

**From:** [Admin](#)  
**To:** [\\_CityCouncilListPublic](#); [Alvarez, Eddie](#); [Stapp, Mark](#); [MacDonald, Dianna](#); [Fleming, Victoria](#); [Rogers, Chris](#); [Okrepkie, Jeff](#); [Rogers, Natalie](#)  
**Subject:** [EXTERNAL] Santa Rose Municipal Code Amendment - Rent Adjustments prior to January 6, 2023  
**Date:** Friday, June 16, 2023 1:00:44 PM  
**Attachments:** [SR\\_COUNCIL\\_CORR\\_FR\\_SR\\_PK\\_Os-WMA.PDF](#)

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Hello,

Please see the attached correspondence.

Thank you.

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IN REPLY REFER TO:

June 15, 2023

6418

***VIA ELECTRONIC MAIL***

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Natalie Rogers, Mayor [nrogers@srcity.org](mailto:nrogers@srcity.org)

City Hall Annex  
90 Santa Rosa Avenue  
Santa Rosa, CA 95404

**RE: RENT NOTICES EFFECTIVE BEFORE JANUARY 6, 2023 MAY NOT BE  
RETROACTIVELY CRIMINALIZED. "AFTER-THE-FACT" (EX POST  
FACTO) LAWS ARE UNCONSTITUTIONAL.**

Dear City Council, Staff and Sue Gallagher, City Attorney:

This office represents mobilehome park owners in the City of Santa Rosa.

Some owners noticed rent adjustments that took effect January 1, 2023, prior to the effective date of a new amendment to the Santa Rosa Municipal Code. That amendment took effect January 6, 2023 and is enforced with criminal punishment.<sup>1</sup> The City cannot nullify previously allowed rent increases. That is, rent increases based on 100% of change in the Consumer Price Index were allowed up to the amendment's effective date (January 6).<sup>2</sup> Actions lawful when taken cannot be retroactively confiscated by subsequent action. One may not

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<sup>1</sup> Reference is made to a letter received from the city attorney dated February 24, 2023, where it is stated: "The City has been clear that the limitations of the Ordinance apply only to rental increases that begin after January 6, 2023, the effective date of the ordinance." at page 2. And at page 1: "If, after January 6, 2023, any park owner imposes a rental increase above that allowed under Ordinance No. ORD 2022-17, that violation will be a misdemeanor and the owner may be subject to code enforcement proceedings and penalties. . . "

<sup>2</sup> Reliance by mobilehome park owners and management on the pre-existing law included forbearance from asserting other allowable rights and entitlements, such as applying for discretionary rent adjustments.

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criminalize previously lawful actions *post hoc*.<sup>3</sup> Enclosed with this letter please find:

- Appendix “1” (REPORTER'S TRANSCRIPT, November 9, 2022, “EXCERPTS RE: REGULAR SESSION RE: PROPOSED AMENDMENTS TO SRCC CH 6-66,” 4:55 - 5:04); Appendix “2” (“SURVEY OF CASES: CONDEMNING RETROACTIVE CRIMINALIZATION OF PREVIOUS LAWFUL CONDUCT”). Appendix “1” is a written transcription of the City Council hearing of November 9, 2022 from 4 hours 55 minutes to 5 hours 4 minutes. During this time, the mayor acknowledged proper rent notices allowed under existing protective ceilings. The mayor questioned whether these notices should be invalidated. The city attorney stated there was “not much” that could be done. *Infra*.

- Appendix “2” is a survey of illustrative legal precedents demonstrating that vested rights cannot be taken away. Ex post facto protections lie at the core of constitutional rights. Ex post facto protections are among the most cherished and sacred of individual freedoms. Santa Rosa may not retroactively outlaw the actions of the owners who followed the law that was existing and enforced when the notices were served. Because of the reliance by all owners on the existing law, and the need for truthful demonstrable reasons for more restrictive action, new changes without articulated justification as required by *Birkenfeld v. Berkeley* and its progeny cannot be sustained.

A rent adjustment is vested by service. A new law cannot deprive owners of such vested rights. At the November 9, 2022 meeting of the City Council, an excerpt of which is enclosed as Appendix “1,” the mayor and city attorney’s office expressly questioned if notices which took effect before the effective date of the amendment would remain valid (at Appendix “1,” p.3, line 20, *et seq.*):

Mayor:	“Okay. Maybe I'm just looking at it the wrong way my question was if they get the rent increase in before in that 6 day window then does it apply retroactively to their rent or are they still covered moving forward just like some of the parks if you have a higher rent when you come in you still have that 5% or that 4% whatever it ends up being at that goes on in perpetuity. Does that make sense? Cause it compounds at that point.”
City attorney:	“Ah, yes. Now I am understanding what your--what you're--what you're saying is that would then be the baseline for that year and would be in

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<sup>3</sup> This rule has been a steadfast pillar of our democratic republic from its inception. In *Beazell v. Ohio*, 269 U.S. 167 (1925), the Supreme Court defined the scope of the constitutional ex post facto through the following restrictions: “[I]t is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done, . . . is prohibited as ex post facto.” In the *Federalist* No. 84, Alexander Hamilton said: “[T]he creation of crimes after the commission of the fact, or . . . punishment for things which, when they were done, were breaches of no law, . . . have been, in all ages, the favorite and most formidable instruments of tyranny.” *The Federalist* No. 84, at 511.

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effect for that year because the change went into effect before the ordinance went into effect. That's ah--I think we would have to take a little bit of a look at that but again we could certainly come back before the second read or at the meeting of the second read to confirm how that would operate."

Mayor: "Okay"

City attorney: "There's not a lot that we can do about that -- if in fact it takes place the way that you're suggesting there's not a lot that we can do about unless it was done by an emergency ordinance"

Constitutional protections against ex post facto laws trump the proposed action. No conceivable harm arises from complying with a rent law capping increases at inflation, in a context of 2.6% increases for the last 20 years. There is no conceivable reason for emergency action. And no findings will suffice, even with performing "all that research first before I committed to being able to make those findings" (in respect to emergency findings). Appendix, p. 5, line 11-12.<sup>4</sup> The proposed ordinance amendments are not supported by any imminent urgency, immediate hardship, or other justification. The circumstances surrounding consideration of the amendments reflect an ongoing status quo as it has existed for years. There is no basis on which to justify a nullification of previous rent increases charged or noticed before January 6, 2023. The proposed action is invalid on its face and as applied; the City cannot cancel out rent notices served in accordance with state law (Civil Code §798.30) and applicable rent ceilings. The owners are all entitled to all allowed CPI increases, for the full annual period as provided.

