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Comments

Vested Rights to Develop Land: California’s Avco Decision and Legislative Responses

Jean McCown-Hawkes*
Diana King**

INTRODUCTION

Increasing public awareness that land use decisions have important social and environmental consequences has led to greater governmental regulation of land use development. Regulation at the state level is particularly significant because it shifts the locus of control from the local government to the representatives of the state as a whole, and restricts the scope of the discretion traditionally reserved to local governments. In recent years, California has imposed on local governments significant substantive and procedural regulations for land use planning and development control, including requirements for general and specific planning, for the preservation of open space, and for consideration of environmental impacts.

This increase in regulation has resulted in greater demands and restrictions on landowners and developers. Seeking to minimize the impact of these limitations, some developers have asserted that their projects should be exempt from new regulations under the doctrine of vested rights. Although in its traditional common law form the vested rights doctrine provides only a narrow exemption from the application of new regulations, these developers have argued that in the context of modern large scale land

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1. General and specific plans are required of all cities and counties in California. Cal. Gov’t Code § 65300 (West 1966); id §§ 65302, 65700 (West Supp. 1977) (general plans); id. §§ 65450.1-65452 (specific plans).

2. Id. §§ 65560-65570, 65910.

development, the doctrine should be modified to provide wider protection to projects in the process of implementation. The vested rights issue has acquired new significance because of two recent trends in land development regulation. The first is the increasing use of relatively large scale regulatory devices such as subdivision ordinances and planned unit development (PUD) zones. The second trend is the increasing intervention of supra-local governmental agencies into the land preservation and regulation field, traditionally a matter of purely local concern.

Both of these trends have been highlighted in the vested rights litigation arising from the requirement of state development permits under the California Coastal Zone Conservation Act of 1972. This litigation has led to judicial reaffirmation of the traditional vested rights doctrines in the context of large scale developments and supra-local controls. In *Avco Community Developers, Inc. v. South Coast Regional Commission,* the California Supreme Court confirmed the narrowest construction of vested rights consistent with due process, giving the government maximum flexibility to impose new land use regulations on private landowners.

The fundamental issue in vested rights cases is the conflict between the property rights of private individuals and the ability of government to respond to changing circumstances with appropriate land use regulations. The government’s authority to regulate land use under the police power is well established. However, at some point such regulation unreasonably infringes on the right of property owners to use their land. The task of vested rights law is to define that point in the development process at which a landowner obtains a right to complete the development of his land without being required to comply with subsequently enacted laws that would restrict the planned development.

4. The California Coastal Zone Conservation Act of 1972, approved by the voters as an initiative measure at the general election held November 7, 1972, can be found at CAL. PUB. RES. CODE §§ 27000-27650 (Deering 1976). This Act provided for an interim permit procedure for development in the coastal zone during the period in which a permanent plan for future development would be drawn up by the Coastal Zone Conservation Commission, see text accompanying notes 9-14 infra, and was by its terms repealed as of January 1, 1977. CAL. PUB. RES. CODE § 27650 (Deering 1976). Many of the provisions of the 1972 initiative measure which are discussed in this Comment were carried forward into the permanent California Coastal Act of 1976. 1976 Cal. Stats., ch. 1330, § 1, CAL. PUB. RES. CODE §§ 30000-30900 (West 1977). However, because the cases discussed in this Comment that involve vested rights in the coastal zone arose and were decided under the terms of the 1972 Act, the statutory references in this Comment are to the section numbers codified at CAL. PUB. RES. CODE §§ 27000-27650 prior to 1977. A table of section number cross references between the 1972 and 1976 Acts can be found at CAL. PUB. RES. CODE div. 18 (West 1977). The 1972 Act has been reprinted in CALIFORNIA COASTAL ZONE CONSERVATION COMMISSIONS, CALIFORNIA COASTAL PLAN 1975, at 431 (available from Documents & Publications Branch, Box 20191, Sacramento, California).


Prior to the enactment of the Coastal Zone Conservation Act, the California courts had developed a workable definition of the point at which rights to develop vested: when a landowner, in good faith reliance on a validly issued building permit, performed substantial work or incurred substantial obligations in connection with the project authorized by the permit, he acquired a vested right to complete the project, notwithstanding an intervening change in the law.\(^7\) This definition was codified in section 27404 of the Act,\(^8\) which became the battleground for the struggle to modify the vested rights rule.

The Coastal Zone Conservation Act was adopted as an initiative measure on November 7, 1972, to provide for “the permanent protection of the remaining natural and scenic resources of the coastal zone . . . .”\(^9\) The Act established state and regional coastal commissions, whose primary duty was to develop a plan for the “orderly, long-range conservation and management of the natural resources of the coastal zone . . . .”\(^10\) In order to ensure that any coastal development during the planning period would be consistent with the Act’s goals, the Act provided that any person intending to develop land within the coastal zone would be required to obtain a permit from the appropriate regional commission.\(^11\) The Act further provided for an exemption from the permit requirement under a “grandfather clause”\(^12\) for any person who, prior to November, 1972, had performed a substantial amount of work on a project pursuant to a city- or county-issued building permit.\(^13\) This exemption, contained in section 27404 of the Act, was a codification of the common law vested rights doctrine, requiring: (1) sub-

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\(^7\) See text accompanying notes 37-48 infra.

\(^8\) CAL. PUB. RES. CODE § 27404 (Deering 1976). See text accompanying note 14 infra for the language of this section.

\(^9\) Id. § 27001.

\(^10\) Id. §§ 27001(b), (d).

\(^11\) On or after February 1, 1973, any person wishing to perform any development within the permit area shall obtain a permit authorizing such development from the regional commission . . . .

\(^12\) Grandfather clauses are often drawn more broadly than would be required under vested rights law. Grandfather clauses in recent environmental legislation include CAL. PUB. RES. CODE §§ 21169-21170 (West Supp. 1977) (California Environmental Quality Act (CEQA)) and a similar provision in CAL. GOV’T CODE §§ 66654-66655 (West Supp. 1977) (enabling legislation of the Bay Conservation and Development Commission (BCDC)). For a discussion of these provision, see Friends of Lake Arrowhead v. Board of Supervisors, 38 Cal. App. 497, 113 Cal. Rptr. 539 (1974) (CEQA); People ex rel. San Francisco BCDC v. Town of Emeryville, 69 Cal. 2d 533, 446 P.2d 790, 72 Cal. Rptr. 790 (1968).

\(^13\) CAL. PUB. RES. CODE § 27404 (Deering 1976). This section originally provided for vested rights if the builder had commenced work prior to April 1, 1972. This was amended by the Legislature on April 18, 1973, substituting “November 8, 1972” as the vesting date. 1973 Cal. Stats., ch. 28, § 1.
stantial expenditures; (2) good faith reliance; and (3) a valid building permit.

If, prior to November 8, 1972, any city or county has issued a building permit, no person who has obtained a vested right thereunder shall be required to secure a permit from the regional commission; . . . . Any such person shall be deemed to have such vested rights if, prior to November 8, 1972, he has in good faith and in reliance upon the building permit diligently commenced construction and performed substantial work on the development and incurred substantial liabilities for work and materials necessary therefor.\textsuperscript{14}

Despite the apparent clarity of section 27404, numerous cases were brought by developers claiming that they should be granted exemptions even though they had not been issued building permits.\textsuperscript{15} The developers argued that in the context of modern land development practice, rights for development should vest long before a building permit is issued. Some plaintiffs claimed that a vested right was established by substantial expenditures on subdivision improvements in reliance on subdivision approvals.\textsuperscript{16} Others argued that the right vested as of the date of planned community zoning, or looked to a combination of approvals to establish a vested right.\textsuperscript{17}

The issue facing the court in \textit{Avco} was whether the building permit standard should be discarded for another standard or possibly replaced by a case by case determination of whether a vested right had been obtained on a particular set of facts. Although the court refrained from ruling that a building permit would be required under all circumstances, it did affirm the strict construction of vested rights that has characterized the common law doctrine in California.

\textsuperscript{14} \textit{CAL. PUB. RES. CODE} \textsection 27404 (Deering 1976).


\textsuperscript{16} Avco Community Developers, Inc. v. South Coast Regional Comm'n, 17 Cal. 3d 785, 791-92, 533 P.2d 546, 550, 132 Cal. Rptr. 386, 391 (1976). For another commentator's view of the \textit{Avco} decision and its context, see the articles by Donald J. Hagman cited in note 146 infra.

