OPINION NO. 84-037

Syllabus:

1. The vested rights doctrine prohibiting the retroactive application of zoning and building code amendments does not apply to amendments designed to prohibit or regulate activities that constitute a nuisance or an imminent threat to the public health, safety or welfare.

2. An amendment to a municipal building code which prohibits new construction and other encroachments that may result in an increase in flood levels may be enforced against a property owner notwithstanding the fact that such property owner applied for a building permit prior to the enactment of such amendment.

To: Myrl H. Shoemaker, Director, Department of Natural Resources, Columbus, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, June 28, 1984

I have before me your request for an opinion regarding the vested rights doctrine as applied to building codes and zoning ordinances. Specifically, you have asked as follows:

1. Is there a difference under Ohio law, between the application of the vested rights doctrine to building codes and its application to zoning ordinances?

2. Where an amendment to a building code was pending and an applicant for a building permit had actual or constructive notice of such ordinance, do the applicant's rights vest at the time of the application for the permit in the same way that they would where the application is made and the amendment is later introduced and adopted?

It is my understanding that the event that prompted this opinion request was the City of Cincinnati's attempt to amend its building code to conform to regulations and requirements adopted by the Federal Emergency Management Agency which is charged with implementing the National Flood Insurance Program. While the proposed amendment to the City's building code was pending, an application for a new building permit was submitted by an entity with full knowledge of the proposed amendment.

Before addressing your specific questions, I shall first clarify the scope of the so-called vested rights doctrine to which you have referred. Municipalities exercise their police powers when enacting both building codes and zoning ordinances. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); City of Dayton v. S. S. Kresge Co., 114 Ohio St. 624, 151 N.E. 775 (1926), aff'd, 275 U.S. 505

(1927); State ex rel. Ohio Hair Products Co. v. Rendigs, 98 Ohio St. 251, 120 N.E. 836 (1918). A municipality's exercise of police power authority must be evaluated in terms of the overall effect and purpose of the ordinance. State ex rel. Stulbarg v. Leighton, 113 Ohio App. 487, 173 N.E.2d 715 (Hamilton County 1959). The development of Ohio law reflects two distinct methods for treating a police power enactment depending upon whether the ordinance is necessary to protect public health, safety, and welfare, or whether it is intended to regulate land use. Ghaster Properties, Inc. v. Preston, 176 Ohio St. 425, 441, 200 N.E.2d 328, 339 (1964) ("[i]t may be that a zoning regulation may not interfere with an existing use of property. . . . [h]owever, a general police regulation may" (citations omitted)). Compare City of Akron v. Chapman, 160 Ohio St. 382, 116 N.E.2d 697 (1953) (a municipality may not terminate a nonconfirming use which does not constitute a nuisance and which was lawfully in existence at the time of passage of the zoning ordinance) with City of Akron v. Klein, 171 Ohio St. 207, 168 N.E.2d 564 (1960) (ordinance prohibiting operation of junk yard during certain hours bears a substantial relationship to public health and welfare and may be enforced against one who operated a junk yard prior to the enactment of the ordinance).

Where the purpose of an ordinance is to confine certain uses of land to certain locations, Ohio courts follow the minority view and hold that the parties are governed by the zoning ordinance as it existed at the time of the building permit application. In the seminal case of Gibson v. City of Oberlin, 171 Ohio St. 1, 167 N.E.2d 651 (1960), the City of Oberlin refused to issue a building permit when the proposed building did not conform with zoning amendments made after the filing of the permit application. The Ohio Supreme Court held that the right to a building permit becomes vested when the application is filed. Thus, the zoning ordinance which is in effect at the time the application is filed is controlling. The holding of the Gibson case is enunciated in the second paragraph of the syllabus of that decision:

> In the enactment of a zoning ordinance, a municipal council may not give retroactive effect to such ordinance so that a property owner is deprived of his right to a building permit in accordance with a zoning ordinance in effect at the time of the application for such permit. (State, ex rel. Fairmount Center Co., v. Arnold, Dir. and Inspr., 138 Ohio St., 259, Hauser, Commr. of Bldgs., v. State, ex rel. Erdman, 113 Ohio St., 662, approved and followed).