### DISCUSSION

Various rental adjustments were served and effective before January 6. The "last act"<sup>5</sup> necessary for the vesting of the right to the increase was the service of the notice, pursuant to Civil Code §798.30. The ordinance became effective January 6, 2023. The previously served and vested rent increase notices per state law and the Ordinance are effective immediately when

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<sup>4</sup> At page 5, line 4: "City attorney: Umm I believe that there would be grounds but again I don't know the details I understand there's 7 parks I don't know what the number of people that are affected umm what the difference ahh would be between the ordinance and the noticed increase. Again I would want to confirm that once the rent increase was in place it would take effect and be in effect for the full year. And then be the base for the next year's increase. I would want to do all that research first before I committed to being able to make those findings but it certainly possible that those findings could be made."

<sup>5</sup> *Immediate or fixed right to present or future enjoyment and one that does not depend on an event that is uncertain. . . . A right complete and consummated, and of such character that it cannot be divested without the consent of the person to whom it belongs, and fixed or established, and no longer open to controversy.* State ex rel. Milligan v. Ritter's Estate, Ind.App., 46 N.E.2d 736, 743."  
*Blue Chip Properties v. Permanent Rent Control Bd.* (1985) 170 Cal.App.3d 648, 658 [216 Cal.Rptr. 492]. (Italics added.)

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served, only to await invoicing and billing. The constitution protects against *ex post facto* laws that criminalize previously lawful behavior. This is why your city attorney stated, rather euphemistically, that “there's not a lot that we can do about that ....” Appendix “1”, p. 4, line 13.

If a rent adjustment is vested by the “last act” prior to the inception of a new law, the new law cannot be applied to upset or deprive the citizen of the vested rights entitled by the “last act.”

*Thus, the critical question for determining retroactivity usually is whether the last act or event necessary to trigger application of the statute occurred before or after the statute's effective date.* (Travenol Laboratories, Inc. v. U.S. (Fed. Cir. 1997) 118 F.3d 749, 752; McAndrews v. Fleet Bank of Massachusetts, N.A. (1st Cir. 1993) 989 F.2d 13, 16.)

In re E.J. (2010) 47 Cal.4th 1258, 1273-1274 [104 Cal.Rptr.3d 165, 223 P.3d 31].)<sup>6</sup>

This has been the law of the United States for hundreds of years. Consider these additional citations.<sup>7</sup> The support for this unassailable proposition of law is legion.<sup>8</sup> And

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<sup>6</sup> Please see Appendix “2” (listing application of the vested rights estoppel doctrine that apply to virtually all states, nationwide). This survey shall substitute for a discussion of all the listed cases brought together for your consideration.

<sup>7</sup> “Since the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent. . . . *The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact.* Indeed, at common law a contrary rule applied to statutes that merely removed a burden on private rights by repealing a penal provision (whether criminal or civil); such repeals were understood to preclude punishment for acts antedating the repeal. See, e. g., United States v. Chambers, 291 U.S. 217, 223-224, 78 L. Ed. 763, 54 S. Ct. 434 (1934); Gulf, C. & S. F. R. Co. v. Dennis, 224 U.S. 503, 506, 56 L. Ed. 860, 32 S. Ct. 542 (1912); [\*\*\*\*53] United States v. Tynen, 78 U.S. 88, 11 Wall. 88, 93-95, 20 L. Ed. 153 (1871); Norris v. Crocker, 54 U.S. 429, 13 HOW 429, 440-441, 14 L. Ed. 210 (1852); Maryland ex rel. Washington Cty. v. Baltimore & Ohio R. Co., 44 U.S. 534, 3 HOW 534, 552, 11 L. Ed. 714 (1845); Yeaton v. United States, 9 U.S. 281, 5 Cranch 281, 284, 3 L. Ed. 101 (1809). But see 1 U.S.C. § 109 (repealing common-law rule). ¶ *The largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance.*” *Landgraf v. U.S. Film Prods.* (1994) 511 U.S. 244, 270-271 [114 S.Ct. 1483, 1499-1500, 128 L.Ed.2d 229, 255-256].) (Emphasis added)

<sup>8</sup> “See, e. g., United States v. Security Industrial Bank, 459 U.S. 70, 79-82, 74 L. Ed. 2d 235, 103 S. Ct. 407 (1982); Claridge Apartments Co. v. Commissioner, 323 U.S. 141, 164, 89 L. Ed. 139, 65 S. Ct. 172 (1944); United States v. St. Louis, S. F. & T. R. Co., 270 U.S. 1, 3, 70 L. Ed. 435, 460 S. Ct. 182 (1926); Holt v. Henley, 232 U.S. 637, 639, 58 L. Ed. 767, 34 S. Ct. 458 (1914); Union Pacific R. Co. v. Laramie Stock Yards Co., 231 U.S. at 199; Twenty per Cent. Cases, 87 U.S. 179, 20 Wall. 179, 187, 22 L. Ed. 339 (1874); Sohn v. Waterson, 84 U.S. 596, 17 Wall. 596, 599, 21 L. Ed. 737 (1873); Carroll v. Lessee of Carroll, 57 U.S. 275, 16 HOW 275, 14 L. Ed. 936 (1854). While the great majority of our decisions relying upon the antiretroactivity presumption have involved intervening statutes burdening private parties, we have applied the presumption in cases involving new monetary obligations that

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likewise, as illustrated by a recently published Fourth District decision, an attempt to modify existing governmental decisions in contravention of vested rights is subject to equitable estoppel. *HPT IHG-2 Properties Trust v. City of Anaheim* (4th Dist., Div. 3, 2015) 243 Cal.App.4th 188.

