Municipal Rezonings in Light of the Vested Rights Doctrine

By Daniel G. Vogel and Paul V. Rost

As suburban growth drives development and population farther from the traditional urban core, new municipalities are incorporating, growth areas are being annexed, and both new and older communities must decide whether the existing zoning plans and development ordinances are appropriate for future development. Whether due to incorporation, annexation or simply a change in zoning or development policies, local governments that attempt to change development plans in unzoned or previously zoned areas are confronted with the inevitable possibility that current or neighboring property owners may object to the change. Property values for any rezoned properties, and those nearby, are likely to be affected, whether upward or downward. This article discusses the extent to which municipalities may lawfully change existing zoning regulations and the circumstances in which such changes may be construed by the existence of vested rights in existing zoning or uses.

General Zoning Principles

Zoning changes in Missouri are considered legislative enactments.[1] As such, a zoning ordinance is presumed lawful and will not be held to be unreasonable if the issue is "fairly debatable."[2] As a general rule, property owners may rely on existing zoning remaining in place unless a change is required for the public good.[3] However, because of the required deference to legislative enactments, a municipality need not necessarily show that any conditions have changed in order to justify a change in zoning classification.[4]

Where a change in zoning is otherwise justified by the public good, no vested right exists merely because the property was purchased in reliance upon the existing zoning or development regulations.[5] And while a municipality that annexes land takes that territory subject to its existing zoning, it may thereafter change the zoning, to conform to its own zoning plan.[6] Accordingly, municipalities are generally free to change zoning districts or regulations to meet changing circumstances or development patterns, or simply to conform to a legitimate change in planning principles as reflected in revisions to the official zoning plan.

Changes in zoning that reduce the permitted intensity of a parcel, such as a change from commercial to residential zoning, often will generate objections that the value of the property has been reduced or "taken" by the legislative enactment. Nevertheless, a property owner has no right to a change in zoning merely because, without such a change, the owner will be deprived of a substantially more profitable use.[7] Similarly, no

1. *J.R. Green Properties v. Bridgeton*, 825 S.W.2d 684, 686 (Mo.Ct.App. 1992)("zoning, rezoning, and refusals to rezone are legislative acts."); *Carson v. Oxenhandler*, 334 S.W.2d 394 (Mo. 1960).

2. *Gerchen v. City of Ladue*, 784 S.W.2d 232, 235 (Mo.Ct.App. 1989); *Dallen v. City of Kansas City*, 822 S.W.2d 429, 433 (Mo.Ct.App. 1991)("zoning ordinance carries with it the presumption of validity.").

3. *Murrell v. Wolff*, 408 S.W.2d 842, 852 (Mo. 1966); *cf. State ex rel. Barber & Sons v. Jackson County*, 869 S.W.2d 113, 120 (Mo.Ct.App. 1993)(neighboring land owners who have relied on zoning have interest in the perpetuation of the zoning unless a change is compelled by the public good).

4. *Clarkson Valley Estates v. Clarkson Valley*, 630 S.W.2d 151, 153 (Mo.Ct.App. 1982).

5. *National Trust v. Village of Westmont* 636 N.E.2d 1157, 1161 (Ill.Ct.App. 1994)("As a general rule there is no vested right in the continuation of a zoning ordinance.").

6. *See, Dahman v. City of Ballwin*, 483 S.W.2d 605, 611 (Mo.Ct.App. 1972) ("the annexing city is not ... forced to abide by the course of conduct prescribed by a sister branch of government."). *But see State ex rel. Dillon v. Vogel*, 945 S.W.2d 625 (Mo.Ct.App. 1997)(prohibiting denial of liquor license where sale of liquor occurred prior to annexation).

7. *Elam v. City of St. Ann*, 784 S.W.2d 330, 338 (Mo.Ct.App. 1990)("there is no absolute right to have property zoned for its most valuable commercial use").

