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Vested Rights and Zoning: Avoiding All-or-Nothing Results

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VESTED RIGHTS AND ZONING: AVOIDING ALL-OR-NOTHING RESULTS

Abstract: In real estate development, courts and legislatures use the vested rights doctrine to determine whether local government should be allowed to enforce newly enacted zoning ordinances against landowners. As real estate development projects continue to increase in scope and expense, and as zoning regulations become more complex and sensitive to environmental awareness, the vested rights debate will remain a contentious issue in land use law. The three dominant vested rights rules in use today generally assume that vested rights protection requires an all-or-nothing result, forcing the debate to revolve almost solely around timing: should vested rights protection be granted now or later? This outcome affords no compromise; either developers get all the protection from new regulations they want and local governments get no flexibility to adapt projects to evolving public interests, or local governments get all the flexibility they want, and developers risk losing their projects altogether. This Note critiques the three major approaches and suggests that one way to add more flexibility to the current vesting scheme is to expand or contract the scope of protection granted based on the breadth of developers' disclosure.

INTRODUCTION

In real estate development, courts and legislatures use the vested rights doctrine to determine whether landowners have proceeded sufficiently far down the path of development of their land that the local government should not be allowed to enforce newly enacted zoning ordinances against them.[1] Landowners claiming vested rights

[1] *See* Richard B. Cunningham & David H. Kremer, *Vested Rights, Estoppel, and the Land Development Process*, 29 HASTINGS L.J. 625, 641 (1978); John J. Delaney, *Vesting Verities and the Development Chronology: A Gaping Disconnect?*, 3 WASH. U. J.L. & POL'Y 603, 603 (2000); Gregory Overstreet & Diana M. Kirchheim, *The Quest for the Best Test to Vest: Washington's Vested Rights Doctrine Beats the Rest*, 23 SEATTLE U. L. REV. 1043, 1043 (2000). The doctrine does not, however, generally give a developer permanent protection for his land. *See* Overstreet & Kirchheim, *supra*, at 1060. Common law and statutory versions of the doctrine grant vesting pursuant to some fixed point in the development process (e.g., building permit, subdivision application) which generally has a statutory expiration date. *See id.* Statutory vested rights doctrines may impose their own expiration dates as well. *See* Overstreet & Kirchheim, *supra*, at 1060; *see, e.g.*, MASS. GEN. LAWS ch. 40A, § 6 (2000). The vested rights doctrine is distinguished from the pre-existing non-conforming use/structure doctrine because it addresses *incomplete*, as opposed to pre-existing, developments. *See*

protection essentially argue that because they have invested so much money in the development of their land, relying on the local government's approval of their development plans, it is unfair to allow the local government to change the rules with respect to their project.[2] Because the doctrine pits an individual's right to use and enjoy property against the government's power to regulate, it creates a hotly contested battleground between owners of private property and local government.[3]

From the landowner/developer's perspective, the right to use and develop land is generally one of the most important and valuable rights associated with the land.[4] This right is, however, subject to the government's exercise of its police power.[5] While still in the process of development, therefore, landowners seek vested rights status because it prevents the local government from exercising police power by enforcing new zoning laws against their development.[6] Because new zoning laws are almost always stricter, enforcement would generally require scaling back a project. Acquiring vested rights protection, therefore, preserves developers' investment in the project as originally conceived and designed.[7] Where the acquisition of vested rights status remains uncertain, however, future profits also remain uncertain, thereby discouraging landowners from investing in development.[8]

Cunningham & Kremer, *supra*, at 670. This Note will focus on vesting in zoning ordinances, however, the ability to develop land can also be affected by other land use controls such as environmental laws.

[2] *See* Delaney, *supra* note 1, at 603; David G. Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes*, 1971 URB. L. ANN. 63, 66 (1971); Overstreet & Kirchheim, *supra* note 1, at 1043.

[3] *See* Overstreet & Kirchheim, *supra* note 1, at 1044.

[4] John J. Delaney & Emily J. Vaias, *Recognizing Vested Development Rights as Protected Property in Fifth Amendment Due Process and Takings Claims*, 49 WASH. U. J. URB. & CONTEMP. L. 27, 30 (1996).

[5] Cunningham & Kremer, *supra* note 1, at 632–33.

[6] *See id.* at 633.

[7] *See* E. A. Prichard & Gregory A. Riegle, *Searching for Certainty: Virginia's Evolutionary Approach to Vested Rights*, 7 GEO. MASON L. REV. 983, 1007–08 (1999); Ralph D. Rinaldi, *Virginia's Vested Property Rights Rule: Legal and Economic Considerations*, 2 GEO. MASON L. REV. 77, 97–98 (1994). Although the discussion in both articles focuses on Virginia's vested rights rule, most of the observations made about the development process and impact of the vested rights doctrine are generally applicable. *See* Prichard & Riegle, *supra*, at 1007–08; Rinaldi, *supra*, at 97–98.

[8] Overstreet & Kirchheim, *supra* note 1, at 1044; Prichard & Riegle, *supra* note 7, at 999, 1008; Roger D. Wynne, *Washington's Vested Rights Doctrine: How We Have Muddled a Simple Concept and How We Can Reclaim It*, 24 SEATTLE U. L. REV. 851, 855 (2001).

The complex, lengthy, and expensive nature of modern land development compounds developers' investment risk prior to the attainment of vested rights.[9] The nature of modern real estate development increasingly requires significant investment in the early planning stages.[10] In addition, rapid population growth has increased the demand for large-scale land development.[11] At the same time, new environmental impact awareness has forced local governments to create additional review agencies, add additional layers to the permitting process, and adopt more regulations.[12] Larger projects developed under this complex regulatory environment need greater financial resources to pay for the preparation of permit applications and engineering and preliminary site work, and to finance these resources over a long period of time until development is complete and profit realized.[13] In addition, more levels of review create more opportunities for delay, which only increases financing costs.[14] Where the developer is faced with litigating his vested rights because the law is unclear or uncertain, he must add attorney's fees to his mounting costs.[15]

Local governments have their own development interests.[16] They want to preserve enough flexibility in the development process to be able to adapt their land use regulations over time to address new situations and to implement new approaches to community planning.[17] The earliest stages of project review generally do not require developers to submit particularly detailed plans for their proposed developments.[18] In the case of large-scale developments that take

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[9] Prichard & Riegle, *supra* note 7, at 999; Walter F. Witt, Jr., *Vested Rights in Land Uses—A View From the Practitioner's Perspective*, 21 REAL PROP. PROB. & TR. J. 317, 318 (1986).

[10] *See* Overstreet & Kirchheim, *supra* note 1, at 1048–54; Prichard & Riegle, *supra* note 7, at 999.

[11] Prichard & Riegle, *supra* note 7, at 999.

[12] Delaney, *supra* note 1, at 617; Prichard & Riegle, *supra* note 7, at 998; Witt, *supra* note 9, at 318. For example, in California, concern about managing growth in coastal areas led to the passage of the California Coastal Zone Conservation Act, which created a new agency, the California Coastal Zone Commission. Avco Cmty. Developers, Inc. v. S. Coast Reg'l Comm'n, 553 P.2d 546, 548, 557 (Cal. 1976). Developers seeking to build in a coastal zone had to apply to this new agency for a permit, in addition to any other permits already required by law. *Id.*

[13] Overstreet & Kirchheim, *supra* note 1, at 1056; Prichard & Riegle, *supra* note 7, at 999; Witt, *supra* note 9, at 318.

[14] *See* Overstreet & Kirchheim, *supra* note 1, at 1056.

[15] *Id.* at 1056; Rinaldi, *supra* note 7, at 99.

[16] *See* Delaney, *supra* note 1, at 603; Wynne, *supra* note 8, at 855.

[17] Delaney, *supra* note 1, at 603; Wynne, *supra* note 8, at 855.

[18] *See, e.g.*, Sunrise Dev. Ltd. P'ship, 623 A.2d 1296, 1298 (Md. 1992) (site plan application did not require detailed construction drawings); Westside Bus. Park v. Pierce County,

years to complete, the local government wants the freedom to revise its regulations as the needs of the community change, and before the developer gains the right to fix the details of the development under outdated ordinances.[19] Local governments do not welcome protracted litigation either because it consumes their time and resources, which are already limited by scarce tax dollars.[20]

In an attempt to balance developers' need for certainty with local governments' need for flexibility, each state has adopted at common law or established by statute its own standard for granting vested rights.[21] Although there are variations and overlaps, the rules fall generally into one of three categories: the majority rule, the minority rule and the early-vesting rule.[22] All three rules generally grant complete protection from changes in the zoning law at the time of vesting.[23] The primary difference, therefore, between the rules is the point in time at which development rights can become vested: late, midway, or early in the development process.[24]

Because vesting is generally an all-or-nothing prospect, scholarly commentary focuses largely on the only remaining open issue: the time at which vesting is granted.[25] The problem, however, is that no matter what point in time is selected, an all-or-nothing outcome necessarily awards complete victory to only one party.[26] This result leaves little room for compromise, either devastating developers to save the public interest, or sacrificing the public interest to preserve developers' investments.[27]

A few scholarly commentators have alluded to the idea of reconsidering the scope of vesting, or in other words, the degree of protection from changes in the zoning law that is granted at the time of vest-

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5 P.3d 713, 715 (Wash. Ct. App. 2000) (short plat application only showed lot lines); Erickson & Assoc., Inc. v. McLerran, 872 P.2d 1090, 1092, 1096 (Wash. 1994) (master use permit applications are filed in earliest stages of project and generally change over time as developer's plans become more concrete).

[19] *See* Cunningham & Kremer, *supra* note 1, at 647; Delaney, *supra* note 1, at 603; Wynne, *supra* note 8, at 855.

[20] Overstreet & Kirchheim, *supra* note 1, at 1057; Rinaldi, *supra* note 7, at 99.

[21] *See* Delaney & Vaias, *supra* note 4, at 32–33, 39 app. I at 40–44, app. II.

[22] *See* Overstreet & Kirchheim, *supra* note 1, at 1045.

[23] *See infra* notes 240–244, 248–258, 259–270 and accompanying text.

[24] *See* Delaney, *supra* note 1, at 607, 619; Overstreet & Kirchheim, *supra* note 1, at 1045–46.

[25] *See* Delaney, *supra* note 1, at 619; Delaney & Vaias, *supra* note 4, at 39 app. I at 40–44; Overstreet & Kirchheim, *supra* note 1, at 1045, 1065.

[26] *See* Cunningham & Kremer, *supra* note 1, at 710; Wynne, *supra* note 8, at 855–57.