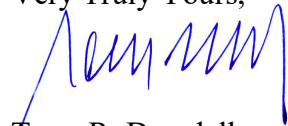
In conclusion, it is crystal clear that the City may not take away the park owner's vested rights exercised before the effective date of the amendment. *See, e. g., Miller v. Florida*, 482 U.S. 423, 430 (1987) ("*A law is retrospective if it 'changes the legal consequences of acts completed before its effective date'*");

The determination of whether a statute's application in a particular situation is prospective or retroactive depends upon whether the conduct that allegedly triggers the statute's application occurs **before or after the law's effective date.** *Travenol Labs., Inc. v. United States* (Fed.Cir. 1997) 118 F.3d 749, 752.

The city cannot cancel proper rent increase notices as provided under the ordinance and MRL. On behalf of Santa Rosa park owners, I urge a thorough re-evaluation of this misguided proposal.

Thank you for your attention to the foregoing. If you have any questions or comments, please feel free to contact the undersigned.

Very Truly Yours,



Terry R. Dowdall  
For  
DOWDALL LAW OFFICES, A.P.C.

SR\_MMXXIII-16-Jun-V\_7.wpd

ENCL:       Appendix "1"  
              Appendix "2"

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fell only on the government. *See United States v. Magnolia Petroleum Co.*, 276 U.S. 160, 72 L. Ed. 509, 48 S. Ct. 236 (1928); *White v. United States*, 191 U.S. 545, 48 L. Ed. 295, 24 S. Ct. 171 (1903)."  
*Landgraf v. Usi Film Prods.* (1994) 511 U.S. 244, 271, n.25 [114 S.Ct. 1483, 1500, 128 L.Ed.2d 229, 256], n 25.

## **APPENDIX “1”**

City Council of the City of Santa Rosa, California

# **TRANSCRIPT**

November 9, 2022

EXCERPTS RE:

REGULAR SESSION RE: PROPOSED AMENDMENTS TO SRCC CH 6-66

4:55 - 5:04

**PUBLIC HEARING -  
AMENDMENT TO CHAPTER 6-66 OF THE SANTA ROSA CITY  
CODE - INTRODUCING A MOBILEHOME RENT CONTROL  
ORDINANCE**

[https://santa-rosa.granicus.com/player/clip/2834?view\\_id=2&meta\\_id=340937&redirect=true&h=dae37a27052e8e5c3f0a42f297ca1b10](https://santa-rosa.granicus.com/player/clip/2834?view_id=2&meta_id=340937&redirect=true&h=dae37a27052e8e5c3f0a42f297ca1b10)

(4 hours. 55 minutes)

Mayor: Part of this--part of the timing of this was precipitated by the anticipated increase in January. If the Council takes action tonight and changes how does that impact the letters that have already gone out notifying residents of an increase.

Megan

Basinger: So if council was to act on a recommendation tonight there would be a second reading of the ordinance next week and then it would be 31 days from that date. So the ordinance would take effect approximately January 6. Ah, mobile home parks-- there are 16 that are subject to rent control. There are a variety of dates where rent increases take place because they are allowed to increase the rents once per 12 months. So there are 7 parks that have rent increases that would take effect in January and there's a 90 day noticing requirement pursuant to state law. So if it was effective January 6 it would impact March increases and those further out.

Mayor: So walk me through that again. So there are you said 6 that the rent increase is anticipated to go in in January--

Megan: 7.

Mayor: Okay. So if this ordinance has the 31 days for enactment and goes into effect January 6 do those 7 that have the planned increase in January is that still does that increase still happen?



1 Megan: I believe they would need to be re-noticed by the Parkowners  
2 I don't know and I've deferred to the city attorney's office if  
3 they've already been noticed could an owner reduce the rent  
4 without having to provide 90 days notice?

5 Mayor: where's the 90-- where's the 90 day requirement coming from?

6 Megan: the 90 day requirement is in state mobile home residency law

7 Sue Gallagher

8 City attorney: I can try to weigh-in and that would be yes it would seem to me  
9 that the park owner would be able to issue a modified notice if  
10 the number is going down--umm.... More important or implied  
11 by scenario is between under our ordinance if what they had  
12 proposed was a higher rate than allowed under our ordinance  
13 then that would be permissible but I have not done that research  
14 so I would have to do that before the ordinance came back for  
15 final read.

16 Mayor: And I think the more important or implied question there is if  
17 there's a 6 day gap between January 1st and when the ordinance  
18 would go into effect do the 7 rent increases do they all start  
19 January 1 and we admit that or do they start later in January and  
20 we would capture that in the ordinance?

21 City attorney: They would start--they would start as of the effective date of  
22 the ordinance so that a park owner would have that higher  
23 potentially higher rent for those 6 days in January before the

ordinance went into effect

Mayor: Okay.

Jeff Berk: If I may I assume the purpose of the notice the rationale for it is to give the residents an opportunity to know their rent is going to be changing and maybe that's what the city attorney was just saying but I would think that if council wants to decrease the amount of a rent that should be able to go into effect on January 6th. city attorney or Megan thots on that it seems like the purpose of the notice is to protect the residents right

Mayor: My question is are there parks that slide in and get the rent increase in place before the change if there is a change and does that then impact 7 parks as opposed to the rest who it sounds like would be covered by the ordinance that's my question

City attorney: All of the parks would be subject to the ordinance and the ordinance terms and the ordinance's limitations would go into effect on January 6th so up until that time the noticed higher rent would be in effect but again it would only be in effect for that 6 days. Again I haven't spun that through in any detailed research but that's my take.

Mayor: Okay. maybe I'm just looking at it the wrong way my question was if they get the rent increase in before in that 6 day window then does it apply retroactively to their rent or are they still covered moving forward just like some of the parks if you have

1 a higher rent when you come in you still have that 5% or that  
2 4% whatever it ends up being at that goes on in perpetuity.  
3 Does that make sense? Cause it compounds at that point.

4 City attorney: Ah, yes. Now I am understanding what your--what you're--what  
5 you're saying is that would then be the baseline for that year  
6 and would be in effect for that year because the change went  
7 into effect before the ordinance went into effect. That's ah--I  
8 think we would have to take a little bit of a look at that but  
9 again we could certainly come back before the second read or  
10 at the meeting of the second read to confirm how that would  
11 operate.

