Stopgap Measures to Preserve the Status Quo Pending Comprehensive Zoning or Urban Redevelopment Legislation

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ally arise from the licensing statutes and the hearings by the respective state insurance commissioners.

**CONCLUSION**

It is submitted that no new duty has been imposed on the insurance salesman by these recent decisions. The duty remains that of exercising reasonable or ordinary care, whether it be imposed by the agency relationship or by a theory of holding out and reliance. The extension of liability has resulted from determinations of what types of conduct constitute reasonable or ordinary care.

In summary it might, therefore, be stated that the insurance salesman, be he an "agent" or a "broker," will be held to the standard of skill and care practiced by other members of his class or the class to which he holds himself out to belong. On the other hand, whether a professional fiduciary duty will be imposed in the near future remains a matter of conjecture.

WORTH A. FAUVER, JR.

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**Stopgap Measures to Preserve the Status Quo**

**Pending Comprehensive Zoning or Urban Redevelopment Legislation**

Men are saying today that property, like every other social institution, has a social function to fulfill. Legislation which destroys the institution is one thing. Legislation which holds it true to its function is quite another.*

One of the most crucial problems of the city planner is to preserve the status quo of an area being planned for redevelopment. Under Title 1 of the 1949 Federal Housing Act, there are necessarily many time-consuming steps to be taken by a municipality before reaching the fruition of an urban renewal program. The creation of an urban renewal agency, the designation of an area for redevelopment; the procurement of federal government commitments and advances for surveys and plans; the study of the designated area and formulation of a general plan (in the larger

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1. 63 Stat. 413 (1949), 42 U.S.C. §§ 1441, 1451-60 (1958). This Act has spurred urban redevelopment. Under it a city can condemn and buy slum sites, clear the land, and sell to a private developer at a loss. The federal government bears two-thirds of the loss, the city the rest.
cities, a General Neighborhood Plan), and the approval of the plan by the city council, are usually prerequisites for obtaining federal funds for condemnation purposes. Also, under the federal act more time is consumed because no land may be acquired without a public hearing first being held. Thus, it may be some time before a landowner in an area designated for urban renewal will actually, if ever, have his property taken under eminent domain.

The particular way land situated in a proposed urban redevelopment area is used prior to the formulation and adoption of a general or comprehensive plan will have an important affect on the success of the plan. For instance, as some courts have reasoned, persons were allowed to construct buildings in derogation of a plan, the details of which are being worked out, then the purposes for which that plan is being formulated will be defeated. Thus, the importance of maintaining the status quo is readily seen. Caution must be used, however, to analyze each case on its own merits. It is often undesirable, and it may be unconstitutional, to sacrifice the rights of a property owner to a nascent development program. The land owner's proposed use may be even more beneficial to society than the use for which his property is designated in a government sponsored plan. But the courts are not likely to substitute the landowner's standard of public interest for that of the governing authority.

The constitutional argument lies in the fact that a landowner is entitled to the beneficial use of his property. The public authority need not compensate a landowner for a change in zoning laws which may affect his land, but just compensation must be made for land taken under eminent domain. Due process of law must be followed in both cases. Thus, where a landowner's plans for his property comply with present

3. "... for urban renewal areas of such scope that the urban renewal activities therein may have to be carried out in stages... over an estimated period of not more than ten years." 63 Stat. 414 (1949), 42 U.S.C. § 1452(d) (1968).
5. "Any single small store-owner in an area that's marked for redevelopment can hold up the works by himself for a year or two." Richard Steiner, Federal Urban Renewal Commissioner, quoted in EDITORS OF FORTUNE, THE EXPLODING METROPOLIS 103 (1958).
7. "The General City Law of New York provides that city planning boards may file master plans providing for the development of the city, and 'for the purpose of preserving the integrity of such official map' no permits, as a general matter, will issue for building in the bed of any street or highway laid out on the map; and this, despite the fact that the map may at all times be modified and the proposed construction may never be carried out. N.Y. General City Law, McKinney, Consol. Laws of N.Y., c. 21, §§ 26-39 (Supp. 1949). This law empowers a municipality to restrict the use of private property which may at some future time decide to take." United States v. Westinghouse Elec. & Mfg. Co. 339 U.S. 261, 274 n.9 (1950). A similar law was declared unconstitutional in Forster v. Scott, 136 N.Y. 577, 32 N.E. 976 (1893). It imposed a restriction upon the use of land, because the property could not be used for building purposes, except at the risk of the owner losing the cost of the building if the land were taken under eminent domain in the future.
zoning and building laws and he is denied a building permit, he is likely to claim that he has been denied the beneficial use of his property without due process and without just compensation. In light of this argument, unreasonably restricting the use of land by freezing the issuance of building permits may, in effect, amount to a confiscation. The time when the application for a building permit is made, and the rapidity with which the urban plan or a comprehensive zoning program is being developed, will often be decisive.

