

1963

"Ex Post Facto" Zoning

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Recommended Citation

"Ex Post Facto" Zoning, 31 Fordham L. Rev. 545 (1963).

Available at: <https://ir.lawnet.fordham.edu/flr/vol31/iss3/7>

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presently encountered would have been obviated, for they were specifically covered. The *Hickman* decision, however, was necessarily mute since these problems were not before that Court. If the 1946 amendment is not in accord with present judicial thought, another proposition expressing the exact scope and application of the privilege should be adopted. It is interesting to note that at least two states have adopted the proposed amendment as part of their discovery rules.¹²⁰ As the matter presently stands, there is a good deal more confusion than is desirable or necessary in a purely procedural area.

“EX POST FACTO” ZONING

I. INTRODUCTION

When a municipality amends a zoning ordinance, thereby forbidding a previously lawful land use, problems are created both for the municipality and the landowner. While existing uses or completed buildings are usually held immune from such a subsequent prohibition,¹ a question arises as to the effect of the change upon a party who has applied for or received a building permit. Can the municipality enforce the amending ordinance retroactively and invalidate the pending application or newly issued permit?

In many cases where the municipal zoning board denies a landowner's application for a permit, it will do so prior to the effective date of the amending ordinance and will base its decision upon the pendency of the new ordinance. This so-called retroactive application of the ordinance is further complicated by the fact that by the time the case gets to court the amending ordinance has usually taken effect and the judge is faced with the problem of making a decree contrary to existing law. A similar complication is encountered where the amending ordinance takes effect between the decision of the trial court and the subsequent appeal by the municipality.

The above situations are shallow in at least one respect, to wit, they presuppose good faith on all sides. When a landowner is fully apprized of a pending change in a zoning ordinance and still makes a last-ditch effort to obtain a permit before the new ordinance takes effect, the problem takes on a new aspect. On the other hand, a municipality, by the exercise of delay, misdirection, deceit and discrimination can zone a landowner's property into oblivion. The same basic problems arise even after the landowner has been issued his permit. How strong a bulwark is this permit to the ravages of an amending ordinance forbidding the very use which the landowner intended?

It is generally held that the constitutional prohibitions against legislation in

126. See, e.g., N.J. Rules 3:26-2; Utah Rules 30(b).

1. See, e.g., N.J. Stat. Ann. § 40:55-48 (1960); *Village of Mill Neck v. Nolan*, 233 App. Div. 248, 251 N.Y. Supp. 533 (2d Dep't 1931) (per curiam) (dictum); *Canberg v. Kleinert*, 225 App. Div. 875, 232 N.Y. Supp. 640 (2d Dep't 1929) (memorandum decision) (dictum); *Pisicchio v. Board of Appeals*, 165 Misc. 156, 300 N.Y. Supp. 368 (Sup. Ct. 1937).

the nature of *ex post facto* laws are restricted to criminal statutes.² This leaves unanswered the question whether such a restriction relegates to an unprotected position a landowner caught in a period of transition and development with respect to the retroactive effect of a subsequent zoning ordinance.

II. VESTED RIGHTS

In the field of zoning law the question of vested rights constantly arises. In the absence of such a right a landowner has, in many cases, no protection against a zoning amendment. But how is a vested right acquired?

A. *With a Permit*

In general, to acquire a vested right once a permit has been issued, the landowner must commence some substantial construction upon his land.³ "Substantial construction" requires at least grading, excavation and the installation of a preliminary foundation with the necessary piping.⁴ In *Wheat v. Barrett*,⁵ however, a California court refused to find a vested right even though it was established that the contractor had excavated and installed forms for a concrete foundation before the zoning amendment was passed.

A less rigorous rule has been applied in some states. For example, Washington would find a vested right upon application for the permit, if the permit is subsequently issued.⁶ Other decisions which have found vested rights upon the mere issuance of the permit, however, involved some bad faith on the part of the municipality. Such is the case in Pennsylvania, but note, there many of the opinions added that the permit would have been irrevocable regardless of the good or bad faith of the municipality.⁷ In fact, one decision expressly exempted from its protection a landowner who secured an eleventh-hour permit with full knowledge of the pending ordinance.⁸ Thus, Pennsylvania might well go as far as the Washington courts but with the added proviso that the injured *landowner* exercise good faith. It is submitted that the distinction is an equitable and a valid one, since the municipality is also entitled to protection from the courts.

A New Jersey case, *Tremarco Corp. v. Garzio*,⁹ may represent a different and more equitable approach than that previously taken in that state.¹⁰ Although

2. See, e.g., *United States v. Davio*, 136 F. Supp. 423, 429 (E.D. Mich. 1955).

3. See, e.g., *Elsinore Property Owners Ass'n v. Morwand Homes, Inc.*, 286 App. Div. 1105, 146 N.Y.S.2d 78 (2d Dep't 1955) (memorandum decision); *Miller v. Dassler*, 155 N.Y.S.2d 975 (Sup. Ct. 1956), *aff'd mem.*, 1 App. Div. 2d 975, 150 N.Y.S.2d 845 (2d Dep't 1956); *Pelham View Apartments, Inc. v. Switzer*, 130 Misc. 545, 224 N.Y. Supp. 56 (Sup. Ct. 1927).