[27] *See* Cunningham & Kremer, *supra* note 1, at 710–11.

ing.[28] This Note builds on this idea by suggesting that courts and legislatures expand or contract the scope of protection granted along a spectrum, based on the amount of information developers have disclosed about their projects.[29] The advantage of this analysis is that by rejecting the all-or-nothing outcome, it would create the possibility of a compromise outcome between developers and local governments.[30]

Section I provides an explanation of the majority, minority, and early-vesting rules, respectively, examining the law of one or two states which provide examples of each version of the doctrine.[31] Section II summarizes the relevant commentary and criticism of all three rules, demonstrating the serious deficiencies in the current doctrine.[32] Section III begins by demonstrating how all three rules result in the same all-or-nothing outcome in terms of the scope of protection granted.[33] It then considers how a closer examination of the relationship between disclosure in the development process and the scope of rights granted might alter the focus of the vested rights debate.[34] It further demonstrates how courts under all three doctrines already implicitly recognize this relationship.[35] Finally, Section III argues that a spectrum vesting analysis would add some flexibility to the doctrine, thereby encouraging compromise and mitigating some of the most severe results of the current doctrine.[36]

I. The Majority, Minority and Early-Vesting Rules

Before grappling with the problems created by the current vested rights doctrine, or proposing ways to improve it, it is important to understand the three rules under which vested rights now operate. Because vested rights in land development are controlled by state law, each state has established its own rule, either by common law or by statute.[37] The rules established generally fall into three groups, from

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[28] *See id.* at 722–23; Grayson P. Hanes & J. Randall Minchew, *On Vested Rights to Land Use and Development*, 46 Wash. & Lee L. Rev. 373, 402–03 (1989); Claire B. Levy, *Changes to Colorado's Vested Property Rights Law*, 28 Colo. Law. 83, 85 (1999); Wynne, *supra* note 8, at 911–12; *see infra* notes 296–299 and accompanying text.

[29] *See infra* notes 295–338 and accompanying text.

[30] *See infra* notes 295–338 and accompanying text.

[31] *See infra* notes 37–186 and accompanying text.

[32] *See infra* notes 187–224 and accompanying text.

[33] *See infra* notes 225–294 and accompanying text.

[34] *See infra* notes 225–294 and accompanying text.

[35] *See infra* notes 225–294 and accompanying text.

[36] *See infra* notes 295–338 and accompanying text.

[37] Delaney & Vaias, *supra* note 4, at 32–34, 39 app. I at 40–44, app. II.

which general rules can be drawn: first, a majority rule that grants vesting late in the development process; second, a minority rule that grants vesting somewhat earlier in the process; and third, an early-vesting rule that, as its name suggests, grants vesting very early in the development process.[38]

A. *The Majority Rule*

Professor David Heeter first articulated the black letter majority vested rights rule in 1971 after analyzing the results of his state-by-state survey of the relevant case law.[39] This rule provides that landowners will be protected when, relying in good faith upon an act or omission of the local government, they have made substantial expenditures or commitments prior to a change in the zoning law.[40] This rule, also referred to as the "building permit plus construction" rule, is followed in more than 30 states.[41] Although the rule itself speaks vaguely of an act or omission of the local government, most states that follow this rule require the act to be the issuance of a building permit.[42]

California and Maryland provide two helpful illustrations of the majority rule at common law.[43] Although California's common law majority rule has been superseded by a statute[44] embracing an earlier vesting doctrine,[45] one of the most famous majority rule vested rights cases came out of California.[46] In 1976, in *Avco Community Developers, Inc. v. South Coastal Regional Commission*, the California Supreme Court

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[38] Overstreet & Kirchheim, *supra* note 1, at 1045–46.

[39] Heeter, *supra* note 2, at 66.

[40] *Id.*

[41] Delaney, *supra* note 1, at 607, 615; Overstreet & Kirchheim, *supra* note 1, at 1061.

[42] Delaney & Vaias, *supra* note 4, at 32, 39 app. I at 40–44; Overstreet & Kirchheim, *supra* note 1, at 1045.

[43] *See generally* Avco Cmty. Developers, Inc. v. S. Coast Reg'l Comm'n, 553 P.2d 546 (Cal. 1976) (describing California's formulation of the common law majority rule); Prince George's County v. Sunrise Dev. Ltd. P'ship, 623 A.2d 1296 (Md. 1992) (describing Maryland's formulation of the common law majority rule).

[44] CAL. GOV. CODE §§ 65865.2, 66498.1–.3 (West 1997) (authorizing development agreements and establishing vesting tentative map approvals); *See* Santa Margarita Area Residents Together v. San Luis Obispo County, 100 Cal. Rptr. 2d 740, 746 (Cal. Ct. App. 2000) (legislature intended to prevent *Avco*-type outcomes by allowing local government to freeze vesting before issuing a building permit).

[45] Thomas G. Pelham et al., *"What Do You Mean I Can't Build?" A Comparative Analysis of When Property Rights Vest*, 31 URB. LAW. 901, 903 (1999). The provisions of the California statute now allow very early vesting through development agreements and vesting tentative maps. *Id.*

[46] *Avco Cmty. Developers, Inc.*, 553 P.2d at 546; *see infra* note 48 and accompanying text.

refused to grant vested rights protection to a developer who had not yet obtained any building permits.[47] This decision, although not the first majority rule case, became widely recognized as embodying the "quintessential" illustration of the majority rule, and the economic hardship it can impose on developers.[48]

The California Coastal Zone Conservation Act came into effect after Avco Community Developers ("Avco") had acquired more than 5,000 acres to be developed as a planned residential community.[49] The law provided that certain "coastal zone" developments had to obtain a permit from the California Coastal Zone Commission, unless the developer had already secured a vested right to proceed.[50] Although Avco had by then spent more than two million dollars on planning and infrastructure development, it lost its vested rights claim because it had not yet obtained a building permit nor had it performed substantial construction as required at common law.[51]

The *Avco* court also noted that it had no way to define the development for which Avco sought protected status.[52] Although the county was aware that Avco intended to develop the land as a residential community, Avco had not yet submitted detailed plans regarding the number, size, height, or placement of the proposed buildings.[53] The court said that without this information, it would be impossible to define what Avco had the right to build.[54] Therefore, even if the common law supported vesting on the basis of rezoning or some other government act, the court would still hold that Avco had gained no vested rights.[55]

Finally, the court explained that if the law allowed vested rights based on rezoning or on preliminary approvals, the result would be to

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[47] *Avco Cmty. Developers, Inc.*, 553 P.2d at 553–54.

[48] *E.g.*, Cunningham & Kremer, *supra* note 1, at 704; *see, e.g.*, Delaney, *supra* note 1, at 613–14; David Hartman, *Risky Business: Vested Real Property Development Rights—The Texas Experience and Proposals for the Texas Legislature to Improve Certainty in the Law*, 30 TEX. TECH. L. REV. 297, 300 (1999); Pelham et al., *supra* note 45, at 902.

[49] *Avco Cmty. Developers, Inc.*, 553 P.2d at 548–49. The Act placed restrictions on development of the coastal zone for one year in order to slow development while the Commission prepared a new comprehensive plan for the area. *Id.* at 557.

[50] *Id.* at 548.

[51] *Id.* at 549, 553. Avco proposed two other theories for relief, all of which the court rejected. *Id.* at 555–56.

[52] *See id.* at 552.

[53] *Id.* However, the trial court agreed with Avco that it had submitted a tract map and a picture of a model of the development, and that together with the applicable regulations, the county could have figured out what Avco intended to build. *Id.*

[54] *Avco Cmty. Developers, Inc.*, 553 P.2d at 552.

[55] *See id.* at 552–54.

freeze the applicable zoning laws as of the time of rezoning or approval of preliminary plans.[56] Developers would be able to leave subdivided but undeveloped lots vacant for years, all the while preserving their right to develop them in the future, under long out-of-date zoning laws.[57] According to the *Avco* court, this scenario would unreasonably constrain the government's ability to control land use policy.[58]

California no longer follows *Avco,* but many other states employ a similar rule.[59] In 1979, in *Prince George's County v. Equitable Trust Co.,* the Maryland Court of Special Appeals held that vested rights protection could only be granted when a developer had obtained a building permit and begun substantial construction.[60] Equitable Trust had subdivided commercially zoned land into two parcels, but had only prepared plans and obtained a building permit for construction on one parcel.[61] Soon after Equitable Trust began construction, both parcels were rezoned for residential use only, pursuant to a regional rezoning plan.[62]

The Maryland Court of Special Appeals held that the rezoning was valid as applied to the parcel where no development had begun, but was invalid as applied to the parcel where Equitable Trust had been issued a building permit and had begun substantial construction.[63] The court said that when a landowner acquires a building permit, begins construction in good faith, and completes substantial construction of the project, his right to finish the project and begin using it cannot be altered by a subsequent change in the zoning ordinance.[64]

While the acquisition of a building permit is a fairly clear requirement, the *Equitable Trust Co.* rule fails to define "substantial construction."[65] In 1993, in *Prince George's County v. Sunrise Development Ltd. Partnership,* the Maryland Court of Appeals held that substantial construction required the completion of enough work that a reasonable member of the public could recognize that a structure was being built

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[56] *Id.* at 554. This is precisely what the minority rule purports to do. *See infra* notes 84–134 and accompanying text.

[57] *Avco Cmty. Developers, Inc.*, 553 P.2d at 554.

[58] *Id.*

[59] *See* Delaney, *supra* note 1, at 607; Overstreet & Kirchheim, *supra* note 1, at 1061.

[60] 408 A.2d 737, 742–43 (Md. Ct. Spec. App. 1979).

[61] *Id.* at 739–40.

[62] *Id.* at 738–39.

[63] *Id.* at 742–43.

[64] *Id.* at 741.

[65] *Equitable Trust Co.*, 408 A.2d at 741.

for a use permitted by the zoning law.[66] Sunrise Development Limited Partnership ("SDLP") acquired a lot zoned for multi-family high density residential use and submitted a site plan which portrayed the building footprint and the location of streets and parking areas, but did not contain any detailed structural or construction drawings.[67] After SDLP obtained a building permit for preliminary construction and poured the first footing, the county enacted legislation downzoning the property to multi-family medium density residential-condo use.[68] By this point, SDLP claimed to have spent more than two million dollars on site development costs including legal fees, accounting fees, insurance, architectural and engineering services, loan interest, taxes, various consulting fees, and permit fees.[69]

Because SDLP had been issued a building permit, the case turned on the court's interpretation of the substantial construction requirement of Maryland's vested rights doctrine.[70] The court explained that one of the rationales behind the substantial construction requirement was public perception of law enforcement.[71] If construction was sufficiently far along such that the public would perceive that a building was begun, they would not expect the new law to be enforced against it.[72] Conversely, if construction was so minimal when the law changed that the public could not perceive it, then they would expect the new law to be enforced against any building that later arose.[73] Therefore, the court held that substantial construction meant completing enough work that a reasonable passerby would recognize that a building was being erected for a permitted use.[74] On the instant facts, the court concluded that the footing was so unnoticeable that it could only be found with the use of a site plan, and therefore denied SDLP vested rights to proceed with construction of its building as planned.[75]

All states following the majority rule require the developer to demonstrate some form of substantial reliance in addition to obtaining a building permit, but they differ as to what constitutes substantial

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[66] 623 A.2d 1296, 1304 (Md. 1993).
[67] *Id.* at 1297–98.
[68] *Id.* at 1298–99.
[69] *Id.* at 1298 n.1.
[70] *See id.* at 1301.
[71] *Sunrise Dev. Ltd. P'ship*, 623 A.2d. at 1304.
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.* at 1304–05.

reliance.[76] The black letter majority rule discussed previously refers to "substantial expenditures."[77] Maryland's version of the majority rule as articulated by *Equitable Trust Co.* and further defined by *Sunrise Development Ltd. Partnership* requires "substantial construction."[78] The various methods used to determine what constitutes substantial reliance among the majority rule states generally fall into one of three categories: 1) a proportionate/ratio test, 2) a balancing test, or 3) a physical changes to land test.[79]

The proportionate/ratio test determines what percentage of the project's final cost is represented by the amount of money already spent.[80] The balancing test tries to weigh the developer's right to use his land and the amount of money already spent on his development, versus the public interests at stake in enforcing the new zoning ordinance.[81] Finally, the physical changes test looks for actual and continued construction of the permitted structure.[82] This final test is the approach the Maryland Court of Appeals took in *Sunrise Development Ltd. Partnership* when it required sufficient actual construction such that a passerby would realize that a building was begun.[83]

B. *The Minority Rule*

In contrast to the majority rule's requirement of building permit approval, the minority rule defines government approval as any site-specific approval, such as a preliminary plan.[84] In addition, some versions of the minority rule also dispense with the majority rule's sub-

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[76] John. J. Delaney, *Vested Rights and the Development Chronology 2000 Update*, SF08 A.L.I.-A.B.A. 379, 384 (2000).

