

IN THE
SUPREME COURT OF CALIFORNIA

JOHN SMITH,)	
)	
Plaintiff and Appellant)	
)	California Court of
)	Appeal, Eighth
vs.)	Appellate District
)	
)	
CITY OF ACME, et al.)	No. xxxxxxxx
)	
Defendant and)	
Respondent)	

**PETITION FOR REVIEW
OF DEFENDANT AND RESPONDENT
JOE JONES
AND MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT THEREOF**

After a Decision by the Court of Appeal
Eighth Appellate District, Division Three
Case No. xxxxxxxx

I.	TABLE OF CONTENTS	i
II.	TABLE OF AUTHORITIES	iv
III.	QUESTIONS PRESENTED	1
IV.	STATEMENT OF THE CASE	1
	A. Statement of Facts	1
	1. <u>Jones Requested the City’s Permission to Build a New Three-Story Home.</u>	2
	2. <u>Smith Complained About Jones’s Home, but the City Concluded That the Home Complied With the Zoning Code.</u>	3
	3. <u>Smith Sued the City and the Court of Appeal Decides That While the Zoning Permit Should Not Have Been Issued, Jones Should Seek a Variance.</u>	3
	4. <u>The City Council Denied Jones the Requested Variance.</u>	4
	B. Procedural History	5
	1. <u>The Superior Court Ordered the City Council To Grant Jones the Variance.</u>	6
	2. <u>The Court of Appeal Reversed the Superior Court Decision and Upheld the City Council’s Denial of the Variance It Had Earlier Told Jones To Seek.</u>	7
	3. <u>Justice Sills Issued a Strong Dissent, Arguing That the Court of Appeal Decision Conflicts With Supreme Court and Court of Appeal Precedent.</u>	8
V.	WHY REVIEW SHOULD BE GRANTED	10
VI.	ARGUMENT	12

POINT I - REVIEW SHOULD BE GRANTED BECAUSE THE COURT OF APPEAL’S DETERMINATION CONFLICTS WITH CLEAR PRECEDENT ESTABLISHING THAT JONES HAD A VESTED FUNDAMENTAL RIGHT THAT REQUIRED APPLICATION OF THE INDEPENDENT REVIEW STANDARD BY THE SUPERIOR COURT. 13

A. In Reviewing a Decision Regarding Issuance of a Writ of Administrative Mandate, the Threshold Question is Whether or Not the Petitioner Had a Fundamental Vested Right That Would Require Use of the Independent Judgment Standard of Review. 13

B. The Court of Appeal Reversed the Superior Court, Finding That No Fundamental Right Was Implicated and Imposing the Substantial Evidence Standard of Review 15

C. The Court of Appeal Decision In This Case Conflicts With Decisions of This Court and Other Court of Appeal Decisions. 16

POINT II - REVIEW SHOULD BE GRANTED BECAUSE THE COURT OF APPEAL’S DETERMINATION CONFLICTS WITH CLEAR PRECEDENT ESTABLISHING THAT A MUNICIPALITY MAY BE ESTOPPED TO DENY THE VALIDITY OF A BUILDING OR OCCUPANCY PERMIT. 21

A. The Court of Appeal Decision Completely Forecloses the Possibility That a Municipality Could Ever Be Estopped From Denying the Validity of a Permit That Was Inconsistent With a Zoning Ordinance 22

B. The Court of Appeal Decision Is Clearly in Conflict With Other Decisions That Allow For the Possibility That a Municipality May Be Estopped To Deny the Validity of a Permit As Justice Requires. 22

POINT III - REVIEW SHOULD BE GRANTED BECAUSE THE COURT OF APPEAL’S INVOCATION OF THE COLLATERAL ESTOPPEL DOCTRINE EFFECTIVELY DENIED JONES A FULL AND FAIR OPPORTUNITY TO OBTAIN A VARIANCE. 25

VII. CONCLUSION 28

APPENDIX

Smith v. City of Acme, (19xx) No. xxxxxxxx, in the California Court of Appeal, Eighth Appellate District
(*Smith I*) Exhibit A

Smith v. City of Acme (19xx) No. xx-xxxx, in the Superior Court for Acme County Exhibit B

Smith v. City of Acme (19xx) No. xxxxxxxx, in the California Court of Appeal, Eighth Appellate District
(*Smith II*) (majority opinion) Exhibit C

Smith v. City of Acme (19cc) No. xxxxxxxx, in the California Court of Appeal, Eighth Appellate District
(*Smith II*) (dissenting opinion) Exhibit D

