordinance 3210 as a PUD ordinance in Holly Homes, Inc. v. City of Bremerton, No. 69553 (Kitsap County Super. Ct. Oct. 30, 1979) (oral decision of Bryan, J.).

63. Ordinance 3210 requires a developer to submit a site plan to the city planning department when applying for a building permit in R–1 districts. The site plan binds the property to the form of development exhibited on the plan unless both the planning department and the city council agree to modifications. *Mercer*, 93 Wn. 2d at 628, 611 P.2d at 1240.

density approximated nine units per acre, but the Phase I density exceeded fifteen units per acre.[64] The site plan was submitted to the Bremerton Planning Department for approval.[65]

The Bremerton Building Department took no action on the permit pending planning department approval of the site plan. At times during the process, Mercer received informal assurances from city officials that it was proceeding correctly to obtain its permits, and it continued to negotiate with the city regarding its proposal. However, responding to neighborhood group pressures, the city council placed a moratorium on R–1 zone permit processing on December 8, 1976. On December 15, 1976, Mercer was notified that its Phase I building permit application was incomplete. Mercer submitted further information, but its application remained substantially incomplete when Ordinance 3210 was repealed in March, 1977.

Mercer filed suit, seeking both a declaratory judgment that its right to develop had vested and a writ of mandamus to compel the city to process the permit application under the old zoning ordinance. The trial court found for Mercer and issued the writ. The supreme court affirmed in a five-four decision.[66]

2. *Issues and Holding*

The *Mercer* case presented two issues: first, whether a building permit application's compliance with the applicable zoning ordinance is determined solely on the basis of information supplied in the application or is determined with reference to the entire development proposal when the building permit is sought as a part of a larger planned unit development;[67] second, whether administrative delays in the permit process constitute sufficient official obstruction of a developer's attempts to complete the building permit application so that vested rights may be acquired despite application incompleteness.[68]

The *Mercer* majority decided that Mercer's application, including the site plan, should be considered as a whole for the purpose of determining

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64. Chief Justice Utter's dissenting opinion gives the Phase I density as 11.78 units per acre. *Id.* at 634, 611 P.2d at 1242. However, 196 units divided by the 12.31 acres in Phase I yields a density of 15.922 units per acre. Chief Justice Utter's density figure may reflect all the anticipated multi-family portions of the project.

65. *Id.* at 628, 611 P.2d at 1240.

66. *Id.* at 628–631, 611 P.2d at 1240–41. *See also* note 83 *infra*.

67. *See* note 68 *infra*.

68. 93 Wn. 2d at 626, 630, 611 P.2d at 1239, 1241. The majority opinion lumps both issues together and states the issue as the "sufficiency" of the permit application.

its compliance with the density restrictions of Ordinance 3210.[69] The court found that the city had considered Mercer's proposal as a single unit and that Mercer had relied on the city's unitary treatment in the permit process. Since the parties viewed the project as a whole, the court found that Mercer's compliance with the zoning ordinance should be evaluated on the same basis.[70] If the site plan and the building permit application are considered as a whole, Mercer's application complied with Ordinance 3210's density requirement of less than nine units per acre.

The majority also found that administration delay obstructed the developer's attempts to complete the building permit application.[71] The court reasoned that the delay in approving the site plan proposal, which in turn delayed the processing of the building permit, obstructed Mercer's attempts to complete the permit application.[72] The court therefore applied the diligence-obstruction rule of *Parkridge v. City of Seattle*[73] and held that Mercer's right to develop had vested.[74]

B. Analysis of Mercer

1. Determining Compliance

In *Mercer,* the court soundly concluded that compliance of individual building permit applications for segments of larger, multi-stage PUD projects should be determined with reference to the total project as a unit. That conclusion both conforms to the purposes of the compliance element of the vesting rule and is appropriate for PUD development.

Determining compliance on the basis of the total development proposal is consistent with the purpose of the compliance requirement of the vesting rule: protecting the integrity of the development permit process.[75]

69. *Id.* at 628, 611 P.2d at 1240.

