

VESTED RIGHTS, NONCONFORMING USES  
AND GRANDFATHERING

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TABLE OF CONTENTS

I. VESTED RIGHTS IN GEORGIA.....1

    1. A Permit is Issued..... 3

    2. An Application has been Filed..... 4

    3. Development Plans have been Approved.....5

    4. Right to Rely Upon Official Assurances That a Building Permit Will  
    Probably Issue..... 6

    5. Improperly Issued Permits.....7

II. NONCONFORMING USES AND GRANDFATHERING .....7

III. ANALYSIS OF CASES..... 10

    Buckner v. Douglas County ..... 11

    Flippen Alliance for Community Empowerment, Inc. v. Brannan ..... 12

    Enviro Pro Inc. v. Emmanuel Co. .... 13

    Cooper v. Unified Gov. of Athens-Clarke County..... 13

    Union Co. v. CGP, Inc. .... 14

    Netherland v. Nelson ..... 15

    Meeks v. City of Buford ..... 16

    Café Risqué/We Bare All Exit 10, Inc. v. Camden County ..... 17

    North Georgia Mountain Crisis Network, Inc. v. City of Blue Ridge ..... 18

    City of Duluth v. Riverbrooke Properties, Inc. .... 19

    Beugnot v. Coweta County..... 21

    Whipple v. City of Cordele ..... 22

    Recycle & Recover, Inc. v. Georgia Bd. of Natural Resources..... 23

    Banks County v. Chambers of Georgia, Inc. .... 24

    City of Hampton v. Briscoe..... 26

    Cohn Communities, Inc. v. Clayton County ..... 27

    Schulman v. Fulton Co. .... 28

    Cobb County v. Peavy ..... 29

    Barker v. Forsyth County..... 31

    Spalding County v. East Enterprises, Inc. .... 32

## **I. VESTED RIGHTS IN GEORGIA**

A vested right is a form of due process; it is the right to continue a use once established in the face of subsequent regulatory changes. Vested rights, nonconforming uses, and grandfathering are closely related – but not interchangeable – concepts. Instead, vested rights should be thought of as rights that arise pursuant to general legal principals, and are personal to the owner of the right. A vested right to a use may arise before the use is actually established. In contrast, a nonconforming use is a use that is established, and it runs with the land, not the owner. A nonconforming use is a species of vested rights, but it is often defined by specific ordinance provisions. Finally, being “grandfathered” is best explained as a right to continue a use that is specifically created by the local zoning ordinance. In other words, a person can be grandfathered by a specific provision of an ordinance where they did not have vested rights. Alternatively, many persons would have vested rights where their local ordinances were silent on grandfathering.

Vested rights are based on the Constitution. They arise from the tension between the exercise of the police power and the previously unfettered right to do something. The courts in Georgia have held that, in the exercise of the police power, the General Assembly is authorized to place restrictions upon land use in order to protect and preserve the natural resources, environment, and vital areas of this state. Pope v. City of Atlanta, 242 Ga. 331 (1978). An enactment under the police power does not ordinarily violate any constitutional prohibition against retroactive statutes. Nevertheless, the

Constitution forbids passage of retroactive laws which injuriously affect the vested rights of citizens. Thus, if a citizen has a vested right which would be injuriously affected by application of the amendment, then the Constitution requires that that amendment be applied prospectively rather than retroactively.

Vested rights of a property owner to use property in a certain way may not be infringed upon by the adoption of a zoning ordinance which prohibits such use. W.M.M. Properties, Inc. v. Cobb County, 255 Ga. 436 (1986). Banks County v. Chambers of Georgia, Inc., 264 Ga. 421 (1994). The term “vested rights” means interests which it is proper for the state to recognize and protect and of which the individual cannot be deprived arbitrarily without injustice. A statute which confers a right upon an applicant seeking to alter the use of his property confers no vested rights upon all property owners. Stone Mountain Indus., Inc. v. Wilhite, 221 Ga. 269 (1965). However, a property owner “can avail himself of the privilege thereof while it remains in the [statute].” Stone Mountain Indus., Inc. v. Wilhite, supra at 269. Thus, if a property owner becomes an actual applicant seeking to alter the use of his land, he has a vested right to consideration of his application under the statutory law then in existence. Banks County v. Chambers of Ga., Inc., 264 Ga. 421 (1994).

Important to keep in mind is that implicit in all vested right analysis is the notion that the right was lawful in the first place. An illegal application for a building permit does not vest rights. If the use was never permitted, an erroneous assurance that the project would be approved, combined with substantial expenditures should not vest

rights. However, this is a subtle point often lost on the courts, and so should be presented carefully. Furthermore, the cases are not always entirely consistent.

There are several types of vested rights. Some of the circumstances were summarized in the case of W.M.M. Properties, Inc. v. Cobb County, 255 Ga. 436 (1986), which categorized four basic types. The analysis breaks down more simply into the concept of whether permission has been sought, or whether it has been granted; and if permission was granted, whether substantial expenditures were made in reliance on that permission. A variety of cases have arisen to analyze what sort of permission is sufficient, and what sort of reliance is required.

1. A Permit is Issued

The strongest sort of vested right is when a permit has been issued, especially a building permit. If a building permit is issued, a landowner has a right to develop the property pursuant to that permit (during its term or for a reasonable time after its issuance if no term is specified), notwithstanding a zoning or regulatory change subsequent to the issuance of the building permit, and notwithstanding the fact that there has been no substantial expenditure of funds in reliance upon the building permit. Clark v. International Horizons, Inc., 243 Ga. 63 (1979); Keenan v. Acker, 226 Ga. 896 (1970).

