Denver Law Review

Volume 66 | Issue 1 Article 4

February 2021

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VESTED PROPERTY RIGHTS IN COLORADO: THE LEGISLATURE RUSHES IN WHERE . . . .

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INTRODUCTION: FLEXIBILITY AND CERTAINTY

Consider the plight of the developer who constructs a thirty-one story tower. After relying on a flawed city zoning map, a court orders the developer to remove twelve stories of the tower because "reasonable diligence" by the developer would have led to the discovery of the flawed zoning map.[1] Consider the developer who obtained all necessary land use approvals for a high density development. Because proper procedures were not followed regarding the environmental impact assessment for the development, the developer must renew the approval process. During that time, the local government downzones the property, reducing its value by more than ninety percent. The court informs the developer that this is the risk of doing business.[2] These examples of apparent hardship grab national attention and create the perception that property owners require protection from the arbitrary and capricious actions of local government officials.[3]

There is an inherent tension between the interests of property developers and the public at large, who often think that development has a negative impact. The trend in land use regulation is to individualize land use approval processes, so that each proposed development can be reviewed on its merits.[4] The extent of "dealmaking" between private developers and land use professionals is ever-increasing.[5] Land use

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1. *See* Parkview Assoc. v. City of New York, 1988 WL 11488 (N.Y.C.A.). *See also Court Rules Building Must Lose 12 Stories*, Kansas City Times, Feb. 10, 1988, at A1.

2. *See* William C. Haas & Co. v. City and County of San Francisco, 605 F.2d 1117 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980).

3. *See* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 655 n.22 (1981) (Brennan, J., dissenting) (describing the practice of local governments to amend the regulations applicable to a development during the approval process).

4. *See, e.g.*, Heyman, *Innovative Land Regulation and Comprehensive Planning*, 13 SANTA CLARA L. REV. 183 (1972) (examining innovative land use control systems that consider development projects on an individual basis). Land use controls that incorporate performance standards are the most frequently used systems for individualizing project analysis. Generally, performance-based systems eliminate land uses as of right and permit development only when the specific project proposal satisfies certain pre-determined criteria. *See generally* C. THUROW, W. TONER & D. ERLEY, PERFORMANCE CONTROLS FOR SENSITIVE LANDS: A PRACTICAL GUIDE FOR LOCAL ADMINISTRATORS (Planning Advisory Service Report Nos. 307-08).

5. *See* R. ELLICKSON & A. TARLOCK, LAND-USE CONTROLS 234-80 (1981) (extensive analysis of dealmaking between landowners and the government). *See also* Fulton, *On the Beach with the Progressives*, 51 PLAN. 4 (1985) (discussing dealmaking in Santa Monica, California).

professionals stress the need to maintain flexibility in regulatory processes in order to ensure that development produces only a minimum level of hardship for the community.[6] The public often does not see the need for development regulations until the need is brought to its attention. By then, a specific project may already have received one or more land use approvals.

Diametrically opposed to the public interest in regulatory flexibility is the property developer's interest in certainty.[7] No business activity is risk-free and businesses require a basic level of certainty before investments are made. The real estate development industry is subject to a high level of market volatility, which makes the need for certainty in government regulations great.[8] Developers point to the complex and uncertain government regulatory environment as the principal reason that a lender will not commit to an otherwise worthwhile development.[9] The developer's choices are few; either to fund the startup costs of the project, to pay excessively high interest rates on borrowed money, or to defer the project altogether. Ultimately, according to the development industry, it is the consumer who pays the cost of flexibility.[10]

The common law's answer to the conflict between flexibility and certainty is the "vested rights doctrine." The doctrine states that the government may not impose new or different regulations on the developer of real property after a developer has reasonably and detrimentally relied in good faith on government approval.[11] The elements necessary or sufficient to vest a right to develop property are the subject of an ever-growing volume of case law.[12] However, many have been critical of the judicial approach to vested rights, arguing instead for a statutory

6. *See* R. ELLICKSON & A. TARLOCK, *supra* note 5, at 213-14 (discussing the quest of local officials for flexibility). The book mentions that numerous innovative land use controls have been developed to increase the flexibility of control over development; R. FREILICH & P. LEVI, MODEL SUBDIVISION REGULATIONS: TEXT AND COMMENTARY 12-13 n.64 (1975) (identifying numerous zoning techniques that courts have held constitutional). The most important innovative zoning scheme that state and local governments have adopted is the "planned unit development." *See also* COLO. REV. STAT. § 24-67-101 to 108 (1982).

7. *See* Hagman, *Estoppel and Vesting in the Age of Multi-Land Use Permits*, 11 SW. U.L. REV. 545 (1979) (examining the problems that developers of real property face because of multiple permitting systems which exist at several levels of government). *See also* Sigg, *California's Development Agreement Statute*, 15 SW. U.L. REV. 695 at 695 (1985) ("[O]n the one hand, builders wanted assurances that after they invested substantial initial sums in a project, regulators would not change the rules . . .").

8. *See* Shultz & Kelley, *Subdivision Improvement Requirements and Guarantees: A Primer*, 28 WASH. U.J. URB. & CONTEMP. L. 3, 26-27 (1985) (discussing the risk of failure in a residential development because of consumer conduct).

9. *Id.* at 24-26 (discussing the role of the lender in the land development process). As the authors indicate: "[I]n the name of 'sound lending,' the lender can dominate the development process." *Id.* at 26.

10. *See* L. SAGALYN & G. STERNLIEB, ZONING AND HOUSING COSTS (1972); S. SEIDEL, HOUSING COSTS & GOVERNMENT REGULATIONS (1978). As an example of increased development costs resulting from land use controls, Seidel notes on page 120 that lot development costs in northern Virginia increased 74.1% between 1969 and 1975. In Colorado, a developer estimated that the cost of a finished lot in one development was $12,000. Ditmer, *Writer: Pioneer in Open Space Planning*, Denver Post, Feb. 19, 1984, at II.

11. *See infra* notes 39-52 and accompanying text.

12. *See generally* C. SIEMON, W. LARSEN & D. PORTER, VESTED RIGHTS: BALANCING PUB-

solution.[13]

On August 27, 1987, the proponents of the statutory solution carried the day in Colorado when Governor Roy Romer signed into law Senate Bill No. 219.[14] After examining the common law's vested rights doctrine, including its application in Colorado, this article describes the new scheme of statutory vested rights embodied in S.B. 219, critically evaluates the issues that the new legislation creates and finally, makes recommendations regarding the contents of local regulations adopted pursuant to S.B. 219.

I. VESTED RIGHTS DOCTRINE

Since the right to develop property to its highest and best use is not constitutionally protected, vested rights doctrines have evolved to protect a property developer from regulatory changes that interfere with or restrict his government approved plans.[15] Three basic analyses are alternately and concurrently relied on by different jurisdictions: (1) an analysis involving common law equitable estoppel, (2) a due process analysis, and (3) a "taking" analysis.[16] While all three theories overlap to some degree, the distinctions between the first two theories becomes blurred in practice.[17]

The doctrine of common law equitable estoppel holds that a party who makes a representation may not repudiate that representation which another has relied on to his detriment.[18] Jurisdictions which subscribe to this doctrine conclude that because a developer has a "vested right" to develop *vis-a-vis* the government's regulation, the government

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LIC AND PRIVATE DEVELOPMENT EXPECTATIONS (1982) (providing a thorough, if not exhaustive, review of case law).

13. *See generally* Witt, *Vested Rights in Land Uses—A View from the Practitioner's Perspective*, 21 REAL PROP. PROB. TRUST J. 317 (1986).

14. Senate Bill No. 219 (codified at COLO. REV. STAT. §§ 24-68-101 to 106 (Supp. 1987)) [hereinafter S.B. 219]. It may be an exercise of literary license to suggest that the Colorado legislature has rushed into the vested rights controversy. The Colorado House was unable to pass H.B. 1360 in 1985 (House Bill No. 1360, Fifty-fifth General Assembly, First Regular Session, 1985). The Colorado legislature then passed S.B. 60 in 1987 (Senate Bill No. 60, Fifty-sixth General Assembly, First Regular Session, 1987). Governor Romer vetoed S.B. 60, and the legislature came back with S.B. 219. Senate Bill No. 219 changed the definition of site specific development plan, decreased the vesting period from five to three years and specified the measure of compensation if the government interferes with a vested property right.

15. C. SIEMON, W. LARSEN & D. PORTER, *supra* note 12, at 9-10; Comment, *Developers' Vested Rights*, 23 URB. L. ANN. 487-88 n.4 (1982). *See* Witt, *supra* note 13, at 317-19. *See generally* F. BOSSELMAN, FEURER & C. SIEMON, THE PERMIT EXPLOSION (Urban Land Institute, 1976).

16. *See* C. SIEMON, W. LARSEN & D. PORTER, *supra* note 12, at 13; Cunningham & Kremer, *Vested Rights, Estoppel, and the Land Development Process*, 29 HASTINGS L.J. 625, 648-76 (1978); Sallet, *Regulatory "Takings" and Just Compensation: The Supreme Court's Search for a Solution Continues*, 18 URB. LAW. 635, 635-45 (1986).

17. Cunningham & Kremer, *supra* note 16, at 648-76; Rhodes, Hauser & De Meo, *Vested Rights: Establishing Predictability in a Changing Regulatory System*, 13 STETSON L. REV. 1, 1-4 (1983). *See also* Kudo, *Nukolii: Private Development Rights and the Public Interest*, 16 URB. LAW. 279, 282-87 (1984).

18. Cunningham & Kremer, *supra* note 16, at 648-52.

should be estopped from applying subsequently enacted regulations.[19] Estoppel focuses upon whether, in light of the circumstances of each case, it would be fundamentally unfair or unjust for the government to apply a new set of rules to a particular parcel of property.[20] Generally, two elements must be established before a developer may claim a vested right by estoppel: (1) a reasonable and good faith detrimental reliance upon a representation by the government, and that (2) such reliance would cause an injustice to the developer if the government applied contrary regulations.[21]

The due process analysis, generally referred to as the "Vested Right" theory or the "Vesting Rule,"[22] focuses on whether the application of land use regulations to a developer's project bears a reasonable relationship to the public health, safety and welfare.[23] The crux of this substantive due process argument is that it may be unreasonable to allow the government to impose new or different conditions on development after previously granting approval for such development. Thus, the developer has a "vested right" to develop his property in accordance with the regulations which were in effect at the time of the initial approval. Although distinguished from estoppel theory's emphasis on "fairness", the due process analysis essentially examines the same factors in determining whether a landowner has a vested right.[24] The doctrines are frequently confused,[25] and more often than not, will yield the same result.[26] However, in those jurisdictions which may be unwilling to estop the government from applying new regulations to a developer's property on the grounds of basic unfairness, the question of whether such an application would constitute a due process violation may arise.[27] If a court will estop a government from changing development regula-

19. *See id.*; Hagman, *supra* note 7, at 548-51, 572-76.

20. *See* C. SIEMON, W. LARSEN & D. PORTER, *supra* note 12, at 13; Witt, *supra* note 13, at 320.

21. *See* Cunningham & Kremer, *supra* note 16, at 648; C. SIEMON, W. LARSEN & D. PORTER, *supra* note 12, at 13; Witt, *supra* note 13, at 320.

22. *See* C. SIEMON, W. LARSEN & D. PORTER, *supra* note 12, at 8-9; *see also* Whalers' Village Club v. California Coastal Comm'n, 173 Cal. App. 3d 240, 251, 220 Cal. Rptr. 2, 8 (1985), *cert. denied*, 476 U.S. 1111 (1976). In *Whaler's Village Club*, the homeowners of Whaler's Village erected a rock revetment in front of 17 homes to prevent further coastal erosion. However, the Regional Commission would only grant a permit to construct revetment if Whaler's Village would allow a public easement across beach property.

23. *See* Cunningham & Kremer, *supra* note 16, at 660-76.

24. Godfrey v. Zoning Bd. of Adjustment of Union City, 317 N.C. 51, 344 S.E.2d 272, 278-80 (1986) ("[A] determination of the 'vested rights' issue requires resolution of questions of fact, including reasonableness of reliance, existence of good or bad faith, and substantiality of expenditures"); Clackamas County v. Holmes, 265 Or. 193, 508 P.2d 190, 192-93 (1973) ("[T]o have acquired a vested right to proceed with the construction, the commencement of the construction must have been substantial, or substantial costs toward completion of the job must have been incurred").

25. *See* Comment, *supra* note 15, at 494 n. 41.

26. County of Kauai v. Pacific Standard Life Ins. Co., 65 Haw. 318, 653 P.2d 766, 777 (1982), *appeal dismissed sub nom.*; Pacific Standard Life Ins. Co. v. Committee to Save Nukolii, 460 U.S. 1077 (1983) (court applied estoppel theory to determine if city could revoke developer's license after it made substantial expenditures).

27. *See* Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

tions, the court may have no occasion to reach the due process claim.[28] Additionally, the due process claim may entitle the owner to damages and attorneys' fees which are unavailable with the estoppel claim.

Jurisdictions which employ a due process analysis often analyze a developer's project under a non-conforming use theory.[29] Just as the government may not immediately abolish a non-conforming use except by the eminent domain power, under the due process analysis a developer with a vested right is entitled to just compensation if the regulation constitutes a taking.[30]

A third and relatively recent concept applicable to a vested rights claim is that a developer, who has been unreasonably deprived of the "beneficial use" of his property by government regulations, is entitled to just compensation pursuant to the fifth amendment's "taking clause" for the period that such regulations were applied to his property.[31] The Supreme Court has apparently settled the issue—at least theoretically—by its decision in *First English Evangelical Lutheran Church v. County of Los Angeles*.[32] The Court held that a property owner is entitled to just compensation when a statute or ordinance effects a taking of property under the fifth amendment.[33] While this area of the law remains complex and uncertain, some factors remain constant.

A developer challenging land use regulations enacted pursuant to the police power as a "taking" has an extremely difficult burden of proof. First, the developer must show that the regulations deprive him of all beneficial use of his property.[34] Mere diminution in value does not constitute a taking.[35] Second, regulations may even destroy all use of the property if the regulations are necessary to protect public health, safety and welfare.[36] Third, all administrative and judicial remedies may have to be exhausted before a court will find that the government has taken a property without just compensation.[37] Variances, waivers and other potential state remedies must first be exhausted. These factors

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28. *Id.* at 191-92 n.12.

29. Cunningham & Kremer, *supra* note 16, at 669-74.

30. *See* Sallet, *supra* note 16, at 637-45. *See also* Robinson v. Ariyoshi, 753 F.2d 1468, 1474-75 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986).

31. *See* Hamilton Bank v. Williamson County Regional Planning Comm'n, 729 F.2d 402, 408-09 (6th Cir. 1984), *rev'd*, 473 U.S. 172 (1985). *See generally* Sallet, *supra* note 16.

32. 107 S. Ct. 2378 (1987).

33. *Id.* at 2388.

34. *See* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (holding that the ordinance did not prevent the best use of the land, and therefore, there was no taking).

35. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 131 (1978) (New York City's Landmarks Preservation Law did not constitute a "taking" of Penn Central's property). *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232, 1245 (1987) (state statute required coal companies to leave 50 percent of coal beneath certain structures. The Court held there was no taking because they failed to show diminution in value).

36. *See also* Hadachek v. Sebastian, 239 U.S. 394, 410 (1915) (ordinance that prohibited the owner of a brick factory from operating the factory was constitutional under the state's police power).

37. *See* Williamson County Regional Planning Comm'r v. Hamilton Bank of Johnson City, 473 U.S. 172, 186-94 (1986); Sallet, *supra* 172, note 16, at 648-50.

discourage a regulatory taking claim.[38]

A. *The Common Law Rule of Vested Rights*

Generally, the common law rule regarding vested rights is that the reasonable, detrimental reliance, which is made in good faith, "vests" a property right in the developer if it would be unfair or unjust to deny or restrict his right to complete development.[39] The rule consists of three elements.

First, the government must make some sort of representation, through zoning or issuance of a building permit, which formally authorizes a particular use of the owner's property.[40] Informal authorization,[41] past regulations that once applied to the land,[42] and unilateral actions taken by the landowner[43] do not constitute such representations.

Second, the reliance upon the governmental representation must be reasonable and made in good faith.[44] Reliance may be deemed unreasonable if the government act preceded the reliance by too many years,[45] or if the developer was aware that proposed or pending changes in government regulations might alter its development.[46]

Just as knowledge of pending regulations may preclude a finding of reasonableness, that knowledge also may preclude a finding of good faith. The developer cannot be found to act in good faith if he has misled the government or induced it to act illegally.[47] While factors indicating good faith and reasonableness are similar and are often merged when a court analyzes them,[48] jurisdictions differ, and the two concepts should be kept distinct.

Finally, the reliance upon the government's act must be to the de-

38. The development of the reasonable, investment-backed expectations strand of federal takings jurisprudence does suggest that the theory may prevail in a federal court which may be more conversant with this area of the law. Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).

39. C. SIEMON, W. LARSEN & D. PORTER, *supra* note 12, at 13.

40. *Id. See also* Cunningham & Kremer, *supra* note 16, at 641-48.

41. *See* C. SIEMON, W. LARSEN & D. PORTER, *supra* note 12, at 17.

42. *See* Curtis v. City of Ketchum, 111 Idaho 27, 720 P.2d 210, 214-15 (1986) (although the City tentatively passed the condominium project, the plaintiffs could not in good faith rely on this prior approval).

43. Furey v. City of Sacramento, 780 F.2d 1448, 1455 (9th Cir. 1986) (the plaintiff's improvement to his land became useless when the City designated his land "open space").

44. McCarthy v. California Tahoe Regional Planning Agency, 129 Cal. App. 3d 222, 241, 180 Cal. Rptr. 866, 873 (1982) (plaintiff was issued a permit prior to the adoption of land use reglations; however, plaintiff's reliance on the permit was not in good faith).

45. P-W Investments, Inc. v. City of Westminster, 655 P.2d 1365, 1372-73 (Colo. 1982) (court held it was unreasonable for plaintiff to rely on City's representation made approximately six years previously).

46. Boron Oil Co. v. Kimple, 445 Pa. 327, 284 A.2d 744, 746-47 (1971) (it was reasonable to deny plaintiff's building permit when there were regulations pending that would prohibit the granting of the permit).

47. *See* City of Coral Gables v. Puiggros, 376 So. 2d 281, 284 (Fla. Dist. Ct. App. 1979), *appeal after remand*, 418 So. 2d 367 (Fla. Dist. Ct. App. 1982); Godfrey v. Zoning Bd. of Adjustment of Union City, 317 N.C. 51, 57, 344 S.E.2d 272, 278-80 (1986).

