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## NOTES

### TRY TO VEST, TRY TO VEST, BE OUR GUEST: THE VESTED RIGHTS CONFLICT IN INDIANA CREATES A UNIQUE SOLUTION FOR ALL DEVELOPMENT\*

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#### INTRODUCTION

At the turn of the twentieth century, the United States was developing rapidly due to the construction of expanded transportation lines and a growing population.<sup>1</sup> The growth of the country has continued since that time, and a constant theme has been a large number of people seeking suitable land to meet their needs for shelter.<sup>2</sup> This is especially true in areas adjacent to metropolitan centers.<sup>3</sup> Early on, development followed no pattern and builders and speculators went wherever there was a housing or construction need.<sup>4</sup> Specifically, after World War I, decentralization of the American city intensified and “speculative uncontrolled development produced a new metropolitan fringe.”<sup>5</sup> Furthermore, early in the twentieth century, the landowner’s right to develop seemed almost unlimited as it sprang from what was believed to be an inherent right to put land to its best and highest use.<sup>6</sup> At that time, development was only restricted “by public nuisance law.”<sup>7</sup> One early U.S. Supreme Court case held that only a “clear case of departure” from a permit or danger to the public could operate to arrest

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\* The title is drawn from *BEAUTY AND THE BEAST* (Disney 1991) and *The Simpsons* (Fox).

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1. ROBERT H. WIEBE, *THE SEARCH FOR ORDER 1877-1920*, at 12 (Harper Collins 1967).

2. *Id.*

3. *See id.*

4. *Id.*

5. Eran Ben-Joseph, *Subdivision Regulations: Practices & Attitudes: A Survey of Public Officials and Developers in the Nations’s Fastest Growing Single Family Housing Markets*, 2003 LINCOLN INST. LAND POL’Y 20-21.

6. Richard B. Cunningham & David H. Kremer, *Vested Rights, Estoppel, and the Land Development Process*, 29 HASTINGS L.J. 625, 630-32 (1978).

7. *Id.* at 632.

a developer in the midst of a construction project.<sup>8</sup>

Today the process of development and building is much more heavily regulated than during the nation's expansion in the late 1800s and early 1900s, but the demand for buildings is still present.<sup>9</sup> A respected scholar explains that one reason for the increased restrictions on development is the "increase in development itself."<sup>10</sup> The need to prevent nuisances is one underlying motivation for the increased regulation.<sup>11</sup> However, the desires of "more affluent newcomers" are the primary forces that result in more stringent regulation of development.<sup>12</sup> Due to this increasingly intense amount of regulation imposed by the government and citizenry, the issue of vested rights has become more important than ever.<sup>13</sup> A vested right ensures "certainty and fairness" to a developer so that he or she can be confident that a subsequently enacted regulation will not affect a project.<sup>14</sup>

In the law of vested rights, there are states that vest rights early in the development process and those that vest rights at a later point. Which one is Indiana? No one really knows. In Indiana there are two inconsistent lines of cases. One line of cases suggests that Indiana is an "early vesting" state. The other line suggests Indiana is a "late vesting" state. The time at which rights vest has become extremely important not just in Indiana, but in all states, because of large scale development projects like subdivisions and planned unit developments.<sup>15</sup> These developments have become increasingly prevalent and present difficult vested rights issues.<sup>16</sup> Large scale development has become the norm in recent years, with a majority of regions in the United States approving forty new subdivisions containing more than fifty units annually.<sup>17</sup>

One vested rights rule announced in Indiana cases seems to recognize this trend of larger and more complex developments and the risks to developers associated with such projects. Therefore, this rule vests rights at an early stage

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8. *Dainese v. Cooke*, 91 U.S. 580, 583-84 (1875).

9. David Hartman, *Risky Business: Vested Real Property Development Rights—The Texas Experience and Proposals for the Texas Legislature to Improve Certainty in the Law*, 30 TEX. TECH L. REV. 297, 299 (1999); see METROPOLITAN INDIANAPOLIS BOARD OF REALTORS & BUILDERS ASSOCIATION OF GREATER INDIANAPOLIS, HOUSING AND THE ECONOMY: STRIKING A BALANCE 3, 5 (2003) [hereinafter MIBOR]; see Gregory Overstreet & Diana M. Kirchheim, *The Quest for the Best Test to Vest: Washington's Vested Rights Doctrine Beats the Rest*, 23 SEATTLE U. L. REV. 1043, 1044 (2000).

10. WILLIAM A. FISCHER, THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS 67 (John Hopkins University Press 1985).

11. *Id.*

12. *See id.*

13. Overstreet & Kirchheim, *supra* note 9, at 1044.

14. *Id.*

15. Grayson P. Hanes & J. Randall Minchew, *On Vested Rights to Land Use and Development*, 46 WASH. & LEE L. REV. 373, 404 (1989).

16. *Id.*

17. Ben-Joseph, *supra* note 5, at 16.

of development to protect the developer. Another line of Indiana cases, however, appears to contain an anti-developer bias by vesting rights very late in the development process and subjecting developers to more risk.

Vesting is usually viewed as an “all-or-nothing” battle with the government.<sup>18</sup> Investors in land development look to the vested rights doctrine as the “legal mechanism” that decides the winner “in the conflict between . . . property owner[s] and the local government.”<sup>19</sup> The existence of a vested right to continue development will often be determinative of whether a project is a success or failure.<sup>20</sup> Without a clear vesting standard, developers are left in an environment of confusion and uncertainty which may discourage future development activity.<sup>21</sup> In addition, uncertainty can spur litigation and increase costs for developers and purchasers.<sup>22</sup> Furthermore, demoralization costs to developers are high when a risk exists that an investment in building could be lost because of a change in the law.<sup>23</sup> Investors are less likely to engage in development activity if their property can be taken by “frequent [unjustified] changes in the law.”<sup>24</sup> Uncertainty seems inherent in the law of vested rights,<sup>25</sup> but certainly a state with two inconsistent vesting standards only adds to the confusion faced by a developer or landowner.

Part I of this Note examines the background of the doctrine of vested rights. Part II considers the various treatments of vesting and the point in time at which rights vest throughout the United States. Part III focuses on the current Indiana vesting rules and the cases which gave rise to those rules. Finally, Part IV of this Note proposes a unique solution for the time at which rights vest that attempts to differentiate between large and small developments. Also, Part IV gives guidance and justification for when a “late vesting” standard should apply as opposed to an “early vesting” standard.

## I. THE ORIGINS AND BACKGROUND OF VESTED RIGHTS

### A. *The History of Vested Rights*

Vested rights is a concept that developed in the English common law and

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18. Karen L. Crocker, Note, *Vested Rights and Zoning: Avoiding All-or-Nothing Results*, 43 B.C. L. REV. 935, 938 (2002).

19. Overstreet & Kirchheim, *supra* note 9, at 1055 (2000).

20. CHARLES L. SIEMON ET AL., VESTED RIGHTS: BALANCING PUBLIC AND PRIVATE DEVELOPMENT EXPECTATIONS 7 (Urban Land Institute 1982).

21. Ralph D. Rinaldi, Note, *Virginia's Vested Property Rights Rule: Legal and Economic Considerations*, 2 GEO. MASON L. REV. 77, 99 (1994).

22. *Id.*

23. Donald G. Hagman, *The Vesting Issue: The Rights of Fetal Development Vis A Vis the Abortions of Public Whimsy*, 7 ENVTL. L. 519, 534 (1976-1977).

24. *Id.* at 527.

25. John J. Delaney & Emily J. Vaia, *Recognizing Vested Development Rights as Protected Property in Fifth Amendment and Due Process and Taking Claims*, 19 WASH. U. J. URB. & CONTEMP. L. 27, 32 (1996).

has existed in American jurisprudence as a constitutionally protected legal interest for centuries.<sup>26</sup> The United States, however, had to reshape the law of England in order for it to function desirably in the very different geography and climate of the new world.<sup>27</sup> The English law was focused on land preservation during the Age of Discovery because much of the land in that country had already been put to use and exploited by the time the new world was discovered.<sup>28</sup> American judges had to create a body of law that would “encourage national development” of a landscape that was rugged and filled with “dense forests, tangled vegetation, arid plains, and lush wetlands” that were all viewed as an “obstacle to progress.”<sup>29</sup> Several examples exist to support this proposition, including the narrowing of the English doctrine of waste, alteration of trespass and nuisance laws, and legal doctrines involving title that were crafted to suit American preferences for land use.<sup>30</sup> “[D]octrines governing title . . . were adjusted for wilderness land in a manner that tended to vest title in the industrious user rather than the idle claimant.”<sup>31</sup> Thus, the courts fashioned laws that would favor the development of land over preservation of land.

In fact, in an Indiana Supreme Court decision dealing with a waste claim arising from the harvesting of timber, the court revealed an anti-wilderness bias.<sup>32</sup> The court announced that “a large portion of our territory consists of vast forests, requiring . . . that these forests should be turned into cultivated fields . . . [and this] makes the rule of the common law . . . wholly inapplicable.”<sup>33</sup> Similar anti-wilderness sentiment existed throughout the rest of the nation.<sup>34</sup>

Vested rights continue to carry this “[a]ntiwilderness bias in American property law.”<sup>35</sup> A developer who begins activity and investment in land will more likely be rewarded a right to continue development without government interference as opposed to a developer who does not commence development and investment until a later date.<sup>36</sup> For example, in many states it is more likely that a property owner with completed improvements on his property will be protected from rezoning, while an owner without any improvements will be subject to new

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26. SIEMON ET AL., *supra* note 20, at 52.

27. See Bernhard Grossfeld, *Comparative Law, Geography and Law*, 82 MICH. L. REV. 1510, 1519 (1984).

28. John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519, 523-24 (1996).

29. *Id.* at 523.

30. *Id.* at 526.

31. *Id.*

32. *Dawson v. Coffman*, 28 Ind. 220 (1867).

33. *Id.* at 224.

34. See *Bradstreet v. Huntington*, 30 U.S. 402, 448 (1831) (noting that the disputed uninhabited land was waste land); *Davis v. Mason*, 26 U.S. 503, 507 (1828) (describing a Kentucky parcel as a “pathless desert[.]”).