II. TABLE OF AUTHORITIES

CASES

<i>Agins v. City of Tiburon</i> (1979) 24 Cal.3d 266 [157 Cal.Rptr. 372, 598 P.2d 25]	17
<i>Anderson v. City of La Mesa</i> (1981) 118 Cal.App.3d 657 [173 Cal.Rptr. 572]	8, 14, 19, 21, 23, 24
<i>Avco Community Developers, Inc. v. South Coast Regional Com.</i> (1976) 17 Cal.3d 785 [132 Cal.Rptr. 386, 553 P.2d 546]	17, 18
<i>Bixby v. Pierno</i> (1971) 4 Cal.3d 130 [93 Cal.Rptr. 234, 481 P.2d 242]	14, 15
<i>City of Long Beach v. Mansell</i> (1970) 3 Cal.3d 462 [91 Cal.Rptr. 23, 476 P.2d 423]	23
<i>Clemmer v. Hartford Insurance Co.</i> (1978) 22 Cal.3d 865 [151 Cal.Rptr. 285, 587 P.2d 1098]	26
<i>County of Sonoma v. Rex</i> (1991) 231 Cal.App.3d 1289 [282 Cal.Rptr. 796]	8
<i>Frink v. Product</i> (1982) 31 Cal.3d 166 [181 Cal.Rptr. 893, 643 P.2d 476]	15
<i>Goat Hill Tavern v. City of Costa Mesa</i> (1992) 6 Cal.App.4th 1519 [8 Cal.Rptr.2d 385]	18, 19, 24
<i>Henn v. Henn</i> (1980) 26 Cal.3d 323 [161 Cal.Rptr. 502, 605 P.2d 10]	27
<i>Interstate Brands v. Unemployment Insurance Appeals Bd.</i> (1980) 26 Cal.3d 770 [163 Cal.Rptr. 619, 608 P.2d 707]	15
<i>Lucido v. Superior Court</i> (1990) 51 Cal.3d 335 [272 Cal.Rptr. 767]	26
<i>Pescosolido v. Smith</i> (1983) 142 Cal.App.3d 964 [191 Cal.Rptr. 415]	16, 17

<i>Pettitt v. City of Fresno</i> (1973) 34 Cal.App.3d 813 [110 Cal.Rptr. 262]	4, 14, 21, 22
<i>San Franciscans for Reasonable Growth v. City and County of San Francisco</i> (1984) 151 Cal.App.3d 61 [198 Cal.Rptr. 634]	25
<i>San Marcos Mobilehome Park Owners Association v. City of San Marcos</i> (1987) 192 Cal.App.3d 1492 [238 Cal.Rptr. 290]	15
<i>Smith v. County of Santa Barbara</i> (1992) 7 Cal.App.4th 770 [9 Cal.Rptr.2d 120]	8
<i>Stanson v. San Diego Coast Regional Co.</i> (1980) 101 Cal.App.3d 38 [161 Cal.Rptr. 392]	19
<i>Strumsky v. San Diego County Employees Retirement Association</i> (1974) 11 Cal.3d 28 [112 Cal.Rptr. 805, 520 P.2d 29]	14
<i>Topanga Association for a Scenic Community v. County of Los Angeles</i> (1974) 11 Cal.3d 506 [113 Cal.Rptr. 836, 522 P.2d 12]	4

STATUTES

California Code of Civil Procedure section 1094.5	5, 13
California Government Code section 65906	4

III. QUESTIONS PRESENTED

1. Should Review Be Granted Because the Court of Appeal's Determination Conflicts with Clear Precedent Establishing That Jones Had a Vested Fundamental Right That Required Application of the Independent Review Standard by the Superior Court?
2. Should Review Be Granted Because the Court of Appeal's Determination Conflicts with Clear Precedent Establishing That a Municipality May Be Estopped to Deny the Validity of a Building or Occupancy Permit?
3. Should Review Be Granted Because the Court of Appeal's Invocation of the Collateral Estoppel Doctrine Effectively Denied Jones a Full and Fair Opportunity to Obtain a Variance?

IV. STATEMENT OF THE CASE

This petition for review arises from a court of appeal decision reversing a writ of administrative mandate issued by the superior court directing the issuance of a zoning variance.

A. Statement of Facts

The genesis of this case was the January 1985 request by Petitioner Joe Jones ("Jones") for a building permit from the City of Acme ("Acme" or the "City") to build a new home in the City. What followed was more than a decade of hearings, suits, and counter-suits, culminating in this Petition for Review.

1. Jones Requested the City's Permission to Build a New Three-Story Home.

Jones asked the City for a permit to build his proposed new home. In reviewing the request for a permit, John Adams, the City's senior plan checker

(“Adams”), determined that the proposed three-story house appeared to exceed the applicable 30-foot height limitation as defined in the City zoning code. A revised set of plans was submitted five months later, but Adams and his immediate supervisor, Glen Jefferson (“Jefferson”), found that the revised structure still did not comply with the 30-foot height limitation.

James Madison, the director of the planning department (“Madison”), disagreed with Adams and Jefferson. Difficulties and disputes had arisen in determining the applicable height limitation due to the severely sloping topography of the Jones building site. (C.T. p. 185) Madison determined that the plans did meet the requirements of the zoning code, and on May 23, Madison ordered that the permit be issued. In issuing the permit, Madison and the planning department ultimately applied the definition for building height set out in the Uniform Building Code (“UBC”) to determine that Jones’s home met the zoning code’s building height requirement. (C.T. p. 185). The UBC definition had previously been used by the City to measure structures on severely sloped lots. (C.T. p. 185).

