

BUT IT WASN'T MY FAULT! THE SCOPE OF THE ZONING ESTOPPEL DOCTRINE

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INTRODUCTION

Before local municipalities were established, land could be developed without the prerequisite of securing governmental approval.¹ With the establishment of local municipalities and regulations governing land use, zoning restrictions and the requirement of approval prior to building developed.² Today, developers³ must comply with local procedures⁴ in the application process to secure a building permit.⁵ Generally, the permit-issuing body will approve an application if the particular project meets the restrictions for its location under the relevant zoning ordinances.⁶ With permit in-hand, a developer may begin construction.

¹ See 4 EDWARD H. ZIEGLER, JR. ET AL., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 69:2 (4th ed. 2011) (discussing the development of land regulation).

² *Id.*

³ The term "developer" or "builder" in this Note refers not only to developers as professionals, but also to property owners and people with other interest in the property who seek to develop or alter it.

⁴ Procedures for applying for permits and approving development plans vary from jurisdiction to jurisdiction, and can be a very complex process. In New York City, for example, there are multiple stages and various requirements to the application process: 1) Only a New York State Professional Engineer or Registered Architect can submit construction plans to obtain the permit, and they must certify that the permit conforms to all applicable laws. They must "prefile" the application in a borough office, where they will submit the plans for the development or construction. These plans include the actual application, drawings/maps of the proposed development, asbestos forms, and energy calculations. 2) The applicant must pay the fee for filing the application, and the application folder is transferred to a Department plan examiner. 3) A Department plan examiner will review the plans for any legal or zoning objections, including the Building Code, Multiple Dwelling Law, and Housing Maintenance Code. 4) If the plans are satisfactory, the Department will then approve the application. 5) Only once the application is approved may the applicant apply for a building permit to begin work. This portion of the application process requires completing a PW2 work permit application and a PW3 cost affidavit form, both of which require a contractor's signature and notarization, plus payment of another fee. Only once all these steps are successfully completed can an applicant receive his permit to begin construction. This process is only further frustrated by the multiple amendments to the plans or application that may be needed if the building department is not satisfied with the submission. N.Y.C. Dep't of Bldgs, Application Filing and Permit Process: Fact Sheet (2005), available at http://www.nyc.gov/html/dob/downloads/pdf/permit_factsheet.pdf; *Applications and Permits*, N.Y.C. DEP'T OF BLDGS, http://www.nyc.gov/html/dob/html/development/applications_and_permits.shtml (last visited Apr. 11, 2013).

⁵ Brian K. Steinwascher, Note, *Statutory Development Rights: Why Implementing Vested Rights Through Statute Serves the Interests of the Developer and Government Alike*, 32 CARDOZO L. REV. 265, 265-66 (2010).

⁶ ZIEGLER ET AL., *supra* note 1, § 69:3. Some states have criteria that zoning commissions must follow when evaluating an application for development permits. In Vermont, the district commission must find that the development: 1) will not result in undue air or water pollution; 2) has sufficient water available to it and will not overburden the supply; 3) will not cause unreasonable soil erosion; 4) will not congest highways; 5) will not place an unreasonable burden on local government to provide governmental services; 6) will not have an undue adverse effect on the natural beauty of the area; and 7) is in accordance with zoning ordinances. VT. STAT. ANN. tit. 10, § 6086 (2011).

There are many zoning-related issues that can interfere with the development of land. A municipality may decide to reject a proposed development and refuse to issue the required permits because there has been a proposed amendment to the zoning ordinance.⁷ Alternatively, a municipality may issue a permit and then, prior to completion of the development but after the permit has been issued, adopt an amendment to the zoning ordinance and revoke the permit.⁸ While many of the difficulties in the development process come about from changes in zoning ordinances, these changes are not the only barrier that may arise. On occasion, government officials inadvertently issue permits that do not comply with the zoning ordinances,⁹ making them invalid. This mistake, which may be the result of a simple oversight or a misinterpretation of an ambiguous zoning ordinance, can have disastrous consequences for the developer.¹⁰

This Note focuses on the following hypothetical fact pattern. Developer Dave decides he wants to buy a tract of land and build a house on it. Though Dave is a cautious and methodical developer who diligently prepares the permit application, he does not recognize that his plans do not comply the local zoning ordinances. After submitting his plans to the municipality, the reviewing zoning official mistakenly issues the permit, despite the fact that the zoning laws do not allow for Dave's development. Relying on the permit to develop, Dave begins development and expends a large sum of money purchasing resources and building the house. Just as construction is about to come to an end, the city inspectors, who did not previously notice the violation, catch

⁷ See *Marinari v. Zoning Hearing Bd.*, 496 A.2d 121, 123 (Pa. Commw. Ct. 1985) (discussing the "pending zoning ordinance doctrine" which states that "a building permit may be refused if at the time of application there is pending an amendment to a zoning ordinance which would prohibit the use of the land for which the permit is sought" (citing *Boron Oil Co. v. Kimple*, 284 A.2d 744, 746 (Pa. 1971))).

⁸ See *Geneva Inv. Co. v. City of St. Louis*, 87 F.2d 83 (8th Cir. 1937) (holding that so long as the power to amend zoning ordinances is not used arbitrarily, a municipality has the right to do so for the sake of promoting the public health and safety; additionally, permits issued prior to the amendment may be revoked if they violate the new amendment because "if the police power is properly exercised, loss to the individual is a misfortune which he must undergo as a member of society").

⁹ One question that may arise: Statistically speaking, how often do municipalities issue invalid permits that violate zoning ordinances? The simple answer is that it is almost impossible to know. Unless the municipality subsequently attempts to revoke an issued invalid permit, it will go unnoticed. It is likely that the proportion of invalid permits to total permits issued is small, but given the amount of claims that seek to utilize the zoning estoppel argument, it is not a topic that can be disregarded academically.

¹⁰ See *infra* Part I. As will be discussed, a permit that is invalid because it allows development of a project that violates zoning regulations can be revoked. If the court is unwilling to find a vested right or to estop the municipality from enforcing the regulations, then the developer, who may have expended significant sums of money while beginning development, may be left with no recourse but to try and conform with the zoning regulations or scrap the project entirely.

the error and report it. Days later, the city issues a stop-work order and seeks to revoke the permit.¹¹

There are a few of routes that Dave Developer can take to try and remedy his situation. One option is to bring suit against the municipality for damages resulting in reliance on the previously issued permit.¹² Even if the municipality is not immune from liability under the doctrine of sovereign immunity,¹³ this approach would only result in an award of damages incurred as a result of the negligent issuance of the permit, and Dave would be unable to complete the development as he intended.¹⁴

The other option available to Dave is to make a claim for zoning estoppel. The argument is that Dave incurred high expenses and costs in reliance on the zoning permit that the municipality approved, and therefore the municipality should be estopped from enforcing the zoning ordinance that it otherwise has an obligation to enforce. Zoning estoppel is a claim in equity,¹⁵ asking the court to find that it would be inequitable or unfair to allow the government to repudiate its prior conduct. In theory, a developer who, relying on the invalidly issued permit in good faith, built his development in violation of the zoning regulations, should feel comfortable with the security that he can rely on the zoning estoppel doctrine to avoid the potentially massive cost to remedy the violation. However, the general consensus is that “[m]ost of the courts hold that such permits are invalid and confer no rights upon the permittee, although their reasons for reaching this result vary widely.”¹⁶

¹¹ The general rule is that building permits are not binding like contracts, and can be modified or revoked if the municipality’s police power reasonably requires it. *See Moore v. Memphis Stone & Gravel Co.*, 339 S.W.2d 29, 33 (Tenn. Ct. App. 1959).

¹² The general rule with respect to municipal liability for revoking invalid permits is that “the granting, refusing, and revoking of licenses, permits, and franchises, a municipal corporation acts in a governmental rather than a proprietary capacity, and therefore cannot be held civilly liable for the wrongful issuance, refusal to grant, or revocation of, a license, permit, or franchise.” Francis M. Dougherty, *Liability of Governmental Entity to Builder or Developer for Negligent Issuance of Building Permit Subsequently Suspended or Revoked*, 41 A.L.R. 4th 99, § 1 (1985). Nevertheless, some courts have recognized exceptions. Some municipalities have created state statutes that impose liability for municipal corporations for damages arising out of their tortious actions, and have applied this to invalid permits. *See Haslund v. Seattle*, 547 P.2d 1221, 1228–29 (Wash. 1976), for a discussion of statute-imposed liability.

¹³ *Id.*

¹⁴ Dougherty, *supra* note 12.

¹⁵ *See Benson v. City of De Soto*, 510 P.2d 1281, 1288 (Kan. 1973) (“[A] municipal corporation is subject to the rules of estoppel in those cases wherein equity and justice require their application”); *see also* ZIEGLER ET AL., *supra* note 1, § 65:28.

¹⁶ David G. Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes*, 1971 URB. L. ANN. 63, 73; *see also*, *Miller v. Bd. of Adjustment*, 521 A.2d 642 (Del. Super. Ct. 1986); *Baiza v. City of College Park*, 994 A.2d 495 (Md. Ct. Spec. App. 2010); *Garnick v. Zoning Hearing Bd.*, 427 A.2d 310 (Pa. Commw. Ct. 1981).

This poses two issues: First, many courts operate under the general rule that one to whom a building permit has been illegally issued can rarely successfully invoke the doctrine of estoppel, notwithstanding the fact the he may have acted in good faith and expended money in reliance on the permit.¹⁷ One court expressed the difficulty of establishing the estoppel claim by analogizing that the “actualization of the doctrine of equitable estoppel is akin to the Holy Grail of land use jurisprudence. It is almost unattainable, and those who have achieved it are peculiarly deserving of its benefits.”¹⁸ Second, even within those courts that do apply estoppel, a successful estoppel claim can be arduous because courts seem to be inconsistent with their reasons for accepting or rejecting it.¹⁹ These inconsistencies can result in potential claimants unable to accurately predict what the possibility for success will be in bringing the claim. As such, the zoning estoppel doctrine has received the reputation of being opaque and unpredictable.²⁰

This Note argues that while the zoning estoppel doctrine is often viewed as an improbable argument to recipients of illegal permits,²¹ courts do in fact invoke this doctrine somewhat consistently. Though it seems as if there is no fluidity to how the doctrine is invoked, this Note proposes that courts can and should find estoppel when the facts of the case satisfy four factual categories.