48. C. SIEMON, W. LARSEN & D. PORTER, *supra* note 12, at 13.

veloper's substantial detriment.[49] Substantial detriment may be determined by examining the developer's change in position, and by considering such factors as the total amount of money expended, the obligations incurred,[50] and the ratio of costs expended in relation to the total proposed costs of the project.[51] The detriment must be actual, valuable and real—not just imaginary.[52]

B. *Variations on the Vested Rights Doctrines*

Vested rights doctrines, which have been largely created by state law, differ widely among jurisdictions.[53] California follows the general common law rule that a property owner who has performed substantial work and incurred substantial liabilities in good faith reliance upon a government issued permit acquires a vested right to complete construction.[54] Under the "final discretionary approval test," a development right may vest upon the *last* discretionary approval issued by the government agency.[55] In the frequently cited decision of *Youngblood v. Board of Supervisors of San Diego County*,[56] the California Supreme Court held that if a final subdivision plat is in substantial compliance with all the conditions imposed at the tentative approval stage, the granting of final approval is only a ministerial act, and the development right essentially "vests" with the tentative approval.[57] The right is only vested as to subdivision regulations imposed by the local government and not against regulations imposed by other government agencies.[58] The California legislature aided property owners by establishing that rights under subdivision regulations may vest with tentative map approval and that developers may enter into development agreements with the government.[59]

Utah follows an extremely pro-development vesting rule. Develop-

49. Delaney & Kominers, *He Who Rests Less, Vests Best: Acquisition of Vested Rights in Land Development*, 23 ST. LOUIS U.L.J. 219, 222-24 (1979); Witt, *supra* note 13, at 322.

50. *See* Santa Monica Pines, Ltd. v. Rent Control Bd. of Santa Monica, 35 Cal. 3d 858, 868, 679 P.2d 27, 33, 201 Cal. Rptr. 593, 599 (1984); Industrial Nat'l Mortgage Co. v. City of Chicago, 95 Ill. App. 3d 666, 669, 420 N.E.2d 581, 585 (1981).

51. *See* Town of Hempstead v. Lynne, 32 Misc. 2d 312, 316, 222 N.Y.S.2d 526, 531 (N.Y. Sup. Ct. 1961).

52. C. SIEMON, W. LARSEN & D. PORTER, *supra* note 12, at 33.

53. See Part II of the article discussing the vested rights doctrine in Colorado, *supra* note 9.

54. *See* Avco Community Developers, Inc. v. South Coast Regional Comm'n, 17 Cal. 3d 785, 791, 553 P.2d 546, 550, 132 Cal. Rptr. 386, 389-90 (1976), *cert. denied*, 429 U.S. 1083 (1977).

55. Aries Dev. Co. v. California Coastal (Zone Conservation) Comm'n, 48 Cal. App. 3d 534, 546, 122 Cal. Rptr. 315, 324 (1975); Pardee Constr. Co. v. City of Camarillo, 37 Cal. 3d 465, 475-76, 690 P.2d 701, 708, 208 Cal. Rptr. 228, 235 (1984) (Mosk, J., dissenting). *See generally* McCowan-Hawkes & King, *Vested Rights to Develop Land: California's Avco Decision and Legislative Responses*, 6 ECOLOGY L.Q. 755, 770 (1978).

56. 22 Cal. 3d 644, 586 P.2d 556, 150 Cal. Rptr. 242 (1979).

57. *Id.* at 655-56, 586 P.2d at 562, 150 Cal. Rptr. at 248.

58. *See Avco*, 17 Cal. 3d at 795, 553 P.2d at 552, 132 Cal. Rptr. at 392.

59. *See* CAL. GOV'T. CODE § 65865 (West 1983 & Supp. 1987) (development agreements); *Id.* §§ 66498.1-66498.6 (West Supp. 1988) (vesting on approval of tentative maps).

ment rights vest upon proper application for either a subdivision approval or a building permit. The Utah Supreme Court, in *Western Land Equities, Inc. v. City of Logan*,[60] fashioned a test that requires only: (1) that a substantially conforming development plan was submitted prior to a change in the law; (2) that the application of the change is not necessary to protect public health, safety and welfare, and (3) that the change was not pending when the developer filed his plan.[61] Thus, the right to develop may vest without any substantial investment or initiation of construction by the developer. On the other hand, the prospect that the government may prohibit development under the guise of public health, safety and welfare—even if substantial and significant detrimental reliance has occurred—may be troublesome.[62]

Maine's view of vested rights is slightly different from Utah. In Maine, a development right may vest when the government takes the threshold step of acting on an application for subdivision approval.[63] The Maine Supreme Court formulated this rule based on a state statute which prevented the application of newly-enacted regulations to plans pending final approval. However, more than mere submission of the plan was necessary to cause the plan to be "pending."[64] Thus, the court distinguished between presentment and acceptance of a plan.

C. *Vested Rights and the Subdivision Approval Process*

The extent to which a developer acquires a vested right against changes in subdivision regulations varies considerably, and may be determined by statute, common law, or a combination of both.[65] This section examines the acquisition of vested rights against changes in subdivision regulations at three stages of the subdivision approval process: preplatting, preliminary plat approval, and final plat approval.

Generally, a developer has no claim to a vested right in subdivision regulations before he has obtained government approval for the project.[66] The mere ownership of land, absent actions intended to establish use, does not create any vested right to that use.[67] Enabling legislation for subdivision approval usually authorizes a two-step process: first pre-

60. 617 P.2d 388 (Utah 1980).

61. *Id.* at 396.

62. Shultz & Kelley, *supra* note 8, at 37 n.182. *See also* Ben Lomond, Inc. v. City of Idaho Falls, 92 Idaho 595, 448 P.2d 209 (1968); Smith v. Winhall Planning Comm'n, 140 Vt. 178, 436 A.2d 760 (1981); Valley View Indus. Park v. City of Redmond, 107 Wash. 2d 621, 733 P.2d 182 (1987) (all adhering to doctrine that a vested right is established upon a substantially conforming application).

63. Littlefield v. Inhabitants of Lyman, 447 A.2d 1231, 1235 (Me. 1982) (planning board failed to process plaintiff's request for subdivision approval before the zoning ordinances were amended).

64. *Id.* at 1235.

65. Shultz & Kelley, *supra* note 8, at 74.

66. *See* Curtis v. City of Ketchum, 111 Idaho 27, 720 P.2d 210, 214-15 (1986) (mere acquisition of land gave developer no right to claim subdivision approval simply because the city had once approved a similar plan for the site).

67. *See* Sherman-Colonial Realty Corp. v. Goldsmith, 155 Conn. 175, 230 A.2d 568, 572 (1967) (the filing of maps for proposed subdivision without any expenditures to improve the land does not vest right); Town of Vienna Council v. Kohler, 218 Va. 966, 244

liminary, and then final plat approval.[68] Yet many local governments use a three-step process. The first step requires the subdivider to file a sketch plat which serves as a guideline to acquaint government officials with the proposed development and allows them to familiarize the developer with pertinent regulations.[69] Where the approval process proceeds in three stages, rather than two, neither statutory regulation[70] nor case law[71] appears to support the idea of a vested right resulting from first stage approval. The purpose of the sketch plat is primarily informational, and providing information about existing ordinances does not amount to a government representation warranting detrimental reliance.[72] Similarly, preliminary engineering studies[73] or architectural plans[74] prepared for a developer's own use generally do not create vested rights because they do not warrant reasonable reliance.[75]

In most jurisdictions, the first stage in subdivision approval is the submission of a preliminary plat for consideration by the planning commission.[76] The planning commission generally examines the detailed plat to ensure that street, park, school and other public use declarations are adequate, to ensure that state and local land use regulations will be met, and to impose new dedication requirements.[77] Public hearings, consultations with state and local agencies and the establishment of a reasonable record are necessary before approval. Often, all the agencies which have been consulted must give approval before the planning commission or local legislature grants preliminary approval.[78]

S.E.2d 542, 548 (1978) ("mere purchase" of land creates no vested right). *See also* Delaney & Kominers, *supra* note 50, at 224-29.

68. Shultz & Kelley, *supra* note 8, at 35-38.

69. D. CALLIES & R. FREILICH, CASES & MATERIALS ON LAND USE 334 (1986).

70. *See* N.J. STAT. ANN. § 40:55D-49 (West Supp. 1986) (developer receives protection from changes in government regulation only after formal approval process).

71. *See City of Ketchum*, *supra* note 66.

72. *See* Colonial Investment Co. v. City of Leawood, 7 Kan. App. 2d 660, 664, 646 P.2d 1149, 1152-53 (1982) (replies to matter-of-fact inquiries do not constitute an act or omission on which a developer may rely).

73. *See* Smith v. Juillerat, 161 Ohio St. 424, 429, 119 N.E.2d 611, 615 (1954).

74. *See* Gosselin v. City of Nashua, 114 N.H. 447, 449, 321 A.2d 593, 596 (1974) (plaintiff did not have a vested right to complete his proposed shopping center; therefore, the new zoning ordinance prohibited the construction of the shopping center).

75. *See* Avco Community Developers, Inc. v. South Coast Regional Comm'n, 8 Cal. 3d 785, 797, 553 P.2d 546, 554, 132 Cal. Rptr. 386, 394 (1976), *cert. denied*, 429 U.S. 1083 (1977) (developers' expenses for their own planning would not serve to establish a vested right absent government inducement or approval).

76. *See* N.J. STAT. ANN. §§ 40:55D-5-47 (West Supp. 1986). In some jurisdictions, the approval process for minor subdivisions—those involving a minimal number of lots, requiring no new streets or extensions of off-tract improvements, and not having the characteristics of a planned development—may be subject to an abbreviated approval process. A minor subdivision approval may require no public hearing, and the approval process may move directly from the sketch plat to the final plat stage.

77. *See, e.g.*, ARIZ. REV. STAT. ANN. § 9-463.01(C) (Supp. 1987); CAL. GOV'T. CODE § 66475.4 (West Supp. 1988); COLO. REV. STAT. §§ 30-28-133(4) (1986).

78. *See, e.g.*, ILL. ANN. STAT. ch. 24, para. 11-12-8 (Smith-Hurd 1962 & Supp. 1987); WASH. REV. CODE ANN. §§ 58.17.100, 110 (Supp. 1987). In Underhill v. Board of County Comm'rs of Boulder County, 39 Colo. App. 185, 186, 562 P.2d 1125, 1126 (1977), county officials properly denied plat approval on the basis of reports from the state engineer and the state geological survey. The government may, in fact, grant preliminary approval conditional on the reports of referral agencies.

Some jurisdictions require consideration of the plat in accordance with the zoning ordinances and land use regulations in effect at the time the plat was submitted, whether as a matter of common law,[79] or as a matter of interpretation of state statutes designed to prevent the retroactive application of substantive legislation.[80] To avoid the expense and frustration of needless delay, many states will approve a plat if the local government does not act within a specified time after it is submitted.[81] Thus, a developer may obtain approval of its plat at a relatively early stage, despite dilatory conduct by a government agency.[82] The merits of such "deemed approved" statutes are debatable.[83]

Preliminary plat approval does not create a vested right to final subdivision plat approval or the right to develop and sell lots. Frequently, state statutes require the developer to submit a final plat for approval within a specified time after preliminary approval.[84] Some jurisdictions hold, however, that substantial expenditures made in reliance on preliminary plat approval, such as grading or the installation of utilities, creates in the developer a vested right to final plat approval and a building permit.[85]

Many jurisdictions use the preliminary plat as a benchmark for approving the final plat.[86] Some states provide, by statute, that a local

79. *See* Western Land Equities, Inc. v. City of Logan, 617 P.2d 388, 395-96 (Utah 1980) (developer may claim approval as a right if his plat conforms to ordinances in effect when it was submitted). On its facts, *Western Land* pertains to receiving final plat approval after preliminary approval, but the holding is more sweeping.

80. Littlefield v. Inhabitants of Lyman, 447 A.2d 1231, 1234 (Me. 1982) (construing state statute); Smith v. Winhall Planning Comm'n, 140 Vt. 178, 179, 436 A.2d 760, 761 (1981) (construing state statute).

81. DEL. CODE ANN. tit. 9, § 4811 (1983) (plat deemed approved if no decision within 40 days); ILL. ANN. STAT. ch. 24, para. 11-12-8 (Smith-Hurd 1962 & Supp. 1987) (90 days); N.J. STAT. ANN. § 40:55D-48 (preliminary approval deemed granted if no decision within 45 days); N.Y. TOWN LAW § 276(4) (McKinney 1987) (plat is approved if no decision with 45 days); *see generally* 4 R. ANDERSON, AMERICAN LAW OF ZONING § 25.16 (3d ed. 1986).

82. *See* Pekar v. Town of Veteran Planning Bd., 58 A.D. 2d 703, 704, 396 N.Y.S.2d 102, 103 (1977) (developer entitled to plat approval when board took no action within 45-day statutory period). *See also* Griffis v. County of Mono, 163 Cal. App. 3d 414, 428, 209 Cal. Rptr. 519, 528 (1985). In *Griffis*, the developer was entitled to plat approval when he appealed from planning commission to county legislature, which failed to act within statutory deadline. Since "deemed approved" statutes are for the protection of the developer, the developer may waive the deadline. *But see* Carmel Valley View, Ltd. v. Maggini, 91 Cal. App. 3d 318, 321, 155 Cal. Rptr. 208, 210 (1979) (the subdivider consented to the extension; therefore, it did not violate the statutory 50 day period for approval).

83. For an excellent discussion of the policy considerations involved in granting developers such protection see West Main Assoc. v. City of Bellevue, 106 Wash. 2d 47, 720 P.2d 782, 785-86 (1986); *see also* Shultz & Kelley, *supra* note 8, at 93-94.

84. ILL. STAT. ANN. ch. 24, para. 11-12-8 (Smith-Hurd 1962 & Supp. 1987) (one year); *see* N.J. STAT. ANN. § 40.55D-49 (Supp. 1987) (three years).

85. *See* Florida Companies v. Orange County, 411 So.2d 1008, 1010-11 (Fla. Dist. Ct. App. 1982) (mortgagee acquired vested right by lending money on the basis of preliminary plat approval); Knutson v. State, 239 Ind. 656, 668-69, 160 N.E.2d 200, 201-02 (1959) (where the plaintiff laid streets and alley with government approval, the government could not later reject the plat after the work was completed).

86. PA. STAT. ANN. tit. 3, § 10508(4) (Purdon Supp. 1986); WASH. REV. CODE ANN. § 58.17.170 (Supp. 1987). Conversely, under such statutes, a final plat may be rejected if it does not conform to the preliminary plat and the conditions imposed on it. *See* Andorra Nurseries, Inc. v. Board of Supervisors of Whitemarsh, 24 Pa. D. & C.3d 260 (1980), *aff'd*, 71 Pa. Commw. 480, 454 A.2d 698 (1983).

government may not impose new land use or subdivision requirements upon the development if the final plat substantially conforms to the approved preliminary plat. Other states offer even more protection by prohibiting final plat rejection if new regulations were not in effect at the time of preliminary plat approval.[87] At least one case has held that approval of a final plat, which is in substantial conformity with the approved preliminary plat, is a ministerial act.[88] Thus, although the development right does not technically vest with preliminary plat approval, substantial compliance with the approved preliminary plat may create a right to have the final plat approved in accordance with regulations in effect when the preliminary plat was approved.

Final plat approval does not necessarily create a vested development right. Although some jurisdictions mandate that a final plat may not be rejected if it substantially conforms with the preliminary plat,[89] and others shield a developer who has obtained final plat approval from subsequent changes in land use regulations for a limited time,[90] most jurisdictions require that the developer actually rely to his detriment on the approval of the plat before he can claim a vested right.[91] The construction of a retaining wall,[92] public improvements[93] and the conveyance of property or dedication of improvements[94] have all been held to constitute sufficient reliance on final plat approval to create a vested right to develop.

Not all jurisdictions, however, recognize that detrimental reliance on the final plat creates a vested right to develop. In jurisdictions that recognize a vested right only when the final discretionary permit or approval is issued or granted, reliance on the final plat will not shield a developer from new land use controls.[95]

D. *Limitations on the Effect of a Claim of Vested Rights*

The concept of vested rights is qualified by two basic limitations.

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87. N.J. REV. STAT. ANN. § 40:55D-49.

88. Youngblood v. Board of Supervisors of San Diego County, 22 Cal. 3d 644, 586 P.2d 556, 150 Cal. Rptr. 242 (1978).

89. *See supra* note 86 and accompanying text.

90. *See* PA. STAT. ANN. tit. 3, § 10508(4) (Purdon Supp. 1986); WASH. REV. CODE ANN. § 58.17.170 (Supp. 1987).

91. *See* Preseault v. Wheel, 132 Vt. 247, 315 A.2d 244 (1974) (merely because regulations change, reissuance of a building permit cannot be denied when the plaintiff complied with conditional plat); Town of Lima v. Harper, 55 A.D.2d 405, 390 N.Y.S. 2d 752 (1977) (as long as permits were acted upon before the new ordinance, the plaintiffs could have a nonconforming use permit), *aff'd sub nom.*, Harper v. Zoning Bd. of Appeals, 43 N.Y.2d 980, 404 N.Y.S.2d 597, 375 N.E.2d 777 (1978).

92. *Preseault*, 132 Vt. at 247, 315 A.2d at 244 (1974).

93. *Harper*, 55 A.D.2d 405, 390 N.Y.S.2d 752.

94. Mayor and City Council of Baltimore v. Crane, 277 Md. 198, 352 A.2d 786 (1976); Waid v. City of New Rochelle, 20 Misc. 2d 122, 197 N.Y.S.2d 64 (N.Y. Sup. Ct. 1959), *aff'd.*, 9 A.D.2d 911, 197 N.Y.S.2d 128 (1959), *aff'd.*, 8 N.Y.2d 895, 204 N.Y.S.2d 144, 168 N.E.2d 821 (1960).

95. *See* Santa Monica Pines, Ltd. v. Rent Control Bd. of Santa Monica, 35 Cal. 3d 858, 679 P.2d 27, 32-33, 201 Cal. Rptr. 593 (1984) (approval of a tentative subdivision map did not confer upon the developer a vested right).

First, the state's police power to protect the public health, safety and welfare may override any vested right that a developer may claim. Second, obtaining a vested right against one level of government or agency does not necessarily confer a vested right against other levels.

