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Emerging from The Confusion: Zoning and Vested Rights in Pennsylvania

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I. Introduction

Throughout the history of municipal zoning regulation,[1] a tension has always existed between constitutionally protected property rights[2] and municipal zoning regulation. This tension is recurringly manifested when courts attempt to determine whether a landowner has acquired a vested right to continue to use his property in a manner that is subsequently prohibited by a zoning ordinance.[3] Pennsylvania courts have been wrestling with the question for forty-nine years.[4] In determining whether a building permit or an application for a building permit confers a vested right on a landowner to proceed with construction in the face of a zoning change, Pennsylvania courts analyze the situation in a way that is unique among the fifty states.[5] The vested rights rules in Pennsylvania, however, are not completely clear because they have been drawn from cases in which the early vested rights rules were inconsistently applied. These rules began with the formulation of a general rule, which was refined and which is now virtually ignored, and continued with the creation and growth of the pending ordinance rule.

Other situations such as the finding of a vested right in an erroneously issued or invalid permit and the argument that municipal inactivity or failure to enforce its applicable ordinances creates a vested right have developed a more restrictive and more consistent set of rules. The legislature has also developed a statutory vested

1. *See* Dobbins v. Los Angeles, 195 U.S. 223 (1904) (pre-zoning case dealing with vested rights in the face of a regulatory ordinance).

2. U.S. CONST. amend. V, § 1.

3. The concept of a nonconforming use, a use of the land or structure that predates the enactment of a zoning ordinance or amendment, confers on the owner a vested right to continue to use his property or retain his structure despite its violation of the ordinance. Nonconforming uses are beyond the scope of this comment, which will examine vested rights created or alleged to have been created in other ways.

4. The first Pennsylvania decision to discuss vested rights is Herskovits v. Irwin, 299 Pa. 155, 149 A. 195 (1930).

5. Only Washington and South Carolina are close to viewing vested rights in the same manner as Pennsylvania. Illinois analyzes some cases along the same lines as the Pennsylvania courts. *See* notes 56-78 and accompanying text *infra*.

rights rule in the case of an approved subdivision plan.[6]

Nevertheless, further refinement of the pending ordinance rule is necessary to ascertain when validly issued permits cause land use rights to vest. If a more refined rule is expounded and consistently applied, the amount of vested rights litigation will be cut substantially, and Pennsylvania's rule will then serve as a model for other states to emulate.

II. Vested Rights in a Valid Permit or Application for a Permit

A. The Original Rule

Although arising earlier in other jurisdictions,[7] the issue of vested rights accruing to a validly issued permit[8] was not presented in the Pennsylvania courts until 1930 in *Herskovits v. Irwin*.[9] In *Herskovits* plaintiff applied for and received a grading permit. He then proceeded to incur expenses in grading and building the foundation for a six-story apartment building. When the foundation was completed, the building inspector refused to issue a building permit to complete construction of the building on the ground that the township was considering an amendment to its zoning ordinance[10] limiting buildings in that district to three stories. The supreme court held that the issuance of the grading permit and plaintiff's reliance upon it had conferred a vested right on him to complete the construction and ordered issuance of the building permit.[11]

Thus, Pennsylvania's first formulation of a vested rights rule re-

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6. The legislature contributed to a consistent approach in 1968 by enacting the Pennsylvania Municipalities Planning Code, 1968, P.L. 805, article V, § 508(4); PA. STAT. ANN. tit. 53, § 10508(4) (Purdon 1972).

7. *See, e.g.*, Dobbins v. Los Angeles, 195 U.S. 223 (1904); Pelham Bay Apartments v. Switzer, 130 Misc. 545, 224 N.Y.S. 56 (1927). *See generally* Hadacheck v. Sebastian, 239 U.S. 394 (1915); Reinman v. Little Rock, 237 U.S. 171 (1915).

8. The most common type of permit in which a vested right is alleged to have been created is a building permit, but other types of permits, such as zoning permits, grading permits, and septic tank permits, have been involved in the cases. *See, e.g.*, Herskovits v. Irwin, 299 Pa. 155, 149 A. 195 (1930) (grading permit); Department of Envt'l Resources v. Flynn, 21 Pa. Commw. Ct. 264, 344 A.2d 720 (1975) (septic tank permit).

9. 299 Pa. 155, 149 A. 195 (1930).

10. Normally the procedure for adopting a zoning ordinance begins with the municipality planning commission. The commission undertakes studies to determine the most feasible zoning scheme and drafts an ordinance or amendment based on these studies or plans. It then advertises the proposals and holds a public hearing or hearings on them, makes needed changes, and may hold more hearings during the process. Eventually the commission recommends an ordinance to the municipal governing body for its action. Before enacting the ordinance the governing body may also hold a public hearing or hearings and may make further changes to the proposal.

The Board of Adjustment or Zoning Hearing Board is a judicial body that has nothing to do with this process. The Board issues rulings and hears appeals from the officer designated to enforce the provisions of the ordinance. It most often enters the process upon an appeal by a landowner if the building officer or zoning officer refuses to issue a permit or revokes a permit.

11. When a permit was issued for the foundations of a "six-story apartment" building, the applicants, under circumstances such as those attending issuance of the permit now in question, had the right to assume that, if their finished plans showed compliance with existing building and zoning regulations, a final permit would natu-

quired the permittee to show substantial reliance on a validly issued permit for the vested right to accrue.[12] Although not specifically discussed in *Herskovits*, later cases made it clear that the permittee had to demonstrate good faith[13] as well as substantial reliance.[14] A number of cases decided under this original rule held that a permit was absolutely necessary, and expenses that were not incurred pursuant to a validly issued permit did not create a vested right.[15] Under this reasoning a mere application did not usually create a vested right in the applicant.

B. The Revised Rule

In *Gallagher v. Building Inspector, City of Erie*,[16] the supreme court established what is generally considered to be the current Pennsylvania vested rights rule.[17] A close examination of the case in conjunction with the pending ordinance rule,[18] however, casts much doubt on the proposition that the case stands for a general rule.[19] In *Gallagher* the court relaxed the original rule by eliminating the need to show reliance on the permit to create a vested right.[20] The court distinguished *Herskovits v. Irwin*[21] and a long line of other cases that

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rally follow for the complete structure. Here, appellees proceeded accordingly, and incurred expense and legal obligations.

299 Pa. at 161, 149 A. at 197.

12. "A permit having been issued and work done thereunder, a right was created in the applicants as to which they were entitled to protection; the subsequent attempt to revoke the permit could not abrogate this right." *Id.* at 161, 149 A. at 197.

13. Gulf Oil Corp. v. Township Bd. of Supervisors, 438 Pa. 457, 266 A.2d 84 (1970); Penn Twp. v. Yecko Bros., 420 Pa. 386, 217 A.2d 171 (1966); A.J. Aberman, Inc. v. City of New Kensington, 377 Pa. 520, 105 A.2d 586 (1954).

14. Schechter v. Zoning Bd. of Adjustment, 395 Pa. 310, 149 A.2d 28 (1959) (distinguishing *Herskovits* on the ground that no substantial expenditures in reliance on the permit were made by permittee); A.N. "Ab" Young Co. Zoning Case, 360 Pa. 429, 61 A.2d 839 (1948); *cf.* Price v. Smith, 416 Pa. 560, 207 A.2d 887 (1965) (substantial expenditures not necessary, temporary structure sufficient to create vested right).

15. City of Harrisburg v. Pass, 372 Pa. 318, 93 A.2d 447 (1953); Appeal of Mutual Supply Co., 366 Pa. 424, 77 A.2d 612 (1951); Berger v. Borough of Bethel Park, 14 Pa. Commw. Ct. 13, 321 A.2d 389 (1974); Hunter v. Richter, 9 Pa. D. & C.2d 58 (C.P. Montg. 1955).

16. 432 Pa. 301, 247 A.2d 572 (1968), noted at 73 DICK. L. REV. 578.

17. *See, e.g.*, 1 R. ANDERSON, AMERICAN LAW OF ZONING § 6.24 (2d ed. 1976); Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel to Zoning Disputes*, 1971 URB. L. ANN. 63, 85.

18. *See* notes 33-53 and accompanying text *infra*.

19. The supreme court decided Gulf Oil Corp. v. Township Bd. of Supervisors, 438 Pa. 457, 266 A.2d 84 (1970), two years later without mentioning *Gallagher*. In Colonial Park for Mobile Homes, Inc. v. Zoning Hearing Bd., 5 Pa. Commw. Ct. 594, 290 A.2d 719 (1972), the commonwealth court indicated that *Gallagher* was an exception to the general rule.

20. A building permit for the construction of town houses was issued to plaintiff on December 12, 1966. At that time town houses were permitted in the B residential zone. Following neighborhood protests in January 1967, the city solicitor notified plaintiffs that their building permits would be suspended, and that the city was considering amending the zoning ordinance to prohibit town houses on plaintiffs' property. On March 9, 1967, the city rezoned the area to an A residential area where town houses were prohibited, and on March 17, 1967, plaintiffs' building permit was revoked. Plaintiffs had spent no money and incurred no liabilities in reliance upon the permit. Yet the supreme court held that plaintiffs had acquired a vested right and ordered issuance of the permit.

21. 299 Pa. 155, 149 A. 195 (1930).

cite the rule of *Herskovits*[22] because in those cases a zoning ordinance was pending at the time when application for a building permit was made. In *Gallagher*, the amendment to the zoning ordinance was not introduced, passed, and adopted by the city council until after the permit had been issued, and although the permittee had not made any significant expenditures in reliance upon the permit before the amendment was adopted, the court found that he had acquired a vested right. In the *Gallagher* court's opinion, however, are references to municipal bad faith,[23] which a previous line of cases had held to be significant in finding a vested right in the permittee.[24]

The danger in using the purported rule of *Gallagher* literally is pointed out by Justice Cohen:

> The problem of how long the holder [of the permit] can remain inactive with what amounts to an "outstanding lien" and thereby defeat a justifiable change in a zoning ordinance is neither decided nor discussed. It should be made clear that the majority opinion is not precedent for any position and cannot be used as such when that problem comes before us.[25]

The commonwealth court has given *Gallagher* little precedential value,[26] but has not directly addressed the problem discussed by Justice Cohen,[27] except in its development of the pending ordinance rule.[28] The *Gallagher* rule does offer a significant advantage over the original rule stated in *Herskovits*[29] because the date on which a right created in a permit vests is more certain, but it does not delimit the

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22. Honey Brook Twp. v. Alenovitz, 430 Pa. 614, 243 A.2d 330 (1968); Penn Twp. v. Fratto, 430 Pa. 487, 244 A.2d 39 (1968); Penn Twp. v. Yecko Bros., 420 Pa. 386, 217 A.2d 171 (1966); A.J. Aberman, Inc. v. City of New Kensington, 377 Pa. 520, 105 A.2d 586 (1954); A.N. "Ab" Young Co. Zoning Case, 360 Pa. 429, 61 A.2d 839 (1948); Gold v. Building Committee, 334 Pa. 10, 5 A.2d 367 (1939).