Part I of this Note sets out the elements of an estoppel claim, and provides an overview of the permit process and the vested rights

¹⁷ See, e.g., *Parkview Assocs. v. City of New York*, 519 N.E.2d 1372, 1374 (N.Y. 1988) (“[Generally,] estoppel may not be invoked against a municipal agency to prevent it from discharging its statutory duties . . . [a] municipality . . . is not estopped from enforcing its zoning laws either by the issuance of a building permit or laches . . .” (alterations in original) (quoting *Scruggs-Leftwich v. Rivercross Tenants’ Corp.*, 517 N.E.2d 1337, 1339 (N.Y. 1987); and *City of Yonkers v. Rentaways, Inc.*, 109 N.E.2d 597, 599 (N.Y. 1952)) (internal quotation marks omitted)); *Wylar v. Eckert*, 73 N.Y.S.2d 789, 790 (Sup. Ct. 1947) (“[The] rule is that no building permit by an administrative official can condone, or afford immunity for, a violation of law and that an illegally granted permit is not a basis for an estoppel.”).

¹⁸ *Hartung v. Baker*, No. BER-L-1499-05, 2006 WL 1063291, at *4 (N.J. Super. Ct. Law Div. Apr. 21, 2006).

¹⁹ Even within the same states, it seems as though courts apply the doctrine inconsistently. In *Village of Wappingers Falls v. Tomlins*, 928 N.Y.S.2d 353, 354–55 (App. Div. 2011), the court held that a municipality can consider the reliance on an invalid permit made prior to revocation of the permit when fashioning a remedy, and declined to sustain the village’s request to order the permittee to remove the construction. While the court did not explicitly estop the municipality, the court did deny it the ability to order the plaintiffs to remove the structure, thereby preventing it from enforcing the zoning ordinance. In *Parkview Associates*, however, the court ordered that the owner of a building who, in reliance on a construction permit, built the building higher than the zoning regulations actually allowed, cannot estop the municipality from enforcing its zoning ordinances, “even where there are harsh results.” 519 N.E. 2d at 1375. While the *Wappingers Falls* case suggests that cost and burden on the permittee should be considered when fashioning a remedy, the *Parkview Associates* case suggests the opposite—that burden on the permittee to enforce the zoning ordinance is irrelevant.

²⁰ See *Baker*, 2006 WL 1063291, at *4.

²¹ See *Wylar*, 73 N.Y.S.2d at 790.

doctrine. Part II demonstrates the doctrine as applied in the courts, indicating issues courts face when ruling on an estoppel claim. Part III of this Note proposes that this blurred doctrine is not as ambiguous as it appears, and can be understood by analyzing the circumstances of each case. Specifically, Part III proposes a test consisting of four factual categories that tend to be determinative when courts are confronted with claims for zoning estoppel, and argues that courts should examine the facts of a zoning estoppel claim through these four factual categories. Finally, Part IV discusses the benefits and potential implications of adopting the test. Ultimately, assessing an estoppel claim through these four factors would create more consistency in applying the estoppel doctrine, and would make a successful claim by a developer or landowner more tenable.

I. BACKGROUND

A. *The Permit, Vested Rights, and Estoppel*

In almost every municipality in the United States, construction or renovation requires prior approval by a zoning authority and an issuance of a permit.²² This process helps to ensure that the zoning ordinances and restrictions are not violated and function correctly.²³ Building officials are required to observe the zoning ordinances within which they operate, and they do not have any individual discretion to permit land use beyond what the zoning laws allow.²⁴ However, the developer also has the burden of ensuring that the requested construction falls within the permitted zoning uses,²⁵ and is required to submit plans and specifications showing compliance with all applicable ordinances.²⁶ Nevertheless, the local building inspector will examine the application prior to construction and make a determination whether to issue the permit.²⁷

From time to time, the municipality might change its decision, and seek to revoke the permit.²⁸ Changes in zoning restrictions or errors in

²² 2 E.C. YOKLEY, ZONING LAW AND PRACTICE § 14-1 (4th ed. 1978).

²³ *Id.*

²⁴ *Id.* § 14-3.

²⁵ See *Gignilliat v. Borg*, 205 S.E. 479, 480 (Ga. Ct. App. 1974) (“One is presumed to know what the zoning regulations do or do not permit.”); *Warholak v. Northfield Twp. Supervisor*, 225 N.W.2d 767, 769 (Mich. Ct. App. 1975) (“[I]t was the responsibility of the plaintiff to learn of the licensing requirements, and that the township was not estopped from applying the requirements of the new resolution to an application filed after its effective date.”).

²⁶ YOKLEY, *supra* note 22, § 14-3.

²⁷ See *supra* note 4, for a description of the permit process in New York City. See also 8A EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 25:233 (3d ed. rev. 2012).

²⁸ See, e.g., *Levine v. Town of Sperling*, 16 A.3d 664, 667 (Conn. 2011); *Md. Reclamation*

issuing the permit are reasons why the municipality may seek to revoke the permit.²⁹ The municipality does not have unlimited discretion to revoke a permit, and cannot be arbitrary in doing so.³⁰ Thus, property law has developed over time to establish vehicles to protect the landowners from this kind of interference. Specifically, the two defenses that are frequently invoked by permit holders are the doctrines of zoning estoppel and vested rights.

Courts frequently confuse the two doctrines, however, and apply them interchangeably.³¹ This is likely due to the fact that the factual basis for one is the same for the other.³² While “the decisions setting forth the circumstances under which the defenses of either estoppel or vested rights will be allowed appear confused and conflicting. [] This could be another example . . . of the courts’ either not understanding what they are saying or saying something other than what they mean.”³³ Therefore, to understand the scope of the doctrine of zoning estoppel, it is necessary to first articulate the differences between zoning estoppel and vested rights.

Both doctrines require that the permittee, in good faith, relied on the government’s act of granting the permit by performing substantial work and incurring substantial liabilities.³⁴ The key distinction between the two is founded on where they are derived from doctrinally. Zoning estoppel is a state law claim based in equity while the vested rights

Assocs., Inc. v. Harford Cnty., 994 A.2d 842, 846–48 (Md. 2010); *Sakolsky v. City of Coral Gables*, 151 So. 2d. 433, 434–35 (Fla. 1963).

²⁹ Municipalities often change their zoning restrictions, and it is possible that the new ordinances do not allow for the type of development for which the permit was originally granted. It is also possible that the municipality made a mistake in reviewing the permit application, and when the error is discovered, it seeks to revoke the permit. The error may be on the part of the building inspector, or may be because of a misrepresentation made on the part of the applicant. See *Md. Reclamation Assocs., Inc.*, 994 A.2d at 876–79 (2010) (finding reliance unreasonable where the developer had reason to believe that the zoning official’s mind may change); *Zoning Bd. of Adjustment v. Datchko*, 362 A.2d 55, 57 (N.J. Super. Ct. App. Div. 1976).

³⁰ See *Rehmann v. City of Des Moines*, 204 N.W. 267, 270 (Iowa 1925) (explaining that administrative officials cannot be constitutionally vested with the unlimited discretion to revoke permits); *Alger v. City of Mukilteo*, 730 P.2d 1333, 1333 (Wash. 1987) (en banc) (holding that municipality was liable for issuing permits and then maliciously revoking them without good cause).

³¹ See, e.g., *Town of Hillsborough v. Smith*, 170 S.E.2d 904 (N.C. 1969) (applying the vested rights doctrine instead of the zoning estoppel doctrine where the defendants were issued a building permit for the construction of a dry cleaning business in an area zoned for residential purposes); *Maurice Callahan & Sons v. Cooley*, 220 A.2d 467 (Vt. 1966) (applying the vested rights doctrine where a permit was granted to erect a billboard that was significantly greater in size than what the zoning regulations permitted).

³² YOKLEY, *supra* note 22, § 14-5.

³³ Heeter, *supra* note 16, at 65.

³⁴ YOKLEY, *supra* note 22, § 14-5. Since they both have the same requirements, this is likely the source of confusion.

doctrine is based in common law and constitutional law.³⁵ The practical effect of this difference is that zoning estoppel asks whether it would be inequitable or unfair to allow the government to revoke a permit it previously issued, despite the fact that the permit is illegal.³⁶ In contrast, a vested rights defense argues that when a landowner substantially relies on a validly issued permit, his right to build pursuant to the permit has vested, and cannot be taken away without due process of law, in violation of the Fourteenth Amendment.³⁷ The distinction is slight, and in many cases “the courts seems to reach the same results when applying these defenses to identical factual situations.”³⁸

However, with respect to invalid permits that are issued in violation of the zoning laws, the distinction becomes quite important. There is a long line of case law holding that a permit holder acquires no vested rights where the permit is issued in violation of the zoning ordinance.³⁹ “A municipal permit issued illegally or in violation of the law, or under a mistake of fact, confers no vested right or privilege on the person to whom the permit has been issued and may be revoked notwithstanding that he may have acted upon the permit.”⁴⁰ Therefore, since property rights can never vest in reliance of an illegally granted permit, permit holders who seek to be able to act on the permit and continue construction cannot argue that they have vested rights, and are

³⁵ DANIEL R. MANDELKER, *LAND USE LAW* § 6.13 (5th ed. 2003).

³⁶ In his treatise, Pomeroy defines zoning estoppel as:

[T]he effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy.

2 JOHN NORTON POMEROY, *A TREATISE ON EQUITY JURISPRUDENCE* § 804 (4th ed. 1918).

³⁷ In contrast, the vested rights doctrine is based on constitutional and common law principles. Grey describes the derivation of the vested rights doctrine as:

When it is said that the legislature ought not to deprive parties of their “vested rights” all that is means is this: that the rights styled “vested” are *sacred* and *inviolable*, or are such as the parties ought not to be deprived of by the legislature. Like a thousand other propositions which sound speciously to the ear, it is either purely identical and tells us nothing, or begs the question in issue. This use of “vested” has passed from the domain of politics to that of law, by reason of the provisions of the 14th Amendment to the Constitution of the United States, and in most of the State Constitutions, that no one shall be deprived of his property “without due process of law,” or “but by the law of the land.”

