

April 15, 1988

REPORT TO THE HONORABLE

MAYOR AND CITY COUNCIL

BELMONT PARK - "VESTED RIGHTS" - COMPENDIUM OF COURT DECISIONS

On March 21 and March 22, 1988, the City Council considered "vested rights" issues relating to the Belmont Park project and the roller coaster at Belmont Park. The question of whether or not the Belmont Park project qualifies for vested rights under the Proposition G initiative was continued to the City Council meeting of April 18 and this office was directed to research and report to the Council with regard to the court decisions involving vested rights issues.

Such direction arose out of the Council discussions on March 21 wherein Councilman Henderson and Councilwoman Wolfsheimer expressed differing opinions as to how the case law defines vested rights. Specifically, Councilwoman Wolfsheimer indicated that it was her view that the "good faith" test in various California court decisions concerning vested rights turns on the issue of whether a person claiming vested rights knew of proposed, potential, or pending legislation which could ultimately preclude a development at the time that such person applied for and received a building permit for his project. Councilman Henderson, on the other hand, indicated that his understanding of the law and the issue of "good faith" in connection with vested rights was that the "good faith" test is met when a developer accomplishes substantial construction on a project in reliance upon a validly issued building permit prior to the effective date of any law which would thereafter preclude or require additional discretionary approval for the issuance of a building permit.

Attached to this report is a summary of the twenty-nine California Appellate and Supreme Court cases involving vested rights, commencing with *San Diego Coast Regional Com. v. See The Sea, Limited*, a California Supreme Court case decided on August 22, 1973, and ending with *Russ Building Partnership v. City and County of San Francisco*, another California Supreme Court case decided March 17, 1988.

While only the cases of *Pettit v. City of Fresno*, an October, 1973 case, and *Strong v. County of Santa Cruz*, a 1975 case, are included in the attachment representing cases on point between the decision in *See The Sea* and *Avco Community Developers*, all of

the California Appellate and Supreme Court cases from the Avco Community Developers case to the present are included in the attachment.

Our review of the case law indicates no support for the theory espoused by Councilwoman Wolfsheimer in circumstances where the building permit is validly issued prior to the effective date of the applicable law. On the contrary, in the See The Sea case, the developer commenced predevelopment activities on property near the coast in 1968 and applied to the City of San Diego for a building permit in July 1972. Proposition 20, an initiative measure, had been previously certified for placement on the November, 1972, general election ballot and on November 7, 1972, Proposition 20 was approved by the electorate. It was effective on November 8. Proposition 20 provided in its text that coastal permits would be required as of February 1, 1973.

The developer received a building permit for his project on December 6, 1972, subsequent to the adoption of Proposition 20 but prior to the stated date after which coastal permits were required. The developer thereupon demolished a hotel on his project site and spent \$79,000 in construction costs prior to February 1, 1973.

The California Supreme Court held that the developer "had obtained a vested right to complete the development because it had relied in good faith on the city's building permit, and that a coastal permit therefore was not required." The court noted that "nowhere does the Act expressly provide for a moratorium on construction commenced prior to 1 February, 1973." The court construed "good faith" as being construction activity based upon a lawfully issued building permit.

Similarly, in the Avco case the California Supreme Court cited the See The Sea case but found that the developer had not obtained vested rights since pre-construction activities did not create "a vested right to build a structure which does not comply with the laws applicable at the time a building permit is issued." The court characterized a "vested rights" issue as being based upon the equitable theory of "estoppel" and that even though a municipal government may approve various pre-construction activities by a developer, "a government makes no representations to a land owner that he will be exempt from the zoning laws in effect at the subsequent time he applies for a

building permit . . . , and thus the government cannot be estopped to enforce the laws in effect when the permit is issued."

The basis for the Avco decision was that Avco had "failed to apply to the county for building permits for specific buildings

by the date the requirements of the Coastal Act became effective . . ."

In the *Stanson v. San Diego Coast Regional Com.* case, decided in 1980, a developer was informed by Coastal Commission staff that no coastal permit was required for his project. The developer thereupon commenced construction of restaurant improvements and when approximately ninety percent completed was informed that a coastal permit was, in fact, necessary. The developer requested such a permit and the request was denied. In that case, even though the law requiring the permit was in effect prior to the commencement of the project, the California Appellate Court found that the property owner had acquired a vested right to complete his project. The court once again indicated that vested rights are founded upon the equitable principal of estoppel.