35. Sprankling, *supra* note 28, at 519.

36. See Hagman, *supra* note 23, at 527-28.

zoning laws.<sup>37</sup> History reveals that a notion exists that the right of a landowner to develop property should be protected. This is a simple enough proposition, but the challenge begins when deciding at what point a landowner should have his rights protected.

### *B. Explanation of Vested Rights*

A vested right is defined as “a right which the law recognizes as having accrued to an individual by virtue of certain circumstances and that as a matter of constitutional law cannot be arbitrarily taken away from that individual.”<sup>38</sup> The law of vested rights balances, on one side, the competing interests of the individual’s desire for “lower development costs” and certainty for investment purposes.<sup>39</sup> On the other side rests “the public’s interest in controlling land-use and land-use planning [as exercised through the government’s police power].”<sup>40</sup> Vested rights is really a mechanism which “draws a line between legislative flexibility and the power to regulate land use and a landowner’s right to use, enjoy, and develop his property in a way that maximizes its value.”<sup>41</sup> In determining on what side of this line a development will be placed, the law of vested rights focuses upon the acquisition of real property rights which are sufficient to continue with development without interference from subsequently enacted regulations.<sup>42</sup>

The vested rights doctrine attempts to provide certainty as to when a developer will be protected from any new government regulation.<sup>43</sup> Courts have concluded that, at some point during development, a level of commitment is reached at which time it would be unfair to halt any further development.<sup>44</sup> The doctrine developed from the law of nonconforming uses.<sup>45</sup> The doctrine makes

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37. *Id.*

38. Delaney & Vaia, *supra* note 25, at 31 (citing BRIAN W. BLAESSER ET AL., LAND USE AND THE CONSTITUTION: PRINCIPLES FOR PLANNING PRACTICE 8-9 (Brian W. Blaesser & Alan C. Weinstein eds., 1989)).

39. Hanes & Minchew, *supra* note 15, at 373; Thomas G. Pelham et al., “What Do You Mean I Can’t Build!?” *A Comparative Analysis of When Property Rights Vest*, 31 URB. LAW. 901, 901 (1999).

40. Pelham et al., *supra* note 39, at 901.

41. Rinaldi, *supra* note 21, at 94; *see also* Ben-Joseph, *supra* note 5, at 2 (noting that planning authorities view regulations as their primary means for ensuring a minimum adequate level of quality in building).

42. 9 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 52D.01 (Eric D. Kelly ed., 1997) (1978).

43. *Id.*

44. *Id.*; *see also* Crocker, *supra* note 18, at 935 (explaining that “courts and legislatures use the vested rights doctrine to determine whether landowners have proceeded sufficiently far down the path of development of their land that the local government should not be allowed to enforce newly enacted zoning ordinances against them”).

45. TRENDS IN LAND USE LAW FROM A TO Z: ADULT USES TO ZONING AND EVERYTHING IN-

guarantees that developers may proceed with a project unaffected by government interference after a certain point in the development process.<sup>46</sup> Of course property rights are not absolute, and a municipality must be able to enact new ordinances that affect landowners so as not to “preclude development and fix a city forever in its primitive conditions.”<sup>47</sup> However, at some point it is necessary to give the developer assurance that the proposed project can continue without retroactive application of new zoning laws.<sup>48</sup>

In order for a landowner to acquire vested rights to develop, generally the “landowner will be protected when: (1) relying in good faith, (2) upon some act or omission of the government, (3) he has made substantial changes or otherwise committed himself to his substantial disadvantage prior to a zoning change.”<sup>49</sup> Fledgling development rights must become vested rights to warrant “property” status, and when this status is obtained the vested development right cannot be affected by any new exercise of governmental police power.<sup>50</sup> The greatest confusion and conflict in gaining a vested right occurs when a developer has begun a project and a zoning ordinance is changed in the midst of development.<sup>51</sup> This situation can be especially taxing on a developer because portions of a project may be complete, but the new ordinance will apply to the entire project.<sup>52</sup> The new law will then require the developer to adjust the completed portions and suffer a monetary loss.<sup>53</sup>

Unfortunately, the vested rights doctrine is often a confusing morass of inconsistent decisions and arbitrary results.<sup>54</sup> In fact, one author has noted that “the only thing certain [about vested rights] is [that] an unjust result” will be produced.<sup>55</sup> Another author stated, “it often appears that the only time a developer has a true ‘vested right’ to develop is after he has literally established that right in concrete, the concrete of the building’s foundation.”<sup>56</sup> These sentiments surely create very serious concerns for developers of large projects

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BETWEEN 317 (Patricia E. Salkin ed., 2001).

46. *Id.*

47. *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915); *see also* *Curtiss v. City of Cleveland*, 144 N.E.2d 177, 187 (Ohio 1957) (explaining that no landowner has a vested right to have the same zoning ordinance operate throughout his ownership).

48. *See* *Cunningham & Kremer*, *supra* note 6, at 647.

49. *Delaney & Vaia*, *supra* note 25, at 759; *see also* *Hanes & Minchew*, *supra* note 15, at 384.

50. *Hanes & Minchew*, *supra* note 15, at 385-86 (explaining that rights that have not become property rights may be taken by the government).

51. John J. Delaney & William Kominers, *He Who Rests Less Vests Best: Acquisition of Vested Rights in Land Development*, 23 ST. LOUIS U. L.J. 219, 220 (1979); *see also* DANIEL R. MANDELKER, *LAND USE LAW* 234 (3d ed. 1993).

52. *See* *Delaney & Kominers*, *supra* note 51, at 220.

53. *See id.*

54. *See* *Cunningham & Kremer*, *supra* note 6, at 625.

55. *Hartman*, *supra* note 9, at 318.

56. *FISCHEL*, *supra* note 10, at 23.

because of the large initial investment often required for complex projects.<sup>57</sup> As examined in Part II, some of the confusion and inequity that vested rights decisions produce may be a result of a number of different and imprecise applications of vesting standards in various jurisdictions.<sup>58</sup>

## II. THE SPECTRUM OF VESTING STANDARDS ACROSS THE UNITED STATES

Each state has adopted, through the common law or by enactment of a statute, “its own standard for [conferring] vested rights” upon deserving developers and landowners.<sup>59</sup> The difference in each standard can be found by examining the precise moment at which development rights become vested.<sup>60</sup> There are essentially three rules of vesting, and each state can be categorized as either a state which follows the majority rule, the minority rule, or the “early vesting” rule.<sup>61</sup>

### A. *The Late Vesting Majority States*

The majority or “late-vesting” rule provides that landowners will be protected when they have “reli[ed] in good faith upon an act or omission of the [] government by making a substantial expenditure[] or commitment[] prior to a change in the zoning law.”<sup>62</sup> The common law in the states following the majority rule requires the “issuance of a building permit,” plus substantial construction or other action in reliance upon the permit in order for development rights to vest.<sup>63</sup> The most essential element of a vested rights claim in a majority state is the developer’s acquisition and possession of a building permit.

One illustration of the majority rule can be seen in an early Massachusetts case in which landowners obtained permits to build multi-family housing units.<sup>64</sup> The landowners began excavation, engineering work, and prepared to lay the foundation on their lots. After the permits were issued, a new zoning ordinance took effect which only allowed for single family homes in the area. The court held that the landowners did not have any vested rights to continue construction in light of the new zoning ordinance because the landowners had “only barely begun work pursuant to their permits.”<sup>65</sup>

California, New York, and Maryland law also maintain a majority “late

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57. See Hanes & Minchew, *supra* note 15, at 403.

58. SIEMON ET AL., *supra* note 20, at 12.

59. Crocker, *supra* note 18, at 938.

60. *Id.*

61. *Id.*

62. *Id.* at 940; see also 3 ARDEN H. RATHKOPF, THE LAW OF ZONING AND PLANNING § 57-6 to -7 (4th ed. 1975); Gramiger v. County of Pitkin, 794 P.2d 1045, 1048 (Colo. Ct. App. 1989) (stating the majority rule does not grant vested rights absent substantial reliance on a valid permit).

63. Delaney & Vaia, *supra* note 25, at 32.

64. Brett v. Bldg. Comm’r of Brookline, 145 N.E. 269, 270 (Mass. 1924).

65. *Id.* at 271-72.

vesting” standard.<sup>66</sup> One frequently cited California case adhered to the majority rule so stringently that a developer who had incurred liabilities in excess of \$700,000; costs of over \$2 million for the construction of residential property; and had begun building storm drains, utilities, and streets in a proposed subdivision, had no vested rights because the developer had not yet obtained a building permit.<sup>67</sup> The court held that if a developer were permitted to gain a vested right to continue construction without a building permit, but instead by making substantial expenditures, there “could be serious impairment of the government’s right to control land use policy.”<sup>68</sup>

In order for rights to vest in New York and Maryland, there must be a substantial change in the land itself.<sup>69</sup> This is required even if a building permit has been obtained and substantial expenditures have been made.<sup>70</sup> For instance, Maryland cases frequently have held that a building permit gives its owner no vested rights in the current zoning classifications unless substantial construction has begun; thus, possession of a building permit combined with substantial expenditures for preliminary fees creates no vested right if there has not been any actual construction.<sup>71</sup> Similarly, one New York decision found no vested rights were created by the issuance of a permit and that actual construction was needed in order to vest rights, not merely substantial expenditures.<sup>72</sup> This test, used in Maryland and New York, is known as the “physical changes” test and looks for “actual and contin[uous] construction” with the intention to complete the building.<sup>73</sup> In jurisdictions following the “physical changes” test, it is difficult to discern the exact time at which construction was commenced.<sup>74</sup> Therefore, a builder not willing to undertake substantial construction without sufficient assurances that the project will be completed may have his development rights taken away very easily.<sup>75</sup> The developer’s rights are vulnerable under the “physical changes” test because the court may find construction did not begin

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66. John J. Delaney, *Vesting Verities and the Development Chronology: A Gaping Disconnect?*, 3 WASH. U. J.L. & POL’Y 603, 607 (2000).