**Stopgap Measures**

"Stopgap" or "interim" ordinances and resolutions are adopted with the intention of preserving the status quo until plans are completed and a subsequent ordinance can be enacted. These measures have been employed by city legislators in the past to protect contemplated permanent zoning regulations. By prohibiting the issuance of building permits, such measures attempt to prevent the use or improvement of property in a manner contrary to the uses designated in the proposed permanent regulations. Building inspectors have attempted, even without the benefit of stopgap measures, to accomplish the same results by administratively denying building permits. However, this practice is usually condemned by the courts because the building inspector is purely an administrative agent and must follow the literal provisions of existing zoning regulations.

Municipalities today are attempting to maintain the status quo in areas designated for redevelopment (but not yet under a general plan) by employing methods similar to those taken to protect future zoning. A comprehensive urban renewal plan does, of course, contain zoning regulations as well as building standards.

In *Hunter v. Adams,* a most significant California case, mandamus proceedings were instituted against the City of Monterey, its building inspector, and members of the city council to compel the issuance of a permit to build a motel on property within a proposed redevelopment project area. The city council, at the request of the local urban renewal agency had, twenty days prior to Hunter's application for the building permit, passed a stopgap resolution which froze the issuance of building permits for the construction of any new structure or for any major improvement on property located within the proposed redevelopment project area.

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11. E.g., *Lee v. Board of Adjustment of City of Rocky Mount,* 226 N.C. 107, 37 S.E.2d 128 (1946); YOKLEY, ZONING LAW AND PRACTICE 177 (1948).
project area. The resolution was to remain in effect for more than one year; its purpose was to preserve, temporarily, the status quo in the proposed project area. The trial court discharged the alternative writ of mandamus and denied the petition for a peremptory writ. In affirming the trial court's judgment, the appellate court stated:

It is difficult for us to conceive how an intelligent integrated plan can be formulated if, while it is under study and planning, the area is in a constant state of flux with new building construction and improvements and the resulting change in property values and appraisals.

Stopgap measures illustrate the use of police power in protecting proposed legislation and plans. The *Hunter* case is significant because it shows the use of police power in that concept's broadest sense. In holding that the city council had properly exercised police power authority, the court effectively neutralized the facts most favorable to the property owners. These facts are (1) that no tentative plan for redevelopment of the project area had been completed and no public hearing had been held on such plan; (2) that the plans and specifications for the erection of the motel complied with existing building and zoning requirements; (3) that the property owners had incurred great expenses in preparing their plans and anticipated further expenses because of the delay in carrying out their intentions; and (4) that the refusal of a permit denied the property owners of the beneficial use of their property.

**Police Power**

Police power, so far as it relates to real property, is the power to regulate its use, and is negative and restraining in its character. Control of the use of land for public purposes by exercise of this power has been manifested most significantly in zoning laws, a development of this century. The courts are reluctant to define the scope of this power because new social developments, such as urban redevelopment programs, require its expanded use. As stated by one court:

What was at one time regarded as an improper exercise of the police power may now, because of changed living conditions, be recognized as a legitimate exercise of that power. In brief, 'there is nothing known to the law that keeps more in step with human progress than does the exercise of this power.'

In 1926, the constitutionality of comprehensive zoning was firmly established by the United States Supreme Court in the landmark case of *Village of Euclid v. Ambler Realty Company*. The Court deter-

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13. *Id.* at 520.
16. 272 U.S. 365 (1926). In this case the Village of Euclid was represented by the Hon.
mained that it was within the police power of an Ohio municipality to
zone as residential a long strip of land along a railroad line, the land
having been purchased for future industrial development. Zoning pro-
visions which excluded commercial buildings were held to be not so
arbitrary and unreasonable, and their relation to the public health, safety,
morals, and general welfare was not so insignificant that they could be
held unconstitutional as a misuse of the police power authority.