JOHN C. GRAY, *THE RULE AGAINST PERPETUITIES* 98 (3d ed. 1915) (citations omitted).

³⁸ Heeter, *supra* note 16, at 65. See *infra* Part II, for a discussion on courts that apply vested rights and still reach the same outcome as they would have had they applied zoning estoppel.

³⁹ See, e.g., *Turner v. Martz*, 401 A.2d 585 (Pa. Commw. Ct. 1979); *Vogt v. Borough of Port Vue*, 85 A.2d 688 (Pa. Super. Ct. 1952); Christine A. Klein et al., *Modernizing Water Law: The Example of Florida*, 61 FLA. L. REV. 403, 416 n.87 (2009).

⁴⁰ *Vogt*, 85 A.2d at 690.

limited to the zoning estoppel defense to prevent the government from revoking the permit.

B. *Zoning Estoppel: The Elements*

The general rule in applying zoning estoppel is that a local government will be estopped from exercising its zoning powers when the property owner 1) relying in good faith; 2) upon some act or omission of the government; 3) has made such a substantial change in position or incurred such extensive obligations and expenses that it would be highly inequitable and unjust to require him to abide by the zoning ordinance.⁴¹ The scope of the doctrine of zoning estoppel with respect to invalid permits is not completely clear and its application varies from jurisdiction to jurisdiction. For example, New Hampshire⁴² and Oregon⁴³ require an element of fraud or misrepresentation on the

⁴¹ See *Md. Reclamation Assocs., Inc. v. Harford Cnty.*, 994 A.2d 842 (Md. 2010). Some courts separate the last element into two, resulting in a fourth element requiring that revoking the permit would result in an inequitable outcome. See, e.g., *Saah v. District of Columbia Bd. of Zoning Adjustment*, 433 A.2d 1114 (D.C. 1981).

⁴² New Hampshire likely has the strictest requirements for pleading an estoppel claim. The court in *City of Concord v. Tompkins*, 471 A.2d 1152 (N.H. 1984), defined the four elements of an estoppel claim as:

[F]irst, a representation or concealment of material facts made with knowledge of those facts; second, the party to whom the representation was made must have been ignorant of the truth of the matter; third, the representation must have been made with the intention of inducing the other party to rely upon it; and fourth, the other party must have been induced to rely upon the representation to his or her injury.

Id. at 1154. The difficulty in claiming estoppel in New Hampshire lies in the first element because the government must have made a representation or concealment of facts with knowledge of those facts. With respect to invalid permits, the government must have knowledge that they misrepresented the ordinance, which is a very tough burden to overcome.

⁴³ With respect to Oregon courts, the claim of zoning estoppel on illegally issued permits appears to be impossible. In *Clackamas County v. Emmert*, 513 P.2d 532 (Or. Ct. App. 1973), the court of appeals articulated the standard for zoning estoppel:

(1) [T]here must be a false representation; (2) it must be made with knowledge of the facts; (3) the other party must have been ignorant of the truth; (4) it must have been made with the intention that it should be acted upon by the other party; and (5) the other party must have been induced to act upon it.

Id. at 535. Of particular relevance is the third requirement that “the other party must have been ignorant of the truth.” *Id.* The opinion goes on to explain: “There is no doubt that if one is aware of the applicable ordinance, or makes no attempt to know of it, the issuance of a permit contrary thereto does not create an estoppel against the city to forbid any further work on the building.” *Id.* at 536. According to this reasoning, one must be ignorant of the fact that the permit violated the ordinance, since the fact that the permit violates the zoning ordinance is the misrepresentation for which the government will be estopped from enforcing. Yet, with respect to erroneous permits, one must make an attempt to be aware of this violation, or else an estoppel claim cannot be maintained. The requirement for estopping the government from enforcing an invalid permit—making an attempt to know of the violation—seems to conflict with the base requirement of estoppel, which is ignorance of the invalidity.

part of the municipality, making a claim for zoning estoppel very similar to an action in fraud and deceit. Nevertheless, the elements of good faith, government act or omission, and substantial reliance to the landowner's detriment applies generally.

1. Good Faith

The first element of a zoning estoppel claim is that the developer relied on the permit in "good faith." It is clear that with respect to faulty permits, the developer must have relied on the permit without knowledge that his plans violated the zoning ordinances.⁴⁴ If the developer did have actual knowledge of the violation, he would not satisfy the requirement of good faith reliance, and the estoppel doctrine would not be available to him.⁴⁵

However, courts have imposed stricter burdens of good faith on those invoking the estoppel doctrine by holding that developers who, based on their experience and expertise, *should have* known that the proposed development violated local zoning ordinances, cannot invoke the doctrine, even if there was no actual knowledge.⁴⁶ In *Parkview Associates v. City of New York*, the New York Court of Appeals refused to invoke the estoppel doctrine where a developer, relying on an invalid permit allowing for a building of 210 feet, began substantial construction on the building and built it sixty feet higher than the zoning ordinance permitted.⁴⁷ The court emphasized that it will not grant estoppel to a developer where "reasonable diligence by a good-faith inquirer would have disclosed the true facts and the bureaucratic error."⁴⁸ By this logic, developers with experience are considered to have constructive notice of the zoning laws and will not be able to, in good faith, claim they did not know the proposed development was in violation of zoning laws.⁴⁹

⁴⁴ See *City of Chicago v. Zellers*, 212 N.E.2d 737 (Ill. App. Ct. 1965) (holding that an owner who "deceptively" misstated facts on his permit application violated the good faith requirement).

⁴⁵ *Id.*

⁴⁶ See *Boyd v. Donelon*, 193 So. 2d 291 (La. Ct. App. 1966) (holding that a developer who has over twenty-five years of experience should have been aware of the multiple violations that his proposed development was violating, and therefore estoppel was not appropriate).

⁴⁷ 519 N.E.2d 1372 (N.Y. 1988).

⁴⁸ *Id.* at 1372.

⁴⁹ This dynamic of the court placing a higher expectation on experienced developers as opposed to homeowners with no building experience can be seen in two cases analyzing zoning estoppel claims in New Jersey. In *Hill v. Board of Adjustment*, the court estopped the Borough of Eatontown from enforcing a zoning law requiring seven feet from the boarder to the structure built. 299 A.2d 737 (N.J. Super. Ct. App. Div. 1972). The court emphasized that the violation created "no discernible damage" and that the homeowner had no ill-intention or experience with the zoning laws. *Id.* at 741. In *Grasso v. Borough of Spring Lake Heights*, 866

Some courts extend this constructive notice reasoning to land owners who are not experienced developers and are not familiar with zoning ordinances. “Persons dealing with agencies of government are presumed to know the legal limitations upon their power and cannot plead estoppel on the theory that they have been misled as to the extent of that power.”⁵⁰ Other decisions have imposed a similar inquiry requirement,⁵¹ and it is unclear to what extent a developer or homeowner is on constructive notice that the proposed development does not conform to the zoning laws.

Good faith is not only limited to knowledge—constructive or actual—of the permit violating zoning laws. A homeowner or developer must also have submitted the application for the permit in good faith, making full disclosure and accurate measurements of the proposed development. If the application is intentionally submitted with misstated information that leads to the issuance of an invalid permit, the good faith requirement is violated.⁵² Moreover, if a homeowner withholds information in the permit application such that disclosure of the information may have inclined the zoning board to reject the application, that owner may himself be estopped from claiming the estoppel doctrine on the invalid permit.⁵³ Even if the homeowner or developer does not intentionally misstate the development in the application, he may still nevertheless be in violation of the good faith requirement if the mistake is later discovered and not disclosed.⁵⁴

A.2d 1076 (N.J. Super. Ct. Law Div. 2003), the developer cited *Hill* as precedent to sustain the estoppel claim. Specifically, he pointed to the fact that the violation was de minimis and was not a public harm. The court refused to apply estoppel, expressly rejecting the parallel to *Hill* because here the developer was experienced and should have known better. Although there was no “discernable damage,” *id.* at 1084, the court stated that “plaintiff, a professional builder . . . ‘made a mistake’ by applying for a building height of twenty-eight feet The borough officials here relied upon plaintiff and his professional planner who mistakenly described the building height without accurately applying the borough’s zoning ordinance’s obvious definitions for height of residential buildings,” *id.* at 1085. Clearly, courts will take into consideration the expertise of the developer when balancing the equities.

⁵⁰ *Ex parte* City of Jacksonville, 693 So. 2d 465, 467 (Ala. 1996) (citing *Marsh v. Birmingham Bd. of Educ.*, 349 So. 2d 34, 36 (Ala. 1977)).

⁵¹ *See Foster & Kleiser v. City of Chicago*, 497 N.E.2d 459, 465 (Ill. App. Ct. 1986) (“[I]f one is aware of the applicable ordinances, or makes no attempt to know them, the issuance of a permit contrary to the ordinances does not create an estoppel against the city.” (citing *Cities Servs. Oil Co. v. City of Des Plains*, 183 N.E. 570 (1932))).

⁵² *See City of Chicago v. Zellers*, 212 N.E.2d 737, 740–41 (Ill. App. Ct. 1965) (holding that an owner who “deceptive[ly]” misstated facts on his permit application violated the good faith requirement).

⁵³ *See City of Coral Gables v. Puiggros*, 376 So. 2d 281 (Fla. Dist. Ct. App. 1979); *see also City of Miami Beach v. 8701 Collins Ave., Inc.*, 77 So. 2d 428 (Fla. 1954).

⁵⁴ *See Stratford Arms, Inc. v. Zoning Bd. of Adjustment*, 239 A.2d 325, 328 (Pa. 1968) (holding that plaintiff could not invoke the estoppel doctrine since he failed to report the error in the approved plans when it was discovered).

