



# A SELECTED READING

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## The Vested Rights Doctrine

One of the main goals of zoning laws is to eliminate impermissible uses from specific areas of the municipality. However, impermissible uses existing at the time a zoning ordinance or amendment becomes effective are generally “grandfathered” into the zone. That is, they are permitted to continue to exist until the use is abandoned. These nonconforming uses create one of the most difficult problems for the creation and enforcement of a zoning ordinance. The Alabama Supreme Court has stated that a property owner generally has a right to continue a nonconforming use until the right is lost through abandonment. *Green v. Copeland*, 239 So.2d 770 (Ala. 1970).

Generally speaking, though, the nonconforming use must have existed prior to the effective date of the zoning ordinance in order to be grandfathered in. It is not unusual, though, to have an ordinance adopted to prevent the introduction of a previously allowed use, either due to public complaints or because the use, while permitted, no longer fits within the character of the zone and the ordinance has not yet been amended to reflect the changing nature of the zone. Sometimes, the attempted amendment takes effect after construction of the use has begun. Can the municipality force the property owner to cease construction, possibly losing a sizable investment, on the argument that the use has not started?

In some cases, the answer is no. A doctrine of law called the “vested rights doctrine” has arisen in many states to solve the problems created by this situation. Although our research has shown that Alabama courts have not yet adopted the vested rights doctrine, they have resolved cases using a similar analysis. This article examines the vested rights doctrine and discusses these Alabama cases.

### What is the Vested Rights Doctrine?

In *Omnivest v. Stewartstown Borough*, 641 A.2d 648 (Pa. Commw. Ct. 1994), the court stated that:

“Vested rights ‘is a judicial construct designed to provide individual relief in zoning cases involving egregious statutory or bureaucratic inequities. In part it involves the equitable concept of detrimental reliance.’”

The court noted that the vested rights doctrine is applicable in a number of land use situations, such as “variance by estoppel” cases, where a property owner claims reliance on a municipality’s long-standing acquiescence in a nonconforming use; to determine if a landowner can continue development of property; or to permit reliance on an improperly issued building permit.

Although different jurisdictions use different criteria to determine if a property owner has acquired a vested right, the Commonwealth Court of Pennsylvania has one of the best summations of many of these elements. In *Ferguson Township v. Zoning Board of Ferguson Township*, 475 A.2d 910 (Pa. Commw. Ct. 1984), the Commonwealth Court enunciated a clear, five-part test. The factors of this test are:

1. good faith;
2. due diligence in attempting to comply with the law;
3. the expenditure of substantial, unrecoverable funds;
4. the expiration without appeal of the period during which an appeal could have been taken from the issuance of a permit; and
5. insufficiency of evidence to prove that individual property rights or the public health, safety or welfare have been adversely affected by the use of a permit.

Note, though; not all states require that a permit has to have been issued. Additionally, not all states examine all these factors to determine if a vest right exists.

In *Hawkinson v. Itasca*, 231 N.W.2d 279 (1975), the Supreme Court of Minnesota noted that, “Under what circumstances

a property owner may complete a project which is in progress at the time his use of the property becomes nonconforming is a difficult question. Its resolution is ordinarily governed by the degree of hardship which would be imposed if the construction or expansion were halted before completion.”

The vested rights doctrine is, then, a way for courts to permit municipal regulation through zoning while recognizing that a property owner may acquire a constitutional or equitable right to complete a nonconforming project. At what point does this right arise? Let’s look at some of the elements mentioned above for an answer.

### **The Elements: Substantial Investment and Prejudice to the Property Owner**

In the *Hawkinson* case, the plaintiff owned some 32 acres on the shore of a lake that he had purchased by 1966. He operated a recreational business, which included rental property. In 1969, the municipality zoned the property as residential. At the time the ordinance was adopted, the plaintiff had started work on a utility building, a hotel and an expansion of the plaintiff’s home to include rental property. The trial court found that the character of the property had become almost entirely residential, and that the uses of surrounding property were consistent with this use. The court upheld the ordinance, refusing to allow the plaintiff to expand what was now a nonconforming use.

The Supreme Court of Minnesota stated that in order to become a nonconforming use, there generally must be some actions taken to use the property for that purpose. In other words, the intent of the property owner alone is not enough. There must be some overt action taken toward using the property. Thus, “substantial expenditures, work or change of position relative to the erection of a building or establishment of a business, in addition to the purchase of land, may entitle one to protection. . . .”