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right exists to prevent enforcement of a new zoning ordinance merely because the new zoning will reduce the profitability of the property.[8] This may be true even where the market value of the property is substantially reduced by a rezoning of the property.[9] A change that denies all economically viable use, of course, will ordinarily constitute a taking for which compensation is required.[10]

To lessen the personal hardship that might occur from changes in zoning that do not amount to unconstitutional taking, several states have enacted laws that specifically establish the vesting of rights in existing zoning or uses.[11] Because no such statute exists in Missouri, municipalities and property owners are subject to a myriad of conflicting common law doctrines that establish when a property owner may acquire an enforceable property right to continue (or commence) a use authorized by an existing zoning ordinance. These doctrines are summarized below in three general categories often referred to as "vested" rights: (1) rights derived from a preexisting lawful use, (2) rights derived from reliance on or estoppel from some act of the governmental entity, and (3) the right to utilize property free from unreasonable or discriminatory changes in zoning.

Preexisting Nonconforming Uses

The most common circumstance in which a municipality may be barred from enforcing new zoning regulations is where the enforcement would prohibit the continuation of a lawful use that existed prior to enactment of the new zoning. A preexisting nonconforming use is a use of land[12] which lawfully existed prior to the enactment of a zoning ordinance and thereby acquires the status of a vested property right.[13] Preexisting nonconforming uses are protected to avoid the injustice of terminating a use that had been lawful before enactment of a zoning provision.[14] Thus, under Missouri common law a municipality is prohibited from terminating a vested preexisting use[15] although the property owner bears the burden of proving that prior use.[16] Applying this basic rule, the court in *Browning-Ferris Indus. v. Maryland Heights*,[17] held that a municipality violated a property owner's vested right by attempting to enforce a new zoning ordinance that would have prohibited continued operation of a landfill that existed prior to the enactment of the ordinance.

The actual commencement of a use does not establish a vested right if it is commenced in violation of the zoning ordinance or on the authority of an unlawfully issued permit.[18] A preexisting use is determined only by the *actual* use lawfully established rather than any proposed or contemplated use.[19] Thus, even where a building is built before a zoning ordinance takes effect, no vested

8. *Hoffman v. Kinealy*, 389 S.W.2d 745, 748 (Mo. *en banc* 1965)(even though ordinance restricting future use may "inflict economic loss... 'every valid exercise of police power is apt to affect the property of someone adversely.'"); *Geneva Investment Co. v. St. Louis*, 87 F.2d 83 (8th Cir. 1937)(zoning ordinance not invalid despite reduction of value of property from $72,000 to $15,000); *Elias v. Town of Brookhaven*, 783 F. Supp. 758 (E.D.N.Y. 1992) (reduction of property value by rezoning not unlawful); McQuillan Mun. Corp. § 25.44 ("diminution in value does not in itself render zoning measure unconstitutional, invalid or confiscating.").

9. *Elias v. Town of Brookhaven*, 783 F. Supp. 758 (E.D.N.Y. 1992).

10. *Lucas v. South Carolina Coastal Council*, 120 L.E.2d 798, 815 (1992)(regulation that denies "*all* economically beneficial uses" constitutes a taking).

11. *See, e.g.*, Wash.Rev.Code § 19.27.095 (rights vested upon filing of fully completed building permit application); Colo.Rev.Stat. § 24-68-103 (vested right attached upon approval of site plan); *See also, J. Delaney and E. Vaias, Recognizing Vested Development Rights as Protected Property in Fifth Amendment Due Process and Taking Claims*, 49 J.Urb. and Contemp. Law 27 (1996).

12. Despite the general rule that a preexisting use refers to a use of land, one recent case has resulted in an apparent expansion of the preexisting use doctrine by requiring a city to renew a liquor license in a newly annexed area. In *State ex rel. Dillon v. Vogel*, 945 S.W.2d 625 (Mo.Ct.App. 1997), a gas station which had lawfully sold beer pursuant to a liquor license issued by St. Louis County was annexed by the City of Sunset Hills, and was thereafter denied a new liquor license. *Id.* The court held this denial unlawful on the basis that sale of liquor prior to annexation constituted a "preexisting nonconforming use" preventing denial of a city license. *Id.* at 626-27. In implicitly interpreting sale of a specific product as the preexisting "use," rather than the sale of goods generally, the court opens the possibility that cities could also be prevented from regulating in the public interest as to where or how certain goods can be sold (*e.g.*, liquor, cigarettes, obscenity,) because to do so would violate the "vested rights" of retailers that had been selling the goods in locations or by methods previously permitted. The court's decision contradicts a long line of authority treating licensing of businesses as a distinct police power apart from zoning. For example, in *St. Charles v. Hackman*, 34 S.W. 878 (Mo. 1986), the court held that a particular occupation could be wholly prohibited even during the pendency of a license period without depriving any "vested" rights.