4. See *Deer Park Civic Ass'n v. City of Chicago*, 347 Ill. App. 346, 106 N.E.2d 823 (1952).

5. 210 Cal. 193, 290 Pac. 1033 (1930).

6. See *Hull v. Hunt*, 53 Wash. 2d 125, 331 P.2d 856 (1958).

7. See *Yocum v. Power*, 398 Pa. 223, 157 A.2d 368 (1960); *Shapiro v. Zoning Bd.*, 377 Pa. 621, 105 A.2d 299 (1954); *Lower Merion Township v. Frankel*, 358 Pa. 430, 57 A.2d 900 (1948).

8. *Yocum v. Power*, 398 Pa. at 229, 157 A.2d at 371.

9. 32 N.J. 448, 161 A.2d 241 (1960).

10. See, e.g., following the general rule, *Koplin v. Village of South Orange*, 4 N.J. Misc.

the case may be distinguished because the court found bad faith on the part of the municipality, nevertheless it did state that "reliance" is ultimately determined by the fairness of the situation.¹¹ The concept of "substantial reliance," borrowed from contract law, would be a more desirable guide since it would protect the landowner who has in good faith expended large sums of money in buying and preparing a plot of land, but who has not laid enough bricks to satisfy the immovable guidelines of a court of review.

B. *Without a Permit*

"Vested rights" are predicated upon and acquired as a result of the landowner's own action. A case involving vested rights is to be distinguished from one where the landowner prevails only because of the misconduct of city officials. In the latter situation, the only reason the landowner succeeds is because he has been unjustly prevented from acquiring any vested rights.

Where a permit is necessary under the law in existence when his application is filed, it is impossible for a landowner to acquire a vested right without such permit.¹² Of course, if a landowner acquired immunity from a subsequent zoning amendment upon his application for a permit, the application itself would operate to create a vested right.¹³ Wisconsin courts have taken a middle ground between the application and the permit, itself, for the landowner must also show substantial expenditures in reliance on his application.¹⁴

III. ZONING AMENDMENT PRIOR TO TRIAL

A. *Generally*

One trend of thought, apparently a majority view, is exemplified by cases in New Jersey which favor the municipality over the individual landowner.¹⁵ In New Jersey, this can be explained in part by the state constitution which provides for liberal construction of a zoning law in order to effectuate the purpose for which it was passed.¹⁶ The general rule in this state, therefore, is that the municipality has every right to wipe away pending applications in order to effectively apply the new ordinance to the problems that it is designed to alleviate.

489, 142 Atl. 235 (Sup. Ct. 1928) (per curiam), aff'd mem., 105 N.J.L. 492, 144 Atl. 920 (Ct. Err. & App. 1929).

11. 32 N.J. at 457, 161 A.2d at 245.

12. See notes 15-34 infra.

13. See notes 35-49 infra.

14. See *State ex rel. Schroedel v. Pagels*, 257 Wis. 376, 43 N.W.2d 349 (1950).

15. See, e.g., *Socony-Vacuum Oil Co. v. Township of Mount Holly*, 135 N.J.L. 112, 51 A.2d 19 (Sup. Ct. 1947); *Burmore Co. v. Champion*, 124 N.J.L. 548, 12 A.2d 713 (Ct. Err. & App. 1940); *Eastern Blvd. Corp. v. Willaredt*, 123 N.J.L. 269, 8 A.2d 688 (Ct. Err. & App. 1939); *Marron & Co. v. Township of River Vale*, 54 N.J. Super. 64, 148 A.2d 205 (App. Div. 1959); *Builders' Constr. Co. v. Daly*, 10 N.J. Misc. 861, 161 Atl. 189 (Sup. Ct. 1932) (per curiam); *Rohrs v. Zabriskie*, 102 N.J.L. 473, 133 Atl. 65 (Sup. Ct. 1926).

16. N.J. Const. art. IV, § 6, para. 2.

In the landmark case of *Rohrs v. Zabriskie*,¹⁷ a landowner applied for a permit to build an apartment house. The building plans made no provision for, and local law did not require, fireproofing. The municipality refused to issue the permit, and before the landowner could bring his case to court, it passed an ordinance forbidding nonfireproof apartments. On application of the landowner to the supreme court¹⁸ for relief, it was held that prohibitions against retroactive zoning did not apply where actual construction on the property had not begun.¹⁹ However, the court continued stressing the fact that the apartment house would have been a threat to the public safety and, therefore, it would have been an abuse of the power of a court of equity to sanction such a menace.²⁰

A later case, *Builders' Constr. Co. v. Daly*,²¹ dealt with a municipal set-back requirement of twenty-four feet. After the landowner had applied for a permit, this requirement was changed to forty-nine feet, thereby rendering impossible the landowner's contemplated use of the property as a housing development. In refusing the landowner's application for a writ of mandamus, the supreme court, citing *Rohrs*, held that it must apply existing law.²²

A final case, indicative of this trend, is *Socony-Vacuum Oil Co. v. Township of Mount Holly*.²³ While placing great reliance on the fact that the landowner knew of the pending ordinance when he made his application, the court nevertheless restated the general rule:

[T]here can no longer be any question as of the time when the status of the applicable law controls. It is neither the status of the law prevailing at the time of the application for the permit nor the status of the law prevailing at the time of the . . . allowance of the rule to show cause. It is the status of the law prevailing at the time of the decision by the court that is controlling.²⁴

This rule has been adopted in New York.²⁵ In *Rodelli v. Burns*,²⁶ where the zoning amendment was passed one day before the supreme court's review of the matter, the court applied the amending ordinance and dismissed the landowner's petition.