The court found that the plaintiff’s expenditures were insufficient to overturn the ordinance. The plaintiff testified that he had spent over \$108,000 in developing the area and that he planned to spend up to \$275,000. The court, though, noted this amount included expenditures he had made in establishing his business to the level it was operating at prior to the ordinance and he could continue to operate his business at that level. The court noted that for the plaintiff to prevail, he had to show that he was substantially prejudiced by the ordinance. Many of the preparations he had performed were consistent with use of the property for residential purposes as well as for his business. The mere fact that his intent to further develop his property commercially was frustrated by the ordinance did not justify allowing him to continue.

This case demonstrates two universal elements in establishing a vested right. They are 1) the existence of substantial preparations to use the property for the intended purpose, and 2) the extent of the prejudice to the property owner.

### **The Elements: Good Faith**

The requirement of good faith means that the property owner cannot act for the sole purpose of acquiring a nonconforming use before a contemplated zoning change becomes effective. In *Donadio v. Cunningham*, 277 A.2d 375 (N.J. 1971), the court held that a property owner did not act in good faith where after a court invalidated a zoning ordinance, the owner started construction before the appeals period could run. The court stated that a municipality should be afforded time to take an appeal or amend its zoning ordinance and that the property owner should have anticipated that the municipality would do one or the other. A property owner should not be able to thwart public interest in proper zoning by winning what the court called an “unseemly race.”

And, in *Stowe v. Burke*, 122 S.E.2d 374 (NC 1961), the court held that a property owner lacked good faith when he began construction of an apartment building even though he knew of community opposition to the project and that the municipality was proposing to change its zoning ordinance. The court held that in spite of this knowledge, the property owner began construction at an extraordinary pace simply to establish a right to continue if the rezoning took place. This fact revealed that the owner did not act in good faith.

The good faith of the municipality is also relevant. In *Leda Lanes Realty v. Nashua*, 112 N.H. 244, 293 A.2d 320 (N.H. 1972), the court noted that a municipality cannot use an unduly prolonged procedure in considering a zoning ordinance to impose a selective or general moratorium on local land development.

### **The Elements: Permit or Governmental Action**

Many jurisdictions require that a landowner act pursuant to a permit or in reliance on some governmental action in order to claim the protection of the vested rights doctrine. See, *Whaler’s Village Club v. California Coastal Comm.*, 173 Cal. App.3d 240, 220 Cal. Rptr. 2 (Cal. App.2 Dist. 1985). Even where a permit has been issued, however, the owner must still begin developing the project in reliance on the permit in order to be protected. *Reno v. Nevada First Thrift*, 100 Nev. 483, 686 P.2d 231 (Nev. 1984).

Some courts have found that the issuance of a permit is absolute. In the *Ferguson* case cited above, a Pennsylvania property owner sold livestock related to his poultry business to rent the buildings for commercial use. He was informed by

a municipal representative that the use in question complied with his zoning classification and was told that he did not need to obtain any permits. Relying on this, the property owner began making improvements to the buildings and sold off the remaining property from his poultry operation. He began preparing to open a furniture store. His property was then rezoned to a residential use and the township issued a stop-work order prohibiting him from opening on the grounds that a permit had not been acquired. The issue was whether the misinformation the property owner had received eliminated his need to obtain a permit and gave him a vested right to continue.

The court refused to deviate from its conclusion that a permit is necessary before rights vest, noting that a person who relies on assurances by employees of the municipality does so at his or her own risk. The court said that while the owner might be able to use these misrepresentations to mitigate penalties enforced against him, they could not be used to prevent the municipality from enforcing its ordinance. The court held that the law requires a permit for rights to vest and since no permit had been issued, the owner could not rely on the doctrine to allow him to open the furniture store.

The Alabama Court of Civil Appeals issued a similar ruling in *Cobb v. New Hope*, 682 So.2d 1375 (1996). In *Cobb*, New Hope filed a complaint alleging that the property owner was in violation of the zoning ordinance because he had three families living together in two structures (a garage and a single-story house with a built-in apartment) that were zoned for single-family residential use. One of the property owner's arguments was that the city should be estopped from enforcing its zoning ordinance because he had been issued building permits to construct the buildings.

The court was not persuaded, stating that while a building permit allows a property owner to build, the use of the structures is governed by the zoning ordinance. The court stated that "a city cannot be estopped from denying an illegally issued building permit – that is, one in violation of local statutes." Although it is unclear whether the Alabama Supreme Court feels that a valid building permit is necessary for an action to become arbitrary and capricious (which, it seems, is the Alabama standard for the existence of a "vested right"), this case makes it clear that a property owner cannot rely on an invalid permit to establish this fact.