70. *Id.* Chief Justice Utter, dissenting, concluded that the permit application's compliance with the zoning ordinance should be measured solely on the basis of the permit application. *Id.* at 633, 611 P.2d at 1242–43. This comment takes the position that Chief Justice Utter's dissent confuses the questions of the *existence* of the vested right and the *scope* of the right obtained. The issue of the existence of a vested right should be resolved on the basis of the total project as one unit. *See* notes 76–81 and accompanying text *infra.* The scope of the right is a separate question; the view taken here is that the scope issue should be resolved by reference to the building permit application. *See* notes 109–10 and accompanying text *infra.*

71. 93 Wn. 2d at 630–31, 611 P.2d at 1241. The dissent claimed that the application was incomplete for failure to submit information required by the city building code as required under the permit process. The trial court found that Mercer did not submit "storm and sewer plans, plumbing and electrical plans, foundation investigations, and water service plans necessary before issuance of a final permit." *Id.* at 635, 611 P.2d at 1243.

72. *Id.*

73. 89 Wn. 2d 454, 573 P.2d 359 (1978).

74. 93 Wn. 2d at 631, 611 P.2d at 1241.

75. *See* note 22 *supra.*

First, the site plan and building permit application, taken together, provide the local government and the courts with adequate information to determine whether the permit application substantively complies—proposes a permitted use—to the applicable zoning ordinance.[76] Second, determining compliance on the basis of the total plan is not a defective procedure.[77] As the *Mercer* court noted, determining compliance of the permit application on this basis was not contrary to the express requirements of the Bremerton zoning or building code. The choice of this procedure was also consistent with the requirements of Ordinance 3210 that site plans be approved prior to issuing a building permit.[78]

Determining compliance of building permit applications with reference to the total development proposal is functionally necessary in a PUD system.[79] The PUD regime is designed to increase the flexibility of land development.[80] Its principal techniques, cluster development and the mixing of uses, vary the intensity of land use within the project.[81] If portions of the proposed development are examined individually, they may not comply with the terms of the zoning ordinance; yet the overall project may comply. If a court applying the vested rights rule examined only discrete project segments, then developers would be unable to obtain a vested right to develop land unless they sacrificed some of the diversity and flexibility of land development that PUD systems were designed to achieve.

2. *Completeness*

The *Mercer* decision significantly expands the *Parkridge* exception[82] to the completeness requirement of the vesting rule. Although the *Mercer* court purports to simply apply the *Parkridge* rule, the cases are distin-

76. In *Mercer* the site plan provided the court with adequate information to determine whether Mercer's proposal complied with Ordinance 3210's density requirements. It should be noted, however, that the supreme court independently, though implicitly, construed Ordinance 3210 as permitting clustering of the units and substitution of privately held lots for common open spaces in calculating project density. 93 Wn. 2d at 628, 611 P.2d at 1240. *See also* note 106 *infra*.

77. *See* note 27 *supra*.

78. *Mercer*, 93 Wn. 2d at 630, 611 P.2d at 1241. In *Mercer*, the court confronted a situation in which *no* city ordinance specified the procedures to be used in processing PUD applications under Ordinance 3210. Therefore, the court applied a rule of reason, allowing developers to rely to some extent on the assurances of city officials as to the proper procedures to follow. The majority distinguished City of Mercer Island v. Kaltenbach, 60 Wn. 2d 105, 371 P.2d 1009 (1962) (facts stated in note 26 *supra*). Presumably, assurances by city officials as to substantive provisions of the zoning code still provide no basis for a vested rights claim.

79. *See* note 8 *supra*.