23. "Landowners received their building permits in entire good faith, before any action toward a zoning change. After the grant of the permits, the City decided to amend the ordinance, to prevent the appellees from completing that which was perfectly legal when they began it." Gallagher v. Building Inspector, 432 Pa. 301, 304, 247 A.2d 572, 573 (1968).

24. *See* notes 91-98 and accompanying text *infra* on municipal bad faith. Although municipal bad faith was not a factor in the *Herskovits* rule, a number of cases developing that rule had intimated that the good faith of the municipality would be implied before the rule could operate.

25. 432 Pa. at 307, 247 A.2d at 575 (Cohen, J., concurring).

26. *Gallagher* has been cited only seven times in the ten years since it had been decided. It was distinguished in two of those cases: Calabrese v. Zoning Board of Adjustment, 5 Pa. Commw. Ct. 444, 291 A.2d 326 (1972) (rezoning before issuance of permit, no *good faith* reliance on permit); Colonial Park for Mobile Homes, Inc. v. Zoning Hearing Bd., 5 Pa. Commw. Ct. 594, 290 A.2d 719 (1972) (*Gallagher* called exception to rule). In the other cases, only passing reference was made to *Gallagher*; none of them relied on it or cited it as stating a general rule.

27. Only one subsequent case has provided a clue. In North Coventry Twp. v. Silver Fox Corp., 10 Pa. Commw. Ct. 646, 312 A.2d 833 (1973) the commonwealth court held that a fifteen-month period with little evidence of work done under authority of the permit does not prevent the permit from then being revoked by the municipality in the face of a newly enacted zoning ordinance.

28. *See* notes 33-53 and accompanying text *infra*.

29. Herskovits v. Irwin, 299 Pa. 155, 149 A. 195 (1930). *See* notes 7-15 and accompanying text *supra*.

length of time during which the permit must actually be used.[30] Thus, a landowner or developer could acquire permits for then permitted uses on hearing of the possibility of a new zoning ordinance or amendment, and without further action, establish a nonconforming use.[31] He might then hold the permit indefinitely while determining what effect the new zoning will have on his land. This practice would frustrate the very reason for the enactment of a zoning ordinance.[32]

C. The Pending Ordinance Rule

The major reason for the commonwealth court's disregard of the *Gallagher* rule[33] is the contemporaneous development by the supreme court of the pending ordinance rule as an aid in determining when rights vest in a permit. Pennsylvania is the only state to use this rule.[34]

In its initial form the pending ordinance rule was quite simple: a person could not acquire a vested right in a building permit for a use permitted in the area if there was a pending zoning ordinance or amendment to an existing zoning ordinance that would prohibit the use from being established in that location.[35] The rule was intended to prevent the landowner from developing a use that immediately would become nonconforming.[36] Since the rule necessarily created

30. Only two other states, Washington and South Carolina, use a rule similar to this one. In the leading Washington case, Hull v. Hunt, 53 Wash. 2d 125, 331 P.2d 856 (1958), the supreme court ruled that a vested right existed on the date of an application for a permit for a permitted use or structure if the permit was actually issued. The court conceded that this was a minority position but preferred to find a date certain when the right vested. Unfortunately, the rule has not been consistently applied in Washington. *See, e.g.*, Pierce v. King County, 62 Wash. 2d 324, 382 P.2d 628 (1963) (no permit issued; vested right still found in application); Parkridge v. City of Seattle, 89 Wash. 2d 454, 573 P.2d 359 (1978) (no permit issued; vested right in application, elements of municipal bad faith and delay involved); *cf.* Talbot v. Gray, 11 Wash. App. 807, 525 P.2d 801 (1974) (state legislation permitted use in coastal zone during time between application and permit, right then vested in application). The South Carolina rule is based on only two cases and may not yet be fully developed.

31. *See* note 3 *supra* and note 36 *infra*.

32. A zoning ordinance is an exercise of the police power to protect the public health, safety, and welfare. A determination of the governing body that a given use in a given location will adversely affect the public health, safety, or welfare should not be frustrated as easily as this construction would permit.

33. *See* note 26 *supra*.

34. *See* R. ANDERSON, *supra* note 17; Heeter, *supra* note 17, at 89. *See also* Annot., 50 A.L.R. 3d 596 (1973); Annot., 49 A.L.R.3d 13 (1973). Idaho may have applied a version of this rule in Ben Lomond, Inc. v. Idaho Falls, 92 Idaho 595, 448 P.2d 209 (1968). The Washington and South Carolina rules, discussed in note 30 *supra*, are similar but more like the *Gallagher* rule.

35. Beverly Bldg. Corp. v. Bd. of Adjustment, 409 Pa. 417, 187 A.2d 567 (1963); Colligan Zoning Case, 401 Pa. 125, 162 A.2d 652 (1960); A.J. Aberman, Inc. v. City of New Kensington, 377 Pa. 520, 105 A.2d 586 (1954); City of Harrisburg v. Pass, 372 Pa. 318, 93 A.2d 447 (1953); A.N. "Ab" Young Co. Zoning Case, 360 Pa. 429, 61 A.2d 839 (1948); Gold v. Building Comm., 334 Pa. 10, 5 A.2d 367 (1939); Gheen v. Mencer, 52 Pa. D. & C. 422 (C.P. Lyc. 1945); Huetsch v. Grove, 16 Pa. D. & C. 86, 23 Berks 154 (C.P. 1930) (not involving zoning ordinance).

36. "A 'nonconforming use' is the use of a building or land that does not agree with the regulations of the use district in which it is situated." *In re* Yocum, 393 Pa. 148, 153; 141 A.2d

the problem of determining when an ordinance was pending, it was not always applied in cases in which it could have been or should have been.[37]

Beginning in the 1960's the rule was refined. First, the supreme court held[38] that the mere preparation of an ordinance and referral of it to the planning commission[39] was not sufficient to make an ordinance pending.[40] This rule still did not offer much guidance on when an ordinance *was* pending. Then, seven years later, the court clarified the rule in *Gallagher*[41] that an ordinance was pending when it was before the municipal governing body and had been properly advertised.[42] The next year the court expanded the time during which an ordinance would be considered pending[43] and concluded that it was pending when it was before the zoning commission for a hearing and had been properly advertised.[44] This holding was more favorable to the municipality because a zoning ordinance or amendment is normally considered by the planning commission or zoning commission before being considered by the municipal governing body.[45]

Finally, the present rule, which was derived from the foregoing

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601, 605 (1958). "[A] non-conforming use is one which does not comply with present zoning provisions but which existed lawfully and was created in good faith prior to the enactment of the zoning provision." Camaron Apartments, Inc. v. Zoning Board of Adjustment, 14 Pa. Commw. Ct. 571, 574, 324 A.2d 805, 807 (1974). Nonconforming uses are otherwise beyond the scope of this comment. *See, e.g.*, Cable and Hauck, *The Property Owner's Non-Conforming Uses and Vested Rights*, 10 WILLAMETTE L.J. 404 (1974) (deals primarily with Oregon law, but general rules explained).

37. A striking example of this is the parallel, but inconsistent cases of Shender v. Zoning Bd. of Adjustment, 388 Pa. 265, 131 A.2d 90 (1957) and Lened Homes, Inc. v. Department of Licenses and Inspections, 386 Pa. 50, 123 A.2d 406 (1956). The cases were based on substantially identical facts, but were different procedurally and reached opposite results. Had the Pending Ordinance Rule been applied, the results in the two cases would have been consistent. *See* Craig, *Zoning Law*, 19 U. PITT. L. REV. 242 (1958) (attempt to reconcile these cases).

38. Lhormer v. Bowen, 410 Pa. 508, 188 A.2d 747 (1963).

39. In *Lhormer* no public hearings on the proposed amendment to the zoning ordinance were held by the borough planning commission or borough council prior to the date of application for the permit, nor was there any prior public declaration by the municipality that it intended to rezone the area. The borough solicitor had merely prepared an amended ordinance about one year earlier and referred it to the planning commission for study.

40. *Accord*, Verratti v. Ridley Twp., 416 Pa. 242, 206 A.2d 13 (1965).

41. Gallagher v. Building Inspector, 432 Pa. 301, 247 A.2d 572 (1968). The exceedingly vague nature of the pending ordinance rule in 1968 surely influenced the *Gallagher* decision, and the subsequent refinement of the rule has been the factor that has relegated *Gallagher* to the position of an anachronism—a purported rule that is not followed, and that has even been called the exception.

42. Mutzig v. Board of Adjustment, 440 Pa. 455, 269 A.2d 694 (1970).

43. Boron Oil Co. v. Kimple, 445 Pa. 327, 284 A.2d 744 (1971).

44. The rules for enacting a zoning ordinance are found in § 608 of the Pennsylvania Municipalities Planning Code, 1968, P.L. 805, art. VI, PA. STAT. ANN. tit. 53, § 10608 (Purdon 1972) and for enacting a zoning ordinance amendment in § 609 of the code and PA. STAT. ANN. tit. 53, § 10609 (Purdon 1972).

45. *See* note 10 *supra*. The landowner normally receives less notice under this rule. Under the prior view that the ordinance is not pending until it has come before the municipal governing body, the landowner had notice when the ordinance or amendment was being considered by the planning commission. Thus, property owners could frustrate the purpose of an ordinance or amendment merely by applying for a permit for a then permitted use during the

progression, was formally enunciated in *Casey v. Zoning Hearing Board of Warwick Township*.[46] The test is as follows: "An ordinance is pending when the governing body has resolved to consider a particular scheme of rezoning and has advertised to the public its intention to hold public hearings on the rezoning."[47] An additional requirement is that the municipality "[must act] initially in good faith to achieve permissible ends and thereafter [proceed] with reasonable dispatch in considering the proposed rezoning."[48]

The rule as stated is simple and easy to apply. If a landowner applies for a building permit for a permitted use before a proposed zoning ordinance or amendment has been advertised to the public for hearings by the planning commission or zoning commission, the permit must be issued and any rights vest as of that date. A problem still exists, however, because no court has ruled whether substantial reliance by the permittee prior to the advertisement of the ordinance or amendment must be shown before the right will vest[49] or whether the municipality may revoke the permit following advertisement if this showing is not made.[50] If it is decided that the landowner must make some effort to begin the work for which the permit was issued to create the vested right dating back to its issuance, or if the permit has a time limit for its use,[51] the test will become fair to both the landowner and to the municipality.[52] Such limitations would prevent the outstanding permit from acting as a license for a nonconforming use on the property and would allow changes in the zoning ordinance to take effect as intended.[53] To ensure that the rule is eq-

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interval between planning commission consideration and formal advertisement by the municipal governing body.