The governmental act the property owner relies on does not have to be the issuance of a permit, though. In *Rocky Mount v. Southside Investors, Inc.*, 254 Va. 130, 487 S.E.2d 855 (1997), Virginia Supreme Court, the court pointed out that, "A landowner who asserts a vested property right to a particular zoning classification must identify a significant governmental act permitting the landowner the particular use of its property that otherwise would not be allowed ... The requirement of a significant governmental act creates a bright line test that enables the landowner to determine the point at which it has acquired the vested right."

In *Rocky Mount*, the significant government act the owners relied on was the approval of a previous development plan. At the time of the original development, the city had rezoned the property to allow the owners to construct townhouses on the property. A subsequent amendment eliminated this use from the zone. The property owners argued that the rezoning of their property amounted to approval and, because they had built their sewer lines and street extensions to support more townhouses, their rights to continue construction had vested.

The Virginia Supreme Court disagreed, stating that the rezoning could not be construed as permission to continue development to the extent sought by the property owners. The fact that they had built street extensions and sewer lines to support further development was irrelevant to the court because they had been approved to service the existing townhouses, regardless of potential development in the future.

Can a municipality refuse to issue a permit for a use that is allowed under an existing ordinance simply because it is considering changing the ordinance to prohibit that use? There is authority to support this view.

In *Navin v. Exeter*, 339 A.2d 12 (N.H. 1975), the owner received a variance to construct 10 apartment buildings. The variance stipulated that any future construction would require further variances. A proposed zoning change a few years later would have required more land area per dwelling unit. At the time the proposal was made, the owner applied for a variance under the existing ordinance, which the board of adjustment granted only after the ordinance became effective. The board argued that because the request was made before the ordinance went into effect, it had the right to issue the variance under the old ordinance. The court disagreed, stating that:

"It would be 'utterly illogical to hold that . . . any person could by merely filing an application compel the municipality to issue a permit which would allow him to establish a use which he either knew or should have known would be forbidden by the proposed ordinance, and by so doing nullify the entire work of the municipality in endeavoring to carry out the purposes for which the zoning law was enacted.'"

In fact, New Hampshire state law prohibited building officials from issuing permits while a proposed ordinance on the use in question was being considered. The court found no difference between the issuance of a permit and the variance in this case and held that it should not have been issued.

At least one other case, though, has stated that the date of filing an application determines which laws should be used to

consider whether a permit should be issued. In *Noble Manor v. Pierce County*, 943 P.2d 1378 (Wash. 1997), a Washington housing developer submitted a subdivision application to develop three multi-family residential units. Before this was approved, the county passed an interim ordinance that increased the minimum lot size for these units. Two of his proposed units did not satisfy the requirements of the interim ordinance. The Washington Supreme Court held that the vested rights doctrine entitled the developer to have his proposal considered under the law as it existed on the date of the application, regardless of subsequent changes in the law. The court said that the purpose of this rule is to allow developers to determine the law applicable to their proposed development to promote certainty and to keep them from wasting money due to a newly enacted law. Note, though, that this case construed a state law, RCW 58.17.033. A different result might have occurred if there had not been a statute on the subject.

Alabama, it seems, would follow the rule that a municipality may change its ordinance even after a property owner has taken steps in reliance on a present zoning classification. For instance, in *Ex parte Jacksonville*, 693 So.2d 465 (Ala. 1996), the city adopted an ordinance rezoning some 200 acres from R-2, which permitted multi-family uses, to R-1, which restricted use to single-family residences. The area rezoned included a 6.2-acre tract intended for use as two separate apartment complexes. The property owner contended that the decision to rezone was arbitrary and capricious and that the city should be estopped from rezoning because he was told at the time he purchased the property that apartment complexes were a permitted use.

The Supreme Court disagreed with these arguments. First, the court stated that the decision to rezone was not arbitrary and capricious, as demonstrated by the fact that the area in question was a developing area of single-family residences. In fact, no property in the area in question was presently being used for an R-2 purpose. The property owner's expert admitted this during cross-examination.

Second, the court held that the property owner could not rely on assurances by municipal employees that the property was properly zoned for the use he had in mind. Equitable estoppel did not prevent the municipality from rezoning the property even after these assurances were made.