\textsuperscript{17} Oceanic California, Inc. v. North Cent. Coast Regional Comm'n, 63 Cal. App. 3d 57, 133 Cal. Rptr. 664 (1976).
This Comment first examines the common law vested rights doctrine in California, including its foundations in constitutional requirements and principles of equitable estoppel. It then analyzes the Coastal Act cases raising the vested rights issue and the resolution provided by the Avco decision. The Comment concludes with a discussion of alternative legislative responses to the Avco ruling.

I

COMMON LAW VESTED RIGHTS DOCTRINE

Two legal principles underlie common law vested rights doctrine. The first is the constitutional law principle that private property cannot be taken for public use without just compensation, nor without due process of law.\(^ {18} \)
The second is the principle of equitable estoppel.\(^ {19} \) California cases generally state that vested rights are constitutionally protected, and then go on to fuller discussion of the estoppel principle.\(^ {20} \) The courts simply assume that at some point the right to develop property becomes a property interest that is protected by due process limitations. It is this interest which is called a "vested right."

Since the vested rights doctrine developed in conjunction with the "nonconforming uses" doctrine, it will be useful to discuss the due process principle in the context of these two closely related doctrines. Vested rights refers to a property owner's right to complete a project despite the enactment of a new law or regulation. It would also be possible to speak of a vested right to continue an existing use of property despite a change in the law, but this is more often referred to as a nonconforming use.\(^ {21} \) A nonconforming use is a use of land which was lawfully in existence prior to the enactment of a zoning restriction or other government regulation and which may be maintained even though it is no longer consistent with the regulation.\(^ {22} \) A landowner who acquires a vested right to complete a structure

\(^ {18} \) U.S. CONST. amends. V & XIV; CAL. CONST. art. 1, § 19.

\(^ {19} \) The doctrine provides that a person may not deny the existence of a state of facts if he intentionally has led another to believe those facts to be true and to rely on that belief to his detriment. The elements of equitable estoppel are that: (1) the party to be estopped is aware of the facts; (2) he intends that his conduct will be acted upon, or he in fact acts so that the party asserting the estoppel has the right to believe the conduct is so intended; (3) the other party remains ignorant of the true state of the facts; and (4) the injured party does in fact rely on the conduct. Strong v. County of Santa Cruz, 15 Cal. 3d 720, 543 P.2d 264, 125 Cal. Rptr. 896 (1975).


\(^ {22} \) Id. at 58-1; 4 N. WILLIAMS, AMERICAN PLANNING LAW 401 (1975).
despite subsequent regulations is in effect entitled to create a new nonconforming use.

Early case law concerning government regulation of private property did not foreclose the possibility of applying new laws retroactively to terminate existing uses. This is not surprising, since early land use doctrines evolved from nuisance doctrines and the government’s power to terminate existing nuisances was a widely accepted component of the police power. However, early proponents of zoning were unsure how far the police power could be extended in terminating uses that were not nuisances in the traditional sense. This uncertainty grew out of such cases as Dobbins v. City of Los Angeles. In Dobbins, a property owner had partially completed the construction of a gas works when the city amended an ordinance which had permitted the maintenance of such a facility on her property. The Court recognized that even an existing use might become, “by reason of the manner of its prosecution or a changed condition of the community,” a threat to public health and safety and thus appropriately prohibited under the police power. Yet the court held that where the use was not a nuisance and where no other justification was given for the regulation, there had been an arbitrary exercise of the police power. The plaintiff, “being the owner of the land, and having partially erected the works, . . . was entitled to protection against unconstitutional encroachments which would have the effect to deprive her of her property without due process of law.” Since the plaintiff was found to have a right to complete and maintain a use no longer allowed by city ordinances, Dobbins states the principle that the right to complete a structure which was lawful when begun and has not become a nuisance will be treated as a property interest and protected from government interference.

Early municipal zoning schemes did not require the termination of nonconforming uses, for fear that courts would invalidate the entire plan. Doubts about the validity of terminating nonconforming uses were resolved in California in Jones v. City of Los Angeles, where enforcement of an ordinance prohibiting the operation of sanitariums in residential districts was held to be unconstitutional as applied to existing sanitariums. While the desire to abolish nonconforming uses was legitimate, the means used to accomplish it could not include destruction of an existing property interest

23. Reinman v. Little Rock, 237 U.S. 171 (1915) (prohibition against stables); Hadachek v. Sebastian, 239 U.S. 394 (1915) (prohibition against existing brickyard). These can also be characterized as nuisance cases.
24. See generally 1 N. Williams, supra note 22, at 103.
25. 195 U.S. 223 (1904).
26. Id. at 238.
27. Id.
30. 211 Cal. 304, 321, 295 P. 14, 22 (1930).
without compensation. The court stated: "Where, as here, a retroactive ordinance causes substantial injury and the prohibited business is not a nuisance, the ordinance is to that extent an unreasonable and unjustifiable exercise of police power." Thus if a use is lawfully in existence, the government's attempt to change the law and require termination is an unconstitutional application of the police power. Immediate termination cannot be accomplished without payment of just compensation.

However, the constitutional protection afforded nonconforming uses is not absolute. Zoning ordinances may prohibit enlargement, alteration, or rebuilding of nonconforming structures and may require a gradual phasing out of the use over a specified period of time. Reasonable amortization schemes based on the investment involved, the nature of the use, and the character and age of the nonconforming structure are considered to be an equitable means of reconciling the conflict between private property rights and the public's interest in eliminating nonconforming uses.

In determining the amount of protection that is constitutionally due nonconforming uses, the courts have attempted to balance private and public interests. The result has been the imposition of only narrow restraints on the police power. California courts have adopted a similar approach to vested rights by granting them only the narrowest protection from government regulation consistent with due process.

*Dobbins* and *Jones* established the proposition that vested rights and nonconforming uses are constitutionally protected, but left unanswered the difficult question of when a landowner acquires a vested right. It is useful to imagine a spectrum of property development. At one end of the spectrum lies the landowner who would suffer an injury to a property interest if he were ordered to terminate an existing use. This interest is protected as a nonconforming use. At the other extreme lies the landowner who has purchased property expecting to develop it in a particular manner. While it would be possible to recognize this owner as having a similar property interest, the law is well settled that such an expectation is not protected from a change in the law. Vested rights claims involve situations that are somewhere between these two extremes.

*Trans Oceanic Oil Corp. v. Santa Barbara* was the first California case to state the elements required to establish a vested right. In *Trans
Oceanic, the city of Santa Barbara had revoked an oil drilling permit pursuant to a rezoning plan after the plaintiff had commenced work on the well site. The court held that since there had been substantial expenditure in good faith reliance on a permit validly issued before the enactment of the new zoning, the owner had a vested right to complete the project. However, the court also stated that the ordinance could have been applied retroactively to nullify the permit if no construction or expenditure of funds had occurred. The emphasis on the owner’s reliance on prior city approval indicates that the court adopted principles of equitable estoppel in defining the point at which the vested right was acquired.

The estoppel basis of the vested rights doctrine was stated explicitly in Anderson v. City Council. In Anderson, the plaintiff purchased property which was zoned to allow the construction of a gas station. While the plaintiff’s application for a building permit was pending, the city enacted a new ordinance requiring special use permits for gas stations, and refused to issue such a permit to the plaintiff. The court held that a landowner does not acquire a vested right “merely by purchasing the property in reliance on the existing zoning and thereafter making certain endeavors to develop it for a specified use.” All of the acts of reliance asserted by the owner occurred before he had applied for the building permit. The court noted that the plaintiff had failed to cite any California case in which a landowner was held to have acquired a vested right “without first having acquired a building permit to construct a specific type of building and having thereafter expended a considerable sum in reliance upon said permit. Such authority would appear to be nonexistent for the reason that vested rights theory is predicated upon estoppel by the governing body.” Thus, where no building permit had been issued, there was no governmental conduct on which the plaintiff was entitled to rely. The previous permissive zoning by itself was not considered a sufficient basis for an estoppel claim.