46. 459 Pa. 219, 328 A.2d 464 (1974). This is one of the very few instances in which the supreme court has heard a discretionary appeal from the commonwealth court in a zoning case. The supreme court established the pending ordinance rule in this case and remanded it to the commonwealth court for further proceedings.

47. *Id.* at 226, 328 A.2d at 467.

48. Boron Oil Co. v. Kimple, 445 Pa. 327, 333, 284 A.2d 744, 748 (1971).

49. This would be more similar to the original rule of *Herskovits* with a fixed date for determining when reliance must occur.

50. Gallagher v. Building Inspector, 432 Pa. 301, 247 A.2d 572 (1968), would appear not to permit revocation, though it was decided before the present version of the pending ordinance rule was formulated and also contains language indicating that the municipality acted in bad faith.

51. *See* the proposals suggested at notes 102-14 and accompanying text *infra*.

52. The supreme court used such a balancing test in formulating the rule:

> If the pending ordinance doctrine were limited as appellant advocates, only to the period of time during which the proposed ordinance is formally before the Borough Council for final action, any one or a number of property owners could gain an unqualified right to a soon to be prohibited land use by the simple expedient of applying for a permit between the time the Zoning Commission announces the proposal and the time the proposal is before the Borough Council for consideration. Though the question is admittedly not easy, we believe that the Borough's interest in precluding this eventuality is paramount and of greater concern than any regrettable but unavoidable harm suffered by an individual landowner.

Boron Oil Co. v. Kimple, 445 Pa. 327, 332, 284 A.2d 744, 747 (1971).

53. These limitations would relieve the fears raised by Justice Cohen in his concurring opinion in *Gallagher* discussed at notes 25-28 and accompanying text *supra*.

uitable, the municipality would also have to act within a reasonable time after initially advertising the ordinance. This would be necessary to prevent municipalities from indefinitely forestalling development.

D. Issues Affecting Application of Vested Rights Based on Valid Permits and Applications

1. The Reliance Problem. —The major obstacle facing a court in deciding whether a right has vested in a permit is determining just what is[54] and what is not[55] substantial reliance upon that permit. Under Pennsylvania's original rule[56] substantial reliance upon the permit was the key to determining whether a right had vested in a permit. Under the pending ordinance rule[57] it is still unclear whether reliance upon the permit must be shown before the ordinance is pending. Even though finding the date when a right vests is made much easier, the problem of determining whether reliance is necessary is unresolved in Pennsylvania.[58]

Three separate tests have been used by courts in attempting to determine reliance:[59] the set quantum test, the balancing test, and the Pennsylvania test.[60] The set quantum test is used by a majority of states and was used in Pennsylvania under the original rule. This

54. The following Pennsylvania cases illustrate findings of substantial reliance on a permit: Lhormer v. Bowen, 410 Pa. 508, 188 A.2d 747 (1963) (loss of opportunity profitably to sell the property); Appeal of Klein, 395 Pa. 157, 149 A.2d 114 (1959) (contracting to have extensive work done on structure); Kahn v. Seeds, No. 2, 20 Pa. D. & C. 365 (C.P. Phila. 1934) and Kahn v. Seeds, No. 1, 20 Pa. D. & C. 361 (C.P. Phila. 1934) (demolition of old structures and contracting for construction of new structures); *cf.* Price v. Smith, 416 Pa. 560, 207 A.2d 887 (1965) (construction of temporary structure).

55. The following Pennsylvania cases illustrate when substantial reliance on a permit will not be found: Honey Brook Twp. v. Alenovitz, 430 Pa. 614, 243 A.2d 330 (1968) (expenditure of $2,000 toward construction cost of $300,000); Schechter v. Zoning Bd. of Adjustment, 395 Pa. 310, 149 A.2d 28 (1959) (examination of premises to determine the amount of material and number of men to build the structure); Dunlap Appeal, 370 Pa. 31, 87 A.2d 299 (1952) (expenditure of $27,000 for sewer laterals 20 years earlier); Clover Hill Farms, Inc. v. Board of Supervisors, 5 Pa. Commw. Ct. 239, 289 A.2d 778 (1972) (expenditure of $3,000 on plans five years earlier); Friendship Bldrs., Inc. v. West Brandywine Twp. Zoning Hearing Bd., 1 Pa. Commw. Ct. 25, 271 A.2d 511 (1970) (earlier subdivision plan); Hunter v. Richter, 9 Pa. D. & C. 2d 58 (C.P. Montg. 1955) (expenditure of $1,200 toward project costing $150,000).

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

57. *See* notes 33-53 and accompanying text *supra.*

58. In Pennsylvania the finding of reliance is less important than in other states that still follow a rule similar to Pennsylvania's original rules because in those states reliance upon the permit, not the pendency of the ordinance, determines whether a right has vested. Some state courts attack the problem of reliance by concentrating upon the estoppel aspects of it rather than upon the vested rights aspect. Although this type of argument may be less complex, in many jurisdictions it is more difficult to prove estoppel against a municipality than against another person. *See* City of Long Beach v. Mansell, 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970) (applicability and elements of equitable estoppel against a municipality). *See also,* Comment, *Application of the Doctrine of Estoppel to Land Use Control and Municipal Taxation,* 23 BAYLOR L. REV. 590 (1971); Cuningham & Kremer, *Vested Rights, Estoppel, and the Land Development Process,* 29 HASTINGS L.J. 623 (1978). Pennsylvania courts have never used an estoppel argument outside of the context of municipal inaction.

59. Heeter, *supra* note 17, at 84-90.

60. *Id.* at 84.

test is also used in jurisdictions that base decisions more on an equitable estoppel theory than on a vested rights theory.[61] An owner is entitled to relief under this test if he has changed his position beyond a certain set amount. Unfortunately, the courts have been unable to determine that amount with any precision.[62]

The balancing test has been used primarily in Illinois, and also in close cases elsewhere.[63] In this test the courts attempt to weigh the property owner's right to use his land along with the expenses and obligation he has incurred against the public interest.[64] This test is even less objective than the set quantum test.[65]

Finally, the Pennsylvania test for reliance[66] is the revised rule of *Gallagher*.[67] Since Gallagher actually eliminated the need to show reliance,[68] however, the Pennsylvania test can hardly be termed a test for reliance. Moreover, because Pennsylvania courts have treated *Gallagher* as an exception and have concentrated on the

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61. California seems to be the only state to apply the equitable estoppel doctrine extensively. *See, e.g.*, City of Long Beach v. Mansell, 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970); County of San Diego v. California Water & Tel. Co., 30 Cal. 2d 817, 186 P.2d 124 (1947); Raley v. California Tahoe Regional Planning Agency, 68 Cal. App. 3d 965, 137 Cal. Rptr. 699 (1977); People *ex rel.* Dept. of Pub. Works v. Ryan Outdoor Advertising, Inc., 39 Cal. App. 3d 804, 114 Cal. Rptr. 499 (1974); Pettitt v. City of Fresno, 34 Cal. App. 3d 813, 110 Cal. Rptr. 262 (1973), *appeal dismissed*, 419 U.S. 810 (1974). *See also* Cunningham & Kremer, *supra* note 58, at 648-60.

62. Heeter, *supra* note 17, at 85. Most courts have found reliance in initiating construction of the building, beginning of excavation, pouring the foundation, and installing underground pipes and tanks. Some courts have found entering into financing arrangements to be substantial reliance, and a few have found mere incurring of contractual obligation without any construction at all to be sufficient. *See also* Annot., 89 A.L.R.3d 1051 (1979).

63. *Id.* at 88 n.85.

64. *Id.* at 88 nn.84-87. *Cf.* Cunningham & Kremer, *supra* note 58, at 652 (commenting that discussion of the public interest appears infrequently in the cases).

65. *See, e.g.*, Pioneer Trust and Sav. Bank v. County of Cook, 71 Ill. 2d 510, 377 N.E.2d 21 (1978) and cases cited therein. *See also* Annot., 50 A.L.R.3d 596 (1973) (Illinois cases). Perhaps another reason for all of the confusion arises because vested rights cases are infrequent. The bulk of the cases seem to have arisen in four states: New York, Pennsylvania, Illinois, and California. Each state follows a different rule. New York uses the set quantum test to determine a vested right. California uses the same test but concentrates instead on the elements of equitable estoppel. Illinois uses the balancing test. Pennsylvania uses the pending ordinance rule. Most other states have followed the New York rule, but these states have so few cases that it is difficult to tell whether there is an established rule or not.

Reliance appears most important in the California estoppel doctrine and the New York vested right doctrine. In the Illinois balancing test, reliance is only one factor to be considered in balancing the equities. Under the Pennsylvania test it is unclear whether reliance must occur before or after the pendency of the ordinance, if at all. *See* North Coventry Twp. v. Silver Fox Corp., 10 Pa. Commw. Ct. 646, 312 A.2d 833 (1973) (permit could be revoked under the authority of a newly enacted zoning ordinance when there was little evidence of reliance upon it after fifteen months).

Other states continue to require substantial reliance upon the permit for any rights to vest. *See, e.g.*, Thomas v. Zoning Bd. of Appeals, 381 A.2d 643 (Me. 1978); Boise City v. Blaser, 98 Idaho 789, 572 P.2d 892 (1977); Robert Randall Co. v. City of Milwaukie, 32 Or. App. 631, 575 P.2d 170 (1978). *See also* Cunningham & Kremer, *supra* note 58, at 676-710 (summary of California's rules).

