

**VESTED RIGHTS AND NONCONFORMING USES:**

**BACKGROUND AND RECENT DEVELOPMENTS**

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*Presented by:*

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1. **BBC Land and Development, Inc. v. Butts County, 281 Ga. 472, 640 S.E.2d 33 (2007)**

The plaintiffs bought land in Butts County for development. At the time of purchase, the zoning allowed construction of homes with a minimum size of 1,500 square feet. The plaintiff submitted plats showing houses of that size. The county approved the plat and the plaintiffs expended money developing the properties consistent with the existing zoning. Thereafter, and prior to requests for building permits, the county amended its zoning ordinance to require a minimum house size of 2,000 square feet in that zoning district. The plaintiffs later sold lots in the subdivision to builders. The county denied building permits to builders because the proposed houses did not comply with the 2,000-square foot minimum under the amended zoning ordinance.

The question presented was whether the builders who purchased the property from the developer had a vested right to develop the property consistent with the minimum size house of 1,500 square feet rather than the 2,000 square feet required under the amended ordinance.

The court reasoned that there was a crucial difference between vested rights and nonconforming uses. Nonconforming uses are uses or structures existing prior to the enactment of an ordinance which renders them nonconforming. A use which is merely contemplated for the future, but not yet realized as of the effective date of an amended ordinance, is not a nonconforming use.

A vested right is the constitutionally protected right to a future use. It cannot be divested without the consent of the person to whom it belongs. The court thus concluded that a vested right is earned by the owner's substantial change of position in relation to the land, including substantial expenditures or in incurring substantial obligations. That gives the owner the right to develop property in accordance with prior zoning restrictions. But vested rights are personal to the owner and are not transferable with the land. The choice by the owner to sell the property is voluntary, but if it chooses to sell, then it sells with the knowledge that the vested right is not transferable to a purchaser since the lots in the subdivision were conveyed to the builder after the zoning ordinance was amended. Since a vested right to build under the former zoning ordinance was not transferable, a purchaser is subject to the new restrictions of the amended zoning ordinance.

**2. Café Risqué/We Bare All Exit 10, Inc. v. Camden County, 273 Ga. 451, 542 S.E.2d 108 (2001).**

Where a local government issues a permit which is in violation of an existing ordinance, even if issued under a mistake of fact, the permit is void and the holder does not acquire any vested rights. This is true even if substantial expenditures were made in reliance on the void permit. A local government is not prohibited from revoking an improperly issued permit.

**3. North Georgia Mountain Crisis Network, Inc. v. City of Blue Ridge, 248 Ga.App. 450, 546 S.E.2d 850 (2001).**

A land use that is merely contemplated for the future but unrealized as of the effective date of a new zoning regulation does not constitute a nonconforming use. A property owner may acquire a vested right to use property where he makes a substantial change in position by expenditures in reliance on the probability that a building permit will issue or based upon an existing ordinance and the assurances of zoning officials. But where the only change in position is the purchase of the property itself, the purchase does not confer a vested right to a particular use by the purchaser.

**4. Meeks v. City of Buford, 275 Ga. 585, 571 S.E.2d 369 (2002).**

The issue in this case is whether a property owner obtained a vested right to use undeveloped investment property in accordance with a variance granted in 1985, 14 years earlier. In finding the earlier variance no longer valid, the court relied on the rule that a property owner must make a substantial change in position or make substantial expenditures or incur substantial obligations in order to acquire a vested right. In this case, the mere reliance on a variance without showing substantial change in position by expenditures or other obligations, does not vest a right in the land owner to develop in accordance with the earlier variance which would no longer be valid by virtue of a subsequently adopted zoning ordinance.

5. **Cooper v. Unified Government of Athens-Clarke County, 277 Ga. 360, 589 S.E.2d 105 (2003).**

A property owner claiming a vested right to use property must make that claim to the local government before an appeal is made to the superior court. A claim of vested right to use property may not be made for the first time in superior court.