Since Ambler Realty was decided, authorized legislative bodies have
been given more leeway by the courts in deciding what public needs are
to be served by social legislation. This was made clear in Berman v.
Parker, a Supreme Court decision concerned with the constitutionality of
the 1945 Redevelopment Act of the District of Columbia and the
validity of the District's Redevelopment Land Agency's taking of certain
property. The procedures involved the exercise of the police power, and
the enforcement by condemnation under eminent domain. The property
owners claimed that their property was not slum housing, and that its
appropriation would be for private, not public use.

To the latter argument, the Court pointed out that the private de-
velopers received the land subject to conditions prescribed by the urban
redevelopment plan. Rejecting the request of the owners to review the
legislative determinations upon which the development plan was based,
the Court stated:

We deal . . . with what traditionally has been known as the police
power. An attempt to define its reach or trace its outer limits is fruit-
less, for each case must turn on its own facts. The definition is essen-
tially the product of legislative determinations addressed to the purposes
of government, purposes neither abstractly nor historically capable of
complete definition. Subject to specific constitutional limitations, when
the legislature has spoken, the public interest has been declared in terms
well-nigh conclusive. In such cases the legislature, not the judiciary, is
the main guardian of the public needs to be served by social legisla-
tion . . . .

We do not sit to determine whether a particular housing project is
or is not desirable. The concept of the public welfare is broad and
inclusive. (Emphasis added.)

The reasoning of the Berman case has been followed in numerous
decisions including Grisanti v. City of Cleveland, appeal of which has

James Metzenbaum, noted Cleveland attorney and author of the well known text METZEN-
BAUM, LAW OF ZONING (1955). The Ambler Realty Company was represented by the
Hon. Newton D. Baker, an outstanding authority on constitutional law and Secretary of
War under President Wilson.
20. Grisanti v. City of Cleveland, 181 N.E.2d 299 (Ohio C.P. 1962), affirning 179
     N.E.2d 798 (Ohio C.P. 1961), appeal dismissed, 173 Ohio St. 386, 182 N.E.2d 568 (1962),
recently been dismissed by the United States Supreme Court because it presented no substantial federal question. The issues in *Grisanti* were essentially the same as those raised in *Berman*, namely, the validity of designating the property owner's land as "blighted," and the taking of private land for a public purpose, the land to be developed by a private developer. In unanimously dismissing the appeal, the Supreme Court indicated, by implication, that the City Council of Cleveland, Ohio, a charter municipality, has the same authority to determine the need for urban redevelopment within its jurisdiction as does the United States Congress over the District of Columbia.\(^{21}\)

**Eminent Domain**

Eminent domain is the right of a government to take and to appropriate private property to some particular public use; but this right can only be exercised if reasonable compensation is paid for the taking. However, the concepts of police power and eminent domain have become so entwined in cases like *Berman* that the question may well be raised: "Have the cases now reached the point of merger of the police and eminent domain powers?"\(^{22}\)

In the *Hunter* case, the eminent domain power to carry out redevelopment was not utilized. The city contended that the enactment of the stopgap resolution was merely to implement the Community Redevelopment Law of the State of California,\(^{23}\) under which it was operating. The resolution was an exercise of the city council's police power not accompanied by compensation. The facts are, therefore, distinguishable from those in *Berman*, a case cited by the California appellate court to uphold the use of the police power by the city council. In *Berman* and *Grisanti*, the municipal authorities stood ready to appropriate the land under eminent domain and to pay the constitutionally required compensation.

The court in *Hunter* held that since "community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis lot by lot, building by building,"\(^{24}\) the city council's stopgap resolution protecting the nascent municipal urban renewal plan should be effective. The resulting injury to the property owner who was denied a permit to build and, thereby, the beneficial use of his property, was justified by the court as being reasonably necessary for the public good. The rule the court stated is:

> If the injury is the result of legitimate governmental action reasonably taken for the public good and for no other purpose, and is reason-

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21. See note 30 infra and accompanying text.
ably necessary to serve a public purpose for the general welfare, it is a proper exercise of the police power to permit the taking or damaging of private property without compensation.\(^{25}\)

Stopgap measures are unlike usual zoning legislation because of the failure to follow customary procedure in their enactment. Further, their enactment and effect are unlike that of condemnation ordinances under the right of eminent domain because of this same alteration of legislative procedure, and the absence of reasonable compensation.