The question becomes what sort of permit besides a building permit is sufficient to vest rights. In Craig v. City of Lilburn, 226 Ga. 679, 177 S.E.2d 75 (1970), it was held that the issuance of septic tank permits plus expenditures in reliance thereon created a

vested right to use the property as shown by the installation of the septic tanks notwithstanding a regulation enacted subsequent to the issuance of those permits. In Schulman v. Fulton County, 249 Ga. 852, 853 (1982), it was held that the issuance of a special use permit plus expenditures in reliance thereon, like a building permit, created a vested right in the use approved by the permit. On the other hand, in Cobb County v. Peavy, 248 Ga. 870, 872 (1982), it was held that issuance of a business license is not the equivalent of a building permit. Hence, if a property owner receives some permission to proceed, the nature of the permission will be relevant, and if the permission is relatively weak, the expenditures in reliance will be reviewed. Licenses, such as alcohol or business licenses, are not generally sources of vested rights.

2. An Application has been Filed

A second type of vested rights is those that arise when one has filed a valid application for a permit but the law is changed before a decision is made on the permit. A landowner has a right, enforceable by mandamus, to be issued a building permit in accordance with zoning regulations as such regulations exist at the time a proper application for building permit is submitted to the proper authority. City of Atlanta v. Westinghouse Electric Corp., 241 Ga. 560 (1978); Gifford-Hill & Co., Inc. v. Harrison, 229 Ga. 260 (1972); Howard Simpson Realty Co. v. City of Marietta, 220 Ga. 727 (1965); City of Decatur v. Fountain, 214 Ga. 225 (1958).

Similarly, a purchaser who contracts to buy land conditioned upon its being rezoned has a right to be issued a certificate of zoning compliance (a prerequisite to the

issuance of a building permit) in accordance with a zoning amendment obtained by the purchaser. Clairmont Development Co., Inc. v. Morgan, 222 Ga. 255 (1966). However, just buying land in reliance on the existing zoning is not enough to vest rights. North Georgia Mountain Crisis Network, Inc. v. City of Blue Ridge, 248 Ga.App. 450 (2001).

It is generally agreed that the application for the permit must be complete, and that the applicant must be entitled to the permit under the then-existing laws. These cases can be tricky procedurally, as the issuing jurisdiction often does not review the application and just denies it out of hand, especially in a situation where a moratorium was adopted. Then, in the court fight over vested rights, the court may find rights vested without adequately considering whether the application was even complete and approvable under the prior law.

3. Development Plans have been Approved

An area of great confusion in vested rights laws revolves around the third category of vested rights identified in WMM, that being the notion of an approved development plan.

(1) *Formally approved.* A landowner has a right to develop the property pursuant to a development plan duly approved by the county zoning authority pursuant to powers delegated to it by the county commission even though the development plan varied the existing zoning, where the landowner has expended large sums of money in furtherance of the development and has dedicated land for use as parks and schools in reliance upon its approved development plan. DeKalb County v. Chapel Hill, Inc., 232

Ga. 238, 244 (1974). This case injects a notion of substantial expenditures, when one would normally assume that approval of a plan would be sufficient, just as approval of a building permit is sufficient.

(2) *Informally approved.* A landowner has a right to develop property where the property was purchased in reliance upon the assurance of one county commissioner that the property was zoned for the use intended, the development plan was in accordance with the existing zoning and was approved, albeit informally, by the county commissioners, and the landowner has expended money in reliance upon the development plan and the existing zoning. Spalding County v. East Enterprises, Inc., 232 Ga. 887 (1974). However, this case might also be reviewed under the analysis that the developer had applied for a development permit at a time when such approval would be required by law (that is, before the law was changed). Under such circumstances, the right should vest regardless of expenditures or informal assurances.

4. Right to Rely Upon Official Assurances That a Building Permit Will Probably Issue

“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.” Barker v. County of Forsyth, 248 Ga. 73, 76 (1981). This type of decision is very fact-specific, and courts in practice

are reluctant to grant vested rights on this basis, especially considering the idea that statements of officials cannot vest rights.

The courts have also held that when a landowner makes expenditures, in addition to paying the purchase price, in reliance on the existing zoning and assurances by zoning officials that they would be able to get a permit for the use planned, county officials may not subsequently impose a moratorium on the issuance of all building permits for the use intended. Cannon v. Clayton County, 255 Ga. 63 (1985).

5. Improperly Issued Permits

Improperly issued permits are void, and void permits do not vest rights, even if they have been relied upon and money has been expended. Unjust results can occur if property owners rely on statements from clerks or even permits issued in violation of the ordinance. Corey Outdoor Advertising v. Bd. of Adjustment of Atlanta, 254 Ga. 221 (1985). Matheson v. DeKalb County, 257 Ga. 48 (1987).

6. The Curious Case of BBC Land and Development, Inc. v. Butts Co.

The notion of vested rights, while variegated, was fairly well understood as a right that ran with the land, until the case of BBC Land and Development, Inc. v. Butts Co., 281 Ga. 472 (2007) was issued in 2007. That case discovered a heretofore unknown dichotomy between nonconforming uses and vested rights. Vested rights were declared to be personal to the owner, because they arise based on actions the owner takes to vest his rights. Nonconforming uses ran with the land and were created by actions of the county or city. The case also noted that vested rights cannot be taken from the owner,

whereas nonconforming uses can be terminated after a reasonable amount of time. Finally, vested rights were found to be nontransferable. Thus, if one property owner vests rights, he cannot sell the land after an intervening change in the ordinance, as the new owner would lose the vested rights. The facts of this case are discussed in Section III below.