80. *Id.*

81. *Id.*

82. *See* notes 34–36 and accompanying text *supra*.

guishable in two ways. First, the permit application was significantly less complete in *Mercer* than in *Parkridge*.[83] Second, in *Parkridge*, city officials acted in bad faith by imposing additional information requirements for permit issuance on the developer to obstruct completing the permit application and to halt the development.[84] In *Mercer*, however, there are few indications of municipal bad faith. The delays in permit processing stemmed from genuine, good faith difficulty in interpreting and applying Ordinance 3210 to Mercer's unconventional development proposal.[85] The element of bad faith obstruction in the *Parkridge* diligence-obstruction test is largely absent in *Mercer*.

In reality, *Mercer* establishes a new exception to the completeness rule, based on the conduct of the parties. Under *Mercer* an incomplete permit application is sufficient to establish a vested right to develop land if (1) the developer has sought to complete its permit application, but (2) has been frustrated in its efforts by some governmental act or omission. This rule is unsound. It does not reach the fundamental vested rights issue,[86] nor does it provide an adequate test for deciding that issue.

Under the Washington vested rights doctrine, which the *Mercer* court purports to retain, the filing of a complete permit application does more than establish a presumption of developer good faith. It is also the operative act that converts the developer's mere expectation of no zoning change into the vested right to develop despite a subsequently effective zoning change barring the development.[87] When a developer fails to complete its permit application, it has done less than the rule requires to estab-

83. In *Parkridge*, the developer submitted complete schematic drawings of the proposed structure, then revised the drawings, reducing the number of proposed units, after discussion with city officials. The revised drawings were ready to be submitted when the city canceled the building permit application. At that time, detailed structural plans also had been prepared, and a requested environmental assessment was far advanced. 89 Wn. 2d at 465–66, 573 P.2d at 366.

The *Mercer* application was less complete. Since a much larger project was involved, storm, sewer, plumbing, water service, and electrical plans were necessary for the permit to be issued. As Chief Justice Utter pointed out in dissent, Bremerton officials could not have legally issued the requested permits on the basis of Mercer's application. Despite being put on notice that further submissions would be necessary, Mercer did not supply the requested information. 93 Wn. 2d at 635–36, 611 P.2d at 1244.

84. The supreme court admonished the Seattle officials in *Parkridge*, stating:

> The State Environmental Policy Act of 1971 and the other statutes and ordinances administered by the building department serve legitimate functions, none of which is intended for use by a governmental agency to block the construction of projects, merely because they are unpopular. We make this statement in light of the history of this matter and because the building permit application will be before the building department for further processing.

89 Wn. 2d at 466, 573 P.2d at 366.

85. In *Mercer*, the trial court found as a fact that the city acted in good faith. Finding of Fact XX, Mercer Enterprises, Inc. v. Bremerton, No. 69384 (Kitsap County Super. Ct. May 26, 1978).

86. *See* note 91 and accompanying text *infra*.

87. *See* note 30 *supra*.

lish a vested right.[88] The developer stands in a lesser position because it has no clear right to compel issuance of a building permit;[89] the developer cannot therefore claim the protection of the vesting rule. Viewed in this fashion, the issue is not whether considerations of developer diligence or official obstruction can excuse the failure to complete the permit application. The fundmental issue is whether principles of fairness[90] still require recognition of a vested right to develop despite the permit application's incompleteness.[91]

The *Mercer* court's conduct test is inadequate to decide this fairness issue for two reasons. First, the conduct test does not consider all the relevant interests in the determination. Second, the conduct test therefore cannot balance the countervailing interests at stake.

The elements necessary to a fair decision in the vested rights context may be derived from the related "retroactivity of civil legislation"[92] doctrine. In the absence of specific constitutional provisions,[93] retroactivity

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88. "[M]ore than the filing of an application for a building permit was required . . . to protect the applicant from a subsequent zoning change." *Parkridge*, 89 Wn. 2d at 465, 573 P.2d at 366.

89. *See* notes 17–20 and accompanying text *supra*.

90. "Fairness" is not being used in the Rawlsian sense of the term. Rawls' principles of justice as fairness are primarily applicable to evaluations of the basic structure of society. J. RAWLS, A THEORY OF JUSTICE 60–61 (1971).