13. *In re Coleman Highlands*, 777 S.W.2d 621, 624 (Mo.Ct.App. 1989); *Hoffman v. Kinealy*, 389 S.W.2d 745, 753 (Mo. *en banc* 1965)(lawful non-conforming use traditionally a vested right).

14. *Acton v. Jackson County*, 854 S.W.2d 447, 448 (Mo.Ct.App. 1993).

15. *See, e.g., State ex rel. Great Lakes Pipe v. Hendrickson*, 393 S.W.2d 481, 484 (Mo. 1965).

16. *Independent Stave v. Missouri Hwy. & Transp. Comm'n.*, 702 S.W.2d 931, 934 (Mo.Ct.App. 1985).

17. 747 F. Supp. 1340, 1348 (E.D.Mo. 1990).

18. *State ex rel. Green's Bottom Sportsmen, Inc. v. St. Charles County Board of Adjustment*, 553 S.W.2d 721, 725 (Mo.Ct.App. 1977); *Hoffman v. Kinealy*, 389 S.W.2d 745, 750 (Mo. *en banc* 1965)("pre-existing lawful nonconforming use" is a vested right).

19. *In re Coleman Highlands*, 777 S.W.2d at 624 ("mere intention or plan to use particular property or buildings for a certain use does not establish a pre-existing non-conforming use.").

right exists prior to establishment of the actual use in the building.[20] However, numerous cases have expanded or blurred this rule in holding that substantial construction towards a use qualifies as a preexisting use protected as a vested right.[21]

For example, in *State ex rel. Great Lakes Pipe v. Hendrickson*,[22] the court held that completion of a portion of a pumping station structure and expenditure of over $64,000 in the project created a preexisting vested use barring a city's application of a new zoning ordinance limiting the property only to residential uses. The court also noted that prior to commencement of construction and adoption of the zoning ordinance, the city attorney had informed the owner that no zoning ordinance had been enacted and none was contemplated. Cases such as *Great Lakes*, involving substantial construction towards a then-lawful use, are better explained by the doctrine of estoppel discussed below, rather than the strained application of the preexisting use doctrine.

Even for courts inclined to find that partial construction constitutes a preexisting nonconforming use, "mere preliminary work which is not of a substantial nature" will not suffice.[23] Nor will issuance of a permit alone create a vested right in a permitted use.[24] One who has a vested right in a lawful preexisting use will nonetheless lose it if the use is abandoned, expanded, or altered to a greater or more intense use.[25] A mere change of ownership does not constitute an abandonment of the nonconforming use.[26] But if a nonconforming use has been expanded, the use is changed and the preexisting use is considered discontinued.[27] And, while many municipal ordinances allow preexisting nonconforming uses to be changed to a use allowed under a less intense zoning classification or a more nearly conforming use, a municipality may lawfully prohibit *any change* in the nonconforming use that does not fully conform to the new zoning.[28]

Estoppel as the Basis for Vested Rights

A second circumstance in which a vested right may exist stems from the equitable estoppel doctrine. Although a municipality generally is not subject to claims of estoppel based on the conduct of its legislative bodies or the conduct of its officers,[29] a narrow line of cases has held that a municipality may be estopped from enforcing an otherwise lawful zoning change where there has been reliance on specific contrary acts of the municipality.