17. 102 N.J.L. 473, 133 Atl. 65 (Sup. Ct. 1926).

18. In New Jersey the Supreme Court was formerly a trial court. However, by the constitution of 1947, that appellation was given to the highest court in the state. N.J. Const. art. VI.

19. 102 N.J.L. at 475, 133 Atl. at 65.

20. *Ibid.*

21. 10 N.J. Misc. 861, 161 Atl. 189 (Sup. Ct. 1932) (*per curiam*).

22. *Id.* at 864, 161 Atl. at 191.

23. 135 N.J.L. 112, 51 A.2d 19 (Sup. Ct. 1947).

24. *Id.* at 117, 51 A.2d at 23.

25. See, e.g., *Rodelli v. Burns*, 19 Misc. 2d 562, 187 N.Y.S.2d 301 (Sup. Ct. 1959); *Suffolk Pines, Inc. v. Harwood*, 14 Misc. 2d 826, 178 N.Y.S.2d 732 (Sup. Ct. 1958); *Application of Kunz*, 128 N.Y.S.2d 680 (Sup. Ct. 1954); *Maxwell v. Klaess*, 192 Misc. 939, 82 N.Y.S.2d 588 (Sup. Ct. 1948).

26. 19 Misc. 2d 562, 187 N.Y.S.2d 301 (Sup. Ct. 1959).

This reasoning also has been followed in California,²⁷ Florida,²⁸ Georgia,²⁹ Illinois³⁰ and Texas.³¹ In *Ward v. Village of Elmwood Park*,³² an Illinois court held that in the absence of a showing of a substantial change of position in reliance thereon, the landowner had no vested rights in the continuation of an old ordinance.³³ Similarly, a Georgia court has flatly stated that such action by a municipality cannot be considered unconstitutional as legislation in the nature of ex post facto laws.³⁴

It would be presumptuous, however, to call the above-mentioned views universal. Contrary decisions exist even in the jurisdictions noted. Two New Jersey decisions are patently inconsistent with the general rule.³⁵ In *Vine v. Zabriskie*,³⁶ the court refused to consider a new ordinance and issued a writ of mandamus compelling the municipality to issue a permit. It was held that the amendment was an eleventh-hour attempt to prevent this relator from using her property for its highest use. . . . Such action was ill-advised, capricious and unreasonable. . . . [W]e are satisfied that the result was an arbitrary interference with the lawful and legitimate use of private property.³⁷

The New York Court of Appeals has also held that the mere fact that an ordinance was pending would not justify a town board's denial of a permit where the ordinance was still pending at the time of the appellate decision.³⁸ However, even in this case when the question came up for rehearing, the pending ordinance had become law and, therefore, the appellate division was constrained to hold that in the absence of vested rights, even though the landowner was entitled to a permit, it was rendered valueless by the new ordinance.³⁹

The courts of Florida⁴⁰ and Illinois⁴¹ have also rendered decisions refusing

27. See *Brougher v. Board of Pub. Works*, 205 Cal. 426, 271 Pac. 487 (1928).

28. See *Davidson v. City of Coral Gables*, 119 So. 2d 704 (Fla. Dist. Ct. App. 1960) (per curiam).

29. See *Gay v. Mayor*, 212 Ga. 438, 93 S.E.2d 352 (1956).

30. See *Ward v. Village of Elmwood Park*, 8 Ill. App. 2d 37, 130 N.E.2d 287 (1955).

31. See *Mc Eachern v. Town of Highland Park*, 123 Tex. 480, 73 S.W.2d 487 (1934).

32. 8 Ill. App. 2d 37, 130 N.E.2d 287 (1955).

33. *Id.* at 39, 130 N.E.2d at 288.

34. *Gay v. Mayor*, 212 Ga. 438, 439, 93 S.E.2d 352, 353 (1956).

35. See *Sgromolo v. City of Asbury Park*, 134 N.J.L. 195, 46 A.2d 661 (Sup. Ct. 1946); *Vine v. Zabriskie*, 122 N.J.L. 4, 3 A.2d 886 (Sup. Ct. 1939).

36. 122 N.J.L. 4, 3 A.2d 886 (Sup. Ct. 1939).

37. *Id.* at 6, 3 A.2d at 887. Similarly in the *Asbury Park* case the court found that: "It . . . beggars understanding why the permit was refused. Relator's right to the lawful use of his property . . . may not be denied him. . . . [T]he zoning ordinance has no application. For here there was a full compliance with the building code before the zoning ordinance was adopted. It was therefore the peremptory duty of the building inspector to issue the permit in question." *Sgromolo v. City of Asbury Park*, 134 N.J.L. at 197-98, 46 A.2d at 662.

38. *Fairchild Sons, Inc. v. Rogers*, 266 N.Y. 460, 195 N.E. 154 (1934) (memorandum decision).

39. 246 App. Div. 555, 282 N.Y. Supp. 916 (2d Dep't 1935) (memorandum decision).

40. See *Broach v. Young*, 100 So. 2d 411 (Fla. 1958); *Harris v. State ex rel. Wester*, 159 Fla. 195, 31 So. 2d 264 (1947).