The legislature reacted to this case by adopting an amendment to O.C.G.A. § 44-5-40, which holds:

Future interests or estates are descendible, devisable, and alienable in the same manner as estates in possession. Vested interests in property stemming from the approval of land disturbance, building, construction, or other development plans, permits, or entitlements in accordance with a schedule or time frame approved or adopted by the local government shall be descendible, devisable, and alienable in the same manner as estates in possession.

The meaning of this language is not entirely clear.

## II. NONCONFORMING USES AND GRANDFATHERING

As mentioned, BBC Land did much to create a new distinction between nonconforming uses and vested rights. Nonconforming uses are generally recognized in the zoning ordinance. Most zoning ordinances state that lawful existing uses that are made nonconforming by a change can continue on as they were, without expansion or change to another use. Very little case law actively defines “grandfathering” and most cases that deal with the concept blend it with the concept of vested rights. This paper draws the distinction of grandfathering being a right granted solely by the zoning ordinance, and not by general legal principles. Some zoning ordinances explicitly use the rules of vested rights to define grandfathering, and other ordinances grandfather

exceptions that would not have vested rights.

For example, amending a zoning ordinance but allowing pre-existing lots to use standards from the prior zoning ordinance would be a grandfathering that was not required under the principles of vested rights. The typical zoning ordinance has a non-conforming use provision that would be considered grandfathering. The continuance of the existing use itself would be a vested right, but for example provisions allowing the expansion of a non-conforming use, or the renewal of such a use after a lengthy lapse, would not be required under vested rights law.

A few examples may be useful. Consider an applicant who realizes the local zoning code has no restrictions on chicken houses, and he requests a building permit for ten chicken houses, the closest of which will be seventy-five feet from a subdivision lot. The local government suddenly decides its regulations on chicken houses are too weak, and implements a moratorium on construction of chicken houses. During the pendency of the moratorium, the local government amends its ordinance and adopts a 500 foot setback between chicken houses and residential lots. The city sends the applicant a letter stating that his building permits are denied. Is that a valid decision? No, because he has vested his right to proceed. Under well-established law, a property owner who applies for a building permit under the existing regulations is entitled to consideration under that ordinance. No grandfathering provision would apply here; the principle is established in law.

On the other hand, consider a property owner who has made no application, and

simply owns a vacant residential R-1 lot. The local government amends the zoning ordinance to alter the setbacks on R-1 property, increasing front setbacks from 20 to 40 feet, and so forth. However, it includes a grandfathering provision that lots of record before a certain date may still apply the prior standards. That would be a grandfathering provision, not a vested right. If the government had not included such a provision, the property owner would be bound by the change in the zoning ordinance. There is no vested right to use one's property under the current zoning. The property owner had to take steps to vest rights, such as filing an application, or substantial expenditures in conjunction with some sort of formal or informal approval of the development. In contrast, grandfathering is simply a right granted by the zoning ordinance. It may overlap with vested rights, or it may not.

Many of the provisions in typical non-conforming use provisions actually exceed what vested rights law would require. For example, allowing a property owner to revive a business after a lapse of up to one year would not be required by a vested rights analysis, but is a typical grandfathering provision. On the other hand, simply allowing a pre-existing business that predates zoning to operate on a residentially zoned lot would implicate a nonconforming use and potentially work a taking if the local government tried to halt the lawfully pre-existing business – at least without amortization. Many ordinances include a grandfathering provision to this effect, but it is superfluous.

Grandfathering, in the sense it exceeds the bounds of a vested right, is not required by law, and is essentially a gift to the property owner. Grandfathering

provisions typically have a political component rather than a legal component, but it is important to understand their basis. Once the grandfathering provision is enacted, however, it in and of itself grants the property owner rights, and so jurisdictions should think carefully about the rights they grant.

In general, 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.

### **III. ANALYSIS OF CASES**

The following is a reasonably exhaustive survey of the cases discussing vested rights and nonconforming uses. Some of the cases mentioned above are not analyzed below, having been discussed above. Review will show that the courts are not always consistent in applying the doctrines. As in many arenas, some cases appear results-driven. Given the abundance of precedent, it can be unpredictable to know the outcome of a vested rights case and how the local trial judge will decide the issue. As a constitutional question, a vested rights case is for the court not a jury, and the appeal would be by discretionary application. Consequently, these cases often turn on the opinion of one judge, who is often considering an unpopular use that a local government

has maneuvered to try and stop. To find a vested right exists requires the judge to have the courage to go against the hoi polloi and the local government and rule in favor of the developer or property owner trying to get the use that no one wants, but that had not been adequately regulated previously. Vested rights cases frequently arise, as can be seen below, in regard to uses such as landfills, transfer stations, septic tank farms, and subdivisions. Those uses have few friends politically in many jurisdictions.

**U.S.A. Gas, Inc. v. Whitfield County,**

--- S.E.2d ----, 2009 WL 1959112, 09 FCDR 2401, Ga.App., July 09, 2009.

County filed suit to determine whether a gas company had vested rights to continued and allegedly non-conforming use of a 30,000 gallon liquefied petroleum gas tank. The Georgia Safety Fire Commissioner had issued a license to USA Gas in 2003 to conduct bulk storage of liquid petroleum gas in 2003, and a tank was constructed. The trial court found that declaratory judgment was proper in that the County faced uncertainty as to its rights, that the use violated the zoning ordinance, and that the state permit only approved the installation from a safety perspective and could not authorize the violation of the zoning ordinance. The trial court held that the gas company did not have vested rights.