2. Act or Omission of the Government

When a developer is trying to assert an estoppel claim against a municipality he must demonstrate that there was an act or omission by the government that was relied on. A developer might argue that the act of issuing the permit itself constitutes an “act.”⁵⁵ Moreover, the developer can argue that the municipality’s failure to discover the error and inform the developer is an omission that was relied on. Finally, if a municipal officer gave some sort of assurance that a permit will be granted or not rescinded, that would constitute an act by a government official.⁵⁶

However, though a government official issued an invalid permit, the issuance alone might not qualify as a “government act.” It is a generally accepted principle that the government will not be held liable for a municipal officer’s *ultra vires*⁵⁷ act.⁵⁸ Therefore, courts have concluded that the municipal officer’s act of issuing a permit in conflict with zoning ordinances alone may not preclude the government from enforcing the restrictions through its zoning power.⁵⁹ This reasoning is grounded in the idea that government agents who issue permits do not have the authority to issue permits that are inconsistent with the zoning ordinances, and permit applicants “are presumed to have constructive knowledge of the nature and extent of the powers of governmental agents who issue permits.”⁶⁰ Since courts can always rely on the idea that government agents do not have the power to issue invalid permits, the scope of the estoppel doctrine with respect to the government act element is hard to define.

⁵⁵ See *Miller v. Bd. of Adjustment*, 521 A.2d 642, 646 (Del. Super. Ct. 1986) (“The issuance of a building permit by an authorized municipal agent constitutes such an affirmative act.”).

⁵⁶ See *Sakolsky v. City of Coral Gables*, 151 So. 2d 433 (Fla. 1963).

⁵⁷ “Ultra vires” is defined as “unauthorized; beyond the scope of power allowed or granted by a corporate charter or by law.” BLACK’S LAW DICTIONARY 1311–12 (9th ed. 2009). The idea is that the government should not have to answer for actions taken by a government official that are beyond their authorization.

⁵⁸ See *Corey Outdoor Advertising, Inc. v. Bd. of Zoning Adjustments*, 327 S.E.2d 178, 182 (Ga. 1985) (citing *City of Calhoun v. Holland*, 152 S.E.2d 752 (Ga. 1966)).

⁵⁹ See, e.g., *V.F. Zahodiakin Eng’g Corp. v. Zoning Bd. of Adjustment*, 86 A.2d 127, 132 (N.J. 1952) (“The governmental zoning power may not be forfeited by the action of local officers in disregard of the statute and the ordinance. The public has an interest in zoning that cannot thus be set at naught. The plaintiff landowner is presumed to have known of the invalidity of the exception and to have acted at his peril.”).

⁶⁰ *Ammons v. Okeechobee Cnty.*, 710 So. 2d 641, 644 (Fla. Dist. Ct. App. 1998).

3. Substantial Reliance Resulting in a Loss

Finally, a successful estoppel claim requires evidence of substantial reliance on the invalid permit.⁶¹ Since zoning estoppel asks the court to balance the equities, the developer seeking the protection of the doctrine must have relied on the permit to his detriment, resulting in economic hardship.⁶² The difficulty with this prong is determining at what point the developer has “substantially relied” such that it would be inequitable to allow the municipality to enforce its zoning restrictions.

A majority of courts simply look to how much developer has expended or committed to the development while relying on the government act.⁶³ While courts within the same jurisdiction tend to be consistent with the requisite degree, jurisdictions will differ on the point at which substantial reliance can be satisfied. Many courts have found that physical construction is sufficient to meet the threshold for substantial reliance,⁶⁴ though others have held that acquiring financing arrangements predicated on the permit being valid are sufficient.⁶⁵ Some courts will be satisfied with a showing of significant expenditures in preparation for development.⁶⁶ In *Levine v. Town of Sperling*, the developer established that though he did not begin construction, he paid multiple professionals in preparing for the project and invested over 400 hours of his own time in reliance on the permit granted to him.⁶⁷ The trial court rejected the estoppel claim because it found that there was an insufficient showing of substantial reliance.⁶⁸ Specifically, the court found that because the developer had not actually engaged in construction that would be rendered useless by application of the

⁶¹ See, e.g., *Saah v. Dist. of Columbia Bd. of Zoning Adjustment*, 433 A.2d 1114, 1116 (D.C. 1981).

⁶² *Id.*

⁶³ See *City of Evansville v. Gasteria*, 51 F.2d 232 (7th Cir. 1931) (ruling that installation of underground pipes and tanks sufficient for substantial reliance); *City of Hialeah v. Allmand*, 207 So. 2d 9 (Fla. Dist. Ct. App. 1968) (finding physical construction sufficient for reliance); *Jayne Estates v. Raynor*, 239 N.E.2d 713 (N.Y. 1968) (finding substantial reliance with over \$60,000 spent in the construction of foundations and pilings).

⁶⁴ See *Gasteria*, 51 F.2d 232 (ruling that installation of underground pipes and tanks sufficient for substantial reliance); *Collins v. Magony*, 294 N.Y.S.2d 860 (App. Div. 1968) (holding that excavation, grading, footings, and foundation walls were sufficient for substantial reliance).

⁶⁵ See *Murrell v. Wolff*, 408 S.W.2d 842 (Mo. 1966) (holding that money invested in planning large development project is sufficient to constitute substantial reliance); *Sautto v. Edenboro Apartments, Inc.*, 202 A.2d 466 (N.J. Super. Ct. App. Div. 1961) (finding substantial reliance in expenses incurred in planning an apartment building and negotiating FHA insurance commitment for a mortgage loan).

⁶⁶ See, e.g., *Drury Displays, Inc. v. Brown*, 715 N.E.2d 1230, 1234–35 (Ill. App. Ct. 1999); *Hagee v. Evanston*, 414 N.E.2d 1184, 1187 (Ill. App. Ct. 1980); *Peru v. Querciagrossa*, 392 N.E.2d 778, 780 (Ill. App. Ct. 1979).

⁶⁷ 16 A.3d 664, 667 (Conn. 2011).

⁶⁸ *Id.* at 675.

zoning ordinance, substantial reliance has not been met.⁶⁹ On appeal, the Connecticut Supreme Court reversed the trial court's dismissal of a zoning estoppel claim as a matter of law.⁷⁰ The court emphasized that the trial court's standard for substantial reliance was incorrect, and that "the primary consideration in determining whether a party will suffer a substantial loss is whether a party has made significant expenditures in reliance upon the representation of a municipal official."⁷¹ Though the distinction is not mutually exclusive, some courts are not so strict as to require a showing of physical construction to satisfy the substantial reliance prong.

Indeed, some courts have considered the effect that allowing the invalid development to continue would have on the public interest in determining substantial reliance.⁷² The benefit to this is that it takes into consideration not only the actual expenditures and costs incurred in reliance on the government's issuance of the invalid permit, but also the public interest considerations of allowing the zoning violation to remain in place. Specifically, the court will balance the hardship of the owner with the injury to public safety and the surrounding area. This view of substantial reliance allows the court to apply zoning estoppel even if the harm to the developer is not outrageous in cases where there would be little negative impact on the public in allowing the violation to continue.⁷³

Additionally, it is important to note that an important aspect of substantial reliance is not only that the expenditures are made in reliance of the permit, but also that making the expenditures be to the detriment of the permittee; Courts will not find estoppel without some harm suffered. In *Virginia Construction Corp. v. Fairman*, the developer had a permit to develop his land by subdividing it into seventy-four one-acre plats and selling them individually.⁷⁴ This permit was later revoked for violating the zoning ordinance requiring the plats to be two acres each, and the developer was forced to alter his plan so that the plats would be two acres each.⁷⁵ Although the developer relied on the permit in good faith and incurred substantial costs, the court found that the expenditures were not to his detriment; the money already spent relying on the permit would have been spent regardless of whether he built one or two-acre plats, and therefore the expenditures were not made to his detriment. Since the development did not reach the point

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² In *Nott v. Wolff*, the court reasoned that "[t]he gain to the public [if the zoning ordinance is enforced] is small as compared to the hardship of the owner." 163 N.E.2d 809, 813 (Ill. 1960).

⁷³ See *Kovacevic v. City of Chicago*, 365 N.E.2d 104 (Ill. App. Ct. 1977).

⁷⁴ 187 A.2d 1, 3 (N.J. 1962).

⁷⁵ *Id.* at 3-4.

where the developer would suffer significant financial harm in complying with the ordinance, the court did not estop the municipality from enforcing it.⁷⁶ *Virginia Construction Corp.* is an example of the requirement that there not only be expenditures incurred in reliance, but that the expenditures were to the detriment of the permittee.

II. THE ESTOPPEL DOCTRINE APPLIED: VESTED RIGHTS AS A SOURCE OF CONFUSION

As noted previously, the doctrines of vested rights and zoning estoppel are markedly similar and therefore often confused by courts.⁷⁷ Nevertheless, there is a theory that this misapplication will often yield the same result.⁷⁸ This is because many estoppel claims against a municipality arise when a municipality amends the zoning ordinances, and valid permits that were granted prior to the amendment become retroactively in violation of zoning regulations, and are subsequently revoked.⁷⁹ For example, in *Town of Hillsborough v. Smith*, the defendants were issued a building permit for the construction of a dry cleaning building.⁸⁰ Within days of obtaining the permit, they paid \$9400 for the lot and signed a contract for construction amounting to \$15,000. Soon thereafter, the town passed an amendment to the zoning laws, rezoning the land on which the defendants were building to a residential area, and revoked the permit.⁸¹ On appeal, the court held that the defendants acquired a vested right to build when they expended significant sums of money on the project and signed the construction contract.⁸² The court correctly addressed this question using the vested rights doctrine, but in practice this outcome would have been the same if the court applied zoning estoppel instead of the vested rights doctrine. Specifically, this is a clear-cut case where the defendant, in good faith, relied on the act of the government of giving the permit, and incurred substantial expenses as a result.

However, the theory that conflation of the vested rights doctrine with the estoppel doctrine yields the same result does not hold true when dealing with cases in which the government revokes an invalid permit. As stated earlier, most courts agree that a permit holder acquires

⁷⁶ *Id.* at 7.

⁷⁷ *See supra* Part I.A.

⁷⁸ Heeter, *supra* note 16, at 65.

⁷⁹ *Id.* at 67.

⁸⁰ 170 S.E.2d 904 (N.C. 1969).

⁸¹ *Id.* at 906.