41. See *Rubin v. City of Rockford*, 296 Ill. App. 650, 16 N.E.2d 607 (1938).

to apply a supervening zoning amendment so as to invalidate a permit application, valid when made. Likewise, in reversing a trial court's application of an amending ordinance, a California court reasoned that

at the time the applications were made and denied, there existed no authority either by ordinance or statute permitting . . . the building inspector, to refuse to issue the license. . . . [I]t being conceded that the then existing statutory requirements had been complied with, the petitioners were entitled to an issuance of the building permits. The trial court was therefore in error . . . in undertaking to require . . . a compliance with . . . this [amending] ordinance. . . .⁴²

Agreeing with this latter view, and in direct conflict with the prevailing view, the Ohio Supreme Court recently held that the issuance of a permit was governed by the law as it existed at the time of application and not by an amendment passed while the landowner's application was pending.⁴³ It was found that:

"A municipal council may not, by the enactment of an emergency ordinance, give retroactive effect to a pending zoning ordinance thus depriving a property owner of his right to a building permit in accordance with a zoning ordinance in effect at the time of the application for such permit" [I]t is established that under the police power the use of land . . . may be regulated However, once regulations have been established, and so long as such regulations are in force, the state and its subdivisions are as much bound as the people to abide by such regulations. In other words, laws bind the state as well as the people.⁴⁴

It should be noted that although the Ohio Constitution prohibits the enactment of retroactive laws,⁴⁵ this fact was not discussed in this case.

A similar constitutional provision was applied to uphold a landowner's right to a permit in contravention of an amending ordinance in *City & County of Denver v. Denver Buick, Inc.*⁴⁶ In a separate opinion, however, it was indicated that the court's decision would probably be the same regardless of the special constitutional provision.

Even if we were not so bound [by the constitution] . . . only in the rarest of instances could a zoning authority be justified under the police power in denying a permit under existing law while a new ordinance or an amendment . . . is being drafted and adopted. . . . [I]t is palpably unjust . . . to say that an owner who has spent large sums on plans and specifications, in reliance on the law as it is, should forfeit his rights and what he has spent . . . for the public good without just compensation. . . . [I]n all cases, except in case of an actual crisis in public health,

42. *McCombs v. Larson*, 176 Cal. App. 2d 105, 109, 1 Cal. Rptr. 140, 142-43 (Dist. Ct. App. 1959).

43. *Gibson v. City of Oberlin*, 171 Ohio St. 1, 167 N.E.2d 651 (1960). See also *State ex rel. Del Monte v. Woodmansee*, 72 N.E.2d 789 (Ohio Ct. App. 1946).

44. *Gibson v. City of Oberlin*, 171 Ohio St. at 4-5, 167 N.E.2d at 653-54.

45. Ohio Const. art. II, § 28.

46. 141 Colo. 121, 347 P.2d 919 (1960).

morals or safety, builders should have the right to rely upon the law as it is, not what some public official thinks it should or will be . . . in the future.⁴⁷

Comparable decisions have been reached in Indiana⁴⁸ and Tennessee.⁴⁹

B. *Knowledge of Zoning Amendment*

Where a landowner's application for a permit is denied on the basis of an ordinance passed subsequent to his application, there are a few cases in which the determination was based on the fact that when the landowner applied he was fully aware of the pending ordinance.⁵⁰ The reasoning here seems quite plausible, *i.e.*, where a town is undertaking a plan of rezoning for the public good, its plans should not be thwarted by the connivance of an individual who, with full knowledge of the situation, attempts to outrun the town board to the courthouse and thereby establish a foothold in the maintenance of a use which has been adjudged contrary to the public good. Of course, for this reasoning to be legitimate, it must appear that the pending ordinance was introduced in good faith and was actually destined for passage into law.

C. *Improper Act of the Municipal Authorities*

Where municipal authorities act in bad faith, as for example where an application is unreasonably refused or delayed until an amendment can be effected, the general rule, and that most compatible with principles of equity, would ignore the amendment and apply the law as of the time of the landowner's application.

While it is generally true that such an application must conform to an ordinance passed while action upon the same is pending . . . that rule seems not applicable to a situation in which the permit clearly should have been issued before amendment to the law.⁵¹

In *Phillips Petroleum Co. v. City of Park Ridge*,⁵² although the landowner did not claim a vested right, he asserted that the city authorities had acted so improperly and arbitrarily that he was prevented from acquiring such a right. In holding that the amending ordinance was inapplicable to the landowner's application, the court found that it would be inequitable to allow the city to benefit from its own wrongdoing. The court reasoned that the landowner's lack of a vested right was immaterial where the city's arbitrary action was the only basis for his lack of such a right.⁵³

47. *Id.* at 165, 347 P.2d at 943 (separate opinion).

48. *Knutson v. State ex rel. Seberger*, 239 Ind. 656, 160 N.E.2d 200 (1959).

49. *State ex rel. Morris v. City of Nashville*, 207 Tenn. 672, 343 S.W.2d 847 (1961).

50. See, e.g., *Chicago Title & Trust Co. v. Village of Palatine*, 22 Ill. App. 2d 264, 160 N.E.2d 697 (1959); *Socony-Vacuum Oil Co. v. Township of Mount Holly*, 135 N.J.L. 112, 51 A.2d 19 (Sup. Ct. 1947); *Rosenzweig v. Crinnion*, 139 N.Y.S.2d 172 (Sup. Ct. 1954).