38. Id. at 783, 194 P.2d at 152. See also Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973).
40. Id. at 90, 40 Cal. Rptr. at 48.
41. Id. at 89, 40 Cal. Rptr. at 47.
42. Brougher v. Board of Public Works, 205 Cal. 426, 434, 271 P. 487, 490-91 (1928). Even if a permit has been issued, it can be revoked by a subsequent change in zoning if the permittee has not made any substantial improvements in good faith reliance on the permit. Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 126, 514 P.2d 111, 121-22, 109 Cal. Rptr. 799, 809-10 (1973). See Russian Hill Improvement Ass’n v. Board of Permit Appeals, 66 Cal. 2d 34, 39, 423 P.2d 824, 56 Cal. Rptr. 672 (1967). Note the contrary line of cases which hold that an applicant is entitled to a permit if he complies with all requirements before a change in the law: Sunset View Cemetery Ass’n v. Kraintz, 196 Cal. App. 2d 115, 16 Cal. Rptr. 317 (1961); McCombs v. Larson, 176 Cal. App. 2d 105, 1 Cal. Rptr. 140 (1959); Munns v. Stenman, 152 Cal. App. 2d 543, 314 P.2d 67 (1957). These latter decisions have been distinguished on the ground that the municipalities changed the zoning hastily in an attempt to frustrate the plans of a particular developer. See D. Hagman, CALIFORNIA ZONING PRACTICE § 5.57, at 171-72 (1969).
A more difficult situation is presented where a landowner has obtained some positive governmental approval but has not been issued a building permit. This problem was faced in *Spindler Realty Corp. v. Monning*. In *Spindler*, the plaintiff had secured appropriate zoning and had obtained a grading permit which allowed it to do preliminary work in preparation for the construction of an apartment complex. The grading permit did not refer to any specific use for the property. After Spindler had spent over $300,000 in preparatory work, but before any building plans had been approved, the City of Los Angeles rezoned the property for single family residential use.

Spindler argued that it had incurred substantial costs and obligations in reliance on specific governmental authorizations, including the zoning classification and the grading permit, and had therefore established a vested right to complete the apartment complex. This claim was rejected. Despite the fact that under local regulations grading permits could be issued only for building purposes, the court upheld the rule stated in *Anderson* that only where a building permit had been obtained did the owner acquire a vested right to construct a building. The grading permit entitled Spindler to complete only the grading. The specific authorization requirement of *Anderson* and *Spindler* has been consistently applied in California cases.

Thus, California courts have narrowly defined the conditions under which a vested right is established. Only when a government has specifically authorized a proposed structure and an owner has detrimentally relied on that authorization does the owner acquire a right to continue construction of the structure notwithstanding a change in the law.

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44. Id. at 260, 53 Cal. Rptr. at 9.
45. Id. at 264, 53 Cal. Rptr. at 11-12.
46. Id. at 268, 53 Cal. Rptr. at 14.
47. See Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973); Russian Hill Improvement Ass'n v. Board of Permit Appeals, 66 Cal. 2d 34, 423 P.2d 824, 56 Cal. Rptr. 672 (1967); Gisler v. County of Madera, 38 Cal. App. 3d 303, 112 Cal. Rptr. 919 (1974).
48. California courts have dealt rather perfunctorily with the other elements of the vested rights rule, i.e., that the reliance be substantial and in good faith. In contrast, see the discussion of the good faith element in other jurisdictions in Heeter, *Zoning Estoppel: Application of Principles of Equitable Estoppel and Vested Rights to Zoning Disputes*, 1971 Urban L. Ann. 63, 77-82. A brief discussion of the good faith issue in Russian Hill Improvement Ass'n v. Board of Permit Appeals, 66 Cal. 2d 34, 39, 423 P.2d 824, 829, 56 Cal. Rptr. 672, 677 (1967), notes that the primary purpose of the good faith requirement is to prevent the occurrence of a rush to develop which might circumvent newly enacted zoning laws. In Aries Dev. Co. v. California Coastal Zone Conservation Comm'n, 48 Cal. App. 3d 534, 122 Cal. Rptr. 315 (1975), the court found that the developer's conduct "bears the indelible stamp of 'unseemly haste' and lack of good faith." Id. at 549, 122 Cal. Rptr. at 326. The court further noted:

It appears without question that Aries entertained substantial doubts about its legal position, that the government did not lull Aries into believing it had received the final green light, and that Aries speeded up its timetable in a calculated effort to escape impending state land use controls.

Id. at 548, 122 Cal. Rptr. at 325.
Despite the fact that the California decisions often appear to be grounded in equitable estoppel, the doctrine has not been applied so as to expand the scope of protection that is afforded owners beyond the minimal constitutional requirement. The principle of equitable estoppel could support a more expansive definition of vested rights than that applied in California. If the only inquiry were whether an individual reasonably relied on governmental authorizations, a vested right might be established at a preliminary stage in the development process. In Spindler, for example, the government knew when it issued the grading permit that Spindler intended to construct an apartment building on the site. Spindler argued that once a permit having no significance apart from the construction of a building had been issued, the government should be estopped from altering the zoning to prohibit the implementation of the permittee's plan. In response to this kind of reasoning, some jurisdictions grant a vested right on the basis of government action prior to the issuance of a building permit.

A broader vested rights rule based solely on principles of fairness might be appropriate if the sole concern of the doctrine is to avoid the financial loss suffered by developers who rely on various government approvals preceding the issuance of a building permit. But California courts have attempted to balance these private interests against the public interest in effective land use control. The use of the building permit as the operative point of governmental approval in vested rights cases is justified on several grounds. First, the building permit stage is the only point at which the government approves the details, height, size, and location of the building to be constructed. The building permit application also provides a final opportunity for the government to satisfy itself that the structure complies with all applicable laws. But the most significant justification for the building permit requirement is that it allows the government to make needed changes in its regulations up to a relatively late point in the land development process.

The courts have attempted to reduce the number of structures that will become nonconforming uses by requiring a building permit as a condition precedent to the establishment of a vested right. This narrow protection

49. Spindler Realty Corp. v. Monning, 243 Cal. App. 2d 255, 268, 53 Cal. Rptr. 7, 14 (1966). One commentator has suggested that the estoppel language used by the courts is misleading because the elements of estoppel would apply factually to the same extent in those cases in which courts have overwhelmingly held that there can be no estoppel raised against the municipality: i.e. where one acts in reliance upon a permit invalidly issued by an administrative officer, the permittee having no knowledge of the invalidity.


51. 2 C. RATHKOPF, supra note 21, at 57-28.
VESTED RIGHTS helps support public efforts to plan a community in the light of changing objectives. The ability to respond to changed circumstances would be seriously weakened if a property owner could acquire a right to complete a structure after having done only preliminary site preparation work. The vested rights doctrine in California weighs the possible economic losses to be suffered by the private property owner against the social and environmental costs to be borne by the public as a result of the completion of a nonconforming use, and resolves the balance in favor of the public interest.

II
VESTED RIGHTS UNDER THE CALIFORNIA COASTAL ZONE CONSERVATION ACT

The common law vested rights doctrine developed by the California courts was incorporated in section 27404 of the California Coastal Zone Conservation Act, with only one variation relating to the date at which the right vests. Under the common law rule, a vested right is established when a property owner has done substantial work under a valid building permit at the time a new regulation goes into effect. The effective date of the new permit requirements of the Coastal Zone Conservation Act was February 1, 1973, but under section 27404 exemptions were to be granted only where vested rights had been established prior to November 8, 1972. This discrepancy between the cut-off date for vested rights and the effective date of the new permit requirement left uncertain the status of construction begun between November 8 and February 1.

The Coastal Commission took the position that only those owners explicitly exempted by section 27404 could proceed with projects absent a permit from a regional commission. This interpretation was rejected by the California Supreme Court in San Diego Coast Regional Commission v. See the Sea, Inc. on the ground that the Act did not intend to impose a moratorium on construction for the period between November 8 and February 1, 1973. The developer in See the Sea did not qualify for an exemption under section 27404 because it had not received its building permit until December 6, 1972. Nevertheless, the court held that "the Act requires a coastal permit for construction commenced after February 1, 1973, but does not require one for builders performing substantial lawful construction of their projects prior thereto."