66. Heeter, *supra* note 17, at 89.

67. Gallagher v. Building Inspector, 432 Pa. 301, 247 A.2d 572 (1968). *See* notes 16-32 and accompanying text *supra*.

68. Heeter, *supra* note 17, at 89. Heeter was writing in 1971 and, of course, did not have the benefit of the later pending ordinance rule cases.

pending ordinance rule, it is doubtful whether Pennsylvania still applies this test. Thus, the determination of whether a landowner has relied on a permit that has created a vested right by being properly issued prior to the pendency of an ordinance or amendment is still necessary. The commonwealth court has indicated that "the obtaining of a permit and an outlay of money or an incurring of liabilities is required to confer a vested right to proceed contrary to new regulations."[69]

Only two other states, Washington and South Carolina, use a similar rule[70] and Washington has not applied it consistently.[71] This rule has the serious flaw of exposing local governments to the threat of a flood of applications whenever an extensive zoning change is contemplated.[72] The pending ordinance rule has partially rectified this problem since an ordinance is considered pending earlier in the process,[73] which shortens the time for any last minute applications and decreases the likelihood that a landowner will know of a proposal before its advertisement. Moreover, the question of when the expenditures must be made in order to indicate reliance upon a permit also arises. The general rule in Pennsylvania[74] is that expenditures made before the issuance of a permit do not indicate any reliance on the permit and are not relevant to the determination of whether rights have vested because of expenditures.[75] Likewise, the issuance of a building permit for partial development of a tract and completion of that portion of the development does not constitute sufficient reliance to create a vested right in future building permits for the completion of the project,[76] which might be applied for after the zoning change.[77] Furthermore, expenditures of a general nature—for improvements that could also be used if the property were used in conformance with the subsequent ordinance or amendment—will not be counted in determining substantial reliance.[78]

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69. Colonial Park for Mobile Homes, Inc. v. Zoning Hearing Bd., 5 Pa. Commw. Ct. 594, 601, 290 A.2d 719, 723 (1972) (also indicating that *Gallagher* is an exception to the rule).

70. *See* note 30 *supra.*

71. *Id.*

72. Heeter, *supra* note 17, at 90.

73. *See* notes 43-44 and accompanying text *supra.*

74. Casey v. Zoning Hearing Bd., 459 Pa. 219, 328 A.2d 464 (1974); Boron Oil Co. v. Kimple, 445 Pa. 327, 284 A.2d 744 (1971).

75. This appears to be the rule in almost all jurisdictions with the notable exception of Illinois. *See, e.g.*, Cos Corp. v. City of Evanston, 27 Ill. 2d 570, 190 N.E.2d 364 (1963); Nott v. Wolff, 18 Ill. 2d 362, 163 N.E.2d 809 (1960). *See also* 3 A. RATHKOPF, THE LAW OF ZONING AND PLANNING, ch. 57, §§ 4, 5 (4th ed. 1978). In Virginia, expenditures under use permits, but before issuance of building permits, have been held to be substantial reliance. Fairfax County v. Cities Serv. Oil Co., 213 Va. 359, 193 S.E.2d 1 (1972).

76. *See* note 15 and accompanying text *supra.*

77. Beverly Bldg. Corp. v. Board of Adjustment, 409 Pa. 417, 187 A.2d 567 (1963); Logan v. Bickel, 11 Pa. D. & C.2d 405, 43 Del. 272 (C.P. 1956).

78. Dunlap Appeal, 370 Pa. 31, 87 A.2d 299 (1952) (sewer lateral installed in anticipation of row home development could be used for permitted detached dwellings equally well); Clover Hill Farms, Inc. v. Board of Supervisors, 5 Pa. Commw. Ct. 239, 241, 289 A.2d 778, 779

Although the pending ordinance rule does add a certainty to the determination of when a right vests, it does not completely eliminate the problem of finding substantial reliance. The courts, the legislature, or the local municipality itself[79] must develop one test for reliance and apply it consistently.[80]

2. The Requirement of Good Faith on the Part of the Permittee.—The earlier Pennsylvania cases implied that to establish a vested right under a validly issued permit, expenditures made in reliance upon it had to be made in good faith.[81] It was not until 1966, however, in *Penn Township v. Yecko Bros.*,[82] that the supreme court stated the rule explicitly:

> The rule . . . is that a property owner who is able to demonstrate (1) that he has obtained a valid building permit under the old zoning ordinance, (2) that he got it in good faith—that is to say without "racing" to get it before a proposed change was made in the zoning ordinance—and (3) that in good faith he spent money or incurred liabilities in reliance on his building permit has acquired a vested right and need not conform with the zoning ordinance as changed.[83]

Although this case was decided under Pennsylvania's original rule,[84] the progression through *Gallagher*[85] to the pending ordinance rule[86] has not relaxed the requirement of good faith on the part of the permittee.[87] The court developed this rule in an attempt to prevent landowners from racing to establish a use or to get a permit[88] before

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(1972) (expenditure of $3,000 for activities not unique to mobile home park did not establish pre-existing use as such a park).

79. This can be done by a "saving clause" in the zoning ordinance itself, a device little used in Pennsylvania. *See, e.g.*, City of Harrisburg v. Pass, 372 Pa. 318, 93 A.2d 447 (1953); Rapho Twp. v. Model Enterprises, Inc., 4 Pa. Commw. Ct. 163, 286 A.2d 490 (1972). A saving clause is a provision in the zoning ordinance that specifically exempts construction undertaken before its effective date from its provisions.

80. *See* notes 105-115 and accompanying text *infra*.

81. *See, e.g.*, Lened Homes, Inc. v. Philadelphia Dept. of Licenses and Inspections, 386 Pa. 50, 123 A.2d 406 (1956); A.J. Aberman, Inc. v. City of New Kensington, 377 Pa. 520, 105 A.2d 586 (1954); Herskovits v. Irwin, 299 Pa. 155, 149 A. 195 (1930).

82. 402 Pa. 386, 217 A.2d 171 (1966).

83. *Id.* at 390, 217 A.2d at 173.

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

85. *See* notes 16-32 and accompanying text *supra*.

86. *See* notes 33-53 and accompanying text *supra*.

87. Cases since *Gallagher* requiring good faith on the part of the permittee include Gulf Oil Corp. v. Township Bd. of Supervisors, 438 Pa. 457, 266 A.2d 84 (1970); Camaron Apts., Inc. v. Zoning Bd. of Adjustment, 14 Pa. Commw. Ct. 571, 324 A.2d 805 (1974); Hodge v. Zoning Hearing Bd., 11 Pa. Commw. Ct. 311, 312 A.2d 813 (1973); City of Pittsburgh v. Oakhouse Assocs., 8 Pa. Commw. Ct. 349, 301 A.2d 387 (1973).

88. The fact situation in Penn Twp. v. Yecko Bros., 420 Pa. 386, 217 A.2d 171 (1966) is typical. The municipality had been considering the adoption of a zoning ordinance for three years. On June 28, 1962 the proposed ordinance was advertised and a public hearing was to be held on July 17, 1962. The ordinance was subsequently enacted on August 13, 1962 and became effective on August 23, 1962. In the meantime, on July 2, 1962 the Yeckos made arrangements to purchase four acres of ground for an automobile parts business and wrecking yard and on July 9, 1962 appeared at a public meeting of the township supervisors to request approval. The supervisors referred them to the planning and zoning commission for approval and advised them of the forthcoming public hearing. Without obtaining any approval, on July

a zoning ordinance became effective or legally pending.[89] Both the second and third elements of the *Yecko* test must be met for good faith to be found.[90]

3. The Requirement of Good Faith on the Part of the Municipality.—Not surprisingly, Pennsylvania courts have also found that a municipality must act in good faith in revoking a permit or in denying an application for a permit.[91] The leading Pennsylvania case on municipal bad faith is *Shapiro v. Board of Adjustment*.[92] The proposed zoning amendment here[93] was aimed expressly at plaintiff's property and proposed use.[94] The court held that this was a "transparent attempt to thwart effectually Shapiro's purpose to use the property for an amusement park."[95]

Of all the requirements for a vested right to arise, the court is most sensitive to an amendment or ordinance aimed specifically at the applicant's property. In *Lower Merion Township v. Frankel*,[96] the court declared that because of the discriminatory nature of an amendment, the applicant had acquired a vested right to proceed as if the amendment had never been passed.[97] A court, therefore, is

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28, 1962 Yecko Bros. moved on the property, installed a used bus as an office, placed wrecked automobiles on the premises and erected a sign. Between that date and August 4, 1962 Yecko Bros. transacted business amounting to $109.50. Since Yecko Bros. did not even attempt to secure a permit, the court held that this was racing in bad faith to create a nonconforming use.

89. A.J. Aberman, Inc. v. City of New Kensington, 377 Pa. 520, 105 A.2d 586 (1954) (no vested right in permit when permittee was racing to construct shopping center in face of zoning ordinance prohibiting its construction).

90. Good faith reliance on the part of the permittee is also an absolute requirement before an equitable estoppel against a municipality can be found. *See* note 58 *supra* and Heeter, *supra* note 17, at 66.

91. *See, e.g.*, Yocum v. Power, 398 Pa. 223, 157 A.2d 368 (1960) Shapiro v. Zoning Bd. of Adjustment, 377 Pa. 621, 105 A.2d 299 (1954); Lower Merion Twp. v. Frankel, 358 Pa. 430, 57 A.2d 900 (1948). *Cf.* Appeal of Klein, 395 Pa. 157, 149 A.2d 114 (1959) (no rule cited, municipal bad faith implied); Gallagher v. Building Inspector, 432 Pa. 301, 247 A.2d 572 (1968) (municipal bad faith implied, not explicitly offered as basis for decision).

92. 377 Pa. 621, 105 A.2d 299 (1954).

93. The preamble to the ordinance enacting the zoning change contained the following language: "Whereas, There appears to be the possibility of the establishment of such an amusement park immediately adjoining a residential district in northwest Philadelphia prior to the enactment of [the proposed amendatory ordinance]." *Id.* at 625, 105 A.2d at 301.

94. Prior to March 1953 Shapiro leased ground in an "A" commercial district on which he wished to construct a kiddie amusement park, a permitted use. On March 18, 1953, he applied for the appropriate permits. The application was denied, and Shapiro appealed to the Board of Adjustment, which dismissed the appeal on the grounds that the use was not permitted, that there was no hardship to the applicant, and that establishment of such a park would be detrimental to the neighborhood. Shapiro then appealed to the court of common pleas. On May 25, 1953, an ordinance designed to prevent the establishment of amusement parks in an "A" commercial district, except when authorized as a special exception, was introduced into City Council and enacted on July 23, 1953. In the meantime the court ordered issuance of a permit to Shapiro on June 25, 1953, and he actually received it on July 10, 1953. On August 13, 1953, the Department of Licenses and Inspections revoked the permit because of the newly enacted amendment, but after Shapiro had incurred expenditure in reliance on the permit.

95. 377 Pa. at 625, 105 A.2d at 301.

96. 358 Pa. 430, 57 A.2d 900 (1948).