A vested right based on estoppel may arise where the "commitment of substantial resources before a zoning change renders it inequitable to deny the non-conforming use status."[30] Unlike the preexisting use doctrine, estoppel is applied only in "exceptional circumstances" and "with great caution."[31]

Although cases to the contrary have been noted above,[32] the preexisting use doctrine is technically not applicable in the situations where mere construction or expenditures have occurred because the contemplated use has not actually begun. Whether the construction or expenditures rise to the level of estoppel is apparently decided on a case by case basis and no bright line test exists.[33]

Based on a distillation of Missouri cases, however, estoppel may prevent termination of a use authorized by an existing zoning where the landowner proves: (1) substantial expenditure of resources (substantial work or substantial expenses),[34] (2) reliance on a lawfully issued build-

20. *Id.* (citing *Camp v. City of Evanston*, 3 Ill.App.3d 189 (1971)(where residential building existed but separate living quarters had not been occupied)).

21. *State ex rel. Great Lakes Pipe v. Hendrickson*, 393 S.W.2d 481, 484 (Mo. 1965).

22. 393 S.W.2d 481, 484 (Mo. 1965).

23. *Id.*

24. *In re Coleman Highlands*, 777 S.W.2d at 624 ("Issuance of a building permit is not sufficient to create a vested right for continuance of a non-conforming use.") *Ford Leasing Development v. City of Ellisville*, 718 S.W.2d 228, 232 (Mo.Ct.App. 1986)("The mere issuance of a zoning or building permit gives no vested rights to the permittee, nor does he acquire a property right in the permit".... (and only acquires vested right if he acts on the faith of a zoning or building permit or certificate)); *Geneva Inv. Co. v. St. Louis*, 87 F.2d 83 (8th Cir. 1937)(upholding revocation of permits); *see* McQuillan, § 25.156.

25. *Law v. City of Maryville*, 933 S.W.2d 873, 876 (Mo.Ct.App. 1996)(protection does not extend when use is changed to less constrictive or more conforming use).

26. *Walker v. City of Kansas City*, 697 F. Supp. 1088, 1090 (W.D.Mo. 1988), aff'd in part 911 F.2d 80 (8th Cir. 1990).

27. *Acton v. Jackson County*, 854 S.W.2d 447, 448 (Mo.Ct.App. 1993)(expansion of massage parlor to illegal activities destroyed nonconforming use).

28. *Law v. City of Maryville*, 933 S.W.2d at 876-77 (citing *Huff v. Board of Adjustment of the City of Independence*, 695 S.W.2d 166 (Mo.Ct.App. 1985)).

29. *State v. City of Woodson Terrace*, 599 S.W.2d 529, 531 (Mo.Ct.App. 1980); *State ex rel. Green's Bottom Sportsmen v. St. Charles County Board of Adjustment*, 553 S.W.2d 721, 726 (Mo.Ct.App. 1977); *State ex rel. Walmar Investment Co. v. Mueller*, 512 S.W.2d 180, 184 (Mo.Ct.App. 1974).

30. *In re Coleman Highlands*, 777 S.W.2d at 625.

31. *Independent Stave v. Missouri Hwy. & Transp. Comm'n.*, 702 S.W.2d 931, 935 (Mo.Ct.App. 1985)(setting forth elements of estoppel).

32. *State ex rel. Great Lakes Pipe v. Hendrickson*, 393 S.W.2d 481, 484 (Mo. 1965)("construction at the time of enactment of the ordinance is protected as a nonconforming use, but mere preliminary work which is not of a substantial nature does not constitute a nonconforming use.").

33. *See In re Coleman Highlands*, 777 S.W.2d at 624-25.

34. *In re Coleman Highlands*, 777 S.W.2d at 625 (citing *State ex rel. Great Lakes Pipe v. Hendrickson*, 393 S.W.2d 481 (Mo. 1965) and *Independent Stave Co. v. Mo. Hwy. & Transp. Comm'n.*, 702 S.W.2d 931, 934 (Mo.Ct.App. 1985)).

ing (or other) permit,[35] and (3) good faith reliance.[36] While reliance on a permit may be necessary, mere reliance is not sufficient — it must be coupled with the other stated elements.[37] Accordingly, building and other development permits may be revoked if the other elements creating a vested right have not been met.[38]