It is clear that many municipalities will wish to protect their nascent comprehensive land use programs by enacting stopgap legislation, an expression of the police power authority. Such legislation, if properly enacted, may preserve the plan until the later stages when the property is ready to be taken under eminent domain.

**Reasons Stopgap Measures Have Been Held Invalid**

*Failure to Follow Mandatory Procedure*

Temporary or stopgap zoning ordinances and resolutions have been held invalid where not enacted in compliance with the constitutional or statutory provisions authorizing municipalities to enact zoning ordinances.\(^{26}\)

**Home Rule Jurisdictions**

The authority of an Ohio municipality to exercise the police power in the form of zoning ordinances stems from article XVIII, section 3 of the Ohio Constitution which provides:

> Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general law.

This home rule provision is self-executing with respect to zoning regulations and, therefore, requires no enabling statutes to give municipalities the power to enact zoning laws.\(^{27}\)

The statutory law of Ohio provides that municipalities may zone,\(^{28}\) and sets forth the procedure to follow in enacting such legislation.\(^{29}\) But an Ohio municipality operating under a charter has unrestricted power in the area of zoning.\(^{30}\)

\(^{25}\) Id. at 523.

\(^{26}\) See Annot., 136 A.L.R. 844, 850 (1942).

\(^{27}\) Pritz v. Messer, 112 Ohio St. 628, 149 N.E. 30 (1925).

\(^{28}\) Ohio REV. CODE § 713.06.

\(^{29}\) Ohio REV. CODE § 713.12.

\(^{30}\) Bauman v. State ex rel. Underwood, 122 Ohio St. 269, 171 N.E. 336 (1930) (interpreting what is now Ohio REV. CODE § 713.14).
The Ohio constitution gives municipalities the power to adopt police regulations "not in conflict with general law," and the statutory law authorizes unrestricted powers regarding zoning if provided for in a municipal charter. It is clear that the effect of this is to give Ohio charter municipalities twin authority to exercise full zoning powers. The power of charter municipalities is limited only when municipal ordinances conflict with substantive zoning regulations of a general application enacted by the state legislature.

Despite this broad authority of charter municipalities, procedural difficulties have arisen where the municipal charter provides that state law be followed.

In State ex rel. Fairmount Center Company v. Arnold the municipal charter of the city of Shaker Heights, Ohio, provided that, except where a contrary intent appeared in the charter or in the actions of the council, the powers of the city may be exercised in such manner as may be provided in the general law. The court held that since there was no contrary intent in either the charter or in the enactments of the council, the state law requiring a public hearing on a zoning ordinance must be followed. An emergency stopgap ordinance depriving a property owner who complied with present zoning ordinances of his right to a building permit was therefore invalidated for failure of the council to follow the required state statutory procedure.

Non-Home Rule Jurisdictions

In states where the right to exercise the police power is not granted to the municipality in the state constitution, the municipality derives whatever authority it may have from state statutes. Such statutes will usually be strictly construed since "any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the [municipal] corporation, and the power is denied." In Downey v. City of Sioux City the city claimed that it had passed an emergency ordinance to protect a nascent general plan for zoning. The Iowa Supreme Court denied the validity of the ordinance since no express delegation of the right to enact such legislation was granted by state statute. The court distinguished the California case of Miller v. Board of Public Works, pointing out that the source of police power in California municipalities is derived from that state's constitution and the

32. 1 DILLION, MUNICIPAL CORPORATIONS § 237 (5th ed. 1911).
33. 208 Iowa 1273, 227 N.W. 125 (1929).
34. 195 Cal. 477, 234 Pac. 381 (1925). This case was relied on in Hunter v. Adams, 180 Cal. App. 2d 511 (1960).
power which it grants is "as broad as that possessed by the Legislature itself, except that it must be confined to local affairs."

Much as it might serve the public welfare to protect a proposed municipal zoning or urban renewal plan, the procedure set forth in the enabling statute of the state must be followed by the municipality in passing its stopgap measures. Sometimes there is no authority at all to pass such measures.

In *State ex rel. Kramer v. Schwartz*, an interim ordinance was invalidated because, regardless of the real or supposed practical needs of the municipality or its inhabitants in protecting contemplated zoning legislation, the clearly expressed and mandatory provisions of the enabling statute could not, the court said, be abrogated, ignored, or relaxed.