12 Mayor: Okay

13 City attorney: There's not a lot that we can do about that -- if in fact it takes  
14 place the way that you're suggesting there's not a lot that we  
15 can do about unless it was done by an emergency ordinance

16 Mayor: While that was going to be my next question. If the council so  
17 chose, if we come back for a second reading and we find that  
18 there is going to be that impact for those 7--ah, 7 homes --  
19 excuse me, parks-- could the council add an emergency clause  
20 into the 2nd reading to have it take effect before the January 6th  
21 date

22 City attorney: If the Council makes the appropriate findings for an emergency  
23 ordinance then you can make it an emergency ordinance as of

1 the second read

2 Mayor: Okay. and in your opinion as the city attorney would there be  
3 grounds for that

4 City attorney: Umm I believe that there would be grounds but again I don't  
5 know the details I understand there's 7 parks I don't know what  
6 the number of people that are affected umm what the difference  
7 ahh would be between the ordinance and the noticed increase.  
8 Again I would want to confirm that once the rent increase was  
9 in place it would it would take effect and be in effect for the full  
10 year. And then be the base for the next year's increase. I would  
11 want to do all that research first before I committed to being  
12 able to make those findings but it certainly possible that those  
13 findings could be made.

14 Mayor: Okay.

15 Councilmember

16 McDonald: Just a question on that. Is there a way that you could do a  
17 moratorium for no rent increases from January 1st January 6th  
18 until the ordinance was passed in in place.

19 City attorney: Yes. And we've talked about doing that at the staff level,  
20 ummm, I was thinking when it was brought up earlier today was  
21 what the council could do would be to set the change at zero  
22 rather than going through the findings that are necessary for a  
23 moratorium, which are different than what is needed for an

1 urgency ordinance, umm, so I have to bring back— ah — a more  
2 thorough you know statement as to what findings you would  
3 have to make if you want to do a moratorium— a moratorium  
4 —ahhh— that would go into effect immediately so that there  
5 would be no rental increases as of January.

6 McDonald: And then just as a quick follow-up if there was a way for us to  
7 do the ordinance but it start at a specific date so say January 1.  
8 Is there a way to do that for second reading or it simply has to  
9 do with that 30 days notice that Parkowners —I'm trying to  
10 make it so that it's a cleaner process not only for Parkowners  
11 but also for residents so that whatever we put in place isn't  
12 based upon our meeting dates but based upon a calendar year.

13 City attorney: Right. If it's a regular ordinance umm adopted by the Council  
14 by law is not effective for 30 days ummm the only way to have  
15 it effective sooner is to do the urgency ordinance. Ah.. And  
16 again I'll look into doing it is a moratorium simply a  
17 moratorium on rental increases for the period of time until the  
18 date the effective date of the ordinance. Again a set of findings  
19 have to be made to be able to do that.

20 (5 hours, 4 minutes)

## SURVEY OF CASES: CONDEMNING RETROACTIVE CRIMINALIZATION OF PREVIOUS LAWFUL CONDUCT

### Alabama

*Grayson v. City of Birmingham*, 173 So. 2d 67, 70 (Ala. 1963) (discussing "vested right in the property" and determining that whether there is a vested right depends on the existence of equitable fairness to the landowner and general public).

### Alaska

*Anchorage v. Sandberg*, 861 P.2d 554, 561 (Alaska 1993) (holding that municipality's activities did not constitute a taking of a speculative developer's "vested rights").

### Arizona

*Town of Paradise Valley v. Gulf Leisure Corp.*, 557 P.2d 532, 540 (Ariz. Ct. App. 1976) (finding that refusal to extend special use permit and building permits by the town was "arbitrary and capricious," and that "no actual physical constriction need be commenced but that substantial monetary expenditures, the invocation of considerable contractual commitments, and extensive preparatory proceedings will give rise to a protectible property right").

*Neal v. City of Kingman*, 810 P.2d 572, 578 (Ariz. Ct. App. 1990) (finding vested right arises where permit has been legitimately issued and permittee has substantially relied upon permit and incurred considerable expense, or permittee in good faith substantially has commenced construction).

*Fidelity Nat'l Title Ins. Co. v. Pima County*, 831 P.2d 426, 428 (Ariz. Ct. App. 1992) ("The general rule is that any substantial change of position, expenditures, or incurrence of obligations under a building permit entitles the permittee to complete the construction and use the premises for the purpose authorized irrespective of subsequent zoning or changes in zoning.") (quoting *Deer Park Civic Ass'n v. City of Chicago*, 106 N.E.2d 823, 825 (Ill. App. Ct. 1952)).

### Arkansas

*Tankersley Bros. Indus. v. City of Fayetteville*, 296 S.W.2d 412, 415 (Ark. 1956) (holding that where a building permit was issued and business was lawfully operating, owner had acquired "a kind of property right on which [it] was entitled to protection" from arbitrary governmental action).

*W.C. McMinn Co. v. City of Little Rock*, 516 S.W.2d 584, 588 (Ark. 1974) (holding that where owner-company incurred substantial expense in upgrading its property without any objections from the City, "to uphold [the city's] action would result in a substantial loss of [company's] investment, making such action inequitable and unjust").

### California

*HPT IHG-2 Properties Trust v. City of Anaheim* (4th Dist., Div. 3, 2015) 243 Cal.App.4th 188 (as illustrated by this Fourth District decision, a lead agency's attempt to modify an existing project approval in contravention of vested rights is also sufficient to invalidate that action where the elements of equitable estoppel against a governmental entity are satisfied).

*Blue Chip Properties v. Permanent Rent Control Bd.* (1985) 170 Cal.App.3d 648, 658 [216 Cal.Rptr. 492] (a

right complete and consummated, and of such character that it cannot be divested without the consent of the person to whom it belongs, and fixed or established, and no longer open to controversy. [citing *State ex rel. Milligan v. Ritter's Estate*, Ind.App., 46 N.E.2d 736, 743.]

*Trans-Oceanic Oil Corp. v. City of Santa Barbara*, 194 P.2d 148, 152 (Cal. Dist. Ct. App. 1948) ("[A valid] permit ripens into a vested property right which may not be taken from him against his will other than by proceedings in eminent domain with the payment of just compensation.").