2. Smith Complained About Jones’s Home, but the City Concluded That the Home Complied With the Zoning Code.

After construction commenced, Respondent John Smith (“Smith”) began complaining about Jones’s new home, which was being built three lots downhill from Smith’s house. After this initial complaint, the City ordered Jones to modify the structure, which Jones did. Smith was still dissatisfied,

however, because Smith believed his ocean view would be obstructed by Jones's home. Smith complained to the City, which began a review of the permit. The planning department requested an opinion from the city attorney regarding the use of the UBC height definition. The city attorney opined that the UBC definition was better suited to the topography on which Jones was building, and also noted that having issued the permit and allowed construction to proceed, the City "was in no position to red-tag the project or recall the permits." (App. C at p. 2). After a requested revision of the plans was made to assure compliance with the UBC height definition, Jones's home was ultimately completed in late 1988.

3. Smith Sued the City and the Court of Appeal Decides That While the Zoning Permit Should Not Have Been Issued, Jones Should Seek a Variance.

Smith then sued the City to have Jones's home altered to conform to the zoning code's height limitation. The superior court denied Smith's request for a writ of mandate, and, in April of 19xx, the Court of Appeal, Eighth Appellate District, reversed. (*Smith v. City of Acme* (19xx), No. xxxxxxxxx) ("*Smith I*"). (App. A). In *Smith I*, the Court of Appeal concluded that the use of the UBC height definition was improper, and that the Jones home therefore violated the zoning code. (App. A at p. 9). The *Smith I* court also rejected the superior court's conclusion that the City was estopped to enforce its zoning ordinance because Jones had obtained a vested right based on the building permit issued

to him. Relying on *Pettitt v. City of Fresno* (1973) 34 Cal.App.3d 813 [110 Cal.Rptr. 262], the court stated that “the permit was invalid at its inception,” and that the City could therefore not be estopped to deny the validity of the permit. (App. A. at p. 10). The *Smith I* court ordered the City to proceed with a suit to force Jones to reduce the height of his home to comply with the 30-foot requirement, “*unless* a timely request for a variance by Jones is granted. The council should be cautioned that findings are necessary to justify the special circumstances required for a variance.” (App. A at p. 12, citing Cal. Gov. Code sec. 65906; *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 517 [113 Cal.Rptr. 836, 422 P.2d 12] (emphasis original)).

4. The City Council Denied Jones the Requested Variance.

This matter began when Jones applied for a variance from the city council. Hearings were held in front of the planning commission and the city council, testimony was taken, and materials were received from many individuals. Jones’s application for a variance was denied. The city council concluded that Jones’s home “blocks the views of properties to the east and may result in a reduction of those properties’ values,” “is incompatible with adjacent properties that are” only two stories tall, and would “have a detrimental effect on the privacy of the adjacent property to the west.” (App. B at p. 5). In addition, the city council concluded that granting a variance

would amount to a special privilege for Jones, apparently because the property could have been developed within the strictures of the zoning code and granting a variance would be “detrimental to the welfare of the adjacent conforming properties in the vicinity.” The city council also found that Jones’s home did not conform with the City’s Local Coastal Program and Implementing Ordinances. (App. B at p. 5).

B. Procedural History

Jones filed a petition with the superior court for issuance of a writ of administrative mandate pursuant to California Code of Civil Procedure section 1094.5. Jones challenged the City’s denial of a variance on four grounds – failure to follow proper procedures, insufficient evidence, estoppel, and balancing of the hardships. (App. B at p. 5). The City filed its own lawsuit seeking an order to have the offending portions of Jones’s home removed. Smith intervened in both actions, opposing Jones and supporting the City. The two lawsuits were consolidated into this action. (App. B at p. 5).

1. The Superior Court Ordered the City Council To Grant Jones the Variance.

After a hearing, the superior court granted Jones’s request for a writ of administrative mandate and ordered the city council to grant the requested variance. The superior court concluded that Jones had

a vested right, not in the permits which the City issued and which have been determined to have been invalid when issued, but in having his home remain where built, as built, because he

relied in good faith on the permits the City issued, and the house, as is, has been in place in excess of eight years.

(App. B at p. 2). Because a vested right was affected by the city council's decision, the superior court reviewed the decision under the independent judgment standard. Applying that standard, the superior court determined that Jones would suffer considerable hardship if required to remove the third story from his house. In its decision, the superior court also concluded that the city council's findings were deficient and invalid, noting that neighbors had no protected rights to particular views, no significant invasion of privacy would be occasioned by a third story, and that as other structures in the neighborhood did have third stories, granting a variance to Jones would not constitute a special privilege. (App. B at p. 3). The superior court then noted that Jones had constructed his home under color of authority and that Jones's "hands are clean" while the City, which "may have improvidently or even erroneously issued the permits in the first place," did not have clean hands. Making use of the doctrine of equitable estoppel, the superior court found that "on balance, justice and right require that [Jones] be permitted to continue to use his home in its present condition." (App. B at p. 4).