The use of the phrase "substantial lawful construction" gave the impression that the court had created a separate exemption, possibly with different requirements from those of section 27404. In subsequent cases,

52. CAL. PUB. RES. CODE § 27400 (Deering 1976). This section reads:
On or after February 1, 1973, any person wishing to perform any development within the permit area shall obtain a permit authorizing such development.
53. The text of § 27404 is set forth in the text accompanying note 14 supra.
55. Id. at 891, 513 P.2d at 130-31, 109 Cal. Rptr. at 378-79.
56. Id. at 890, 513 P.2d at 130, 109 Cal. Rptr. at 378 (emphasis added).
courts spoke of two different exemptions under the Coastal Act, one provided by section 27404, the other by See the Sea.\(^57\) One court suggested that a building permit might not be required under the See the Sea exemption: "Although the defendant in See the Sea did its work under a building permit, the majority decision is not necessarily predicated upon the existence of a 'building permit' as distinguished from a 'grading permit,' or some other governmental authorization."\(^58\) Another court concluded that the See the Sea exemption was available only if actual construction, as distinguished from preparatory work, had been commenced prior to February 1, 1973.\(^59\)

This confusion was not dispelled until the California Supreme Court faced the vested rights issue in *Avco Community Developers, Inc. v. South Coast Regional Commission*.\(^60\) There the court corrected the view that the "substantial lawful construction" language in See the Sea had been intended to allow an exemption in the absence of a building permit.\(^61\) The court noted that the builder in See the Sea did have a building permit, and thus the only issue in that case had been whether the statutory exemption should be supplemented where work had been done between November 8 and February 1. Therefore, See the Sea had not established a new standard for vested rights claims under the Coastal Act that differed from the vested rights principles developed by earlier case law.

Despite See the Sea, most of the pre-Avco cases applied the building permit standard. *California Central Coast Regional Coastal Zone Conservation Commission v. McKeon Construction Co.*\(^62\) is an example of an extremely strict application of this standard. McKeon was denied building permits in July, 1972.\(^63\) Despite its conclusion that McKeon was entitled to building permits as of that date, the court held that McKeon was not exempt from the permit requirements of the Coastal Zone Conservation Act because it had not established a vested right prior to November 8 by doing substantial work pursuant to a building permit.\(^64\)

In a few of the cases under the Act, the California Attorney General, representing the state and regional coastal commissions, assumed that the

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60. 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976).

61. 17 Cal. 3d at 799, 553 P.2d at 555, 132 Cal. Rptr. at 395 (1976).


63. Id. at 158, 112 Cal. Rptr. at 905.

64. Id. at 159, 112 Cal. Rptr. at 906.
building permit might no longer be the *sine qua non* of a vested right. As described by the court in *Aries Development Co. v. California Coastal Zone Conservation Commission*, the Attorney General’s position was that under modern land development practices, various governmental approvals are required before the issuance of a building permit, each approval pertaining to different aspects of the project. . . . [Thus] a vested right might arise before the issuance of a building permit if the preliminary permits approve a specific project and contain all final discretionary approvals required for the completion of the project.

This concession did not affect the outcome of *Aries* because the court concluded that the developer had not obtained a vested right under either theory. But the "final discretionary approval" theory continued to be invoked by developers asserting a vested right where no building permit had been issued. The *Avco* case concerned this type of claim.

III

THE AVCO CASE

Avco Construction Company began development of 7,936 acres of land in Orange County in 1968 as the site of its Laguna Niguel Planned Community. In 1971, the county zoned 5,234 acres for a planned community development, to contain approximately 19,000 residential units. The specific land involved in the litigation was Tract 7479, a 74 acre parcel located within the coastal permit zone. A final subdivision map dividing Tract 7479 into 27 parcels for multiple unit residential use was approved by the county in 1972 and a rough grading permit was issued. By February 1, 1973, storm drains, culverts, street improvements, utilities, and related facilities were under construction or completed. Although building permits

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66. Id.
67. Id.
68. Id.
69. Avco’s effort to complete the construction of its Laguna Niguel project has generated more than one round of court action. Environmental Coalition of Orange County, Inc. v. Avco Community Developers, Inc., 40 Cal. App. 3d 513, 115 Cal. Rptr. 59 (1974), involved the exemption claim for Tract 7479. The plaintiffs had obtained a preliminary injunction to stop Avco’s development because of the absence of a coastal permit. The court of appeals modified the lower court’s order so as to allow completion of work authorized by a grading permit. The issue of exemption for the whole project was deferred for decision at the trial on the merits. Id. at 523, 115 Cal. Rptr. at 65.
70. The coastal zone permit area is defined in CAL. PUB. RES. CODE § 27104. See note 11 supra. A total of 493 acres of Avco’s property is within the permit area. Avco Community Developers, Inc. v. South Coast Regional Comm’n, 17 Cal. 3d 785, 789, 553 P.2d 546, 549, 132 Cal. Rptr. 386, 389 (1976).
71. Id.
72. Id.
had not been issued, Avco had spent over $2,000,000 and incurred liabilities of over $740,000 in the development of Tract 7479.73

Avco’s request for an exemption from the permit requirement of the Act was denied by the South Coast Regional Coastal Commission and the State Commission because Avco had not obtained any building permits before February 1, 197374 and thus did not fall under the section 27404 exemption. Avco then petitioned for judicial review.

The trial court found that Avco had installed the subdivision improvements in good faith reliance upon the county’s approvals and that these approvals had reasonably led Avco to expect that no further discretionary approval would be required.75 The trial court also found that the maximum number, size, and type of buildings to be constructed could be determined by reference to the tract map, the planned community district regulations, and a model of the development prepared by Avco in 1971.76 Although it was persuaded that in basic fairness Avco should be permitted to complete its project, the trial court ruled that Avco had not established a vested right to complete development on Tract 7479. Applying the test established in Spindler,77 the court concluded that since Avco did not have a building permit authorizing construction, it was not exempt from the permit requirements of the Act.78

The court of appeal reversed, distinguishing Spindler as the “high water mark of harsh results . . . in upholding the exercise of the police power in zoning.”79 The court noted that Avco’s plans had been developed “in response to multiple demands from many agencies of the Orange County government”80 and argued that it would be “sheer folly to expend such staggering effort” on grading and other improvements if the result was not to be the construction of homes.81

The court of appeal narrowed its determination to the issue of whether Orange County would be estopped from preventing the completion of Avco’s project. The court believed that once Avco had completed grading, the county would no longer have the power to refuse to issue the building permits so long as the building code requirements were met.82 Because it viewed the granting of the building permit as purely ministerial in this case, the court concluded that Orange County had already granted final discretion-

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73. Id.
74. Id. at 790, 553 P.2d at 549, 132 Cal. Rptr. at 389.
75. Id. at 789, 553 P.2d at 549, 132 Cal. Rptr. at 389.
76. Id.
77. See text accompanying notes 43-47 supra.
78. 17 Cal. 3d at 789, 553 P.2d at 549, 132 Cal. Rptr. at 389.
79. 122 Cal. Rptr. 810, 813-14 (1975). The court of appeal’s opinion is no longer available in the official California reports.
80. Id. at 814.
81. Id. at 815.
82. Id.
ary approval of Avco’s project. Furthermore, without ever precisely stating
which county approval constituted a final discretionary approval, the court
held that this approval met the “building permit” requirement for purposes
of section 27404 of the Coastal Zone Conservation Act.

The conflict between the trial court’s literal reading of “building
permit” as a condition precedent to attainment of a vested right and the
court of appeal’s acceptance of the “final discretionary approval” theory set
the stage for the decision by the California Supreme Court.