It is this comment's position that a particularized decision is more likely to be fair if all the relevant interests in the matter are considered by the decision-maker.

91. If the application is complete, under the mechanical Washington rule, the right to develop is vested. *See* note 21 and accompanying text *supra*. The supreme court recognized in *Parkridge* and *Mercer* that, under exceptional circumstances, a vested right can accrue despite a failure to complete the building permit application. The only tenable rationale for creating this exception is that doing so is fair. That is also, as most commentators recognize, the basic reason for doctrines providing protection from retroactive civil legislation, whether labeled as "vested rights" or "retroactivity." *See* note 11 *supra*.

92. Cunningham & Kremer, *supra* note 2, at 660, provides a useful capsule description of basic "retroactivity of civil legislation" doctrine:

> Official acts of a legislative body will become effective at some defined moment or period. The traditional pattern is to adopt legislation that is prospective in nature, therefore affecting only those transactions or events occurring after passage of the statute. In contrast, retroactive . . . legislation gives new legal significance to events or transactions that preceded enactment of the legislation; very often the result is that actions that were legal when begun, and which already may be completed, are suddenly rendered illegal.
>
> For several centuries the common law courts have therefore generally accepted the proposition that legislation that has such a retroactive effect is unfair and perhaps unconstitutional. The general premise has been that legislation must by its nature be prospective in effect, reflecting a general philosophy that statutory law should provide forewarning or guidance in order that people may be able to plan their conduct with reasonable certainty of its legal consequences.

93. The United States Constitution prohibits states from passing ex post facto criminal laws, U.S. CONST. art. I, § 10; Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798), and laws impairing the obligation of contracts, U.S. CONST. art. I, § 10. The contract clause does not restrict the exercise of legislative power for general and legitimate public welfare purposes. Manigault v. Springs, 199 U.S. 473, 480 (1905).

doctrine historically employed a vested rights analysis.[94] More recent decisions, however, analyze a variety of public and private interest factors to decide whether fairness and justice principles would be offended by retrospectively applying subsequently enacted legislation.[95] These factors may be reduced to two broad considerations: first, the weight and validity of the private interests that would be impaired by a retrospective application of the new law; second, the legitimacy and importance of the public policy asserted by the new law. These competing considerations are then balanced.[96]

The *Mercer* conduct test neither measures the competing interests, nor balances them.[97] The conduct test's criteria—developer diligence and official obstruction—reflect only the developer's interest.[98] The test, however, does not adequately measure the developer's interest, since it does not evaluate the extent to which the developer will be injured by the application of the newly enacted zoning ordinance.

More significantly, the conduct test does not provide for any judicial consideration of the competing public policy interests[99] identified in and implemented by the subsequently enacted ordinance. Zoning laws are a

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94. *See* Hochman, *supra* note 1, at 696–97. *See also* Greenblatt, *Judicial Limitations on Retroactive Civil Legislation*, 51 Nw. U.L. Rev. 540, 561–66 (1956). Washington still uses the vested rights concept, *see* Godfrey v. State, 84 Wn. 2d 959, 963, 530 P.2d 630, 632 (1975), supplemented by a rule of construction against retroactive application of statutes, Sorenson v. Western Hotels, Inc., 55 Wn. 2d 625, 349 P.2d 232 (1960).

95. Hochman, *supra* note 1, at 726–27.

96. Cunningham & Kremer, *supra* note 2, at 664–66. *See also In re* Marriage of Bouquet, 16 Cal. 3d 583, 546 P.2d 1371, 128 Cal. Rptr. 427 (1976). In *Bouquet*, the California Supreme Court broke the two basic considerations down into six factors:

(1) The significance of the state interest served by the new law;

(2) The importance of retroactive application to effectuate the attainment of that interest;

(3) The extent of reliance on the prior law;

(4) Legitimacy of that reliance;

(5) The extent of actions taken on the basis of that reliance;

(6) The extent to which the retroactive application of the new law would disrupt actions taken in reliance on the prior law.