The leading estoppel case in Missouri is *Murrell v. Wolff*.[39] In *Murrell*, the developer sought to invalidate a zoning ordinance prohibiting multiple dwellings in the "C" district passed after the developer had received its building permit.[40] The developer pleaded estoppel, contending it had a vested right to develop the property and challenged the ordinance as unreasonable, arbitrary and confiscatory.[41] The court, however, expressly declined to reach the claim of "vested rights" (presumably based on preexisting use) or the separate allegation that the ordinance was arbitrary and unreasonable and decided the case solely on the basis of estoppel. The city could not revoke the building permit for apartments after the developer had expended $71,000 in construction costs including grading and completion of the foundation.[42] Note, however, the court also found that there was no other practical use for the property, which alone could have justified the holding.[43]

While courts have recognized a vested right based on equitable estoppel where substantial construction has occurred, other types of substantial expenditures prior to enactment of a zoning ordinance have often failed to create a vested right. For example, in *McDowell v. Lafayette County Comm'n.*,[44] a property owner acquired land and planned for the commencement of a landfill on the property. After expending approximately $200,000 for acquisition of the land, planning, equipment leasing, applying for permits, and dumping several loads of material in a "ceremonial dumping," zoning regulations were established that prohibited use of the property for a landfill. The owner sought declaration of a vested right to use the property as planned. Noting that a "contest" had occurred between the owner and the various citizens opposed to the project, and admitting that the equities appeared to rest with the property owner, the court nevertheless rejected a claim of vested right.[45] Citing prior case law, the court held that:

> A vested right to a nonconforming use cannot exist unless the nonconforming use is first established. It has been held that purchase, planning and even securing a permit do not establish a lawful nonconforming use.[46]

The court thus expressly rejected the property owner's attempt to create a vested right from even substantial expenditures that did not amount to actual use of the property as prohibited by the new ordinance. The loss of the substantial expenditures by the property owner was held to be neither confiscatory nor unreasonable.[47]

Similarly, in *Geneva Inv. Co. v. St. Louis*,[48] a gas station obtained building permits for previously unzoned land. The City of St. Louis thereafter enacted a zoning ordinance restricting the property to residential uses and revoked permits before substantial work began. The court held that a reduction in value of the property from $72,000 to $15,000 was not a denial of property rights. Applying the general rule, the court held that a zoning must be upheld as long as the zoning change was based on the public good.[49]

The platting and recording of a subdivision also is insufficient to create a vested right to exempt the property from changes in the zoning that would require changes in the lot size of the subdivision property.[50] Likewise, the execution of a con-

35. *See Murrell v. Wolff*, 408 S.W.2d 842, 851 (Mo. 1966) mot. For reh'g or transfer denied, (estoppel may occur such as "reliance on an honestly-obtained permit, coupled with substantial work or expenditures or irrevocable commitments"); *State ex rel. Green's Bottom Sportsmen, Inc. v. St. Charles County Board of Adjustment*, 553 S.W.2d 721, 726 (Mo.Ct.App. 1977)("It is a well established principle in Missouri that a governmental unit is not estopped by illegal or unauthorized acts of its officers ... it is recognized that a building permit for construction issued but unauthorized under the ordinance is void and a city is not estopped because its employee issued the license or permit.").

36. *Ford Leasing Development v. City of Ellisville*, 718 S.W.2d 228, 232 (Mo.Ct.App.1986)(vested right requires reliance on "faith" of permit). *McDowell v. Lafayette County Commission*, 802 S.W.2d at 162, 164 (Mo.Ct.App. 1990); ("contest" to obtain the permit and "ceremonial dumping"); *In re Coleman Highlands*, 777 S.W.2d at 624 (property owner who "in good faith" makes substantial investment in construction is exempt from subsequent zoning.); McQuillan, § 25.157 (attempting to establish use with knowledge of prospective change is not "good faith.").

37. *See, Murrell v. Wolff*, 408 S.W.2d 842, 850 (Mo. 1966); *In re Coleman Highlands*, 777 S.W.2d 621, 624 (Mo.Ct.App. 1989)("Issuance of a building permit is not sufficient to create a vested right for a continuance of a non-conforming use.").

38. *Geneva Inv. Co. v. St. Louis*, 87 F.2d 83 (8th Cir. 1937), *cert. den.* 301 U.S. 692 (1937)(no vested right in building permit).

39. 408 S.W.2d 842 (Mo. 1966).