The council had passed the "freeze" ordinance designed to preserve the status quo without receiving a final report of the zoning or planning commission, and without a public hearing or a provision for a board of adjustment as required by the statute. The court reasoned that the municipality's use of the police power must conform to the terms of the grant of that authority from the state legislature.

Similarly, the Supreme Court of Pennsylvania held that the state enabling statute did not carry with it implied or inherent power authorizing the City of Harrisburg to pass an interim zoning ordinance. While there are decisions to the contrary, the cases strictly construing enabling legislation appear to be in the majority.

### Retroactive Legislation

One of the strongest arguments against the validity of interim or stopgap measures in zoning is that zoning ordinances are put into effect which have not been properly enacted. As a general rule, the restrictions of a zoning ordinance or regulation may only be prospective.

The issue necessarily entails the problem of nonconforming uses and the "vesting of rights" prior to the enactment of permanent zoning law. A use

35. 336 Mo. 932, 82 S.W.2d 63 (1935).
36. Kline v. City of Harrisburg, 362 Pa. 438, 68 A.2d 182 (1949). In this case the city had progressed to approximately the same stage of development as had the city in *Hunter v. Adams*, supra note 12.
37. E.g., McCurley v. City of El Reno, 138 Okla. 92, 280 Pac. 467 (1929). The requirement for a hearing was held to mean for permanent comprehensive zoning only, and not for a temporary ordinance.
of property in existence on the effective date of a municipal zoning ordinance, which use does not comply with that ordinance, is called a nonconforming use.\(^4\)

Despite their retroactive effect, stopgap or interim ordinances have been held valid in California since *Miller v. Board of Public Works*,\(^4\) was decided in 1925. The courts in Ohio, on the other hand, will not allow a municipality to refuse a permit merely because the proposed use of property by its owner does not conform to pending legislation.\(^42\)

Attempts have been made to freeze the issuance of building permits even when it is unknown whether the proposed legislation would be interfered with if the permit were to be issued. For example, in *Bassichis v. Guion*,\(^43\) the relator, whose plans conformed to the present zoning laws, was denied a building permit on the basis of an administrative order made more than one month before a freeze ordinance was enacted by the city council. In its brief the relator argued:

The Respondent's refusal to issue the building permit to the Relators is based upon the argument that the proposed building will be located in an area which is under study as an urban renewal area by the City of Cleveland, and if the building is erected, it may not conform to the urban renewal plan which is presently being formulated for this area, and which, when completed, may or may not be adopted by the Council of the City of Cleveland. The uncertainties which confront the Relators in the present use of their properties is apparent from the above statement.

The court of appeals issued the writ of mandamus compelling the building commissioner to issue the permit.

In *Hauser v. State ex rel. Erdman*,\(^44\) the council of the City of Cincinnati, on January 15, 1924, adopted a resolution directing the commissioner of buildings to refuse a permit for the erection of a building until the council had acted upon a building and zoning ordinance then pending before it. Relator's application was not formally filed until January 31, 1924, although it had been presented to the commissioner prior to June 2, 1923. The ordinance, which was eventually passed by the council, did not become effective until May 4, 1924, more than three months

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40. For a discussion of whether a building permit alone, or a building permit plus substantial investment and actual use is needed to establish a nonconforming use, see Young, *The Regulation and Removal of Nonconforming Uses*, 12 W. Res. L. Rev. 681, 687 (1961).
41. 195 Cal. 477, 234 Pac. 381 (1925). This case was relied upon by the court in *Hunter v. Adams*, note 12 supra.
42. See Gibson v. City of Oberlin, 171 Ohio St. 1, 167 N.E.2d 651 (1960); *State ex rel. Fairmount Center Co. v. Arnold*, 138 Ohio St. 259, 34 N.E.2d 777; *State ex rel. Ice & Fuel Co. v. Kreuzweiser*, 120 Ohio St. 352, 166 N.E. 228 (1929); *Hauser v. State ex rel. Erdman*, 113 Ohio St. 662, 150 N.E. 42 (1925).
44. 113 Ohio St. 662, 150 N.E. 42 (1925).
Stopgap Measures

after relator filed his application. The Ohio Supreme Court granted relator's prayer for mandamus, stating:

He [relator] had fully complied with the state and city building codes when he filed his application for a permit, and there seems to have been no reason why it was refused other than the insistence that a zoning ordinance was pending at the time.