Id. at 592, 546 P.2d at 1376, 128 Cal. Rptr. at 432.

97. *See* notes 82–86 and accompanying text *supra*.

98. A developer may be diligent in seeking to complete its building permit application, but it does not necessarily follow that the developer has significantly changed positions in reliance on its application or the prior zoning ordinance. *Mercer* is an example.

99. For a zoning ordinance to be valid at all, it must serve the public health, safety, or welfare. The various public purposes which zoning may promote are detailed in 1 R. Anderson, American Law of Zoning 2d §§ 7.04–.33 (1976).

One comment has listed some costs associated with recognizing a vested right to develop land which has been subsequently downzoned. These are:

(1) Unanticipated increases in public service costs;

(2) Increased automobile traffic;

(3) Intensified air and noise pollution;

valid exercise of the police power intended to further public welfare.[100] Although retrospectively applying such legislation was historically disfavored, courts now recognize that if retrospective application achieves the legislative goal and furthers an important public policy, it is permissible.[101] Zoning vested rights cases involving incomplete permit applications may fall within this class.[102] Vesting rights on the basis of incomplete permit applications can impair both the legislative policy identified in the new zoning ordinance,[103] and the judicial policy against encouraging nonconforming uses.[104]

These public policy interests are not dispositive. Nonetheless, the absence of consideration of public policy interests in the *Mercer* conduct test makes it nearly impossible for a court to undertake the balancing needed to determine whether a vested right to develop land should be recognized to secure a fair result.

The *Mercer* completeness rule is also poor vested rights policy. The rule provides for very early and easy vesting of the right to develop. This has two effects. First, under a very early vesting principle, the courts tend to supplant the local government's institutional role as the initial zoning decision-maker.[105] Second, the ability of local governments to respond to changed community needs by rezoning is unduly restricted, since the rezoning is likely to be ineffective against the very development which re-

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(4) Violation of location, size, and architectural requirements set forth in pending zoning comprehensive plans and ordinances;

(5) Reduction of open space;

(6) Aesthetic eyesores.

Comment, *Vested Rights and Land Use Development,* 54 OR. L. REV. 103, 109 (1975) (author's paraphrase). Obviously, some of these costs are costs of development as well as costs of recognizing vested rights.

100. Lewis v. City of Medina, 87 Wn. 2d 19, 548 P.2d 1093 (1976).

101. *See* Cunningham & Kremer, *supra* note 2, at 664.

102. *See* notes 103–04 and accompanying text *infra.*

103. The newly enacted zoning ordinance may reflect a significant change in the policies guiding community growth, as, for example, when it implements changes in the comprehensive plan. The comprehensive plan is used in Washington to guide legislative and administrative zoning decision-making. State *ex rel.* Standard Mining Co. v. City of Auburn, 82 Wn. 2d 321, 510 P.2d 647 (1973).

104. Keller v. City of Bellingham, 92 Wn. 2d 726, 730, 600 P.2d 1276, 1279 (1979). No vested right can be claimed to expand or reinstate a nonconforming use. State *ex rel.* Miller v. Cain, 40 Wn. 2d 216, 222, 242 P.2d 505, 509 (1952).

105. The power to zone is delegated to local governments. WASH. CONST. art. XI, § 11; WASH. REV. CODE chs. 35A.63, 36.70 (1979). Too early vesting of the right to develop limits the ability of local governments to make zoning decisions, because the initial filing of the building permit application would foreclose any further government action as to the use of that property. In other words, by recognizing a vested right the court in effect makes the decision to approve development. For a critical analysis of the Washington courts' activism in zoning matters, see Alkire, *Washington's Super-Zoning Commission,* 14 GONZ. L. REV. 559 (1979).

vealed the local zoning scheme as inadequate.[106] As a consequence, communities will bear increased costs from nonconforming uses.[107] These costs will be particularly burdensome when the proposed land development is large scale, such as the PUD project involved in *Mercer*.[108] Large-scale development not only affects a community; it may also transform it.