*In re E.J.* (2010) 47 Cal.4th 1258, 1273-1274 [104 Cal.Rptr.3d 165, 223 P.3d 31] ("Thus, the critical question for determining retroactivity usually is whether the last act or event necessary to trigger application of the statute occurred before or after the statute's effective date. (Citing *Travenol Laboratories, Inc. v. U.S.* (Fed. Cir. 1997) 118 F.3d 749, 752; *McAndrews v. Fleet Bank of Massachusetts, N.A.* (1st Cir. 1993) 989 F.2d 13, 16).

*Goat Hill Tavern v. City of Costa Mesa*, 8 Cal. Rptr. 2d 385, 392 (Cal. Ct. App. 1992) (noting the trial court's use of the independent judgment test and determining the owner had a vested fundamental right to continue operating the tavern).

*AVCO Community Developers v. South Coast Regional Comm'n*, 553 P.2d 546, 550 (Cal. 1976) ("If a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit.").

#### Colorado

*Ficarra v. Dep't of Regulatory Agencies*, 849 P.2d 6, 17 (Colo. 1993) ("No fixed formula ... measures the content of all the circumstances whereby a party is said to possess 'a vested right.'" (citing *Incorporated Village of Northport v. Guardian Fed. Sav. & Loan Ass'n*, 384 N.Y.S.2d 923, 928 (N.Y. Sup. Ct. 1976)).

*Van Sickel v. Boyes*, 797 P.2d 1267, 1271 (Colo. 1990) ("A building permit can form the basis for a vested right if the permit holder takes steps in reliance on the permit.").

*P-W Investments v. City of Westminster*, 655 P.2d 1365, 1371 (Colo. 1982) ("A city [building] permit can provide the foundation for a vested right, and thus be constitutionally protected from impairment by subsequent legislation, if the permit holder takes steps in reliance upon the permit.").

#### Connecticut

*Brady v. Town of Colchester*, 863 F.2d 205, 212 (2d Cir. 1988) (discussing "vested property rights" and suggesting that they may amount to "protectible fourteenth amendment property rights").

*Graham Corp. v. Board of Zoning Appeals*, 97 A.2d 564, 566-67 (Conn. 1953) (holding that beginning work not substantially related to construction and possessing building permit are insufficient to establish a vested right).

*Parker-Quaker Corp. v. Young*, 184 A.2d 553, 556 (Conn. Super. Ct. 1962) (finding that developer had a vested right where, in reliance on issuance of valid building permits, developer had performed considerable work in demolishing existing building and in construction of new building before building inspector notified him of inspector's intention to revoke permits).

#### Delaware

*Miller v. Board of Adjustment*, 521 A.2d 642, 645 (Del. Super. Ct. 1986) (describing the vested rights doctrine as focussing on "whether the owner acquired real property rights which cannot be taken away by government regulation.") (quoting *Allen v. City & County of Honolulu*, 571 P.2d 328, 329 (Haw. 1977)).

*Shellburne, Inc. v. Roberts*, 224 A.2d 250, 254 (Del. 1966) (stating that issuance of building permit for a particular use alone does not create a vested right in a particular zoning classification).

#### Florida

*Villas of Lake Jackson, Ltd. v. Leon County*, 796 F. Supp. 1477, 1478 (N.D. Fla. 1992) ("[A] development permit duly issued by a Florida local government is a species of property for due process and taking clause purposes, especially if the property owner has taken actions in reliance upon the permit to his detriment.").

*Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So. 2d 10, 17-18 (Fla. 1976) (holding that plaintiffs had a vested property right because they acted in good faith reliance on rezoning for multiple family use dwellings and made considerable financial investment on preliminary plans).

*Key West Harbour Dev. Corp. v. City of Key West*, 987 F.2d 723, 729 n.4 (11th Cir. 1993) (distinguishing *Villas* on the basis that in *Villas* the landowner detrimentally relied on assurances from the County whereas in this case "the only agreement that the appellees signed clearly stated that the appellant would not acquire vested property rights to redevelop the property").

*Decarion v. Monroe County*, 853 F. Supp. 1415, 1419 (S.D. Fla. 1994) ("Equitable estoppel may create property interests in obtaining permits even where no permits have been issued, where the statutory prerequisites have been met and the agency had no discretionary power to deny the permit.").

#### Georgia

*WMM Properties v. Cobb County*, 339 S.E.2d 252, 254-55 (Ga. 1986) (stating that vesting rules deal with the time that "property rights in property as zoned vest" and that these rules include the "Right to Rely upon Building and Other Permits Once Issued," the "Right to Issuance of a Building Permit," the "Right to Rely upon Approved Development Plan," and the "Right to Rely upon Official Assurances that a Building Permit Will Probably Issue").

*Cohn Communities v. Clayton County*, 359 S.E.2d 887, 889 (Ga. 1987) ("The rule in Georgia is that where a landowner makes a substantial change in position by expenditures in reliance upon the probability of the issuance of a building permit, based upon an existing zoning ordinance and the assurances of zoning officials, he acquires vested rights....").

*Jackson v. Delk*, 361 S.E.2d 370, 372 (Ga. 1987) ("The issuance of a building permit, as well as various other forms of administrative approval, vests the right of the permittee to develop his or her property in accordance with existing zoning or regulatory laws.") (citing *WMM Properties v. Cobb County*, 339 S.E.2d 252 (Ga. 1986)).

#### Hawaii

*Allen v. City & County of Honolulu*, 571 P.2d 328, 329 (Haw. 1977) (stating that to determine vested rights, the court looks to see "whether the owner acquired real property rights which cannot be taken away by governmental regulation") (quoting David G. Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Right to Zoning Disputes*, 1971 Urb. L. Ann. 63, 65).

*Kaiser Dev. Co. v. City & County of Honolulu*, 649 F. Supp. 926, 937 (D. Haw. 1986) (rejecting developer's



claim of "vested property rights" because developer relied on a general plan that was not an actual ordinance), aff'd, 913 F.2d 573 (9th Cir. 1990), cert. denied sub nom. *Lyman v. City & County of Honolulu*, 499 U.S. 954 (1991).