2. The Court of Appeal Reversed the Superior Court Decision and Upheld the City Council's Denial of the Variance It Had Earlier Told Jones To Seek.

The court of appeal reversed the issuance of the writ of administrative mandate. (*Smith v. City of Acme* (May 29, 19xx), No. xxxxxxxx) ("*Smith II*")

(App. C). First, the court of appeal concluded that the superior court had used an improper standard of review. The court invoked the doctrine of collateral estoppel, finding that its determination in *Smith I* that Jones had no vested right based on an improperly issued permit precluded the superior court's determination that Jones had some vested right in remaining "in his home in its present condition." The *Smith II* court stated that the superior court's finding was merely "semantic maneuvering to avoid our prior holding." (App. C at p. 7). The court of appeal found that the superior court should have reviewed the city council's decision under the substantial evidence standard. Applying that standard, the court of appeal concluded that there was substantial evidence in the record as a whole to uphold the city council's denial of the variance to Jones. The superior court was ordered to vacate the writ and issue a new order denying the writ. (App. C at p. 9-10).

3. Justice Jackson Issued a Strong Dissent, Arguing That the Court of Appeal Decision Conflicts With Supreme Court and Court of Appeal Precedent.

Justice Jackson dissented from the decision, concluding that the superior court decision should be affirmed based on, *inter alia*, another court of appeal case, *Anderson v. City of La Mesa* (1981) 118 Cal.App.3d 657 [173 Cal.Rptr. 572], which supported the superior court's conclusion that Acme Beach was estopped from denying the variance. (App. D at p. 2). In his dissent, Justice Jackson stated that *Smith I* was incorrectly decided. Justice Jackson noted that the *Smith I* decision conflicted directly with the *Anderson*

decision, because, *inter alia*, the court had incorrectly concluded that a city could never be estopped to deny the validity of a building or occupancy permit issued in violation of a local zoning ordinance. (App. D at p. 3). This conclusion also conflicted with *County of Sonoma v. Rex* (1991) 231 Cal.App.3d 1289 [282 Cal.Rptr. 796] and *Smith v. County of Santa Barbara* (1992) 7 Cal.App.4th 770 [9 Cal.Rptr.2d 120], which establish that when considering estoppel in the context of zoning and permits, courts must apply a balancing test. (App. D at p. 3). Justice Jackson stated that it was error to fail to consider whether estoppel could be applied in this situation -- “as in *Anderson*, the zoning violation here was minimal; and it did not create a special problem for the area or the complaining neighbor.” (App. D at p. 6). Having balanced the potential harm of Jones being forced to remove the third story from his home against the “minimal zoning violation,” (App. D at p. 6), Justice Jackson would have affirmed the superior court’s determination that the City was estopped to deny the variance because “justice and right require[d] it.” (App. D at p. 3). This Petition was then timely filed within 10 days after the court of appeal decision became final as to that court.

V. WHY REVIEW SHOULD BE GRANTED

Review should be granted to clarify and enhance uniformity regarding the applicable standard of review to be applied to a request for a writ of administrative mandate. The court of appeal decision to apply the substantial evidence standard is inconsistent with clear Supreme Court and court of appeal precedent. The superior court correctly determined that Jones had a fundamental, vested right in his home as built because he relied in good faith on the permits the City had issued and the house had been in place for eight years. The court of appeal reversal of this decision was inconsistent with precedent establishing the existence of a fundamental vested right where an individual has, in good faith reliance on an improperly issued permit, expended considerable sums pursuant to that improperly issued permit and thereby acquired a vested right in the property as altered. The superior court correctly used the independent judgment standard, and the court of appeal should have affirmed the superior court's decision based on clear precedent. This court should grant review to clarify the law in this area.

Review should also be granted to resolve the conflict among court of appeal decisions regarding whether a city may ever be estopped to deny the validity of a building or occupancy permit issued in violation of a local zoning ordinance. As the dissent in this case pointed out, the court of appeal decision in this case conflicts with earlier court of appeal opinions regarding estoppel in the context of zoning. The court of appeal decision in this case precludes

the possibility that a city may ever estopped from denying the validity of a permit issued in violation of a zoning ordinance, while other court of appeal decisions, as well as decisions of this Court, clearly establish that estoppel may be invoked in certain situations, particularly where equitable considerations justify application of estoppel principles. As noted by Justice Jackson in dissent, the court of appeal opinion in this case, as well as the court of appeal's prior decision, went astray, and review should be granted to facilitate uniformity of decision and settle this issue.

In addition, review should also be granted to settle important issues relating to the application of the collateral estoppel doctrine. The court of appeal invoked that doctrine to preclude Jones from having a meaningful opportunity to seek a zoning variance, even though the prior court of appeal opinion directed Jones to seek that very relief. In 1991, the court of appeal explicitly stated that Jones could seek a variance. In 1998, the court of appeal effectively stated that its 1991 opinion precluded the superior court from granting that variance to Jones. This application of the collateral estoppel doctrine was inconsistent with prior precedent of this court and review should be granted to facilitate the uniformity of decisions and to settle issues relating to the applicability of collateral estoppel in such situations.