III. A MODIFIED VESTED RIGHTS RULE

A. *The Proposed Rule*

The vested rights rule should be modified to resolve vested rights controversies arising in the context of large-scale PUD development as well as traditional Euclidean zoning, as follows.

The right to develop land vests if the applicant files a building permit application that:

(1) Complies with the existing zoning ordinance and building code as determined by reference to the entire development proposal;

(2) Is filed during the effective period of the zoning ordinance under which the applicant seeks to develop;

(3) Is complete prior to the effective date of the zoning change. If the

106. *Mercer* is a case in point. The City of Bremerton apparently intended the R-1 classification to encompass medium density cluster development. 93 Wn. 2d at 629, 611 P.2d at 1240 (quoting letter from the Bremerton Planning Director to plaintiff Mercer). Mercer's application, however, proposed high density multi-family units; the high density development was to be balanced by large, single-family waterfront lots. Thus, Mercer intended to "comply" with Ordinance 3210 without providing any significant open space at all. One of the purposes for which Ordinance 3210 was passed was to provide "more *common* open space within the RESIDENTIAL ONE DISTRICTS of the City." Bremerton, Wash., Ordinance 3210 (Mar. 5, 1975) (repealed 1977) (emphasis added). Plaintiff Mercer's good faith in the matter is somewhat questionable; the city's efforts to block the development by amending the ordinance appear understandable under the circumstances.

A prohibiting legislative response to a particular land development does raise fears of special legislation, even under the facts in *Mercer*. Special legislation is arbitrary action against a particular person or group. There is no need, however, to automatically invalidate retroactive legislation that is aimed at a particular land development project:

> To ignore that the public and their legislative representatives often become aware of a land use problem only when a particular proposal suddenly brings into focus the shortcomings of the existing regulatory scheme would deny human experience. . . . Thus, a particular project could appear to be the focus of a new law, which would render that law suspect as special legislation. However, merely because the project spurred legislative awareness which resulted in the change of policy should not render the law unenforceable as applied to the project. Newly awakened public concerns are no less legitimate than others and, in the absence of a showing of intentional discrimination, should be equally deserving of retroactive application when they represent important public policies.

Cunningham & Kremer, *supra* note 2, at 668-69. *See also* Hochman, *supra* note 1, at 701-02.

107. *See* note 99 *supra*.

108. 93 Wn. 2d at 628, 611 P.2d at 1240.

application is not then complete, a vested right to develop may be recognized only if the developer's interest outweighs the legitimate public policy interests identified in the subsequently enacted zoning ordinance.

B. Analysis

1. Compliance

The *Mercer* court held that the compliance of a large-scale, multiple-phase PUD project with the zoning ordinance should be determined on the basis of the entire development, and not its discrete components. The modified rule follows the court's holding on this issue.

The court did not resolve the associated question of whether the scope of the vested right the developer acquires encompasses the entire development proposal.[109] The modified rule would not expand the scope of the right beyond what is applied for in the building permit.[110]

2. Completeness

Securing development permits for large-scale PUD projects remains an expensive, time-consuming process. Cases like *Parkridge* and *Mercer,* involving incomplete applications, are likely to recur. The Washington courts should retain the rule that the right to develop vests on filing of a complete and conforming building permit application. The courts should also, however, develop a consistent rule for dealing with incomplete-permit-application cases.

Section (3) of the modified rule suggests that in deciding vested rights cases involving incomplete applications, the courts should balance the interests of the developer and the local government, and determine whether recognizing a vested right is necessary to be fair to the developer under

109. Both the majority and dissenting opinions are confusing on this point. The writers both appear to confuse, or at least subsume, the issues of existence of the right and scope of the right. *See* note 81 *supra.* The precise remedy ordered by the trial court and affirmed by the supreme court is of no help; it requires only that the city, under a writ of mandamus, *process* Mercer's *building permit application.* Conclusion of Law VI, Mercer Enterprises, Inc. v. City of Bremerton, No. 69384 (Kitsap County Super. Ct. May 26, 1978) (emphasis added). That application, of course, covered only Phase I of the project. Mercer itself conceded that it would have to file new building permit applications for remaining phases of the project. 93 Wn. 2d at 634, 611 P.2d at 1243 (Utter, C.J., dissenting).