[77] John J. Delaney & William Kominers, *He Who Rests Less, Vests Best: Acquisition of Vested Rights in Land Development*, 23 ST. LOUIS U. L.J. 219, 222 (1979); *see* Heeter, *supra* note 2, at 66.

[78] *Sunrise Dev. Ltd. P'ship*, 623 A.2d at 1301; *Equitable Trust Co.*, 408 A.2d at 741.

[79] Delaney, *supra* note 76, at 384–85; Delaney, *supra* note 1, at 608.

[80] Delaney, *supra* note 76, at 384. New York, for example, follows this rule. Reichenbach v. Windward at Southampton, 364 N.Y.S.2d 283, 288–89 (1975) (approximately $6,000 spent on construction not substantial when compared to $600,000 total cost of proposed project).

[81] Delaney, *supra* note 76, at 385.

[82] *Id.*

[83] *See* 623 A.2d at 1304.

[84] Delaney, *supra* note 1, at 619; Overstreet & Kirchheim, *supra* note 1, at 1045, 1065; *see, e.g.*, N.J. STAT. ANN. §§ 40:55D-49–55D-52 (West, WESTLAW through L.2001, c.100); VA. CODE ANN. § 15.2–2307 (Michie, WESTLAW through 2001 Spec. Sess. I, c.4.).

stantial reliance requirement.[85] States following the minority rule generally establish vested rights protections by statute, but may have common law protections as well.[86] New Jersey and Virginia provide good illustrations of the minority rule in practice: New Jersey follows a typical minority rule statute, while Virginia developed its rule by common law and later codified it.[87]

New Jersey has provided vested rights protection under a minority rule statute since 1976.[88] According to the New Jersey Supreme Court, "[t]he purpose of the statute is to give a developer a reasonable period of protection from changes in the zoning law."[89] By providing such protection, the legislature tried to find a reasonable balance between landowners' desire for certainty in the zoning law and local governments' need for flexibility to plan for the future needs of the community.[90]

Following the minority rule, the statute focuses clearly on application approval.[91] The statute protects developers who have received preliminary approval of a major subdivision or site plan from zoning changes for a period of three years.[92] In addition, the statute requires local governments to evaluate applications for final approval according to the laws in effect at the time of preliminary approval.[93] Once a project has been granted final approval, the preliminary period of protection ends, and the statute protects the project from zoning

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[85] *See* Delaney, *supra* note 1, at 619; Overstreet & Kirchheim, *supra* note 1, at 1045, 1065; *see, e.g.*, N.J. STAT. ANN. §§ 40:55D-49–55D-52 (West, WESTLAW through L.2001, c.100); VA. CODE ANN. § 15.2–2307 (Michie, WESTLAW through 2001 Spec. Sess. I, c.4.).

[86] *See* Delaney, *supra* note 1, at 619; Overstreet & Kirchheim, *supra* note 1, at 1045.

[87] N.J. STAT. ANN. §§ 40:55D-49–55D-52 (West, WESTLAW through L.2001, c.100); VA. CODE ANN. § 15.2–2307 (Michie, WESTLAW through 2001 Spec. Sess. I, c.4.); Prichard & Riegle, *supra* note 7, at 993, 999–1000.

[88] N.J. STAT. ANN. §§ 40:55D-49–55D-52 (West, WESTLAW through L.2001, c.100); Carl S. Bisgaier & Yvonne Marcuse, *Vesting and the Time of Decision Rule*, N.J. LAW., Nov.–Dec. 1997, at 13, 14–15. When a developer, for whatever reason, does not gain vesting under the statute, New Jersey provides common law vesting according to the majority rule. *See* Palatine I v. Planning Bd., 628 A.2d 321, 325–28 (N.J. 1993). The statute, therefore, by granting vested rights on approval of a subdivision or site plan, allows developers to gain protection earlier than under the common law rule. *See* §§ 40:55D-49–40:55D-52; *Palatine I*, 628 A.2d at 325–28.

[89] *Palatine I*, 628 A.2d at 325.

[90] *Id.* at 329–30 (citing Gruber v. Mayor of Raritan Township, 186 A.2d 489, 497 (1962)).

[91] N.J. STAT. ANN. §§ 40:55D-49–55D-52 (West, WESTLAW through L.2001, c.100).

[92] *Id.* § 40:55D-49. In the case of a subdivision or site plan for more than 50 acres, the planning board has the discretion to grant a longer period of protection. *Id.* § 40:55D-49(d).

[93] *Id.* § 40:55D-49(a).

changes for an additional two years.[94] The statute also authorizes local governments to enact ordinances specifying the requirements for subdivision and site plan approval, and includes an extensive list of its own requirements.[95] The number of requirements set by the statute ensures that any such plan will necessarily be very detailed.[96]

Recent case law illustrates the application of New Jersey's minority rule.[97] In 1991, in *Lake Shore Estates, Inc. v. Denville Township Planning Board*, the New Jersey Superior Court refused to grant a developer protection from a change in the zoning law on the grounds that the township had never approved a subdivision application.[98] Several years previously, Lake Shore Estates ("Lake Shore") had submitted a subdivision application for a residential development.[99] The following month, the township adopted an ordinance reducing the allowable density for this type of development.[100] The township subsequently denied the application.[101] A few years later, a trial court struck down the ordinance as unconstitutional, and invited Lake Shore to resubmit its application.[102] The day before the revised application was submitted, however, the township passed a modified version of its previous ordinance.[103]

The court explained that, in the absence of an approved application, the statutory standard required that it defer to the township's legislative decision in pursuit of the public interest.[104] The court, therefore, rejected Lake Shore's argument that its resubmitted application should be considered without regard to the modified ordinance.[105] The court held that under the statute it had to enforce zoning laws in effect at the time the revised application was submitted.[106]

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[94] *Id.* § 40:55D-52(a). Again, for larger developments, the planning board has the discretion to grant a longer period of protection. *Id.* § 40:55D-52(b).

[95] *Id.* § 40:55D-38. The statute requires that all plans include provisions for adequate facilities, such as streets, water supply, sewerage, utilities, and open space, and conform to environmental and other public safety standards. § 40:55D-38.

[96] *See* N.J. STAT. ANN. § 40:55D-38 (West, WESTLAW through L.2001, c.100).

[97] *See* Lake Shore Estates, Inc. v. Denville Township Planning Bd., 605 A.2d 1106, 1111–12 (N.J. Super. Ct. App. Div. 1991).

[98] *Id.* at 1111. Where the facts are not important to the ultimate outcome of the case, they have been simplified for the sake of brevity.

[99] *Id.* at 1108.

[100] *Id.*

[101] *Lake Shore Estates, Inc.*, 605 A.2d at 1108.

[102] *Id.*

[103] *Id.*

[104] *Id.* at 1111.

[105] *Id.* at 1111–12.

[106] *Lake Shore Estates, Inc.*, 605 A.2d at 1111–12.

In contrast to New Jersey's relatively long-standing statutory minority rule, Virginia began developing its version of the minority rule by common law, only very recently codifying and expanding it by statute.[107] At first, Virginia common law adopted the late vesting majority rule.[108] Then, about thirty years ago, the courts began to turn away from the majority rule in favor of an earlier vesting rule.[109] In 1972, in *Board of Supervisors v. Cities Service Oil Co.* and *Board of Supervisors v. Medical Structures, Inc.*, the Virginia Supreme Court issued two companion cases holding that counties could not enforce new land use restrictions against developers who had received special use permits, filed site plans, and incurred substantial expenditures before the new restrictions became effective.[110]

In *Medical Structures*, the county granted a special use permit to develop a nursing home in a residential district.[111] A few years later, when the developer applied for site plan approval, the county denied his application on the grounds that a new zoning ordinance no longer permitted nursing homes in residential districts.[112] The developer appealed, claiming he had gained a vested right in his proposed use upon the issuance of the special use permit and his reliance on it.[113]

The court first observed that site plans had effectively displaced building permits as the crucial documents in the development process.[114] It pointed out that site plan applications require detailed information about the proposed project, including maps, surveys, and studies.[115] The court found that when a site plan was approved, a later request for building permit approval was granted almost as a matter of course.[116] Without any further explanation, the court went on to hold that where a developer has received a special use permit, filed and pursued approval of a site plan, and incurred substantial expen-

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[107] Prichard & Riegle, *supra* note 7, at 993, 999–1000.

[108] McClung v. Henrico County, 108 S.E.2d 513, 516 (Va. 1959); Prichard & Riegle, *supra* note 7, at 990–91.

[109] *See* Bd. of Supervisors v. Cities Service Oil Co., 193 S.E.2d 1, 3 (Va. 1972); Bd. of Supervisors v. Medical Structures, Inc., 192 S.E.2d 799, 801 (Va. 1972).

[110] *Cities Service Oil, Co.*, 193 S.E.2d at 3; *Medical Structures, Inc.*, 192 S.E.2d at 801.

[111] *Medical Structures, Inc.*, 192 S.E.2d at 800. The permit was actually issued to a predecessor in title, but the subsequent transfer of title is irrelevant to the disposition of the case. *Id.*

[112] *Id.* at 800–01.

[113] *Id.* at 801.

[114] *Id.*

[115] *Id.*

[116] *Medical Structures, Inc.*, 192 S.E.2d at 801.

ditures in good faith before the zoning changed, that developer gains a vested right to pursue the permitted land use.[117]

In the companion case, *Cities Service Oil Co.*, the same county had denied site plan approval for a developer with a special use permit for a gas station, on the grounds that gas stations were no longer permitted in the district.[118] There, the court reached the same conclusion as above, and quoted from *Medical Structures* in its decision.[119] Although neither decision articulates an explicit adoption of the minority rule, the outcome implies that the court rejected the majority rule building permit requirement in favor of the minority rule's earlier vesting scheme.[120]

Almost twenty years later, when presented with the opportunity to adopt an even more liberal vesting rule, the Virginia Supreme Court instead chose to draw the line clearly at permit approval.[121] In 1990, in *Notestein v. Board of Supervisors*, the Virginia Supreme Court refused to grant vested rights in the absence of a government approval.[122] The Notesteins had secured financing and began conducting engineering studies for a private landfill, based on verbal indications from the county that their project would be approved.[123] Meanwhile, the county adopted a new ordinance prohibiting landfills in that district.[124] Citing *Medical Structures* and *Cities Service Oil*, the court denied the Notesteins' claim for relief, distinguishing their case on the grounds that no significant governmental act had occurred.[125] The court disregarded the Notesteins' financial investment because their application had not yet been approved—in other words, they had not obtained a government approval upon which to rely.[126]

The Virginia Supreme court has continued to apply its approval-based minority rule, even to large-scale multi-stage development projects.[127] In 1994, in *Board of Supervisors v. Trollingwood Partnership*, the court refused to protect the final stage of a development project from

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[117] *Id.*

[118] *Cities Service Oil Co.*, 193 S.E.2d at 3.