⁸² *Id.* at 910 (“The defendants had a properly issued building permit which, for the reasons above stated, the town could not revoke By reason of the defendants’ vested right to build the structure, the zoning ordinance does not apply to their proposed construction project.”).

no vested rights when the permit is issued in violation of the zoning ordinances.⁸³ This is because one cannot acquire a right to develop pursuant to a permit that was never legal to begin with. Thus, a permit holder of an invalidly issued permit seeking to prevent a municipality from revoking his permit could only rely on the zoning estoppel doctrine as a defense. Nevertheless, courts continue to refer to “vested rights” when discussing the rights of a permittee who relied on an illegal permit.⁸⁴

For this reason many courts that refuse to entertain estoppel claims by permit holders seeking to enforce their illegal permit do so on a widely held misconception. Specifically, a number of decisions that deny a request for variance⁸⁵ or dismiss a claim for estoppel make the faulty argument that since an invalid permit vests no rights in the permittee, the government may revoke the permit. This argument is faulty because although the permittee may not have a vested right to develop, a court may still find it inequitable to revoke the permit under zoning estoppel. Still, some courts do not examine the merits of the estoppel claim, and instead reject the estoppel claim as a matter of law by addressing it as a vested rights issue.

Maurice Callahan & Sons v. Cooley is a prime example of this misapplication of the estoppel doctrine.⁸⁶ There, the plaintiff applied for, and was granted, permits allowing him to erect billboards that were 240 square feet in size.⁸⁷ The zoning laws in the Town of Bennington limited the size of billboards to forty-square-feet, and thus the permit was clearly issued in violation of local zoning law.⁸⁸ After discovery of

⁸³ See *Hilton Acres v. Klein*, 174 A.2d 465, 470–71 (N.J. 1961) (“[A] building permit issued contrary to a zoning ordinance or building code cannot ground any rights in the applicant. . . . This result derives from a recognition of estoppel as a vehicle for a just solution, involving a weighing of the particular interests and equities. Where the action is without any legal warrant, there is a lack of equity in the owner and the public interest completely predominates.”).

⁸⁴ See, e.g., *City of De Soto v. Centurion Homes, Inc.*, 573 P.2d 1081, 1086 (Kan. Ct. App. 1977) (“[A] building permit issued in violation of law or under a mistake of fact confers no right”); *In re Broad Mountain Dev. Co.*, 17 A.3d 434, 444 (Pa. Commw. Ct. 2011) (“[A] municipal permit issued illegally or in violation of the law, or under a mistake of fact, confers no vested right or privilege on the person to whom the permit has been issued”).

⁸⁵ Though this Note is aimed at claims by permittees seeking to employ the doctrine of zoning estoppel, permit holders who subsequently have illegal permits revoked often simply bring an action seeking a “variance.” An action for variance is a request by the permit holder to the zoning board, asking them to make an exception and allow the zoning violation to continue. If the zoning board denies this application, and the permit holder appeals to the court, the court will then determine if the denial of the variance was appropriate, and in effect balance the equities. Thus, for the purposes of this Note, if a court affirms the denial of a variance, this decision has the same effect as the court refusing to estop the municipality from applying the zoning laws. Similarly, if the court decides that a variance was appropriate, or finds that the permit should not have been revoked, it has the same effect as estopping the municipality.

⁸⁶ 220 A.2d 467 (Vt. 1966).

⁸⁷ *Id.* at 468.

⁸⁸ *Id.*

this error, though not before the billboards had been produced and erected, the Town revoked the permits and informed the plaintiff that he had to remove the billboards.⁸⁹ In evaluating the plaintiff's claim that the government should be estopped from revoking his permits in light of his expenditures, the court approached the issue under the vested rights doctrine:

Such permit, void in its inception, may be revoked notwithstanding that permittee may have acted upon it, and any expenditures made in reliance upon such permit, are made at his peril Moreover, in issuing a permit under a zoning ordinance, municipal officials are discharging a governmental function, and its citizens cannot be bound or estopped by the unauthorized acts of its officers in pursuance of that function.⁹⁰

The court relied on the principle that an invalid permit is void, and thus vests no rights in the permittee.⁹¹ However, the court did not balance any equities; it made no inquiry as to the amount of money the plaintiff expended on erecting the billboards in reliance on the permit or the good faith nature of the plaintiff. The court did acknowledge that “[t]he public has an interest in zoning which cannot be set at naught by the unauthorized acts of its officers,” but it did not attempt to establish the actual harm in having 240-square-foot billboards.⁹² This is just one example of courts repeatedly confusing the vested rights doctrine and the zoning estoppel doctrine, and improperly denying relief to the permittee without the appropriate inquiry.⁹³

It is possible that in some instances courts that seem to be relying on the vested rights doctrine are actually balancing the equities according to the estoppel doctrine, and are simply misusing the proper terms. In *Space Station 2001 v. Moses*, the court concluded that “a building permit cannot be granted in violation of the terms of a zoning ordinance; . . . Space Station gained no rights upon the issuance of the permits, and cannot rely on that issuance to estop the city from revoking them.”⁹⁴ Although Space Station's claim was that the city should be estopped from revoking the permit because Space Station relied on it to its detriment, the court seemed to have addressed the claim through the lens of the vested rights doctrine, which could have had the effect of altering the outcome. However, a closer reading of the opinion reveals

⁸⁹ *Id.* at 468.

⁹⁰ *Id.* at 11.

⁹¹ *Id.* at 468–69 (“Such permit, void in its inception, may be revoked notwithstanding that permittee may have acted upon it, and any expenditures made in reliance upon such permit, are made at his peril.”).

⁹² *Id.* at 469.

⁹³ For another example of this faulty reasoning, see *Gruberg v. Henry*, 163 N.Y.S.2d 1003 (Sup. Ct. 1956).

⁹⁴ 455 N.E.2d 266, 270 (Ill. App. Ct. 1983).

that the court's analysis was really a balancing of the equities. First, the court noted that Space Station began construction at least two months prior to receiving the permit, and the permit was revoked within seven days of its issuance.⁹⁵ This being the case, Space Station failed to establish the second prong of the estoppel test—reliance on the permit. The evidence showed that the grant of the permit did not induce Space Station to begin construction, since Space Station had begun construction prior to the permit's issuance.⁹⁶ The court also noted that the evidence did not support Space Station's argument that they incurred a substantial loss in reliance of the permit.⁹⁷ Though they did spend \$12,000 in the seven days that they held the permit, the trial court found that Space Station spent this money not in reliance on the permit, but in order to finish as much construction before the validity of the permit could be decided.⁹⁸ Moreover, while the court did not specifically address the issue of good faith, it seemed as though Space Station's expenditures were not made in good faith, but rather to finish construction before the city could revoke the permit, and that Space Station may have had knowledge of the permit's defect. Based on this analysis, it is clear that though the court referred exclusively to vested rights, the substantive analysis was done through application of the estoppel doctrine.

Ultimately, while the confusion may be a simple misuse of terminology, as in the *Space Station* case, there are courts, such as the one that decided *Maurice Callahan & Sons*, that have dismissed viable zoning estoppel claims on their face because the permit holder did not have a "vested right" to proceed with construction.⁹⁹ This substantive confusion of the two doctrines is one of the reasons why the zoning estoppel doctrine, with respect to invalid permits, has a reputation of being nearly impossible to apply.

III. A PROSPECTIVE OUTLOOK—CATEGORIZING THE APPLICATION OF THE ESTOPPEL DOCTRINE

There is no doubt that the inability of courts to either clarify or comprehend the distinction between the vested rights doctrine and zoning estoppel plays a large role in the general inconsistency in applying the doctrine. However, it is not the exclusive source of

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ See *supra* Part I; see also *Jelinski v. Eggers*, 148 N.W.2d 750, 755 (Wis. 1967) (holding that a permit authorizing unlawful use of property grants no vested rights, and thus no zoning estoppel claim can be maintained).

confusion. Part of the problem is that courts applying the zoning estoppel doctrine do not undergo a thorough balancing of the equities in every case. Rather, courts rely on one aspect of the factual background to conclude for or against estopping the municipality. This results in a fact-intensive area of law that courts approach with little guidance on how to balance the equities.

Since zoning estoppel is a claim in equity, and because it is a state law claim, courts do not have to apply a similar analysis or a consistent test. Nevertheless, while there seems to be little fluidity in applying the doctrine throughout jurisdictions, this Note argues that when analyzing certain categories of facts, courts have reached similar outcomes. In order to clarify what seems to be an opaque doctrine, this Note proposes that there are four “factual categories” that courts should look to when determining whether zoning estoppel should be applied. Courts should examine: 1) the reasonableness of the error on the part of the municipal officer; 2) any misstatement of fact or bad faith by the permittee; 3) length of time between granting and subsequent revocation of the illegal permit; 4) potential damage to the public if the municipality is estopped from revoking the permit.

It must be acknowledged that these individual factual categories are not, in and of themselves, original. Rather, they are a reflection of what courts have found to be determinative when applying zoning estoppel.¹⁰⁰ Given the importance of these factors, and in order to clarify the doctrine, this Note advocates that going forward, courts should apply the facts of each case to all four factors to ensure that zoning estoppel claims are addressed more consistently and thoroughly. Though these categories are not exhaustive of all factual situations, they comprise the most common categories of facts that tend to be dispositive when zoning estoppel claims are decided on.

A. *Reasonableness of the Error on the Part of the Municipal Officer: The Doctrine of Honest Error*

Of all the factors that the courts should consider in balancing the equities, the reasonableness of the interpretation of the zoning ordinance by the municipal officer should be one of the most influential for a finding of zoning estoppel. Where a property owner applied for a permit, and in good faith relied on a reasonable interpretation of an

¹⁰⁰ In each of the subsequent Sections, the analysis provided examines cases that exemplify the importance of the particular factual category. While part of the analysis shows how courts, in the past, have dealt with cases presenting those types of facts, the purpose of analyzing those cases is to support the argument that these factual categories are vital to a zoning estoppel analysis and, going forward, courts should be sure to look at every factor that this Note identifies.

ambiguous zoning regulation, there is little more that the owner could have done to ensure he was acting on a valid permit.¹⁰¹ Therefore, many courts have developed the doctrine of “honest error,” and will deny a municipality the right to revoke an illegal permit based on a reasonable interpretation of an ambiguous statute.¹⁰²

Often, zoning laws are straightforward and have only one reasonable interpretation. For example, statutes that have certain height or length specifications are hard to be reasonably misconstrued.¹⁰³ However, there are many ordinances that are either poorly written or unnecessarily ambiguous. For example, in *Jantausch v. Borough of Verona*, the plaintiff applied for and was granted a permit for the alteration of her home and operation of a beauty salon therein.¹⁰⁴ The zoning ordinance, which applied to all residential districts, provided “[w]ithin any one-family residence district no buildings shall be erected or altered or used in whole or in part for any other than the following specified purposes: . . . Home occupations incidental to the use as a residence . . .”¹⁰⁵ The ordinance failed to define “home occupation,” and the municipality granted the permit to convert half of the plaintiff’s garage into a beauty salon, in reliance on which she expended \$3000.¹⁰⁶ After a thorough analysis of the statute and the proposed use, the court concluded that the municipal officer’s interpretation of the statute was reasonable, albeit erroneous.¹⁰⁷ In so stating, the court further argued “there should be some point at which the owner of property who acts in such circumstances becomes secure.”¹⁰⁸ This is the basis of the doctrine of honest error.