The supreme court’s analysis of Avco’s vested rights claim began with
a restatement of the common law vested rights rule: “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 per-
mit.”83 The court then discussed Spindler84 and Anderson,85 emphasizing
that the builders in those cases took calculated business risks in expending
funds when they knew that they could not justifiably rely on governmental
approval until they had obtained building permits.86 Avco’s attempt to
distinguish its situation from these cases on the facts was rejected by the
court. Despite the fact that Avco had performed substantially more work and
had received more governmental approvals than the builder in Spindler, and
despite the fact that the property owner in Anderson had never received any
type of governmental approval, the court found those cases controlling:

Despite minor factual variations, Spindler and Anderson are clearly
controlling; they stand for the proposition that neither the existence
of a particular zoning nor work undertaken pursuant to governmen-
tal approvals preparatory to construction of buildings can form the
basis of a vested right to build a structure which does not comply
with the laws applicable at the time a building permit is issued. By
zoning the property or issuing approvals for work preliminary to
construction the government makes no representation to a landown-
er that he will be exempt from the zoning laws in effect at the
subsequent time he applies for a building permit or that he may
construct particular structures on the property, and thus the govern-
ment cannot be estopped to enforce the laws in effect when the
permit is issued.87

The court considered, but did not have to rule on a concession by the
Coastal Commission that in rare situations a vested right might be estab-
lished by another type of permit, such as a conditional use permit, contain-

83. 17 Cal. 3d at 791, 553 P.2d at 550, 132 Cal. Rptr. at 389. The court relied primarily on
the language of Dobbins v. City of Los Angeles and of Trans Oceanic Oil Co. v. Santa Barbara.
See text accompanying notes 25-38 supra.
84. See text accompanying notes 43-47 supra.
85. See text accompanying notes 39-41 supra.
86. 17 Cal. 3d at 792-93, 553 P.2d at 550-51, 132 Cal. Rptr. at 390-91.
87. Id. at 793, 553 P.2d at 551, 132 Cal. Rptr. at 391.
ing "substantially the same specificity and definition as a building permit." The court concluded that Avco would not have been entitled to a vested right in any case since none of the approvals obtained by Avco related to identifiable buildings or the details of their structure:

Thus, on the date the Act became effective, the county did not know, much less had it approved, plans indicating such matters as the placement of buildings to be built on the tract, the size of the proposed buildings, the number of apartments of specified size, or how high the buildings would rise, there being no legal height limitation for multiple residential units. Indeed, it was not even clear how many units would be built on the tract. This discussion emphasizes one of the essential features of the building permit standard: at the building permit stage, the government makes decisions based on its knowledge of specific and detailed information on identifiable structures. Detailed information allows the government to know exactly what is to be constructed; without such details, "it would be impossible to determine the precise scope of any purported right to construct buildings on the site." The court was presented with the contention that the special characteristics of modern subdivisions and planned unit developments require a modification of the traditional vested rights rule. Avco argued that subdividers are in a different position from the builders in Spindler and Anderson because subdivision map approval is a "final discretionary approval" entitling the subdivider to complete its project. The supreme court rejected this argument, holding that the issuance of building permits after a subdivision map approval is not merely a ministerial act. The court also rejected the amicus curiae's suggestion that the special features of planned unit development zoning require that a vested right be established at the time the PUD approval is received. PUD zones differ from conventional zoning in that they involve governmental approval for the overall density and scale of a project, rather than for the detailed characteristics of lot size, setback, and housing type. The court, however, drew no distinction, simply noting that PUDs are only a special form of zoning, and holding that there is no vested right in existing or anticipated zoning.

88. Id. at 794, 553 P.2d at 551, 132 Cal. Rptr. at 391.
89. Id. at 794, 553 P.2d at 552, 132 Cal. Rptr. at 392.
90. Id. at 795, 553 P.2d at 552, 132 Cal. Rptr. at 392.
91. Id.
92. Id. at 795, 553 P.2d at 552-53, 132 Cal. Rptr. at 392. The court noted that, under the provisions of the Orange County Building Code, the county could not have been compelled to issue a building permit unless the plans conformed "not only to the structural requirements of the code but to 'other pertinent laws and ordinances.'" Id.
93. Id. at 796, 553 P.2d at 553, 132 Cal. Rptr. at 393. Oceanic California, Inc. was the amicus who argued this position.
94. Id.
The most important reason underlying the court's refusal to modify the common law vested rights rule for large land development projects was a concern that such a modification would seriously restrict the government's flexibility in regulating land use: "If we were to accept the premise that the construction of subdivision improvements or the zoning of the land for a planned community are sufficient to afford a developer a vested right . . . , there could be serious impairment of the government's right to control land use policy." A vested rights exemption based on a preliminary approval might free a major development for an indefinite period from subsequently enacted regulations unless the developer waived, abandoned, or was required to amortize its vested right. The result would be a drastic curtailment of the government's discretion to modify or enact new regulations in response to the changing needs of the community. This result would be anomalous in view of the purposes of subdivision regulations, PUD ordinances, and other innovative controls, which have been enacted for the purpose of giving local governments increasing flexibility in land use management.

Although Avco applied a narrow interpretation of vested rights to the plaintiff before the court, the court did not disavow the possibility of an exception to the section 27404 permit requirement, and it would be incorrect to state that the case requires a building permit to establish a vested right in all cases. Nevertheless, only an authorization with the same specificity as a building permit, issued at a similarly late stage in the development process, would appear to satisfy the court's strict standards and policy concerns.

The leading post-Avco decision appears not to leave even a small degree of flexibility in determining whether a vested right has been established. In Oceanic California, Inc. v. North Central Coast Regional Commission, the court of appeal denied an exemption claim by the company that was developing Sea Ranch, a project involving 5,200 acres on the coast in Sonoma County. The county had given the property planned community zoning and had approved a specific development plan. In addition, all improvements were controlled by development constraints known as the Sea Ranch Restrictions. As of 1972, completed portions of the project included 2,000 subdivided lots, 350 single family residences, 14 condominiums, a lodge, a store facility, recreational facilities, and other improvements; the developer's financial expenditures totalled $26,900,000.

The implementation of Sea Ranch project was a two stage process. First, the county approved the general parameters of the planned community (PC) concept by adopting the PC zoning and approving the specific plan.

95. Id. at 797, 553 P.2d at 554, 132 Cal. Rptr. at 394.
96. Id. at 798, 553 P.2d at 554, 132 Cal. Rptr. at 394.
98. Id. at 62-64, 133 Cal. Rptr. at 667-68.
99. Id. at 64, 133 Cal. Rptr. at 668.
The second stage involved the actual construction of specific portions of the project on an incremental basis. This stage required approval of subdivision maps and the issuance of use, grading, and building permits.

The developer, Oceanic, sought a vested rights exemption from the Coastal Zone Conservation Act for the entire 5,200 acre project, including those portions for which no specific use, grading, or building permits had been issued. Oceanic's theory was that the existing plans and approvals, i.e., the PC zoning, the specific plan, and the Sea Ranch Restrictions, set a pattern that rendered the issuance of specific permits "mere ministerial acts in applying standards already established and agreed upon." The regional and state coastal commissions rejected the exemption claim and were upheld by both the trial court and court of appeal.

The court of appeal, quoting the trial court, stated: "Although the County of Sonoma repeatedly approved the concept of a planned community development for the Sea Ranch . . . . , this type of general approval is not a sufficient government approval on which to base a claim of vested rights to develop notwithstanding the Coastal Act." In its application to proposed single family residences, Oceanic highlights the potential strictness of the Avco rule. The trial court determined that the proposed construction of single family residences on certain lots was so specifically defined by the subdivision map approvals, the county ordinances, and the Sea Ranch Restrictions that the issuance of a building permit was merely a ministerial act. The court of appeal noted that, unlike the developer in Avco, Sea Ranch's developer had supplied the county with "detailed information concerning the buildings it intended to construct on the tract." This finding appears to satisfy Avco's requirement that elementary details such as size, height, placement, and number of units be presented and approved before any vested right is established. Nevertheless, both the trial court and the court of appeal applied an objective theory of vested rights, holding that the absence of building permits precluded any vested right. The court of appeal read Avco to mean that even precise approvals that specify the details of the structures to be built could not give rise to a vested right. Thus read, Avco apparently requires submission of construction plans for each specific building, the only concession being that the permit issued need not be labeled a "building permit."

100. Id. at 77, 133 Cal. Rptr. at 676.
101. Id. at 62, 133 Cal. Rptr. at 666.
102. Id. at 65, 133 Cal. Rptr. at 668.
103. Id. at 77-78, 133 Cal. Rptr. at 676.
104. Id. at 78-79, 133 Cal. Rptr. at 677, quoting from Avco Community Developers, Inc. v. South Coast Regional Comm'n, 17 Cal. 3d 785, 794 n.3, 553 P.2d 546, 552 n.3, 132 Cal. Rptr. 386, 392 n.3 (1976).
105. Avco Community Developers, Inc. v. South Coast Regional Comm'n, 17 Cal. 3d at 794, 553 P.2d at 552, 132 Cal. Rptr. at 392.
106. 63 Cal. App. 3d at 78-79, 133 Cal. Rptr. at 677.
The *Avco* and *Oceanic* decisions indicate that attempts to obtain a judicial expansion of the vested rights doctrine have failed. The *Avco* court noted that any modification of the strict building permit standard should be left to the legislature. It was to the legislature that developers next turned for relief.