Although State ex rel. Fairmount Center Company v. Arnold was decided primarily on the issue that a stopgap ordinance was enacted contrary to the required statutory procedure, the court also implied that article II, section 28 of the Ohio Constitution, which prohibits the Ohio General Assembly from enacting any retroactive law, might also apply to municipal legislative bodies. If such were not the case, the broad powers granted to Ohio municipalities under the home rule amendment would be greater than those granted to the state. Paragraph one of the syllabus states:

A municipal council may not, by the enactment of an emergency ordinance, give retroactive effect to a pending zoning ordinance thus depriving a property owner of his right to a building permit in accordance with a zoning ordinance in effect at the time of the application for such permit.

The Fairmount decision was followed by the court in Gibson v. City of Oberlin. The property owner applied for a permit to build an apartment house in conformity with the ordinances in effect at the time of the application. Upon being refused the permit by the building inspector, the property owner appealed to the Board of Appeals which reversed the building inspector and ordered the permit to be issued. An appeal was prosecuted from this order to the Oberlin City Council which reversed the ruling of the Board of Appeals. While the property owner's appeal before the court of common pleas was pending, the council amended the zoning ordinances, thereby making the building of apartment houses illegal. Reversing the decision of the court of appeals which had reversed the common pleas court, and, following the Fairmount and Hauser cases,

45. Kirschke v. City of Houston, 330 S.W.2d 629 (Tex. Civ. App. 1959), appeal dismissed, 364 U.S. 474 (1960), illustrates that a petitioner should use care to seek a writ of mandamus rather than damages. Here, the municipality was not liable for damages even though it wrongfully appropriated plaintiff's property. The issuance of a permit or license was held to be a governmental function for which the municipality was not liable.
47. 138 Ohio St. 259, 34 N.E.2d 777 (1941).
49. OHIO CONST. art. XVIII, § 3.
50. But see, Williams v. Village of Deer Park, 78 Ohio App. 231, 69 N.E.2d 536 (1946), where a later enacted zoning ordinance was given effect.
51. State ex rel. Fairmount Center Co. v. Arnold, 138 Ohio St. 259, 34 N.E.2d 777 (1941).
52. 171 Ohio St. 1, 167 N.E.2d 651 (1960).
the Ohio Supreme Court held that the council could not give retroactive effect to a zoning ordinance, and the permit must be issued. The court of appeals had held that the law in existence at the time of the suit controlled.

"Vested Rights" Theory

Another reason why *Hunter v. Adams*\(^5\) may not be persuasive authority in some jurisdictions is because of decisions holding that an applicant's right to a building permit becomes vested at the time the application is filed, and that his right to the permit must be decided on the basis of the zoning laws then in effect.\(^4\) Ohio, for example, in supporting the "vested rights" theory, is diametrically opposed to the California law on this issue.\(^5\)

In *Gibson v. City of Oberlin* Justice Matthias stated that while a property owner has no vested right in the continuance of any particular regulation, once the regulations have been established and are in force, the state and its subdivisions are as much bound to abide by them as the people. Since the applicant had complied with all the requirements for the permit, he had a right to it. Justice Matthias wrote:

Subsequent legislation enacted pending applicant's attempted enforcement of such right through administrative or legal channels cannot deprive him of the right. The right became vested, under the law applicable thereto, upon the filing of the application for the permit.\(^6\)

Contrast this statement with one by the California Supreme Court in a 1934 decision:\(^7\)

The rights of the parties are to be determined as of the present time rather than the time of the application for a permit. By its application for a permit before the zoning ordinance was passed, respondent company secured no vested right to the same.\(^8\)

The California rule, it should be noted, expresses the prevailing view.\(^\text{59}\)

Speculative Purpose for Freeze

A reasonable period of time has usually been allowed to municipalities by the courts to plan comprehensive zoning measures.\(^6\) Since urban

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53. See note 12 *supra* and accompanying text.
55. See cases cited *supra* note 42.
58. Sunny Slope Water Co. v. City of Pasadena, 1 Cal. 2d 87, 91, 33 P.2d 672, 674 (1934).
renewal programs also require planning and the expenditure of millions of dollars of public funds, it is logical to assume that the same rule will hold true. Of course, what is considered a "reasonable period" will vary with the facts of each case. The landowner who would like to use his property by legally conforming to existing requirements of zoning and building should not be indefinitely deprived of his property rights by stopgap legislation.