[119] *Id.*

[120] *See Cities Service Oil, Co.*, 193 S.E.2d at 3; *Medical Structures, Inc.*, 192 S.E.2d at 801.

[121] *See* Notestein v. Bd. of Supervisors, 393 S.E.2d 205, 207–08 (Va. 1990); Rinaldi, *supra* note 7, at 81.

[122] *Notestein*, 393 S.E.2d at 207–08.

[123] *Id.* at 206.

[124] *Id.* at 207.

[125] *Id.* at 207–08.

[126] *See id.* at 208.

[127] *See* Bd. of Supervisors v. Trollingwood P'ship, 445 S.E.2d 151, 152–53 (Va. 1994).

a change in the zoning law, where plans for that stage had not yet been approved.[128] When the new zoning ordinance became effective, the developer had only submitted plans and received approval for the first two stages of his project.[129]

Finally, in 1998, Virginia amended its zoning ordinance enabling statute to codify and expand upon its common law minority rule.[130] The act now provides vested rights status when a landowner "(i) obtains . . . a significant affirmative governmental act. . . , (ii) relies in good faith on [the act], and (iii) incurs extensive obligations or substantial expenses . . . in reliance on [the act]."[131] Distinguishing itself from what otherwise sounds like a mere recitation of the majority rule, the statute goes on to list things that it deems, without limitation, to be "significant affirmative governmental act[s]."[132] The list includes approval of any of the following applications: 1) rezoning for a specific use or density; 2) special exception or use permit; 3) variance; 4) preliminary subdivision plat, site plan or development plan; and 5) final subdivision plat, site plan or development plan.[133] By granting vested rights protection on approval of applications submitted in advance of the building permit stage, the statute clearly falls into the minority rule camp.[134]

C. *The Early Vesting Rule*

A second minority rule or "early vesting rule" has emerged, which grants vesting even earlier than the traditional minority rule.[135] Under this rule, a developer can obtain vesting as of the date of application for a site-specific permit.[136] States following this rule, which

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[128] *Id.* at 152–53.

[129] *Id.* at 152.

[130] *See* VA. CODE ANN. § 15.2–2307 (Michie, WESTLAW through 2001 Spec. Sess. I, c.4.); Prichard & Riegle, *supra* note 7, at 999–1000.

[131] VA. CODE ANN. § 15.2–2307.

[132] *Id.*

[133] *Id.*

[134] *See id.*; Delaney, *supra* note 1, at 618–19; Overstreet & Kirchheim, *supra* note 1, at 1045, 1065.

[135] Overstreet & Kirchheim, *supra* note 1, at 1045–46. Commentators Gregory Overstreet and Diana Kirchheim dub this new rule the "Washington rule," but for this Note it will be referred to as the "early vesting rule." *Id.* at 1045.

[136] *Id.* at 1067. A growing minority of states are also enacting legislation authorizing "development agreements," which are essentially contractual agreements between a developer and a municipality that a developer will be allowed to proceed with a given development under the zoning ordinances in effect at the time the agreement is made. Delaney, *supra* note 1, at 619–20. Where this type of agreement is authorized by statute, and is

include Colorado, Massachusetts, Texas, and Washington, tend to impose it by statute, not common law.[137] The state of Washington, however, is somewhat unique in having developed this rule by common law, and later codifying it.[138]

The Washington Supreme Court first departed from the permit approval standard of the majority and minority rules over fifty years ago.[139] In 1954, in *State ex rel. Ogden v. City of Bellevue*, the court held when a landowner files a building permit application, he acquires a vested right to use his land in accordance with the current zoning law.[140] In 1958, in *Hull v. Hunt*, the Washington Supreme Court reconsidered the merits of the majority rule, but then reaffirmed its choice of earlier vesting. The court wrote:

> Notwithstanding the weight of authority, we prefer to have a date certain upon which the right vests to construct in accordance with the building permit. We prefer not to adopt a rule which forces the court to search through . . . the 'moves and countermoves of . . . parties' . . . to find that date upon which the substantial change of position is made which finally vests the right.[141]

The court dismissed the argument that such early vesting would result in speculation in building permits, finding that the substantial costs involved in preparing the applications would ensure that developer had a good faith intent to proceed.[142] The court also noted that because such permits expire after six months, applicants would lose their protection if they did not proceed with construction promptly.[143] Despite the popularity of the majority rule, the court clearly preferred

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signed relatively early in the development process, it can afford a developer considerably more protection than an early vesting rule. *Id.* at 619–21. However, where such agreements are not authorized by statute, they may not always be enforceable. *Id.* at 619–20.

[137] *See, e.g.*, COLO. REV. STAT. ANN. § 24–68–101to 106 (West, WESTLAW through 2001 1st Reg. Sess.); MASS. GEN. LAWS ch. 40A, § 6 (2000); TEX. LOC. GOV'T CODE ANN. § 245.002–006 (Vernon 1999); WASH. REV. CODE ANN. §§ 19.27.095, 58.17.033 (West, WESTLAW through 2000 2d Spec. Sess.).

[138] *See* WASH. REV. CODE ANN. §§ 19.27.095, 58.17.033 (West, WESTLAW through 2000 2d Spec. Sess.); Noble Manor Co. v. Pierce County, 943 P.2d 1378, 1381–82 (Wash. 1997).

[139] State *ex rel.* Ogden v. City of Bellevue, 275 P.2d 899, 902 (Wash. 1954); *see* Overstreet & Kirchheim, *supra* note 1, at 1074–75.

[140] *Id.* at 902.

[141] 331 P.2d 856, 859 (Wash. 1958).

[142] *Id.*

[143] *Id.*

a rule that granted vesting upon the filing of a permit application, not the time of its approval.[144]

In 1987, the Washington legislature codified and expanded *Ogden*'s early vesting rule.[145] The statutes grant vesting as of the time of submission of "valid and fully complete" application for a building permit or for a preliminary or short plat approval.[146] Local governments may determine what constitutes a complete application.[147] Once vested, a developer is protected from any changes in the applicable permit ordinance, zoning ordinance, or other land use control ordinances.[148]

Since the statutes were enacted, the Washington courts have continued to shape and expand Washington's early vesting rule through their interpretation of the statutes, all the while emphasizing their conscious choice to favor the developer.[149] Vested rights are now also granted upon application for conditional use permits and planned unit developments.[150] Three cases in particular demonstrate the courts' judicial refinement of the statutory rule: *Erickson & Associates v. McLerran*, *Noble Manor Co. v. Pierce County*, and *Westside Business Park v. Pierce County*.[151]

In the first case, the Washington Supreme Court identified a point in time that was too early, even in Washington, to grant vesting.[152] In 1994, in *Erickson & Associates*, the Washington Supreme Court held that the filing of a master use permit did not trigger vested rights protection.[153] After the developer submitted a master use permit application, but before it was approved, the city adopted an ordinance restricting development in environmentally sensitive areas.[154] First, the court observed that review of master use permits is a process

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[144] *See id.*

[145] WASH. REV. CODE ANN. §§ 19.27.095, 58.17.033 (West, WESTLAW through 2000 2d Spec. Sess.); *Noble Manor Co.*, 943 P.2d at 1382; Adams v. Thurston County, 855 P.2d 284, 287 (Wash. Ct. App. 1993); *Ogden*, 275 P.2d at 902; Overstreet & Kirchheim, *supra* note 1, at 1082–83.

[146] WASH. REV. CODE ANN. §§ 19.27.095(1), 58.17.033(1).

[147] *Id.* §§ 19.27.095(2), 58.17.033(2).

[148] *Id.* §§ 19.27.095(1), 58.17.033(1).

[149] *See* Erickson & Assoc., Inc. v. McLerran, 872 P.2d 1090, 1094 (Wash. 1994); *Adams*, 855 P.2d at 287; Overstreet & Kirchheim, *supra* note 1, at 1083–89.

[150] Ass'n of Rural Residents v. Kitsap County, 4 P.3d 115, 119 (Wash. 2000); Weyerhaeuser v. Pierce County, 976 P.2d 1279, 1286 (Wash. Ct. App. 1999).

[151] *Noble Manor Co.*, 943 P.2d at 1386–87; *Erickson & Assoc.*, 872 P.2d at 1096; Westside Bus. Park v. Pierce County, 5 P.3d 713, 717–18 (Wash. Ct. App. 2000).

[152] *See Erickson & Assoc.*, 872 P.2d at 1095–96.

[153] *Id.* at 1096–97.

[154] *Id.* at 1092.

of evolution.[155] The developer begins the process with a general idea, refining it over time in response to the city's feedback.[156] Second, the court explained that its vested rights rule does not require local governments to review all permit applications in light of the law in effect at the time of filing.[157] Finally, the court noted that granting vested rights too easily subverts the public interest.[158]

Taking these factors in consideration, the court found that master use permit applications were submitted so early in the development process that the developer would not have yet demonstrated the necessary commitment to complete the project.[159] That lack of commitment undermined the doctrine's goal of avoiding permit speculation.[160] In addition, at such an early stage, the developer's plans were not concrete enough to deserve protection from enforcement of new community needs.[161] Therefore, the court held that only when accompanied by a building permit application would a master use permit application possess the requisite commitment and detail to warrant vested rights protection.[162]

In its next important vesting case, the Washington Supreme Court began its more recent trend of expanding the early vesting rule through its interpretation of the statutes.[163] In 1997, in *Noble Manor Co.*, the court held that when developers vest under the statute, they gain the right to develop their land according to the use disclosed in their application.[164] Noble Manor Company ("Noble Manor") filed a short plat application for subdivision which stated its intention to build residential duplexes.[165] Before approving the application and subdividing the land, the county enacted a new zoning law which increased the minimum lot size for duplexes.[166] When Noble Manor tried to submit building permit applications, the county denied them on the grounds that the lot sizes were inadequate for duplexes.[167] On

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[155] *Id.*

[156] *Id.*

[157] *Erickson & Assoc.*, 872 P.2d at 1095.

[158] *Id.* at 1095–96.

[159] *Id.* at 1096.

[160] *See id.*

[161] *See id.* at 1095–96.

[162] *See Erickson & Assoc.*, 872 P.2d at 1096.

[163] *See Noble Manor Co.*, 943 P.2d at 1385–86.

[164] *Id.* at 1387.

[165] *Id.* at 1380. For the sake of brevity, I have simplified the facts in a way which does not materially affect the issue presented to the court or its discussion and decision.