VI. ARGUMENT

As Justice Jackson stated in his dissent to the court of appeal opinion in this case:

More than 40 years of settled land use law says the majority opinion in this case is wrong. If the majority believes the law as laid down by the Supreme Court should be revisited, then it may encourage the court to do so. But, it is not our province to silently overrule precedent and rewrite the law in this area.

(App. D at p. 1). Review should be granted to resolve the conflicts between the decision in this case and the clear precedent supporting the conclusion that Jones had a vested fundamental right requiring the superior court to apply the independent judgment standard to Jones's petition for writ of administrative mandate. This Court should also grant the petition to resolve conflicts between this decision and other decisions of the court of appeal and this Court regarding when a municipality may be estopped to deny the validity of a building or occupancy permit. In addition, review should be granted to correct the erroneous application of the collateral estoppel doctrine by the court of appeal.

POINT I - REVIEW SHOULD BE GRANTED BECAUSE THE COURT OF APPEAL'S DETERMINATION CONFLICTS WITH CLEAR PRECEDENT ESTABLISHING THAT JONES HAD A VESTED FUNDAMENTAL RIGHT THAT REQUIRED APPLICATION OF THE INDEPENDENT REVIEW STANDARD BY THE SUPERIOR COURT.

Review should be granted to examine the court of appeal's decision on what standard of review should have been applied to Jones's petition for writ

of administrative mandate. The court of appeal's decision to apply the substantial evidence standard was based upon its finding that there could never be a fundamental vested right created by the issuance of a permit that was in violation of a zoning code when issued. This decision conflicts with decisions of this Court and other court of appeal decisions that balance the equities to and find, in certain cases, that a fundamental vested right is created where, as in this case, a permit was issued under color of law upon which a property owner substantially relied to his or her detriment.

A. In Reviewing a Decision Regarding Issuance of a Writ of Administrative Mandate, the Threshold Question is Whether or Not the Petitioner Had a Fundamental Vested Right That Would Require Use of the Independent Judgment Standard of Review.

In evaluating Jones's petition for a writ of administrative mandate pursuant to California Code of Civil Procedure section 1094.5, the superior court had to choose which standard of review it should apply when inquiring into the validity of the city council's denial of Jones's request for a variance. If the city council's decision affected a vested fundamental right, a court should exercise "its independent judgment of the evidence disclosed in a limited trial de novo." (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 143 [93 Cal.Rptr. 234, 481 P.2d 242] (citations omitted)). Otherwise, the superior court had to apply the substantial evidence standard to the city council's decision. (*Bixby, supra*, 4 Cal.3d at p. 144).

If a fundamental vested right is affected by an administrative decision, the reviewing court “must exercise its independent judgment.” (*Anderson v. City of La Mesa* (1981) 118 Cal.App.3d 657, 660 [173 Cal.Rptr. 572], quoting *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 32 [112 Cal.Rptr. 805, 520 P.2d 29]). The rationale for applying this standard of review is based on concerns about administrative proceedings affecting fundamental rights in the absence of full judicial protections.

When an administrative decision affects a right which has been legitimately acquired or is otherwise “vested,” and when the right is of a fundamental nature from the standpoint of its economic aspect or its “effect . . . in human terms and the importance . . . to the individual in the life situation,” then a full and independent judicial review of that decision is indicated because “[the] abrogation of the right is too important to the individual to relegate it to exclusive administrative extinction.”

(*San Marcos Mobilehome Park Owners’ Assn. v. City of San Marcos* (1987) 192 Cal.App.3d 1492, 1499 [238 Cal.Rptr. 290], quoting *Bixby v. Pierno*, 4 Cal.3d 130, 144 [93 Cal.Rptr. 234, 481 P.2d 242]).

Whether or not a vested right is affected by an administrative decision is a critical determination -- the answer determines what level of scrutiny the judiciary will give to the administrative agency decision. “A right may be deemed fundamental within the meaning of *Bixby* on either or both of two bases: (1) the character and quality of its economic aspect; (2) the character and quality of its human aspect.” (*Interstate Brands v. Unemployment Ins. Appeals Bd.* (1980) 26 Cal.3d 770, 780 [163 Cal.Rptr. 619, 608 P.2d 707]).

“The ultimate question in each case is whether the affected right is deemed to be of sufficient significance to preclude its extinction or abridgment by a body lacking judicial power.” (*Frink v. Prod* (1982) 31 Cal.3d 166, 176 [181 Cal.Rptr. 893, 643 P.2d 476] (citations omitted)).

B. The Court of Appeal Reversed the Superior Court, Finding That No Fundamental Right Was Implicated and Imposing the Substantial Evidence Standard of Review.