#### Idaho

*Cunningham v. City of Twin Falls*, 874 P.2d 587, 592 (Idaho Ct. App. 1994) (refusing to equate a building permit applicant's rights with property rights).

#### Illinois

*Pioneer Trust & Sav. Bank v. County of Cook*, 377 N.E.2d 21, 26 (Ill. 1978) ("Where there has been a substantial change of position, expenditures or incurrence of obligations made in good faith by an innocent party under a building permit or in reliance upon the probability of its issuance, such party has a vested property right and he may complete the construction and use the premises for the purposes originally authorized, irrespective of subsequent zoning or a change in zoning classifications.") (quoting *People ex rel. Skokie Town House Builders v. Village of Morton Grove*, 157 N.E.2d 33, 37 (Ill. 1959)).

*Lucas v. Village of La Grange*, 831 F. Supp. 1407, 1413 (N.D. Ill. 1993) (following *Pioneer Trust*, 377 N.E.2d 21 (Ill. 1978), and stating that under Illinois law, when "there has been a substantial change of position, expenditures or incurrence of obligations made in good faith by an innocent party under a building permit or in reliance upon the probability of its issuance ....").

*Constantine v. Village of Glen Ellyn*, 575 N.E.2d 1363, 1376 (Ill. App. Ct. 1991) (finding a party has a "vested property right" if the party relied on the probable issuance of building permit in good faith).

*Village of Palatine v. LaSalle Nat'l Bank*, 445 N.E.2d 1277, 1283 (Ill. App. Ct. 1983) ("A finding that a landowner has acquired a vested right to the issuance of building permits is particularly appropriate where, as here, public officials actively encourage a landowner to change position or incur expense in reliance on such acts.").

#### Indiana

*Lutz v. New Albany City Planning Comm'n*, 101 N.E.2d 187, 190 (Ind. 1951) (holding construction must begin prior to the enactment of the contested zoning law for the owner to have "any vested rights in the property").

*Stuckman v. Kosciusko County*, 495 N.E.2d 775, 777 (Ind. Ct. App. 1986) ("The right of a governmental body to enact zoning ordinances is subject to vested property interests acquired prior to enactment of the ordinance."), opinion vacated on other grounds, 506 N.E.2d 1079, 1081 (Ind. 1987).

#### Iowa

*Kasperek v. Johnson County Bd. of Health*, 288 N.W.2d 511, 518 (Iowa 1980) (finding legitimate expenditures before the change in regulation "may create a property right which cannot be arbitrarily interfered with or taken away without just compensation"). See also *Nemmers v. City of Dubuque*, 716 F.2d 1194, 1197 (8th Cir. 1983) (following *Kasperek*).

#### Kansas

*Colonial Inv. Co. v. City of Leawood*, 646 P.2d 1149, 1154 (Kan. Ct. App. 1982) (suggesting that if actual

construction began before the zoning ordinance change, an owner would have "vested property rights" in the zoning of the land).

*Gunkel v. City of Emporia*, 634 F. Supp. 345, 348 (D. Kan. 1986) (finding no "vested property right" because permit did not comply with existing law), *aff'd*, 835 F.2d 1302 (10th Cir. 1987).

#### Kentucky

*City of Berea v. Wren*, 818 S.W.2d 274, 276 (Ky. Ct. App. 1991) (stating that vested rights and estoppel are distinct theories in that vested rights involve a determination as to "whether the owner acquired real property rights which cannot be taken away by government regulation" while equitable estoppel "focuses on whether it would be inequitable to allow the government to repudiate its prior conduct") (quoting David G. Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Right to Zoning Disputes*, 1971 Urb. L. Ann. 63, 64-65).

#### Louisiana

*Palermo Land Co. v. Planning Comm'n of Calcasieu Parish*, 561 So. 2d 482, 486 (La. 1990) (finding a Parish could rezone certain property, notwithstanding a developer's equitable estoppel argument).

*Lakeshore Harbor Condominium Dev. v. City of New Orleans*, 603 So.2d 192, 196 (La. Ct. App. 1992) (holding developer did not have property right to convert condominium project to hotel project).

#### Maine

*Cumberland Village Housing Assocs. v. Inhabitants of Town of Cumberland*, 609 F. Supp. 1481, 1489 (D. Me. 1985) (interpreting 1 M.R.S.A. 302, Maine's "savings" statute).

#### Maryland

*Prince George's County v. Equitable Trust Co.*, 408 A.2d 737, 741 (Md. Ct. Spec. App. 1979) (discussing vested rights as rights protected by the Takings Clause).

*Prince George's County v. Sunrise Dev. Ltd. Partnership*, 623 A.2d 1296, 1304 (Md. 1993) ("To obtain a 'vested right' in the existing zoning use which will be constitutionally protected against a subsequent change in the zoning ordinance ..., the owner must (1) obtain a permit or occupancy certificate where required by the applicable ordinance and (2) must proceed under that permit or certificate to exercise it on the land involved so that the neighborhood may be advised that the land is being devoted to that use.") (quoting *Richmond Corp. v. Board of County Comm'rs*, 255 A.2d 398, 404 (Md. 1969)).

#### Massachusetts

*Green v. Board of Appeal*, 313 N.E.2d 451, 454 (Mass. 1974) (finding that under the relevant statute, the period of protection extends to "building permit applications filed, but not approved").

*Chira v. Planning Board*, 333 N.E.2d 204, 209 (Mass. App. Ct. 1975) (stating that protection under Massachusetts law extends to proceedings brought before the appeals board as well as to those brought before the planning board).

#### Michigan

*Seguin v. City of Sterling Heights*, 968 F.2d 584, 591-92 (6th Cir. 1992) (reviewing Michigan law and finding

that a building permit and substantial construction are necessary before property rights can vest, and that without a vested property right, plaintiffs had no claim of a Fourteenth Amendment procedural due process violation because no liberty or property was at stake).

*Triomphe Investors v. City of Northwood*, 49 F.3d 198, 203 (6th Cir. 1995) (stating that a city's knowledge of a property owner's intent to build on certain land does not itself create a state law property interest in a special use permit).

#### Minnesota

*Littlefield v. City of Afton*, 785 F.2d 596, 602 (8th Cir. 1986) ("An applicant for a building permit has a constitutionally protected property interest in the permit....").