[166] *Id.*

[167] *Id.*

appeal, Noble Manor claimed that when it submitted the short plat application it gained a vested right to develop the land, whereas the county claimed that Noble Manor had only vested in the right to subdivide the land.[168]

The court first reiterated that the purpose of the early vesting rule was to give developers certainty as to what zoning laws would be applied to their development projects, and to protect their investment.[169] Concluding that the right to subdivide would be meaningless without the right to develop, the court held that the legislature intended the statutory vested rights protection to include the right to develop, not just subdivide, land.[170] The court then found that applicants with vested rights only gained the right to develop uses disclosed in their applications.[171] The court based its decision on the statutory language which granted developers the right to have "their application" processed according to the existing zoning law, and the legislature's intent to protect developers' expectations, but to discourage speculation in permits.[172] The court rejected the county's argument that Noble Manor's use should not be protected at this stage because the county did not consider the intended use when reviewing the short plat application, instead granting Noble Manor the right to proceed on the grounds that its application stated its intention to develop residential duplexes.[173]

In 2000, in *Westside Business Park*, the Washington Court of Appeals broadened the *Noble Manor Co.* doctrine when it held that even verbal disclosure of use could be sufficient to secure vested rights protection.[174] After meeting with county officials to discuss their proposed project, the developers of Westside Business Park ("Westside") filed a short plat application which delineated two lots, but indicated no other improvements whatsoever.[175] The county subsequently amended its zoning regulations to add new storm drainage requirements.[176] When the developers asked the county for permission to proceed with their business park under the zoning laws in effect at the time they submitted their short plat application, the county de-

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[168] *Noble Manor Co.*, 943 P.2d at 1381.
[169] *Id.* at 1383.
[170] *Id.* at 1384.
[171] *Id.* at 1385.
[172] *Id.* at 1386.
[173] *Noble Manor Co.*, 943 P.2d at 1386.
[174] *Westside Bus. Park*, 5 P.3d at 717.
[175] *Id.* at 715.
[176] *Id.*

nied it, later pointing out to the court that the application did not specify the intended use, in accordance with *Noble Manor Co.*[177]

The court faulted the county for not requiring developers to disclose their intended use in their applications, which the county had statutory authority to do.[178] The court, therefore, found that Westside's developers had disclosed their intentions the only way they could—through discussions with county officials.[179] The court, therefore, held that under the circumstances the developers had disclosed their use in a manner sufficient to warrant vested rights protection.[180]

Washington is not alone in granting vested rights protection at the time of application filing.[181] Colorado recently revised its vested rights statute to change it from a minority rule statute to an early vesting statute.[182] Massachusetts grants broad vested rights protection as of the time of application for definitive subdivision plan approval, for a period of 8 years from the time of approval.[183] Texas enacted its current statute in 1987, granting vesting as of the time a permit application is filed.[184] Early vesting was not yet the absolute rule in Texas, however, because local governments were permitted to grant vested rights in stages for multi-permit projects.[185] Then, in 1995, the legislature amended the statute to state that all permits required for a project should be evaluated under the laws in effect at the time of application for the first permit.[186]

II. Criticism

Despite the apparent diversity between the three vested rights rules, commentators have not universally praised any one as providing an ideal solution to the vested rights dilemma.[187] The majority and

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[177] *Id.* at 715–16.

[178] *See id.* at 716–17.

[179] *Westside Bus. Park*, 5 P.3d at 717.

[180] *Id.*

[181] Overstreet & Kirchheim, *supra* note 1, at 1067–69.

[182] *See* Colo. Rev. Stat. Ann. § 24–68–101 to 106 (West, WESTLAW through 2001 1st Reg. Sess.); Levy, *supra* note 28, at 83–84.

[183] Mass. Gen. Laws ch. 40A, § 6 (2000). The zoning law grants this same protection upon application for preliminary subdivision approval, so long as the preliminary plan is followed by a definitive plan within seven months. *Id.*

[184] Tex. Loc. Gov't Code Ann. §§ 245.002–006 (Vernon 1999); Hartman, *supra* note 48, at 312. The statute was accidentally repealed in 1997, and then reinstated in 1999. Tex. Loc. Gov't Code Ann. § 245.002–006; Hartman, *supra* note 48, at 317.

[185] Hartman, *supra* note 48, at 313–15.

[186] Tex. Loc. Gov't Code Ann. § 245.002; Hartman, *supra* note 48, at 315–16.

[187] *See infra* notes 190–222 and accompanying text.

minority rules are criticized primarily for being unfair to developers, whereas the early-vesting rule is criticized for being unfair to the local government.[188] One of the few things the rules have in common is that they all make someone unhappy.[189]

Courts and academics alike have thoroughly criticized the majority rule for granting its protection in an untimely and uncertain manner.[190] It has been called "arbitrary," "inefficient,"[191] and the "handmaiden of . . . administrative anarchy."[192] The harshest criticism of the rule usually arises in the context of multi-phase, multi-building projects which are typically very expensive and lengthy undertakings; this setting seems to accentuate the rule's weaknesses.[193] Even the Maryland Court of Special Appeals, in a case decided on other grounds, acknowledged in dicta that their majority rule may not work well in that context.[194]

The majority rule was originally developed at a time when most construction consisted of single building projects on single parcels, therefore requiring only one permit—the building permit.[195] Although the rule in that context does provide a measure of certainty and objectivity, in modern land development such approval is issued very late in the planning process.[196] Developers of large projects are typically required to secure numerous local government approvals before the building permit, often requiring substantial expenditures on surveys, environmental studies, architectural drawings, and other

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[188] *See infra* notes 190–222 and accompanying text.

[189] *See infra* notes 190–222 and accompanying text.

[190] *See, e.g.*, W. Land Equities v. City of Logan, 617 P.2d 388, 395 (Utah 1980) ("In our view the [majority rule] tends to subject landowners to undue and even calamitous expense because of changing city councils or zoning boards or their dilatory action and to the unpredictable results of burdensome litigation. [It] permits an unlimited right to deny permits when ordinances are amended after application and preliminary work."); Delaney, *supra* note 76, at 384–85 ("application of the [majority] rule has led to a hodge-podge of ad-hoc, case-by-case decision making by the judiciary. . . . The situation is unsatisfactory for everyone involved, including developers and lending institutions as well as public agencies.").

[191] Cunningham & Kremer, *supra* note 1, at 710.

[192] Raley v. Cal. Tahoe Reg'l Planning Agency, 137 Cal. Rptr. 699, 711 (1977).

[193] *See* Delaney, *supra* note 1, 603–04; *see, e.g.*, *Raley*, 137 Cal. Rptr. at 702–03, 711–12.

[194] Rockshire Civic Ass'n, Inc. v. Mayor & Council of Rockville, 358 A.2d 570, 579 (Md. Ct. Spec. App. 1976).

[195] *See* Cunningham & Kremer, *supra* note 1, at 626–27; Delaney, *supra* note 1, at 603–04.

[196] *See W. Land Equities, Inc.*, 617 P.2d at 395; Delaney, *supra* note 1, at 608.

planning tools.[197] If a local government makes a significant change in the zoning law after developers have made this investment, but before they have secured a building permit, the developers stand to lose considerable sums of money.[198]

The rule is particularly onerous for developers of large-scale projects who prefer to proceed in phases, securing building permits and commencing construction on one stage before proceeding to the next.[199] If, for example, the local government amended the minimum lot size ordinance after issuing the building permits for the first phase, but before issuing the permits for other phases, the developer could be forced to alter his plans for the remaining phases to conform to the amended ordinance.[200] The majority rule could not protect such a developer on the basis of the issuance of just one building permit, because securing one permit and commencing construction on one unit out of many would not constitute substantial reliance.[201] Requiring such a developer to secure all the building permits and commence construction on the entire project at once, however, seems unreasonably burdensome.[202]

The minority rule for vested rights is popular among states with vesting statutes, but receives much of the same criticism directed at the majority rule.[203] The rule's advocates claim it provides the best balance between protecting the developer's investment and expectations while still allowing the local government enough flexibility to protect the public interest.[204] They argue that it allows the local government to enforce zoning changes up until the time of permit approval and then merely binds the government to its decision.[205]

Critics of the rule, however, claim that it suffers from many of the same flaws as the majority rule.[206] They point out that a developer must make a substantial investment in land acquisition, design and

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[197] *See* Bd. of Supervisors v. Medical Structures, Inc., 192 S.E.2d 799, 801 (Va. 1972); Cunningham & Kremer, *supra* note 1, at 710, Delaney, *supra* note 76, at 414.

[198] *See* Delaney & Kominers, *supra* note 77, at 241–48 (discussing the harshness of the majority rule in the context of various types of large-scale development projects).

[199] *See* Delaney, *supra* note 1, at 615.

[200] *See id.*

[201] *See id.*

[202] *See id.*

[203] *See id.* at 619; Overstreet & Kirchheim, *supra* note 1, at 1065–66; Prichard & Riegle, *supra* note 7, at 1001.

[204] Rinaldi, *supra* note 7, at 104.

[205] *Id.* at 94; *see* Prichard & Riegle, *supra* note 7, at 1009.

[206] Overstreet & Kirchheim, *supra* note 1, at 1065; *see* Prichard & Riegle, *supra* note 7, at 1001.

engineering work, application preparation, and response to community concerns, all before approval of a site specific plan.[207] In addition, knowing that their decisions will be rendered final by vested rights, local governments may require that such applications contain more detailed information, increasing the preparation costs for the developer.[208] This leaves the developer in the same vulnerable financial position if the local government decides to amend the ordinance before approving the application.[209]

Like the minority rule, the early vesting rule has strong supporters, but is also not without critics.[210] One pair of commentators touts the early vesting rule as "ahead of its time" in successfully finding the balance between landowners' desire for certainty and local governments' desire for flexibility.[211] They claim that the rule permits local governments to exercise their zoning powers in good faith, while prohibiting bad faith actions in response to community opposition to a proposed development.[212] The rule accomplishes this by preserving local governments' power to amend zoning ordinances as needed, but preventing them from enforcing those changes against pending permit applications.[213] The rule also preserves local governments' flexibility by leaving them free to impose moratoria on applications when the need arises to reevaluate their zoning schemes.[214] In addition, the rule protects the public interest because all permits granted under it will expire eventually, preventing developers who do not proceed promptly from vesting indefinitely.[215]

Another commentator, however, suggests that the balance is perhaps less than optimal for all parties when he notes that "developers have a sweet deal" under the early vesting rule.[216] Whereas the majority and minority rules are criticized for slighting developers, the early vesting rule is criticized for giving short shrift to the public interest.[217]

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[207] *See* Bisgaier & Marcuse, *supra* note 88, at 14–15; Overstreet & Kirchheim, *supra* note 1, at 1065.

[208] Prichard & Riegle, *supra* note 7, at 1004.

[209] *See* Overstreet & Kirchheim, *supra* note 1, at 1065.

[210] *Id.* at 1047, 1073 (praising fairness and certainty of early vesting rule); Wynne, *supra* note 8, at 939 (arguing that Washington's early vesting rule is no longer fair or certain).

[211] Overstreet & Kirchheim, *supra* note 1, at 1047.

[212] *See id.* at 1060, 1073.

[213] *See id.*

[214] *See id.* at 1060.

[215] *See id.*

[216] Wynne, *supra* note 8, at 932.

[217] *See id.* at 855, 921 (arguing that early vesting can come at expense of public interest); *supra* notes 190–209 and accompanying text.