In its decision granting Jones’s petition for issuance of the writ of administrative mandate, the superior court stated that Jones

has a vested right, not in the permits which the City issued and which have been determined to have been invalid when issued, but in having his home remain where built, as built, because he relied in good faith on the permits the city issued, and the house, as is, has been in place in excess of eight years.

(App. C at p. 2). The court of appeal dismissed this formulation as “semantic maneuvering to avoid our prior holding” that Jones had no fundamental vested right. (App. C at p. 7). The court of appeal cited no direct authority for the proposition that Jones had no vested right at the time he requested a variance or at the time he petitioned for the writ of administrative mandate – the court only cited its prior decision in *Smith I*, which also concluded Jones had no vested right at that time without citing any specific authority for that proposition. (App. A at p. 10).

C. The Court of Appeal Decision In This Case Conflicts With Decisions of This Court and Other Court of Appeal Decisions.

Although the court of appeal dismissed the superior court's finding as mere semantics, in fact the superior court's language tracks the wording in other cases from this Court and the court of appeal that have found a vested right in similar situations. (See, e.g. *Pescosolido v. Smith* (1983) 142 Cal.App.3d 964, 969 [191 Cal.Rptr. 415], citing *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785 [132 Cal.Rptr. 386, 553 P.2d 546] (a fundamental right may be affected if the agency has given its permission to a landowner for a specific use and the landowner has begun such development in good faith reliance thereon)). The court of appeal in this case concluded, in both *Smith I* and *Smith II*, that there could never be a fundamental right arising from the improper issuance of a permit issued in violation of a zoning ordinance.

While zoning of land itself does not constitute a taking by the government unless it deprives a landowner of substantially all reasonable uses of a piece of property, *Agins v. City of Tiburon* (1979) 24 Cal.3d 266, 277 [157 Cal.Rptr. 372, 598 P.2d 25], *aff'd*, (1980) 447 U.S. 255 [65 L.Ed.2d 106, 100 S.Ct. 2138], a fundamental right may be affected if the government has given its permission to a landowner for a specific use and the landowner has begun such development in good faith reliance thereon. (*Pescosolido v. Smith* (1983) 142 Cal.App.3d 964, 969 [191 Cal.Rptr. 415], citing *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785 [132 Cal.Rptr. 386, 553 P.2d 546]). Indeed, "government power to regulate land

use is so important that no vested right to a particular use arises until the government has approved that specific use.” (*Pescosolido v. Smith* (1983) 142 Cal.App.3d 964, 969 [191 Cal.Rptr. 415]). As this Court noted in *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785 [132 Cal.Rptr. 386, 553 P.2d 546], where “a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit.” (*Avco, supra*, 17 Cal.3d at p. 791). Securing such a vested right is crucial -- “once a landowner has secured a vested right the government may not, by virtue of a change in the zoning laws, prohibit construction authorized by the permit upon which he relied.” (*Avco, supra*, 17 Cal.3d at p. 793).

In this case, Jones built his property based upon the permits issued by the City. The City itself concluded that the UBC formula for determining allowable height was applicable to Jones’s steeply-sloped property. Jones continued and ultimately completed construction of his home in reliance on this arguably valid permit. Some years later, the court of appeal concluded that the UBC formula was inapplicable and that the permit was therefore invalid. In making its decision that Jones had no fundamental right, however, the court of appeal ignored the initial multiple approvals given by the City, and also ignored case law supporting a conclusion that, in such a case, a fundamental right could be created.

A fundamental right may be created even where the permit is invalid from the start. For example, in *Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519 [8 Cal.Rptr.2d 385], the court affirmed the granting of a writ of administrative mandate ordering the Costa Mesa city council to set aside its denial of an application for a renewal of a conditional use permit for a tavern. The court found that the superior court correctly applied the independent judgment standard of review because the tavern, which had been in operation for over thirty years, had a vested right to continue in business. The city of Costa Mesa was attempting to put the tavern out of business by refusing to renew a conditional use permit. Citing, *inter alia*, *Anderson v. City of La Mesa* (1981) 118 Cal.App.3d 657 [173 Cal.Rptr. 572], the *Goat Hill* court found that this effort infringed “the right to continue operating an established business in which [the owner] has made a substantial investment . . . [a] right [that] is sufficiently personal, vested and important to preclude its extinction by a nonjudicial body.” (*Goat Hill, supra*, 6 Cal.App.3d at p. 1529).

Similarly, in *Stanson v. San Diego Coast Regional Co.* (1980) 101 Cal.App.3d 38 [161 Cal.Rptr. 392], the coastal commission originally told the plaintiff that he did not need a permit to remodel his restaurant. In reliance on that representation, the plaintiff obtained municipal building permits and spent considerable sums remodeling the building. The coastal commission later discovered that it had erred because its rules required that a permit be obtained. It then sought to require the plaintiff to obtain such a permit as if the

remodeling had not actually occurred, and when the plaintiff applied, the commission denied the application. The court of appeal found that, under such circumstances, the plaintiff had acquired a vested right to undertake the remodeling. The court therefore concluded that the superior court should have applied the independent judgment standard in reviewing the coastal commission's denial of the permit application. (*Stanson, supra*, 101 Cal.App.3d at p. 50).