67. *Avco Cmty. Developers, Inc. v. S. Coast Reg’l Comm’n*, 553 P.2d 546, 554 (Cal. 1976). However, *Santa Margarita Area Residents Together v. San Luis Obispo County Board of Supervisors*, 100 Cal. Rptr. 2d 740, 746 (Ct. App. 2000), points out development agreements may be used to freeze development rights early in the development process.

68. *Avco Cmty. Developers, Inc.*, 553 P.2d at 554.

69. Delaney & Kominers, *supra* note 51, at 234.

70. *Id.*

71. *Pemberton v. Montgomery County*, 340 A.2d 240, 244 (Md. 1975); *Prince George’s County v. Equitable Trust Co.*, 408 A.2d 737, 743 (Md. Ct. Spec. App. 1979) (holding that vested rights could only be granted when a developer had obtained a building permit and begun substantial construction).

72. *Gramatan Hills Manor, Inc. v. Manganiello*, 213 N.Y.S.2d 617, 621 (App. Div. 1961).

73. Crocker, *supra* note 18, at 944.

74. Delaney & Kominers, *supra* note 51, at 235.

75. *Id.*



before the ordinance became effective.<sup>76</sup>

Other majority rule jurisdictions do not necessarily require actual construction but look to substantial investment or a balancing of interests in order to determine if rights have vested.<sup>77</sup> In order to determine if a developer has exhibited substantial reliance, majority rule states typically employ either a “proportionate/ratio test” or a “balancing test.”<sup>78</sup> The proportionate/ratio test measures substantial reliance by comparing the amount spent on the project to the estimated total cost of the project.<sup>79</sup> If the expenditures represent a substantial percentage of the total cost then vested status is achieved.<sup>80</sup>

On the other hand, the balancing test considers the expenditures made on the project as only a factor and tries to “weigh the developer’s right to use his land and the amount of money already spent on his development versus the public interests at stake in enforcing the new zoning ordinance.”<sup>81</sup> The balancing test recognizes that no precise percentage or expenditure can be set to confer vested status upon a development.<sup>82</sup> Furthermore, it allows a court to look at the impact of the newly enacted ordinance with both an *ex ante* and *ex post* view.<sup>83</sup> The balancing test considers a number of factors including the “existing uses” in the area; the impact of the nonconforming use on property value; the public’s health, safety, and welfare; net gain to the public and developer; and “the suitability of the property for zoned purposes.”<sup>84</sup> The balancing test is more fact sensitive and thus is likely to produce a more equitable outcome.<sup>85</sup>

The majority rule has been criticized as being too harsh because it provides very little protection to property owners and often yields unjust results.<sup>86</sup> According to some, the majority rule allows the government very broad power in land regulation which may not be justified by the public interest.<sup>87</sup> The rule leaves the developer in a “no-man’s land”<sup>88</sup> and there is a possibility that a permit may be denied at a late stage of development.<sup>89</sup> The rule makes the developer subject to the whims of the government and may tempt the developer to

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76. *Id.*

77. *See* Clackamas County v. Holmes, 508 P.2d 190, 192 (Or. 1973).

78. Crocker, *supra* note 18, at 944.

79. *See* MANDELKER, *supra* note 51, at 240.

80. City of Rochester v. Barcomb, 169 A.2d 281, 286 (N.H. 1961) (finding no vested right because a developer’s expenditures in relation to the total costs of the project were insignificant).

81. Crocker, *supra* note 18, at 944.

82. *See* MANDELKER, *supra* note 51, at 240 (recognizing the balancing test as the preferred approach).

83. *Id.*

84. Delaney & Kominers, *supra* note 51, at 223 (citing Smith v. City of Macomb, 352 N.E.2d 697, 704 (Ill. App. 1976)).

85. *Id.*

86. Overstreet & Kirchheim, *supra* note 9, at 1062.

87. Pelham et al., *supra* note 39, at 912.

88. SIEMON ET AL., *supra* note 20, at 2.

89. Pelham et al., *supra* note 39, at 912.

“manipulate the process by prematurely engaging in [bad faith] activities [to] establish the substantial reliance required to vest his right to develop when inappropriate.”<sup>90</sup> The majority rule can promote bad faith on the part of the government as well. It may encourage the government to quickly propose new zoning laws and satisfy the minimum public notice requirements, in the hopes that property owners will not find out about the new ordinance until it is enacted.<sup>91</sup> One scholar noted that a lack of a more precise vesting standard is “an open invitation to lawlessness[.]”<sup>92</sup> and one court has commented that the majority rule is the “handmaiden of . . . administrative anarchy.”<sup>93</sup>

Nevertheless, the majority rule may be desirable for maintaining flexibility in controlling development and for what some see as fixing a clear and objective standard for the point at which rights vest.<sup>94</sup> The government or local municipality is able to maintain control until nearly the last moment in order to meet the needs of its citizens.<sup>95</sup> However, the majority rule is most likely unworkable for a large number of developments today because it is not suited for large scale development.<sup>96</sup> The majority rule originated in a time of “small-scale land development [proposals]” by individuals which took only a short time to construct.<sup>97</sup> In contrast, today developers have started pursuing more ambitious and complex projects that are multi-phased and involve a series of permits, reviews, and hearings.<sup>98</sup> This evolution makes the majority rule seem inadequate as a mechanism for determining when a developer has a protected right to continue construction on a particular project.<sup>99</sup> Often a development will require a large initial investment before a building permit is sought, and here the majority rule certainly falls short in protecting the developer by not accounting for pre-construction expenditures.<sup>100</sup> A more modern and realistic application of the majority rule would take into account pre-construction expenses because of the necessary investment of time and money in the conceptual, pre-construction stage of development.<sup>101</sup> While the majority rule may fail in circumstances involving multi-phased and investment intensive projects, its use should not be completely discarded, as this Note discusses in later sections.

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90. *Id.*

91. See Joel S. Russell, *Massachusetts Land-Use Laws—Time for a Change* (Jan. 2002), <http://www.planning.org/PEL/masslaws.htm> (last visited Mar. 7, 2006).

92. Donald G. Hagman, *Estoppel and Vesting in the Age of Multi-Land Use Permits*, 11 SW. U. L. REV. 545, 574 (1979).

93. *Raley v. Cal. Tahoe Reg'l Planning Agency*, 137 Cal. Rptr. 699, 711 (Ct. App. 1977).

94. See Crocker, *supra* note 18, at 955.

95. See *id.* at 956.

96. See *id.* at 955.

97. Cunningham & Kremer, *supra* note 6, at 626-27.

98. *Id.*

99. *Id.*; see also SIEMON ET AL., *supra* note 20, at 1.

100. SIEMON ET AL., *supra* note 20, at 1.

101. David G. Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes*, 1971 URB. L. ANN. 63, 91.

*B. The Minority Rule States*

The minority rule permits a developer to obtain a vested right before a building permit is issued.<sup>102</sup> Unlike the majority rule, which requires building permit approval and issuance by the government, the minority rule defines government approval as “any site-specific approval, such as a preliminary plan.”<sup>103</sup> Some states that are classified as “minority rule” states do not even require substantial reliance.<sup>104</sup> The minority rule allows development rights to vest to the effective zoning and building ordinances on the date the project is approved by the government, unless a compelling reason can be shown for retroactive application of an ordinance.<sup>105</sup> States following the minority rule have recognized that the majority rule often is unfair because it leaves too many matters in the development process open, which can result in unnecessary litigation.<sup>106</sup> At the same time, the rule attempts to leave some room for the government to make any necessary changes that are supported by a compelling public interest.<sup>107</sup>

Florida is one of the most liberal jurisdictions under the minority rule.<sup>108</sup> Florida courts have recognized vested rights in situations where the developer did not have a permit or had not made any physical changes to the land in reliance on existing zoning laws.<sup>109</sup> Similarly, New Jersey and Virginia have both enacted statutes which codify the minority view.<sup>110</sup>

New Jersey’s statute confers specific rights upon a developer when the developer obtains preliminary approval for a major subdivision; the statute includes a provision that for a three year period, “the general terms and conditions on which preliminary approval was granted” will not change except for reasons of public health and safety.<sup>111</sup> Importantly, and perhaps in recognition of the failures of the majority rule to adequately protect large development projects, the New Jersey statute specifies that the statute applies to “[p]reliminary approval of a major subdivision.”<sup>112</sup>

The Virginia statute protects against the impairment of any vested right by

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102. MANDELKER, *supra* note 51, at 237 (citing *W. Land Equities, Inc. v. City of Logan*, 617 P.2d 388, 395 (Utah 1980)).

103. Crocker, *supra* note 18, at 944.

104. *Id.* at 945.

105. Overstreet & Kirchheim, *supra* note 9, at 1045.

106. *W. Land Equities, Inc.*, 617 P.2d at 391.

107. *Id.* at 396.

108. Pelham et al., *supra* note 39, at 905-06.

109. *Id.*; see *Town of Largo v. Imperial Homes Corp.*, 309 So. 2d 571, 574 (Fla. Dist. Ct. App. 1975) (finding the existence of vested rights where a developer entered into a contract to purchase land contingent on gaining desired zoning classification and such classification was granted).

110. Crocker, *supra* note 18, at 945.

111. N.J. STAT. ANN § 40:55D-49 (West 2004).

112. *Id.*

essentially codifying the elements of a common law vested rights claim.<sup>113</sup> In addition, the Virginia statute enumerates specific actions which will be deemed affirmative government acts, including when

the governing body or its designated agent has approved a preliminary subdivision plat, site plan or plan of development for the landowner's property and the applicant diligently pursues approval of the final plat or plan within a reasonable period of time under the circumstances; . . . or the governing body or its designated agent has approved a final subdivision plat, site plan or plan of development for the landowner's property.<sup>114</sup>

Similar to New Jersey, Virginia specifically included subdivisions in its statute, which is likely in recognition that subdivisions and multi-phased projects are the "Achilles' heel" of the majority "late vesting" rule.