171 Ohio St. at 1, 167 N.E.2d at 651. In reversing the lower court, the Supreme Court in Gibson cited with approval the language and its prior decisions in State ex rel. Ice and Fuel Co. v. Kreuzweiser, 120 Ohio St. 352, 166 N.E. 228 (1929), and State ex rel. Fairmount Center Co. v. Arnold, 138 Ohio St. 259, 34 N.E.2d 777 (1941). In Gibson, the court recognized that when a property owner has complied with all the legislative requirements for the procurement of a building permit and the proposed structure falls within the use classification of the area in which he proposes to build, he has a vested right to such a permit. The court then held that subsequent zoning legislation enacted during the pendency of the application cannot be used to deprive the applicant of his right to that permit. Gibson, 171 Ohio St. at 5-6, 167 N.E.2d at 654. See Laderman and Weiss Realty Co. v. City of Beachwood, 27 Ohio St. 2d 150, 153, 271 N.E.2d 844, 846 (1971). The rationale for this approach is that retroactive application of a zoning amendment deprives the applicant of the property rights involved in obtaining a building permit without due process of law. Therefore, under Ohio law "zoning legislation enacted subsequent to the filing of an application for a building permit does not affect the property owner's right to receive the permit." Union Oil Co. of California v. City of Worthington, 62 Ohio St. 2d 263, 264, 405 N.E.2d 277, 279 (1980) (citing Gibson).

When dealing with matters directly affecting public health and safety rather than the mere restriction of land use, however, Ohio courts have recognized that municipalities may apply new regulations to existing businesses or property. Ghaster Properties, Inc. v. Preston (statute prohibiting billboards adjacent to highway applied against existing signs); City of Akron v. Klein; Benjamin v. City of Columbus, 167 Ohio St. 103, 146 N.E.2d 854 (1957) (municipal ordinance regulating possession of gambling devices enforceable against existing businesses). Indeed,

this authority is explicitly provided in section 19 of Article I of the Ohio Constitution which states that, "[p]rivate property shall ever be held inviolate, but subservient to the public welfare."

The key decision of the Ohio Supreme Court which enunciates this approach is State ex rel. Ohio Hair Products Co. v. Rendigs. In that case the plaintiff sought a writ of mandamus to compel the building commissioner to reissue a previously granted building permit for the construction of an animal hair processing factory which permit was revoked after the city had passed an ordinance amending its code to prohibit the erection of such factories in certain areas. The Supreme Court held that the relator did not acquire vested rights which remained unaffected by the amendment. Specifically in response to relator's argument that the ordinance could not be retroactive because he had expended considerable money in the purchase of land and material and in otherwise preparing for the construction of the building, the court declared that:

> It is not necessary to devote much time to this proposition, for it seems to be well settled that a permit such as was issued in this case has none of the elements of a contract, and may be changed or entirely revoked, even though based on a valuable consideration, if it becomes necessary to do so in the exercise of a legislative power on subjects affecting the public health or public morals.

98 Ohio St. at 261, 120 N.E. at 839 (citations omitted). It is important to note that in rendering its decision in Gibson, the Supreme Court did not overrule its previous decision in Ohio Hair Products. Thus, the principle of law enunciated in Ohio Hair Products continues to govern in situations where a municipal ordinance is necessary to prohibit or regulate activities that constitute a nuisance or a threat to the public health or public morals.

I turn now to your first question which asks whether the vested rights doctrine applies to limit the application of building code regulations in the same manner as it limits the application of zoning code regulations. This issue is addressed by the Ohio Supreme Court in Gates Co. v. Housing Appeals Board, 10 Ohio St. 2d 48, 225 N.E.2d 222 (1967). The Gates court denied the retroactive application of a building code requirement that at least one bathroom be provided for every two dwelling units and that hot water be supplied to every facility. The court found that there was no evidence to suggest that the failure of an existing building to conform to the requirements of the ordinance constituted an imminent threat to the public health, safety, morals or welfare. Relying on City of Akron v. Chapman and distinguishing City of Akron v. Klein and Benjamin v. City of Columbus, the court enunciated the following rule of law in its syllabus:

> In the absence of a determination that the continued use of improved real property without conforming to building standards subsequently adopted would constitute a nuisance, improvements necessary to comply with the new standards may not constitutionally be compelled by a public agency against the private owner of such property.

10 Ohio St. 2d at 48, 225 N.E.2d at 223. Thus, while the Gates holding extends the vested rights doctrine applied in zoning code cases to building code regulations, it likewise preserves the distinction that the doctrine is inapplicable to ordinances designed to prohibit or regulate activities that may constitute a nuisance or an imminent threat to the public health, safety or welfare.

The situation about which you have inquired aptly illustrates the distinction noted in Gates. The essential question which must be considered is whether the present Cincinnati ordinance is substantially related to the public health, safety, and welfare, or whether the Cincinnati ordinance is merely an attempt to restrict the use of land. The starting point for this analysis is the National Flood Insurance Act, 42 U.S.C. §§4001-4128, the program in which the City of Cincinnati desires to participate. In adopting the National Flood Insurance Act, Congress made a finding that, "flood disasters have created personal hardships and economic distress which

have required unforeseen disaster relief measures and have placed an increasing burden on the Nation's resources. . . ." 42 U.S.C. §4001(a)(1). In addition, Congress declared that it was enacting such legislation because "the Nation cannot afford the tragic losses of life caused annually by flood occurences, nor the increasing losses of property suffered by flood victims, most of whom are still inadequately compensated despite the provision of costly disaster relief benefits. . . ." 42 U.S.C. §4002(a)(5) (emphasis added).