Many statutes[96] and court decisions[97] guard against granting any protection to a development that would constitute a public or private nuisance.[98] To claim that an approved development creates a nuisance or hazard, the courts must carefully examine the facts underlying the alleged nuisance, balancing both public and private interests.[99] Thus, while one court permitted interference with an approved development which would cause downstream flooding,[100] another upheld an approved development against new regulations despite the assertion that the septic tanks would pollute the area water supply.[101]

Another major limitation on vested rights claims is that the representations of one agency do not necessarily bind another. Developers claiming reliance on local government approval may not always be protected against state agencies representing substantially different concerns.[102] Yet some courts have recognized that actions of an inferior local authority may bind a state agency if the two are acting in privity—representing the same concerns and standing in a quasi-principal/agent relationship.[103] Still, even within the same level of government, reliance on the normal subdivision approval process may not create a vested right against newly-established agencies with newly-expanded powers.[104]

E. *Large-Scale, Phased Development*

Vested rights issues become more complex in large-scale, phased development projects. Although preliminary approval for all phases of a

96. *See, e.g.*, CAL. GOV'T. CODE § 66498.1(c) (West Supp. 1987) (tentative vesting map will not confer any rights on any development which would endanger public health or safety).

97. *See, e.g.*, Western Land Equities, Inc. v. City of Logan, 617 P.2d 388, 396 (Utah 1980). In *Western Land Equities*, the court considered the city's argument that fire protection would be undermined if the permit was granted. The court ultimately rejected the argument.

98. C. SIEMON, W. LARSEN & D. PORTER, *supra* note 12, at 38-40.

99. *Id. See also* Weldin Farms, Inc. v. Glassman, 414 A.2d 500, 502-03 (Del. 198O) (court upheld the injunction below and rejected riparian rights argument. The court adopted a reasonable user test that balances the interests of upstream and downstream owners).

100. Glassman v. Weldin Farms, Inc., 359 A.2d 669, 671-72 (Del. Ch. 1976), *modified*, 414 A.2d 500 (Del. 1980).

101. Kasparek v. Johnson County Bd. of Health, 288 N.W.2d 511, 516-17 (Iowa 1980) (the developer's vested interest outweighed Board of Health's concern that septic tanks wold pollute the water).

102. South Cent. Coast Regional Comm'n v. Charles A. Pratt Constr. Co., 128 Cal. App. 3d 830, 839, 180 Cal. Rptr. 555, 564 (1982).

103. R. CUNNINGHAM & D. KREMER, *supra* note 16, at 657-59; *see also* Department of Public Works v. Volz, 25 Cal. App. 3d 480, 102 Cal. Rptr. 107, 112-13 (1972) (state highway department bound by actions of county highway department).

104. *See* Santa Monica Pines, Ltd. v. Rent Control Bd. of Santa Monica, 35 Cal. 3d 858, 679 P.2d 27, 201 Cal. Rptr. 593 (1984).

development may come with the preliminary plat approval, final approval generally occurs one phase at a time. The developer does not have to provide the infrastructure for the entire development, but only for those portions which the government grants final approval. Since preliminary plat approval may not confer a vested right, and the loss of a right to develop any particular tract as planned may impair the value of the entire project, the developer may incur substantial expenses and complete several tracts only to face the possibility that the project may turn out to be unprofitable.[105]

In response to this predicament, many jurisdictions support the proposition that if a developer, acting in reliance on a government approval, dedicates land or improvements pertaining to the entire project, the developer then has a vested right to complete the entire project, conforming only to the regulations in effect when the government approved the first phase of the project.[106] Conversely, if a jurisdiction holds that only the final discretionary permit or approval creates a vested right to build, then no dedication of land will give a developer any vested right to complete a sequential development unless it complies with the new regulations.[107]

F. *Statutory Solutions to Vested Rights Problems*

Although the courts are largely responsible for the creation of vested rights doctrines, several state statutes—in order to provide a date certain for the vesting of rights—grant a subdivider exemption from new land use regulations if his plans have reached final plat approval.[108] These statutes are designed to circumvent the uncertainties and complexities of the estoppel and due process analyses of vested rights.[109] Vesting statutes vary in the length of time for which they give protection, in the extent of the protection they provide, and in the nature of the rights they vest. But they may provide little protection if the development is later found to pose a threat to the public health, safety, or welfare.[110]

The best example of statutory vesting comes from Washington state. In Washington, it is possible for a developer to acquire a vested

105. *See* Rockshire Civic Ass'n, Inc. v. Mayor and Council of Berkshire, 32 Md. App. 22, 31, 358 A.2d 570, 579 (1976); Delaney, *Current Issues in Land Use—Vested Rights*, ALI-ABA COURSE OF STUDY, LAND USE INSTITUTE: PLANNING, REGULATION EMINENT DOMAIN AND COMPENSATION 739, 748-49, 759-62 (1985).

106. *See* Preseault v. Wheel, 132 Vt. 247, 315 A.2d 244 (1974); Town of Lima v. Harper, 55 A.D.2d 405, 390 N.Y.S.2d 752 (1977), *aff'd sub nom.*, Harper v. Zoning Bd. of Appeals, 43 N.Y.2d 980, 404 N.Y.S.2d 597, 375 N.E.2d 777 (1978). *See also* Delaney & Kominers, *supra* note 50, at 241-47.

107. *See* Avco Community Developers, Inc. v. South Coast Reg. Comm'n, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), *appeal dismissed & cert. denied*, 429 U.S. 1083 (1977).

108. *See e.g.*, MASS. GEN. LAWS ANN. ch. 40A, § 6 (West Supp. 1988); PA. STAT. ANN. tit. 53, § 10508(4) (Purdon Supp. 1988); WASH. REV. CODE ANN. § 58.17.170 (Supp. 1987).

109. D. CALLIES & R. FREILICH, *supra* note 69, at 197.

110. CAL. GOVT. CODE § 66498.1(c) (West Supp. 1988).

right to develop under state statutory law.[111] Section 58.17.170 of the Washington Revised Code provides that final plat approval must be granted if the plat satisfies the rules and regulations applicable at the time of preliminary approval.[112] A developer has three years following preliminary plat approval to obtain final approval.[113] Further, local governments may modify regulations affecting subdivisions within five years from final approval upon a finding that the public health, safety and welfare necessitate application of the modifications.[114] Thus, a developer in Washington has statutorily vested rights against changes in rules and regulations for a period of up to eight years following preliminary approval, regardless of the existence of detrimental reliance.[115]

Local governments are now entering into contractual agreements with developers at the time land use or subdivision approvals are granted.[116] Development agreements purport to limit or modify land use regulations affecting a developer's property in exchange for the developer's concessions to government.[117] In this way, both the developer and the local government can spell out the exact terms and conditions of development for each party, including the vesting of rights.[118]

Prior to S.B. 219, four states authorized local governments to enter into development agreements.[119] Development agreements raise the issue of whether the government may contract away its inherent right to exercise the police power.[120] One commentator has noted that, if limited to a reasonable period of time, courts will likely uphold development agreements.[121]

II. THE VESTED RIGHTS DOCTRINE IN COLORADO

A. *A Colorado View of Property Rights*

Before specifically examining the common law vested rights doctrine in Colorado, it may be helpful to examine how Colorado courts

111. *See* WASH. REV. CODE ANN. §§ 58.17.150, .170 (Supp. 1987).
112. *Id.* at § 58.17.170.
113. *Id.*
114. *Id.*
115. *Id.* at § 58.17.150(1), (3).
116. *See* Kessler, *The Development Agreement and Its Use in Resolving Large Scale, Multi-Party Development Problems*, 1 FLA. ST. U. J. LAND USE & ENVTL. L. 451 (1985).
117. D. Callies, Statutory Development Agreements: Analysis, Checklist, and Model Agreement 4-10 (1987) (unpublished manuscript).
118. C. SIEMON & W. LARSEN, *supra* note 12, at 84.
119. *See* CAL. GOV'T CODE §§ 65864 to 65867.5 (West 1983 & Supp. 1987); HAWAII REV. STAT. § 46-121 to -132 (1985); NEV. REV. STAT. § 278.0201 to .0207 (1985); FLA. STAT. ANN. §§ 163.3220 to .3243 (West Supp. 1987).
120. Kaiser Dev. Co. v. City and County of Honolulu, 649 F. Supp. 926, 949 (D. Hawaii 1986) (it is simply not within the City's power to contract away essential police powers, such as the ability to make future zoning decisions); *compare* Geralnes B.V. v. City of Greenwood Village, Colo., 583 F. Supp. 830, 841 (D. Colo. 1984) (local government agreement not to rezone certain property for period of 25 years was not *ultra vires*, but valid exercise of police power). *See generally*, Kramer, *Development Agreements: To What extent are They Enforceable?*, 10 REAL ESTATE L.J. 29 (1981).
121. D. Callies, *supra* note 117, at 4.

have viewed property rights. Their view has been shaped by the Colorado constitution, which provides that "[a]ll persons have certain natural, essential and inalienable rights, among which may be reckoned the right of . . . acquiring, possessing and protecting property . . . ."[122]

1. The Constitutional Theory of Property Rights

Despite the acknowledgement of certain "natural, essential and inalienable rights," the Colorado Supreme Court has long held that zoning regulations are constitutional. In *Colby v. Board of Adjustment*,[123] the court held that a zoning ordinance adopted by the City and County of Denver was constitutional.[124] The court responded to a vested rights claim of a party who had acquired property for a brickyard prior to adoption of the zoning ordinance. The court reasoned that "a vested interest on the ground of conditions once obtained cannot be asserted against the proper exercise of the police power—to so hold would preclude development."[125] The court explained further that "[t]he exercise of the police power extends to so dealing with conditions *when they arise* as to promote the general welfare of the people."[126] More recent Colorado cases have concluded that "[t]he exercise of the police power, be it in the enactment of land use controls, or as here, in decisions enforcing those regulations, must bear a rational relationship to the health, safety, and welfare of the community."[127]

A second constitutional provision that Colorado has considered relevant to the vested rights issue is the prohibition on the general assembly's adoption of any law "retrospective in its operation."[128] The

122. COLO. CONST. art. II, § 3. Other specific protections afforded property rights include a prohibition on the taking or damaging of private property "for public or private use, without just compensation," *id.* at art. II, § 15, and the prohibition against depriving a person of property "without due process of law," *id.* at art. II, § 25. Regarding the due process clause, the Colorado Supreme Court has stated: "Any legislative action which takes away any of the essential attributes of property, or imposes unreasonable restrictions thereon, violates the due process clauses of the Constitutions of the United States and Colorado." City and County of Denver v. Denver Buick, Inc., 141 Colo. 121, 128, 347 P.2d 919, 924 (1960). The *Denver Buick* court took an expansive view of property rights: "At the common law the owner of property has a vested right to make the fullest legitimate use of such property." *Id. Compare* C.F. Lytle Co. v. Clark, 491 F.2d 834, 838 (10th Cir. 1974) ("due process and just compensation clauses of the state and federal constitutions do not require that zoning ordinances permit a landowner to make the most profitable use of his property").

The *Denver Buick* opinion should be given little precedential value. The Colorado Supreme Court has overruled two different rulings in the case. *See* Service Oil Co. v. Rhodus, 179 Colo. 335, 500 P.2d 807 (1972) (overruling *Denver Buick* regarding right of government to terminate nonconforming uses); Stroud v. City of Aspen, 188 Colo. 1, 532 P.2d 720 (1975) (overruling *Denver Buick* regarding right of government to require off-street parking as condition of land use approval).

123. 81 Colo. 344, 255 P. 443 (1927).

124. *Id.* at 353, 255 P. at 445.

125. *Id.* at 353, 255 P. at 446.

126. *Id.* (*citing* Waltshor v. Burden, 241 N.Y. 289, 150 N.E. 120, 43 A.L.R. 651 (1926).

127. Tri-State Generation and Transmission Ass'n, Inc. v. Board of County Comm'rs, 42 Colo. App. 479, 481, 600 P.2d 103, 104 (1979); *see also* Ford Leasing Dev. Co. v. Board of County Comm'rs, 186 Colo. 418, 528 P.2d 237 (1974).

128. COLO. CONST. art. II, § 11. Although the prohibition addresses only the general

Colorado Supreme Court, in reliance upon this provision, held unconstitutional an attempt by the City and County of Denver to retroactively apply a zoning regulation.[129] The court explained that the prohibition on retrospective laws was broadly defined (retrospectivity) as an act ". . . which takes away or impairs *vested rights* acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or consideration already passed."[130]

Within the framework of state constitutional protections for property rights and prohibitions on retrospective legislation, the Colorado courts have established a vested rights doctrine that is independent of any constitutional right. The courts clearly have made equitable estoppel, or estoppel *in pais*, the basis for a vested property right. An early recognition of the applicability of equitable estoppel to government land use regulations came in *Pratt v. City and County of Denver*.[131] In *Pratt*, the building inspector issued a building permit for a parking garage. One week later, the inspector revoked the building permit theorizing that the garage was a public parking garage for which the city council had to grant approval. The owner sued for injunctive relief to prevent interference with the construction of the garage. The trial court held in favor of the city and the owner appealed. The Colorado Supreme Court held that the parking garage was not a public garage as the term was defined under local law.[132] The court further held that the building permit was not revocable because there was "evidence that plaintiff, acting in reliance on the permit, incurred considerable expenditures for work, labor and material necessary for the construction of the building, prior to the time of the attempted revocation of the permit."[133] Thus, the court determined that the city was "estopped to claim that the permit [was] revoked . . . applying a well-settled principle."[134] Interestingly,

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assembly, the supreme court has held the prohibition applicable to local governments. *See, e.g.*, City and County of Denver v. Denver Buick, Inc., 141 Colo. 121, 347 P.2d 919 (1960).

129. *Denver Buick*, 141 Colo. at 140, 347 P.2d at 930.

130. Spiker v. City of Lakewood, 198 Colo. 528, 532-33, 603 P.2d 130, 133 (1979) (emphasis in original) (quoting Moore v. Live Stock Co., 90 Colo. 548, 10 P.2d 950 (1932)). What constitutes a law with retrospective operation may be a matter of form over substance. For example, if the local government adopts new requirements as conditions precedent to the issuance of a building permit, it may not be able to impose the restrictions against owners who already have acquired permits. The government may adopt a new permit system that requires a property owner to meet the same requirements that were added to those necessary to obtain a building permit and obligate the owner to acquire the permit before the owner lawfully may use his or her property. *Compare* Colby v. Board of Adjustment, 81 Colo. 344, 553, 255 P. 443, 446 (1927). Although the property owner may claim a vested right to use his or her property free from the new regulations, the owner could not, technically, argue that the new regulations were retrospective in operation. Indeed, in Colorado, the government may require a person who has obtained a building permit under one set of regulations to obtain a new permit under amended regulations if there has been no detrimental reliance on the permit. *See, e.g.*, Witkin Homes, Inc. v. City and County of Denver, 31 Colo. App. 410, 414, 504 P.2d 1121, 1123 (1972).

131. 72 Colo. 51, 209 P. 508 (1922).

132. *Id.* at 51, 209 P. at 508.

133. *Id.* at 54, 209 P. at 509.

134. *Id.* The court then made a reference to licenses to construct irrigation ditches that become irrevocable after reliance on the license. The court stated that an irrevocable license was tantamount to an easement. *Id.* Although a license granted by one private per-

the court noted that the local ordinance had set forth conditions for revocation of a building permit and that the government had not shown any of those conditions to exist.[135]

2. The Estoppel Theory of Property Rights

The equitable estoppel doctrine has two key elements: (1) a representation and (2) reliance upon that representation.[136] Cases subsequent to *Pratt* have contributed to these basic elements.[137] The Colorado Court of Appeals has stated that a factual predicate for the invocation of equitable estoppel is "a communication or action by the city by which the property owner is 'unmistakably misled.' "[138] When the government issues a permit, the court will examine the face of the permit to determine the scope of the representation made to the property owner.[139] When a property owner is unaware of local laws, he cannot claim reliance on any representation.[140] In addition to permits issued by the government, the statements of local officials may give rise to an estoppel.[141] In *Underhill v. Board of County Commissioners*,[142] the Colorado Court of Appeals explained that statements made by a county commissioner could give rise to estoppel only if the owner detrimentally

son to another may be analogous to a government issued permit, the two situations may have as many differences as similarities.

135. *Id.*

136. *See, e.g.*, City of Sheridan v. Keen, 524 P.2d 1390, 1393 (Colo. App. 1974) (not selected for official publication).

137. *See infra* notes 143-50 and accompanying text.

138. LaFollette v. Board of Adjustment of Lakewood, 741 P.2d 1262, 1263 (Colo. App. 1987). In *LaFollette*, the lessee of certain property annexed by Lakewood obtained a building permit for a storage barn in a CN-Conservation zoning district. The lessee subsequently stored construction equipment in the barn. After complaints by neighbors, the city advised the lessee that he was in violation of zoning regulations. The lessee invoked estoppel against the government's contention that his use violated local zoning regulations. The court focused on the scope of the permit issued to the lessee and held that the permit was only to construct a storage barn, which presumably, would have been used for the storage of agricultural equipment as allowed in a CN district. Thus, the court determined that the government had not represented that the use of a storage barn for storing construction equipment was permissible under local law. *Id.* at 1263-64.

The *LaFollette* court's emphasis on a government representation or action may be an overstatement. If one relies on existing zoning regulations, a vested right may accrue absent any representation by the government. The theory supporting the vested right may not, however, be equitable estoppel. *Compare* City of Cherry Hills Village v. Trans-Robles Corp., 181 Colo. 356, 509 P.2d 797 (1973).

139. *See* P-W Investments, Inc. v. City of Westminster, 655 P.2d 1365, 1371 (Colo. 1982) (city made no representation about future availability of water and sewer services when it issued water and sewer tap permits); Crawford v. McLaughlin, 172 Colo. 366, 372, 473 P.2d 725, 730 (1970) (building permit authorized construction of apartment building and not only a foundation for apartment building); *LaFollette supra* note 138 at 1263-64 (building permit authorizing construction of storage barn did not authorize the storing of construction equipment in that barn).

140. *See* Webster Properties v. Board of County Comm'rs, 682 P.2d 506, 508 (Colo. App. 1984) (owner could not claim reliance on local law when it became aware of zoning resolution only after it platted land).

141. *But see* Witkin Homes, Inc. v. City and County of Denver, 31 Colo. App. 410, 414, 504 P.2d 1121, 1123 (1972) (plaintiff may not have been able to demonstrate reliance because no building permit had been issued).