IV

LEGISLATIVE RESPONSES

The California Legislature has been willing to consider the appeals of developers for increased protection of development expectations. A bill granting a limited expansion of vested rights was passed by the Legislature, but vetoed by Governor Edmund G. Brown, Jr., in 1976. This bill has been reintroduced in virtually identical form in the 1977 session as Assembly Bill 1789. A second bill introduced in the 1977 session, Assembly Bill 20, uses a different approach to achieve a potentially far reaching expansion of vested rights.

The problems of administering a vested right granted at a stage earlier than the issuance of a building permit were suggested by the supreme court in *Avco*. If the vested right is obtained on the basis of an early approval of general development plans, no certain basis exists for determining the scope of the right. Subdivision plat and planned community zoning maps do not contain the detail that would permit a determination of whether later permits and construction conform to the approval granted.

A second problem raised by early vesting is that of the duration of the right. The building permit standard provides natural limits, since the permit

107. The *Oceanic* decision was final when the California Supreme Court denied review. Official Minutes of the Supreme Court of California, Dec. 21, 1976. The United States Supreme Court declined to exercise jurisdiction in either the *Avco* or *Oceanic* cases. 97 S. Ct. 1089 (1977) (*Avco*); 97 S. Ct. 2668 (1977) (*Oceanic*). Efforts to persuade the courts to modify the vested rights rule have apparently reached a dead end.

108. 17 Cal. 3d at 796, 553 P.2d at 553, 132 Cal. Rptr. at 393.

109. A.B. 3275, Cal. Reg. Sess. (1976). Governor Brown's veto message expressed his support for the general objectives of the bill but criticized certain unspecified "technical defects." Office of the Governor, Press Release No. 370 (Sept. 30, 1976). A.B. 3275 contained a number of questionable procedural provisions, such as a limited period for judicial review and a provision for automatic approval if a local government should fail to act on an application within 40 days. The new bill, A.B. 1789, retains most of these provisions. This Comment will not consider these procedural aspects but will focus only on the vested rights issue. One factor that might be noted, however, is that concentration of all government approvals into a single procedure necessarily reduces the number of opportunities for citizen input into the decision-making process, and might result in less responsive decisions.

110. A.B. 1789, Cal. Reg. Sess. (1977), introduced April 21, 1977. Citations to A.B. 1789 in this Comment are with reference to those sections of CAL. GOV'T CODE which would be added if the bill were enacted.

111. A.B. 20, Cal. Reg. Sess. (1977), introduced December 8, 1976, amended June 8, 1977. Citations to A.B. 20 in this Comment are with reference to those sections of CAL. GOV'T CODE which would be added or amended if the bill is enacted.

112. See text accompanying notes 91-96 supra.
is issued only when all preparatory stages are completed and construction is ready to begin. The vested right acquired at this stage is the right to complete a specific structure within a limited period of time. But if a vested right is obtained at an early stage, it could insulate a project from any further regulation for an indefinite period.113

Both A.B. 1789 and A.B. 20 would grant a vested right to complete a project at an earlier stage than allowed under the traditional rule. Both attempt to deal with the problems of defining the scope of the right granted and of limiting the period of its effectiveness. A comparison of these two approaches will demonstrate many of the difficulties involved in devising a practicable statutory expansion of the common law vested rights rule.

A. Assembly Bill 1789

A.B. 1789 states that certainty in the construction industry and the efficient utilization of its resources to provide for housing are matters of statewide concern, and that the possibility that a project will be subject to multiple governmental approvals and to changes in the laws after initial approval is granted impairs both certainty and efficiency.114 The declared intent of the bill is to remedy these problems in a manner that allows local government to exercise maximum discretion, while requiring that governmental discretion be exercised at the earliest possible moment, so that the developer can expend resources in reliance on that approval "without risk of frustration of a project or development by subsequent governmental action."115

A.B. 1789 establishes a new procedure whereby a city or county may grant an approval known as a Development Plan Permit (DPP) at an early stage in the development process. Once a DPP is issued, the project is exempt from any subsequent changes in local regulations made by the local agency. The local government is required to issue all further permits and approvals on the basis of the ordinances and regulations in existence at the time the DPP was granted.116 But the vested right obtained pursuant to this procedure is not effective against new or amended requirements of other jurisdictions (i.e., state or federal governments and agencies), nor against new requirements mandated by judicial determinations.117

Under the provisions of A.B. 1789, the developer may, at its option,
apply to the appropriate local government for a DPP. The government's power to disapprove such an application is not limited, and any condition may be imposed that is authorized by current laws and ordinances. But once a DPP is granted, the local government is prohibited from taking any action "which would frustrate or alter or render the proposed development unfeasible, as approved." All subsequent approvals, permits, extensions, or entitlements needed to complete the project must be acted on "consistent with" the DPP. The DPP is effective for three years and may be extended for an additional two years.

The development plan submitted by the applicant for approval need only include a scale drawing showing the approximate proposed design and improvement of the property, the densities, location, size, and use of buildings and other facilities, and the proposed maximum heights and minimum

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118. "Development plan permit" means an ordinance by the legislative body of the local agency approving or conditionally approving a proposed development plan. Id. § 64020. Sections 64030 to 64066 describe the application procedure.

119. Section 64045 contains a number of specific grounds for denial modeled after provisions of the Subdivision Map Act, CAL. GOV'T CODE §§ 66410-66499.37 (West Supp. 1977). Section 64045(b) provides that "the legislative body may deny approval of the proposed development plan where it determines such denial is in the interest of public health, safety or general welfare." Section 64045(c) provides that a denial on these grounds shall not be subject to judicial review.

120. The planning commission of a local agency may recommend to the legislative body, and the legislative body may impose, any condition on the approval of a proposed development plan which is authorized by existing ordinances or state law governing necessary local approvals entailed by the proposed development.


121. A development plan permit shall confer a right to complete the proposed development in conformity with an approved development plan. The local agency which approved or conditionally approved the development plan permit shall take no action which would frustrate or alter or render the proposed development unfeasible, as approved or conditionally approved by the development plan permit. All such local agency's approvals, permits, extensions or other entitlements for the proposed development applied for subsequent to the development plan permit shall be acted upon consistent with the development plan permit. Only conditions which could have been imposed by such local agency at the time the development plan was approved or conditionally approved may be imposed as a condition to such subsequent approvals or permits. No subsequent permits, approvals, or extensions shall be denied by such local agency based on subsequent changes in applicable general or specific plans. Nothing herein shall prevent an action or imposition of condition by such local agency if required by a public agency, an agency of the federal government or a court of competent jurisdiction.

Id. § 64040.

122. Id.

123. Id. § 64041.

124. Prior to the expiration of the development plan permit, an applicant may apply to have the time at which such permit expires extended. No extension shall be for more than 24 months. Additional conditions may be imposed as a prerequisite for the extensions. If the applicant shows that substantial sums have been spent or liabilities incurred in reliance on the development plan permit and that work or effort toward final development has been made with due diligence, an extension may be denied only for good cause.

Id. § 64042.
The plan need not be based on an accurate and detailed survey of the land, nor are engineering details required. The definitions of "design" and "improvement" in A.B. 1789 are virtually identical to the definition of those terms in the Subdivision Map Act. In effect, A.B. 1789 authorizes a local government to give a vested right based on no more than the approval of plans like those presently submitted for subdivision map purposes.

The key provisions of A.B. 1789 described above appear somewhat contradictory. On the one hand, the bill seems to benefit developers because it allows them to establish vested rights without first obtaining a building permit and based upon only approximate plans. Yet, on the other hand, it does not limit the power of the local government to impose conditions or to deny the application in the interests of public health, safety, or general welfare. A city council or county board of supervisors could condition approval of a DPP on the submission of specific construction plans so that the developer would not be assured of final approval of the project until the stage at which he would be entitled to a building permit. Thus A.B. 1789 would have little effect on a local agency that desired to exercise its discretionary authority to the maximum extent.