**Henry v. Cherokee County,**

290 Ga. App. 355, 659 S.E.2d 393 (2008).

Property owner owned 43 acres. Property owner sold off a 15 acre portion to another owner who installed a car “shredder.” The property owner over the years also expanded the area of his 28 acres being used as a nonconforming use. The county

objected that the nonconforming use was being expanded on the 28 acres and also objected to the car shredder as a change in nonconforming use that was not permitted. The court held that the definition did not prohibit expansion of a nonconforming use on the same lot, so the entire 28 acres could be used as an automobile salvage yard, but the 15 acres were changed from auto salvage to car shredding, and so that was a change from one nonconforming use to another. The 15 acres could have been used as an automobile salvage yard, the court noted, as that would continue the prior lawful nonconforming use.

**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.

**Buckner v. Douglas County,**  
273 Ga.App. 765, 615 S.E.2d 850 (2005).

A developer entered into a contract to purchase 68 acres for single-family development. After entering the contract, developer contacted the county staff, who reportedly assured him that his conceptual development plan satisfied the county's existing zoning ordinance. Subsequent to that, the county amended its regulations to greatly increase minimum lot sizes. After the developer objected, the county sent a letter (signed by three of five Board members) to the developer stating he had vested rights in the prior regulations. Developer relied on that letter in concluding his purchase and beginning development. However, he was later denied building permits because his plan violated the new regulations. The Court concluded that, because it does not appear that the developer either concluded his purchase of the subject property, or made substantial expenditures in reliance upon the probability of issuance of a building permit, until after the county zoning ordinance had been amended, he did not acquire a vested right to develop the property in conformity with the prior zoning classification. The letter was held to be an illegal zoning decision, because it did not comply with the Zoning Procedures Law.

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

The county filed an action seeking a judicial declaration as to whether a landfill violated Henry County's Zoning Ordinance or other law and as to whether the owner

was entitled to a permit to operate a landfill on his property. The trial court granted summary judgment, finding that portions of the landfill were grandfathered as a nonconforming use under the Henry County Zoning Ordinance, that the zoning ordinance did not apply to the landfill because the owner had a vested right to use the land at issue as a landfill, and that the county was estopped from barring use of the land as a landfill due to laches. The Court of Appeals reversed, pointing out that prior nonconforming uses are not absolutely protected from subsequent zoning regulations, and recognizing that a governing authority can require a nonconforming use to be terminated in a reasonable time. This case thus recognizes that nonconforming uses can be eliminated through amortization (and this point was again made in the BBC Land case).

There was evidence that the landfill had never been lawful, even before zoning had been adopted, and thus was not a lawfully non-conforming use. The court held that it is incumbent upon one seeking to use the property for a non-conforming use after the rezoning ordinance to show that his prior use of the property was legal and not unlawful. The laches defense was also rejected, on the notion that, in general, equitable defenses are unavailable against the state where their application would thwart a strong public policy. The court held that estoppel cannot legalize or vitalize that which the law declares unlawful and void. Estoppel cannot be asserted if it will embarrass a municipality in its capacity as a governing body or operate to prevent it from exercising its police power. Zoning, even if based merely

on aesthetic interests, is a reasonable and proper exercise of the police power.

**Enviro Pro Inc. v. Emmanuel Co.**,  
265 Ga.App. 309, 593 S.E.2d 673 (2004).

A county board chairman gave a letter to a company purporting to give the company the authority to apply septic tank waste to farm property. The entire board later voted that it did not have approval. The court found the board chairman's letter to be ultra vires (unauthorized), and held that the company had no vested rights as the permit had not been lawfully obtained. This case does not seem entirely consistent with the notion of informal approval of a development permit vesting rights, as is discussed in WMM Properties, but it does clearly apply the law that an ultra vires act cannot vest rights. In reality, this case demonstrates the difficulties of relying on an "informal approval" to argue vested rights. The court also relied on an EPD regulation that required the approval of the "governing authority" and correctly held that a chairman cannot act alone for the governing authority.

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

In mid-2000, Plaintiff began taking steps to develop his property in Athens-Clarke County as a solid-waste transfer station. Plaintiff alleged that the staff of the Planning Commission assured him at that time that the existing zoning classification for the property, "Industrial," would permit such a project. Plaintiff commissioned various studies, but never formally applied for a permit. In December 2000, the zoning

classification on the property was changed to “Employment Industrial,” which no longer permitted a transfer station. Plaintiff applied to have the property rezoned back to Industrial, and that was denied. Plaintiff went to court seeking mandamus to have a permit issued, and asserted for the first time that he had a vested right to have his *hypothetical* permit application granted because his proposed solid-waste transfer station would have been an appropriate use under the previous zoning classification of “Industrial.” The Court relied upon its well-established precedent that constitutionally-based zoning claims cannot be raised for the first time in the Superior Court, but must first be brought before the local zoning authority. The Court described in a footnote various exemptions from this requirement: Martin v. Hatfield, 251 Ga. 638, 308 S.E.2d 833 (1983) (no requirement to bring claim before zoning authority when the claimant is seeking to compel the issuance of a permit in accordance with the existing zoning ordinance); Powell v. City of Snellville, 266 Ga. 315, 316, 467 S.E.2d 540 (1996)(claimant not required to bring claim before the local zoning authority when to do so would be obviously futile); O.S. Advertising Co. of Ga. v. Rubin, 263 Ga. 761, 763, 438 S.E.2d 907 (1994) (claimant not required to bring claim before zoning authority when attacking the constitutionality of the zoning ordinance on its face) overruled on other grounds by Ashkouti v. City of Suwanee, 271 Ga. 154, 156, 516 S.E.2d 785 (1999).