142. 39 Colo. App. 185, 562 P.2d 1125 (1977).

relied on the statement.[143] In other cases, the effort to invoke equitable estoppel failed when the court could not find either a sufficient representation to bind the government or the consequent reliance on the representation.[144]

In addition to a representation by the government, equitable estoppel requires reliance or a change in position as a result of the representation.[145] The reliance must be more than conduct preparatory to actual development.[146] The Colorado Court of Appeals explained the rationale for this rule in *Tri-State Generation and Transmission Association, Inc. v. Board of County Commissioners*.[147] The court stated that "[L]ogically extended (the rule) would mean that developers, by spending money on planning, could thereby prevent application of future land use controls to their land."[148] On the other hand, when the owner has incurred substantial out of pocket expenses for actual construction, the right to complete construction will vest, even under an erroneously issued building permit.[149]

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143. *Id.* at 188, 562 P.2d at 1127.

144. *See* Colby v. Board of Adjustments, 81 Colo. 344, 255 P. 443 (1927) (statement by government official that new zoning ordinance would not apply to owner's property did not estop the government from so applying the new ordinance); City of Sheridan v. Keen, 524 P.2d 1390 (Colo. App. 1974) (not selected for official publication) (statements made to owner about use of property and right of owner to seek variance did not estop government from prohibiting use).

145. *See generally Underhill*, 39 Colo. App. 185, 562 P.2d 1125.

146. *See* Cline v. City of Boulder, 168 Colo. 112, 119, 450 P.2d 335, 339 (1969) (property owner who acquired building permit was in no more than "dream stage" concerning construction of gas station); Colby v. Board of Adjustment, 81 Colo. 344, 348, 255 P. 443, 445 (1927) (purchase of land and expenditure of $5,000 did not vest right to build brickyard); Tri-State Generation and Transp. Ass'n, Inc. v. Board of County Comm'rs, 42 Colo. App. 479, 600 P.2d 103, 105 (1979) (power company's preparatory work in acquiring easements and spending money on plans did not vest right to construct transmission lines); *but see* Crawford v. McLaughlin, 172 Colo. 366, 377, 473 P.2d 725, 731 (1970) (work done before issuance of building permit "should not be totally ignored" when determining level of reliance).

147. 42 Colo. App. 479, 600 P.2d 103 (1979).

148. *Id.* at 481, 600 P.2d 105 (1979).

149. *See* City and County of Denver v. Stackhouse, 135 Colo. 289, 310 P.2d 296 (1957). In *Stackhouse*, the owner received a building permit to construct an apartment building on the mistaken assumption that his property was in a "C" zoning district, which required a minimum lot size of 4,000 square feet to construct a four-plex. Later, the city determined that the property actually was in a "B" zoning district and ordered the owner to stop work because the minimum lot size for a four-plex was 12,000 square feet. In fact, the building permit stated that it was for a parcel in a "B" district, but the owner alleged that he never looked at the permit after it was issued. The court held that the owner's substantial reliance valued to be $18,000, and estopped the government from denying the validity of the permit. *Id.* at 293, 310 P.2d at 298. *See also* Crawford v. McLaughlin, 172 Colo. 366, 376, 473 P.2d 725, 731 (1970). In *Crawford*, the court found that the government was estopped for imposing new height restrictions on an apartment complex after issuance of a building permit and reliance by the property owner. The owner had razed an existing structure on the site, made further financial commitments and had obtained additional architectural drawings. *Id.* The *Crawford* case reveals a rather simplistic view of the equitable estoppel doctrine which is invoked to prevent manifest injustice. *See Stackhouse*, 135 Colo. at 293-94, 310 P.2d at 297. The *Crawford* court determined that imposing new height restrictions on the developer of the apartment complex would create injustice because the building would only be seven stories under the new regulations rather than fourteen. The court could have determined whether the developer would have made the same investment if the original regulations had allowed only a seven story building. Similarly, the court might have

At least one Colorado court has determined that the cost of obtaining additional approvals may vest a right under earlier approvals obtained from another level of government.[150] This holding is consistent with the general doctrine that detrimental reliance on a permit may estop the government from changing development regulations, but it may not be consistent with the rule that mere preparatory work will not vest a right.[151] Of course, what is merely "preparatory" is a matter of perception, which may be affected by the fact that the government has approved a land use application.

Although case law in Colorado is sparse, there are indications that reliance on a permit must be reasonable and made in good faith. In *P-W Investments, Inc. v. City of Westminster*,[152] the court concluded that the developer's alleged reliance on a development agreement (or on water and sewer tap permits) could not be reasonable because the government never represented that water and sewer service would be available indefinitely.[153] Similarly, in *Cline v. City of Boulder*,[154] the court noted that it could "infer from the evidence that the Clines obtained a [building] permit merely as a tactic."[155] Finally, the Colorado Supreme Court has held that an owner's reliance on a government official's apparent authority is reasonable.[156]

Once it is determined that a property owner may acquire a vested right under an equitable estoppel theory, the next issue concerns the scope of that right. Despite any express holding by the Colorado Supreme Court, the court of appeals has regularly suggested that equitable estoppel will not be invoked as freely against the government as against private persons.[157] Certainly, nothing in the supreme court's seminal decision in *Pratt v. City and County of Denver*[158] suggests this limitation. When estoppel is available to a property owner, the doctrine will apply even if development may threaten public health and safety and there is no evidence that the government received new information fol-

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determined whether the new regulations would permit the developer a reasonable return on its investment. *See* C.F. Lytle Co. v. Clark, 491 F.2d 834, 838 (10th Cir. 1974) (owner has no right to most profitable use of its property).

150. Saur v. County Comm'rs of Larimer County, 525 P.2d 1175 (Colo. App. 1974) (not selected for official publication). In *Saur*, the owner obtained a permit to operate a quarry in an agricultural district. The owner then spent a substantial sum in seeking additional permits from the Department of Natural Resources and the State Air Pollution Commission. The court held that this reliance estopped the government from changing the owner's use to one permitted only by special review. *Id.* at 1176.

151. *See supra* note 147.

152. 655 P.2d 1365 (Colo. 1982).

153. *Id.* at 1371.

154. 168 Colo. 112, 450 P.2d 335 (1969).

155. *Id.* at 119, 450 P.2d at 339.

156. Franks v. City of Aurora, 147 Colo. 25, 27, 362 P.2d 561, 563 (1961). *Franks* is not a vested rights case, but deals with equitable estoppel and holds that an owner that altered construction plans for a drainage culvert under instructions of a city engineer could not be sued by the city when the inadequately sized culvert subsequently caused flooding damage.

157. *See, e.g.*, Fueston v. City of Colorado Springs, 713 P.2d 1323, 1325 (Colo. App. 1985), *cert. denied* (1986).

158. 72 Colo. 51, 209 P. 508 (1922).

lowing its approval.[159] In fact, Colorado courts do not appear to weigh hardships when determining whether an owner may invoke equitable estoppel against the government.[160]

A property owner who acquires a vested right within one government jurisdiction may exercise that right even if another government annexes the property. The Colorado Supreme Court made this apparent in *Cline v. City of Boulder*,[161] although it ultimately determined that the owners had not relied to their detriment on a building permit issued by Boulder County.[162]

Another Colorado court has suggested that estoppel may not be invoked against the government "where such estoppel would require violation of the law."[163] This limitation on the equitable estoppel doctrine should not be read too broadly. In *City and County of Denver v. Stackhouse*,[164] the supreme court held that the government was estopped from denying the validity of a permit that it had issued.[165] Thus, the court actually countenanced an illegal act — perhaps two: (1) illegal to issue the permit and (2) illegal to use the property in the manner approved for. Similarly, in *Underhill v. Board of County Comm'rs, Boulder County*[166], the court of appeals suggested that since approval was ministerial, the board might have had to approve a subdivision plat if the developer had relied on a misstatement of law made by a commissioner.[167]

An issue that may arise occasionally is whether protectable vested property rights exist for neighbors of property under a land use application. In *Spiker v. City of Lakewood*,[168] the supreme court declared that

159. *See* Williams v. Smith, 76 Colo. 151, 230 P. 395 (1924). In *Smith*, the government could revoke a building permit based on a danger to public health and safety if there was "additional information to that body showing some danger to health and safety, of which its members were not informed at the time of the resolution [authorizing construction of a filling station and directing issuance of a building permit]." Since the trial court did not allow in evidence of reliance, the supreme court was unable to determine whether a development right had vested. *Id.* at 153, 230 P. at 397.

160. *See, e.g.*, Crawford v. McLaughlin, 172 Colo. 366, 473 P.2d 725 (1970).

161. 168 Colo. 112, 450 P.2d 335 (1969) (involving property involuntarily annexed).

162. *Cline*, 450 P.2d at 339. *See also* City of Cherry Hills Village v. Trans-Robles Corp., 181 Colo. 356, 509 P.2d 797 (1973), where the court held that the city could not modify minimum lot size requirements after the developer had platted property under Arapahoe County regulations and constructed infrastructure for the subdivision. Although *Trans-Robles* was decided on due process grounds, it may easily have been an equitable estoppel case. The obvious difficulty with applying the estoppel against an annexing municipality is that government did not make the representation on which the owner relied. *See supra* notes 102-04 and accompanying text.

163. Fueston v. City of Colorado Springs, 713 P.2d 1323, 1325 (Colo. App. 1985) (*cert. denied* 1986).

164. 135 Colo. 289, 310 P.2d 296 (1957).

165. *Id.*

166. 39 Colo. App. 185, 562 P.2d 1125 (1977).

167. *Id.* It is not necessary that a court hold that the government is estopped from changing a representation that is made erroneously, whether it is a verbal expression or permit. At most, the equitable estoppel doctrine might be applied only when the government correctly and legally represents to the owner of property what his or her development rights are. The answer, of course, is that injustice occurs when the government alters its representation after detrimental reliance by the owner regardless of the accuracy or legality of that representation.

168. 198 Colo. 528, 603 P.2d 130 (1979).

neighbors had no "vested right, per se, in the maintenance of a particular zoning classification."[169] The court of appeals dealt with this matter when the neighbors raised the equitable estoppel doctrine. In *Bentley v. Valco, Inc.*,[170] the court determined that equitable estoppel was not available to an owner who allegedly bought his property after the county had denied a special use permit. The application was for a strip mine on property which was adjacent to the plaintiff's, even though the county approved a second application.[171] The court concluded that either the government had made no representation to the neighbor or that it was unreasonable for the neighbor to believe that the government would never grant the permit.[172]

The Colorado Supreme Court eschewed a vested rights equitable estoppel theory in *City of Cherry Hills Village v. Trans-Robles Corp.*[173] In *Trans-Robles*, the city had argued that the facts were insufficient to establish estoppel against the government.[174] The court, however, determined that the city could not downzone property that had been annexed because the owner had platted the property for one-half acre lots consistent with Arapahoe County zoning regulations that had been applied before annexation, and had constructed infrastructure in the subdivision appropriate for the half-acre configuration.[175]As a result of the evidence, the property could not be used if rezoned for a minimum lot size of two and one-half acres, and the court held the rezoning was confiscatory and unconstitutional.[176]

The court's theory supporting the invalidation of the rezoning in *Trans-Robles* is troublesome. The owner's property could likely have been used for two and one-half acre lots—the change would simply have been costly and economic waste might have resulted. The better reasoning would have been that Trans-Robles' development rights had vested because of its detrimental reliance on Arapahoe County's land use regulations. The court may have been reluctant to apply the equitable estoppel doctrine against the city since the city had not made any representation to the developer, or the court might have thought that evidence of issuance of a building permit was necessary to invoke equitable estoppel.[177]

One might ask why the Colorado courts have held that detrimental reliance on some government representation, such as a permit, is necessary to vest a property right. Why have the courts generally analyzed the vested rights problem within the framework of equitable estoppel? The

169. *Id.*
170. 741 P.2d 1266 (Colo. App. 1987).
171. *Id.* at 1269.
172. *Id.*
173. 181 Colo. 356, 509 P.2d 797 (1973).
174. *Id.* at 360, 509 P.2d at 799.
175. *Id.* at 360, 509 P.2d at 798.
176. *Id.* at 360, 509 P.2d at 799.
177. *Compare* Witkin Homes, Inc. v. City and County of Denver, 31 Colo. App. 410, 414, 504 P.2d 1121, 1123 (1972) (owner could not demonstrate reliance considering that no building permit had issued).

answer is that the courts quickly concluded that no property rights vested under even a validly issued permit until there had been reliance on the permit.[178] One can trace Colorado law on the rights that attach to a validly issued building permit back to *Pratt v. City and County of Denver*.[179] Although the court applied the equitable estoppel doctrine against the government, the court found that the government had not shown any of the conditions set forth by local laws under which a building permit could be revoked.[180] Thus, all that the court assumed was that local law could provide for the revocation of a building permit on certain conditions. Two years later, however, in *Williams v. Smith*,[181] the supreme court wondered whether a city council would have the power to rescind a building permit before expenditures were made in reliance on the permit. Citing *Pratt*, the court stated that it saw "no valid answer to such a proposition."[182] It now appears firmly embedded in Colorado law that one acquires no property right under a permit or other land use approval unless there has been detrimental reliance on the permit or approval.[183]

Before examining the Colorado legislature's response to vested rights problems, it is appropriate to evaluate whether Colorado judicial treatment of landowners justified the legislative action. Since the Colorado courts have viewed the issue of vested rights from an equitable estoppel perspective, judicial evaluation of vested rights claims is superior to any legislatively prescribed formula unless the legislature views vested rights from a different perspective.[184] The courts are in a better position than the legislature to make the type of *ad hoc* inquiry that is necessary to determine whether the government should be estopped from changing development regulations applicable to certain property.

A review of the case law demonstrates that Colorado courts have

178. *See* Cline v. City of Boulder, 168 Colo. 112, 118, 450 P.2d 335, 338 (1969): The basic legal question involved is simply, does a building permit per se vest such a property right in the owner that subsequent rezoning is ineffective as to the property? The majority rule in the United States is that the owner must take some steps in reliance on the permit before his rights vest thereunder.

179. 72 Colo. 51, 209 P. 508 (1922).

180. *Id.* at 55, 209 P. at 509.

181. 76 Colo. 151, 230 P. 395 (1924).

182. *Id.* at 154, 230 P. at 396. Presumably, this meant that it was irrefutable that the government could revoke the permit. *See also* Elam v. Albers, 44 Colo. App. 281, 282, 616 P.2d 168, 169-70 (1980) (conditional use permit gave an owner no more rights than it would have under basic zoning ordinance). Crittenden v. Hasser, 41 Colo. App. 235, 585 P.2d 928 (1978), relates to this issue in holding that new regulations may be applied to a land use application if they are pending at the time of the application and the government does not unreasonably delay in acting on the application.

183. Unfortunately, the case law does not express with certainty whether a building permit itself is necessary to vest a property right — assuming the requisite reliance. This could raise substantial problems for property owners in Colorado counties that do not enforce building codes with a building permit process.

184. The Colorado legislature has, indeed, viewed the vested rights issue from a radically different perspective. The legislative response in S.B. 219 does not consider detrimental reliance relevant to a vested property right claim, rather the legislative focus is on the permit or approval that the government grants and the rights that attach to that permit or approval. This "property rights" approach is different from the Colorado courts' equitable estoppel approach.

treated landowners fairly.[185] The general rule in Colorado is that a right to develop or use property will vest when a landowner has suffered detrimental reliance as the result of some land use approval. The reliance must be made reasonably and in good faith, and must be more than preparatory work done in conjunction with a project. The Colorado courts have been somewhat pro-landowner in refusing to balance equities, once it has been determined that the elements of equitable estoppel are present. At the same time, the courts have preserved flexibility in the land use regulatory process by permitting the government to modify development regulations after land use approval when the landowner cannot demonstrate sufficient or detrimental reliance. This scheme affords a reasonable level of certainty to landowners who wish to develop their properties while allowing for a sensible measure of flexibility for the land use regulatory process.

B. *Statutory Vested Rights in Colorado: Senate Bill 219*

1. Definitions Under Senate Bill 219

Senate Bill No. 219 drastically changed vested rights law in Colorado. The most obvious change was the legislature's rejection of the need for any detrimental reliance to vest a property right.

Senate Bill No. 219 defines a vested property right ("VPR") as "the right to undertake and complete the development and use of property under the terms and conditions of a site specific development plan."[186] In other words, a landowner has the right to proceed with a project free from the effects of local government regulations adopted subsequently to the time the landowner receives approval for the project.[187] The statute defines landowner as any owner of a legal or equitable interest in real property, including heirs, successors and assigns.[188]

In addition, "site specific development plan" is defined as "a plan which has been submitted to a local government by a landowner or his representative describing with reasonable certainty the type and intensity of use for a specific parcel or parcels of property."[189] The statute provides that the site specific development plan "may be in the form of, but need not be limited to, any of ten different plans or approvals."[190] It remains for the local government to determine when a plan or ap-

185. *See supra* notes 159-77 and accompanying text.

186. COLO. REV. STAT. § 24-68-102 (5) (Supp. 1987).

187. Section 24-68-105(1) also addresses the effect of a VPR. The section is labeled "Subsequent regulation prohibited—exceptions." It prohibits the government from taking "any zoning or land use action" that would interfere with the VPR. COLO. REV. STAT. § 24-68-105 (1) (Supp. 1987). The prohibition appears to apply to action taken pursuant to regulations in effect at the time that the government approves a site specific development plan, in addition to regulations adopted subsequent to that approval. It cannot be the intention of the legislature, however, to provide that one land use approval entitles a developer to favorable treatment during subsequent, discretionary approval processes. *See infra* notes 238-43 and accompanying text, concerning the horizontal vesting effects of S.B. 219.

188. COLO. REV. STAT. § 24-68-102 (1) (Supp. 1987).

189. *Id.* at § 24-68-102 (4) (Supp. 1987).