40. *Id.* at 844.

41. *Id.* at 850.

42. *Id.* at 851.

43. *Id.* at 852.

44. 802 S.W.2d 162, 164 (Mo.Ct.App. 1990).

45. *Id.*

46. *Id.* (rejecting appellant's attempt to merge "the purchase, planning and intent into the concept of a lawful nonconforming use").

47. *Id.* at 165.

48. 87 F.2d 83 (8th Cir. 1937), *cert. den.* 301 U.S. 692 (1937).

49. *Id.* at 89.

50. Missouri A.G. Op. No. 35 (May 23, 1978)(John Ashcroft)(substantial construction required to create nonconforming use).

struction contract and commencement of construction is not sufficient to vest the contemplated use.[51] Where the attempted zoning change is defectively enacted, however, less than substantial construction is sufficient to estop a city from denying permits necessary to construct the project.[52]

Arbitrary Action Denying Use of Property

A third category of cases involve attempts by a municipality to selectively rezone a single piece of property in a discriminatory manner. The underlying basis in the decision is the principle that zoning may not be applied arbitrarily or unreasonably. Zoning that is enacted arbitrarily to one parcel (sometimes referred to as "spot zoning") is unlawful.[53]

Rather than another doctrine creating a "vested right," these cases are likely no more than application of the principle that a zoning ordinance arbitrary or discriminatorily applied is unlawful. This is evident in *May Department Stores v. St. Louis County*,[54] where the developer had obtained rezoning to C-8 Planned Commercial District to allow the development of a proposed retail/office space. Between the date of purchase and the issuance of the building permit, May incurred expenditures for engineering and architectural drawings, grading and demolition, and road and sewer construction, obtained an approved subdivision plat, constructed a "good part" of the building, and had incurred over $5.8 million in costs, before the County repealed the C-8 ordinance.[55] The court held May had a right to rely on the zoning not being arbitrarily changed, and the rezoning here was enacted "solely to prevent the operation of a Venture store on the property and not because the Council made a determination that the public good required rezoning of the property...."[56] Accordingly, the "retroactive application of a rezoning amendment aimed solely at an individual site already in the process of being developed has been consistently denounced as discriminatory, arbitrary, unreasonable and confiscatory."[57]

Even without reference to the discriminatory application, the property owner had already begun substantial construction and therefore had likely acquired a vested right under the estoppel and preexisting use doctrines.

The "Police Power" Exception to Vested Rights Doctrine

Even where a vested right is found to exist, such right, as with all property rights, remains subject to the municipality's valid exercise of its police powers.[58] At its heart the police power exception permits abrogation of even established vested uses where designed to protect public safety or prevent a nuisance or noxious use.[59] In *Bellerive Investment Co. v. Kansas City*,[60] a city enacted an ordinance prohibiting parking more than three vehicles inside any structure used for living and sleeping. The appellant owned an apartment structure that had long been used to park more than three vehicles. The court held that the ordinance could be enforced without regard to a claim of vested right because the law was a legitimate exercise of the city's police powers.

Several Missouri cases have permitted abrogation of vested uses on "police power" grounds even where the use is not "noxious" or directly related to safety or public health concerns. In *City of Blue Springs v. Gregory*,[61] the court rejected a claimed vested right in a nonconforming use where a zoning law prohibited parking of commercial vehicles over six tons in a residentially zoned district even though the use had occurred for 14 years prior to the enactment of the zoning ordinance. Thus, even in where the police power is exercised through amendment of a zoning ordinance, a vested right may nevertheless be abrogated where the law "fairly relates" to the "public health, safety, peace, comfort and general welfare" of the inhabitants of the city.

Similarly, in *University City v. Diveley Auto Body Co.*,[62] the court upheld an ordinance which imposed more restrictive sign regulations and required removal of all nonconforming signs after a three year period. The court rejected the argument that the ordinance was confiscatory, noting that the zoning change did not prohibit all signage

51. *Indep. Stave v. Missouri Hwy. & Transp. Comm'n.*, 702 S.W.2d 931, 934 (Mo.Ct.App. 1985).