The Federal Emergency Management Agency (hereinafter "FEMA"), is the agency designated to implement the flood insurance program. See 42 U.S.C. §4011. According to FEMA's publication The Flood Way: A Guide For Community Permit Officials, the annual loss due to flood related damages now exceeds 3.8 billion dollars. Furthermore, FEMA concludes that "flood ways are abnormally dangerous areas due to the depths and velocities of the water. . . ." and that "every effort should be made to avoid endangering lives."

One of the purposes of the National Flood Insurance Program is to prevent flood level increases by prohibiting development in floodways which would displace flood waters and, as a result, raise the flood level in a given area. If a community located in a flood plain adopts local flood plain management regulations which are consistent with FEMA's criteria for land management and use in flood plain areas, owners of property in these areas are eligible to purchase policies of federally subsidized flood insurance. The City of Cincinnati has chosen to participate in this program.

It is my understanding from the information provided with your request that in 1977 Cincinnati entered the "Emergency Phase" of the program. To continue to be eligible and to enter the regular phase of the program the City was required to enact ordinances acceptable to FEMA by October 15, 1982. Noncompliance with these federal requirements would result in denying flood insurance to property owners in flood prone areas and other forms of federal assistance in flood hazardous areas. As a result, on October 13, 1982, Cincinnati amended its building code by adopting Ordinance No. 416-1982 which enacted new flood plain regulations. Because the City was aware of the vested rights doctrine enunciated in Gibson, the City adopted the ordinance in a manner which was prospective only.

FEMA contested the validity of the City's attempt to apply its flood plain regulatory program strictly in a prospective manner and on October 15, 1982, FEMA suspended Cincinnati from the program until Cincinnati revised its ordinance. FEMA's position was that limiting the application of the flood control program to prospective use only would permit further development in the flood plain area and, therefore, was inconsistent with the program requirement that there be no increase in the base flood levels permitted by development after entering the regular phase of the program.

In order to restore its eligibility, the City amended its ordinance to read:

> Further encroachments, including fill, new construction, substantial improvements, and other developments are prohibited unless a technical evaluation demonstrates that encroachments will not result in any increase in flood levels during the occurrence of the base flood discharge or unless the applicant has the right clearly vested by operation of Ohio law to make such encroachments. (Emphasis added.)

The facts you have provided me indicate that Cincinnati passed the amended ordinance to comply with requirements of the National Flood Insurance Program. This amended ordinance was a proper exercise of police power and seeks to regulate against a nuisance or an imminent threat to the public safety and welfare. Activities which result in increasing surface waters on the property of another may be found to constitute a nuisance. See Tootle v. Clifton, 22 Ohio St. 247 (1871); Boettler v. Board of Township Trustees, 83 Ohio L.Abs. 184, 165 N.E.2d 705 (C.P. Summit County 1960). See also Myotte v. Village of Mayfield, 54 Ohio App. 2d 97, 375 N.E.2d 816 (Cuyahoga County 1977) (municipality held liable for damages resulting from increased flooding where municipality issued a building permit for

the development of an industrial complex which diminished the surface area available for drainage). The ordinance attempts to confer upon the public the benefit of subsidized flood insurance and to prevent additional harm to the public by controlling the flood level. Moreover, the ordinance is narrowly drawn. It does not restrict the right to use land; it merely requires that such use cannot increase the likelihood of flooding or result in an increase in the flood level in the designated flood plain area. Since the ordinance by its very terms prohibits only those encroachments that may constitute a nuisance or an imminent threat to the public safety or welfare, the ordinance falls within the exception to the vested rights doctrine noted and preserved in Gates. Accordingly, the fact that a property owner applied for a building permit prior to the enactment of the amended ordinance does not give such owner a right clearly vested by operation of law to make the encroachments prohibited by the ordinance.

In light of my answer to your first question, the second question need not be addressed.

Based on the foregoing analysis, it is my opinion, and you are advised, that:

1. The vested rights doctrine prohibiting the retroactive application of zoning and building code amendments does not apply to amendments designed to prohibit or regulate activities that constitute a nuisance or an imminent threat to the public health, safety or welfare.

2. An amendment to a municipal building code which prohibits new construction and other encroachments that may result in an increase in flood levels may be enforced against a property owner notwithstanding the fact that such property owner applied for a building permit prior to the enactment of such amendment.