Many courts have followed the *Jantausch* court in similar situations. In *City of Berea v. Wren*, the court applied the doctrine of honest error where a permit was issued by a zoning official who

¹⁰¹ The court in *Jantausch v. Borough of Verona*, 124 A.2d 14, 17–18 (N.J. Super. Ct. Law Div. 1956), engaged in a foundational and influential analysis regarding estoppel claims where the zoning official granted the permit on the basis of a reasonable, albeit erroneous, interpretation of an ambiguous statute. Ultimately, when a permit is challenged in this situation, it is a function of the courts to interpret the statute. Nonetheless, little else could have been done by the permittee to prevent the situation that eventually occurred. Based on this, the court found it equitable to estop the municipality from revoking the permit.

¹⁰² For a discussion on the doctrine of “honest error,” see ZIEGLER ET AL., *supra* note 1, § 70:29.

¹⁰³ In *Maurice Callahan & Sons v. Cooley*, 220 A.2d 467 (Vt. 1966), the zoning ordinance limited billboards to forty square feet. This limitation in size has only one reasonable interpretation, and the permissible size of billboards under this statute is not ambiguous.

¹⁰⁴ 124 A.2d 14, 15 (N.J. Super. Ct. Law Div. 1956).

¹⁰⁵ *Id.* at 15–16.

¹⁰⁶ *Id.* at 16.

¹⁰⁷ *Id.* at 17 (“I have no doubt as to the good faith of plaintiffs and the building inspector. Additionally, whether the building inspector’s view of the ordinance was sound or not it cannot be said to be unreasonable.”).

¹⁰⁸ *Id.*

reasonably interpreted a zoning map to include the defendant's property in the commercial district.¹⁰⁹ There, the zoning board determined that although the map did indicate defendant's property to be in a commercial district, it did so based on a faulty interpretation of the zoning ordinance, and therefore attempted to revoke the permit.¹¹⁰ Citing to *Jantausch*, the court reasoned that the officials understood precisely what the defendant's intended to construct, and reasonably interpreted the ordinance by relying on the official map.¹¹¹ Based on this alone, the court found it inequitable to apply the zoning ordinance and revoke the permit, and the estoppel claim was sustained.

Some courts have even gone beyond applying estoppel, and have held that where a permit is granted based on a reasonable interpretation of a zoning ordinance, and is relied on, the permittee acquires a vested right to build based on that permit. In *Crow v. Board of Adjustment*, the plaintiff got a permit to build a veterinary hospital in an area that was zoned to include "hospital and sanitariums."¹¹² In the process of acquiring that permit, he was assured by the building inspector and the city attorney that this use was permitted.¹¹³ Nevertheless, the city ultimately sought to revoke the permit, claiming "hospitals" was not intended for animal hospitals.¹¹⁴ In response to the zoning estoppel claim, the court not only agreed that the interpretation taken by the plaintiff was reasonable, but held that since the building inspector had no other guidance to define "hospital," his broad interpretation of the definition was proper at the time, and the building permit "was valid in its inception and during the time the construction work was in progress."¹¹⁵ In so doing, the court ruled that in instances where the official gave a reasonable interpretation of the zoning ordinance to issue a permit that is relied on, the permittee acquires a vested right to build even though the resulting interpretation was not what the municipality intended.¹¹⁶ The fact that the court was willing to go as far as to claim

¹⁰⁹ 818 S.W.2d 274, 275 (Ky. Ct. App. 1991).

¹¹⁰ *Id.* at 275–76.

¹¹¹ *Id.* at 277.

¹¹² 288 N.W. 145, 145 (Iowa 1939).

¹¹³ *Id.*

¹¹⁴ *Id.* at 146.

¹¹⁵ *Id.* at 147.

¹¹⁶ It is important to note that the court here differentiates from applying estoppel and vesting rights. As discussed in Part II, many courts incorrectly apply the two doctrines interchangeably. While the court does not directly indicate that it recognizes the difference between the two, language in the opinion suggests it does. Specifically, the court approaches the issue by inquiring whether or not the permit was valid, not whether or not the permittee had a vested right. There is a subtle difference between the two approaches. The latter approach does not give any indication that the court actually recognizes the difference between vested rights and estoppel, because claiming that one has a vested right is a conclusion, not a statement of fact (one has a vested right because the permit was valid, not vice versa). The former approach indicates that the court recognizes that the permittee had a permit that is sufficient to create a

that the permit was valid at its inception is further evidence that the reasonableness of the municipal officer's interpretation of the ordinance is integral to the outcome of the zoning estoppel claim.

The importance of the reasonable interpretation factor can be further realized when examining the success of estoppel claims where the zoning official made an unreasonable interpretation of the ordinance. In *Jantausch*, the court explains that "where there is no semblance of compliance with or authorization in the ordinance, the deficiency is deemed jurisdictional and reliance . . . in such circumstances has been held not to constitute a special reason" to estop the municipality from enforcing its ordinance.¹¹⁷ Citing multiple cases, the court makes clear that no estoppel claim will be sustained when the permit is granted based on an unreasonable interpretation of the statute.¹¹⁸ Going forward, courts should be sure to always examine the reasonableness of the interpretation of the ordinance by the municipal officer, given how influential that factor has been in the past. A very reasonable interpretation should lead courts to favor stopping the municipality.

B. *Any Misstatement of Fact or Bad Faith by the Permittee*

In discussing the zoning estoppel doctrine, one overlooked element of the claim is the reason for the illegal permit being issued to begin with. Often it is the municipality's wrongful application of the zoning ordinance to the permit application. However, one contested issue is the availability of the estoppel doctrine where the permittee, either intentionally or by oversight, misstated a fact in the permit application that led to the issuance of an illegal permit.

Intuitively, it would seem sensible to conclude that where there is an intentional misstatement of fact that led to the municipality to issue the permit, the estoppel doctrine should not be available because the permittee acted in bad faith.¹¹⁹ In *Lamar Advantage GP Co. v. Zoning Hearing Board of Adjustments*, the court refused to invoke any doctrine of estoppel because the owner blatantly misstated the severity of the

vested right if it is relied on (in order to have a vested right, the permit must have been valid in the first place).

¹¹⁷ *Jantausch v. Borough of Verona*, 124 A.2d 14, 17 (N.J. Super. Ct. Law Div. 1956).

¹¹⁸ See, e.g., *City of Russellville v. Hodges*, 957 S.W.2d 690 (Ark. 1997) (holding that no estoppel claim can succeed where a permit was granted allowing defendants to have electricity and power tags for mobile homes in a zone that expressly prohibited mobile homes by its zoning ordinance); *V.F. Zahodiakin Eng'g Corp. v. Zoning Bd. of Adjustments*, 86 A.2d 127, 132 (N.J. 1952) (holding a variance granted which was an "arrogation of authority in defiance of the statute and the ordinance" can be revoked even though the plaintiff spent substantial money in reliance on the variance).

¹¹⁹ See *supra* notes 52–54 and accompanying text.

renovations in applying for the permit.¹²⁰ In applying for the permit to construct an LED sign atop a parking complex, the owner categorized the construction as a “minor amendment” to an approved project development plan that would cost \$5000.¹²¹ In reality, the project’s cost was \$3,500,000, and constituted a major amendment to the development, which would not have been permissible.¹²² The court’s refusal to grant a variance was grounded in the fact that the owner acted to “circumvent the explicit requirements” of the zoning ordinance.¹²³ Courts have consistently held that intentional misstatement of fact on which an illegal permit is granted will preclude the owner from relying on zoning estoppel.¹²⁴

Similarly, in *Zalarick v. Monroe County*, the court rejected an argument for estoppel where the landowner’s intended use for the property was different than what the permit application suggested.¹²⁵ In *Zalarick*, the landowner’s properties were rezoned in 1974 to a single-family residential district. The landowner owned two adjacent properties prior to the rezoning. On one of the properties she maintained her home as well as a retail flower nursery business, which was permitted as a valid non-conforming use after the rezoning. In 1977, she applied for two building permits for her other property to erect two greenhouses. Her permit application described the greenhouses as “accessories” to the property, which the zoning ordinance permits “provided no retail sales are made on the premises,” and further provided that they are not used as the principle purpose of the parcel.¹²⁶ In reality, she used the greenhouses to grow the flowers that she sold in her retail nursery business, in patent violation of the ordinance. Upon discovery that the second property was being used solely to grow flowers in her retail business, the municipality revoked the permits.¹²⁷

The landowner claimed to have relied on the permits, resulting in substantial loss.¹²⁸ In rejecting the landowner’s estoppel argument, the court recognized that the landowner was deceptive. She intended to use the greenhouses to grow supply for her retail business, and she knew that this use was not permitted under the zoning ordinance. She fraudulently manipulated her permit application without disclosing her intended use so that she could have it approved. More importantly, the

¹²⁰ 997 A.2d 423, 441–42 (Pa. Commw. Ct. 2010).

¹²¹ *Id.* at 428.

¹²² *Id.* at 442.

¹²³ *Id.* at 441–42.

¹²⁴ *See supra* note 53.

¹²⁵ 467 So. 2d 1088 (Fla. Dist. Ct. App. 1985).

¹²⁶ *Id.* at 1089.

¹²⁷ *Id.*

¹²⁸ *Id.*

municipality only approved the application under the mistaken assumption that the landowner intended to use the greenhouses lawfully. A municipality should not be estopped from enforcing its ordinance because a landowner unreasonably relied on a permit that did not permit her to engage in retail activity on her property.¹²⁹ The courts in *Lamar Advantage* and *Zalarick* are representative of how courts will not entertain an estoppel claim where developers acted deceptively or in bad faith in the application process.