52. *Casey's General Store v. City of Louisiana*, 734 S.W.2d 890, 896 (Mo.Ct.App. 1987)(although noting that the invalidity of the zoning did not necessarily preclude the city from ever denying a building permit, the court held that the city was estopped from denying a permit because the "city officials were consulted early and were reassuring that nothing would prevent the operation of the store."). Because no valid zoning existed authorizing denial of a building permit, this case has limited application.

53. McQUILLAN MUN. CORP., § 25.83.

54. 607 S.W.2d 857, 861-62 (Mo.Ct.App. 1980).

55. *Id.* at 864-69.

56. *Id.* at 869.

57. *Id.*

58. *City of Blue Springs v. Gregory*, 764 S.W.2d 101, 103 (Mo.Ct.App. 1988).

59. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886 (1992)(citing "police power" as lawful basis for regulating for public good even where diminution of property value results); and *see, e.g. Mugler v. Kansas*, 123 U.S. 623 (1887)(holding that use of building as a brewery could lawfully be proscribed, where other uses remained lawful) *and*, McQUILLAN MUN. CORP., § 25.157.

60. 13 S.W.2d 8, 15 (Mo. 1929).

61. 764 S.W.2d 101, 103 (Mo.Ct.App. 1988).

62. 17 S.W.2d 107 (Mo. *en banc* 1967).

on the subject property — it simply allowed less and different signage. Thus, unlike the unlawful "amortization" attempt in *Hoffman v. Kinealy*,[63] the court characterized this amortization as mere "regulation" of the use and therefore not subject to the preexisting use doctrine.

The police power exception, if applied strictly, would eradicate the vested rights doctrine. Zoning laws generally stem from the police power and are by law required to promote the "health, safety, morals or the general welfare of the community."[64] Thus, applied strictly, any law changing the existing zoning could be a "police power" regulation that "fairly relates" to the public health or welfare sufficient to abrogate rights in existing uses.

Accordingly, numerous other cases have refused to allow a typical zoning regulation to be applied to abrogate a preexisting use. In *State ex rel. Kugler v. Maryland Heights*,[65] the court held that a change in off-street parking spaces requirement could not be applied to deny business licenses to new businesses seeking to occupy a preexisting commercial property that did not have the sufficient number of spaces.

No Missouri decisions have clearly articulated precisely what limits exist to the power of the municipality to abrogate vested rights under its "police power." It would appear, however, that courts have balanced the importance of the vested right being abrogated with the public interest being served. For example, in *City of Blue Springs v. Gregory* and *University City v. Diveley, supra*, the regulations limited only the right to park commercial vehicles or the size or number of signs — fairly minor impacts on existing uses of the property. Whereas, in *Kugler, supra*, the complete deprivation of a commercial use was at issue, which would have required a much greater public need for the abrogation of the vested use. Conversely, in *Bellerive Investment Co., supra*, the public interest was arguably very strong in that the prohibition was directly related to safety, and therefore a fairly significant deprivation of use was permitted.

Conclusion

Where changes in zoning fail to accommodate projects that are substantially under construction or prohibit projects that were affirmatively encouraged by the city officials, the municipality risks legal challenge. Cities must generally make exceptions to allow preexisting uses to continue. Even substantial non-construction expenditures, however, may not create a vested right where no final permit was issued or where the expenditures were not in good faith but were designed to preempt a rezoning. Cities have broad latitude to change zonings and utilize their police powers, but any change in permitted uses must be properly justified by the public interest and properly timed to avoid the severe inequities that, on balance, would cause more private harm than public good. ❑

63. 389 S.W.2d 745 (Mo. *en banc* 1965). The landowner had used a vacant lot for the storage of lumber continuously since 1910 but was required by ordinance after a six-year "amortization" period to cease that use. *Id.* at 749. The court held that a lawful non-conforming use traditionally is considered a vested right, and may not be prohibited or terminated by ordinance even after expiration of a "reasonable" period. *Id.* at 753 ("no one, as yet, has been so brash as to contend that such a pre-existing lawful nonconforming use properly might be terminated immediately.").

64. § 89.020, Mo.Rev.Stat.

65. 817 S.W.2d 931 (Mo.Ct.App. 1991).