190. *Id.*

proval constitutes a site specific development plan that will trigger a VPR.[191] The determination may be made by "ordinance, regulation or upon an agreement entered into by the local government and the landowner."[192] "[T]he document that triggers the [VPR] shall be so identified at the time of its approval."[193] It is not clear whether that document refers to the agreement only or to an ordinance, regulation *or* agreement.[194] Neither a variance, a sketch, nor a preliminary plan constitute a site specific development plan.[195]

Under the statute, a "local government" refers to "any county, city and county, city, or town, whether statutory or home rule, acting through its governing body or any board, commission, or agency . . . having final approval authority over a site specific development plan."[196] An urban renewal authority constitutes a local government for purposes of the statute.[197]

2. Creating a VPR

A VPR is created when a local government approves (or conditionally approves) a site specific development plan, following notice and public hearing.[198] Once the VPR is established, it remains in effect for three years.[199] The local government, however, can extend the three-year vesting period by approving amendments to the site specific development plan that expressly authorize an extension.[200] The government also may *exceed* the three-year period by entering into a development agreement with the landowner if the excess period is warranted in light of all relevant circumstances, including the project's size and phasing, economic cycles and market conditions.[201]

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191. *Id.*
192. *Id.*
193. *Id.*
194. This issue may be important in determining the local government's role under the statute. *See infra* notes 230-34 and 296-99 and accompanying text. The better interpretation is that "document" refers only to the development agreement which must be designated expressly as creating a VPR. Ordinances and regulations that establish VPR's do not need to be designated expressly in estabishing the VPR's because definition of a site specific development plan controls its establishment.
195. COLO. REV. STAT. § 24-68-102(4) (Supp. 1987).
196. *Id.* at § 24-68-102(2).
197. *Id.*
198. *Id.* at § 24-68-103(1). This creates the somewhat paradoxical situation that issuance of a building permit alone does not create a VPR unless the government gives notice of and holds a hearing on the application for the permit. Under common law principles, detrimental reliance on the building permit should vest the property. *See* Williams v. Smith, 76 Colo. 151, 230 P. 395 (1924). Consequently, a local government may possibly avoid establishment of a VPR by declining to give notice of a hearing on a land use application. The requirements of procedural due process may, however, dictate that the government give notice of and hold a hearing on the application. *See generally* Kahn, *In Accordance with a Constitutional Plan: Procedural Due Process and Zoning Decisions*, 6 HASTINGS CONST. L.Q. 1011 (1979).
199. COLO. REV. STAT. § 24-68-104(1) (Supp. 1987).
200. *Id.*
201. *Id.* at § 24-68-104(2). The difference between the terms "extend" and "exceed" in the statute is that the government may enter into a development agreement at the time of a land use approval and create a vesting period in excess of three years or enter into a

The local government can conditionally approve a site specific development plan[202] as well as impose certain terms and conditions, as long as the terms and conditions are reasonably necessary to protect the public health, safety, and welfare. Furthermore, a VPR can be forfeited prior to the end of the three-year vesting period if the landowner does not comply with the terms and conditions of plan approval.[203]

The local government's approval of the site specific development plan is effective on the date of the ordinance or resolution approving the plan.[204] The approval, however, is subject to all rights of referendum and judicial action.[205] The time limits for instituting the referendum or judicial action begin on the date of publication of the approval or on the date of notice advising the general public of the approval, not on the effective date of the approval.[206] Publication or notice must occur within fourteen days following the approval.[207]

Although it appears out of place, the statute provides that zoning not a part of a site specific development plan does not establish a VPR.[208] This apparently means that no landowner may claim a right to develop based on the fact that the existing zoning is consistent with owner's intended use. The owner would need some other land use approval or would need to have had his property rezoned to vest the development right.

Once a local government approves the site specific development plan and creates a VPR, any zoning or land use action taken by the local government is precluded if the action would alter, impair, diminish or delay the development or use of the property.[209] There are four excep-

development agreement only and create an original vesting period in excess of three years. The government may not enter into a development agreement to "extend" the vesting period.

202. *Id.* at § 24-68-103(1). The statute authorizes the government to conduct subsequent reviews of the conditionally approved development to ensure its compliance with applicable conditions. *Id.* at § 24-68-104(3).

203. *Id.* at § 24-68-103(1).

204. *Id.*

205. *Id.* The drafters of S.B. 219 probably believed that judicial review would occur through COLORADO RULE OF CIVIL PROCEDURE 106. The rule is the exclusive method of review for land use actions which may be characterized as quasi-judicial. *See* Snyder v. City of Lakewood, 189 Colo. 421, 426-27, 542 P.2d 371, 375 (1975). If judicial review is sought under Rule 106, review must be sought within 30 days of the challenged decision. On the other hand, if a land use decision is legislative in character, judicial review may be sought outside Rule 106 and the plaintiff may have several years to commence an action. If the plaintiff eventually prevails, the developer cannot claim a vested right under the statute, because the VPR is subject to judicial review. The statute expressly provides that adoption of a development agreement is a legislative act. COLO. REV. STAT. § 24-68-104(2) (Supp. 1987). The *Snyder* criteria for a quasi-judicial action are: (1) a state or local law requiring that the decision-maker give notice to the community before acting; (2) a state or local law requiring that the decision-maker conduct a public hearing, pursuant to notice, and allowing the public an opportunity to be heard, *and* (3) a state or local law requiring that the decision-maker reach a determination by applying facts to criteria established by law. *Id.* at 374. The approval of most site specific development plans should satisfy these criteria.

206. COLO. REV. STAT. § 24-68-104(3) (Supp. 1987).

207. *Id.* at § 24-68-103(1).

208. *Id.* at § 24-68-103(2).

209. *Id.* at § 24-68-105(1).

tions to this rule. First, the local government can take a zoning or land use action that alters, impairs or delays the project if the landowner consents to the action.[210] Second, the local government can take a zoning or land use action if the action is necessary to correct a man-made or natural hazard that would pose a serious threat to the public health, safety or welfare and the hazard could not reasonably have been discovered at the time the plan was approved.[211] Third, the local government can take a zoning or land use action that impacts the project as long as the landowner receives just compensation for all costs, expenses and liabilities incurred after the local government's approval of the site specific development plan.[212] While the compensation scheme includes reimbursement for all architectural, planning, marketing, legal and other consultant fees, it does not include any diminution in the value of the landowner's property.[213] Finally, the local government may enact ordinances or regulations that are general in nature and applicable to all properties subject to land use regulation without paying just compensation, even though these ordinances or regulations alter, impair or delay the development or use of the property for which a VPR is claimed.[214] Examples of these regulations include building, fire, plumbing, electrical and mechanical codes.[215]

Under the statute, a VPR acquired while one local government has jurisdiction over the property, in whole or in part, is good "against any other local government which may subsequently obtain or assert jurisdiction over such property."[216] This section would apply most often when a local government annexes property for which a VPR exists. It is possible, however, that a municipality could condition any agreement to annex property on the owner's waiver of his VPR.[217]

The statute expressly provides that statutory vested rights exist in addition to whatever vested property right might exist at common law.[218] The statute does not modify the common law regarding claims that a compensable taking has occurred.[219] The first provision should have no real impact on the law, but the second provision may be relevant to a claim for damages alleging that a taking of property.[220]

Senate Bill No. 219 became effective on January 1, 1988.[221] The statute makes no mention of the need for the adoption of any local law to implement the vesting scheme. Apparently, any land use application

210. *Id.* at (1)(a).
211. *Id.* at (1)(b).
212. *Id.* at (1)(c).
213. *Id.*
214. *Id.* at (2).
215. *Id.*
216. *Id.* at § 24-68-106(2).
217. *See* Groy & Shultz, *Negotiating a Successful Annexation Agreement*, 39 LAND USE L. & ZONING DIGEST 3, 6-7 (1987).
218. COLO. REV. STAT. § 24-68-106(3) (Supp. 1987).
219. *Id.*
220. *See infra* notes 281-93 and accompanying text.
221. COLO. REV. STAT. § 24-68-106(4) (Supp. 1987).

approved on or after January 1, 1988, which is reasonably certain as to the type and intensity of use carries with it a VPR.

3. "How Could We Go So Wrong When We Were So Sincere?"

One could suggest that S.B. 219 was ill-conceived from the beginning. The law totally changes the normal order of things — that the rights of a property owner are always subject to the reasonably exercised police power.[222] Moreover, an owner of property, at common law, had no right to make any specific use of his or her property. Instead, the owner had only a right to a reasonable or beneficial use.[223] As the courts have stated consistently, no property owner is entitled as a matter of law to the highest and best use of his or her property.[224]

A legislative body is free to modify common law notions of property rights. Although it is not clear whether a legislature may diminish a property right on which there has been no reliance beyond some constitutionally protected minimum, it is clear that a legislature may enlarge rights that are incidental to property ownership. Senate Bill No. 219 greatly enlarges the rights of property owners by establishing the right "to undertake and complete the development and use of property under the terms and conditions of a site specific development plan."[225]

No state has a law that goes as far as Colorado's S.B. 219. A handful of states vest development rights following preliminary or final plat approval,[226] but even then, only as to certain additional regulations. By far, the majority of states require some form of detrimental reliance by a property owner before a development right will vest.[227] Senate Bill No. 219, as suggested in the legislative findings,[228] enhances business certainty by eliminating any need for detrimental reliance before a development right will vest.

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222. *See* Euclid v. Ambler Realty Co., 272 U.S. 369, 395 (1926) (holding that a zoning restriction is invalid if it is arbitrary and unreasonable with no substantial relationship to public health, safety or the general welfare). The Supreme Court eventually replaced this "substantial relationship" test with the "rational relationship" test normally applied to socio-economic regulation. *See* Moore v. City of East Cleveland, 431 U.S. 494, 498 n.6 (1977); *see also* Wright v. City of Littleton, 174 Colo. 318, 321, 483 P.2d 953, 955 (1971); Colby v. Board of Adjustment, 81 Colo. 344, 347, 255 P. 443, 446 (1927). Most recently, however, the Court revived the substantial relationship test for land use regulations which exact a property interest from the landowner as a condition for a land use approval or permit. Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3149 (1987).

223. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1233, 1242 (1987) (a taking may be found where a regulation denies an owner *all* economically viable use of his land).

224. *See, e.g.*, *Euclid*, 272 U.S. at 395-97 (explaining that landowner was not entitled to commercial use of property simply because that use has a higher value than residential use); Wright v. City of Littleton, 174 Colo. 318, 322, 482 P.2d 953, 956 (1971) (owner not entitled to highest use of property).

225. COLO. REV. STAT. § 24-68-102(5) (Supp. 1987).

226. *See supra* note 86 and accompanying text.

227. *See supra* notes 44-53 and accompanying text.

228. COLO. REV. STAT. § 24-68-101(a) (Supp. 1987) states: "It is necessary and desirable, as a matter of public policy, to provide for the establishment of vested property rights in order to ensure reasonable certainty, stability, and fairness in the land use planning process and in order to stimulate economic growth . . . ."

There are at least three reasons why S.B. 219 unreasonably favors the development industry. First, land use regulatory processes are often a system for mediating the inevitable disputes between property developers and their so-called "neighbors."[229] The officials who implement the regulatory process must attempt to balance the legitimate and competing expectations of developers and neighbors. Yet frequently, neighbors are not fully informed about land use applications and are unconcerned about development until there is some visible sign that development is about to take place.[230] Under the common law, the protests of neighbors will be both too little and too late if the developer who has obtained a land use approval has reasonably relied on the approval to its detriment. If reasonable and detrimental reliance does not exist, the neighbors might have an impact on a previously approved project.[231]

Senate Bill No. 219 drastically changes the dynamics of the land use regulatory process. If neighbors are unable to come together and effectively challenge a land use application when the government first considers a developer's proposal, the neighbors may have lost their only opportunity to insist that the developer mitigate the impact of the project on the community.[232]

A second flaw of S.B. 219 is its insistence that the government pay just compensation to a landowner when the government interferes with a VPR because of "natural or man-made hazards on or in the immediate vicinity of the subject property"[233] unless the "hazards could not reasonably have been discovered at the time of site specific development plan approval, and which hazards, if uncorrected, would pose a serious threat to the public health, safety, and welfare . . . ."[234] In other words, if a development project is determined to pose a "serious threat" to neighboring property owners or to future residents of the project itself, the government cannot interfere with the development if the problem

229. The term "neighbors" refers to persons in the community other than the landowner who propose to develop his or her property. The opinions of neighbors have always played a substantial role in land use decisionmaking. *See* Allen v. Coffel, 488 S.W.2d 671 (Mo. App. 1972) (discussing legitimate interests of neighbors in land use approval processes). But courts can hold that the government may not turn the land use decision making process into a plebiscite on the neighborhood opinion. *See* Taco Bell v. City of Mission, 234 Kan. 879, 879 P.2d 133 (1984). The Colorado Supreme Court held that neighbors, in the ordinary sense, do not have vested rights in a zoning ordinance that would restrict the government's rezoning of *another* person's property. *See* Spiker v. City of Lakewood, 198 Colo. 528, 532-33, 603 P.2d 130, 133 (1979).

230. *See* Cunningham & Kremer, *supra* note 16, at 668-69.

231. *See, e.g.*, William C. Haas v. City and County of San Francisco, 605 F.2d 1117 (1979), *cert. denied*, 445 U.S. 928 (1980) (concerning a protracted legal battle between a developer and neighbors).

232. In essence, S.B. 219 creates a form of collateral estoppel for land use decisions that prevents neighbors, to a limited extent, from attacking an approved development proposal in another forum. Neighbors are free to seek judicial review of the land use approval. *See, e.g.*, U.S. DEPT. OF COMMERCE, STANDARD STATE ZONING ENABLING ACT § 7 (rev. ed. 1926) (permitting judicial review at the request of persons aggrieved by zoning decisions). *See also* COLO. R. CIV. PROC. 106(a)(4).

233. COLO. REV. STAT. § 24-68-105(1)(b) (Supp. 1987).

234. *Id.*

should have been discovered at the time the government approved the site specific development plan. However, the government can pay just compensation to the landowner.[235] This legal limitation creates a difficult dilemma for the government. The government is unlikely to compensate a property owner for what could amount to several hundred thousand dollars of work if it interferes with a VPR.[236] But the cost would be a liability to neighbors or future residents of the project due to the government's failure to interfere with the project.[237] Given current economic conditions, it is unlikely that the government will interfere with the VPR, merely hoping that the gods will look favorably upon its decision.

Senate Bill No. 219 also creates the difficult problem of determining when a natural or man-made hazard could reasonably have been discovered, presumably by the government.[238] This limitation on the right of the government to interfere with a VPR should not be applied strictly by a court when the developer has not incurred the type of reasonable and detrimental reliance that would vest a development right at common law. Similarly, a court should not read the phrase "serious threat" as requiring proof by the government that the threat is life-threatening or more likely than not to occur. The interference with development projects, even for public health and safety reasons, imposes costs on developers. Furthermore, those costs often can be internalized and spread

235. *Id.*

236. At common law, expenditures will not necessarily vest a development right. If the costs are incurred for preparatory work or are small relative to the overall cost of a project, the development right will not vest. *See* Delaney & Kominers, *supra* note 49, at 226-29.

237. *See* Eschette v. City of New Orleans, 245 So. 2d 383 (La. 1971) (holding local government liable for failure to enact sufficiently stringent subdivision regulations, which resulted in damage to neighbors of subdivision); *compare* Barney's Furniture Warehouse of Newark v. City of Newark, 62 N.J. 456, 303 A.2d 76 (1973) (holding that the city lacked a duty towards plaintiffs to impose specific subdivision improvement requirements on developer). Several courts have refused to hold governments liable when land use decisions caused injury to neighbors of a development on the grounds of immunity for the exercise of a discretionary, governmental function. *See, e.g.*, Panepinto v. Edmart, Inc., 129 N.J. Super. 319, 323 A.2d 533 (App. Div. 1974). Whether neighbors of or residents in a development project could bring an action against the local government depends on application of the Colorado Governmental Immunity Act. COLO. REV. STAT. § 24-10-101 to -118 (1982 & Supp. 1987). Generally, the act immunizes a local government from claims in tort, *id.* at § 24-10-105, unless the claim involves certain exempted areas in which the government may be liable, *id.* at § 24-10-106. Even then, a plaintiff must comply with certain notification requirements or forfeit its claim. *See* Morrison v. City of Aurora, 745 P.2d 1042, 1046 (Colo. App. 1987); *compare* Franks v. City of Aurora, 147 Colo. 25, 362 P.2d 561 (1961) (neighbors brought an action against Aurora due to flood damage allegedly caused by undersized drainage culvert installed by private developer pursuant to plans issued by city engineer—the City settled).

238. Section 24-68-105(1)(b) is ambiguous as to who should have reasonably discovered the hazard. Presumably, the government may not interfere with the right if *it* reasonably should have discovered the hazard. The government normally relies on data that the land use applicant submits in support of its application, thus the government will argue that the hazard was not reasonably discoverable because the applicant failed to submit sufficient data. In addition, if the government should have realized that a hazard existed, the government should not be prohibited from interfering with the VPR if the applicant was not forthcoming and withheld data from the government that would have made the hazard even more apparent. *Compare* Fueston v. City of Colorado Springs, 713 P.2d 1323, 1325 (Colo. App. 1985) (estoppel not available to developer who acts wrongly).

among the various consumers of the development industry's products. This cost shifting technique is superior to forcing the government to put a segment of the population at risk because of its fiscal austerity or a court's anti-government reading of S.B. 219.[239]

The third problem with S.B. 219 is the likelihood that S.B. 219 will promote the warehousing of property. Under the statute, property owners will want to bring as much land within the size specific development plan as possible in order to gain protection from subsequent changes in the law.[240] A developer will include excess land in a site specific development plan, even if the land is unlikely to be developed within the three-year vesting period. Unfortunately, the "terms and conditions" by which a site specific development plan is approved could become obsolete within three years. Apart from differing land use control philosophies, there are two major reasons for the obsolescence: (1) planning and engineering principles change and (2) conditions within the community change. An example of the first reason is a determination, when the slope of land increases, that the density of development should be reduced even more than previously believed.[241] Senate Bill No. 219 prevents a rezoning to reduce density for all land within the site specific development plan, regardless of whether a rezoning was part of the approval process.[242] An example of the second reason is a determination that other development occurring subsequent to approval of a site specific development plan has had a greater impact on community services and facilities than was previously expected.[243]

Where to draw the line between flexibility and certainty is a political question. The Colorado legislature drew the line far to the side of cer-

239. *Compare* Western Land Equities v. City of Logan, 617 P.2d 388 (Utah 1980). The Utah Supreme Court held that a developer acquired a vested property right when he filed a substantially conforming plan for a building permit or subdivision plat approval while there was no notice that a change in the law was pending *and* if the change in the law was not necessary to protect public health and safety. Thus, even in a jurisdiction that adopts a very pro-landowner vesting rule, the court will not vest a right when public health and safety militates against the vesting, at least when there is no detrimental reliance. Senate Bill No. 219 arguably codifies Colorado common law by vesting a right when the government should have known about hazards associated with the project. *See, e.g.*, Williams v. Smith, 76 Colo. 151, 230 P. 395 (1924). The common law rule, that would vest a right when the government should have known about a hazard, included the requirement that the landowner demonstrate detrimental reliance.

240. *See generally* M. Shultz & J. Groy, *The Premature Subdivision of Land in Colorado: A Study with Commentary*, Lincoln Institute of Land Policy, Cambridge, Mass., Monograph 86-10 (1986) (DISCUSSING EXTENT AND EFFECTS OF PREMATURE CONVERSION OF LAND TO RESIDENTIAL DEVELOPMENT).