Since none of the exceptions applied, Plaintiff’s claims failed. The Court held that the purpose of the rule requiring constitutionally-based zoning claims to be brought first before the local zoning authority is to afford the local zoning authority an opportunity to

amend the zoning ordinance or grant a permit for a non-conforming use, and to prevent unnecessary judicial intervention into local affairs. It is also a matter of judicial economy, since the local authority is empowered to correct any such violations.

**Union Co. v. CGP, Inc.**

277 Ga. 349, 589 S.E.2d 240 (2003).

A developer began a subdivision development with a land purchase, subsequently receiving health department approval and a land disturbance permit in 1997. The developer obtained additional building permits in 2000. In 2001, the developer sought more building permits and was told no more would be issued until the subdivision complied with Flood Damage Prevention Ordinance (FDPO), dating to 1983 (amended 1993 and 2000). The developer claimed vested rights. The trial court determined CGP's rights vested because of substantial expenditures in furtherance of approved plans and permits, plus official assurances that future permits would probably issue. The Supreme Court reversed, noting that the prior-issued building permits were illegal since they violated the preexisting FDPO. They therefore did not vest rights, and further held that "unofficial approval of CGP's plans without regard to the restrictions of the flood ordinance would frustrate Union County's duty to its residents to enforce the law." The issuance of the prior building permits vested no rights, as they were issued as a mistake, and violated the ordinance. Thus violation of an ordinance other than the zoning ordinance can prevent vesting of rights. A permit must be lawfully issued to vest rights.

**Netherland v. Nelson,**  
261 Ga.App. 765, 583 S.E.2d 478 (2003).

In this case, Netherland sought and obtained a permit from the county to dig a well on his property. It was later determined that under the zoning ordinance a well was not permitted and thus suit was initiated by an interested party to enjoin the use of the well. (The interested party owned a community water system and thus had a financial interest in prohibiting the use of the well.)

Netherland argued that he had been issued a permit by the county to dig the well and had obtained a vested right to construct and use the well. That being the case, the Plaintiff had no right to enjoin Netherland's use of the well. However, the court found that Netherland had not obtained a vested right to use the well since the permit when issued was not valid, owing to its violation of the existing zoning ordinance. Only where a valid building permit has been issued does the applicant acquire a vested right to the use permitted by the building permit.

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

In 1985, the City of Buford amended the zoning on a parcel that was under a contract for sale from 13 units/acre to 8 units/acre. Late that year, the BZA allowed a variance to 11-12 units/acre, without time limitations or conditions precedent. In 1999, a subsequent purchaser, who had purchased the property in 1986 and not done anything, sought to have the variance enforced. The record demonstrated that since they purchased the property in 1986, the owner had made no significant expenditures in

reliance on the variance or official assurances that a building permit would issue. The Court found they therefore failed to establish that they acquired a vested right to use the property in accordance with the 1985 variance. The court looked at cases related to building permits and businesses licenses, and found no reason why the holder of an unexercised variance should be in a better or different position with regard to the vesting of property rights than one whose rights emanate from a building or special use permit or approved development plan.

However, compare Pinnell v. Knight, 245 Ga.App. 299, 537 S.E.2d 170 (2000) (Pinnell's failure to exercise a variance for five years does not mean that the right to the variance has been lost, so long as circumstances remain the same.)

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

A corporation applied for a special use permit to construct a warehouse in a district zoned as 'Interchange Commercial' ("IC"). The permit was granted and portable buildings were erected and leased to another company, which then opened an adult store. The county revoked the special use permit.

The Court held that 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. The court held that the original

applicant was issued a special use permit for the construction and operation of a warehouse in a portion of Camden County that is zoned IC-Interchange Commercial. However, Camden County's Zoning Ordinance does not allow warehouses in areas zoned as IC. Rather, it requires warehouses to be located in districts zoned as Restricted Industrial. ("IR"). Hence, under Camden County's Zoning Ordinance, a warehouse is not authorized within an IC zone, either as a permitted or a special use. Therefore, the County's issuance of a special use permit for the construction and operation of a warehouse was an ultra vires act, rendering the special use permit null and void from its inception. The court held that the law in Georgia, like the rule in nearly all jurisdictions, supports the conclusion that a permit for an illegal use is void and vests no property rights. In order for a property right to vest, it is essential that the building permit must be based upon a permitted use under the zoning law then in force; that a building permit has been legally obtained and is valid in every respect; and that the building permit must be validly issued. The county could not be estopped from revoking the improperly issued permit, because not even estoppel can legalize or vitalize that which the law declares unlawful and void.

See also, City of Statham v. Diversified Development Company, 250 Ga.App. 846, 550 S.E.2d 410 (2001) (Permit issued for a use or structure which is forbidden by the ordinance is beyond the power of the officer to issue; consequently, it has no legal status, is invalid, and is itself entirely without power to clothe its holder with any legal rights hereunder.)

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

Plaintiff sought to purchase a property for use as a domestic violence shelter. While their purchase was pending, its attorney told the mayor of Blue Ridge that it was planning to purchase the property and use it as a shelter. At the time, the property was zoned R-1 for low-density residential development, which permitted “[p]ublic governmental facilities or institutions.” The ordinance defined “institution” as “[a] public or semi-public building occupied by a governmental entity, non-profit corporation or non-profit establishment for public use.” The mayor told the Plaintiff’s attorney that he did not believe the zoning ordinance would permit the intended use of the house. Shortly thereafter, the Mayor wrote to the executive director of the Plaintiff and the attorney for the Plaintiff and reaffirmed that its proposed use was not permitted under the ordinance. Plaintiff closed its purchase. The city later filed an action in superior court seeking a declaratory judgment and injunctive relief, and subsequent to the filing of that suit, but before it was heard, amended its zoning ordinance to delete reference to “institutions” in R-1.