*Northpointe Plaza v. City of Rochester*, 465 N.W.2d 686, 689 (Minn. 1991) ("Minnesota recognizes a constitutionally protected property interest in an application for a land use permit which, as here, is conditioned only upon compliance with the zoning ordinance.").

#### Missouri

*Ford Leasing Dev. Co. v. City of Ellisville*, 718 S.W.2d 228, 232 (Mo. Ct. App. 1986) (holding that where a permittee acts on the faith of a zoning permit, he acquires a property or vested right therein) (citing 101A C.J.S. Bonding and Land Planning 222 (1979)).

#### Nebraska

*Whitehead Oil Co. v. City of Lincoln*, 451 N.W.2d 702, 706 (Neb. 1990) ("Nor does the permittee acquire a property right in the permit absent a showing substantial construction had already been undertaken.") (citing *County of Saunders v. Moore*, 155 N.W.2d 317 (Neb. 1967)).

#### Nevada

*City of Reno v. Nevada First Thrift*, 686 P.2d 231, 233 (Nev. 1984) (holding that where property owner received a permit and, in good faith, made considerable expenditures in reliance on the permit, owner had a vested right against changes in zoning laws).

#### New Hampshire

*Navin v. Town of Exeter*, 339 A.2d 12, 14-15 (N.H. 1975) (establishing that property owner obtained vested rights where owner made either substantial construction or expenditures on the property in good faith before zoning ordinance was revoked).

#### New Jersey

*Urban Farms v. Borough of Franklin Lakes*, 431 A.2d 163, 172 (N.J. Super. Ct. App. Div. 1981) (holding that substantial expenditures made in reliance on zoning ordinance created vested rights which defeated retroactivity of ordinance's subsequent amendment).

*Lake Shore Estates v. Denville Township Planning Bd.*, 605 A.2d 1106, 1111 (N.J. Super. Ct. App. Div. 1991) (stating that developer did not have a vested right where he did not justifiably rely on past municipal approval and the current zoning ordinance was in the process of being changed).

#### New Mexico

*Sandoval County Bd. of Comm'rs v. Ruiz*, 893 P.2d 482, 485 (N.M. Ct. App. 1985) (establishing that permit approval and "a substantial change in position by the applicant in reliance upon such approval" are required for rights to vest).

#### New York

*Town of Orangetown v. Magee*, 594 N.Y.S.2d 951, 960 (N.Y. Sup. Ct. 1992) (holding that vested right in building permit constitutes a "'property interest' which is subject to protection under the Fourteenth Amendment").

*Burdick v. Bryant*, 444 N.Y.S.2d 997, 999 (N.Y. Sup. Ct. 1981) (stating that a property owner with a valid building permit who performs substantial construction on the property in reliance on the permit has a vested right in that property).

*Schoonmaker Homes v. Village of Maybrook*, 576 N.Y.S.2d 954, 957 (N.Y. App. Div. 1991) (discussing vested rights with regard to the single-integrated-project theory).

#### North Carolina

*Town of Hillsborough v. Smith*, 170 S.E.2d 904, 912 (N.C. 1969) ("[The defendants] must have exercised the privilege of the permit 'at a time when it was lawful' in order to acquire a property right which would be protected from the zoning power of the town.").

*Mays-Ott Co. v. Town of Nags Head*, 751 F. Supp. 82, 85 (E.D.N.C. 1990) (declaring that developer's substantial expenditures were sufficient "to create a vested property right which cannot be taken without due process of law").

*Simpson v. City of Charlotte*, 443 S.E.2d 772, 776 (N.C. Ct. App. 1994) (holding that a property owner can acquire a vested right in two ways: either by meeting all the statutory requirements necessary for a building permit or by making a "substantial beginning" in construction, if made in good faith).

*In re Application of Campsites Unlimited, Inc.*, 215 S.E.2d 73, 77-78 (N.C. 1975) (holding that where a landowner made substantial expenditures on his property prior to zoning ordinance enactment, a vested right existed).

#### North Dakota

*City of Fargo v. Harwood Township*, 256 N.W.2d 694, 700 (N.D. 1977) (holding that a property owner may acquire a vested right where owner made "substantial expenditures in reliance upon existing zoning or otherwise committed himself to his substantial disadvantage before the zoning change").

#### Ohio

*Washington County Taxpayers Ass'n v. Peppel*, 604 N.E.2d 181, 187 (Ohio Ct. App. 1992) ("A 'vested right' ... is generally understood to be the power to lawfully do certain actions or possess certain things; in essence, it is a property right.").

*Zaremba Dev. Co. v. City of Fairview Park*, 616 N.E.2d 569, 571 (Ohio Ct. App. 1992) (holding that where property owner complied with all requirements to obtain a building permit, owner obtained a vested right upon filing the permit application) (citing *Gibson v. Oberlin*, 167 N.E.2d 651 (Ohio 1960)).

*Gibson v. City of Oberlin*, 167 N.E.2d 651, 654 (Ohio 1960) (holding that where property owner complied

with all building permit requirements and permit was issued, owner had a vested right regardless of subsequent change in zoning ordinance).

#### Oklahoma

*Oklahoma Water Resources Bd. v. Central Oklahoma Master Conservancy Dist.*, 464 P.2d 748, 755 (Okla. 1968) ("A 'vested right' is the power to do certain actions or possess certain things lawfully, and is substantially a property right.").

#### Oregon

*Clackamas County v. Holmes*, 508 P.2d 190, 192-93 (Or. 1973) (holding, in part, that a landowner acquired a vested right to continue development based upon the ratio of expenses already incurred to the total cost of the project).

#### Pennsylvania

*Herskovits v. Irwin*, 149 A. 195, 197-98 (Pa. 1930) (upholding the principle that "a property interest arises where, after permit granted, a landowner begins construction of a building and incurs liability for future work").

*Commonwealth v. Flynn*, 344 A.2d 720, 725 (Pa. Commw. Ct. 1975) (articulating five factors to be evaluated in determining whether a landowner has acquired a vested right in a permit: (1) good faith, (2) due diligence in trying to comply with the law, (3) expenditure of substantial, unrecoverable funds, (4) expiration without appeal of 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 public welfare have been adversely affected by use of a permit).