The minority rule is more certain and fair than the majority rule because, under the minority rule, "the regulations in effect at the time of project approval are applied."<sup>115</sup> Practically, the minority rule operates in states such as Virginia to provide limited certainty to the landowner so that, once government approval of a site plan is received, only non-discretionary approvals remain.<sup>116</sup> The minority rule nonetheless, is considered inadequate by some commentators because it still allows the government to pull the rug out from under the developer between the time of permit application and final approval.<sup>117</sup> The risk of loss of a substantial investment toward preliminary activities, such as surveying and contracting, persist under a minority rule regime because the protected vested right arises only after final application approval.<sup>118</sup> Thus, the time period between application and approval is fraught with uncertainty.<sup>119</sup> Unfortunately for the developer, the time between application and approval is the time during which the risk of loss and cost are most substantial.<sup>120</sup>

### *C. The Early Vesting States*

A "second minority rule" has developed in Washington, Colorado, Massachusetts, Utah, and Texas that grants vested rights even earlier than the minority rule.<sup>121</sup> The "early vesting" rule confers vested rights upon a developer on the date of application for a "site specific" permit.<sup>122</sup> Under this rule, there is

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113. VA. CODE ANN. § 15.2-2307 (2004).

114. *Id.*

115. Overstreet & Kirchheim, *supra* note 9, at 1065.

116. Hanes & Minchew, *supra* note 15, at 394.

117. Overstreet & Kirchheim, *supra* note 9, at 1065.

118. *Id.*

119. *Id.*

120. *Id.*

121. Crocker, *supra* note 18, at 949-50.

122. *Id.*

no requirement that the developer change his or her position in reliance upon a permit.<sup>123</sup> Therefore, no evidence of substantial investment is required.<sup>124</sup> Rather, the “early vesting” rule presumes that a sufficient amount of detrimental reliance has occurred in the form of preliminary expenses prior to application for a building permit.<sup>125</sup> Consequently, the rule allows rights to vest upon filing of a permit application.<sup>126</sup>

The “early vesting” rule is much more developer friendly in comparison to the other rules. The developer’s right to a permit vests when the developer applies for the permit, and the development is permissible under the building codes and ordinances in effect at the time the permit application is made.<sup>127</sup>

The “early vesting” rule has been hailed as revolutionary, in that it allows the government to “exercise its reasonable health, safety, and welfare powers when necessary [while creating] a good balance between the needs of local government and property owners.”<sup>128</sup> The rule allows the government to retain regulatory flexibility, yet gives property owners powerful protection of their right to develop.<sup>129</sup> Also, the rule minimizes the risk that any expenditure toward development will be wasted due to government interference.<sup>130</sup> The rule is able to accomplish this balance of developer and government rights by establishing a “date certain” for vesting.<sup>131</sup> The “date certain” is the date a proper application for a permit is filed.<sup>132</sup> Under the “date certain” doctrine, the enumerated uses in the permit accrue into vested rights upon the date a proper application is filed.<sup>133</sup> Washington courts have reasoned that this is a more practical and predictable rule.<sup>134</sup> Furthermore, advocates of the “early vesting” approach maintain that “the only government power sacrificed by [the use of an early vesting rule] is the ability of local politicians to retroactively prevent currently lawful—but politically unpopular—land uses.”<sup>135</sup>

As an illustration of the “early vesting” rule, a landowner who simply

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123. RATHKOPF, *supra* note 62, § 57-4.

124. *Id.*

125. Lynn Ackermann, Comment, *Searching for a Standard for Regulatory Takings Based on Investment-Backed-Expectations: A Survey of State Court Decisions in the Vested Rights and Zoning Estoppel Areas*, 36 EMORY L.J. 1219, 1236 (1987).

126. *Id.*

127. RATHKOPF, *supra* note 62, § 57-2; see *Allenbach v. City of Tukwila*, 676 P.2d 473, 476 (Wash. 1984).

128. Overstreet & Kirchheim, *supra* note 9, at 1047, 1060.

129. *Id.*

130. *Id.* at 1062 (citing Frederick D. Huebner, Comment, *Washington’s Zoning Vested Rights Doctrine*, 57 WASH. L. REV. 139, 162 (1981)).

131. *Id.* at 1073.

132. *Id.* at 1071.

133. *Id.* at 1069.

134. *Valley View Indus. Park v. City of Redmond*, 733 P.2d 182, 195 (Wash. 1987); *Hull v. Hunt*, 331 P.2d 856, 859 (Wash. 1958).

135. Overstreet & Kirchheim, *supra* note 9, at 1073.

proposed the development of a business and complied with all zoning provisions was held to have gained vested rights to develop his property, despite attempts by the municipality to prevent such use.<sup>136</sup> The court stated that “[a] building or use permit must issue as a matter of right upon compliance with the ordinance” and that “an owner of property has a vested right to put [land] to a permissible use as provided by prevailing zoning ordinances.”<sup>137</sup> The rule clearly appreciates the trend toward longer and more expensive development processes by recognizing that substantial investment often occurs prior to application for a permit.<sup>138</sup>

Washington enacted a statute in 1987 which essentially codified the common law vested rights doctrine announced in *Ogden v. City of Bellevue*.<sup>139</sup> In addition, the statute extended protection to subdivisions, likely due to their special status as multi-phase developments.<sup>140</sup> For example, in *Noble Manor Co. v. Pierce County*,<sup>141</sup> the court applied Washington’s vested rights doctrine to a subdivision and found that once a subdivision plat had been submitted, the landowner’s rights to develop had vested.<sup>142</sup> The court found the development was immune to any subsequently enacted zoning change.<sup>143</sup> Thus, the “early vesting” rule appears to be the most fair rule when applied to expensive and lengthy development projects.

Nevertheless, the “early vesting” rule is criticized for being too developer friendly and leaving the government almost no flexibility to react to important community concerns and issues.<sup>144</sup> The rule could allow a developer who has manifested no sincerity in completing a development to freeze the zoning laws against the government.<sup>145</sup> Thus, the rule may allow the zoning laws to become obsolete in providing for the community’s needs and desires.<sup>146</sup>

For instance, in the town of West Tisbury on Martha’s Vineyard, Massachusetts, local authorities proposed a temporary moratorium on building permits for single-family homes.<sup>147</sup> Within the first six weeks after the proposal, the total number of building permits granted exceeded the number that had been given during the previous year.<sup>148</sup> The moratorium had the perverse effect of actually generating growth due to the advantage given to landowners under the

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136. *Ogden v. City of Bellevue*, 275 P.2d 899, 901-02 (Wash. 1954).

137. *Id.*

138. Rinaldi, *supra* note 21, at 95.

139. *Noble Manor Co. v. Pierce County*, 943 P.2d 1378, 1382 (Wash. 1997).

140. WASH. REV. CODE § 58.17.033 (1998).

141. 943 P.2d 1378.

142. *Id.* at 1382.

143. ROHAN, *supra* note 42, § 52D.03[2].

144. See Roger D. Wynne, *Washington’s Vested Rights Doctrine: How We Have Muddled a Simple Concept and How We Can Reclaim It*, 24 SEATTLE U.L. REV. 851, 855 (2001).

145. Crocker, *supra* note 18, at 958.

146. *Id.*

147. Russell, *supra* note 91.

148. *Id.*

“early vesting” rule.<sup>149</sup> Thus, the possibility of bad faith behavior on the part of the developer is still present under the “early vesting” rule because developers may rush to begin a project to gain protection from any subsequent zoning amendment.

Clearly, there is jurisdictional conflict concerning vested rights. This leaves developers scratching their heads as to when they no longer have to be concerned with newly enacted ordinances.<sup>150</sup> The developer confusion can logically only become greater in a state such as Indiana, where two vesting standards currently exist.

### III. THE INDIANA PROBLEM

Indiana has placed itself in the unique position of becoming a vested rights “laboratory” for the entire United States. A series of nonconforming use cases seem to announce one vesting rule that is unfavorable to developers,<sup>151</sup> while a separate line of cases subscribes to a more developer friendly standard.<sup>152</sup> This is a troublesome development because the vesting rule is essentially an extension of the protections provided by the nonconforming use rule to partially completed development projects.<sup>153</sup> The vesting rules and nonconforming use rules should be compatible.<sup>154</sup> In Indiana, however, it seems impossible to view the rules together at the present time because the cases concerning vested rights sit at polar opposites. Indiana recognizes that property rights are not perfect and may be restricted by the government’s police power,<sup>155</sup> but beyond this basic notion there exists much confusion.

#### A. *The Lutz Case Line*

In one line of cases, Indiana appears to have adopted a vesting standard similar to the courts of Maryland and New York, which requires actual construction for a vested right to be conferred upon a landowner.<sup>156</sup> In *Lutz v. New Albany City Plan Commission*,<sup>157</sup> the owners of a parcel of land entered into a lease with an oil company. The lease called for the construction of a service station on the site. The owners entered into a loan for the station and applied for permission to build the station but the application was denied. After denial of the permit, the city enacted a new zoning ordinance which prohibited gasoline

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149. *Id.*

150. Delaney & Vaia, *supra* note 25, at 731.

151. Dandy Co. v. Civil City of South Bend, County City Complex, 401 N.E.2d 1380 (Ind. Ct. App. 1980); Lutz v. New Albany City Plan Comm’n, 101 N.E.2d 187 (Ind. 1957).

152. Bd. of Zoning Appeals v. Shell Oil Co., 329 N.E.2d 636 (Ind. Ct. App. 1975); Knutson v. State, 160 N.E.2d 200 (Ind. 1959).

153. Hagman, *supra* note 23, at 526.

154. *See id.*

155. Zahm v. Peare, 502 N.E.2d 490, 494 (Ind. Ct. App. 1985).

156. *See supra* notes 68-75 and accompanying text.