The Court held that 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 non-conforming 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. Moreover, there is no evidence that the Crisis Network purchased the property in reliance upon an assurance from a zoning official that the property could be used as a domestic violence shelter in the R-1 zone. To the contrary, the property was purchased despite warnings that it could not be so used.

**City of Duluth v. Riverbrooke Properties, Inc.**,  
233 Ga.App. 46, 502 S.E.2d 806 (1998).

In 1991, development plans for a five-phase subdivision were submitted, and were approved under Development Regulations adopted in 1971. New development regulations were adopted in 1992. In 1995, the city approved the final plat of the completed subdivision. The city began receiving complaints in 1994 from residents of the subdivision relating to flooding. The city's investigation caused it to decide that no "as-built" survey and certification for the lake as a detention facility had ever been filed with the City as part of any subdivision plats under the 1992 Regulations. This was a way to force the developer to correct the problem to the satisfaction of the City's engineers.

The Court rejected this attempt to apply later-adopted regulations. The Court noted that the city allowed the subdivision to be annexed, at the urging of the city officials, and that the subdivision willingly incurred a higher ad valorem burden with the understanding and expectation that the development would be under the 1971

Regulations. All of the engineering and development costs were based upon the 1971 Regulations. Such expectation, in submitting the entire future subdivision development in phases, was based upon the 1971 Regulations as they existed in 1991. The annexation of the subdivision and the developmental plans approved in 1991 constituted a substantial change of position and an expenditure in reliance upon the existing regulations, so that the defendants acquired a vested property right.

The Court held that a landowner has a right to develop the property pursuant to a development plan duly approved by the municipal director of planning and development pursuant to powers delegated to it by the mayor and council of the municipality even though the development plan was not final within the existing developmental regulations, where the landowner has expended large sums of money in furtherance of the development and has granted to the homeowner's association the lake, clubhouse, and surrounding land with amenities in reliance upon its approved development plan.

Such vested property right arises where there was a substantial change of position in reliance with legal or economic liability resulting through expenditures based upon the probability of approval of the development plan, and there was conditional or tentative approval; where assurances and representations made by governmental authority, or by someone with the delegated authority to approve the preliminary developmental plan; where the plans would allow such development under something other than a final plan; or where regulations existing at the time of submission of the

plan of development supported such developmental plan. Thus, the defendants acquired vested property rights under the preliminary developmental plan filed under the 1971 Regulations and, as a matter of law, such vested rights in the entire subdivision were “grandfathered” from the effect of the subsequently adopted 1992 Regulations.

**Beugnot v. Coweta County**,  
231 Ga.App. 715, 500 S.E.2d 28 (1998).

Plaintiff initially began developing a manufactured home park before zoning was adopted. When zoning was adopted, the park was treated as non-conforming, but allowed to expand. Eventually, the County stopped issuing permits. The Court noted that it has repeatedly recognized the vested right of property owners seeking to develop a mobile home park on their land to continue the development despite a county’s adoption of zoning ordinances preventing such use. E.g., Rainwater v. Coweta County Bd. of Zoning Appeals, 123 Ga.App. 467, 181 S.E.2d 540 (1971).

There was evidence in the instant case that Beugnot had expended substantial time, effort and money on the development of the property as a mobile home park prior to the county’s enactment of the zoning ordinance. With full knowledge of Beugnot’s intentions and the ordinance provisions, the county allowed Beugnot to continue development of the entire parcel for 25 years. The evidence before the Board clearly showed that Beugnot has, at the very least, *maintained* the lawful nonconforming use of the property as required by the zoning ordinance. Beugnot was thus entitled to the continued enjoyment of the nonconforming use as a vested right.

**Whipple v. City of Cordele,**  
231 Ga.App. 274, 499 S.E.2d 113 (1998).

This is a striking case asserting that no vested rights arise for a use that is simply unregulated. In 1993, Whipple built a stable for multiple horses. Before doing so, she checked with the city attorney, who informed her that no city ordinance prohibited keeping horses within the city limits, and that only the county Health Department would be involved in regulating the activity. In reliance upon this information, Whipple had the barn constructed and expended additional funds on its maintenance and upkeep.

In October 1994, the city adopted an ordinance that prohibited the keeping of horses in residential areas of the city. The effective date of the ordinance was April 1, 1995. After that date, the ordinance was enforced against Whipple and she was forced to move her horses. Whipple sued, and the trial court granted summary judgment to the City. The Court of Appeals affirmed, under unusual logic. The Court noted that, while a property owner who becomes an actual applicant seeking to alter the use of his land acquires a vested right to have that application considered under the statutory law then in existence, Whipple did not make formal or official application to modify her property. She did not acquire a “vested right” to keep horses on her property merely because no law then prohibited her from doing so. The Court noted that “it is obvious that many rights, privileges, and exemptions which usually pertain to ownership under a particular state of the law, and many reasonable expectations, cannot be regarded as vested rights in any legal sense.” The Court found that the fact that the city attorney

merely informed her correctly of existing law did not create a vested right. It concluded that her claim of a vested right was based solely on the absence of any then-existing law preventing it. This conclusion that a lawful use can be taken away in this fashion is an aberration from other cases.

**Recycle & Recover, Inc. v. Georgia Bd. of Natural Resources,**  
266 Ga. 253, 466 S.E.2d 197 (1996).

The Board of Natural Resources issued a permit to an applicant for the construction and operation of a landfill. Shortly thereafter, the permit holder applied for a major modification to triple the size. Before the Board took final action on that expansion application, the General Assembly amended OCGA § 12-8-24(e)(1) so as to provide that, a major modification “shall not be granted ... sooner than three years from the date any such facility commenced operation....” Based upon this amendment, the Board denied the expansion application. The permit holder brought suit and the trial court upheld the decision.