6. **Union County v. CGP, Inc., 277 Ga. 349, 589 S.E.2d 240 (2003).**

The issuance of a building permit results in a vested right only when the permit has been legally obtained, is valid in every respect, and has been validly issued. Where a permit was issued to build a subdivision which was in violation of the flood control ordinance, the permit was not valid and the developer did not obtain a vested right to complete the subdivision.

7. **Cohn Communities, Inc. v. Clayton County, 257 Ga. 357, 359 S.E.2d 887 (1987).**

“The rule in Georgia is that where a landowner makes a substantial change in position by expenditures in reliance upon the probability of the issuance of a building permit, based upon an existing zoning ordinance and the assurances of zoning officials, he acquires vested rights and is entitled to have the permit issued despite a change in the zoning ordinance which would otherwise preclude the issuance of a permit.” The expenditure of \$600.00 was not substantial and thus did not accord the developer of a proposed multi-family building a vested right.

**8. Corey Outdoor Advertising, Inc. v. The Board of Zoning Adjustments of the City of Atlanta, 254 Ga. 221, 327 S.E.2d 178 (1985).**

Property owner did not obtain a vested right to build a sign even though the city issued a permit if the permit was invalidated because the location of the sign violated the sign ordinance.

**9. Flippen Alliance for Community Empowerment, Inc. v. Brannan, 267 Ga.App. 134, 601 S.E.2d 106 (2004).**

“To be vested, in its accurate legal sense, a right must be complete and consummated[.]” “[P]rior nonconforming uses are not absolutely protected from subsequent zoning regulations.” A governing authority can require a nonconforming use to be terminated in a reasonable time. Georgia law permits municipalities to terminate, over time, pre-existing nonconforming uses. “A property owner cannot move a ‘grandfathered’ use from one location to another.” Moreover, courts have consistently held that ordinances prohibiting the expansion of a nonconforming use to new lands are enforceable. “[I]t is incumbent upon one seeking to use the property for a nonconforming use after the rezoning ordinance to show that his prior use of the property was legal and not unlawful.”

**10. The Ansley House, Inc. v. City of Atlanta, 260 Ga. 540, 397 S.E.2d 419 (1990).**

The following city ordinance was in issue in this case:

When a **nonconforming use** of a major structure or a major structure and premises in combination is discontinued for a continuous period of one (1) year, the

structure and premises in combination, shall not thereafter be used except in conformity with the regulations of the district in which it is located. Such restriction shall not apply if such cessation is as a direct result of governmental action impeding access to the premises.

The court found that an ordinance such as this one, which attempted to discontinue a nonconforming use based on cessation of use for a specific period of time, impliedly introduced the question of intent to abandon the use by the property owner. That is a fact question, for which evidence must be presented, either in favor of or against intent to abandon the use of the property.

To remove the issue of intent to abandon, the court shows that an ordinance may terminate a nonconforming use by cessation of use for a specified period of time, but the ordinance should state that the nonconforming use may not be resumed regardless of any reservation of an intent not to abandon. That language removes the subjective intent of the property owner as a factor.

**11. Barker v. County of Forsyth, 248 Ga. 73, 281 S.E.2d 549 (1981).**

“A landowner will be held to have acquired a vested right to continue the construction of a building or structure and to initiate and continue a use despite a restriction contained in an ordinance where, prior to the effective date of the ordinance, any reliance upon a permit theretofore validly issued, he has, in good faith, made a substantial change of position in relation to the land, made substantial expenditures, or

has incurred substantial obligations. 3 A. Rathkopf, The Law of Zoning and Planning, 57-3”

**12. Henry v. Cherokee County, 290 Ga. App. 355, 659 S.E.2d 393 (2008).**

Nonconforming uses run with the land and benefit a subsequent purchaser of the property. But expanding a nonconforming use on the same lot may be prohibited, depending on the language of the nonconforming use ordinance. If it is intended that a nonconforming use may not be expanded on the same lot, the ordinance should state, “no such nonconforming use of land shall in any way be extended, either on the same or adjoining property.” Absent this language, a property owner may be allowed to expand a nonconforming use on the same lot.