157. 101 N.E.2d 187 (Ind. 1951).

stations in the area where the parcel was situated.<sup>158</sup> The landowners contended they had a vested right because they had entered into a lease and had begun conversion of the parcel into a service station. The court held that the landowners had not gained any vested rights and stated, “where no work has been commenced, or where only preliminary work has been done without going ahead with the construction of the proposed building, there can be no vested rights.”<sup>159</sup> In addition the court said, “the fact that ground had been purchased and plans had been made for the erection of the building before the adoption of the zoning ordinance prohibiting the kind of building contemplated, is held not to exempt the property from the operation of the zoning ordinance.”<sup>160</sup> The court required actual construction in order for rights to vest and asserted that construction did not include purchasing a parcel and contemplating a use upon that parcel.<sup>161</sup> Furthermore, the court made clear that the lease which the landowners had entered into did not provide a basis for vested rights.<sup>162</sup>

The *Lutz* case implicitly states that, not only is substantial construction needed in order for development rights to vest, but a valid permit is also necessary. In fact, some scholars categorize Indiana as one of many states which require the issuance of a building permit and substantial reliance, “such as construction or expenditure of funds to implement the permit.”<sup>163</sup> Thus, according to *Lutz* and certain scholarly analysis, it appears Indiana is a majority rule “late vesting” state.

The *Lutz* holding was reaffirmed in *Dandy Co. v. Civil City of South Bend, County-City Complex*.<sup>164</sup> In *Dandy Co.*, the owner of a parcel of land operated an adult bookstore which she later vacated. The premises remained dormant for two years until Dandy Co. signed a lease to operate the premises once again as an adult bookstore.<sup>165</sup> Subsequently, the city of South Bend enacted an ordinance which forbade certain types of uses, including adult bookstores, from being in close proximity to one another. Dandy Co. argued the ordinance could not apply to the store despite the lapse in the operation of the business.<sup>166</sup> The landowner and Dandy Co. offered evidence that a lease had been entered into before the ordinance was enacted and while the store was vacant. The court held no vested interest existed because no substantial liabilities had been incurred by either Dandy Co. or the landowner.<sup>167</sup> The court looked to the *Lutz* decision in determining whether a vested right had been created and found that no renovation

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158. *Id.* at 189.

159. *Id.* at 190.

160. *Id.*

161. *Id.* (defining construction as the act of building).

162. *Id.*

163. Delaney, *supra* note 66, at 607.

164. 401 N.E.2d 1380, 1384 (Ind. Ct. App. 1980).

165. *Id.* at 1381.

166. *Id.* at 1382.

167. *Id.* at 1384 (citing *City of Omaha v. Glissman*, 39 N.W.2d 828, 903 (Neb. 1949)).



had begun on the premises but merely “clean-up work.”<sup>168</sup> Also, like the *Lutz* court, the *Dandy Co.* court found that “the mere execution of a lease does not create a vested right.”<sup>169</sup> In addition, the court extended the *Lutz* holding, and in doing so further shaped Indiana’s vested rights law by stating, “preliminary contracts are not considered to be substantial liabilities . . . and do not give persons a vested interest.”<sup>170</sup>

The *Lutz* case was implicated once again in *Town of Avon v. Harville*.<sup>171</sup> In *Harville*, a landowner operated a “salvage recycling” business on two lots.<sup>172</sup> After the landowner had purchased each lot and began business operations upon those lots, the town enacted a zoning ordinance making the operation of junkyards in the landowner’s district illegal. The landowner claimed he had gained a vested right in operating his business. However, the court found that he had not shown a legal use of the land before enactment of the ordinance.<sup>173</sup> The court looked to *Lutz* and found that the landowner had failed to provide any evidence of a vested right that would insulate his property from the newly enacted ordinance.<sup>174</sup> It is important that such a recent case relied upon the *Lutz* decision as it is in conflict with a competing standard which will be discussed later in this Note.

#### B. The Shell Oil Case Line

Another line of Indiana cases that has emerged in the area of vested rights seems to have developed a standard that completely and utterly contradicts the decision of the *Lutz* court. In fact, commentators have acknowledged that Indiana follows this standard by documenting Indiana as a state that vests development rights when an application for a building permit is officially filed.<sup>175</sup> Indiana has been listed among “early vesting” states similar to Washington.<sup>176</sup> The primary case that has likely led scholars to conclude that Indiana is an “early vesting” state is *Board of Zoning Appeals of the City of Fort Wayne v. Shell Oil Co.*<sup>177</sup> The case relies upon a rule set forth in *Knutson v. State ex rel. Seberger*,<sup>178</sup> a case which postdates *Lutz* by only a few years.

In *Knutson*, a landowner sought governmental approval of a subdivision plat, but the plat was rejected by the town board.<sup>179</sup> The landowner appealed the

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168. *Id.*

169. *Id.*

170. *Id.* (citing *County of Saunders v. Moore*, 155 N.W.2d 317, 319 (Neb. 1967)).

171. 718 N.E.2d 1194 (Ind. Ct. App. 1999).

172. *Id.* at 1195.

173. *Id.* at 1200.

174. *Id.* at 1198.

175. SIEMON ET AL., *supra* note 20, at 27.

176. *Id.* *Contra* Delaney, *supra* note 66, at 607.

177. 329 N.E.2d 636 (Ind. Ct. App. 1975).

178. 160 N.E.2d 200 (Ind. 1959).

179. *Id.*

decision of the town board, and subsequently the town board adopted a new subdivision control ordinance. The new ordinance gave the planning commission the authority to approve subdivision plats. The town board claimed the suit was invalid because of the new ordinance, but the court held that the landowner had a vested right in the prevailing laws affecting his property at the time the suit was filed.<sup>180</sup>

Following the *Knutson* case, the court of appeals then decided *Shell Oil Co.*<sup>181</sup> In that case, a landowner entered into a lease agreement with Shell Oil Co. for the construction and operation of a service station on a parcel held by the landowner.<sup>182</sup> On the same date as the execution of the lease, Shell applied to the building commissioner for a building permit. Five days later, the city adopted an ordinance which prohibited the construction of any gasoline station for a period of six months. The ordinance was extended two times, each time for three months.<sup>183</sup> Although Shell had properly completed the permit application, it was not issued a permit. Shell contended it was entitled to a permit on the date of application. The *Shell Oil Co.* court found that the use listed in the permit was conforming and held that “[t]he right to use property in accordance with prevailing zoning ordinances accrues upon the filing of an application for a building permit; and an ordinance of substantive character cannot later operate to divest such right.”<sup>184</sup> The court therefore found that Shell Oil Co. was entitled to a permit and the parcel was immune to the newly enacted ordinance.<sup>185</sup>

The holdings of the *Knutson* and *Shell* cases nearly parallel the “early vesting” rule currently followed by the Washington Supreme Court.<sup>186</sup> Later, the rule was used in *Yater v. Hancock County Board of Health*.<sup>187</sup> In *Yater*, a landowner-developer was building a subdivision and installing in-ground septic systems.<sup>188</sup> The landowner obtained permits for thirty-five of the forty-seven lots but was denied permits for the remaining lots due to a newly enacted ordinance. The new ordinance severely restricted installation of septic systems.<sup>189</sup> The landowner argued that, as owner of the remaining lots, he had a vested right to obtain the permits for installation of the septic systems. The landowner contended that a vested right existed because the subdivision had been approved before the zoning ordinance restricting septic installation had taken effect. The *Yater* court looked to *Shell Oil Co.* for guidance and held that “[t]he right to use

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180. *Id.* at 201.

181. 329 N.E.2d 636.

182. *Id.* at 637.

183. *Id.* at 639.

184. *Id.* at 642 (citing *Knutson*, 160 N.E.2d at 202).

185. *Id.*

186. See RATHKOPF, *supra* note 62, § 57-4 to -6 (noting that Indiana courts have reached similar results as Washington courts).

187. 677 N.E.2d 526, 529 (Ind. Ct. App. 1997).

188. *Id.* at 528.

189. *Id.*

property under prevailing regulations accrues with the application of a permit.”<sup>190</sup> When the court applied the *Shell Oil Co.* standard it determined that, because the landowner had not applied for the permits with respect to the remaining lots, he had gained no vested rights.<sup>191</sup> Thus, the property was subject to the new ordinance.<sup>192</sup>

An examination of the *Shell Oil Co.* case, its predecessor, and subsequent decisions point to a vested rights formulation that is more in line with “early vesting” states and therefore much more developer friendly. These cases seem to announce that only a proper application for a permit is needed in order for rights to become vested. The *Lutz* case line and the *Shell Oil Co.* case line are in conflict and a recent case calls for examination of the vesting disparity in Indiana.

### C. A Billboard Case Inspires Examination

The recent Indiana case that illustrated a need for an assessment of the competing Indiana vesting standards, and inspired this Note, was *Metropolitan Development Commission of Marion County v. Pinnacle Media, LLC*.<sup>193</sup> The case involved the siting of billboards in the city of Indianapolis and was the cause of a great deal of controversy throughout the state of Indiana. The case itself has larger implications that extend beyond the state of Indiana. The circumstances of the case may provide a unique solution to the confusion surrounding vested rights throughout the United States.

To begin, in the early part of the twentieth century and continuing into the present day, cities began reacting to the proliferation of billboards throughout their landscape.<sup>194</sup> Cities attempted to restrict construction of billboards through various ordinances.<sup>195</sup> Initially, courts were not willing to uphold billboard regulations if they were based on aesthetic concerns, but more recently, courts have found that aesthetic concerns are legitimate and within the scope of the police power.<sup>196</sup> Indianapolis, like other cities, recently found itself combating billboards when they began to clutter the scenery of the city in many locations.<sup>197</sup>

The mass of billboards was due in large part to a loophole Pinnacle Media, LLC had found in the city’s municipal code.<sup>198</sup> The loophole allowed the

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190. *Id.* at 529.

191. *Id.*

192. *Id.*

193. 811 N.E.2d 404 (Ind. Ct. App. 2004).

194. See Katherine Dunn Parsons, *Billboard Regulation After Metromedia and Lucas*, 31 HOUS. L. REV. 1555, 1558 (1995).

195. See *id.*

196. *Id.* at 1560 (citing *Ness v. Albert*, 665 S.W.2d 1, 2 (Mo. Ct. App. 1983); *Berman v. Parker*, 348 U.S. 26, 32 (1954)).