51. *Munns v. Stenman*, 152 Cal. App. 2d 543, 551, 314 P.2d 67, 73 (Dist. Ct. App. 1957).

52. 16 Ill. App. 2d 555, 149 N.E.2d 344 (1958).

53. The rule was stated thus: "The rights of the parties crystallized at the time when the permit was applied for and was improperly withheld. To hold otherwise would be to

A recent Florida decision concerning an application for a liquor license, while holding on its facts that a subsequent amendment was applicable, set forth, in dictum, the general view as follows:

[I]n a suit involving an application for issuance of a . . . license, the law as it stands at the time of the decree, rather than at the time of application or the filing of the suit, controls the decision thereon. . . . The exception is that when the officials . . . to whom an application . . . has been made . . . act arbitrarily to avoid their duty, such as by undue delay . . . or by passing new limitations . . . designed to avoid having to issue the license and to circumvent an impending court decision which would direct its issuance, the court may disregard the new . . . regulation thus enacted by the officials . . . or which has been passed after their undue delay.⁵⁴

On the other hand, the courts of New Jersey, even in a situation such as this, remain adamant in their stand behind the municipality. In *Roselle v. Mayor*⁵⁵ the landowner secured a writ of mandamus commanding the town to issue him a permit. The town thereupon ignored the order and proceeded to amend its ordinance to forbid the intended use. On final disposition of the case the appellate division, affirming its prior finding that the town officials were in contempt for their disobedience of the trial court's decree,⁵⁶ nonetheless denied the landowner his permit. The court went even further in admitting that although the town might be guilty of "maladroit" acts,⁵⁷ it would still uphold the result.

If one is not confused by the holdings in this area, he has only to look to the decisions in New York. In *Dubow v. Ross*,⁵⁸ the appellate division purported to set forth the prevailing rule that where city officials wilfully refuse to give a landowner his permit and further mislead and hinder him so that he cannot acquire a vested right before the new ordinance becomes effective, the ordinance is inapplicable to the landowner. In other words, the court suggested that where the malfeasance of city officials is the only reason for the landowner's failure to acquire a vested right before the amending ordinance takes effect, the necessity for such a right is waived and he is held immune from the intervening ordinance. This theory has been followed in *Harris v. Coffey*,⁵⁹ where the court stated:

It is the duty of an administrative official to perform the functions of his office promptly and in accordance with the law as it *presently* exists. He may not refuse to act because of the possibility that the law may be modified at some future time. . . . It is most improper to assume or anticipate. . . .⁶⁰

give the city, without statutory authority, a right to suspend a zoning ordinance." *Id.* at 566, 149 N.E.2d at 350.

54. *Davidson v. City of Coral Gables*, 119 So. 2d 704, 708 (Fla. Dist. Ct. App. 1960).

55. 49 N.J. Super. 35, 139 A.2d 42 (App. Div. 1958).

56. For the earlier opinion in which the town was found to have been properly held guilty of contempt, see *Roselle v. Mayor*, 48 N.J. Super. 17, 25, 136 A.2d 773, 777 (App. Div. 1957).

57. 49 N.J. Super. at 42, 139 A.2d at 46.

58. 254 App. Div. 706, 3 N.Y.S.2d 862 (2d Dep't 1938) (memorandum decision).

59. 14 Misc. 2d 916, 179 N.Y.S.2d 8 (Sup. Ct. 1957).

60. *Id.* at 918, 179 N.Y.S.2d at 11.

The case was then remanded for a full hearing with instructions that the landowner be issued his permit if it were found that he could have acquired a vested right but for the wrongful act of the town officials.

This theory, however, was apparently contradicted in *Whittaker v. Burns*.⁶¹ There the supreme court failed to find any proof of unreasonable delay by the town board. Nevertheless, it went on to say as dictum that even if wilful conduct were proven, the landowner would not be entitled to a permit, since its issuance was a matter of discretion.⁶² A later case, *Rodelli v. Burns*,⁶³ followed the *Whittaker* reasoning, but made a distinction of sorts, stating that while the fact of unreasonable delay by the town board was immaterial, the court's finding might have been different if actual deception was found to have been practiced upon the landowner.⁶⁴ A recent decision put the entire issue in doubt by proposing that the rule of *Dubow* be limited to the extent that for a landowner to prevail, he must show not only a wilful delay by the town officials, but also that he had acquired a vested right.⁶⁵

Some of the cases, therefore, would seem to draw a distinction between unreasonable delay on the one hand, and hindrance or deception on the other. However, as a practical matter, this distinction seems imaginary. An intentional delay by a public servant in issuing a building permit could certainly be found to be in the nature of deception or hindrance.

D. Application of One Landowner

Even where municipal authorities are galvanized into action by the application of one particular landowner, the courts of New Jersey sustain the amending ordinance. While earlier decisions recognized the evils of such an action,⁶⁶ *Guaclides v. Borough of Englewood Cliffs*⁶⁷ stated the prevailing New Jersey view:

Plaintiffs argue . . . that the ordinance must be struck down because . . . it was hurriedly adopted for [the] specific purpose of preventing . . . [the landowner] from carrying out its known plan to construct the apartment building. . . . Manifestly the ordinance would not be invalid merely because . . . the . . . [landowner's] action gave incentive to its passage.⁶⁸

This rationale, apparently peculiar to New Jersey, has been followed in subsequent cases.⁶⁹

61. 13 Misc. 2d 233, 176 N.Y.S.2d 513 (Sup. Ct. 1958).