97. Pennsylvania courts traditionally have been hostile to attempts of municipalities to frustrate applicants. Casey v. Zoning Hearing Bd., 459 Pa. 219, 328 A.2d 464 (1974) (Munici-

much more likely to find a vested right in a permit or application if it determines that the reason the applicant was unsuccessful or the permittee had his permit revoked was because of a municipal act aimed directly at him.[98]

4. Effect of the Nature of the Applicant and Intended Use of the Property on Vested Rights.—The nature of the applicant and the intended use of the property may also influence the court in its decision on whether a right vests in a permit or application. For example, because of first amendment implications, churches are treated with utmost care in zoning cases[99] and therefore receive vested rights more liberally than other land users.[100] In addition, Pennsylvania courts disfavor municipal activity aimed at zoning out particular individuals or uses and have used language that is stronger than necessary in striking down such special legislation or in finding a vested right.[101] These cases have confused the issue of vested rights rather than clarifying it and have added little to the development of a comprehensive, widely applicable rule.

E. Some Proposals

After years of confusion Pennsylvania's vested rights rules are emerging with some clarity and some promise of consistent application. The pending ordinance rule[102] is an acceptable determinant of when rights vest and can be applied consistently. With one major exception[103] the rule is fair to both the landowner seeking to develop his property and to the municipality seeking to protect the health, safety, and welfare of its citizens. The major improvement needed is some control over property owners who, when they hear rumors of

palities Planning Code could not be used to prevent challenger from obtaining meaningful relief after successful attack on zoning ordinance); Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970); Raum v. Board of Supervisors, 29 Pa. Commw. Ct. 9, 370 A.2d 777 (1977) (fifty-four page diatribe aimed at municipal officials).

98. Under these circumstances, a court could reach the same result by declaring an amendment aimed directly at one property invalid as spot zoning. A spot zoning argument will arise if the amendment has the effect of rezoning a small tract or single property differently from all of the land surrounding it. *See* Appeal of Mulac, 418 Pa. 207, 210 A.2d 275 (1965).

99. *See* Annot., 74 A.L.R.2d 377 (1960). *See also* Westchester Reform Temple v. Brown, 22 N.Y.2d 488, 239 N.E.2d 891 (1968) (religious structures enjoy constitutionally protected status severely curtailing permissible extent of governmental regulation in the name of police powers).

100. Yocum v. Power, 398 Pa. 223, 157 A.2d 368 (1960). An inexplicitly acknowledged basis of *Yocum* was municipal bad faith.

101. Appeal of Klein, 395 Pa. 157, 149 A.2d 114 (1959) (vested rights rules never mentioned, agricultural use); Linda Dev. Corp. v. Plymouth Twp., 3 Pa. Commw. Ct. 334, 281 A.2d 784 (1971) (zoning amendment was special legislation, vested rights not discussed); Limekiln Golf Course, Inc. v. Zoning Bd. of Adjustment, 1 Pa. Commw. Ct. 499, 275 A.2d 896 (1971) (special legislation; vested rights not mentioned but municipal bad faith cases such as *Yocum* cited).

102. *See* notes 33-53 and accompanying text *supra*.

103. *See* notes 48-53 and accompanying text *supra*.

zoning changes, rush to acquire permits and then hold them. This improvement can be accomplished by fixing a time limit during which a permit acquired in good faith will remain valid.[104] To retain the fairness inherent in the rule, a time limitation must be fixed during which the municipal governing body can act on a proposed ordinance or amendment after it is first advertised.[105]

These improvements could be accomplished judicially, but since the supreme court rarely hears zoning cases[106] they could be obtained more appropriately by an amendment[107] to the Municipalities Planning Code.[108] An amendment to its article on zoning,[109] such as the following example, would suffice.

(a) For the purpose of determining whether a building permit or zoning permit creates a vested right in the permittee to establish a use or structure that is to be prohibited by a proposed zoning ordinance or amendment, such ordinance or amendment is deemed to be pending on the day on which it is first advertised to the public for hearings by the planning commission. A permit issued after that date for a use or structure that will not be permitted under the proposed ordinance or amendment is not valid and creates no vested right.

(b) The governing body of the municipality shall receive a recommendation on the proposal from the planning commission within – days of the date of such advertisement and shall take action on such proposal within – days of such advertisement. If such action is not taken, the ordinance or amendment is no longer pending.

(c) A valid building or zoning permit issued before the date of advertisement of the proposal shall remain valid after the date of such advertisement and shall create a vested right in

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104. Sixty or ninety days seems to be a reasonable limit on the validity of a permit, with, perhaps, a possibility of renewal if the developer runs into unforeseen difficulties or the proposed amendment or ordinance has not yet been enacted.

105. A municipal governing body should not be able to keep a proposed ordinance pending indefinitely simply by allowing the appropriate commission to advertise the ordinance and hold a hearing on it, and then refusing to take action within a reasonable time after the commission's recommendation. Six months from the date of first advertisement to final decision by the governing body should be adequate to give the proposal consideration. More time might benefit the municipality by preventing it from feeling rushed, but then landowners in the affected area would be foreclosed from doing anything with their land other than what is permitted in the proposed ordinance. Nine months should be the maximum permitted period.

106. Since 1970 all zoning cases are heard by the commonwealth court. *See* Judicial Code of 1976, 42 PA. CONS. STAT. ANN. §§ 721-726 (Purdon Supp. 1979). An appeal from the commonwealth court to the supreme court is discretionary and is granted by the affirmative vote of any two supreme court justices. 42 PA. CONS. STAT. ANN. § 724 (Purdon Supp. 1979). *See also* PA. R. APP. P. §§ 1111-1123.

107. At least one state has legislation addressing rights that accrue to a permit. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 40A, § 6 (West Supp. 1978). *See also* MODEL LAND DEVELOPMENT CODE § 2-309(1)(c) (1976) (recognizing a vested right based on an application for a permit; similar to the pending ordinance rule).

108. PA. STAT. ANN. tit. 53, §§ 10101-11202 (Purdon 1972) (hereanafter cited as MPC). The Municipalities Planning Code was passed in 1968 to repeal the sections dealing with planning and zoning in the various city, borough, and township codes. The MPC now provides a uniform statutory framework for planning, zoning, and subdivision regulation in all of the state's municipalities except Philadelphia.

109. PA. STAT. ANN. tit. 53, §§ 10601-10619 (Purdon 1972).

> the permittee to use it for its intended purpose. The municipality may attach a time limit to the permit during which the permittee must begin his proposed construction or lose his vested right to proceed. Such time limit may be fixed by the municipality, but in no case shall it be less than – days.[110]

Another possibility is to include in the zoning ordinance a "saving clause" that offers protection from zoning changes to owners who have applied for or received a permit prior to the change.[111] This scheme has been rarely used in Pennsylvania,[112] but it does offer the possibility of further clarification of the vested rights dilemma.

III. Vested Rights in Reliance Upon an Erroneously Issued Permit

In contrast to the confusion that prevailed during the development of rules concerning whether a vested right was created by a valid permit, the Pennsylvania law dealing with vested rights created by an erroneously issued or invalid permit has developed without confusion and has been consistently applied.[113] Dealing with an invalid permit, however, is simpler than dealing with a valid permit. If the permit is not valid, it should never have been issued, and had it not been issued no rights of any sort could vest in the applicant. In exceptional cases innocent reliance upon a permit may be sufficient to convince the court that the permittee did have a vested right despite the invalidity of the permit.[114]

A. The General Rule

The Pennsylvania version of the rule was first stated in *Vogt v. Port Vue Borough*.[115]

> A municipal permit issued illegally or in violation of the law, or under a mistake of fact, confers no vested right or privilege on the person to whom the permit has been issued and may be revoked notwithstanding that he may have acted upon the permit; any expenditures made in reliance upon such permit are made at his peril.[116]

The court held that the borough manager properly revoked a permit that had been issued mistakenly two days earlier by the burgess and the borough engineer.[117]

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110. These provisions logically would be inserted in the MPC between § 609.2 and § 610.

111. This device is relatively new, but its use is increasing. *See* Annot., 49 A.L.R.3d 1150 (1973).

112. *See* note 79 *supra*. *See also* Township of Radnor v. Civitella, 43 Del. 192 (Pa. C.P. 1956) (saving clause in zoning ordinance gave defendant a vested right).

113. The rule is the same in all jurisdictions. *See* Heeter, *supra* note 17, at 73-75 (noting courts have reached the result in widely varying ways).

114. *See* notes 121-29 and accompanying text *infra*.

115. 170 Pa. Super. Ct. 526, 85 A.2d 688 (1952).

116. *Id.* at 528, 85 A.2d at 690.

117. The applicant applied for a permit to construct a gas station in a commercial zone and was issued one by the burgess. Gas stations were not a permitted use in commercial zones

Commonwealth court decisions have adhered to this rule.[118] Unlike the rules applying to validly issued permits,[119] the rule applying to erroneously issued or invalid permits has been consistently stated.[120]

B. The Exception

The commonwealth court has recognized that the strict application of this rule can cause hardship. Instead of dealing with this situation on a case-by-case basis, the court in *Department of Environmental Resources v. Flynn*[121] developed a set of guidelines defining when an exception to the general rule would be found. The elements require

> (1) [the permittee's] due diligence in attempting to comply with the law;
> (2) his good faith throughout the proceedings;
> (3) the expenditure by him of substantial unrecoverable funds;
> (4) the expiration without appeal of the period during which an appeal could have been taken from the issuance of the permit;
> (5) the insufficiency of the evidence to prove that individual property rights or the public health, safety or welfare would be adversely affected by the use of the permit.[122]

This test is straightforward and easy to apply, with the exception of the fourth element, which needs clarification in future decisions.[123]

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and the borough manager promptly revoked the permit on learning of its issuance. The applicant had entered into a construction contract, but had not otherwise relied on the permit.

118. Pae v. Hiltown Twp. Zoning Hearing Bd., 35 Pa. Commw. Ct. 229, 385 A.2d 616 (1978); Appeal of Donofrio, 31 Pa. Commw. Ct. 579, 377 A.2d 1017 (1977); Kirk v. Smay, 28 Pa. Commw. Ct. 13, 367 A.2d 760 (1976); Zoning Hearing Bd. v. Petrosky, 26 Pa. Commw. Ct. 614, 365 A.2d 184 (1976); Klavon v. Zoning Hearing Bd., 20 Pa. Commw. Ct. 22, 340 A.2d 631 (1975); Houser v. Zoning Hearing Bd., 20 Pa. Commw. Ct. 313, 341 A.2d 566 (1975); City of Pittsburgh v. Oakhouse Associates, 8 Pa. Commw. Ct., 349, 301 A.2d 387 (1973); *cf.* Ventresca v. Exley, 358 Pa. 98, 56 A.2d 210 (1948) (improperly granted variance; used as analogy to develop the rule).

119. *See* Section II *supra*.