197. John Strauss, *Billboard Outcry Is Sky-High as Panel Examines Ordinance*, INDIANAPOLIS STAR, Oct. 15, 2003, at B01.

198. John Strauss, *Duke Realty Is Dragged into Battle over Billboards*, INDIANAPOLIS STAR, May 30, 2003, at B01.

company to obtain permits for construction of billboards at certain sites and, at the same time, avoid the normal permitting process.<sup>199</sup> The typical business cycle for Pinnacle would begin when the company would lease land from a landowner, then obtain the necessary permits from the State and/or local authorities.<sup>200</sup> Finally, Pinnacle would erect billboards and lease the signs for advertising purposes to various entities.<sup>201</sup>

In 1999, Pinnacle entered into a lease with a landowner to build two signs on property that consisted of a railroad corridor which passed under an interstate. Pinnacle then sought the necessary permits for construction of the billboard. During the course of reviewing the permit applications, the Indianapolis Department of Metropolitan Development (“DMD”) found that the land which Pinnacle had leased was not zoned. Therefore, the land was not subject to local authority nor was it controlled by the State of Indiana. “The land underneath and immediately adjacent to freeways is owned by the State . . . [with] the only exceptions [being] tiny slivers of land where the freeway intersects a railroad corridor.”<sup>202</sup> Thus, the DMD lacked the jurisdiction to rule on the permits or to require that Pinnacle obtain the permits. The DMD advised Pinnacle to contact the Indiana Department of Transportation (“INDOT”). After learning that the City lacked jurisdiction over the site of the proposed billboards, Pinnacle acted upon the advice of the city and requested permits from INDOT. The State issued the permits and Pinnacle constructed two signs in accordance with the lease.<sup>203</sup>

Apparently realizing that the inherent administrative costs and long time delays of the government approval process could be avoided by developing these railroad parcels, Pinnacle pursued more leases for similar property in Indianapolis. Pinnacle succeeded in entering into fifteen additional leases at similarly situated sites.<sup>204</sup> The citizens of Indianapolis objected to Pinnacle circumventing the normal zoning process and feared that the loophole would lead to more billboards.<sup>205</sup> Once the leases had been secured, Pinnacle applied to INDOT for additional permits for each of the fifteen sites. During the time the permits were pending, city officials introduced and adopted an ordinance that zoned the areas containing the interstate railroad corridors.<sup>206</sup> The result of the new ordinance was that any developer in the railroad corridors would have to seek a building permit from the DMD. Subsequently, ten of the fifteen permits for which Pinnacle had applied were granted by INDOT. Pinnacle began construction on a site after gaining permit approval, but shortly after work began the DMD posted an “Order to Stop Work” for failure to obtain an “Improvement

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199. *Id.*

200. *Metro. Dev. Comm’n of Marion County v. Pinnacle Media, LLC*, 811 N.E.2d 404, 406 (Ind. Ct. App. 2004).

201. *Id.*

202. *Id.* at 407 n.5.

203. *Id.* at 407.

204. *Id.*

205. Strauss, *supra* note 198.

206. *Pinnacle Media*, 811 N.E.2d at 408.

Location Permit” for the sign from the city pursuant to the newly enacted ordinance.<sup>207</sup> Pinnacle argued that the ordinance could not be retroactively applied to the signs that had permit approval from the State and contended the “Stop Work Order” was void and unenforceable.

Eventually, the issue reached the Indiana Court of Appeals where the trial court’s grant of Pinnacle’s motion for summary judgment was upheld.<sup>208</sup> The court of appeals relied upon the *Shell Oil Co.* case line to resolve the dispute and held, “[o]nce a property owner applies for the relevant building permits under the prevailing zoning laws, the owner’s rights vest as against other government units who subsequently attempt to intervene by enacting laws to assert jurisdiction . . . over the subject matter of the pending permit applications.”<sup>209</sup> The court looked to *Knutson* as well and stated that if the government was authorized to apply subsequently enacted zoning ordinances not known to the landowner at the time of permit application there would exist “a government by men, and not by law.”<sup>210</sup>

Ultimately, the court decided that the vested rights doctrine operated to prevent the city from interfering with the construction of the billboard.<sup>211</sup> By doing so, the court essentially subscribed to a rule consistent with *Shell Oil Co.* and the “early vesting” law of the state of Washington. This latest chapter in Indiana’s vested rights saga only created more confusion. Which rule can developers rely upon with assurance that it will be consistently applied? How can the government maintain control and power of land without gaining too much of an advantage with *Lutz* in its back pocket? Indiana would be wise to resolve these seemingly contradictory standards.

This Note examines the proposed structure in *Pinnacle Media*, a billboard, and finds it especially useful to focus on it to reconcile the two lines of Indiana cases.<sup>212</sup> In fact, sometimes a single proposed development may change public policy and regulation.<sup>213</sup> The proposed billboard in *Pinnacle Media* could have the effect of redefining vested rights rules throughout the United States because of its small, less development-intensive nature. The billboard exposes the strengths and weaknesses of the vesting rules and indicates that one rule is better suited for complex and lengthy projects, while another is more appropriate in small, less development-intensive projects.

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207. *Id.*

208. *Id.* at 413.

209. *Id.* at 411.

210. *Id.* (quoting *Knutson v. State ex rel. Seberger*, 160 N.E.2d 200, 202 (Ind. 1959)).

211. *Id.*

212. This Note does not raise the possibility that Pinnacle was unfairly singled out but proceeds on the belief that the proliferation of billboards was a general concern with Pinnacle as one of many builders affected. See Cunningham & Kremer, *supra* note 6, at 668-69 (explaining that although a specific project may create legislative awareness of a problem it does not make the new law wholly inapplicable to the project).

213. SIEMON ET AL., *supra* note 20, at 7.

## IV. ANALYSIS AND SOLUTION

The most frustrating aspect of vested rights jurisprudence is the inconsistency and lack of a bright line test. This is due, in part, to the fact that land use regulations are always changing because of “man’s understanding of his relationship with his environment and the political process that translates that understanding into policies.”<sup>214</sup> Therefore, the different vested rights rules have developed in response to various situations where a new standard was necessary.<sup>215</sup> At some point, courts encountered situations where it would have been inequitable to deprive the landowner of vested rights and fashioned new rules to protect the landowner.<sup>216</sup> This resulted in the various rules that currently exist.<sup>217</sup> Thus, it can be argued that the individual vesting rules are each useful in the face of different circumstances.

Instead of adhering to a single test, states should retain multiple vesting rules and apply the relevant standard according to the nature and circumstances surrounding the development. Retention of two rules would require an initial inquiry into a set of factors to determine which rule will govern the proceeding. This would allow all relevant factors to be examined and would give the landowner two opportunities to avoid application of the new zoning ordinance. The landowner could satisfy the criteria that result in application of an “early vesting” rule or simply begin construction at an early date. At the same time, this solution lets the government maintain its power to affect certain projects through application of the “late vesting” rule. When the developer does not meet the criteria for an application of the “early vesting” rule, the more government-friendly “late vesting” rule will determine if a vested right has been acquired.

This bifurcated approach arguably could lead to increased administrative costs. Once the rule is instituted, uncertainty will likely exist regarding development projects which do not clearly fall on either side of the proposed factors. To resolve this “gray area,” courts will necessarily have to draw lines so that unmistakable boundaries emerge with regard to certain projects. Nevertheless, some uncertainty may still exist because the proposed factors make every case fact sensitive.

However, any increased administrative costs may be exaggerated. Even if the feared costs are realized, they are justified in the end. Developers will lose large initial investments less often, and the public will not face the prospect of a wasted parcel containing a partially completed project. This is because, under a bifurcated system, the developer who is challenging the zoning change will more likely have the correct rule applied to the development circumstances. The bifurcated approach in many ways is like running a diagnostic before surgery is performed. By running a diagnostic, incorrect or unnecessary surgery is avoided. Here, an examination of the factors serves as the diagnostic. A bifurcated

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214. *Id.* at 6-7.

215. *See* Heeter, *supra* note 101, at 91.

216. *See id.*

217. *See id.*

approach will lead to correct application of a vesting rule, which in turn will make an unjust result less likely. Because an inequitable result will be avoided, the developer will not be unfairly deprived of his initial investment.

The initial examination of the factors in the bifurcated approach is analogous to a motion in limine. Motions in limine streamline the trial process by determining complicated issues early in the proceeding.<sup>218</sup> The proceeding can then continue in the most efficient and equitable manner because the scope of the proceeding has been established. Similarly, the initial examination of factors will control which vesting rule is appropriate. The court can then reach the most equitable decision because the correct rule will already have been selected. In this way, the process will be streamlined because the court will only have to apply an “early” or “late” vesting rule. Instead of attempting to bend a single rule in a situation that would otherwise result in unfairness to the developer, the applicable vesting rule will be clear from the beginning. Any increased administrative cost will likely be outweighed, not only by savings to the developer and the community, but also by the administration of justice.

Considering that the trend toward earlier vesting developed in the era of large subdivision development, the notion of retaining two vesting standards is especially workable. This is because small, less complex projects are still undertaken, along with larger projects. Since the 1970s there has been an overwhelming escalation of the complexity of regulation and the “size of development projects.”<sup>219</sup> For example, Indianapolis, Indiana, alone granted 17,056 single family building permits between 1996 and 2000, making it the jurisdiction issuing the greatest number of permits in the Midwest.<sup>220</sup> This also indicates that a great number of sizeable subdivisions were planned or constructed during that period.<sup>221</sup> As a result of the demand for more housing, “pressures for planned, mixed use communities, political pressures for developer funding of large scale infrastructure improvements, and economic pressures for economy-of-scale cost savings, landowners today frequently propose large mixed-use development projects that will require years and perhaps decades of full-time planning and construction before completion.”<sup>222</sup> Yet, as *Pinnacle Media* demonstrates, developers still undertake smaller projects frequently.

There is a range of variation in development, and therefore, different vesting rules should be applied according to varying development circumstances. As mentioned previously, the more complex the development, the more likely a greater substantial investment will be required before a developer even applies for a building permit.<sup>223</sup> Complex development projects require greater protection in part because they carry a greater risk of a lost investment. Increased

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218. James J. Brosnahan, *Motions in Limine in Federal Civil Trials*, A.L.I.-A.B.A. COURSE OF STUDY 213, 219-220 (Feb. 28, 2001).