On the other extreme, the courts often make it a point of emphasis where the permittee accurately and exhaustively discloses every fact that the municipality needs to determine the development's compliance with zoning regulations.¹³⁰ Where building plans are clear and disclosed in detail, the municipality has ample time to review the application, and other elements of estoppel are present, courts look favorably on the permittee.¹³¹

That said, while the availability of the estoppel claim are more easily ascertained at the extremes, it becomes less clear where the permit holder mistakenly misstates or negligently omits certain facts on the permit application. Zoning estoppel claims based on mistake of fact on the part of the applicant are not common, likely because the only information that the municipality has about the proposed development is the application itself, and any representation that the municipality makes by permitting the development is solely based on the information in the application. If the applicant made a mistake when submitting it, the permit should not reasonably be relied on because the violation of the zoning ordinance was by no fault of the municipality.

One court reasoned that where there is a mistake of fact in the application, there can be no estoppel because in issuing the permit, the zoning officer never intended to allow the type of development that the permittee anticipated, and, based on the information in front of him, the development conformed to zoning law.¹³² The majority of courts hold that permits that have been issued under mistake of fact, and in violation of the ordinance, confer no rights on the permittee and may be

¹²⁹ *Id.*

¹³⁰ In *Congregation Etz Chaim v. City of Los Angeles*, 371 F.3d 1122 (9th Cir. 2005), the court estopped the City of Los Angeles from revoking the Congregation's permit to renovate. The Congregation submitted their plans to the City's Department of Building and Safety, and in doing so "clearly and explicitly described expansion of the existing home from 3,400 square feet to 8,150 square feet. The Building Department spent approximately three months reviewing the renovation plans . . . demand[ing] numerous changes to the plans, with which the Congregation complied." *Id.* at 1123–24. In ruling for the Congregation, the court conceded that the estoppel analysis would have been a difficult question, except for the fact that the City had full knowledge of the plans, and the size of the building was "clearly delineated in the building plans that were reviewed at length and approved by the City." *Id.* at 1125.

¹³¹ *Id.* at 1125.

¹³² See *In re Donofrio*, 377 A.2d 1017, 1018 (Pa. Commw. Ct. 1977).

revoked even though expenditures may have been made in reliance.¹³³ However, the flaw with this approach stems from the same source as the confusion courts face with vested rights and estoppel¹³⁴—though a permit issued under mistake of fact confers no right on the permittee, it does not and should not preclude a claim based on zoning estoppel, so long as a balancing of the equities reveals that it would be in the interest of fairness to estop the government from revoking the permit. Understandably, where an illegal permit is issued based on a negligent misrepresentation or omission of the permittee, the violation of the zoning laws are not by any fault or omission of the municipality, and the cause of the issuance of the permit falls squarely on the permittee. Nevertheless, courts should consider each case under the circumstances, and in balancing whether or not it would be equitable to estop the municipality from enforcing its laws, should consider the negligence of the applicant. While it may be highly unlikely that a court will find it equitable to permit the violation, there should not be such a bright line rule prohibiting them from doing so.

In balancing the equities, courts should look to the adequacy of the application and the depth and clarity of disclosure of all facts pertaining to the proposed development. On one extreme, if there were a finding of intentional misstatement of facts, courts should not entertain an estoppel claim for lack of good faith. On the other extreme, where there is clear and exhaustive disclosure, courts should be more inclined to sustain an estoppel claim. For cases that fall between, in which there is either a negligent misstatement or an omission of facts, courts should still balance the equities, though in doing so should consider that the applicant caused the illegal permit that may have not been issued in the first instance had there been adequate disclosure.

C. *Length of Time Between Granting and Subsequent Revocation or Attempt to Enforce the Zoning Ordinance*

The amount of time that lapsed between the issuance of the illegal permit and the attempt to enforce the zoning ordinance is a vital factor that courts should look to in evaluating an estoppel claim mostly because of the implications that time may have. Specifically, a long lapse of time between issuance and attempted enforcement might imply that the harm done to the public in allowing the illegality is minimal.¹³⁵

¹³³ See *Matheson v. DeKalb Cnty.*, 354 S.E.2d 121 (Ga. 1987); *City of DeSoto v. Centurion Homes, Inc.*, 573 P.2d 1081 (Kan. 1977); *State ex rel. Howard v. Vill. of Roseville*, 70 N.W.2d 404 (Minn. 1955).

¹³⁴ See *supra* Part II.

¹³⁵ See *infra* Part III.D.

Additionally, a very prompt enforcement by revoking¹³⁶ the permit may lead the court to inquire as to whether the permittee actually relied substantially on the permit or acted in good faith.¹³⁷ While it is true that no set period of time will preclude the court from estopping the municipality,¹³⁸ the length of time between issuance and revocation or enforcement should be a good indicator to courts when balancing the equities.

Courts that are faced with claims by municipalities seeking to enforce zoning ordinances that have been violated for long periods of time—without some showing of public harm or nuisance—should be very skeptical to do so. Generally speaking, municipalities that don't take action on zoning ordinance breaches are effectively acquiescing in the violation. Such acquiescence creates a strong argument that the municipality interpreted the zoning laws to allow the structure in question.¹³⁹ Also, aspect to balancing the equities is a review of the potential negative impact of allowing the zoning violation to continue.¹⁴⁰ Long periods of inaction are potentially a strong indication that the zoning violation has little impact on the public welfare. In *Town of Highland Park v. Marshall*, the court rejected the municipality's attempt to enforce a zoning ordinance that was violated for over eighteen years.¹⁴¹ There, the zoning ordinance did not clearly prohibit the building of an "accessory house" that could be lived in and rented.¹⁴²

¹³⁶ In seeking to enforce the ordinance, a municipality will first attempt to revoke the illegal permit. However, it is possible that the permittee completed the work for which the permit was issued (and subsequently is violating the zoning laws), and in that case the municipality will seek to enforce the ordinance and require the permittee to comply. Therefore for the purposes of this Note, a municipality's revocation of a permit or attempt to enforce an ordinance are the same.

¹³⁷ See *O'Laughlin v. City of Chicago*, 357 N.E.2d 472, 476 (Ill. 1976) (viewing the fact that the City promptly revoked the permit, recognized that the plaintiff, upon receiving the defective permit, raced to begin construction by hiring several building craftsman to begin construction; further, the court implies that the quick expenditures made may have not been in good faith, and the court was unwilling to "subscribe to a test that would rely solely upon whether the permittee could race successfully against the time period which would lapse before the municipality could correct its error.").

¹³⁸ See *Highland Park Cmty. Club v. Zoning Bd. of Adjustment*, 506 A.2d 887, 887 (Pa. 1986) (holding that passage of time will not create a vested right where a permit was issued in violation of the zoning ordinance.).

¹³⁹ See *Town of Highland Park v. Marshall*, 235 S.W.2d 658 (Tex. Civ. App. 1950). In *Highland Park*, the court recognized that the ordinance did not clearly prohibit the structure, but it was a question of interpretation of the ordinance. Therefore, the court interpreted the acquiescence of the town as an indication that they once interpreted the ordinance to allow such structures. "The presumption would obtain after such lapse of time that aforesaid extension was consistent with ordinance, not that there was a violation." *Id.* at 664. This same reasoning could be applied to all cases where the municipality is unclear with respect to the structure in question, and there has been acquiescence on the part of the municipality in allowing the structure to remain without question for several years.

¹⁴⁰ See *supra* Part I.B.3.

¹⁴¹ 235 S.W.2d 658, 663–64 (Tex. Civ. App. 1950).

¹⁴² *Id.* at 662–64.

In ruling for the owner, the court argued that “the completed structure stand[s] as mute evidence of acquiescence on part of Highland Park officials concerning alterations made 18 years before.”¹⁴³ Given the long lapse of time during which the municipality never sought to enforce the ordinance and the impreciseness of the ordinance’s language, the court extrapolated that the municipality’s acquiescence signified that it believed the ordinance permitted the use. The court found it inequitable to force the innocent purchaser to abide by the new interpretation of the statute based on this theory.¹⁴⁴ Courts faced with claims consisting of long lapses of time between issuance of the permit and attempt to enforce the ordinance should similarly interpret the time lag as acquiescence with the violation.

However, if a municipality promptly revokes an illegal permit, the opposite effect should be true, and courts should be dubious of claims by owners who seek to estop the municipality from revoking an illegal permit where the permit was revoked promptly. While it is possible for an owner to spend substantial sums of money in a short period of time in reliance of a permit, courts should ensure that these owners did so in good faith.¹⁴⁵

The factor of time lapse between permit issuance and revocation or attempt to enforce a statute might be a strong element of balancing the equities. Where a municipality seeks to enforce an ordinance years after the permit was issued, it is possible that compliance with the ordinance could be costly to the owner, and the fact that the zoning ordinance has not been challenged for years implies that there is little harm in allowing the violation to continue. Courts should consider these arguments when attempting to reach the equitable outcome when faced within zoning estoppel claims.

D. *Potential Damage to the Public if the Municipality is Estopped from Revoking the Permit*

In discussing the doctrine of zoning estoppel, it is easy to overlook the effect of potential public harm, or lack thereof. Though there is no precise definition of public harm, it is clear that violating a zoning

¹⁴³ *Id.* at 664.