The *Stanson* case represents a situation where Councilwoman Wolfsheimer's view of "good faith" test is an important criterion. In such a fact situation, Councilwoman Wolfsheimer's concept is appropriate and well taken. For example, if it had been shown in the *Stanson* case that the property owner knew of the necessity for the coastal permit prior to commencement of construction and did not reasonably rely upon the representation of the Coastal Commission employee, the court could well have upheld the requirement for a coastal permit based upon the absence of "good faith" on the part of the property owner.

The other case on the attached list which revolved around the issue of "good faith" on the part of the property owner at the time of receiving a building permit is the case of *Strong v. County of Santa Cruz*, a 1975 California Supreme Court decision. In that case the court held that, since the developer had knowledge of the fact that his permit had expired prior to obtaining approvals from county officials for additional construction, no estoppel could be claimed against the county and the developer could not obtain vested rights to complete the project.

The other cases contain reasoning similar to that found in the *See The Sea* and the *Avco* cases. The fundamental premise being that substantial construction of aboveground improvements based upon a lawfully issued building permit meets the "good faith" requirement and results in "vested rights" to complete the project described in the building permit.

The courts in the various cases did not indicate that there was any lack of "good faith" on the part of developers attempting to, in effect, anticipate a deadline for obtaining building permits and commencing substantial construction in reliance on

such permits prior to the effective date of pending legislation. The courts characterized such activities by developers as a "calculated risk" in those circumstances where the developer did not, in fact, sufficiently anticipate the deadline to actually obtain building permits and commence substantial construction. See the Avco Community Developers; McCarty v. California Tahoe Regional Planning Agency; and Santa Monica Pines, Ltd. v. Rent Control Board cases.

As a related matter, it should be noted that some of the vested rights cases imply that vested rights could arise out of a contract with a city even prior to the issuance of building permits for a project in those circumstances where the project to be constructed is clearly described and approved in the contract. (See, for example, Avco at p.793-794.) No appellate case, however, has to this date involved such a fact situation.

The closest case in point would probably be the Monterey Sand Company case, decided in 1987, wherein the court found that a sand extraction operation, pursuant to a mineral lease granted by the State, had resulted in vested rights to continue sand extraction operations and that the project was not subject to a requirement of obtaining a coastal permit.

While the Belmont Park fact situation does, in fact, involve a contract entered into with the City which specifically describes and requires the development of a project, it is not necessary to theorize as to whether the courts would have found that vested rights exist even without the issuance of building permits and substantial development since, of course, the Belmont Park situation includes not only the contract with the City but also the lawful issuance of building permits and substantial construction based upon such permits.

With regard to the Belmont Park project, it should be noted that the City Council approved the option and lease in June, 1986. Subsequently, an initiative petition was circulated and was certified as containing adequate signatures by the City Clerk on February 24, 1987. In the meantime, the developer had complied with the requirements specified in the option to lease and had executed the lease. On March 5, 1987, the City Manager executed the lease on behalf of the City and the developer on the same dates obtained building permits pursuant to construction plans which had been previously submitted. The developer, between March 5, 1987, and November 3, 1987, reportedly spent

approximately \$5 million on construction pursuant to the building permits. On November 3, 1987, the electorate approved the initiative which was by its terms effective immediately. The initiative on its face exempts projects with vested rights

obtained prior to the effective date of the initiative.

These basic facts should be kept in mind as you read and compare the rulings in the attached cases.

In summary, Councilwoman Wolfsheimer's theory of "good faith" in the mind of a developer at the time of applying for or obtaining a building permit has significant importance in those fact situations where a law is already in effect which would preclude the issuance of such building permits but for a mistake by the issuer of the permit. On the other hand, the court decisions clearly indicate that a developer obtains a vested right to complete a project when such developer obtains a lawfully issued building permit and commences substantial construction based upon such permit. This conclusion has been consistently made by the courts even though at the time of obtaining the building permit the developer is aware of a proposed law which would affect similar projects.

Respectfully submitted,

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Attachment

RC-88-24