One of the primary concerns is that it locks in the zoning laws for a particular development far earlier than is appropriate.[218]

Such early vesting can result in the building of large-scale projects under decade old ordinances.[219] One critic argues that this creates an unreasonable restraint on local governments' ability to keep zoning ordinances in step with changing community needs and new understanding of development impacts.[220] Ordinance amendments enacted shortly after an application is filed may not be targeted at the particular development at all, but may represent a sincere local government response to an important community issue.[221] Freezing the zoning law in that case bestows an unwarranted benefit on a developer who has not demonstrated any serious intention to proceed with the proposed projects.[222]

In summary, it is clear that despite the variety of vesting options on the table, none pleases all parties concerned.[223] Given the stakes involved, and the inherently conflicting nature of the interests concerned, some degree of dissatisfaction is probably unavoidable. Nevertheless, the next section considers whether an analysis of the scope of vesting, an element missing from much of the current debate, could contribute positively to the discourse.[224]

III. Scope of Rights Granted and a Spectrum Approach to Vesting

Legal opinions and academic articles have discussed certain aspects of the vested rights doctrine extensively, yet there has been very little discussion of the scope of rights granted when vesting is achieved.[225] The general assumption under all three versions of the

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[218] *See* Wynne, *supra* note 8, at 855, 921.

[219] Hartman, *supra* note 48, at 320; *see* Wynne, *supra* note 8, at 921.

[220] Wynne, *supra* note 8, at 855.

[221] *See* Heeter, *supra* note 2, at 94.

[222] *See* Wynne, *supra* note 8, at 916.

[223] *See supra* notes 190–222 and accompanying text.

[224] *See infra* notes 225–338 and accompanying text.

[225] Hanes & Minchew, *supra* note 28, at 402–03. *But cf.* Cunningham & Kremer, *supra* note 1, at 710–29 (recommending a new rule which incorporates a consideration of the scope of vesting). *See generally* Delaney, *supra* note 1 (focusing on topics such as timing of vesting, substantial reliance, and application of vesting to large-scale developments); Heeter, *supra* note 2 (focusing on topics such as legal theory of vesting doctrine and substantial reliance tests), Overstreet & Kirchheim, *supra* note 1 (focusing mainly on timing of vesting); Prichard & Riegle, *supra* note 7 (focusing on advantages and disadvantages of minority rule); Wynne, *supra* note 8 (focusing on criticism of early vesting rule).

vested rights doctrine is that the outcome will be all-or-nothing.[226] In other words, once developers gain vested rights, they are exempt from almost any change in the zoning law, but if they fail to gain vested rights, they receive no protection at all.[227] The fact that the vested rights debate operates under this assumption forces it to remain myopically focused on timing, the only remaining significant variable.[228] As a result, the three rules that have developed differ primarily on the choice of timing.[229] The problem with these rules and their all-or-nothing outcome is that they create a zero sum game between the developer and the public interest.[230] Because the rules predetermine that either the developer will receive full protection and the local government will be precluded from applying new zoning laws to the project, or the developer will receive no protection and the local government will be allowed to apply any new zoning laws to the project, there is no room for a compromise solution.[231]

Examining the relationship between disclosure of developers' intentions and the scope of protection granted is one way to alter the focus of the debate and provide some additional solutions to the vested rights problem.[232] When courts seek to determine whether it is an appropriate time to grant a developer vested rights protection, they implicitly, and sometimes explicitly, consider the degree to which the developer has disclosed his intentions to the local government.[233] If the degree of disclosure were tied to the scope of protection granted, courts and legislatures could grant vested rights along a spectrum, instead of being constrained by the all-or-nothing outcome.[234] Under such an analysis, developers who disclose virtually all the details of their projects might receive broad protection from almost any

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[226] *See infra* notes 240–267 and accompanying text.

[227] *See infra* notes 240–267 and accompanying text.

[228] *See* Delaney, *supra* note 1, at 619; Delaney & Vaias, *supra* note 4, at 39 app. I at 40–44; Overstreet & Kirchheim, *supra* note 1, at 1045, 1065, 1067.

[229] *See* Delaney, *supra* note 1, at 619; Delaney & Vaias, *supra* note 4, at 39 app. I at 40–44; Overstreet & Kirchheim, *supra* note 1, at 1045, 1065, 1067.

[230] *See* Cunningham & Kremer, *supra* note 1, at 707, 710 (criticizing the zero sum game result in the context of the majority rule).

[231] *See id.* at 710–11 (discussing this dilemma in the context of the majority rule).

[232] *See id.* at 723 (suggesting a "Rule of Irrevocable Commitment" which incorporates a consideration of the plans disclosed by the developer); Wynne, *supra* note 8, at 911–12 (suggesting that the scope of rights granted to a developer be limited to the use disclosed in the permit application).

[233] *See infra* notes 283–293 and accompanying text.

[234] *See infra* notes 295–338 and accompanying text.

zoning ordinance changes.[235] By comparison, developers who disclose very few details about their projects would be protected from changes in only a few zoning ordinances—those implicated by whatever disclosure they made.[236] Although such an analysis will not solve all the problems inherent in the vested rights doctrine, it would mitigate the impact of the present rules by creating a solution that resembles more of a compromise than a strict win and loss.[237] Creating space for a compromise solution might also encourage more mediation and less litigation.[238]

A. *Scope of Rights Granted and the All-or-Nothing-Result*

A review of the statutes and common law decisions discussed earlier illustrates the all-or-nothing scope of rights granted under the three vested rights rules.[239] The scope of vesting under the majority rule is clearly all-or-nothing.[240] As *Prince George's County v. Equitable Trust Co.*, demonstrated, when developers acquire vested rights under the majority rule, their entire project is protected from all subsequent zoning changes.[241] Courts grant this complete protection regardless of whether the project could be adapted to conform to the new ordinance.[242] The *Equitable Trust Co.* court granted the developer a vested right to proceed because he had already obtained a building permit and had begun construction of the building.[243] The court made no mention of whether the partially completed construction could be or should be adapted to conform to the new ordinance; once vesting was granted, all the zoning laws were effectively frozen in time for that development.[244]

Conversely, *Avco Community Developers v. South Coastal Regional Commission* demonstrated that when developers lose under the majority rule, their projects remain subject to any newly enacted zoning or-

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[235] *See infra* notes 300–303 and accompanying text.
[236] *See infra* notes 300–303 and accompanying text.
[237] *See infra* notes 327–334 and accompanying text.
[238] *See infra* notes 335–338 and accompanying text.
[239] *See infra* notes 240–267 and accompanying text.
[240] Cunningham & Kremer, *supra* note 1, at 710.
[241] 408 A.2d 737, 742–43 (Md. 1979); Cunningham & Kremer, *supra* note 1, at 710.
[242] Cunningham & Kremer, *supra* note 1, at 710; *see, e.g.*, *Equitable Trust Co.*, 408 A.2d at 742–43.
[243] *Equitable Trust Co.*, 408 A.2d at 742–43.
[244] *See id.*

dinance.[245] This remains true until the developer gains vested rights status, regardless of the fact that adapting the project to a new ordinance may negate hundreds of thousands of dollars spent on preliminary planning and site preparation.[246] The *Avco* court held that because the developer had not applied for any building permits, it could not grant the developer any exemption from subsequent zoning law changes.[247]

The scope of vesting is not quite as clear under the minority rule, although in general it is probably as broad as under the majority rule, once granted.[248] The New Jersey statute, for example, appears to grant all-or-nothing vesting, like the majority rule.[249] According to the statute, a developer with vested rights under a final site plan approval is protected from changes to the "zoning requirements applicable to the preliminary approval first granted."[250] As noted earlier, the New Jersey Supreme Court said that the purpose of the statute is to protect the developer from "changes in zoning law."[251] Implicitly, the reverse is also true, as illustrated by the outcome of *Lake Shore Estates, Inc. v. Denville Township Planning Board*—before a project receives local government approval, and thereby vests, the court will not protect it from any changes in the zoning law.[252]

Before its statute was enacted, Virginia's common law minority rule was somewhat unclear as to the scope of rights granted upon vesting.[253] In *Board of Supervisors of Fairfax County v. Medical Structures*, the Virginia Supreme Court granted the developer a "vested right to the *land use described in the use permit.*"[254] Because the issue in the case was whether the developer was protected from a new ordinance pro-

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[245] 553 P.2d 546, 551–54 (Cal. 1976); *see also* Prince George's County v. Sunrise Dev. Ltd. P'ship, 623 A.2d 1296, 1304–05 (Md. 1993) (development subject to rezoning from multifamily high-density residential to multifamily medium-density residential); *Equitable Trust Co.*, 408 A.2d at 742–43 (parcel subject to rezoning from commercial use to residential use).

[246] Cunningham & Kremer, *supra* note 1, at 710.

[247] *Avco Cmty. Developers, Inc.*, 553 P.2d at 551.

[248] *See, e.g.*, N.J. STAT. ANN. §§ 40:55D-49(a), 40:55D-52(a) (West, WESTLAW through L.2001, c.100); VA. CODE ANN. § 15.2–2307 (Michie, WESTLAW through 2001 Spec. Sess. I, c.4.).

[249] *See* N.J. STAT. ANN. §§ 40:55D-49(a), 40:55D-52(a) (West, WESTLAW through L.2001, c.100).

[250] *Id.* § 40:55D-52(a).

[251] Palatine I v. Planning Bd., 628 A.2d 321, 325 (N.J. 1993).

[252] *See* 605 A.2d 1106, 1111–12 (N.J. Super. Ct. App. Div. 1991).

[253] *See* Bd. of Supervisors v. Medical Structures, Inc., 192 S.E.2d 799, 801 (Va. 1972) (holding only addressed right to land use).

[254] *Id.* (emphasis added).

hibiting his proposed use, the ruling left open the question whether the developer gained protection from any subsequent change in the zoning law.[255] The Virginia courts were, however, clear that when vesting failed, developers received no protection.[256] In *Board of Supervisors v. Trollingwood Partnership*, the court denied any vested rights protection to a developer who had not received approval for the third phase of his project, despite the fact that he had received approval for the first two phases and had begun construction on those phases.[257] Virginia's statutory minority rule appears to grant a broad scope of vesting when it states that developers will be protected from "a subsequent amendment to a zoning ordinance."[258]

States following the early vesting rule generally allow broad vesting in virtually any land use control law.[259] Washington's statute, for example, protects developers from changes in the building permit ordinance or subdivision or short plat ordinance "and the zoning or other land use control ordinances in effect on the date of application."[260] Case law suggests that this may be limited by the uses disclosed to the local government.[261] In both *Noble Manor Co. v. Pierce County* and *Westside Business Park v. Pierce County*, Washington courts only protected the developers from changes in zoning laws which affected the use they disclosed, although the court was clearly very lenient about the manner of disclosure.[262] The authors of one article extensively examining Washington's rule conclude, however, that "any

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[255] *See id.*

[256] Bd. of Supervisors v. Trollingwood P'ship, 445 S.E.2d 151, 152–53 (Va. 1994) (third phase of project not protected from rezoning because developer had not obtained approval for that phase); Notestein v. Bd. of Supervisors, 393 S.E.2d 205, 207–08 (Va. 1990) (because owners had not received any permit approval, parcel was subject to rezoning which prohibited owner's proposed development).

[257] *See* 445 S.E.2d at 152–53.

[258] VA. CODE ANN. § 15.2-2307 (Michie, WESTLAW through 2001 Spec. Sess. I, c.4.)