62. *Id.* at 235, 176 N.Y.S.2d at 516.

63. 19 Misc. 2d 562, 187 N.Y.S.2d 301 (Sup. Ct. 1959).

64. *Id.* at 563, 187 N.Y.S.2d at 303.

65. *Gramatan Hills Manor, Inc. v. Manganiello*, 30 Misc. 2d 117, 213 N.Y.S.2d 617 (Sup. Ct. 1961).

66. See, e.g., *Ridgefield Terrace Realty Co. v. Borough of Ridgefield*, 136 N.J.L. 311, 55 A.2d 812 (Sup. Ct. 1947); *Brown v. Terhune*, 125 N.J.L. 618, 18 A.2d 73 (Sup. Ct. 1941).

67. 11 N.J. Super. 405, 78 A.2d 435 (App. Div. 1951).

68. *Id.* at 415, 78 A.2d at 440.

69. See, e.g., *Marron & Co. v. Township of River Vale*, 54 N.J. Super. 64, 75, 148 A.2d

Ordinances such as that in *Guacildes* are in the nature of special legislation and have in other states been held inapplicable to the aggrieved landowner. In *Munns v. Stenman*,⁷⁰ a California court found strong evidence of arbitrary and discriminatory action where the "emergency" requiring the amendment was the plaintiff's application for a permit. Another California court has stated that:

Nothing . . . indicates that . . . [the town] had . . . contemplated the ordinance before the trial court's . . . decision; the enactment of the ordinance stemmed from the county's attempt to frustrate respondent's plans. . . . "Such an isolation of one party as the object of the Board's legislative action is a plain discrimination; one that cannot survive testing under accepted principles of constitutional law."⁷¹

A recent Florida decision also followed this rationale.⁷²

E. Summary

It is submitted that when a town carries out a contemplated zoning amendment it should be authorized to revoke pending applications for uses inconsistent with the proposed change. Since the purpose of zoning legislation is to improve public welfare, a municipality should be given wide latitude in implementing its laws so that it can achieve the beneficial result intended. Where this can be done without prejudice to the vested rights of an individual, the preservation of which is fundamental to our system of jurisprudence, the court should not apply imaginary distinctions to thwart the intended benefit to the common good. However, where evidence of bad faith on the part of the municipality is discovered, the courts should preserve for the individual those privileges which would have been his but for the unjust act of the municipal authorities.

IV. ZONING AMENDMENT SUBSEQUENT TO TRIAL BUT PRIOR TO APPEAL

A. Generally

Where the law has been changed subsequent to trial but prior to appeal, the rule stated by Mr. Chief Justice Marshall in *United States v. Schooner Peggy*⁷³ usually controls.

It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation

205, 212 (App. Div. 1959); *Crecca v. Nucera*, 52 N.J. Super. 279, 284, 145 A.2d 477, 479 (App. Div. 1958); *Roselle v. Mayor*, 49 N.J. Super. 35, 40, 139 A.2d 42, 45 (App. Div. 1958).

70. 152 Cal. App. 2d 543, 314 P.2d 67 (Dist. Ct. App. 1957).

71. *Sunset View Cemetery Ass'n v. Kraitz*, 196 Cal. App. 2d 115, 123-24, 16 Cal. Rptr. 317, 322-23 (Dist. Ct. App. 1961).

72. *Davidson v. City of Coral Gables*, 119 So. 2d 704, 708 (Fla. Dist. Ct. App. 1960) (dictum).

73. 5 U.S. (1 Cranch) 103 (1801).

denied. . . . It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in *great national concerns*, where individual rights . . . are sacrificed for *national purposes* . . . the sacrifice ought always to receive a construction conforming to its manifest import *In such a case* the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.⁷⁴

From this precedent decisions have gone divers ways. As a result there has been a conflict of authority not only among the several states, but even in the decisions of courts of the same state. The majority rule, totally ignoring Mr. Chief Justice Marshall's requirement of "great national concerns," applies the new law to all cases wherein a change of law has taken place prior to the decision on appeal.⁷⁵ With regard to permits in particular, it is generally held that:

A change in the law between a *nisi prius* and an appellate decision requires the appellate court to apply the changed law. . . . *A fortiori*, a change of law pending an administrative hearing must be followed in relation to permits for future acts. Otherwise the administrative body would issue orders contrary to the existing legislation.⁷⁶

The minority view, on the other hand, strictly interprets the Chief Justice's words and nullifies the *Peggy* holding in the vast majority of situations.⁷⁷ The reasoning behind this theory is that:

Neither can we . . . send the case back to the court below, with instructions to enter a . . . nonsuit, because since the judgment below, and while this writ of error has been pending, the statute authorizing the action has been repealed. A writ of error to this court does not vacate the judgment below. That continues in force until reversed, which is only done when errors are found . . . on which it rests, and which were committed previous to its rendition.⁷⁸

B. Zoning in Particular

A change of law prior to an appeal has been comparatively rare in zoning cases. Where it has occurred the courts have almost invariably followed the

74. *Id.* at 109. (Emphasis added.)

