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## VESTING, VARIANCES AND SPECIAL EXCEPTIONS

Michael P. Haymans

May, 2006



We the people are not prescient beings. Unintended consequences roll off our actions like those of blind boaters throwing a wake. Yet we try. In doing so, we and our representatives project and institutionalize our hopes and fears, needs, wants, and even whims. We, as government, make laws, regulations, and rules. Imperfect in our understanding, compromised in our attempted application, and hampered by popular and unpopular results, it is no wonder that justice sometimes fails. Common sense has it that even the best, particularly the best, of rational systems need release valves. Vesting, variances, and special exceptions are such release mechanisms.

Vested rights and estoppel are equitable concepts allowing reliance on the status quo. One must assert such rights to retain them. Those not paying attention when the rules change can lose their voice by waiver and through the silent passage of time. Reliance on the way things were establishes vested rights. Reasonable and detrimental reliance on what has been represented, including too long a silence, establishes estoppel, which is a defense. So, despite new rules, which may apply to everyone else, our system allows a case by case, institutionalized, often administratively applied relief from grave injustice. The common term for such a condition is "grandfathered."

Modern legislative acts, codes, of local governments attempt to recognize the common law concepts of vesting and estoppel, and to flesh out criteria and procedures for establishing vested rights. Codes also provide the possibility of relief beyond reliance-based, common law considerations. Variances and special exceptions are adopted to allow flexibility, lenience in the harsh application of laws of general application to particular circumstances.

Variances are not favored. Applicants bear a heavy burden to prove all the criteria. If met, then an applicant hopes for a vote providing the needed relief. However, most criteria, only posing as objective, are value-laden avenues to an applicant's often-dashed hope. "Not a self-created hardship" is one of the more objective of the typical criteria. So practically, because even the designed relief mechanism suffers from the law's structural inadequacies, the people making the variance decisions are often looked to as boards of reason and mercy. "Quasi judicial," "Based on competent, substantial evidence," are constructs of variance rules, but common sense at times grants just relief despite the rules.



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Special exceptions are favored. The applicant bears the burden to prove the criteria, but once a threshold case is established the burden shifts to those opposing the special exception. By definition zoning districts anticipate such special uses if controlled as to number, location, and impact on neighbors. Conditions can be imposed.

If application of the law seems harsh in a particular land use situation, then the system may have a relief mechanism available. In such cases flexibility in the law is the purpose, common sense is the goal, and community acceptance is the ultimate measure.

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