If *Mercer* is read to support the notion that the scope of the vested right extends to all future phases of a multi-phase project, the case would represent a sharp departure from existing law, since vested rights could be obtained prior to filing a building permit application. It is unlikely that the court would overrule such substantial prior law by such a very indirect implication.

110. *See* notes 29–30 & 109 *supra.*

the circumstances of the case.[111] In applying this balancing rule, the courts must, however, accurately identify the interests at stake.

a. *The Developer's Interest*

The developer's interest in completing the proposed land development should be both legitimate and substantial to merit recognizing a vested right. The developer's interest is legitimate if the developer has, in good faith, made a complying and timely application that is diligently pursued.[112] Applications filed with notice of pending zoning changes should not be regarded as made in good faith.[113]

The weight to be attached to the developer's interest will vary from case to case. A court can evaluate the weight of the interest by looking to the investment the developer has placed at risk[114] in terms of expenditures to secure permits and approvals, costs of preliminary site preparations, and nonvoidable contract obligations incurred.[115] A court should also

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111. The balancing test suggested here is based on the modern retroactivity of civil legislation doctrine. *See* notes 91–96 and accompanying text *supra*. It also reflects one aspect of the Washington decisional law with respect to equitable estoppel against governments. An estoppel, under Washington law, will not be raised against a government when doing so would substantially impair the exercise of sovereign governmental powers. Finch v. Matthews, 74 Wn. 2d 161, 169–70, 443 P.2d 833, 839 (1968). *See also* Ford v. Bellingham-Whatcom County Dist. Bd. of Health, 16 Wn. App. 709, 716, 558 P.2d 821, 826–27 (1977) (rejecting alternative equitable estoppel claim in vested rights case because of "overriding considerations of public health"). *Finch* and *Ford* may be cited for the proposition that courts must consider public interests before invalidating governmental actions on grounds of fairness.

112. This factor is similar to the court's analysis in *Mercer*. *See* text following note 85 *supra*. This comment does not take the position that the actions of the developer and the government in a vested rights case are irrelevant; rather, it suggests that those actions should not be the sole basis on which cases like *Mercer* should be decided.

113. When a permit application is made following notice of a pending zoning change, there is no legitimate reliance on the prior ordinance. Although reasonable expectations of continuity in the law may be frustrated, those expectations are not a sufficient reason to apply the vested rights doctrine. Godfrey v. State, 84 Wn. 2d 959, 962–63, 530 P.2d 630, 632 (1975).

114. *See* text accompanying notes 54–55 *supra*. Consideration of such costs is not the functional equivalent of adopting the zoning estoppel rule in Washington. First, the extent of the developer's reliance is not the sole basis for decision under the proposed rule. Second, the balancing test applies only to incomplete applications; manufacturing reliance by expending very large sums would be difficult because construction of the project cannot proceed until the building permit is obtained.

115. Losses in land values that result from a downzone should not be considered. Such losses are not social costs because of the "shifting value" theory. The value of land for development is largely a function of its location. If a change in zoning restricts the ability to develop in one location, the value of similar lands in other locations will be enhanced. Thus, a downzone does not destroy value measured on a societal basis; it merely shifts it. Professor Hagman argues that such shifts do not impose heavy demoralization costs, because "losing a bet only temporarily demoralizes a gambler. . . . [E]ven if demoralization costs are so high that people stop investing in land, it may not make much difference because land is not human made. . . . It is not very important to encourage investment in raw land as a matter of efficiency. That is not so with respect to buildings. It is important that investors continue to invest in shelter if we are to have it." Hagman, *supra* note 51, at 528–29.

consider how far the development permit process has advanced prior to the zoning change. A developer who has secured preliminary permits and approvals should stand in a stronger position than a developer who has merely submitted a speculative proposal.[116]

b. The Public Policy Interest

In evaluating the weight and legitimacy of the public policy interest identified in the subsequently enacted zoning ordinance, a court should consider three factors.