241. *See* L. KENDIG, PERFORMANCE ZONING 39 (1980) (showing relationship between slope and need for additional open space within boundaries of property). Governments are increasingly adopting ordinances to regulate hillside development for health, safety and aesthetic reasons. *See* Sellon v. City of Manitou Springs, 745 P.2d 229 (Colo. 1987) (en banc) (upholding hillside development ordinance).

242. Although existing zoning may not be the basis for claiming a VPR, COLO. REV. STAT. § 24-68-103(2) (Supp. 1987), once the VPR is established, the government may not interfere with the VPR by rezoning the property to which it attaches. *Id.* at § 24-68-105(1).

243. Generally, local governments may deny land use approvals due to a lack of available community services or facilities. The leading case in support of this proposition is Golden v. Planning Bd. of Town of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972).

tainty. Unfortunately, the statute raises numerous issues that will need to be resolved by amendment or litigation. To the extent that developers, local government officials, and neighbors do not know how a court might resolve the ambiguities in S.B. 219, certainty will remain elusive. The courts or the legislature will need to address the following issues.

4. Is S.B. 219 a Mandatory or an Enabling Statute?

Senate Bill No. 219 appears, at first, to be a self-executing scheme for creating vested property rights. The statute defines a vested property right and links that right with approval of a site specific development. If the statute mandated the types of land use that constitute a site specific development plan, there would be little or no reason for local government action.[244]

Instead, the statute appears to allow each local government to determine what will constitute a site specific development plan. Section 24-68-102(4) of the Colorado Revised Statutes provides that a site specific development is a plan that describes "with reasonable certainty the type and intensity of use for a specific parcel or parcels of property."[245] Ambiguity is created by the next sentence of the section which reads in

244. If one reads S.B. 219 with the understanding that it establishes a vested property right as a matter of state law without reference to local law, one may interpret section 24-68-102(4) as follows:

1. A site specific development plan is one that is reasonably certain as to type and intensity of use;
2. A number of land use plans and approvals *may be* site specific development plans and, in fact, *will be if* they meet the two criteria for a site specific development plan;
3. Because local governments use different types of plans or approvals, what finally constitutes a site specific development shall be determined by the government on a case by case basis as it approves land use applications by ordinance or regulation or when it enters into a development agreement;
4. If the government creates a vested right by entering into a development agreement, the document evidencing the agreement shall be designated by the government at the time of its approval.

This view of S.B. 219 leaves no room for local discretion regarding establishment of a VPR except as one may be established by the development agreement. In all other circumstances, when the government approves a land use plan or application by ordinance or regulation, assuming public notice and a hearing, and the plan or approval is reasonably certain as to the type and the intensity of use, a VPR is established as a matter of state law notwithstanding the local government's desires. If this is the correct interpretation of S.B. 219, the law is even more draconian than it appears at first glance. A court must interpret S.B. 219 to provide local governments some latitude in designating land use plans or approvals that constitute site specific development plans. Local administration is allowed too much discretion in regulating land by imposing a state law scheme that operates irrespective of local law. Since an interpretation, not based on plain meaning, of S.B. 219 would be to preclude any meaningful role by local governments to establish a VPR, a court should base the reading of the statute on the policy implications of the various reasonable interpretations of the statute.

Apparently, Governor Romer believes that S.B. 219 allows for local discretion in determining what constitutes a site specific development plan. Letter from Governor Roy Romer to Colorado State Senate (August 27, 1987). Governor Romer indicated that he signed S.B. 219 because it included language which allows local governments to have the final determination on what plans or approvals will vest the right. The Governor, however, may have overestimated the impact of the sentence that was added to S.B. 219 following the Governor's veto of S.B. 60.

245. COLO. REV. STAT. § 24-68-102(4) (Supp. 1987).

part: "[s]uch plan may be in the form of, but need not be limited to, any of the following plans or approvals . . . ."[246] The section then lists ten specific land use approvals in addition to "any other land use approval designation as may be utilized by a local government" that may constitute a site specific development plan.[247]

At this point, it may appear that the types of plans and approvals listed in section 24-68-102(4) not only may, but will, be a site specific development plan when the plan or approval relates to the type and intensity of use for a parcel or parcels, at least if the type and intensity of development are described with "reasonable certainty" in the plan or approval. The better interpretation is that no specific land use plan or approval needs to constitute a site specific development plan unless the local government determines that the plan or approval will constitute a site specific development plan. Section 24-68-102(4) is clear on this: "What constitutes a site specific development plan under this article that would trigger a vested property right shall be finally determined by the local government either pursuant to ordinance, regulation or upon an agreement entered into by the local government and the landowner . . . ."[248]

In light of the local government's discretion to determine which plans or approvals will constitute a site specific development plan, S.B. 219 appears merely to enable a local government to adopt a vesting ordinance or regulation. Even assuming that the local government is obliged to refer to the statutory definition of site specific development when determining whether a plan or approval is within that definition, S.B. 219 allows local government the ultimate decision.[249] At most,

246. *Id.*

247. *Id.*

248. *Id.* This section, which purports only to define a site specific development plan, is extremely unclear. The ordinance or regulation referred to in the section may mean one of general applicability which establishes local government policy, or it may mean every ordinance or regulation relating to a development plan or approval that describes the type and intensity of development with reasonable certainty. The term "certainty" itself is ambiguous. "Certainty" implies predictability whereas the intent of the section appears to connote "certainty" as "specificity."

249. The ambiguity of S.B. 219 is again present in one sentence of section 24-68-102(4) which provides that "[w]hat constitutes a site specific development plan . . . shall be finally determined by the local government . . . ." The sentence may be interpreted four different ways:

1. On a case by case basis, the government must ("shall") determine that a land use plan or approval constitutes a site specific development plan if the plan or approval describes with reasonable certainty the type and intensity of development. This determination is subject to judicial review;
2. On the basis of an ordinance or regulation of general application, the local government must ("shall") determine that its land use approvals and required development plans, which describe with reasonable certainty the type and intensity of development, are site specific development plans. This determination is subject to judicial review;
3. On a case-by-case basis, the government may exercise final discretion and shall determine whether a specific land use plan or approval constitutes a site specific development plan. This determination could *possibly* be reviewed only to evaluate whether the government acted arbitrarily or capriciously in determining that a land use plan or approval does or does not constitute a site specific development plan because of the degree of certainty with which the type and intensity of development are described in the plan or approval;

S.B. 219 might require a local government to designate one land use plan or one land use approval as a site specific development plan.

If a local government is obligated to designate one or more land use plans or approvals as a site specific development plan, a related issue is whether a property owner may waive his or her claim to a VPR.[250] For example, if the local government determines that final subdivision plat approval constitutes a site specific development plan, the government may grant final plat approval only if the property owner waives any claim to the VPR. Assuming that local governments must recognize site specific development plans, which by statute create vested property rights, it is illogical to believe that the government always could withhold approval of a land use application unless the property owner waived any claim to a VPR. Similarly, the government should not be permitted to withhold approval of land use applications unless the landowner waives the right to argue that the government reasonably could have discovered a hazard associated with development at the time of approval.

Logically a local government could, on a case-by-case basis, determine that certain specific land use approvals should not create a VPR because of hazards associated with a given development project. Thus, for example, a rezoning to residential use may create a VPR generally, but the government may refuse to rezone property in a floodplain to residential use unless the property owner waives any claim to a VPR.[251] Even here, the government might need to retain the power to deny approval for public health and safety reasons.

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4. On the basis of an ordinance or regulation of general application, the government shall determine by the exercise of its discretion, which is final, which of its land use approvals or required development plans will constitute site specific development plans. This ordinance or regulation could possibly be reviewed only to determine whether the government acted unreasonably in determining that a specific land use approval process or plan does or does not constitute a site specific development plan.

250. *See* letter from Governor Roy Romer to Colorado State Senate (August 27, 1987). In his letter, Governor Romer stated that when he vetoed the predecessor of S.B. 219 (S.B. 60), he suggested that express language be included in a revised bill authorizing the waiver of a VPR. Waiver should be possible only when the government offers to waive certain conditions that it could impose on the developer in exchange for the developer's waiver of any claim to a VPR. This issue relates to whether the local government has discretion in designating plans or approvals which constitute site specific development plans. If the local government really does have complete or substantial discretion, waiver is irrelevant because the government may refuse to designate a specific plan or approval as a site specific development plan and avoid establishment of a VPR altogether. *See* Memorandum from Gerald E. Dahl to Municipal Officials at 1 (September 28, 1987) (discussing waiver of vested rights).

251. The government will be on safer ground if it either (1) adopts an ordinance or regulation of general application that excludes plans or approvals involving hazardous sites from the definition of site specific development plans, or (2) amends existing zoning, subdivision or other land use approvals to limit a landowner's ability to develop property involving natural or man-made hazards. *Compare* Keystone Bituminous Coal Ass'n. v. DeBenedictis, 107 S. Ct. 1232 (1987) (upholding restrictions on coal mining to prevent subsidence). The government also should be free to agree to waive certain conditions that it lawfully could impose on a development in exchange for the developer's waiver of any claim to a vested right. The waivers should logically relate to one another. *See* Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987) (suggesting that land use regulations may not be used as a system of extortion).

B. *What is the Effect of a VPR on Subsequent Land Use Approval and Permit Processes?*

A superficial reading of S.B. 219 would infer that a development, for which the government has approved a site specific development plan, cannot be subjected to any regulation enacted subsequent to the establishment of the VPR if the regulation "would alter, impair, prevent, diminish, or otherwise delay the development or use of the property as set forth in the site specific development plan . . . ."[252] There can be no doubt that a VPR does *not* entitle a property owner to additional land use approvals or permits unless the owner meets the conditions for those approvals or permits that existed at the time the VPR was established.[253]

More importantly, a VPR does not immunize a development project from the effect of regulations enacted after the establishment of the VPR if the regulations do not relate to the "terms and conditions" of the site specific development plan.[254] For example, the terms and conditions of

252. COLO. REV. STAT. § 24-68-105(1) (Supp. 1987).

253. For example, if a landowner subdivides a five-acre tract into five one-acre lots pursuant to a government approved plat, the landowner has no vested right to have the property rezoned to residential use. Rather, the landowner must prove to the zoning board that a change in use is proper. This proof of necessity for rezoning is required, if for no other reason, because subdivision and zoning are two different land use regulatory processes and the terms and conditions of subdivision approval do not deal with the type of use permitted for a piece of property. *See* Spiker v. City of Lakewood, 198 Colo. 528, 532, 603 P.2d 130, 132 (Colo. 1979) ("Although zoning changes and plat approvals may be conjoined, they are essentially separate and distinct matters.") A more difficult question is whether the government may rezone the property following plat approval. *See infra* notes 240-41 and accompanying text. Senate Bill No. 219 provides that the local government plan exists to determine its compliance with the terms and conditions of approval. COLO. REV. STAT. § 24-68-104 (3) (Supp. 1987).

254. The phrase "terms and conditions" used in section 24-68-102(5) is ambiguous, as demonstrated by New Jersey case law. At one time, New Jersey state law provided that tentative approval of a subdivision plat assured the developer that the government could not change "terms and conditions" upon which approval was granted for three years from the date of approval. *See* Hilton Acres v. Klein, 35 N.J. 570, 574, 174 A.2d 465, 469 (1961) (discussing statute). In a series of cases, the New Jersey Supreme Court determined that "minimum lot size" was a term or condition of tentative plat approval. *Id.* On the other hand, the court held that paving requirements, Levin v. Township of Livingston, 35 N.J. 500, 509, 173 A.2d 391, 400 (1961), the existence of sidewalks, and the width of streets, Pennyton Homes v. Planning Bd., 41 N.J. 578, 197 A.2d 870, 872 (1964), were not terms and conditions of approval, and therefore the government could alter those requirements after tentative approval. The fact that a VPR is *not* created when a local government approves a sketch or preliminary subdivision plat, *see* COLO. REV. STAT. § 24-68-102(4) (Supp. 1987), does not negate the fact that courts will need to determine what constitutes the "terms and conditions" of each site specific development plan.

Unfortunately, the issue regarding the scope of the VPR is even more confusing because of the inconsistency between the definition of a VPR, which relates to a right to develop and use property in accordance with the "terms and conditions" of the site specific development plan, *Id.* at § 24-68-102(5), and the effect of a VPR, which prevents a government from interfering with the development or use of property subject to a VPR "as set forth in a site specific development plan." *Id.* at § 24-68-105(1). A site specific development plan might "set forth" matters that were not necessarily considered the local government during its approval of the plan and therefore should not be considered part of the "terms and conditions" of the plan. To the extent that section 24-68-102(5) defines a VPR, it should control the scope of the VPR and the correlative duty of the local government.

final subdivision plat approval may include the right of the subdivider to use individual sewage disposal systems in the subdivision. However, the terms and conditions may not include any criteria relating to the design standards for the individual sewage disposal systems.[255] Although the local government could not refuse to allow the individual systems after final plat approval, the government should be able to require the subdivider to comply with local regulations which existed when an application was submitted. The local government should also be able to require compliance with regulations which are amended subsequent to the establishment of the VPR. The enforcement of amended regulations would not affect the "development or use of the property as set forth in a site specific development plan" unless the plan contained the design standards for individual sewage disposal systems.

In addition, the statute prohibits any change in zoning or land use except where "the application of ordinances or regulations which are general in nature and are applicable to all property subject to land use regulation by a local government."[256] Although the section lists only building, fire, plumbing, electrical and mechanical codes, the section should be read to include any other ordinance or regulation that does not deal on a site specific basis with property for which a site specific development plan exists.[257]

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255. *See* COLO. REV. STAT. §§ 25-10-101 to -112 (1982 & Supp. 1987). It should not matter whether the local government had regulations regarding individual sewage disposal systems in place at the time that the government approved the site specific development plan. The developer should be subject to regulations, whether existing before or after establishment of the VPR, so long as the regulations do not involve the "terms and conditions" of the site specific development plan. It is unreasonable, for example, to argue that a term or condition of approval is that a landowner does not have to conduct an environmental impact assessment ("EIS") when the government has no regulations concerning an EIS. If, however, the government imposes an EIS as a condition precedent to issuance of a building permit, the landowner who claims a VPR should be required to perform the EIS. *Compare* Western Land Equities v. City of Logan, 617 P.2d 388, 391 (Utah 1980) (holding that a landowner could be subject to regulations pending adoption at the time he or she submits a conforming land use application if the owner is aware of the regulation); *see also* Crittenden v. McPherson, 585 P.2d 928, 929 (Colo. App. 1978) (county could deny liquor license application pending at time when government rezoned subject property so long as there was no undue delay in acting on the application). It is worthwhile to note that a landowner has no right under S.B. 219 to request its land use application be reviewed under only those regulations in effect at the date of the application.

256. COLO. REV. STAT. § 24-68-105(2). One may wonder if rezoning, accomplished by an amendment to the zoning ordinance text, would be within this provision. Although the amendment may prohibit a previously permitted use in a certain zoning district, such amendment will have a general application since it will apply to all property within the zoning district for which the applicable regulations have been amended. In other words, the textual change is not really a site specific rezoning.

257. There are two state statutes enabling local governments to regulate land use that are in possible conflict with S.B. 219. The Local Government Land Use Control Enabling Act ("LUCEA"), COLO. REV. STAT. §§ 29-20-101 to -107 (1986), adopted by the Colorado legislature in 1974 when the land use control pendulum was in a different position, generally empowers local governments to regulate land use for a number of specific reasons in addition to "[o]therwise planning for and regulating the use of land and protection of the environment in a manner consistent with constitutional rights." *Id.* at §§ 29-20-104(a)-(h). It remains to be seen whether regulations adopted pursuant to LUCEA are exempt under S.B. 219. The Colorado Supreme Court limited the apparent breadth of LUCEA in Pennobscott, Inc. v. Board of County Comm'rs, 642 P.2d 915 (Colo. 1982) (state enabling

Apart from the horizontal vesting question,[258] there is the question of the effect of a VPR on state or regional land use approval processes (vertical vesting). The statute only vests a development right against interference by a local government. Section 24-68-102(2) defines local government in a way that cannot be read to include any state or regional land use approval process.[259] For example, an owner's development right is not vested against changes in state regulations under the federal Safe Drinking Water Act.[260] Similarly, a development right should not be vested against regulations that the Colorado Land Use Commission may adopt.[261]

C. *What is the Scope of Government Liability for Interference with a VPR?*

The scope of a local government's liability for interference with a VPR is uncertain under S.B. 219. The statute does not directly address the question of liability if a local government interferes with a VPR; rather, the statute allows for local government interference with a VPR provided "the affected landowner receives just compensation for all costs, expenses, and liabilities incurred by the landowner" after the government approved the site specific development plan.[262] The payment of just compensation appears, from the statute, to be a condition precedent to the government's right to interfere with the VPR. Assuming the likelihood that the government may not pay just compensation prior to interference with a VPR, the question is whether the landowner is entitled to damages or injunctive relief.

If governmental interference with a VPR constitutes a "taking" of

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statute limiting county subdivision control to divisions creating parcels under 35 acres also limited LUCEA).

The second statute of general application is the Areas and Activities of State Interest Law. COLO. REV. STAT. §§ 24-65.1-101 to -502 (1982 & Supp. 1987). The act encourages local governments to designate areas and activities of state interest and to administer these areas and regulate these activities after designation. *Id.* at § 24-65.1-101(2)(b). Areas of state interest include natural hazard areas, areas containing or having a significant impact on historical, natural or archeological resources of statewide importance and areas around key facilities in which development may have a material effect on the facility or the surrounding community. *Id.* at § 24-65.1-201. Activities of state interest include, among others, site selection and construction of major new domestic water and sewage treatment systems and major extensions of existing systems and site selection and development of new communities. *Id.* at § 24-65.1-203(1)(a), (b) & (g). Although this statute does not appear to come within the exemption provided in section 24-68-105(2) of S.B. 219, a court should exercise caution before holding that a landowner is vested against regulations adopted pursuant to a statute that is predicated on matters of statewide interest to the same extent as S.B. 219.

258. Horizontal vesting refers to the effect that detrimental reliance has on an approval from one agency of the local government to other agencies at the same level of that local government.

259. COLO. REV. STAT. § 24-68-102(2) (Supp. 1987) states: "Local government means any county, city and county, city, or town, whether statutory or home rule, acting through its governing body or any board, commission, or agency thereof having final approval authority over a site specific development plan, including without limitation, any legally empowered urban renewal authority."