¹⁴⁴ *Id.*

¹⁴⁵ In both *Space Station 2001 v. Moses*, 455 N.E.2d 266 (Ill. App. Ct. 1983), and *O’Laughlin v. City of Chicago*, 357 N.E.2d 472 (Ill. 1976), the court recognized the prompt revocation of the permit combined with the significant expenditures made in the short period that the permit was in effect, and questioned the good faith of the owners in finding that they likely knew the permits were illegal and attempted to complete construction as quick as possible before revocation. Therefore, in estoppel claims with a prompt revocation, courts should be sure to recognize the possibility that the owner knew that the permit was illegal and because of this made the expenditures.

ordinance, in and of itself, will not be sufficient to establish a public harm.¹⁴⁶ Courts have held that public harm refers to the harm done to local residents and neighbors, and can even be harm such as a “negative aesthetic impact” of the structure to the surrounding area.¹⁴⁷ From a practical standpoint though, a zoning estoppel claim based on reliance on an illegal permit effectively urges the court to prevent the municipality from enforcing the laws and regulations that it is tasked with enforcing. Therefore, a zoning estoppel claim is not simply an inquiry as to whether there was good faith reliance on a governmental act, but also a balance of the government’s duty to regulate land development for the public interest with the damage to the public if it is estopped from doing so.¹⁴⁸ Courts have been reluctant to hold government entities estopped from enforcing their laws because of the fear that estopping these entities on the basis of negligent acts by individual government agents will impair their function of enforcing regulations.¹⁴⁹ Public entities are not absolutely immune from estoppel claims, however, and where benefit of estopping the government outweighs the public harm that may occur by disabling the government from enforcing the zoning regulations, a government entity should be estopped.¹⁵⁰

While any successful estoppel claim requires the existence of substantial reliance, in good faith, on an act or omission of another party,¹⁵¹ one factor that may be determinative will be the measure of public harm that might occur as a result of the application of estoppel. If the elements of an estoppel claim are present, and the court determines that there will be little public harm resulting from estopping the municipality, the court should be more inclined to apply estoppel. This dynamic can be seen in *Kovacevic v. City of Chicago*, where the court

¹⁴⁶ See *Baiza v. City of College Park*, 994 A.2d 495, 498–507 (Md. 2010) (discussing public harm with respect to an estoppel claim). In *Baiza*, the court does not sustain an estoppel claim, but bases its reasoning on a statute passed by the municipality which, in the court’s eyes, is a statutory remedy mirroring the elements of an estoppel claim. The statute has four prongs: 1) no fraud or misrepresentation in obtaining the permit; 2) at the time of the permits issuance, no appeal has been filed regarding its issuance before any body; 3) the applicant has acted in good faith, expending funds or incurring obligations in reliance on the permit; and 4) the validation will not be against public interest. *Id.* at 498. Most notably, the statute requires that the “public interest” not be harmed. In its analysis, the court rejected the City’s argument that the mere fact that the owner violated the legislatively imposed zoning ordinance is sufficient to violate public interest prong.

¹⁴⁷ *Rosewood Home Builders, Inc. v. Zoning Bd. of Appeals*, 794 N.Y.S.2d 152, 154 (App. Div. 2005).

¹⁴⁸ See *Hickey v. Ill. Cent. R.R. Co.*, 220 N.E.2d 415 (Ill. 1966) (highlighting the balance courts face between protecting governments from estoppel claims that may impair their ability to enforce laws and the ability of the individual to have a remedy against the government where they have been harmed as a result of reliance on a government act).

¹⁴⁹ *Id.* at 425–26.

¹⁵⁰ See *Kovacevic v. City of Chicago*, 365 N.E.2d 104 (Ill. App. Ct. 1977).

¹⁵¹ See *supra* Part I.

estopped the City from exercising its power to deny a building permit based on an unrecorded covenant that limited the use of the property as a parking zone.¹⁵² In *Kovacevic*, the previous owner of the property intended to use it as a parking structure for the benefit of the adjacent property, and a permit was issued allowing for development of the parking structure.¹⁵³ Additionally, the properties in question were the subject of a previous suit in which the parking zone covenant was validated by judgment. Nevertheless, the city failed to notify the Recorder of Deeds.¹⁵⁴ The owner later sold the property to the plaintiffs, and at the time of purchase there was no covenant filed or recorded, no publicly available sources that would have informed a subsequent purchaser of the parking restriction on the property, and no parking lot was ever established.¹⁵⁵ In justifying the decision to estop the municipality, the court recognized the existence of the elements of estoppel, and emphasized the importance of potential harm to the public when considering estoppel against a municipality.¹⁵⁶ “Although it is clear a private citizen would be estopped if he acted as the City has done in this case, an examination must be made as to what public interest may be jeopardized or lost by applying the doctrine of equitable estoppel against the City.”¹⁵⁷ In its examination, the court was persuaded by the fact that estopping the City would result in an otherwise vacant land being put to use.¹⁵⁸ The owners of the adjacent lot never intended to erect a parking structure, so in effect estoppel not only didn't harm the public, it served to create a new property, which is beneficial.¹⁵⁹ In sum, *Kovacevic* is one of a number of examples that display the importance of an inquiry into the effect on the public's interest,¹⁶⁰ and how courts are more inclined to apply estoppel when there is a minimal or non-existent public harm.

Courts have also consistently refused to apply estoppel where the public harm would be great.¹⁶¹ In *Beverly Bank v. Cook County*, an

¹⁵² 365 N.E.2d 104, 105–06 (Ill. App. Ct. 1977).

¹⁵³ *Id.* at 106.

¹⁵⁴ *Id.* at 108.

¹⁵⁵ *Id.* at 106.

¹⁵⁶ *Id.* at 108.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ See *Hill v. Bd. of Adjustment*, 299 A.2d 737 (N.J. Super. Ct. App. Div. 1972) (holding that a structure's four-foot distance from the property's border, which violated the zoning requirement of seven feet, is a de minimis violation and causes no harm to the public or adjacent property owners. It was notable that there were a significant number of homes in the Borough that had the same violation.); *Jayne Estates v. Raynor*, 239 N.E.2d 713 (N.Y. 1968) (ordering issuance of a variance—effectively estopping the municipality from rejecting the variance request—where the intended use was consistent with existing use in the area, and therefore no public harm done).

¹⁶¹ See *Palermo Land Co. v. Planning Comm'n*, 561 So. 2d 482 (La. 1990) (refusing to estop a

invalid permit granted authorization to conduct surface mining operations to develop a sanitary landfill on land that was zoned for single-family residences.¹⁶² The permit was revoked, and plaintiffs brought suit to estop the County from enforcing the zoning restrictions.¹⁶³ The court refused to estop the County largely because of the public harm that would occur if it did.¹⁶⁴ Specifically, the sanitary landfill “clearly affects environmental standards and thus the health, safety and welfare of the public.”¹⁶⁵ Although the plaintiff spent \$130,000 in reliance on the mining permit, the court refused to estop the County from enforcing its regulations when there was such a high cost to the public.¹⁶⁶

While not technically an element of an estoppel claim, it is evident that the public interest is an often-determinative factor that should be thoroughly considered when attempting to estop a municipality from enforcing its zoning regulations. Since zoning estoppel is a claim in equity, courts have the discretion to apply it. When estopping the municipality will result in minimal public harm, courts should weigh that factor in favor of the developer.¹⁶⁷

IV. ADOPTING THE FACTUAL CATEGORIES INTO A TEST: BENEFITS AND IMPLICATIONS

The existence of any or all of the factual categories discussed above could have a significant and potentially outcome-altering affect on the zoning estoppel analysis. Going forward, courts should thoroughly analyze the facts through the lens of all four factual categories. The adoption of this new legal test does not ignore or replace the core elements of a zoning estoppel claim—good faith, on an act or omission by the municipality, and substantial reliance.¹⁶⁸ Rather, the elements of an estoppel claim should be viewed as a preliminary analysis that courts should conduct in order to establish if balancing the equities should apply at all. If all of the elements are present, then courts should, in balancing the equities, apply the four factual category test to the facts.

municipality’s decision to rezone an area near a church and school to prohibit a gas station even though the municipality represented to the developer that it would not do so, since the potential public harm in having a gas station in close proximity to a school and church is too great).

¹⁶² 510 N.E.2d 941, 942–43 (Ill. App. Ct. 1987).

¹⁶³ *Id.* at 943.

¹⁶⁴ *Id.* at 945.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 943.

¹⁶⁷ See *supra* text accompanying note 15.

¹⁶⁸ See *supra* Part I.B.

Adopting this test in the zoning estoppel analysis will be mutually beneficial to both potential claimants and the courts. Courts will be less likely to allow the existence of one circumstance to be dispositive without conducting a thorough analysis of all of the facts. This more comprehensive analysis is consonant with a “balancing the equities” analysis that, by definition, looks to the overall fairness to the developer.¹⁶⁹ Additionally, applying such a structured test will simplify the doctrine and result in more consistent case law.¹⁷⁰

The application of such a clearly enumerated test might appear to have potentially negative implications on the doctrine. One argument might be that limiting the analysis to a four-factor test may be too restrictive. However, this test should not be viewed as an exhaustive analysis; unique facts may exist that fall beyond the purview of this analysis.¹⁷¹ The test should be viewed as a guideline that would address most zoning estoppel claims. As an equity analysis, courts should not be restricted by a hard and fast rule, but can benefit greatly by consistently looking to this test as a guideline.

Another potential concern is that creating a legal test for the zoning estoppel analysis might encourage the courts to estop municipalities more frequently than they have in the past. But it is important to note that this test is not changing the zoning estoppel analysis—it is merely focusing it and encouraging courts to more thoroughly examine the overall claim. Courts will adhere to the same standard of review and will apply the law as they have in the past. This four-factor test will simply guide courts to consistently reach the more equitable outcome.

CONCLUSION

Since zoning estoppel is both a state law claim and one that is in equity, it is virtually impossible for courts to apply it consistently. As a state law claim, trial courts are not bound by decisions of other state’s trial courts. As a claim in equity, zoning estoppel is by nature a fact-intensive inquiry that allows for judicial discretion. Nevertheless, the principles behind zoning estoppel remain the same, and the inquiry turns on fairness. Many courts fail to even reach the fairness inquiry because of the conflation of the doctrine of estoppel with that of vested

¹⁶⁹ See *supra* text accompanying note 36.

¹⁷⁰ See *supra* text accompanying note 19.

¹⁷¹ For example, suppose a municipal officer gave continued verbal assurances to the developer that the permit was valid. This fact alone may not be examined through any of the four factors, yet it can be very crucial element to arguing that it would be inequitable to revoke the permit. A similar situation to this was presented in *Crow v. Board of Adjustment*, 288 N.W. 145 (Iowa 1939). A court should not ignore this fact when balancing the equities.

rights. While complete consistency can never be reached, courts would be well-advised to consider the four proposed factual categories in order to ensure that, at the very least, plaintiffs who suffer from relying on invalid permits granted by municipalities are given the proper review. The application of this approach can minimize confusion over the estoppel doctrine, and a more consistent balancing of the equities can occur.