The Court analyzed the issue of vested rights, concluding that the term “vested rights” means interests which it is proper for the state to recognize and protect and of which the individual cannot be deprived arbitrarily without injustice. The Court noted that a statute which confers a right upon an applicant seeking to alter the use of his property confers no vested rights upon all property owners. However, a property owner can avail himself of the privilege thereof while it remains in the statute. Thus, if a property owner becomes an actual applicant seeking to alter the use of his land, he has a

vested right to consideration of his application under the statutory law then in existence. The dissent strongly argued that the application was never complete and an incomplete application should not vest rights; and that rights cannot vest in a procedure for review.

**Banks County v. Chambers of Georgia, Inc.**,  
264 Ga. 421, 444 S.E.2d 783 (1994).

On August 20, 1991, Plaintiffs sought written verification that the proposed, expanded site complied with the County's zoning ordinances in order to obtain a landfill permit. The County refused to issue verification. Plaintiffs filed suit on September 26, 1991. Later that day, the County adopted a "Restated Zoning Ordinance." The trial court determined that the County failed to enact a valid land use ordinance prior to August 20, 1991, which would preclude written verification of compliance. The court concluded that plaintiffs were entitled to a written verification letter and it ordered defendants to issue such a letter. Significantly, the court made no finding as to whether the zoning ordinance enacted by the County on September 26, 1991, barred issuance of a written verification letter.

The County's administrative zoning officer issued a written verification letter, on July 9, 1993, to the Environmental Protection Division of the Georgia Department of Natural Resources. It read: "In accordance with the order [in the superior court case], it is hereby certified that as of August 20, 1991, when the plaintiffs in said actions applied for a certificate of zoning compliance, the plaintiffs' intended use was not contradictory to any county zoning or other land use regulations or ordinances.... [N]o

certification is made as to the effect of the current Banks County Zoning Ordinance which was enacted on September 26, 1991.”

Plaintiffs were dissatisfied with the verification letter and moved to have defendants found in contempt. The Court held that Plaintiffs had vested rights to a zoning verification letter. The Court held that when land is zoned for a particular use, and an applicant properly applies for authorization to use the land for that particular use, he is entitled to have such authorization issued; an applicant must thereafter comply with all reasonable conditions and requirements imposed upon the use of the land, and if he fails to do so the governing authority can withhold building permits and occupancy permits to enforce compliance with these regulations and conditions subsequent; but a governing authority cannot deny or postpone requested authorization to use the land for a permitted use and then defeat the applicant’s right by thereafter rezoning the land.

The Court held that Plaintiffs were in compliance with the County’s zoning ordinances when they sought written verification of compliance on August 20, 1991; and therefore plaintiffs had a vested right to obtain written verification of zoning compliance despite the enactment of the September 26, 1991, zoning ordinance.

The Court made an interesting distinction, noting that where a landowner is in compliance with zoning regulations, he is entitled to the issuance of a building permit at the time he applies for it; but where a zoning ordinance is interpreted to preclude the issuance of a building permit, a landowner may nevertheless be entitled to the issuance

of a building permit if he made a substantial change in his position in reliance upon assurances of zoning officials.

Thus, evidence of substantial expenditures played no role here, where the landowner was in compliance with zoning regulations at the time he sought written verification of zoning compliance.

**City of Hampton v. Briscoe**,  
207 Ga.App. 501, 428 S.E.2d 411 (1993).

Plaintiff owned property zoned light manufacturing (M-1). He requested a business license for a general merchandise store. The clerk denied the license as a non-permitted use, but the property owner went to the city council, who voted to issue the license. The property owner later sought to add an auto auction and sought another license. The city council, realizing that the proposed use was not permitted in the light manufacturing district and that the previous license he received had been issued in error, denied his application. The Court noted that the case involved the issuance of a business license, and not a building *permit*, which weakened his position.

The Court, looking for example to Schulman v. Fulton County, 249 Ga. 852, 295 S.E.2d 102 (1982), held that no vested rights are conferred by an *invalidly* issued permit. A permit issued for a use or structure which is forbidden by the ordinance is beyond the power of the officer to issue; consequently, it has no legal status, is invalid, and is itself entirely without power to clothe its holder with any legal rights hereunder. The expenditure of even substantial sums in reliance upon a permit found to be void is generally held not to raise an estoppel against its revocation or against enforcement of the ordinance found to be violated by the use or structures maintained pursuant to the permit. Where a permit is issued by a governing body in violation of an ordinance, even under a mistake of fact, it is void, and its holder does not acquire any rights; even a substantial expenditure in reliance on a void permit does not raise an estoppel.

See also, Corey Outdoor Advertising v. City of Atlanta, 254 Ga. 221, 327 S.E.2d 178 (1985) (A permit issued for either an illegal use or an illegal non-conforming use is void; it cannot be used as an excuse to continue the use in violation of the zoning ordinance, and it does not vest constitutional rights.)

**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 held 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

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

Land that had been rezoned and partially developed by prior owner was bought by new owner. Prior to purchase, the new owner obtained a confirmation of the zoning classification of one portion of the property (a multi-family portion). Neighbors sought to have the multi-family portion of the property rezoned to single-family, and the county on its own motion began an application to rezone the property. Landowner sought a TRO to enjoin the rezoning application and alleged vested rights. Evidence showed purchaser had spent \$600 on development of the multi-family to date. The developer

also had spent \$900,000 on the single-family portion, and argued that it was one unified development. The trial court ruled in the property owner's favor, finding reliance on an official assurance and substantial expenditures.