The court of appeal decision in this case is clearly out of line with other decisions. By foreclosing the possibility that a landowner may ever acquire a vested fundamental right due to the mistaken issuance of a permit upon which that landowner relies to his substantial detriment, the court of appeal decision removes administrative decisions affecting substantial property rights from any meaningful review. Guidance from this Court is necessary to address this incongruous decision and to restore uniformity to this area of the law.

POINT II- REVIEW SHOULD BE GRANTED BECAUSE THE COURT OF APPEAL’S DETERMINATION CONFLICTS WITH CLEAR PRECEDENT ESTABLISHING THAT A MUNICIPALITY MAY BE ESTOPPED TO DENY THE VALIDITY OF A BUILDING OR OCCUPANCY PERMIT.

In *Smith I*, the court stated that because “the permit was invalid at its inception . . . ‘the City cannot be estopped to deny the validity of a permit or other representations respecting the use of property issued or made in violation of the express provisions of a zoning ordinance’.” (App. A at p. 10, quoting *Pettitt v. City of Fresno* (1973) 34 Cal.App.3d 813, 819 [110 Cal.Rptr. 262]). In *Smith II*, the court of appeal reaffirmed this decision, finding that Jones also had no fundamental vested right at the time he requested a variance from the city council. As Justice Jackson pointed out in his dissent, both decisions were clearly incorrect.¹ The court of appeals decision precluding application of estoppel “misstates the applicable law, ignores *Anderson v. City of La Mesa* (1981) 118 Cal.App.3d 657, the one case which is most on point, and compels

¹ While the majority opinion applied the collateral estoppel doctrine, giving preclusive effect to the *Smith I* opinion, the dissent stated that *Smith I* was the law of the case. Justice Jackson found that *Smith I* should not be followed because it was “based upon manifest misapplication of the law and . . . would, upon sober reflection, promote substantial injustice.” (App. D at p. 1-2). The majority opinion invocation of collateral estoppel is addressed in Point III *infra*. Whether *Smith I* operates as the law of the case is unclear. This case only began after the completion of the *Smith I* litigation when Jones made a new application for a variance. The petition to the superior court followed, and it was consolidated with Smith’s new lawsuit, which culminated in this Petition.

an absurd result, the removal of the top portion of a completed residence.”

(App. D at p. 2).

A. The Court of Appeal Decision Completely Forecloses the Possibility That a Municipality Could Ever Be Estopped From Denying the Validity Of a Permit That Was Inconsistent With a Zoning Ordinance.

The court of appeal decision reiterated the determination in *Smith I* that equitable estoppel was not a bar against the City. In support of this conclusion, the court of appeal quoted *Pettitt v. City of Fresno* (1983) 34 Cal.App.3d 813 [110 Cal.Rptr. 262] for the proposition that “as a matter of law, the City cannot be estopped to deny the validity of a permit or other representations respecting the use of property issued or made in violation of the express provisions of a zoning ordinance.” (*Pettitt, supra*, 34 Cal.App.3d at p. 819). The decision in *Pettitt* appears to rest on distinguishing cases where a permit for a particular use was valid when issued from cases where the permit for a particular use was invalid from the beginning because it was issued in violation of the zoning law for the area. (*Pettitt, supra*, 34 Cal.App.3d at p. 824).

B. The Court of Appeal Decision Is Clearly in Conflict With Other Decisions That Allow For the Possibility That a Municipality May Be Estopped To Deny the Validity of a Permit As Justice Requires.

As Justice Jackson pointed out, the draconian decision of the court of appeal is inconsistent with precedent that has used estoppel in the context of invalid permits. Specifically, the dissent cited *Anderson v. City of La Mesa*

(1981) 118 Cal.App.3d 657 [173 Cal.Rptr. 572]. In *Anderson*, “the City first claimed Anderson’s house violated the specific plan ordinance after she had completed her house in good faith reliance upon the building permit the City issued. Once she built the house, her right was vested. The court properly exercised its independent judgment.” (*Anderson, supra*, 118 Cal.App.3d at p. 660). In response to the city’s contention that it could not, as a matter of law, be estopped to deny a building permit issued in violation of a zoning ordinance, the *Anderson* court stated that a governmental entity could be estopped where “the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel.” (*Anderson, supra*, 118 Cal.App.3d at p. 661, quoting *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 496-97 [91 Cal.Rptr. 23, 476 P.2d 423]). As the court noted, the plaintiff had built her house according to and in compliance with the permit issued by the city, which did violate the specific plan for the property but did not violate the standard zoning ordinance, altering the house would substantially harm the plaintiff, and the variance would not create any special problems for the area or adjacent landowners or impose any hardship on any other persons. (*Anderson, supra*, 118 Cal.App.3d at p. 661).