The significance of A.B. 1789 is in its effect on pro-development local agencies. A city council or county board of supervisors that wanted to assist the construction of a proposed development could issue a DPP at an early stage, and thus bind the community to that development for a minimum of three years and perhaps more. The developer would be protected from attempts to modify or halt the development by a subsequently elected city council or board of supervisors.

One issue raised by A.B. 1789 is that the person who applies for a DPP need not actually intend to build the project. The bill allows the original DPP applicant to assign the permit to another party.

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125. "Development plan" shall consist of a drawing to scale of the property to be developed showing the approximate proposed design and improvement of the development, densities, the location, maximum height, size and use of all proposed buildings, proposed location of accessory facilities, and proposed minimum setbacks. It need not be based on an accurate or detailed final survey of the property nor shall it contain engineering details. The dimensions and scale of the proposed development plan shall be the same as that required for tentative subdivision maps. When architectural review is authorized by existing ordinances or state law governing necessary local approvals entailed by the proposed development, the development plan shall include architectural renderings or elevations.

126. Id. § 64012.


129. "Applicant" means any person, firm, corporation, partnership, association or
expenditure in reliance on the DPP is required in order to establish a vested right. This might encourage an entrepreneur to propose a project and obtain a DPP simply to acquire a vested right with the expectation of marketing the permit to a different developer, and could lead to speculation in land development projects by persons who have no genuine interest in carrying a project through to completion.

The potential duration of the vested right established by a DPP raises another troublesome issue. The DPP is effective for three years with the possibility of extensions for additional two year periods. If the applicant shows that substantial expenditures or liabilities have been incurred in reliance on the DPP and that "work or effort" toward final development has been made, an extension may be denied only for "good cause." The extension provision seems to create a presumption that the applicant is entitled to an extension based on some expenditures and "effort," and the burden is on the government to show "good cause" for denying the extension.

The bill does not limit the number of permissible extensions. While new conditions may be imposed at the time of an extension, it is not clear whether the new conditions are limited to those which will not "frustrate or alter or render infeasible" the project as originally approved. This suggests that the period of insulation from changes in local regulations may be considerably more than three years. Consequently, the final expiration date of a DPP would not be known at the time it was granted.

Perhaps the most troublesome aspect of A.B. 1789 is its failure to limit the size and scope of projects to which the new procedure might apply. The larger the project and the longer the period of time needed for completion, the more likely it is that changes will occur to which governments must respond. Such changes include the recognition of the need for regulation in new areas (e.g., environmental impact reports and coastal regulation), changing population patterns which necessitate revisions of old plans, and changes in citizen outlook which result in the election of different officials with different approaches to land use planning. To ensure that a community can preserve the opportunity to re-evaluate its needs at reasonable intervals, no local agency should be permitted to approve a DPP for any project that will take more than five years to complete. This limitation would help prevent the situation where the government is faced at the end of the permit period with a partially completed project and pressure to extend the permit to prevent "waste" and inequity to the builder. If a developer wished to

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its assignee which files, causes to be filed or on whose behalf is filed an application for a development plan permit.

Id. § 64014.

130. Id. § 64042. See note 124 supra. "Good cause" is never defined in the bill.

131. Id.

132. Id. § 64040. See note 121 supra.
build a larger project over a longer term, it would have to make consecutive applications for DPPs for portions of the total project.

B. Assembly Bill 20

An approach that does not require creation of a new category of development approvals for extending vested rights is contained in A.B. 20. In contrast to A.B. 1789, A.B. 20 establishes a vested right against changes in laws or regulations by state and regional agencies as well as by local governments and special districts. A vested right is acquired when a person has made or contracted for substantial expenditures in connection with a project which has received all of the discretionary approvals required from all of the agencies having jurisdiction over the project. The right to complete the project as approved, regardless of subsequent laws, is effective for a period of five years from the date of the last discretionary approval. The right can be lost only by an unexcused failure to diligently proceed with the project for 365 consecutive days. The vested right is transferable, and may be held by any person proposing to carry out the project, including an assignee of the person who received the original approvals.

To qualify as a "project" within the meaning of A.B. 20, the proposed land development must be embodied in a "specific and detailed plan." This plan must cover the entire real property proposed for development, including those portions not part of the current project, and must have been reviewed by all agencies having discretionary approval authority over the project. The "specific and detailed plan," however, is not strictly defined. It need only indicate "the appearance of the project upon completion" and give other more detailed information "where appropriate."  

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134. Id. § 64100(a). This section reads:

Any person who pays substantial expenses or incurs substantial liabilities in connection with a project shall have the right and shall be permitted to complete the development of the project notwithstanding any change after the date of the last discretionary approval of the project by a public agency in any law which would preclude, impede or adversely affect the completion of the development of the project.

135. Id. A delay in the exercise of the right will not be considered a failure if caused by "strikes, walkouts, wars, unavailability of materials, floods, unusual weather conditions or other acts or causes beyond such person's control . . . ." Id.

136. Id. § 64100(e). This section reads:

"Person" shall mean and refer to a person who proposes to carry out the project and may be the owner of the project, a person having the right to purchase the project from the owner thereof under a valid and binding contract, or any successor or assignee of either, who acquires the project for purposes of development in accordance with the specific and detailed plan therefor . . . .

137. Id. § 64100(g).

138. Id. § 64100(h). The full text of this section follows:

"Specific and detailed plan" shall mean and refer to a plan for the entire project which indicates the appearance of the project upon completion and shows, where
Thus this bill would not change the specificity of plans required for approvals under current practice. The requirement of a "specific and detailed plan" seems intended only to ensure that the scope of the right acquired be determinable by reference to a sufficiently detailed document. Requiring that the plan cover the entire property could have the beneficial effect of ensuring that the decision makers have information on the entire contemplated development at the time of their decisions regarding the proposal before them.

The substantial expenditures or liabilities required as a prerequisite for the vested right must amount to at least $100,000 or 10 percent of the total estimated cost of the project. Unlike those required for the establishment of a common law vested right, these expenditures need not have been made in reliance on the approvals. The costs of obtaining the approvals, such as architectural, engineering, and planning expenses and the permit fees charged by public agencies, are included in the calculation of expenses. Obligations under construction contracts, construction loans, and bonds required by public agencies are included as liabilities. Costs or liabilities connected with the acquisition of land prior to receiving all necessary approvals for the project may not be included in the calculation.

The right granted by A.B. 20 vests when two conditions are met: substantial expenditures or liabilities must have been incurred; and all necessary discretionary approvals must have been received. The delineation of what constitutes a discretionary approval is central to this scheme. The bill defines a "discretionary approval" as one requiring the exercise of "judgment or deliberation" on the part of the legislative body of a public agency. This is distinguished from those decisions made when the governing body "acts upon a given state of facts in a prescribed manner and in obedience to the mandate of law, and merely determines whether there has been conformity with the applicable laws . . . ." Building permits are expressly excluded from the category of discretionary approvals.

A.B. 20 appears to avoid some of the problems created under A.B. 1789. But the vested right granted under A.B. 20 would not be easy to appropriate, lot size and configuration, the location and dimensions of any streets, the location and type of any utilities, the location and type of any landscaping and the size (including number of stories), number, type, location and uses of any buildings and other permanent structures.

139. Id. §§ 64100(i), (j).
140. Id. § 64100(i).
141. Id. § 64100(j).
142. Id. §§ 64100(i), (j).
143. Id. § 64100(c). The limitation of "discretionary approvals" to those granted by legislative bodies appears unrealistic, since many important discretionary decisions are delegated to administrative bodies or to individual administrators.
144. Id.
145. Id. "For the purposes hereof, the issuance by a public agency of a building permit or other permit, license or authorization in lieu of a building permit, shall not be deemed to be a discretionary approval." Id.
enforce or administer. A developer claiming a vested right must prove to an agency attempting to impose a new restriction that he obtained final discretionary approvals from all appropriate agencies before the effective date of the new regulation; it will be difficult for the agency to evaluate such a claim in order to clearly establish or refute the satisfaction of this condition. The problems faced by members of the public will be even greater; in cases of complex developments requiring many kinds of approvals, a citizen challenging the vested right is unlikely to know all the agencies having jurisdiction over a project and what approvals must be obtained from each.