#### Rhode Island

*Lanmar Corp. v. Rendine*, 811 F. Supp. 47, 51 (D.R.I. 1993) (holding that even if the building permit had been issued illegally, owner had a "property interest in the building permit" based upon the granting of special exception by the city and demolition of buildings).

#### South Carolina

*Sherman v. Reavis*, 257 S.E.2d 735, 737 (S.C. 1979) (stating that owners have a property right in the permit if they "have incurred expense or substantially changed their position under an issued permit ... or ... have relied in good faith on the right to use property as permitted under the zoning ordinances in force at the time application was made") (citation omitted).

#### Tennessee

*Nichols v. Tullahoma Open Door*, 640 S.W.2d 13, 16 (Tenn. Ct. App. 1982) (inferring that a "constitutionally recognized property right" is comparable to a "vested right").

*State ex rel. SCA Chemical Waste Serv. v. Konigsberg*, 636 S.W.2d 430, 437 (Tenn. 1982) ("Rights under an existing ordinance do not vest until substantial construction or substantial liabilities are incurred relating directly to construction.").

#### Texas

*City of Pharr v. Pena*, 853 S.W.2d 56, 64 (Tex. Ct. App. 1993) ("Mere preparation for use of property before adoption of a zoning ordinance is not enough to show a devotion of the property to that use ... An existing use should mean the utilization of the premises so that they may be known in the neighborhood as being employed for a given purpose.") (citations omitted).

*City of Dallas v. Crownrich*, 506 S.W.2d 654, 659 (Tex. Civ. App. 1974) ("Property and its owner are subject to a zoning ordinance adopted subsequent to an application for a building permit, and subsequent to his suit after refusal of permit.").

## Utah

*Western Land Equities v. City of Logan*, 617 P.2d 388, 396 (Utah 1980) ("An applicant is entitled to a building permit or subdivision approval if his proposed development meets the zoning requirements in existence at the time of his application and if he proceeds with reasonable diligence, absent a compelling, countervailing public interest.").

## Vermont

*In re Ross*, 557 A.2d 490, 491 (Vt. 1989) (holding that "a landowner's right to have his project's permit reviewed vested "as of the time when proper application is filed.") (quoting *Smith v. Winhall Planning Comm'n*, 436 A.2d 760, 761 (1981)).

## Virginia

*Holland v. Board of Supervisors*, 441 S.E.2d 20, 21-22 (Va. 1994) ("[A] landowner who seeks to establish a vested property right to a particular land use must identify a significant official governmental act that would permit the landowner to conduct a use on its property that otherwise would not have been allowed.").

*Snow v. Amherst County*, 448 S.E.2d 606, 608 (Va. 1994) ("Where, as here, a special use permit has been granted under a zoning classification, a bona fide site plan has thereafter been filed and diligently pursued, and substantial expense has been incurred in good faith before a change in zoning, the permittee then has a vested right to the land use described in the use permit and he cannot be deprived of such use by subsequent legislation.") (quoting *Board of Supervisors v. Medical Structures, Inc.*, 192 S.E.2d 799, 801 (Va. 1972)).

*Board of Supervisors v. Cities Serv. Oil Co.*, 193 S.E.2d 1, 3 (Va. 1972) (holding that a landowner's right to the land use described in the use permit was a vested property right that vested upon the filing of the site plan).

*Board of Supervisors v. Medical Structures, Inc.*, 192 S.E.2d 799, 801 (Va. 1972) (holding that issuance of a special use permit and subsequent filing of a site plan combined with incurred expenses created a "vested right" in the permittee).

## Washington

*Valley View Indus. Park v. City of Redmond*, 733 P.2d 182, 191-92 (Wash. 1987) ("Citizens must be protected from the fluctuations of legislative policy, so that they can plan their conduct with reasonable certainty as to the legal consequences. Property development rights constitute "a valuable property right.") (citations omitted) (quoting *West Main Assocs. v. City of Bellevue*, 720 P.2d 782, 785 (Wash. 1986)).

*Adams v. Thurston County*, 855 P.2d 284, 287 (Wash. Ct. App. 1993) (stating that "property development rights vest at the time a developer files a complete and legally sufficient building permit or preliminary plat

application").

*Erickson & Assocs. v. McLerran*, 872 P.2d 1090, 1095 (Wash. 1994) ("Our vested rights doctrine is not a blanket rule requiring cities and towns to process all permit applications according to the rules in place at the outset of the permit review. Instead, the doctrine places limits on municipal discretion and permits land owners or developers "to plan their conduct with reasonable certainty of the legal consequences.") (quoting *West Main Assocs. v. City of Bellevue*, 720 P.2d 782 (Wash. 1986)).

#### West Virginia

*L.M. Everhart Constr. v. Jefferson County Planning Comm'n*, 2 F.3d 48, 53 (4th Cir. 1993) (inferring that if the developer had acquired a vested right, the developer would have had a protectible property interest requiring due process of law).

*H.R.D.E., Inc. v. Zoning Officer of Romney*, 430 S.E.2d 341, 346 (W. Va. 1993) ("The following factors are to be weighed when determining whether or not a landowner has acquired a vested right in a nonconforming use: (1) whether the landowner has made substantial expenditures on the project; (2) whether the landowner acted in good faith; (3) whether the landowner had notice of the proposed zoning ordinance before starting the project at issue; and (4) whether the expenditures could apply to other uses of the land.").

#### Wisconsin

*Lake Bluff Hous. Partners v. City of South Milwaukee*, 525 N.W.2d 59, 67 (Wis. Ct. App. 1994) (assessing prior cases and noting various emerging principles: "[A] property owner can have vested rights in a planned building before actual construction begins; ... 'retrospective effect' of an ordinance is 'not favored, and this is especially true where vested rights are affected'; and ... vested rights can be separated from zoning compliance.") (citations omitted).

(See, ARTICLE: RECOGNIZING VESTED DEVELOPMENT RIGHTS AS PROTECTED PROPERTY IN FIFTH AMENDMENT DUE PROCESS AND TAKINGS CLAIMS, 49 Wash. U. J. Urb. & Contemp. L. 27, 40-62)