The *Anderson* court also distinguished other cases holding that estoppel could not be used to justify nonconforming uses based on permits issued in violation of existing zoning ordinances. (*Anderson, supra*, 118 Cal.App.3d at

p. 661.). As the court stated in *Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519 [8 Cal.Rptr.2d 385], in commenting favorably on the *Anderson* case, “the court concluded once the plaintiff had completed her house in reliance on the permit, her rights vested and the trial court correctly applied its independent judgment in reviewing the city’s decision denying a variance from the zoning.” (*Goat Hill, supra*, 6 Cal.App.4th at p. 1527, citing *Anderson, supra*, 118 Cal.App.3d at p. 660).

As the dissent pointed out, this case is clearly similar to the situation presented in *Anderson*, and consistent with that precedent, the court of appeal, instead of refusing to consider estoppel, should have affirmed the superior court’s balancing of the various factors to invoke estoppel. While the court of appeal ultimately determined in *Smith I* that the UBC measurement should not have been applied, at the time the permit was ultimately issued to Jones and construction proceeded, the property appeared to conform to the ordinance, and the City had given its blessing to the plans. The zoning violation here was, as in *Anderson*, minimal at most. Requiring Jones to comply with the ordinance as the court now interprets it would impose a substantial hardship. As Justice Jackson stated,

balanced against the need to enforce the zoning ordinance and the desire to preserve part of a neighbor’s ocean view, the prior opinion’s directive that the city attorney begin abatement proceedings, the end result of which can only be the removal of the third story, would promote a substantial injustice.

(App. D at. p. 6, citing *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 82 n. 19 [198 Cal.Rptr. 634]).

Review should be granted to correct the erroneous, inconsistent decision of the court of appeal. *Anderson* and other cases clearly support the use of a balancing test to determine whether estoppel should be invoked. The court of appeal ignored clear precedent by failing to apply a balancing test to determine whether or not the City should be estopped to deny the validity of the permit issued to Jones. Direction from this Court is needed to clarify and unify the law in this area.

POINT III REVIEW SHOULD BE GRANTED BECAUSE THE COURT OF APPEAL'S INVOCATION OF THE COLLATERAL ESTOPPEL DOCTRINE EFFECTIVELY DENIED JONES A FULL AND FAIR OPPORTUNITY TO OBTAIN A VARIANCE.

Review should be granted to correct the court of appeal's improper application of the doctrine of collateral estoppel. The court of appeal used the doctrine to deprive Jones of any meaningful review of his request for a variance, a request the court of appeal itself directed Jones to make. Collateral estoppel, by definition, is forward-looking in its operation and should not have been used as the court of appeal did to preclude Jones from arguing that at the time he petitioned the superior court, he had a vested right in his home as it had been constructed.

The doctrine of collateral estoppel, which is also known as issue preclusion,

precludes a reexamination as between the parties or their privies of any issue necessarily decided if the issue is involved in any subsequent lawsuit brought on a different cause of action.

(*Clemmer v. Hartford Ins. Co.* (1978) 22 Cal.3d 865, 874 [151 Cal.Rptr. 285, 587 P.2d 1098]). This Court has articulated five elements that must be established to invoke collateral estoppel: (1) the issue sought to be precluded from relitigation must be identical to that decided in the prior proceeding; (2) the issue must have been actually litigated in the prior proceeding; (3) the issue must have been necessarily decided in the prior proceeding; (4) the decision in the former proceeding must be final and on the merits; and (5) the party against whom issue preclusion is sought must be the same or in privity with the party to the prior proceeding. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341 [272 Cal.Rptr. 767, 795 P.2d 1223], cert. den. *sub. nom. Lucido v. California* (1991) 500 U.S. 920 [114 L.Ed.2d 107, 111 S.Ct. 2021]). Collateral estoppel applies only to issues that were actually litigated and determined in the first action. (*Henn v. Henn* (1980) 26 Cal.3d 323, 239 [161 Cal.Rptr. 502, 605 P.2d 10]).

In its 1991 *Smith I* opinion, the court of appeal did not decide the issue presented to the superior court -- in 1994, when he was requesting issuance of a writ of administrative mandate, did Jones have a fundamental vested right in his home as constructed? The superior court did address that issue and

found that in 1994, Jones had such a right. Through its invocation of the collateral estoppel doctrine in its 1998 opinion, the court of appeal effectively said it had decided back in 1991 whether or not Jones would have a vested right in 1994. As justification for this determination, the court of appeal stated that “the mere passage of time required to resolve the variance issue has not transformed Jones’s dross to gold.” (App. C at p. 9). The court of appeal’s trite language does not mask the truth -- that it had never decided the specific issue presented to the superior court. By invoking collateral estoppel, the court of appeal effectively kept Jones from procuring any meaningful review of the city council decision on his request for a variance, a request the superior court advised him to make in the *Smith I* opinion. Review should be granted to correct this improper invocation of the collateral estoppel doctrine.

VII. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant his Petition for Review, and grant to Petitioner such other and further relief to which he may be justly entitled.