It appears that the diligence and speed with which a municipality is progressing with its zoning or urban renewal program will influence the courts in deciding whether to allow temporary protection of the status quo for the planned area.

In Chicago Title and Trust Company v. Village of Palatine\textsuperscript{61} where the proposed ordinance was on file and open to public inspection, and hearings had been held on it, the court held that the city could wait for a "reasonable" length of time before acting on an application for a building permit which conformed to the zoning laws in effect at the time of the application, but which did not conform to the proposed ordinance.

The duty of a municipality to refrain from tying up property for mere speculative purposes is illustrated in Henle v. City of Euclid.\textsuperscript{62} The property owner complied with all the requirements necessary to have the zoning law changed so that she could use her property for a gasoline filling station. The city frustrated her efforts claiming that the property might be needed for a freeway. In a strong opinion, the court of appeals indicated that the planning had not developed to a point where the city could tie up the plaintiff's use of her property. The court declared:

The claim that the city has the right to 'freeze' plaintiff's property, preventing her from its beneficial use until the city gets around to appropriating it for public purposes as a part of the Lakeland Freeway, is without foundation. If the city needs the property in that development then an immediate proceeding in eminent domain would end this lawsuit. All that has been done so far toward building the Lakeland Freeway is tentative in character. The proceeding looking to the construction of the freeway has not reached a stage compelling the city to appropriate the property, nor is the plaintiff compelled to stand by, paying taxes without benefit, until the development reaches a stage, if it ever does, where her property must be taken for freeway purposes.\textsuperscript{63}

In a subsequent decision\textsuperscript{64} stemming from the Henle case, the Ohio Supreme Court pointed out that when the proposed improvement is still in a "visionary stage awaiting a co-operation agreement with the county,

\textsuperscript{61} 22 Ill. App. 2d 264, 160 N.E.2d 697 (1959). \textit{But see} Lido Links Homes v. Young, 13 Misc. 2d 157, 176 N.Y.S.2d 504 (Sup. Ct. 1956), where the plan for a highway was already in existence.
\textsuperscript{62} 97 Ohio App. 258, 118 N.E.2d 682 (1954).
\textsuperscript{63} \textit{Id.} at 264, 118 N.E.2d at 685-86 (1954).
\textsuperscript{64} \textit{State ex rel.} Sun Oil Co. v. City of Euclid, 164 Ohio St. 265, 130 N.E.2d 336 (1955).
state or federal government," the municipality cannot appropriate the property. These two cases appear to have meaningful implications for future urban renewal litigation. They indicate that a municipality should not attempt to restrict the use of land by stopgap measures when the plan which is sought to be protected has only a fledgling existence.

The city attempting to control land use pending the adoption of a plan is often in the position of not knowing until it actually receives the plan whether particular property will have to be acquired for the public need. In State ex rel. Dille Laboratories Corporation v. Woditsch preparations had progressed to the point where the city expected to receive the plan within two or three weeks from the date set for litigation. In upholding the right of the petitioner to a writ of mandamus for a building permit, the court pointed out that a property owner cannot be expected to refrain from embarking on his plans until others have completed theirs. A municipality has no power or authority to appropriate lands for some contemplated future use, and, if stopgap measures fail, the municipality will find difficulty in exercising any control over the use of property which otherwise complies with present laws.

CONCLUSION

Protecting a property owner who wishes to acquire a building permit to build a structure that would be inferior under the proposed legislation, or who has no intention of using the permit except as a device for bargaining when his land is finally appropriated, does not seem proper. On the other hand, there are those who desire to use their property in a socially desirable way, conforming to present laws and perhaps even to the proposed ones, but who would be forced to give up their property rights to the state police power if interim legislation were held valid.

The community's power to protect itself is often hamstrung by the slow process of enacting ordinances, coupled with the court's antipathy for retroactive legislation. The most desirable solution might be to allow interim legislation when there is a sufficient showing that the adoption of a permanent zoning ordinance or urban renewal plan is imminent, but to set a statutory time limit after which the stopgap measure would become invalid. This solution would soften opposition to stopgap legislation by assuring that the use of property will not be restricted for mere speculative purposes.

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65. Id. at 272, 130 N.E.2d at 340.