(1) The legitimacy of the policy interest identified in the subsequently enacted ordinance

A court must necessarily review the legitimacy of the interest identified in the rezone in order to assure that substantial land development interests are not terminated for impermissible reasons. The test to be applied is whether the policy articulated in the rezone bears a substantial relationship to the general public welfare.[117] Although courts should be sensitive to allegations of special legislation, the rezone should not be per se invalid for the purpose of vested rights cases if the record reveals that the rezone occurred in response to the proposed land development.[118]

(2) The importance of the zoning change relative to the overall community zoning regime

Clearly, some zoning policy interests are likely to be more significant than others. For example, a rezone of hundreds of acres from industrial to residential use in accordance with comprehensive plan changes should have greater weight than does an amendment deleting five possible uses from the fifty permitted in a classification district.[119] The importance of

116. *See* Cunningham & Kremer, *supra* note 2, at 666. This criterion is relevant in two ways. First, if a developer obtains almost all of the preliminary permits, those actions intuitively suggest a greater reliance on the prior zoning ordinance. Second, the more conditions that are satisfied (assuming that one views the right to develop as a conditional right as is suggested in note 12 *supra*) the stronger the claim of right.

117. This test states present Washington law with respect to the substantive validity of a rezone. Parkridge v. City of Seattle, 89 Wn. 2d 454, 460, 573 P.2d 359, 364 (1978) (rezone case). *See also* Note, *Rezones: New Standards for Governing Bodies*, 55 WASH. L. REV. 255, 258–59 (1979). As this note explains, the Washington courts distinguish between "quasi-adjudicatory," "administrative" rezones, typically downzones of small parcels, and "legislative" rezones of a more general nature. The quasi-adjudicatory rezone is not aided by a presumption of validity, and must, to be valid, bear a substantial relationship to the public welfare and be supported by adequate evidence. *Id.* at 264–66.

118. *See* note 106 *supra*.

119. Cunningham & Kremer, *supra* note 2, at 666–67.

any particular type of change is relative, however, and should be determined on a case-by-case basis.

(3) The necessity of retroactive application to effectuate attainment of the policy interest

Having determined that the policy interest is significant and legitimate, a court should balance the impact of recognizing a vested right allowing the proposed development against the ability to achieve the policy interest. When completing the development would substantially frustrate the intended zoning change, the case for rejecting the vested rights claim is strengthened.[120]

IV. CONCLUSION

The vested rights doctrine should balance the competing policy goals of eliminating wasteful risk and uncertainty in the land development permit process and retaining sufficient local government flexibility to respond to changed community conditions by rezoning. The present Washington doctrine of vesting the right to develop when the building permit application is conforming, timely, and complete adequately protects both these goals.

The vested rights doctrine must now accommodate large-scale, multiple-phase planned developments as well as traditional Euclidean land developments. In *Mercer,* the supreme court adopted a reasonable rule of referring to the entire development proposal to determine whether building permit applications comply with the zoning ordinance. This rule allows a rational application of the doctrine to PUD developments and should be retained.

The *Mercer* decision also justifiably recognizes the need to grant vested rights prior to completing the building permit application in exceptional cases. The court's analysis of the conduct of the parties in the building permitting process does not, however, provide a sound basis for decision. Instead, the court should balance the developer's interest in completing the proposed development against the public policy interests identified in the subsequently enacted zoning ordinance. A balancing approach, encompassing all the relevant interests, provides a better means of securing a fair result.

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120. *Id.* at 667. Factors (2) and (3) are linked, as the commentators suggest. Two types of developments would be likely to significantly frustrate the legislatively defined policy: (1) large scale development; and (2) development with significant spillover and nuisance characteristics.