The Supreme Court reversed, finding no vested rights. First, the Court held that the letter only was a confirmation of the present zoning, and was not the kind of assurance required in the creation of vested rights, because it lacked the quality of promise necessary to an estoppel. The Court pointed out there was no notice to the zoning official that the landowner was about to expend substantial sums in reliance on information received, nor was there any assurance that necessary permits would probably issue. In one of the few cases in Georgia to consider what would equate to "substantial expenditures," the Court noted that "the sum of \$600, under the circumstances, is not a substantial expenditure sufficient to vest rights." Prior expenditures by the prior owner (who spent \$700,000 running water and sewer to the entire tract) were irrelevant, in that they were not "in reliance" on that letter.

**Schulman v. Fulton Co.**,  
249 Ga. 852, 295 S.E.2d 102 (1982).

In 1981, the appellant filed an application for a special use permit for an outdoor lighting system. The application was granted, on the condition that certain modifications be made in the lighting system and that the usage of the lights be

restricted to certain hours. The appellant had expended money in order to make the required modifications.

However, shortly thereafter the County voted to reconsider its decision to issue the special use permit to the appellant, and a few months later, the appellee revoked the permit. The Court noted that the actual issuance of a building permit vests zoning rights even in the absence of a showing of reliance on the permit. By a parity of reasoning, issuance of a special use permit should also be held to vest rights, especially where, as here, the applicant for the permit has expended money in reliance thereon. Therefore, we hold that the appellant in this case has acquired a vested right to use his property in the manner authorized by the special use permit.

**Cobb County v. Peavy,**  
248 Ga. 870, 286 S.E.2d 732 (1982).

A property owner sought a day care facility on residentially-zoned property, and after a court fight, was permitted to have no more than five children. After further study of the zoning ordinances, the property owner discovered that she could operate a private “elementary school” within the residential property classification. Under the applicable ordinance, an elementary school was defined as “grades one to seven, inclusive; provided, however, that a kindergarten and day-care center shall be allowed when operated in conjunction with and as an integral part of an elementary school, which shall include no less than grades one through three.” Property owner applied for and, upon payment of \$50.00 received a business license to operate a private school known

as “Pine Needles Academy.” She made very small expenditures afterwards, for brochures and a sign.

After the school opened, neighbors complained. The county amended its zoning ordinance regarding elementary schools, and added other requirements. The property owner did not comply with the new terms. The county sued, and the property owner asserted vested rights under the old zoning ordinance. The trial judge agreed, finding that appellee’s purchase of the business license, as well as other expenditures made in reliance upon the earlier ordinance, gave her a vested right to operate a private school on her property.

The Court contrasted a building permit with a business license, and noted that a business license is typically not a device for ensuring compliance with zoning ordinances. Although the general aim of both zoning and licensing regulations is the promotion of the general welfare, each is independent of the other and seeks to accomplish its purpose by a different means. The fact that a zoning ordinance permits a use in a particular district does not authorize the use there without a license. On the other hand, a license or permit does not authorize a use in violation of zoning laws. In other words, a license or permit does not relieve one from complying with a zoning ordinance, and this generally is true of a state license or permit.

The Court found that the license obtained was clearly not intended to serve a zoning compliance function. Accordingly, it concluded that she did not acquire vested

rights under the prior zoning ordinance by virtue of her procurement of a business license.

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

Plaintiff owned a mountain tract and sought to develop an alpine slide ride. The property was zoned agricultural. Plaintiff first sought to have the tract rezoned commercial. This was refused in January 1979. Plaintiff then met with the zoning administrator in February 1979 who told Barker the project would be permissible under existing agricultural zoning as a commercial recreation use if certain modifications were made. Plaintiff also claimed he met with other zoning officials who gave similar assurances. While the record reflects the zoning administrator admits having made certain assurances, other officials dispute the contention that they made such assurances. The Plaintiff proceeded with engineering, marketing and traffic studies, incurring expenses. In December 1979 Forsyth County amended its zoning ordinance so as to delete commercial recreation as a permitted use in agricultural districts. Building permits were denied.

The court recognized the majority rule of vested rights as follows: where 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. The court also noted that it had previously gone outside the majority rule to allow vested rights when a valid building permit was issued, even though the facts showed no substantial change of position by the landowner. The court considered this a new case, in which there were allegations of substantial expenditures in reliance upon an existing zoning ordinance plus verbal expressions of approval given by officials, but no permit has issued.

The court held 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.

**Spalding County v. East Enterprises, Inc.,**  
232 Ga. 887, 209 S.E.2d 215 (1974).

Property was purchased in 1971 and the ordinance permitted mobile home parks at that time. Development towards that goal was done by the developer. About July, 1972, the developer sought a building permit from the county and was told by the building inspector that the zoning was satisfactory and that only a set of plans for the construction was necessary for the issuance of the permit. Acting on this information the purchaser expended about \$10,000 for development services. When the development plan was completed in September, 1972, the developer took a copy of it to

the building inspector. At that time the three county commissioners were in the courthouse and they had an informal meeting. The development plan was discussed in detail with them. The county commissioners informed the developer that the plans were adequate and met the county zoning requirements. The commissioners informed the developer that the only further requirement was the approval of the county board of health. This approval was obtained after contacting the board four times prior to November, 1972. On November 30, 1972, the county adopted a resolution which eliminated entirely the mobile home park classification in Spalding County.

The court found that the developer had acquired a vested interest in the mobile home park classification as it existed prior to November, 1972. The developer had relied on the zoning ordinance, had made substantial expenditures in consequence thereof, and the Constitutions of the State of Georgia and the United States protect such vested property rights.