219. Hanes & Minchew, *supra* note 15, at 404.

220. Ben-Joseph, *supra* note 5, at 54.

221. *See id.*

222. Hanes & Minchew, *supra* note 15, at 403-04.

223. ROHAN, *supra* note 42, § 52D.04[1].

complexity and cost in development persuaded some courts to adopt an “early vesting” standard because of the perceived inequitable results the majority rule caused many large scale developers to suffer. Recognition of special treatment for larger and more complex development is also seen elsewhere. Many courts will now vest rights when a final subdivision plat approval is relied upon, or even a preliminary subdivision plat approval.<sup>224</sup>

Additionally, in California, the Vesting Tentative Map statute<sup>225</sup> provides that a developer who submits a subdivision map which is approved gains a vested right to proceed with the development under the laws in effect at the time of submission.<sup>226</sup> The statute is based on the notion that a developer should be able to rely on an approved plat map before making substantial expenditures.<sup>227</sup> The same principle, which is based on certainty, is recognized internationally as well. The United Kingdom has a system, similar to the California statute, which calls for the submission of an outline of the essential parts of the development.<sup>228</sup> Once permission is granted based on the outline, only aesthetic and minor details of the project can be changed by the police power.<sup>229</sup> However, the English law is more complete than the California statute because it vests rights to the entire project.<sup>230</sup> Contrastingly, the California statute only vests rights to the permit for which the developer applied.<sup>231</sup>

Obviously the majority “late vesting” rule is less than perfect, and its shortcomings have been recognized in the United States and abroad. However, the “late vesting” rule is still useful for those development activities that do not require the same level of time and investment as larger projects. In addition, a “late vesting” rule results in “fewer nonconforming uses which is good for public health, safety, and welfare” and deters bad faith on the part of developers.<sup>232</sup>

This Note now undertakes the task of devising a system by which two rules of vesting may co-exist. Simply put, the goal of a vested rights rule or test is to allow developers to organize their economic behavior to encourage investment and allow them to gain protection in order to complete development.<sup>233</sup> A vested

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224. *Id.* § 52D.03[2]; *see also* Hanes & Minchew, *supra* note 15, at 404-05 (stating that a limited number of states have recognized that large complex projects require a different vesting standard).

225. CAL. GOV'T CODE § 66426 (West 1994).

226. Overstreet & Kirchheim, *supra* note 9, at 1067.

227. *Id.*; CAL. GOV'T CODE § 66426.

228. Hagman, *supra* note 23, at 542-44 (citing Town & Country Planning Act 1971, c. 78, 542; Town and Country Planning General Development Order 1973, No. 31 § 5(2)).

229. *Id.* at 543 (noting that after submission and approval of the outline the developer can recover damages if approval is revoked).

230. *Id.* at 544.

231. *Id.* (explaining that because the California statute only vests rights to a permit, the protection provided to the developer of a multi-permit project is minimal).

232. *Id.* at 530. *But cf.* FISCHER, *supra* note 10, at 64 (noting that studies have found the presence of nonconforming uses have little effect on residential property values).

233. *See* MANDELMER, *supra* note 51, at 234.



rights standard also needs to preserve government power to protect local communities. A clear vested rights standard provides a measure of certainty for developers so that they do not fear the risk of losing their investment, and as a result of this fear, curtail development activities.<sup>234</sup> If the developer is apprehensive because of possible government interference, lower production and increased risk may lead to higher costs for buildings passed on to purchasers.<sup>235</sup> Concern over increased cost to consumers is not unfounded. A majority of developers responding to a national survey indicated that government regulation was responsible for at least a five percent increase in the purchase price of subdivision homes.<sup>236</sup>

A system containing two rules, or a bifurcated approach, would minimize the uncertainty faced by developers because it is more likely that the correct rule would be applied. Also, the bifurcated approach does not strip the government of the power needed to properly regulate development. Several factors are to be used in order to create certainty in the developer's mind as to what actions need to be taken in order to gain vested rights. The factors can be analyzed individually and the result of each analysis bears on which vesting rule to apply. If the factors are all accounted for and it is decided the development is one that is deserving of great protection, the developer or court will look to whether a proper application for a permit has been filed. If such an application has been submitted, then rights will vest under the "early vesting" rule. On the other hand, if the factors indicate that the development is one that is not worthy of the utmost protection, the developer or court will look to whether substantial construction has begun under the "late vesting" rule.

The factors promulgated are ones that the developer may examine himself or herself to understand what actions need to be taken to gain vested rights. The developer can ask self-critical questions to which the developer can easily find the answer, such as, "Is this the best use of the land in this community?"; "How much have I invested in the project compared to the overall cost?"; and "How many permits are required for this project?" The basic design of the solution is fairness because "the test of fairness . . . to some extent has always served . . . as a guide to public policy."<sup>237</sup> The solution also attempts to include points of inquiry that are not just focused on the developer, but the community as well because "[t]o ignore the bilateral nature of justice in property cases is, in truth, the deepest of ironies."<sup>238</sup> Nevertheless, special burdens should not be placed on

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234. See Rinaldi, *supra* note 21, at 98.

235. *Id.*; see Bd. of Supervisors of Fairfax County v. Snell Constr. Corp., 202 S.E.2d 889, 892 (Va. 1974) (asserting that landowners will only invest in a project when the prospect of profit is reasonably certain, which is complicated without vesting laws that assure project completion).

236. Ben-Joseph, *supra* note 5, at 9.

237. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1172 (1967).

238. Laura S. Underkuffler, *Tahoe's Requiem: The Death of the Scalian View of Property and Justice*, 21 CONST. COMMENT. (forthcoming 2005) (unpublished article at 27, on file with Duke University School of Law), available at <http://lsr.nellco.org/duke/fs/papers/22/>.

identifiable individuals in order to confer benefits upon the majority,<sup>239</sup> and this notion persists throughout Part IV of this Note. The solution follows a totality of the circumstances ad hoc approach, which seems to be in line with recent Supreme Court takings jurisprudence.<sup>240</sup> Takings is an area closely related to vested rights and recent analysis reveals that significant individual loss to a landowner will not necessarily lead to the conclusion that a wrong has occurred.<sup>241</sup> This indicates the government may be able to retain a great deal of power in deciding if a right has vested. Thus, a balanced and comprehensive approach is all the more necessary.

#### *A. Type of Structure*

The first factor used to determine which vesting rule to apply is the type of structure being built. If the developer is constructing a building, this would favor the "early vesting" rule. It is of the utmost importance to protect investment in buildings if society is going to continue to have shelter for residential, commercial, and industrial purposes.<sup>242</sup> Buildings differ from raw land because raw land obtains value from its location and proximity to other activities.<sup>243</sup> Investment in raw land is not very important as a matter of efficiency.<sup>244</sup> On the other hand, structural buildings are driven by the demands of the people who live, work, and shop in the community.<sup>245</sup> The demands and needs of the community cannot be met if a developer faces a great deal of uncertainty because of the possible intrusion of zoning law into a project that is in the midst of construction.<sup>246</sup>

Uncertainty (in terms of project completion and realization of return on investment) surrounding the construction of buildings can lead to increased purchase prices because of holding costs, overhead, increased costs of labor, and great expenditures for materials.<sup>247</sup> In fact, one study indicates that for every additional month added to the expected completion date of a home, there is a one to two percent increase in the selling price of the home to a consumer.<sup>248</sup> The same study also indicated that over the past twenty-five years there has been a

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239. FISCHER, *supra* note 10, at 151; *see* Michelman, *supra* note 237, at 1166.

240. *See* Underkuffler, *supra* note 238, at 2, 9 (explaining that the Supreme Court has returned to an ad hoc analysis for regulatory takings where the subject land is not completely deprived of all value and where all relevant circumstances are weighed).

241. *See id.*

242. Hagman, *supra* note 23, at 529 (noting that it is not as important to encourage investment in raw land because it will continue to exist, unlike buildings).

243. *Id.*

244. *Id.*

245. FISCHER, *supra* note 10, at 56.

246. *Id.*

247. *See* ROBERT H. FREILICH & ERIC O. STUHLER, *THE LAND USE AWAKENING*, 179 (1981); Ben-Joseph, *supra* note 5, at 15, 17.

248. Ben-Joseph, *supra* note 5, at 15.

steady increase in the time needed to receive subdivision approval.<sup>249</sup> The average time for approval of a subdivision in 2002 was seventeen months, a significant amount of time during which any number of contingencies could thwart a development project.<sup>250</sup> Some of the costs and risks associated with regulation and compliance thus has undoubtedly shifted to the purchaser because of the lengthened approval process.<sup>251</sup>

Thus, a consideration of the purpose of the project in providing a home, locus of commerce, or industry which offers employment should factor into which vesting rule should apply. It seems highly probable that in most instances the end product of a large, investment-intensive project will be a building. Thus, the developer of a building will find this factor weighs in favor of the application of an “early vesting” standard.

### *B. Number of Permits*

The second factor is the number of permits required to complete a project. It seems more equitable to apply a “late vesting” rule to projects requiring fewer permit approvals. Beginning in the 1950s, complicated land use control systems came into existence and made it more difficult for developers to acquire vested rights, particularly in majority rule jurisdictions.<sup>252</sup> Frustration is the typical reaction developers experience because of the increased regulation.<sup>253</sup> Illustrative of the frustration is the Urban Land Institute’s statement that “American developers . . . must deal with an expanding array of regulations at every level of government . . . [which] inevitably inflate[s] [the] paperwork required for a project and intensif[ies] the complexity of data, analysis, and review procedures for both the public and private sector.”<sup>254</sup>

The emergence of various agencies involved in the development process has increased the number of permits needed, the cost of permitting, and the time needed to receive permit approval.<sup>255</sup> A greater number of permit approvals requires a greater initial investment. Therefore, larger projects are subject to a higher risk of lost investment if no vested right is acquired. To use Indiana as an example, a planned subdivision of fifty units in a middle class Indianapolis neighborhood would require an initial investment of \$203,300.<sup>256</sup> If a developer believed there was a good chance such a large investment could be lost because

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249. *Id.*

250. *Id.*

251. *Id.*

252. *See* Hanes & Minchew, *supra* note 15, at 388 (noting that prior to World War II only one government approval was needed for landowners).