75. See, e.g., *United States v. Alabama*, 362 U.S. 602 (1960) (*per curiam*); *Board of Educ. v. Brittin*, 11 Ill. 2d 411, 143 N.E.2d 555 (1957); *Westinghouse Elec. Corp. v. United Elec. Workers*, 139 N.J. Eq. 97, 49 A.2d 896 (Ct. Err. & App. 1946); *Fruhling v. Amalgamated Housing Corp.*, 9 N.Y.2d 541, 175 N.E.2d 156, 215 N.Y.S.2d 493 (1961); *In re Stickney*, 185 N.Y. 107, 77 N.E. 993 (1906) (*per curiam*).

76. *Ziffrin, Inc. v. United States*, 318 U.S. 73, 78 (1943).

77. See, e.g., *Hatheway v. Barnhart*, 12 Ill. App. 2d 433, 139 N.E.2d 862 (1957); *Cole v. Fall Brook Coal Co.*, 159 N.Y. 59, 53 N.E. 670 (1899); *Ball Motors, Inc. v. Orange County Trust Co.*, 8 App. Div. 2d 937, 190 N.Y.S.2d 533 (2d Dep't 1959) (memorandum decision).

78. *Railway Co. v. Twombly*, 100 U.S. 78, 81 (1879). To properly evaluate the holdings on this point would require an exhaustive study of this separate field of the law. For a collection of cases on both sides, see *Annot.*, 111 A.L.R. 1317 (1937).

majority view expressed above.⁷⁹ An exception is permitted, again, where bad faith is found on the part of the municipality. In such a case, the appellate courts have applied the law as it existed at the time of the trial regardless of the subsequent amendment.⁸⁰ This principle is really a projection of the rule in the case where the amendment comes before the trial.

V. ZONING AMENDMENT CAUSING REVOCATION OF ISSUED PERMIT

A. Generally

As a general rule, the mere issuance of a permit to a landowner will not, per se, preclude a subsequent revocation by an amending ordinance forbidding the landowner's intended use. As against a subsequent zoning amendment the permit is worthless unless the landowner has acquired a "vested right" under and in reliance upon such permit.⁸¹

This rule, however, is not universal. In *Hull v. Hunt*,⁸² a Washington court, recognizing the existence of widespread authority to the contrary, reasoned:

Notwithstanding the weight of authority, we prefer to have a date certain upon which the right vests to construct in accordance with the building permit. We prefer not to adopt a rule which forces the court to search through . . . "the moves and countermoves of . . . parties . . . by way of passing ordinances and bringing actions for injunctions"—to which may be added the stalling or acceleration of administrative action in the issuance of permits—to find that date upon which the substantial change of position is made which finally vests the right. The more practical rule to administer, we feel, is that the right vests when the party . . . applies for his building permit, if that permit is thereafter issued.⁸³

In *Sharrow v. City of Dania*,⁸⁴ a Florida court denied the property owner relief because of his knowledge, at the time he procured the permit, of the pending ordinance. The court, however, added the qualification, "if it were not for this fact [plaintiff's knowledge], we might find an area for the application of the doctrine of equitable estoppel in . . . [plaintiff's] favor. With such forewarning, however, the doctrine cannot be applied."⁸⁵ Thus, reliance on the

79. See *Wheat v. Barrett*, 210 Cal. 193, 290 Pac. 1033 (1930); *Roselle v. Mayor*, 49 N.J. Super. 35, 139 A.2d 42 (App. Div. 1958) (by implication); *Crecca v. Nucera*, 52 N.J. Super. 279, 145 A.2d 477 (App. Div. 1958); *Fairchild Sons, Inc. v. Rogers*, 266 N.Y. 460, 195 N.E. 154 (1934) (memorandum decision); *Dengeles v. Young*, 3 App. Div. 2d 758, 160 N.Y.S.2d 83 (2d Dep't 1957) (memorandum decision).

80. See *Sunset View Cemetery Ass'n v. Krantz*, 196 Cal. App. 2d 115, 16 Cal. Rptr. 317 (Dist. Ct. App. 1961); *Phillips Petroleum Co. v. City of Park Ridge*, 16 Ill. App. 2d 555, 149 N.E.2d 344 (1958); *Lened Homes, Inc. v. Department of Licenses & Inspections*, 386 Pa. 50, 123 A.2d 406 (1956).

81. See, e.g., *Fairchild Sons, Inc. v. Rogers*, 266 N.Y. 460, 195 N.E. 154 (1934) (memorandum decision); *Williams v. Village of Deer Park*, 78 Ohio App. 231, 69 N.E.2d 536 (1946); *In re Hertrick*, 391 Pa. 148, 153, 137 A.2d 310, 314 (1958) (dictum).

82. 53 Wash. 2d 125, 331 P.2d 856 (1958).

83. *Id.* at 130, 331 P.2d at 859.

84. 83 So. 2d 274 (Fla. 1955).

85. *Id.* at 275.

part of the injured party must be shown for an estoppel to operate.⁸⁶ Since in this case there was no "vested right" in the plaintiff, it would follow that the reliance necessary would be less than that needed for the acquisition of a "vested right."