120. *See, e.g.*, Appeal of Donofrio, 31 Pa. Commw. Ct. 579, 582, 377 A.2d 1017, 1018 (1977) (citing Klavon v. Zoning Hearing Bd., 20 Pa. Commw. Ct. 22, 340 A.2d 631 (1975)); Herbel v. Middletown Twp. Zoning Hearing Bd., 32 Bucks 1 (Pa. C.P. 1978); DeVitis v. Board of Supervisors, 18 Chest. 139 (Pa. C.P. 1969); Appeal of Sukthankar, 58 Del. 91 (Pa. C.P. 1970), *rev'd on other grounds*, 2 Pa. Commw. Ct. 489, 280 A.2d 467 (1971); Montgomery County Mental Health Clinics, Inc. v. Norristown Borough, 90 Montg. 200 (Pa. C.P. 1968); Franchise Enterprises v. Spring Garden Twp., 76 York 97 (Pa. C.P. 1962); Smith v. Bristol Twp. Zoning Bd., 4 Bucks 131 (Pa. C.P. 1954) (building 90% complete).

121. 21 Pa. Commw. Ct. 264, 344 A.2d 720 (1975). In *Flynn*, the permittee was erroneously issued a permit to install a septic tank and in reliance thereon, he began construction of a home. When it was about 75% completed, representatives of the Department of Environmental Resources (DER) visited the site and found that because of the high water table, the permit should not have been issued. DER thereupon attempted to halt construction and Flynn appealed. The court felt that under these circumstances, the invalid permit did create a vested right. *See also* Turner v. Martz, — Pa. Commw. Ct. —, 401 A.2d 585 (1979), which summarizes the invalid permit cases, applies the *Flynn* test, and finds that a township and its sewage enforcement officer could be held liable for negligence in the issuance of a sewer permit for a septic system that failed to function after its installation.

122. *Id.* at 272, 344 A.2d at 725.

123. Presumably the Department should have appealed the issuance of the permit if it was

Flynn, which dealt with a septic tank permit, was soon extended to a zoning case. In *Zoning Hearing Board of Upper Chichester Township v. Petrosky*[124] the court applied the *Flynn* test and found that an erroneously issued building permit did not create a vested right in defendants.[125] At least one lower court has also applied the *Flynn* test in determining if there is an exception to the general rule.[126]

With the exception of the fourth guideline that might not apply in all situations,[127] the others to be considered as a part of the *Flynn* test are reasonable. If the permittee complies with all of them his rights should vest by virtue of the permit, even if it is clear that the permit should not have been issued. The fifth element will protect neighboring property owners and the citizens of the municipality from the incompetence of its officials by denying a vested right to a property owner who meets the other four criteria of the test. A vested right will not be found in an erroneous permit if it will adversely affect the public or harm neighboring properties.[128] The exceptions should be found sparingly.[129]

IV. Vested Right in Municipal Inaction or Failure to Enforce

A. The General Rule

The equitable doctrine of laches[130] is not ordinarily applicable

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incorrect, but this fact was not discovered until after the appeal period had passed. The court may also be referring to a situation like that which developed in Flood v. Zoning Hearing Bd., 19 Pa. Commw. Ct. 427, 338 A.2d 789 (1975), in which the court held that even if property owners expend money or incur liabilities in good faith reliance upon a building permit, they acquire no vested right until expiration of the period during which other affected property owners might appeal the hearing board's decision. Such appeals, however, are unavailable for non-zoning cases as in the issuance of septic tank permits. Perhaps the court was formulating a general statement of exceptions and the fourth factor was not meant to be applicable to the particular situation in *Flynn*. In a future decision, the court should specify the circumstances under which an appeal should be taken and by whom it should be taken.

124. 26 Pa. Commw. Ct. 614, 365 A.2d 184 (1976). After this comment went to press, the Pennsylvania Supreme Court in Petrosky v. Zoning Hearing Bd., 298 Jan. Term 1977, filed July 6, 1979, adopted the five-part test for an exception established by the Commonwealth Court, but reversed on the facts, finding a vested right.

125. In *Petrosky* defendants had already constructed the structure, which had been erroneously permitted to violate setback requirements, and were ordered to remove it.

126. *See* Herbel v. Zoning Hearing Bd., 32 Bucks 1 (Pa. C.P. 1978).

127. *See* note 123 *supra*.

128. The court has recognized that the reason for requiring a permit in the first place is to protect the public welfare—the general justification for any exercise of the police power. Any local ordinance requiring a permit, whether a zoning ordinance or some other type of ordinance, is an exercise of the police power.

129. A contrary rule would lead to chaos in municipal affairs. If the doctrine of estoppel could be invoked in such situations, municipalities would repeatedly find themselves bound by the unauthorized acts of officers and agents possessing only limited authority. Experience has shown the wisdom of the prevailing rule that persons dealing with municipal officers and agents are bound by constructive notice of the law and public records with respect to the powers and functions of such officers and agents.

Alexander Co. v. City of Owatonna, 22 Minn. 321, –, 24 N.W.2d 244, 250 (1946). *See also* Annot., 6 A.L.R.2d 960 (1949).

130. Laches is neglect for unreasonable and unexplained time, under circumstances per-

to a municipality,[131] but a number of cases have considered it in determining whether a vested right may be created by municipal inactivity or nonenforcement of its ordinances. The general rule was formulated in *Hasage v. Philadelphia Zoning Board of Adjustment*.[132] After reviewing the complex fact situation in *Hasage*,[133] the court held that inactivity on the part of the municipality does not create a vested right in a landowner to continue using his property not in conformance with the provisions of an applicable zoning ordinance. The court also declared that the landowner's ignorance of the nonconforming use was irrelevant and inexcusable.

> It is argued that the applicants purchased the property thinking multiple family dwelling was permissible, and, acting on such belief, made an investment of approximately $36,000. The answer to that is that they were duty bound to check the zoning status of the property before purchase, . . . If the records had been searched, it would have been immediately revealed that the zoning board had refused to permit multiple dwelling within a few years before title to the property was purchased.[134]

With a few exceptions,[135] the appellate courts in Pennsylvania have continued to hold that laches is not a defense in an action to enforce a zoning ordinance. They have also generally continued to hold that a longstanding violation of a zoning ordinance, in itself, does not create a right to continue the violation.[136] This is the majority position among the states.[137]

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mitting diligence, to do what in law should have been done. Brodt v. Brown, 404 Pa. 391, 172 A.2d 152 (1961). The essence of laches is estoppel arising out of inexcusable delay in the bringing of suit, which delay prejudices the defendant's rights to such an extent that it would be an injustice to permit suit to be brought. Pennsylvania Turnpike Comm'n v. Atlantic Richfield Co., 31 Pa. Commw. Ct. 212, 375 A.2d 890 (1977).

131. Breisch v. Locust Mountain Coal Co., 267 Pa. 546, 110 A. 242 (1920).

132. 415 Pa. 31, 202 A.2d 61 (1964).

133. In 1951 the Board of Adjustment refused the owner of a single family dwelling permission to convert the structure to a multi-family dwelling because such use would violate the zoning ordinance, which permitted only single family dwellings. The owner converted the home into a five-family unit anyway. In 1956 Hasage bought the property as a five-family unit for $26,000 and expended $10,000 more in improvements. In 1962, during a routine inspection, the city became aware of the violation for the first time, served a notice thereof on Hasage, and later refused to grant a variance. Hasage then appealed this decision.

134. Hasage v. Philadelphia Zoning Bd. of Adjustment, 415 Pa. 31, 35, 202 A.2d 61, 64 (1964).

135. *See* notes 138-59 and accompanying text *infra*.

136. Pae v. Hilltown Twp. Zoning Hearing Bd., 35 Pa. Commw. Ct. 229, 385 A.2d 616 (1978) (two years); Marzo v. Zoning Hearing Bd., 30 Pa. Commw. Ct. 225, 373 A.2d 463 (1977) (ten to fifteen years); Milewski v. City of Philadelphia, 27 Pa. Commw. Ct. 59, 365 A.2d 680 (1976) (eighteen years); Lewis v. Zoning Hearing Bd., 24 Pa. Commw. Ct. 574, 357 A.2d 725 (1976) (fifteen years); Camaron Apts., Inc. v. Zoning Bd. of Adjustment, 14 Pa. Commw. Ct. 571, 324 A.2d 805 (1974) (seven years); Dewald v. Board of Adjustment, 13 Pa. Commw. Ct. 303, 320 A.2d 922 (1974) (six years). *But see* Cities Service Oil Co. v. City of Des Plaines, 21 Ill. 2d 157, 171 N.E.2d 605 (1961) (seven month delay on the part of the city amounted to ratification by the city of an invalid permit).

137. *See* Heeter, *supra* note 17, at 75-77. Illinois has found exceptions in Westfield v. City of Chicago, 26 Ill. 2d 526, 187 N.E.2d 208 (1962) and City of Evanston v. Robbins, 117 Ill. App. 2d 278, 254 N.E.2d 536 (1969). *See also* City of Passaic v. H.B. Reed & Co., 70 N.J. Super. 542, 176 A.2d 27 (1961). No Pennsylvania cases are within an exception, but there are a few discussed at notes 138-59 and accompanying text *infra*.

B. *The Exceptions*

A few cases have been decided contrary to the general rule. Although the supreme court did not actually specify the exact reasons why it found a vested right in the municipal inaction or nonenforcement in any of these cases, these decisions do fall into interrelated but definable categories.

1. Great Hardship and Substantial Reliance by Owner.—This exception is concerned with the extreme hardship that strict enforcement of the zoning ordinance would impose on a landowner because of his reliance upon the action of the municipality in permitting the violation to continue. The exception is usually applied to a purchaser of a property who had no way of knowing that a land use violation was present.[138] The leading case applying this doctrine is *Sheedy v. Philadelphia Zoning Board of Adjustment*,[139] in which the Board of Adjustment, in denying an application for a variance,[140] gave no notice to the owner that the present use was actually in violation of the zoning ordinance.[141]

The court in *Hasage v. Philadelphia Zoning Board of Adjustment*[142] distinguished and confined *Sheedy* to its facts and established a three part test to determine if this type of exception existed: (1) the nonconforming use must have existed for a long period of time; (2) the municipality must have permitted the illegal use to continue unchallenged despite knowledge of its existence and must have indicated that the use was not objectionable; (3) the cost of bringing the structure into compliance must be prohibitive.[143]

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138. *Contra*, Hasage v. Philadelphia Zoning Bd. of Adjustment, 415 Pa. 31, 202 A.2d 61 (1964) (purchaser should have known of the violation).

139. 409 Pa. 655, 187 A.2d 907 (1963).

140. Sheedy had purchased the property after the previous owner had used it as a multiple dwelling for nineteen years in violation of the zoning ordinance. The previous owner had been denied a variance to change the use, but in denying it the Board gave no indication that the multiple dwelling use violated the ordinance. Sheedy continued to use the property for five years before the city took any action. The court found that reconversion of the dwelling to a single family unit would be ruinously expensive and wasteful, especially since the use was causing no harm to the public health, safety, or welfare.