260. *See id.* at § 25-1-107(1)(x)(I) (1982).

261. *See id.* at § 24-65-104(2) (1987).

262. *Id.* at § 24-68-105(1)(c) (Supp. 1987).

property, a property owner is not entitled, at least as a matter of federal constitutional law, to enjoin the taking.[263] The owner may merely be entitled to just compensation, as required by the fifth amendment.[264] The government may pay just compensation after the taking rather than prior to the taking without violating the federal Constitution.[265] Of course, state law may impose different limitations on the power of the government to interfere with property rights and a court. For example, state law may dictate that the local government's failure to pay just compensation to the property owner, whose VPR has been interfered with, entitles the owner to sue for damages, including all incidental and consequential damages.[266]

When the VPR is established pursuant to a development agreement,[267] the local government may have increased its exposure to a claim for damages. A development agreement is a contract between the property owner and the government,[268] and if the government breaches the contract, it may be burdened by more than just statutory liability. To avoid paying more than the damages enumerated in the statute, the local government will need to convince a court that the statutory measure of damages is meant to be exclusive. The government should be free to enforce the provision in the development agreement which limits its liability to the damages specified in section 24-68-105(1)(c).[269]

Senate Bill No. 219 creates the possibility which requires a local government to pay just compensation to an owner who is liable for a public nuisance.[270] Such a result would not be required even under the expanding "takings" jurisprudence of the United States Supreme Court.[271] As the Court stated, no person can acquire a vested right to

263. *See* Larson v. Domestic & Foreign Corp., 337 U.S. 682, 695 (1949); Hurley v. Kincaid, 285 U.S. 95, 104 (1932). The Supreme Court recently extended the rule that the owner of property that is taken for a public purpose, is entitled as a matter of law to just compensation and not injunctive relief for local regulations that "go too far." First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378, 2388 (1987).

264. *See supra* note 39.

265. *See* Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194, (1985) (federal constitution does not require that just compensation be paid in advance of or contemporaneously with taking).

266. *See supra* note 223 (regarding local government immunity in Colorado). As an alternative, a landowner may seek relief from the district court if the government action that interferes with a VPR is quasi-judicial in nature and the action exceeds the local government's authority. *See* COLO. R. CIV. PROC. 106(a)(4) (Supp. 1987); *see also* Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (1975) (dealing generally with Rule 106 relief against a rezoning of property); Ossman v. Mountain States Tel. & Tel. Co., 184 Colo. 360, 360, 520 P.2d 738, 742 (1974) (discussing available damages in inverse condemnation action).

267. *See* COLO. REV. STAT. § 24-68-102(4) (Supp. 1987).

268. *See generally* Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C.L. REV. 957, 995-1003 (1987) (providing a detailed treatment of the proper characterization of development agreements and arguing that they are as much regulatory in nature as contractual).

269. COLO. REV. STAT. § 24-68-105(1)(c) (Supp. 1987).

270. For a discussion of public nuisance law, *see* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 88 (1971).

271. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232, 1245-1246

maintain a nuisance.[272] Under S.B. 219, the government will be forced to pay just compensation to a property owner who engages in a nuisance if the government reasonably should have known at the time of approval of the site specific development plan that the owner's intended use would constitute a nuisance.[273] For example, a government may approve an application to operate a landfill only to discover later that the landfill constitutes a public nuisance. It is unfair that the government could terminate the landfill three years and one day after the establishment of the VPR without payment of just compensation. However, the government could not interfere with the completion of the landfill project during the three year vesting period unless it paid just compensation as defined in S.B. 219 to the property owner.[274]

Another interesting issue with respect to the scope of local governmental liability is whether a local government must pay just compensation when it interferes with a VPR, pursuant to the mandate of state or federal law. For example, the federal government could require a local government to adopt regulations respecting clean air, and the regulations would apply to the property subject to a VPR.[275] It would be unconscionable to require the local government to pay out of its pocket just compensation to a property owner only because the local government was forced to enact regulations under the mandate of state or federal law.

A final issue on local government liability relates to the receipt of a windfall by the property owner if the government tries to "alter, impair, prevent, diminish, or otherwise delay the development or use of the property."[276] If a regulation enacted subsequent to the establishment of the VPR delays the completion of the affected development for one day, section 24-68-105(1)(c) requires the government to pay "just compensation" for all of the property owner's expenses which were incurred following establishment of the VPR.[277] "Just compensation" is a legal term of art and generally refers to fair market value.[278] Thus, the government would appear to be liable for the fair market value of all "costs,

n.22 (1987) (rejecting the landowner's argument for a right to compensation when government interferes with nuisance or nuisance-like activities).

272. *See id.* at 1245 n.20 ("no individual has a right to use his property so as to create a nuisance or otherwise harm others").

273. COLO. REV. STAT. § 24-68-105(1)(c) (Supp. 1987).

274. Senate Bill No. 219 appears to prohibit a change in use of property, to which a VPR attaches, for three years even if development of the property is completed in a much shorter time. *Id.* at § 24-68-102(5) (Supp. 1987) (VPR "means the right to undertake and complete the development and use of property"). This interpretation may be correct, for an owner may not develop his or her property following establishment of a VPR. Thus, the VPR protects the "use."

275. The failure of the government to enact regulations to come into compliance with federal air and water quality standards could cause the state or local government to lose federal funds. *See* 42 U.S.C. §§ 7405, 7616 (1982) (federal grant programs for air quality control and sewers).

276. COLO. REV. STAT. § 24-68-105(1) (Supp. 1987).

277. *Id.* at § 24-68-105(1)(c).

278. *See* D. HAGMAN & J. JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 610 (2d ed. 1986).

expenses, and liabilities incurred by the landowner" after establishment of the VPR even though the extent of government's interference with the VPR is negligible.

A court should read "just compensation" (as used in S.B. 219) as meaning something other than "fair market value." The application of the term fair market value is out of context of payment for all "costs, expenses, and liabilities" incurred by the landowner. Within the context of section 24-68-105,[279] "just compensation" should denote an amount of money that is reasonably related to the extent of the government's interference with a VPR. For example, a local government should not be required to pay all of the landowner's costs, expenses, and liabilities when the government reduces the allowable density of the development project, unless the developer can demonstrate that the development project would not have been undertaken at the reduced density. Instead, a court should determine what constitutes a fair *portion* of costs, expenses, and liabilities for which the government should compensate the landowner.[280]

D. *What Standards Will Guide a Court Seeking to Resolve Conflicts Involving Development Agreements?*

Four states other than Colorado have adopted development agreement statutes by enacting a relatively comprehensive scheme to guide local governments entering into a development agreement.[281] Presumably, the statutory schemes and legislative histories, where they exist, can provide standards to guide a court when resolving disputes in this area. Colorado, by contrast, has two sentences of text regarding development agreements.[282]

There are several issues that may be litigated with respect to development agreements. First, S.B. 219 does not establish a maximum time period for which a development right will be vested pursuant to the agreement. The statute only provides that the normal three year period may be exceded if the landowner and government enter into the agreement. Since a development agreement is included within the examples of site specific development plans,[283] and a VPR resulting from approval of a site specific development plan lasts only for three years,[284] the agreement may extend the original vesting period by a maximum of only three years. This argument necessarily assumes that the development agreement must be used in conjunction with some other plan or approval that constitutes a site specific development plan, otherwise the

279. COLO. REV. STAT. 24-68-105.

280. This argument is supported by the statutory language that the government may interfere with the VPR "[t]o the extent" that it pays just compensation. COLO. REV. STAT. § 24-68-105(1)(c) (Supp. 1987).

281. *See supra* note 119.

282. *See* COLO. REV. STAT. § 24-68-104(2) (Supp. 1987).

283. *Id.* at § 24-68-102(1).

284. *Id.* at § 24-68-104(1).

agreement standing alone would vest a right for the basic three year period only.

Unless S.B. 219 limits the time period for which a development agreement can vest a development right, local governments are free under the statute to vest a right in property for eternity. This possibility raises a constitutional question: may a local government agree never to adopt a regulation that will interfere with a landowner's property interests? The answer is no. Under the reserved powers doctrine, no legislative body may agree by contract to refrain from exercising its legislative powers.[285] Several courts have limited the effect of the reserved powers doctrine to a total abdication of power by the government and thus have upheld agreements that limited the exercise of legislative power for a reasonable period of time.[286] It is not certain what a Colorado court would consider a reasonable period of time to be.[287]

A second potential issue for litigation is the permissible purpose for which a local government may enter into a development agreement. The development agreement originally was viewed as a method to protect phased developments from government interference.[288] The agreement was necessary because common law vesting rules did not protect future phases of a development for which present development did not create a vested right. In a number of jurisdictions, dealmaking has replaced strict adherence to statutory procedures and standards for land use approvals.[289] Thus, local governments may treat each development application as a new business opportunity. The government approves the land use application, waives certain procedural or substantive requirements, and vests the development for some period of time, all in exchange for the developer's contract to provide certain benefits to the government. The benefits usually include constructing or paying for off-site improvements or by setting aside units in a residential development for middle to low-income persons.[290]

Senate Bill No. 219 does not specify the purposes for which the

285. *See* Wegner, *supra* note 268, at 965-68 and 965 n.30.

286. *See e.g.*, Morrison Homes Corp. v. City of Pleasonton, 58 Cal. App. 3d 724, 130 Cal. Rptr. 196 (1976); City of Farmers Branch v. Hawnco, Inc., 435 S.W. 2d 288 (Tex. Civ. App. 1968).

287. *Cf.* Geralnes, B.V. v. City of Greenwood Village, 583 F. Supp. 830, 841 (D. Colo. 1984) (upholding annexation agreement that limited city's power to rezone for 25 years). There is no consideration of the time element in this court's decision.

288. *See* Kessler, *supra* note 116, at 451.

289. *See supra* notes 4-6 and accompanying text; *see also* Sigg, *supra* note 7. A full treatment of dealmaking and the increased use of development agreements is beyond the scope of this paper. The most thorough treatment of the topic is by Professor Wegner. *See generally* Wegner, *supra* note 268.

290. *See* Wegner, *supra* note 268, at 1023-27 (discussing possible limitations on "extractions" imposed as part of a development agreement). Although Wegner suggests that there are limits beyond those imposed under a theory of unconscionability, she herself admits that "a contractor with the government has the freedom to contract or to walk away from the proposed deal." *Id.* at 1024. This does not mean that the landowner is not entitled to a land use approval, only that the government may agree to a land use approval, and that the government may agree to vest property rights beyond three years on a "take it or leave it" basis.

government may use development agreements. The statute appears, however, to allow the agreements only for the purpose of exceeding the three year vesting period and only when the government considers the statutory criteria. [291] The government should not be permitted to use development agreements to avoid the procedures and standards for land use approvals which are contained in state laws and local ordinances. The local government should, however, be permitted to condition its acceptance to enter into a development agreement on whatever terms it chooses. Nothing in the statute entitles a landowner to compel the local government to enter into a development agreement. Therefore, the terms and conditions of the agreement should be based on the arms-length negotiations of the parties. The local government's assent to vest a development right might very well be conditioned on performance by the landowner. The government could not have required this under either state or local laws or the federal constitution.

A final issue regarding development agreements concerns their reviewability. First, who, if anyone, will have standing to challenge a development agreement? By statute, the agreement must be adopted by a legislative act and is subject to referendum. One must presume that an aggrieved citizen could challenge the government's decision to enter into the agreement. The statute itself makes no effort, unfortunately, to identify any person or group of persons who might have standing to challenge the development agreement.

Similarly, it is uncertain under the statute as to whether a local government must consider the factors of the "size and phasing of the development, economic cycles, and market conditions" before entering into an agreement.[292] Section 24-68-104(2) provides that these are some of the "relevant circumstances" on which the government may base a decision to enter into a development agreement, but they are not the only factors.[293] If a court does not consider the statutory factors to be controlling, a court should review the government's decision to enter into a development agreement under a minimum rationality standard.[294]

291. *See* COLO. REV. STAT. § 24-68-104(2) (Supp. 1987).

292. *Id.*

293. *Id.*

294. *See, e.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) (holding that local zoning ordinance that, *inter alia*, prohibited multi-family housing was constitutional because it bore a rational relationship to a legitimate state purpose). This standard of review assumes that adoption of a development agreement truly is a legislative act as the statute suggests. COLO. REV. STAT. § 24-68-104(2) (Supp. 1987). Under the standards established by the supreme court in Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (1975), the act appears to be more quasi-judicial or administrative in nature. *See supra* note 193. Thus, review would be through a Rule 106 action. *Snyder*, 189 Colo. at 427, 542 P.2d at 375. Section 24-68-104(2) only provides that adoption of a development agreement is a legislative act and subject to referendum. Thus, it still is possible that Rule 106 is the proper procedure for judicial review of a development agreement. *See* Margolis v. District Court, 638 P.2d 297, 304-05 (1981) (small-scale rezoning is quasi-judicial for purposes of judicial review and legislative for purpose of initiative and referendum process). The issue probably will center around whether a court will defer to the legislature's judgment that adoption of a development agreement is a legislative act for purposes of both judicial review and initiative and referendum.

Conversely, no one should have standing to review the validity of the government's refusal to enter into the contract.[295]

E. *What is the Relationship Between S.B. 219 and Federal Constitutional Law?*

Senate Bill No. 219 provides that nothing in the law should "preclude [a] judicial determination, based on common law principles, that a vested property right exists in a particular case or that a compensable taking has occurred."[296] This provision does little more than make explicit that the rights created by S.B. 219 are in addition to rights a landowner has at common law.

The more important relationship is between S.B. 219 and federal constitutional law. The federal constitution requires that a state or local government pay just compensation to a property owner whenever the government "takes" the owner's property.[297] A taking may occur when the government physically invades an owner's property or when the government subjects the property to an unreasonably restrictive police power regulation.[298] In the latter instance, the Supreme Court may find a taking when a regulation denies an owner all reasonable use of his or her property, works a substantial diminution in value or extracts a property interest from the owner without substantially advancing a legitimate state interest.[299] The United States Supreme Court has even given a constitutional dimension to the common law's vested rights doctrine by virtue of its own reasonable, investment-backed expectations test for a taking.[300]

Senate Bill No. 219 relates to federal takings jurisprudence in a straight-forward manner. The federal constitution does not define property or property rights. Instead, independent sources, such as state law, define the nature of the rights that a property owner may claim.[301] The Supreme Court has compared a property right to a legitimate claim

295. A developer would need to argue that section 24-68-104(2) creates an entitlement to have the government enter into a development agreement when the developer makes the necessary showing regarding the size and phasing of the development, economic cycles, and market conditions. This section, however, expressly "authorize[s]" local governments to "enter into development agreements." COLO. REV. STAT. § 24-68-104(2) (Supp. 1987). The authority to enter into a development agreement cannot be read to create a duty in the government to enter into development agreements.

296. *Id.* at § 24-68-106(3).

297. *See* First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378, 2388 (1987) (holding that the landowner is entitled to just compensation when government regulation effects even a temporary taking of property).

298. *See* Penn. Central Transp. Co. v. New York City, 438 U.S. 104, 124-25 (1978) (discussing takings from the viewpoint of the character of the government's action).

299. *See id.* at 124; Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3149 (1987) (holding that condition on development approval that landowner dedicate lateral beach easement did not substantially advance legitimate state interest and thus constitute a taking).

300. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005-07 (1984) (discussing in detail the prerequisites to establish a "reasonable investment-backed expectation").

301. *See id.* at 1001. In *Monsanto*, the court found that trade secrets constituted property under Missouri law and were therefore within the due process clause of the fourteenth amendment.

of entitlement, which is an expectation of gaining some benefit that is more than a mere hope or desire.[302] The expectation may not be unilateral but must be based on some bilateral relationship.[303]

Traditionally, a landowner in Colorado had no legitimate claim of entitlement to be free from land use regulations adopted or applied after the landowner had obtained some government approval. Detrimental reliance, probably on a building permit, would have been necessary to vest the development right.[304] Senate Bill No. 219 creates a legitimate claim of entitlement to a vested right immediately on the government's approval of a site specific development plan. The VPR is more than a mere incident of property ownership that remains subject to police power regulation. By definition, the VPR is immune from interference by police power regulations adopted or applied after establishment of the VPR for a period of three years.[305] As a consequence, because

302. *See* Board of Regents v. Roth, 408 U.S. 564 (1972). In *Roth*, the court confirmed that property interests are not created by the Constitution, rather "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* at 577. The court also explained that "to have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it." *Id.*

303. *See id.* To claim a property interest, a person "must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* Although *Roth* dealt with a procedural due process claim, its discussion of property rights should apply equally to taking claims. *See Monsanto*, 467 U.S. at 1001, citing *Roth* in its discussion of whether trade secrets are property for purposes of the taking clause.

304. *See supra* note 139.

305. *Compare* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435-38 (1982) (holding that state law, which authorized cable television company to invade landowner's property, permanently and physically constituted a *per se* taking). In *Loretto*, the court felt that there was something special about the right to exclusive physical possession. Although the scope of *Loretto* has been undermined, *see* PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) (upholding right of citizens under state law to disseminate information at private shopping center), its point is well taken. There are certain attributes of property, which may vary from time to time and place to place, that are so tied up with the concept of property itself that if the government interferes with those attributes, the government's action constitutes a taking. The Supreme Court has emphasized two major "attributes" of property that may serve to define property operationally — exclusive physical possession and reasonable use. If the government interferes with either of these attributes, the court is likely to find a taking. *See Loretto*, 458 U.S. 419 (1982); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378 (1987). The Court has been less protective of other attributes of property or property ownership., *e.g.*, the power to transfer ownership to another. *See* Andrus v. Allard, 444 U.S. 51 (1979) (upholding federal prohibition on the sale of pre-existing avarian artifacts). If a state defines property in a way that elevates an attribute of property ownership to the level of exclusive possession or reasonable/beneficial use, the court should afford that attribute the same constitutional protections which it affords the latter attributes.