Essentially, the owner was arguing that the property was zoned for the use he intended at the time of purchase and "citizens should be able to rely on current zoning laws." He stated that his argument was supported by the fact that the City had performed no studies justifying the change. The court said that nothing requires a council to conduct studies or give its reasons before undertaking a rezoning. Therefore, the rezoning was proper.

A similar action, though, was held arbitrary and capricious in *Martin v. O'Rear*, 423 So.2d 829 (Ala. 1982). In *Martin*, the property owner bought land in an R-4 district for the purpose of constructing a seven unit condominium. A citizens group then petitioned to have approximately 24 blocks, including this property, rezoned to allow only single-family residences, prohibiting this type structure.

Evidence revealed that there were a number of other structures in the area rezoned that were being used as apartments and condominiums. These buildings became nonconforming uses in the new zoning classification. This indicated that the new zoning classification was inconsistent with the land use pattern of the area. The court also noted that an attempt to show that the proposed unit would create a traffic or parking problem was not based on any studies or expert testimony. In fact, the chairman of the planning commission testified that in his opinion the condominium would have no effect on the public health, safety or welfare. Thus, the court found this rezoning improper.

Regardless of whether a property owner can rely on assurances from city officials to continue building if that advice proves incorrect, however, damages may result from giving such advice. In *Mobile v. Sullivan*, 667 So.2d 122 (Ala. Civ. App. 1995), the property owners bought their land to operate a used car lot based on assurances by municipal employees that the property was zoned for this use. The Alabama Court of Civil Appeals refused to protect the municipality and its employees from liability. It is important to note, though, that *Sullivan* involved a misinterpretation of an existing zoning ordinance, not a rezoning.

Even where courts have allowed a property owner to build based on a valid permit being issued under a subsequently changed zoning ordinance, the vested right to construct a nonconforming use is controlled by the permit. For instance, in *Todem Homes, Inc. v. Board of Zoning Appeals*, 74 A.D.2d 908, 425 N.Y.S.2d 852 (N.Y.A.D. 1980), the court held that even though the property owner had a vested right to complete a hotel pursuant to a valid permit, he could not expand the development or build different structures.

### **Protection of the Public**

Where an ordinance change is made to protect the public, a property owner may not acquire vested rights. In at least one case, a property owner was not allowed to rely on a building permit issued pursuant to a prior ordinance – even where he had done site preparation work – because the new ordinance was enacted to address safety and construction concerns. *Smith v. Arkadelphia*, 336 Ark. 42, 984 S.W.2d 392 (Ark. 1999).

## **Change in Enforcement**

A similar issue that should be examined here is whether a municipality may change its enforcement or interpretation of its ordinances. In *Foley v. McLeod*, 709 So.2d 471 (Ala. 1998), the property owner operated a mobile home park in an area that was subsequently zoned for single-family usage. The city allowed the park to continue operating as a nonconforming use. The property owner sought to replace six mobile homes in the park with new units. The city argued that this would merely extend the life of the nonconforming use and should not be allowed. The court agreed, stating that the zoning ordinance clearly disfavored extending the life of nonconforming uses. The replacement of units contravened that policy. Thus, the city was permitted to prohibit the replacement of the mobile homes.

That did not end the inquiry, though, because the city had allowed other units to be replaced. The property owner argued that the municipality was estopped from enforcement of this change in policy against his park. On this point, the court agreed, stating because numerous units had been replaced over the years without objection, “it would be unjust and unfair at this point to allow the city to force the (owners) to remove the six mobile homes.”

The court refused to permanently bar the city from enforcing its ordinance, though. The court said that although the action in this case marked a departure from a previous action, in the future the property owner was on notice that replacement units would not be allowed. This case seems to indicate that where a municipality intends to change its procedure or interpretation, notice to those affected by this change is necessary before acting. Once notice is given, though, the ordinance or new interpretation may be enforced.

## **Conclusion**

General public policy favors the elimination of nonconforming uses. However, constitutional and equitable rights do not permit a municipality to order the immediate cessation of nonconforming uses. This is true, sometimes, even where the use isn't in existence on the date the zoning ordinance goes into effect. The vested rights doctrine is one method the courts have created to determine when a property owner must be allowed to continue to operate, even when his or her actions are prohibited by subsequent municipal regulation.

Although Alabama courts do not recognize the vested rights doctrine, it seems that our courts come to similar conclusions, generally through the use of equitable estoppel. For this reason, it helps to see how courts in other jurisdictions have used this theory to determine when a nonconforming right vests.

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