141. *Compare* Koenen v. Lower Merion Twp., 85 Montg. 93 (Pa. C.P. 1965) (purchaser for value unaware of violation), *with* Saylor v. Lower Merion Twp., 85 Montg. 96 (Pa. C.P. 1965) (adjacent properties) (landowner knowing of violation).

142. 415 Pa. 31, 202 A.2d 61 (1964).

143. *Sheedy* was a singular situation and presented at least three factors which do not appear in the present case: (1) The multiple-family dwelling or non-conforming use, had existed for a score of years, in fact, almost from the date of passage of the zoning ordinance; (2) The city had permitted the illegal use to continue without challenge for twenty-three years despite knowledge of its existence, and pursued a course of conduct that indicated multiple tenancy was not objectionable; (3) It was clearly established that the cost of conversion to a single dwelling would be enormous and prohibitive.

Id. at 36, 202 A.2d at 64.

The key point, which is absolutely necessary to establish the exception, is that the municipality must permit the violation to continue after it becomes aware of the violation. In *Sheedy* the city knew of the violation when the variance was denied, but waited five years before it

This exception is well-founded, especially when both the second and third elements of the test are strongly present or when the landowner did not create the violation, but was a good faith purchaser. Because of the substantial reliance permitted by a municipality knowing of a violation, it is reasonable to apply the doctrine of equitable estoppel to the municipality in this situation.[144]

2. Extreme Length of Time During Which Violation is Permitted to Continue with Knowledge of the Municipality.—If a municipality knows or should have known of a violation of its zoning ordinance and the violation has continued for a long time without any municipal action to abate it, the court may find that the landowner has acquired a vested right to continue the use.[145] This is especially true when the violation was authorized by the municipality with an improperly issued permit that was never revoked.[146] The commonwealth court has found that this constitutes sufficient detrimental reliance on the apparent acquiescence of the municipality[147] to entitle the owner to a vested right.[148]

3. De Minimis Nature of Violation.—If the violation is of a minor nature having no effect on the public health, safety, or welfare, the court may find that the property owner has a vested right to continue to use his land in violation of the ordinance.[149] The leading case in which this exception is found, *Heidorn Appeal*,[150] is aberrant

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took any type of action. In *Hasage*, however, the violation persisted for some eleven years, but the city issued a cease and desist order almost immediately upon becoming aware of the violation.

144. The court must balance any harm to the citizens of the municipality or the adjoining landowners against the harm suffered by the owner who has relied on the municipality's inactivity. This may be implied in the three factor test used in determining this exception, but should be more clearly stated, perhaps as a distinct fourth element. *See also* notes 128-29 and accompanying text *supra*.

145. Township of Haverford v. Spica, 16 Pa. Commw. Ct. 326, 328 A.2d 878 (1974) (violation continued for thirty-six years). A court might also conceivably find a vested right in the willful violation of an ordinance, if the local government permits the violation to persist for many years.

146. *Id.* The township had issued a permit for establishment of a real estate office in a residential zone, a use that was not permitted in the zone in 1938. The permit was never revoked.

147. [T]he township not only permitted construction of a structure, the obvious use of which was in violation of the ordinance, but it also did the affirmative act of sanctioning the construction and use through the issuance of its own building permit. The Township was then silent for thirty-six years. In such circumstances we believe the property owner is entitled to rely on the Township's apparent acquiescence.

Id. at 333, 328 A.2d at 882.

148. To correct the erroneous issuance of an outstanding permit, some jurisdictions allow an action of mandamus against the appropriate municipal official to revoke an invalid permit. *See* Annot., 68 A.L.R.3d 166 (1976) (no Pennsylvania cases cited). This device has never been used in Pennsylvania, but it should prove useful in those situations where an invalid permit has been issued and the municipality takes no action to revoke it.

149. This characterization is found in R. RYAN, PENNSYLVANIA ZONING LAW AND PRACTICE, § 8.3.4 (1970).

150. 412 Pa. 570, 195 A.2d 349 (1963).

and potentially dangerous.[151] It focuses more on the nature of the appellant than on the nature of the violation.[152] Moreover, the case continues to be cited for the proposition that laches can be applied against a municipality.[153] Yet nowhere in the opinion is there any language to indicate how the court reached its decision.[154] No other cases are cited in support. Thus, the only rational basis for the decision is the de minimis nature of the violation.[155]

This decision does not have much merit; if the court feels that the doctrine of laches should be applied to a municipality because of its inaction, it should at least offer a reason for applying the doctrine. Furthermore, unlike the other possible exceptions found by the courts,[156] this one is not well founded. A violation is a violation, and the court should be very reluctant to find a vested right in an unenforced zoning ordinance simply because the violation was not major. The rule would be more reasonable, however, if the landowner had to show that the violation does not harm the community or the use, enjoyment, and value of adjoining property, and that it was created or continued in good faith and at substantial expense to the property owner.

C. The Result

The Pennsylvania cases dealing with vested rights created by municipal inaction follow the majority rule and find that municipal

151. *See* Yocum v. Power, 398 Pa. 223, 157 A.2d 368 (1960).

152. The appellants were an elderly couple whose new front porch violated by five and a half feet a setback ordinance requiring a twenty-five foot setback. The old front porch had violated the ordinance by an even greater amount, but the township had ignored the violation for ten years. Seventy-five homeowners in the vicinity signed a petition supporting the appellants, and from that fact the court found no detrimental effect on the health, safety, and welfare of the community. Nor did the court find detrimental reliance on any affirmative municipal act, and it surely seems that appellants should have checked the setback requirements before building a new porch. Nothing indicates that a building permit had been issued for the construction, but the court still applied the doctrine of laches against the municipality.

153. *See, e.g.*, Township of Haverford v. Spica, 16 Pa. Commw. Ct. 326, 328 A.2d 878 (1974).

154. The opinion does contain the following interesting language:

> The Township stands not on a logical platform but on a dialectical stoop to argue its case. It says that if the Heidorns are permitted to retain their patios then every "property owner in the Commonwealth of Pennsylvania" is entitled to have a front porch and that therefore building setback lines will become a "nullity." This is like worrying that the oceans will some day go dry. The law, while concerned about the future, focuses its attention on the immediate problem at hand and cannot allow an injustice to occur on the theory that a certain decision will become a ghost to haunt posterity. It cannot be influenced by the argument that if a certain privilege is allowed a hunchback, the whole world will become humpbacked.
>
> The short answer to the appellant's thesis in this field is that if our decision becomes a precedent to allow other exceptions to setback requirements, so let it be.

Heidorn Appeal, 412 Pa. 570, 575, 195 A.2d 349, 352 (1963).

155. There may be legally irrelevant explanation. The appellants apparently were elderly and had just spent a good deal of money on a new porch. They should have been presumed, however, to know the law as well as anyone else, in the absence of any affirmative municipal action.

156. *See* notes 138-48 and accompanying text *supra*.

inaction does not create a vested right.[157] This body of law is not as consistent as that dealing with vested rights accruing on the basis of an invalid permit. The exceptions and the reasoning behind them are not as well thought out as those in the invalid permit situation.[158] Courts should develop a set of criteria to use as a test for finding exceptions. The three criteria developed to show that *Sheedy* was an exception are a starting point.[159] To them must be added some consideration of the public health, safety, and welfare and of the rights of neighboring property owners that might be affected. Courts should avoid ad hoc application of the doctrine, as was done in *Heidorn*, and should disaffirm the precedential value of that case.

V. Other Vested Rights Arguments

A. Vested Right in Continuation of Present Zoning

In several Pennsylvania cases a landowner or land purchaser has attempted to claim that he has a vested right to the continuation of the present zoning classification.[160] The basis of this claim is that the owner purchased or improved the property in reliance on the zoning classification that existed at the time, and, therefore, the municipality should be estopped from changing the classification. This argument has never succeeded in Pennsylvania,[161] and only a very few cases in other jurisdictions have found a vested right in these circumstances.[162]

Although not explicitly stated in any Pennsylvania case, the reason for not finding a vested right in the continuation of a zoning classification is that zoning must be flexible enough to cope with changing circumstances.[163] If a property owner did have this vested right, the municipality's ability to alter the zoning to meet changing conditions would be greatly hampered.[164] This conflict suggests that

157. *See* Heeter, *supra* note 17, at 75-77.

158. *See* note 143 and accompanying text *supra.*

159. *See* notes 143-44 and accompanying text *supra.*

160. Key Realty Co. Zoning Case, 408 Pa. 98, 182 A.2d 187 (1962); Schmidt v. Philadelphia Zoning Bd. of Adjustment, 382 Pa. 521, 114 A.2d 902 (1955); Gratton v. Conte, 364 Pa. 578, 73 A.2d 381 (1950); Hollearn v. Silverman, 338 Pa. 346, 12 A.2d 292 (1940); Kelly v. Zoning Bd. of Adjustment, 2 Pa. Commw. Ct. 136, 276 A.2d 569 (1971); *cf.* Peterson v. Zoning Bd. of Adjustment, 412 Pa. 582, 195 A.2d 523 (1963) (purchaser was assured proposed use was permitted, but the permit was denied after purchase; relied on a semantic discussion of whether cement and concrete are different in zoning context rather than examine vested rights concepts).

161. *See also* Appeal of Boyle, 179 Pa. Super. Ct. 318, 116 A.2d 860 (1955) (appellant argued that he had a vested right in being in the only commercially zoned area in the municipality when the municipality attempted to rezone additional land as commercial; court found no vested right).

162. *See, e.g.* Hollywood Beach Hotel Co. v. City of Hollywood, 329 So. 2d 10 (Fla. 1976). *See also* 13 AM. JUR. PROOF OF FACTS 2d 373 (1977) (how to prove a case for a vested right in an existing zoning ordinance).

163. Missouri Realty, Inc. v. Ramer, 216 Md. 442, 140 A.2d 655 (1958).

164. Limits exist, however, to the flexibility of a zoning ordinance. So-called "floating

a balancing test might be developed, weighing the reliance of and notice to the landowner on the one side against the need to amend the zoning ordinance or zoning map on the other side.[165]

B. Statutory Vested Rights: Approved Subdivision Plans

A vested right may be created by statute. In Pennsylvania, Section 508(4) of the Municipalities Planning Code[166] confers a vested right on property owners who have a previously approved subdivision plan in which the lots are made too small to conform to the regulations of a newly enacted zoning ordinance or amendment.[167] This rule creates a right to the use in accordance with the ordinances in effect at the time the plans were properly submitted. This vested right lasts for three years, no matter how many changes the municipality makes to its ordinances during that time.[168]

Legislative creating of a vested right is a compromise between

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zones," which are not mapped initially but are located only when applied for by a landowner, have not been looked upon favorably by the judiciary because they amount to rezoning without notice. *See, e.g.*, Eves v. Zoning Bd. of Adjustment, 401 Pa. 211, 164 A.2d 7 (1960) (leading Pennsylvania case on floating zones). Despite this limitation, the municipality must retain the ability to amend the ordinance by changing zoning classifications or adding or deleting classifications to cope with changing conditions.