[259] *See, e.g.*, COLO. REV. STAT. ANN. §§ 24-68-102.5 (West, WESTLAW through 2001 1st Reg. Sess.); MASS. GEN. LAWS ch. 40A, § 6 (2000); TEX. LOC. GOV'T CODE ANN. § 245.002 (Vernon 1999); WASH. REV. CODE ANN. §§ 19.27.095(1), 58.17.033(1) (West, WESTLAW through 2000 2d Spec. Sess.); Overstreet & Kirchheim, *supra* note 1, at 1086 (discussing Washington's early vesting rule).

[260] WASH. REV. CODE ANN. §§ 19.27.095(1), 58.17.033(1) (West, WESTLAW through 2000 2d Spec. Sess.).

[261] *See* Westside Bus. Park v. Pierce County, 5 P.3d 713, 717 (Wash. Ct. App. 2000) ("therefore it was vested with regard to that use"); Noble Manor Co. v. Pierce County, 943 P.2d 1378, 1386 (Wash. 1997) ("applicant should have the right to have the uses disclosed in their application considered . . . under the laws in existence at the time of the application").

[262] *Westside Bus. Park*, 5 P.3d at 717; *Noble Manor Co.*, 943 P.2d at 1386.

standard that exerts a restraining or directing influence over land use . . . is a land use control ordinance that statutorily vests."[263]

Other states following the early vesting rule also grant relatively broad vesting.[264] Texas' early vesting statute provides that in the case of a development which requires a series of permits, the developer gains vested rights in all the existing zoning regulations as of the date of the original application for the first permit.[265] Similarly, according to the Massachusetts zoning statute, when a developer files a definitive plan, "the land shown on such plan shall be governed by the applicable provisions of the zoning ordinance or by-law" in effect at the time of application.[266] Massachusetts, therefore, has perhaps the broadest scope of vesting, protecting the land itself from any changes in the zoning law, not just the proposed development project.[267]

Clearly then, none of the versions of the early vesting rule places significant limits on the scope of the protection granted.[268] The usual outcome is all-or-nothing, like the majority and minority rules.[269] This "all" is granted at such an early stage in the development process, however, that the possibility of "nothing" is not a significant factor for developers.[270]

The problem with an all-or-nothing outcome is that it creates a zero sum game: either the court grants the developer total protection and precludes the local government from enforcing any new zoning legislation against the project, or the developer receives no protection and the local government has free reign to subject the project to new restrictions.[271] When the developer receives the "all" outcome, it

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[263] Overstreet & Kirchheim, *supra* note 1, at 1086 (internal quotations omitted); *cf.* Wynne, *supra* note 8, at 873 (arguing that Washington's early vesting rule grants protection from at least all zoning ordinances and other ordinances requiring land use approvals, but suggesting that the law is unclear with regard to health and safety regulations and procedural land use requirements, and does not provide protection from impact fees).

[264] *See, e.g.*, MASS. GEN. LAWS ch. 40A, § 6 (2000); TEX. LOC. GOV'T CODE ANN. § 245.002 (Vernon 1999).

[265] TEX. LOC. GOV'T CODE ANN. § 245.002 (Vernon 1999).

[266] MASS. GEN. LAWS ch. 40A, § 6 (2000).

[267] *See id.* § 6.

[268] *See supra* notes 259–267 and accompanying text.

[269] *See* Overstreet & Kirchheim, *supra* note 1, at 1073; Wynne, *supra* note 8, at 856–57, 916.

[270] *See* Delaney & Kominers, *supra* note 77, at 232; Overstreet & Kirchheim, *supra* note 1, at 1073; Wynne, *supra* note 8, at 916.

[271] *See* Cunningham & Kremer, *supra* note 1, at 707, 710; Wynne, *supra* note 8, at 855–56.

comes at the community's expense.[272] This is particularly true when a project is in an early enough stage that the developer could reasonably bring it into compliance with the new zoning restriction.[273] The outcome seems particularly unfair under the early vesting rule, where a lengthy project could receive full vesting protection in zoning laws which are nearly a decade old by project completion.[274]

When developers receive the "nothing" outcome, particularly in a majority rule state, they may lose all their investment.[275] Under the majority rule, local governments can pull the rug out from under developers who do not have building permits, even going so far as rezoning the site to prohibit a developer's intended use.[276] The all-or-nothing outcome under the majority and minority rule place local governments in a powerful bargaining position, because developers are desperate to get their permits issued so that they can vest in the current law.[277] Further, the possibility of a "nothing" result encourages developers to present large proposals as a single, massive project, instead of a phased, or staged, development, so that they can vest in the entire project at the same time.[278]

Because the three rules generally award the same scope of rights upon vesting—complete protection from changes in the zoning law—the distinguishing feature between them is their choice of timing: earlier or later in the developer process.[279] Statute or common law precedent, therefore, binds courts to render a decision according to one of the three timing rules.[280] Nevertheless, courts and legislatures seem to implicitly recognize that a relationship exists between a de-

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[272] *See* Cunningham & Kremer, *supra* note 1, at 710, 714; Wynne, *supra* note 8, at 855–56.

[273] *See* Cunningham & Kremer, *supra* note 1, at 710, 726–27; Hanes & Minchew, *supra* note 28, at 402–03.

[274] *See* Hartman, *supra* note 48, at 320; Wynne, *supra* note 8, at 921.

[275] Raley v. Cal. Tahoe Reg'l Planning Agency, 137 Cal. Rptr. 699, 711–12 (1977) (under the majority rule "many entrepreneurs run out of money"); W. Land Equities v. City of Logan, 617 P.2d 388, 395 (Utah 1980) (majority rule can "subject landowners to undue and even calamitous expense"); Cunningham & Kremer, *supra* note 1, at 710; Overstreet & Kirchheim, *supra* note 1, at 1063.

[276] *See, e.g., Avco Cmty. Developers, Inc.*, 553 P.2d at 551.

[277] Cunningham & Kremer, *supra* note 1, at 710–11; *see* Overstreet & Kirchheim, *supra* note 1, at 1064.

[278] Cunningham & Kremer, *supra* note 1, at 711; *see* Delaney, *supra* note 1, at 615.

[279] *See* Delaney, *supra* note 1, at 619; Delaney & Vaias, *supra* note 4, at 39 app. I at 40–44; Overstreet & Kirchheim, *supra* note 1, at 1045, 1065, 1067.

[280] *See, e.g., Avco Cmty. Developers, Inc.*, 553 P.2d at 551; *Lake Shore Estates, Inc.*, 605 A.2d at 1111.

veloper's disclosure and their ability to award vesting rights.[281] Courts frequently discuss how much information the developer has disclosed about the project as a means of justifying their decision either to grant or deny vested rights protection.[282]

In two of the majority rule cases discussed earlier, the courts linked the developers' disclosure of their plans to the appropriateness of granting vested rights protection.[283] The California Supreme Court made this point explicitly in *Avco* when it held that it could not grant vested rights status to the development because the developer had not submitted detailed plans to the county and therefore had not fully disclosed his building plans to the county.[284] In *Prince George's County v. Sunrise Development Ltd. Partnership*, the Maryland Court of Appeals, while outlining the developer's work on the project to date, stated that "structural, construction, or detail drawings of the high-rise building have never been prepared."[285] This pointed observation, together with the court's holding that vested rights could not be granted short of the commencement of construction to a degree that was apparent to the general public, imply that this court was also looking for full disclosure before granting vested rights protection.[286] By the time building construction was apparent to the public, the developer necessarily would have fully disclosed his plans to the local government.[287]

Similarly, the Virginia Supreme Court, in applying the minority rule, has implied that disclosure is somehow linked to the appropriateness of vesting.[288] The *Medical Structures, Inc.* court, in explaining its decision to grant vested right protection, emphasized the amount of information available to the local government by virtue of the site plan application, which the developer had submitted in addition to the special use permit.[289] Conversely, the *Trollingwood Partnership* court, in explaining its decision to deny vested rights protection,

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[281] *See infra* notes 283–293 and accompanying text.

[282] *See infra* notes 283–290 and accompanying text.

[283] *See Avco Cmty. Developers, Inc.*, 553 P.2d at 552; *Sunrise Dev. Ltd. P'ship*, 623 A.2d at 1298, 1304.

[284] *Avco Cmty. Developers, Inc.*, 553 P.2d at 552.

[285] 623 A.2d at 1298.

[286] *See id.* at 1298, 1304.

[287] *See id.*

[288] *See Medical Structures, Inc.*, 192 S.E.2d at 801.

[289] *Id.*

noted the lack of information available to the local government about the details of the project's final phase.[290]

Even Washington's early vesting statute recognizes a relationship between disclosure and vesting because it allows local governments some control over the amount of disclosure required at the time protection is granted.[291] Under the statute, vested rights are granted at the time of filing a complete permit application, and local governments are given some power to determine what constitutes a complete application.[292] Therefore, they can to some extent determine how much information must be disclosed before a developer can secure vested rights.[293] Although courts and legislatures clearly recognize a relationship between disclosure and the scope of rights vested, none have yet considered how that relationship might be used to develop a more flexible approach to vested rights.[294]

B. *A Spectrum Approach to Vesting*

Developing this link between disclosure and the granting of vested rights protection could potentially give the vested rights doctrine a new dimension of flexibility, by shifting the focus from a pure timing analysis.[295] A few commentators, recommending improvements to the vested rights doctrine, have suggested ways that courts and legislatures could adjust the scope of vested rights protection granted based on considerations of disclosure.[296] For example, one pair of authors suggest a new vesting rule based on the financial commitment a developer has made to a project, but which considers several factors, including the plans disclosed by the developer, in its consideration of

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[290] *Trollingwood P'ship*, 445 S.E.2d at 152–53 (noting that developer had not submitted required detailed plans for third phase).

[291] *See* WASH. REV. CODE ANN. §§ 19.27.095(1)–(2), 58.17.033(1)–(2) (West, WESTLAW through 2000 2d Spec. Sess.).

[292] *Id.*

[293] *See id.*

[294] *See supra* notes 283–293 and accompanying text.

[295] *See* Cunningham & Kremer, *supra* note 1, at 723; Wynne, *supra* note 8, at 911–12.

[296] *See* Cunningham & Kremer, *supra* note 1, at 723 (suggesting a "Rule of Irrevocable Commitment" which incorporates a consideration of the plans disclosed by the developer); Hanes & Minchew, *supra* note 28, at 402–03 (suggesting that developers should vest in laws which govern the project as outlined in their subdivision or site plan, but not necessarily in any change in the law whatsoever); Levy, *supra* note 28, at 85 (suggesting that Colorado counties devise permit processes which grant vesting upon submission of applications that satisfy the counties' need for information and flexibility); Wynne, *supra* note 8, at 911–12 (suggesting that the scope of right granted to a developer be limited to the use disclosed in the permit application).

the scope of protection to be granted.[297] Another pair of authors suggest that developers should at least vest in the zoning laws necessary to protect their investment, which would include the laws governing the details of the project disclosed in a permit application.[298] A third commentator, writing in the context of subdivision applications, suggests that the scope of rights granted to a developer be limited to the use disclosed in the application.[299]

These suggestions could be developed into a coherent analysis which grants vested rights along a spectrum.[300] Courts and legislatures would expand or contract the scope of protection granted according to the amount of information developers had disclosed about their projects.[301] At one extreme, a developer who had disclosed full details and plans for his project would receive protection from virtually any changes in the zoning law.[302] At the other extreme, a developer who had disclosed few details, perhaps only the proposed use, would only be protected from changes in a few zoning ordinances—only those which implicated his choice of use.[303]

At the two extremes, the spectrum would resemble the traditional "all" and "nothing" choice of outcomes, but the flexibility would come in the presence of a middle ground: the more developers disclose about their projects, the more zoning laws in which they would vest.[304] Or, in other words, the more local governments know about what projects are going to look like, the less they can enforce new zoning laws against them.[305] For states preferring not to leave this decision up to the courts on a case by case basis, the legislature could impose this spectrum statutorily, by defining the scope of protection

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[297] Cunningham & Kremer, *supra* note 1, at 715, 722–23.