B. Action of Municipal Authorities

In *Tremarco Corp. v. Garzio*,⁸⁷ a New Jersey landowner, after having received its permit, was lulled into inaction by the false representations of the mayor of the town. As a result, before it had acted in any substantial manner upon its permit, the landowner was caught unawares by a zoning amendment. The trial court granted the landowner's petition for relief and the appellate division reversed, basing its decision upon the general New Jersey rule favoring the municipality.⁸⁸ However, on appeal, in a decision which may have far reaching implications, the New Jersey Supreme Court reversed, holding the ordinance invalid as to the plaintiff. The court stated that a permit may not be revoked by a zoning amendment after the landowner's reliance thereon. Reliance, it was suggested, is really a matter of balancing the interests of the parties.⁸⁹ It is interesting to note that the supreme court expressly refused to consider what the result might have been had an application rather than a permit been involved.⁹⁰ Whether this case presages a modification of the strong view heretofore taken by New Jersey courts remains to be seen.

A similar result was reached in *Wasilewski v. Biedrzycki*,⁹¹ where a Wisconsin court stated that "the subsequent amendment cannot affect defendant's right [to build] . . . [which] accrued under valid laws, and [which] . . . but for this action would probably have been . . . completed before the amendment. . . ."⁹² A Pennsylvania court, in *Shapiro v. Zoning Bd.*,⁹³ applied the same rule and also found that the ordinance had been aimed directly at plaintiff's permit. The court stated that "if a permit cannot rightfully be refused in the first instance, it cannot be arbitrarily revoked after issuance. . . ."⁹⁴

86. See, e.g., *Byrne v. Barrett*, 268 N.Y. 199, 197 N.E. 217 (1935); *First Nat'l Bank v. Starke Design, Inc.*, 11 App. Div. 2d 595, 200 N.Y.S.2d 703 (3d Dep't 1960) (memorandum decision).

87. 32 N.J. 448, 161 A.2d 241 (1960).

88. 55 N.J. Super. 320, 150 A.2d 799 (App. Div. 1959).

89. 32 N.J. at 457, 161 A.2d at 245.

90. *Id.* at 455, 161 A.2d at 244.

91. 180 Wis. 633, 192 N.W. 989 (1923).

92. *Id.* at 638, 192 N.W. at 991.

93. 377 Pa. 621, 105 A.2d 299 (1954).

94. *Id.* at 629, 105 A.2d at 303. A similar result was reached in *Yocum v. Power*, 393 Pa. 223, 157 A.2d 368 (1960). The court felt that, "as nothing can be more unjust in criminal law than an ex post facto law, so nothing is more frowned on in civil law than a procedure which has the effect of making illegal what the law has already recognized as legal." 393 Pa. at 227, 157 A.2d at 370.

VI. CONCLUSION

It is doubtful whether judicial precedent or legislative action can solve all of the problems of "ex post facto" zoning. To achieve a maximum of fairness, however, the legislature can prescribe more specific guidelines.

This end has been achieved to a limited extent by a recent New York statute which provides for the exemption from an amending ordinance of lots shown on an approved subdivision plat. Where such lots are planned and subdivided for residential use, providing for at least one street therein, and these plans are approved by the town board, the lots specified are thereby rendered immune from a subsequent ordinance which seeks to enlarge the minimum lot area or set-back requirement.⁹⁵ By passing such a law, the New York Legislature has furnished protection to a commercial builder in a limited situation. Whether this indicates a trend in the granting of further protection to the landowner is a matter for conjecture.

A broader protection was given by the ordinance before the court in *Inspector of Bldgs. v. Nelson*⁹⁶ which provided that upon its passage:

Nothing herein shall require any change in the plans, construction, or intended use of a building for which unexpired approval has heretofore been issued, and the construction of which shall be completed according to such approval within one year from the date when this by-law goes into effect.⁹⁷

A Massachusetts statute immunizes a permit from revocation by a subsequent zoning amendment if the permit is issued before the landowner has notice of the proposed amendment.⁹⁸

Legislation of this type requires at least the issuance of a permit. It would seem, however, that the spirit of these laws could be extended to cover applications for permits. In such a case, the emphasis might be placed upon

95. N.Y. Gen. City Law § 83-a; N.Y. Town Law § 265-a; N.Y. Village Law § 179(2). All three statutes provide: "[T]he provisions of a zoning ordinance hereafter adopted, and the provisions of [an amendment thereto] . . . which . . . establish or increase lot areas, lot dimensions which are greater than . . . the lot areas . . . or dimensions of the lots shown and delineated on a subdivision plat of land into lots for residential use and which said subdivision plat also shows and delineates one or more new streets . . . and which said subdivision plat has been duly approved by the . . . board . . . of the [city, town or village] . . . and duly filed in the office of the recording officer . . . or which provisions establish or increase side, rear or front yard or set back requirements in excess of those applicable to building plats under the provision of the zoning ordinance . . . in force . . . at the time of the filing of the said subdivision plat, shall not [for certain fixed times] . . . be applicable to . . . any of the lots shown and delineated on such subdivision plat."

96. 257 Mass. 346, 153 N.E. 798 (1926).

97. 257 Mass. at 348, 153 N.E. at 799. To the same effect was the ordinance in a Louisiana case: "[N]othing in this ordinance shall be construed as cancelling any permit heretofore granted prior to the passage of this ordinance . . . but the legal rights of such . . . owners shall be duly and legally preserved. . . ." *City of Shreveport v. Dickason*, 160 La. 563, 570-71, 107 So. 427, 430 (1926).

98. Mass. Gen. Laws ch. 40A, § 11 (1954).