In addition, the problem remains of how to determine which approvals are discretionary ones. Disputes are certain to arise, because the existence or non-existence of a vested right will depend on the characterization of the approvals yet to be obtained. The definitions provided in the bill will not resolve all questions concerning the nature of particular approvals. Many agencies exercise "judgment or deliberation" through a series of decisions; whether a particular decision should be considered discretionary or non-discretionary depends on a close reading of the enabling legislation and regulations. Ultimately, the determination would be made by a court. Since every change in regulations may affect the determination, the question of what is a discretionary approval would never be definitively settled. The scheme of A.B. 20 invites endless litigation and uncertainty.

The effect of obtaining a vested right under this bill would vary from project to project, depending on the number and type of approvals required. A residential subdivision might receive the only necessary discretionary approval at the time that the subdivision map is approved, since regulations governing the construction of houses on the lots are contained in zoning ordinances and building codes which do not allow for discretion in their application. For such a subdivision, therefore, A.B. 20 provides for vesting of rights at the stage of subdivision map approval.

For complex development projects, subject to many discretionary approvals, the last such approval would occur later in the application process. But the protection provided, once the right had vested, would be substantial. Not only would the vested right preclude a change in requirements by any agency which had approved the project, but it would also bar the imposition of any new state or local authority. Thus, if the Avco developer had obtained an A.B. 20 vested right for its development of Tract 7479 in 1972, the Coastal Zone Conservation Act permit requirements could not have been imposed on any part of that project for a period of five years. If instead it had obtained a DPP under A.B. 1789, it would have been subject to the Act's provisions, since the DPP protects only against changes in regulations of the issuing agency.

The limited term of the vested right granted by A.B. 20 meets one of the most serious objections to the developer's claim in the Avco case. There, the developer asserted that final discretionary approval of his project
created a vested right for the period of time necessary to complete the entire project. Acceptance of such a theory would have meant that zoning and other regulations applicable to the project might be frozen indefinitely. A vested right good only for a limited period precludes this possibility, and also prevents the exemption of the project from new governing authority for an indefinite period. At the end of the five year term, the A.B. 20 right no longer exists; any renewal or extension of approvals must be based on compliance with intervening changes in all applicable laws and regulations.

Another effect of the passage of A.B. 20 might be to induce a restructuring of the approval process. Since the distinction between discretionary and non-discretionary approvals is critical under this scheme, public agencies might revise their standards for approval at various stages in order to control the point at which the last discretionary approval could be obtained. A local government wishing to defeat the possibility of early vesting, for example, might impose an additional requirement of a discretionary conditional use permit on every development project.

CONCLUSION

The common theme of A.B. 1789 and A.B. 20 is the desire to limit the traditional vested rights doctrine followed by Aveo in favor of a statutory scheme that would give developers a vested right earlier than the building permit stage. As noted in the discussion above, A.B. 1789 opens the possibility of a vested right based only on approximate plans and might allow a pro-development local agency to bind subsequently elected officials for indefinite periods, regardless of any changes in the needs and values of the community. A.B. 20 creates a different kind of uncertainty because of the problems of knowing what decisions are “final discretionary approvals” and whether all such approvals have been obtained.146

146. An early vesting scheme with even greater uncertainties is proposed in Hagman, The Vesting Issue: The Rights of Fetal Development Vis a Vis the Abortions of Public Whimsey, 7 ENV'TL L. 519 (1977). Hagman disapproves of the late vesting rule because he sees it as leading to economic waste and promoting irresponsible government. “[T]he inability to vest a right to complete development regardless of the number of preliminary permits obtained and regardless of the degree of construction undertaken pursuant to them results in unutilized partial development from which the social, economic and environmental costs often outweigh the benefits.” Id. at 558. He would shift to the courts the responsibility for determining whether a new regulation should be applied to a project already begun.

Under Hagman’s “Model Statute,” a complex development could obtain a vested right on the basis of preliminary activities and would be exempt from regulation adopted after the preliminary approvals, so long as the reviewing court concluded that the newly enacted law was not of “fundamental” importance:

The proposed vesting law covers those developments requiring more than one permit, all of which cannot be obtained in advance of construction. In such developments, the developer has a vested right to complete construction enforceable by a court if the court finds: (1) substantial construction pursuant to any permit; (2) which construction would either be wasted, or would not have been undertaken if completion of the project was known to be precluded; and (3) if compliance with any changed law is not required in order to protect fundamental public health or safety.
Assuming the problems and ambiguities of these bills can be solved, the issue remains whether early vesting of development rights is preferable to the late vesting approach of the traditional rule. Developers argue that an early vesting rule is needed because of the unfairness of the risks imposed by changes in the law which occur after a project is underway. This argument is based on the view that the risks involved in land development are of a different order than ordinary business risks. Although land has traditionally been accorded a special place in the American legal system, the protection granted to landowners is inappropriate in the case of modern real estate developers. Their interest in land is temporary, and their expectations are of profit, to be gained from investments in improvements of land, not at all unlike profit expectations from other business investments.

Business expectations in other fields are often frustrated when the government determines that regulation is necessary to protect the public welfare. For example, a product may be ordered off the market because it is unsafe, or additional expenditures may be required under new laws, as for pollution control equipment. A drug manufacturer which has already invested in a new product has no vested right to continue production after a government agency has ruled the product unsafe. Any new regulation interferes with previous expectations of the persons regulated, and may increase the cost to consumers of the ultimate product.

The second argument in favor of early vesting is that the uncertainties faced by developers result in higher costs which are passed on to the consumer in the form of higher housing costs and decreased availability. No attempt can be made here to analyze the validity of that contention. But even if it is true that housing is more expensive because of delays and increased costs caused by the imposition of new regulations at a late stage in the process, there is evidence that the public is willing to accept these extra costs.

While Hagman criticizes the current rule for lack of certainty, the scheme he proposes relies entirely on a case by case evaluation by the courts of the particular development and the necessity of applying the new law to it. Under this statute, Avco would have established a vested right at the time that it installed roads and sewers under the subdivision approval, unless the court had later found that the application of the Coastal Zone Conservation Act requirements to the development was necessary "to protect fundamental public health or safety." Presumably, a separate determination would be required for each project claiming exemption from the Act. A legislature enacting this statute would be asking the courts to independently re-evaluate legislative action in each case and to weigh the purposes of the new regulation against an ill-defined policy of avoiding economic waste.

In an earlier article, Hagman proposed an "elastic box" in which a project in the development process is treated more like developed property as the process proceeds. The greater the developer's investment and the number of permits obtained, the more compelling must be the government's case for changing regulations. Hagman, Avco: Nothing Vested, Nothing Gained, 29 LAND USE L. & ZONING DIG. 1 (1977).

Id. at 558. "Construction" refers to any alteration of land or structures, and includes grading, filling, road construction, the laying of underground pipes, and demolition of structures. Id. at 561. A "permit" is "any required authorization from any government necessary to construct or alter . . . any building or structure or land . . . ." Id. at 561-62.

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costs where other values are at stake. The Coastal Zone Conservation Act of 1972 presents an excellent illustration. The new regulations and the limitations on development threatened to increase the price of building on the coast. Yet the public was willing to absorb those costs because of the perceived importance of coastal preservation.

The ultimate policy question remains: are the risks and uncertainties imposed on developers by a late vesting rule of such magnitude that they justify limiting the government's ability to respond to new conditions up to the last possible moment? Land use regulations are imposed under the power of the government to protect public health, safety, and welfare. Regulations are changed and new regulations imposed in response to new understanding of potential environmental dangers, technological advances, and changing community values and goals. The traditional vested rights rule gives notice that all land development projects will be subject to new regulations that are enacted before actual construction is begun. This is to prevent the construction of buildings that are nonconforming uses from the outset. An earlier vesting of the right to complete, under schemes such as A.B. 1789 and A.B. 20, would require the public to stand by and watch development occur in ways that already have been determined to be harmful to the public welfare. These proposals would divest the government of a measure of the discretion exercised under the traditional vested rights rule. The burden of persuasion concerning the need for modification of this rule has not yet been met by those who seek the change.  

147. As of the end of the 1977 session of the California Legislature, both A.B. 20 and A.B. 1720 were still in committee. Whether they would be reintroduced in the 1978 session remained uncertain.