253. Ben-Joseph, *supra* note 5, at 17.

254. *Id.*

255. *Id.* at 19.

256. Telephone Interview with Shannon Hinshaw, Development Coordinator, Centex Homes, in Indianapolis, IN. (Jan. 10, 2005); Permit Schedule of Fees from Shannon Hinshaw, Development Coordinator, Centex Homes, to the staff of Centex Homes 1 (Jan. 10, 2005) (on file with author).

of future development regulations, it is easy to see how construction of new buildings would be chilled.

Furthermore, the permitting process is burdensome and complicated. There are at least 321 federal regulations affecting the building process.<sup>257</sup> In discussing permits, Professor Hagman used the analogy of a developer driving on a race course with the finish line being the acquisition of vested rights.<sup>258</sup> He reasoned that the more “stop lights” (permits) the “driver” (developer) must pass through, the less likely that the driver will be successful in acquiring a vested right.<sup>259</sup> Furthermore, even if the race course is completed, rights may still not vest in some states if substantial construction or investment has not been undertaken.<sup>260</sup>

However, the fewer stoplights the driver must pass through, the more diligent and timely the investment and construction of the project should be. On a course with only a few stoplights (a small scale development), it is likely that no great investment is needed to reach the finish line.<sup>261</sup> Thus, a “late vesting” rule appears to be fair in situations where only a few permits are required because the level of uncertainty is diminished in comparison to a large project.<sup>262</sup> “If only one, easily obtained permit is required, it makes sense to require that the permit first be issued and that substantial construction or liabilities be incurred before a right to complete development vests.”<sup>263</sup> Thus, the number of permits needed to begin construction as well as the pervasiveness of the government requirements in order to apply for and obtain the permit should be taken into consideration to determine which vesting rule will control.

### *C. Investment by the Developer in the Project*

The third factor which is relevant to the court’s decision on which vesting rule to apply is the developer’s investment in the project. Overall cost and investment toward completion of a project is a necessary and pertinent consideration that is already found in the proportionate/ratio test.<sup>264</sup> A greater investment toward the overall cost of the project would favor the application of an “early vesting” rule because of the potential for inflicting harsh results on the developer. For example, the average cost of constructing a home in Indianapolis, Indiana, is \$188,659.<sup>265</sup> A subdivision developer would stand to lose a great deal of money when planning for multiple units. Because of the large investment, the potential for demoralization costs will be greater for developers of sizable

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257. Ben-Joseph, *supra* note 5, at 8.

258. Hagman, *supra* note 23, at 538.

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* at 529.

264. *See, e.g.,* Clackamas County v. Holmes, 508 P.2d 190, 209 (Or. 1973).

265. MIBOR, *supra* note 9, at 2.

projects, especially when construction has already begun.<sup>266</sup> Demoralization costs are the amount needed to offset the disadvantages suffered by the developer plus the present value of loss to the affected developer, those similarly situated, and sympathizers.<sup>267</sup> Demoralization costs result from the redistribution of rights to property causing expectations of developers and landowners to be disappointed.<sup>268</sup> High demoralization costs are more devastating for developers undertaking long term projects and may discourage future development.<sup>269</sup>

On the other hand, a minimal degree of protection for projects that are less investment-intensive is not a new concept in the law. *Cheney Brothers v. Doris Silk Corp.*<sup>270</sup> and *Smith v. Chanel, Inc.*<sup>271</sup> illustrate that where investment into an asset is not substantial, powerful property rights will not arise to protect those assets. In *Cheney Brothers*, a corporation involved in the design of dresses was denied a copyright for dress patterns.<sup>272</sup> In *Smith*, the court held a perfume company could advertise its product as the equivalent of Chanel, Inc.'s perfume.<sup>273</sup> Although dress designs and perfume may not receive the protections arising from the law of property, long term endeavors which concentrate more investment, like pharmaceuticals, receive strong protection in the law.<sup>274</sup> Thus, an examination of the total investment compared to the overall estimated cost, in order to discover the intensity of investment, is a factor to be considered.

However, not only should the current investment as compared to the overall cost of the project be considered, but the quantitative expenditure should be examined as well.<sup>275</sup> The proportionate/ratio test is best suited for application to smaller projects because if a large investment or important part of the project has been completed the test will validate the project.<sup>276</sup> Conversely, a "nominal investment" test is best suited for large projects because even a substantial investment into a costly project may not have a favorable outcome under the proportionate/ratio test.<sup>277</sup> A "nominal investment" test would examine the size of the sum expended absent any comparison with the total cost of the project. If the sum expended on the project was large enough, the project would be

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266. Hagman, *supra* note 23, at 528.

267. Michelman, *supra* note 238, at 1214.

268. *Id.* at 1212.

269. *Id.*; see also Hagman, *supra* note 23, at 528.

270. 35 F.2d 279 (2d Cir. 1929).

271. 402 F.2d 562 (9th Cir. 1968).

272. *Cheney Bros.*, 35 F.2d at 280.

273. *Smith*, 402 F.2d at 569.

274. Leah R. Garnett, *Prozac Revisited*, BOSTON GLOBE, May 7, 2000, at A1, available at [http://www.drugawareness.org/Archives/1stQtr\\_2001/050700Prozac.html](http://www.drugawareness.org/Archives/1stQtr_2001/050700Prozac.html) (discussing the expiration of Eli Lilly & Co.'s fourteen-year patent on its drug Prozac).

275. *Cooper v. County of Los Angeles*, 138 Cal. Rptr. 229, 233 (1977) (recognizing that a proportionate/ratio test is conducive to a small project while a quantitative test lends itself to a larger project).

276. *Id.*

277. *Id.*

validated. Also, the investment factor would favor an “early vesting” standard.<sup>278</sup> The problem in attempting to measure investment is deciding what constitutes a small project and what constitutes a large project. Thus, in order to assure thorough judicial scrutiny and prevent any failure to recognize the type of development project being undertaken, both tests should be employed and examined.

*D. Social Utility of the Proposed Development and Best and Highest Use*

Finally, courts should consider a fourth factor, the social value of the development at issue. Social utility and the best and highest use of the land become relevant factors because of the undesirable nature of the billboard in the *Pinnacle Media, LLC* case. This factor includes a consideration of how the proposed land will impact the public as compared to the harm the landowner will suffer if development rights are denied.<sup>279</sup> A “late vesting” rule seems especially fit for a small project with arguably little social utility, such as a billboard. On the other hand, a home has arguably high social utility and so an “early vesting” standard seems justified. The “late vesting” rule allows the public and elected government officials the greatest opportunity to voice any concern over the development.<sup>280</sup> Only after the small, low utility project had commenced construction or reached a point of substantial reliance or investment could the developer continue without interference from the government. In this way, the developer has given the public and government every opportunity to prevent a use it may view as undesirable.

In order to prevent this factor from becoming too subjective and unpredictable, a standard of “reasonable expectations” based on social norms must control.<sup>281</sup> “If a parcel of land were uniquely suited for some activity deemed subnormal or unneighborly, the social norm rule would allow a valid zoning ordinance” to prevent the owner from developing as planned.<sup>282</sup> The social norms of a community can be found by examining the past behavior of the community.<sup>283</sup> The use of a standard of “normal” behavior in the community for determining the best and highest use of a parcel protects the landowner from the imposition of “supernormal” regulations and at the same time allows the community to avoid “subnormal” uses from entering into the area.<sup>284</sup> Therefore, although the social utility factor initially appears regulator friendly, it could certainly weigh in favor of the “early vesting” rule and benefit the landowner.

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278. *See id.*

279. *Nott v. Wolff*, 163 N.E.2d 809, 813 (Ill. 1960).

280. *See Hagman*, *supra* note 23, at 530; *see also Underkuffler*, *supra* note 238, at 7 (noting that recent Supreme Court decisions imply that the public interest can trump a property owner’s complaint concerning burdensome regulations).

281. *See FISCHER*, *supra* note 10, at 159.

282. *Id.*

283. *Id.*

284. *Id.*

For instance, in *Pinnacle Media*, the proposed billboard was at least one of the highest and best uses for which a railroad corridor could be used and would likely not be considered “subnormal” when placed next to an interstate.

#### CONCLUSION

Society’s need for homes, offices, and industrial buildings will only continue to grow as the population increases. Developers need to be certain that a project will not be subject to a newly enacted ordinance at some point in the future. The doctrine of vested rights is supposed to provide that certainty. However, if uncertainty surrounds vested rights to develop, land developers will be hesitant to continue investing in projects. Certainly, in a state like Indiana, the development process is unnecessarily ambiguous because two vesting standards exist. One rule, the “late vesting” rule, vests development rights only after actual construction has begun. The other rule, the “early vesting” rule, vests rights when a permit is filed which is in compliance with existing ordinances. However, the two rules can continue to exist in a more efficient and equitable system of vested rights. The “late vesting” rule existed and was effective in the past when single buildings were the norm in development. Thus, it is better suited for less investment-intensive and time consuming projects. The “early vesting” rule developed in conjunction with the proliferation of subdivisions. Therefore, it is conducive to large, investment-heavy projects that may take years to complete.

Under a bifurcated approach, where the initial inquiry examines a number of factors to determine which rule should be applied, equity in vesting can be more consistently achieved. A consideration of the type of structure being built, the number of permits needed to construct the building, the investment made by the developer, and the social utility of the project will allow for the correct vesting rule to be applied more consistently. Under this approach, a developer may insulate a project from a newly enacted ordinance in two ways. A developer may either meet the factors that lead to application of an “early vesting” rule or begin actual construction. However, the approach still allows the government flexibility to meet public needs by retaining the “late vesting” rule.

The bifurcated approach recognizes that acquisition of vested rights turns on the circumstances of a development. The emergence of various vesting rules illustrates that different circumstances call for different rules. The bifurcated approach allows for a comprehensive review of relevant factors. The bifurcated approach makes it more likely that the correct vesting standard will be applied. In turn, this will yield more equitable results and developers will not fear loss of investment. Thus, the need for continued development will be met because the amount of uncertainty will decrease.