165. The supreme court in *Eves* set out an incipient balancing test.

> While it is undoubtedly true that a property owner has no vested interest in an existing zoning map and, accordingly, is always subject to the possibility of a rezoning without notice, the zoning ordinance and its accompanying zoning maps should nevertheless at any given time reflect the current planned use of the community's land so as to afford as much notice as possible.

Id. at 218, 164 A.2d at 11.

166. PA. STAT. ANN. tit. 53, § 10508(4) (Purdon 1972).

167. (4) From the time an application for approval of a plat, whether preliminary or final, is duly filed as provided in the subdivision and land development ordinance, and while such application is pending approval or disapproval, no change or amendment of the zoning, subdivision or other governing ordinance or plan shall affect the decision on such application adversely to the applicant and the applicant shall be entitled to a decision in accordance with the provisions of the governing ordinances or plans as they stood at the time the application was duly filed. In addition, when a preliminary application has been duly approved, the applicant shall be entitled to final approval in accordance with the terms of the approved preliminary application as hereinafter provided. However, if an application is properly and finally denied, any subsequent application shall be subject to the intervening change in governing regulations. When an application for approval of a plat, whether preliminary or final, has been approved or approved subject to conditions acceptable to the applicant, no subsequent change or amendment in the zoning, subdivision or other governing ordinance or plan shall be applied to affect adversely the right of the applicant to commence and to complete any aspect of the approved development in accordance with the terms of such approval within three years from such approval. Where final approval is preceded by preliminary approval, the three-year period shall be counted from the date of the preliminary approval. In the case of any doubt as to the terms of a preliminary approval, the terms shall be construed in the light of the provisions of the governing ordinances or plans as they stood at the time when the application for such approval was duly filed.

Id.

168. The judicially created rule that preceded the enactment of the Municipalities Planning Code was the opposite: an approved subdivision plan did not create a vested right to develop or sell lots that later became nonconforming because of the adoption of a zoning ordinance or amendment. York Twp. Zoning Bd. of Adjustment v. Brown, 407 Pa. 649, 182 A.2d 706 (1962). The reasoning was that "in the abstract it is highly desirable in the zoning process that preexisting land subdivisions should conform to later zoning laws. Otherwise,

the position of finding no vested right in the subdivider, which forces him to resubdivide,[169] and granting him a permanent vested right, which fills the municipality with nonconforming lots. This solution is a reasonable attempt to balance competing interests. If the subdivider has miscalculated his market and failed to sell all of the nonconforming lots within three years, he must resubdivide. The municipality will then have nonconforming lots only in separate ownership, and most of the lots will have dwellings on them.

The post code cases have uniformly applied the provisions of Section 508(4).[170] Because of the first test in the statute requiring that a decision on the subdivision plan must be made in accordance with the ordinances existing at the date of its proper submission for approval,[171] the court has held that the pending ordinance rule[172] does not apply in the case of a subdivision plan approval.[173] The three-year rule,[174] the second statutory requirement, has also been upheld by the commonwealth court.[175]

The statutory provision and the cases applying it have shown that it is possible to establish a workable vested rights rule with legislation. The legislature discerned that a problem existed and attacked it directly,[176] and the courts have had no problems in interpreting the resulting legislation and applying it consistently. This is a good indication that a legislative enactment of a general vested rights rule will

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subdivisions in their infancy could perpetuate for years the problems zoning was designed to eliminate." *Id.* at 652, 182 A.2d at 707.

169. In addition to what he might lose by virtue of having fewer lots to sell, the subdivider sustains injury because new plans must be prepared. Since the lots will be larger, he may be able to charge a higher price for them, but market conditions will be the main determinant. He may be unable to demand an increment sufficient to recoup the loss from having fewer lots to sell.

170. PA. STAT. ANN. tit. 53, § 10508(4) (Purdon 1972). In Clover Hill Farms, Inc. v. Board of Supervisors, 5 Pa. Commw. Ct. 239, 289 A.2d 778 (1972), the rule was not applied since the court found that the subdivision plan had been approved before the effective date of § 508(4) and also because more than three years had elapsed since approval. *See also* Friendship Bldrs., Inc. v. West Brandywine Twp. Zoning Hearing Bd., 1 Pa. Commw. Ct. 25, 271 A.2d 511 (1970).

171. *See* note 167 and accompanying text *supra*.

172. *See* notes 33-53 and accompanying text *supra*.

173. Monumental Properties, Inc. v. Board of Comm'rs., 11 Pa. Commw. Ct. 105, 311 A.2d 725 (1973). *Accord*, Vogel v. Hopewell Twp., 27 Pa. Commw. Ct. 118, 365 A.2d 706 (1976); Devonshire Realty Corp. v. Township of Maxatawney, 22 Pa. Commw. Ct. 555, 349 A.2d 802 (1976). The statute, in effect, creates its own pending ordinance rule.

174. *See* note 167 and accompanying text *supra*.

175. Gable v. Springfield Twp. Zoning Hearing Bd., 18 Pa. Commw. Ct. 381, 335 A.2d 886 (1975). This rule has not been applied, however, in the case of a developer who purchased a partially developed subdivision with the knowledge that some of the lots did not conform to the present zoning, whether or not they conformed at the time when the plan was first approved. Ephross v. Solebury Twp. Zoning Hearing Bd., 25 Pa. Commw. Ct. 140, 359 A.2d 182 (1976). *See also* Central Penn Nat. Bank v. Zoning Hearing Bd., 33 Bucks 38 (Pa. C.P. 1978), for application of rule.

176. Perhaps one reason why legislation has been enacted in this area is because the developers in Pennsylvania have a fairly strong lobby. Other types of vested rights problems previously referred to almost invariably affect only the single owner of a particular piece of property rather than a developer who owns many tracts.

work and will be able to diminish the confusion that has permeated the Pennsylvania decisions until recent years.

C. Judicially Created Vested Rights

When a landowner appeals to the court a decision denying him a permit, and the court orders that the permit be issued, the landowner may then acquire a vested right. The municipality cannot continue to refuse to issue the permit or revoke it on other grounds if the permittee continues to conform to all other applicable ordinances.[177] This is particularly true when the municipality goes to great lengths to frustrate the applicant[178] for some reason such as citizen opposition.[179] Thus, any act of the municipality that attempts thereafter to interfere with a judicially ordered permit is in bad faith[180] and does not affect the permittee's rights acquired by the issuance of the permit. This is a sensible rule since a property owner who has just won protracted litigation at great expense certainly would not seek a judicial remedy if the municipality could still frustrate him after he has fully litigated the matter and won.

VI. Conclusion

The law of vested rights and zoning in Pennsylvania is, in many ways, unique among the fifty states.[181] Pennsylvania is the only state that has developed a pending ordinance rule that can be applied reasonably consistently, although it is not yet clear whether reliance upon the permit is necessary or when it occurs.[182] Development of this rule is a great improvement over the rules that preceded it, but a deficiency remains.[183] An excessive number of inconsistent prior cases also remains as precedent to allow circumvention of the rule. The legislature could effect the optimal solution by enacting a statu-

177. Raum v. Board of Supervisors, 29 Pa. Commw. Ct. 9, 370 A.2d 777 (1977); Borough of Brookhaven v. Reece, 19 Pa. Commw. Ct. 16, 339 A.2d 621 (1975) (prior mandamus action; validity of permit agreed to by borough); Council of Borough of Monroeville v. Al Manzo Const. Co., 5 Pa. Commw. Ct. 97, 289 A.2d 496 (1972) (prior stipulation of validity of permit in settling litigation was res judicata to subsequent attempt to revoke and relitigate validity of permit).

178. Raum v. Board of Supervisors, 29 Pa. Commw. Ct. 9, 370 A.2d 777 (1970).

179. "Attempts to legislatively amend approved zoning for the purpose of frustrating development can be viewed as nothing more than contempt of our Order [in a previous case]." *Id.* at 50, 370 A.2d at 799.

180. *See* notes 91-98 and accompanying text *supra* for a discussion of municipal bad faith in other contexts.

181. Only four states—New York, Pennsylvania, Illinois, and California—have had enough vested rights cases to be able to discern a trend or rule within the cases of that state alone. Each follows a different rule. *See* note 65 *supra*. None of these States' rules have developed to the point of fixing a date when a right vests.

182. Washington and South Carolina use similar rules. *See* note 30 *supra*.

183. The developer may be able passively to hold the permit and acquire a vested right to construct a nonconforming use far in the future. *See* notes 102-103 and accompanying text *supra*.

tory vested rights rule. Since the General Assembly has already enacted a vested rights rule applying to subdivision development,[184] there is precedent for creation of a statutory general vested rights rule. If the legislature does not act, the courts must continue to refine the pending ordinance rule to eliminate the remaining difficulties. Pennsylvania courts have been able to deal successfully with the easier vested rights situations that do not involve a valid permit. Any legislative or judicial attempt to deal with the subject must balance the interests of the landowner in using his property as he wishes, against the interest of the municipality in promoting the general health, safety, and welfare of its residents.

Developing a consistent, easily applicable set of vested rights rules has not been easy in any jurisdiction.[185] After years of confusion, Pennsylvania's courts have developed a method of dealing with vested rights and zoning that has the potential both for effective operation and for consistent application. All that is required is legislative or judicial action to remove the remaining area of doubt in the rule—the clarification of whether substantial reliance upon the permit is necessary to make the pending ordinance rule operate. If such reliance is necessary, its timing must be clarified. If it is not, the deficiency that may enable a landowner to sit on a validly issued permit for a great length of time must be eliminated.

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184. *See* notes 100-110 and accompanying text *supra*.

185. *See* MODEL LAND DEVELOPMENT CODE § 2-309 (Official Text 1975) for an example of this difficulty. Comment one to § 2-309 evidences disagreement over whether a limit should be placed on the length of time during which an ordinance can remain pending. The reporters did not include the time limit, fearing that it might cause more problems than it solved. The text of § 2-309 is a compromise in other respects. It adopts an "in the interest of justice" test to finding a vested right. This resembles the Illinois balancing test but is weak in that it gives no definite guidelines. It will not end the confusion in vested rights law.