This analysis of what constitutes fundamental aspects of property ownership, which aspects may be defined by state law, is difficult to reconcile with *Monsanto*. In that case, the Court first determined that Monsanto had a property interest in trade secrets and that the fundamental aspect of a trade secret was exclusive possession. *Monsanto*, 467 U.S. at 1002. The Court, nevertheless, held that Monsanto had no reasonable, investment backed expectation that would prevent the federal government from disclosing Monsanto's trade secrets, thereby destroying them. *Id.* at 1006-07. The Court did hold, however, that during a period when federal law provided that trade secret data would not be revealed except on certain conditions, Monsanto had a reasonable, investment backed expectation that would cause government disclosure of the data to constitute a taking for which Monsanto would be entitled to just compensation. *Id.* at 1010-11. The Court does not explain why a

state law now establishes a new right that attaches to land ownership, the local government's interference with that right—the VPR—will render the government liable for the payment of just compensation. If the local government interferes with a VPR, it may be required to pay just compensation to the property owner. Just compensation will equal the fair market value of the VPR, which will include the diminution in the value of the land to which the VPR was attached.[306]

Arguably, section 24-68-105(1)(c) avoids the result described above by limiting just compensation evolving from reliance damages and ex-

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property owner must undertake reasonable investments in order to secure a right to exclusive possession of property. In contrast, *Loretto* did not inquire into whether an apartment building owner incurred reasonable investments, rather *Loretto* focused on the character of the government's action. *Loretto*, 458 U.S. at 419.

Whatever the rationale for *Monsanto*, the situation should be different when the state establishes that a landowner acquires a right to complete development and use of property for three years following approval of site specific development plan and that the owner need not make any reasonable investment to secure that right. Thus, the state defines a fundamental attribute of property and negates any need for detrimental reliance to secure that right against changes in government regulations. Although a state should be able to repeal a statute creating vested property rights, the statute should be permitted to operate prospectively only because property owners who have acquired VPRs should be able to rely on the government's representation that reliance is unnecessary to vest a right. At the very minimum, the government, if it repealed a statute that vested development rights without detrimental reliance, must afford the owner a reasonable time period to commence development before extinguishing the vested development right. *Compare* FLA. STAT. § 380.06(4), (20) (1988) (concerning the termination of vested rights in subdivision against changes in the law pursuant to Florida's developments of regional impact ("DRI") law). Formerly, under Chapter 380, owners of certain platted lands in Florida could be vested without any detrimental reliance against changes in DRI regulations, while other persons could vest their rights only by reliance. In 1985, Florida adopted a new, comprehensive land use management scheme that required owners to notify the government of their claims of vested rights and allowed vested owners to undertake development within a certain time period or else they would lose their vested status. The statute appears to require owners who vested without reliance to notify the government of their claims, but it does not terminate those rights except for failure to notify the government.

All that has been said to this point has assumed that government interference with a VPR should constitute a taking. Equally arguable is that interference will be a violation of substantive due process. *Compare* Littlefield v. City of Afton, 785 F.2d 596, 601 (8th Cir. 1986) (holding that applicant for building permit suffered substantive due process violation when government arbitrarily withheld permit). A substantive due process violation is remediable under section 1983, which affords a right to money damages. 42 U.S.C. § 1983 (1982).

306. *See* Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 191-92 n.12 (1985) (discussing measure of damages for taking as a result of interference with a vested property right). Clearly, if a property owner had a VPR to build a ten-story building and the government downzones the property to five stories, the owner has had five stories of development rights taken for which he should be compensated. The compensation might be based on the diminution in the value of the owners's estate in land or on the fair market value of the development rights that the government has taken (assuming those two measures would yield different results). *See also* Ossman v. Mountain States Tel. & Tel. Co., 184 Colo. 360, 365-66, 520 P.2d 738, 741-42 (1974) (discussing existence of inverse condemnation action in Colorado and holding that exemplary damages are not available in such action). *Ossman* concerns a physical invasion of property. In Wright v. City of Littleton, 174 Colo. 318, 323, 483 P.2d 953, 956 (1971), the court also suggested that a zoning regulation that denies all owners any reasonable use of his or her property could constitute either a taking of property without just compensation or a violation of due process. Since S.B. 219 reserves to the landowner a right to claim a taking under common law principles, the statutory limitation on compensation may be irrelevant to a state inverse condemnation action.

cluding compensation for "diminution in the value of the property which is caused by such action"[307] that interferes with the VPR. There are two answers to this argument. First, the section probably does no more than delineate a state law remedy for interference with a VPR. The section does not exclude a claim for relief under federal law which applies federal rules on the elements of just compensation. Second, the passage cannot be read as creating a diminutive property right— one for which the owner of the right is entitled only to partial compensation when it is taken. The United States Supreme Court has not adopted the "half-a-loaf" theory of property rights. The theory would permit the government to interfere with a so-called property right through any process established by the state, on the theory that the process for protecting the right is merely a reflection of the scope of the right in the first instance.[308] The court has taken an all-or-nothing approach with regard to property rights. If a property right exists, the government will be subject to the procedural due process requirements of the fourteenth amendment and the owner will be compensated if the government takes the property right.[309] In short, the apparent limitation of section 24-68-105(1)(c) on government liability for interference with a VPR should give little comfort to a local government which may be liable under federal law for interference with the VPR.

The five areas discussed in this section of the article are only some of the many issues that the legislature or courts will need to address at some future time. In the interim, the much sought-after certainty for land developers will remain as elusive as the infamous "missing link."

V. DRAFTING A LOCAL ORDINANCE OR REGULATION TO IMPLEMENT SENATE BILL 219

At least some of the ambiguities of S.B. 219 may be cleared up if a local government adopts a sufficiently specific local ordinance or regulation to implement the statute. Since local ordinances or regulations may differ, a landowner must be careful to consult local law before asserting a claim for a VPR.

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307. COLO. REV. STAT. § 24-68-105(1)(c) (Supp. 1987).

308. *See, e.g.*, Arnett v. Kennedy, 416 U.S. 134, 152-54 (1974) (plurality opinion by Justice Rehnquist arguing that state could deprive a person of property interest pursuant to state-established procedures that might not comport with due process because the procedure by which an interest may be deprived serves to define the scope of the property interest in the first instance). Other courts have been less certain about the relationship between procedures to protect individual interests and the existence of property rights. *See, e.g.*, Shelton v. City of College Station, 780 F.2d 475, 482 (5th Cir.) ("a state's use of an adjudication-like mechanism for zoning decisions does not by itself . . . create such [protected] property rights"), *cert. denied*, 106 S. Ct. 3276, *cert. denied*, 107 S. Ct. 89 (1986).

309. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 535 (1978) (noting that Rehnquist has not obtained a majority for his positivist view of property rights); *see also* Cleveland Board of Education v. Loudermill, 470 U.S. 532, 541 (1985) (majority clearly rejects Rehnquist's positivist view of property rights). Although cases like *Arnett* and *Loudermill* arise in the context of procedural rights that a state affords to property rights, the analysis should apply equally when a state purports to offer less than just compensation when it takes a property right.

A. *Should the Local Government Implement Senate Bill 219 by Ordinance or Regulation?*

Section 24-68-102(4) permits a local government to determine what constitutes a site specific development plan by "ordinance or regulation."[310] This language permits a local government to delegate the responsibility for determining what constitutes a site specific development plan to any agency, such as a planning commission, which may enact regulations to implement S.B. 219.[311] From a flexibility point of view, it may be better to implement S.B. 219 by regulations which may be amended administratively rather than by ordinance which may be amended only by legislative action. This flexibility may be important as local governments learn to live with S.B. 219.

Section 24-68-102(4) appears to authorize a local government to create a VPR only by entering into development agreements which are designed to create VPRs when the government approves an agreement. The section provides that a local government shall determine what constitutes a site specific development plan "*either* pursuant to ordinance or regulation or upon an agreement."[312] If the local government really is free to choose among three options for determining what constitutes a site specific development, the government need not adopt an ordinance or a regulation. This interpretation supports the view that S.B. 219 is merely an enabling statute.[313] The probable intent of the legislature was to allow the government to establish a VPR by entering into a development agreement in addition to its adoption of an ordinance or regulation. Obviously, the statute's language poorly executes the legislative intent.

Possibly, S.B. 219 does not envision that a local government will adopt an ordinance or regulation of general application regarding vested rights. Rather, if the government acts by ordinance to approve a specific land use application, the site specific development plan is established by ordinance. If an administrative agency approves a specific application, then the site specific development plan may be established by regulation. This approach is consistent with the statutory requirement that "the document that triggers such vesting shall be so identified at the time of its approval."[314] The "document" may refer to the ordinance, regulation or development agreement establishing the VPR.[315] Still, a

310. COLO. REV. STAT. § 24-68-102(4) (Supp. 1987).

311. The definition of "local government" in S.B. 219 includes any local "commission, or agency" that has "final approval authority" over a site specific development plan. *Id.* at § 24-68-102(2). One might ask if a commission or agency has "final approval authority" when its approval is subject to appeal to a zoning board of adjustment or to the local legislative body.

312. *Id.* at § 24-68-102(4) (emphasis added).

313. *See supra* notes 186-201 and accompanying text.

314. *See* COLO. REV. STAT. § 24-68-102(4).

315. It is more reasonable to interpret that "document" refers only to a development agreement and not a document executed by a legislative body or other agency as part of the adoption of an ordinance or regulation. Thus, only the document evidencing the development agreement must be identified as establishing a VPR. This interpretation makes sense if state and, perhaps, local laws already identify those plans or approvals that consti-

local government would be well-advised to have a general policy regarding the establishment of VPRs. This policy can assist the government in making site specific determinations on whether a site specific development plan exists. The government may, for example, want to establish precisely the certainty required for the type and intensity of use necessary for a plan or approval to qualify as a site specific development plan.[316]

B. *Which Plans or Approvals Shall the Government Designate as Site Specific Development Plans?*

The statute is not clear about how a site specific development plan can be in the form of a land use approval, rather than a plan.[317] Perhaps if a land use application is not reasonably certain regarding type and intensity of use, but the approval of the application is, a site specific development plan appears.

Assuming a local government need not designate every land use approval and every development plan that a landowner submits to it as a site specific development plan—even if the approval or plan is reasonably certain as to the type and intensity of use—the government should be very careful when designating approvals or plans as site specific development plans. The government should exclude from the definition of these plans any plan involving a natural or man-made hazard in or near the property that is subject to a land use application. Similarly, plans or approvals involving environmentally sensitive lands should be excluded. The government should establish sufficiently specific standards regarding the hazards and environmental considerations that will exclude a plan or approval from constituting a site specific development plan.[318]

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tute a site specific development plan. It is not necessary to identify specifically that the plan or approval, whether accomplished by ordinance or regulation, constitutes a site specific development. When, however, the government and a developer enter into a development agreement, it will not be clear that the parties intended that the agreement establish a VPR.

A self-executing statute would be consistent with a legislative intent to vest development rights pursuant to state law and without respect to local policy. Indeed, the effective date of the statute was January 1, 1988, and the approval of any site specific development plan on or after that date establishes a VPR. The statute did not become effective until local adoption of an ordinance or regulation of general application. The statute did not mandate that local governments adopt a general ordinance or regulation. *Compare* COLO. REV. STAT. § 30-28-133 (1986) (regarding requirement that counties create planning commission and adopt subdivision regulations by September 1, 1972, or else the Colorado Land Use Commission would adopt regulations for the county).

316. The courts should defer to a local government's judgment whether a specific development plan or approval lacks the "reasonable certainty" regarding type and intensity of use necessary to constitute a site specific development plan even if a court holds that S.B. 219 otherwise is self-executing. Local regulations may be necessary to provide a developer with sufficiently specific standards regarding what the local government believes is necessary to establish "reasonable certainty." *See* Beaver Meadows v. Board of County Comm'rs, 709 P.2d 928 (Colo. 1985) (regarding standards for approval of a planned unit development). *See also* Dahl, *supra* note 236, at 4.

317. COLO. REV. STAT. § 24-68-102(4).

318. *See* Beaver Meadows v. Board of County Comm'rs, 709 P.2d 928 (Colo. 1985) (regarding standards for approval of a planned unit development). The fact that a devel-

The local government also may exclude development proposals above certain size thresholds, whether based on the number of units or acres, from qualifying as a site specific development plan.[319] Consequently, this policy will minimize the impact of a VPR by restricting its establishment to downsized developments. As an alternative, the local government may accomplish the same effect by amending its zoning, subdivision or other land use approvals to developments that are limited in size. In fact, the government may incorporate a public need criterion into its various land use approvals that would permit the government to deny approval when there is no public need for a rezoning or a subdivision.[320] The government may put the land use applicant to the proof that other land that is properly zoned or already subdivided is not available for development.[321] The purpose of these government techniques is to limit the land mass in the jurisdiction that may lay claim to a VPR, and thereby promote greater flexibility.

C. *How May the Government Condition a Land Use Approval?*

Clearly, S. B. 219 provides for the local government to approve a site specific development conditionally. The landowner's failure to comply with the "terms and conditions [of approval] will result in a forfeiture of the vested property rights."[322] Although the forfeiture appears automatic, the local government should expressly state, in any land use approval, that the landowner's failure to comply *strictly* with the terms and conditions of approval will result in an automatic forfeiture of vested rights, including any that could otherwise have been obtained under common law.

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oper may acquire a VPR when there is a natural or man-made hazard, *see* COLO. REV. STAT. § 24-68-105(1)(b) (Supp. 1987), does not mean that a developer has a right to develop property when the government knows of a natural or man-made hazard in or near the subject property. It merely means that if the government approves the development, a VPR is established unless the hazard "could not reasonably have been discovered at the time . . . [of] approval." *Id.* The government can protect itself from approving development when it will be inappropriate to establish a VPR by conditioning approval on the developer's waiver of a VPR, or better yet, by amending its other land use approval processes to ensure that land associated with natural or man-made hazards or otherwise unsuitable for certain types of development cannot receive approval irrespective of the government's concern over establishment of a VPR. This review of other land use approval processes must be thorough and well thought out.

319. COLO. REV. STAT. § 24-68-103.

320. *See e.g.*, MONT. CODE ANN. § 76-3-608 (1987) (requiring government to determine that proposed subdivision is in the public interest). One factor to determine whether a proposed subdivision is in the public interest is "the basis of the need for the subdivision." *Id.* at § 76-3-608(2)(a).

321. *See* Fasano v. Board of County Comm'rs of Washington County, 264 Or. 574, 575, 507 P.2d 23, 28 (1973) (suggesting that rezoning is proper when there is no other available property that could be developed equally as well). In Neuberger v. City of Portland, 288 Or. 155, 163, 603 P.2d 771, 779 (1979), the Oregon Supreme Court concluded that, considering the changes in Oregon statutory law, the other "available property" requirement should no longer be a mandatory factor when local governments consider rezoning proposals. *See also* 33 C.F.R. § 320.4(1)(2)(ii) (1987) (Army Corps of Engineers' criteria for issuing dredge or fill permits under section 404 of Clean Water Act, including whether other available land may be developed).

322. COLO. REV. STAT. § 24-68-103(1) (Supp. 1987).

As a general matter, the government should always condition any land use approval on the landowner's compliance with all local, state and federal laws, including both statutes and regulations. The government may also condition a land use approval on the landowner's agreement to commence development within a specific time following the approval. Similarly, the approval may be conditioned on the landowner's agreement not to abandon the project for any substantial period of time. As a part of the terms and conditions of a land use approval, the government should provide that the landowner agrees not to assert any waiver by the government of its right to claim a forfeiture of the owner's VPR unless the waiver is in writing and signed by a designated government official.[323]

4. How May a Local Government Protect its Interests When Entering Into a Development Agreement?

Development agreements could easily be the topic of an entire article;[324] thus only a few brief comments will be made. Since the agreement should be the result of an arms-length negotiation, each party—government and landowner—should be able to insist on whatever terms and conditions that it wants before consenting to the agreement. When the government requires a landowner either to perform or promise to perform certain acts as part of the owner's consideration, the requirements should not be subject to due process challenge any more than other contracts that the government may enter.[325]

In the development agreement, the government should insist on several exculpatory clauses. First, the landowner will limit any claim based on the government's alleged breach of the agreement to state law contract claims. Second, the government will not be liable for breach of the agreement if the conduct giving rise to the breach is mandated by state or federal law. Third, the government cannot be held liable where the interference with a VPR is the result of ordinary negligence.

5. How Does the Government Avoid Interfering with a VPR?

The local government must take care that any land use regulation adopted subsequent to establishment of a VPR does not interfere with

323. An interesting issue is whether the government may condition approval of land use application on the applicant's waiver of any right to a VPR. The possibility runs contrary to the entire intent of S.B. 219, though a government might impose the condition where it believes that vesting would be detrimental to public health and safety as applied to a specific situation—for example, hillside or flood plain development. *See supra* notes 238-39 and accompanying text. The government, however, may condition approval of certain developments involving natural or man-made hazards on the landowner's submission of sufficient data to permit the government to discover possible hazards relating to development, no matter how remote. The government could agree to waive the requirement if the developer waives any claim to a VPR following approval. It is doubtful, however, that the government could impose artificially restrictive conditions on development that the government would waive in exchange for the landowner's waiver of any claim to a VPR. *See* Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3148 n.5 (1987).

324. *See* Wegner, *supra* note 268.

325. *See supra* note 274.

the VPR. Section 24-68-105(1) does not require actual interference with a VPR before compensation is paid: it is only necessary that a "zoning or land use action . . . *would* alter, impair, prevent, diminish, or otherwise delay the development or use of the property."[326] The possibility exists that a newly-enacted land use regulation that is not of the type considered in section 24-68-105(2) and that does not expressly exempt properties subject to a VPR will violate the statute's prohibition on interference, except on payment of just compensation. Thus, the government should include boiler-plate provisions in all land use regulations exempting all properties subject to a VPR, but only for the time for which the VPR is effective with respect to each exempt property.[327]

CONCLUSION

The proponents of Senate Bill No. 219 sought to introduce certainty into the real estate development process, but unfortunately, the attempt was made by radically altering the existing common law vested rights doctrine. Even assuming one could accept the political decision that the Colorado legislature has made, one still must question the wisdom of adopting a law as opaque as S.B. 219. The concept of vested rights is a difficult one that courts have struggled with for decades. Colorado courts now must struggle with the mysteries of both common law and statutory vested rights.

326. COLO. REV. STAT. § 24-68-105(1) (Supp. 1987) (emphasis added).

327. As discussed elsewhere, there should be few land use regulations of general application that actually interfere with a VPR, and even those regulations that are site-specific may no longer alter the "terms and conditions" of approval of the site specific development plan. *See supra* notes 208-15 and accompanying text. Thus, a local government should not be overly generous in granting exemptions from its land use regulations. The government also may avoid establishment of a VPR by limiting "approvals" until late in the land development process. Section 24-68-103(1) provides that the VPR is established when the government approves or conditionally approves the land use application. Thus, the government may be able to amend its land use regulations to the land use applications receiving something similar to tentative or preliminary approval. Similarly, consistent with procedural due process requirements, the government may decline to give notice of and to hold a hearing on land use applications until late in the regulatory process, thereby defeating establishment of a VPR. *Id.* (VPR created when plan is approved following notice and hearing).