[298] Hanes & Minchew, *supra* note 28, at 402–03.

[299] Wynne, *supra* note 8, at 911–12.

[300] *See* Cunningham & Kremer, *supra* note 1, at 723; Hanes & Minchew, *supra* note 28, at 402–03; Levy, *supra* note 28, at 85; Wynne, *supra* note 8, at 911–12; *see infra* notes 301–325 and accompanying text.

[301] *See infra* notes 302–318 and accompanying text.

[302] *See* Cunningham & Kremer, *supra* note 1, at 722–23; Hanes & Minchew, *supra* note 28, at 402–03; Wynne, *supra* note 8, at 893–94, 897.

[303] *See* Cunningham & Kremer, *supra* note 1, at 722–23; Hanes & Minchew, *supra* note 28, at 402–03; Wynne, *supra* note 8, at 893–94, 897.

[304] *See* Cunningham & Kremer, *supra* note 1, at 722–23; Hanes & Minchew, *supra* note 28, at 402–03; Wynne, *supra* note 8, at 893–94, 897.

[305] *See* Cunningham & Kremer, *supra* note 1, at 722–23; Delaney, *supra* note 1, at 622; Hanes & Minchew, *supra* note 28, at 402–03; Wynne, *supra* note 8, at 893–94, 897.

granted to each level of permit application or approval in the development process.[306]

For example, a majority rule case like *Sunrise Development Ltd. Partnership* would have a better outcome for the developer under a spectrum vesting analysis.[307] In that case, the developer had submitted and received approval for a site plan which disclosed his intention to build high-density multi-family units.[308] Although the developer had also received a building permit, the court held that the amount of construction completed was not substantial enough at the time the land was downzoned to medium-density multi-family units.[309] As a result, the developer received no protection.[310] Under a spectrum vesting analysis, however, because the developer had disclosed and received approval for his intended use, that project would be protected from the new restriction to medium-density housing.[311] The developer would not, however, receive blanket protection from changes in the zoning law, because he had not disclosed the details of the buildings.[312] Therefore, until such disclosure, the local government would be able to enforce changes in the zoning laws applicable to the construction of high-density multi-family units.[313]

Similarly, an early vesting rule case like *Westside Business Park* would have a better outcome for the local government under a spectrum vesting analysis.[314] In that case, the developer had submitted a short plat application merely outlining two lots, and had orally dis-

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[306] *See* Wynne, *supra* note 8, at 893–94, 897, 911–12. For example, presently Washington's statute appears to protect developers with vested rights from virtually any change in the zoning law which relates to the use disclosed in the developer's application. *See* WASH. REV. CODE ANN. §§ 19.27.095(1), 58.17.033(1) (West, WESTLAW through 2000 2d Spec. Sess.). This is a much broader protection than would be granted under a spectrum vesting approach, where the protection would be limited to changes in the zoning laws which are actually implicated by details disclosed in the application. For example, under a spectrum vesting approach, a developer who had submitted a subdivision application only showing lot lines would have a protected right to subdivide the land, but would not vest in the building height ordinance, since the application did not disclose the intended building height.

[307] 623 A.2d at 1296–1305.

[308] *Id.* at 1297–98.

[309] *Id.* at 1304–05.

[310] *Id.*

[311] *See* Cunningham & Kremer, *supra* note 1, at 723–24; Wynne, *supra* note 8, at 893–94, 897.

[312] *Sunrise Dev. Ltd. P'ship*, 623 A.2d at 1298; *see* Cunningham & Kremer, *supra* note 1, at 723–24.

[313] *See* Cunningham & Kremer, *supra* note 1, at 723–24; Hanes & Minchew, *supra* note 28, at 403; Wynne, *supra* note 8, at 893–94, 897.

[314] *Westside Bus. Park*, 5 P.3d at 713–19.

closed to local government officials his intention to build a business park.[315] Because the developer had orally disclosed his intended use, the court awarded the developer full vested rights protection, including protection from a recent change in the county's storm drainage requirements.[316] Under a spectrum vesting analysis, however, because the developer had not yet disclosed the details of his building plans and site layout, which would take into consideration storm drainage requirements, he would not be protected from a change in those requirements.[317] The developer would not necessarily, however, be left with the "nothing" outcome; if the court was willing to count the oral disclosure of use as legally sufficient, the developer would still be protected from any change in the zoning law which might prohibit use of the land as a business park.[318]

As these two examples demonstrate, a spectrum analysis gives the developer some protection, the local government some flexibility, and avoids the harsh all-or-nothing outcome of the three current vested rights rules.[319] This type of analysis satisfies arguments made on both sides of the current timing-focused vested rights debate.[320] On the one hand, the more the local governments know about what developers intend to do, the less justification they have for attempting to enforce new rules against their projects.[321] In addition, the more details developers disclose about their proposed projects, the more time and resources they have necessarily risked on the outcome, justifying a commensurate level of protection in return.[322] On the other hand, completely staying local governments' hand in the early stages of development projects, when developers may have done nothing more than draw lot lines on parcels, is unfair to the public interest.[323] Not only do local governments have no idea what the developers intend to build, but the developers may also have committed very little capital to the project and may themselves have only a vague idea of the future

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[315] *Id.* at 715.

[316] *Id.* at 715–17.

[317] *See* Cunningham & Kremer, *supra* note 1, at 723–24; Hanes & Minchew, *supra* note 28, at 403; Wynne, *supra* note 8, at 893–94, 897.

[318] *See* Cunningham & Kremer, *supra* note 1, at 723–24; Hanes & Minchew, *supra* note 28, at 403; Wynne, *supra* note 8, at 893–94, 897.

[319] *See supra* notes 307–318 and accompanying text.

[320] *See infra* notes 321–325 and accompanying text.

[321] *See* Delaney, *supra* note 1, at 622.

[322] *See* Prichard & Riegle, *supra* note 7, at 1001.

[323] Cunningham & Kremer, *supra* note 1, at 723; Hartman, *supra* note 48, at 320; Heeter, *supra* note 2, at 94; Wynne, *supra* note 8, at 855.

shape of their projects.[324] In that case, not allowing the community, via the local government, to enforce changes in the zoning law seems unfair.[325]

Certainly some of the criticisms of the current three rules can also be levied against a spectrum vesting analysis.[326] Unless statutes tie the scope of protection to particular permit applications or approvals, this type of analysis could leave developers in a somewhat uncertain position vis-à-vis which laws they have vested in and which they have not.[327] In common law jurisdictions, some developers and local governments would still end up asking courts to determine their respective rights.[328] Courts would have to determine what details were disclosed, what details were not, and what forms of disclosure would be legally significant.[329]

If vesting were tied to disclosure, developers would want to disclose more details earlier, increasing their up front development cost for preparing plans and designs.[330] In addition, such an analysis could arguably still lead to permit speculation.[331] A developer could conceivably file a very preliminary application which disclosed the intended use, say retail shopping center, without giving any other details of the building design or lot layout or investing any further in the project.[332] Under spectrum vesting, such a developer could nevertheless protect the land from, for example, a future downzoning of the land to residential only use.[333] Finally, this analysis does not resolve the debate over whether vested rights should be granted upon filing of a

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[324] *See* Wynne, *supra* note 8, at 916.

[325] *See id.*

[326] *See infra* notes 327–334 and accompanying text.

[327] *See* Cunningham & Kremer, *supra* note 1, at 723–24; *cf.* Delaney, *supra* note 76, at 384–85 (attributes of majority rule create uncertainty).

[328] *Cf.* Delaney, *supra* note 76, at 384–85 (uncertain application of common law majority rule leads to litigation).

[329] *Cf. id.* (under majority rule, courts have to determine what constitutes substantial construction or substantial reliance).

[330] *Cf.* Prichard & Riegle, *supra* note 7, at 1004 (if local governments required more disclosure in early applications, developers would incur more up front costs).

[331] *Cf.* Delaney & Kominers, *supra* note 77, at 232 (granting vested rights at time of permit application leads to permit speculation); Heeter, *supra* note 2, at 90 (granting vested rights at time of permit application leads to permit speculation); Wynne, *supra* note 8, at 920 (Washington's early vesting rule encourages permit speculation).

[332] *Cf.* Delaney & Kominers, *supra* note 77, at 232; Heeter, *supra* note 2, at 90; Wynne, *supra* note 8, at 920.

[333] *See supra* notes 301–303 and accompanying text.

permit application or upon its approval, because the measure of disclosure would be the same at both points in time.[334]

Nevertheless, a vested rights analysis which offers some middle ground, while not a perfect solution, would encourage negotiation over litigation.[335] The all-or-nothing outcomes of the current rules push local governments and developers into litigation in a desperate fight not to end up the losing party.[336] Under spectrum vesting, while neither party would win everything, neither party would lose everything.[337] Because even a litigated outcome would necessarily involve compromise, the parties would be encouraged to find this point of compromise on their own.[338]

CONCLUSION

As real estate development projects continue to increase in scope and expense, and as zoning regulations become more complex and sensitive to environmental awareness, the vested rights debate will remain a contentious issue in land use law. The fact that the three dominant vested rights rules in use today generally assume that vested rights protection requires an all-or-nothing result, forces the debate to revolve almost solely around timing: should vested rights protection be granted now or later? This outcome affords no compromise; either developers gets all the protection from new regulations they want and local governments get no flexibility to adapt projects to evolving public interests, or local governments get all the flexibility they want, and developers risk losing their projects altogether.

Courts already implicitly recognize that there is a relationship between developers' disclosure of their project designs and the scope of protection warranted. One way to add more flexibility to the current vesting scheme is to expand or contract the scope of protection granted based on the breadth of developers' disclosure. This would mitigate the impact of the all-or-nothing outcome by allowing courts and/or legislatures to award vested rights along a spectrum: more

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[334] *See* Overstreet & Kirchheim, *supra* note 1, at 1065–66.

[335] *See* ROBERT COULSON, HOW TO STAY OUT OF COURT 7, 19–21 (1984); ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 56–59, 70–75 (Bruce Patton ed., 1981).

[336] *See* Delaney & Kominers, *supra* note 77, at 241–48; Overstreet & Kirchheim, *supra* note 1, at 1064.

[337] *See supra* notes 307–318 and accompanying text.

[338] *See* COULSON, *supra* note 335, at 7, 19–21; FISHER & URY, *supra* note 335, at 56–59, 70–75.

protection for developers and less flexibility for local governments when developers have disclosed more details of their projects, and less protection for developers and more flexibility for local governments where developers have disclosed less details. Although this approach would certainly not solve all the problems inherent in the tension between landowners and communities over development rights, it would provide more evenhanded outcomes, and would encourage compromise over litigation.

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