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John R. Nolon
Pace University School of Law, jnolon@law.pace.edu

Jessica A. Bacher
Pace University School of Law, jbacher@law.pace.edu

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Vested Rights:
Do Land Developers Need More Protection?

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John R. Nolon and Jessica A. Bacher

[John Nolon is a Professor at Pace University School of Law, Counsel to its Land Use Law Center, and Visiting Professor at Yale's School of Forestry and Environmental Studies. Jessica Bacher is an Adjunct Professor at Pace University School of Law and a Staff Attorney for the Land Use Law Center. Pace Law School students Elizabeth Cassidy and Christine Kowalski contributed to this article.]

Abstract: The general doctrine of vested rights protects developers from changes in zoning after they have received a valid building permit. This article explains the two varieties of vested rights laws New York: statutory, and common law. Also discussed, is a new proposal for vested rights legislation that would increase protection for developers over the existing laws. The article closes by citing of some of the concerns with vested rights such as the single integrated project theory, losing vested rights by abandonment, and the equitable estoppel rule.

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Proposed Vested Rights Bill

Currently before the New York State Assembly is legislation that would establish a rebuttable presumption that all local land use regulations affecting a particular parcel of land will remain applicable for six years following the submission of a complete site plan, subdivision, or other development plan application.[1] For example, if parcel A requires 20 foot set backs and the owner applies for site plan approval, the setback requirements, as they apply to that application, cannot be amended by the municipality for six years. A municipality may rebut this presumption by making one of three findings: (1) change in state or federal laws, rules or regulations; (2) newly discovered information or changes in circumstances related to the proposed project show that the project is likely to harm or endanger the public health, safety or biological habitat and that such harm will not be prevented by existing laws, codes, rules or regulations; (3) the municipal board is applying a new or altered requirement that has been the subject of a draft environmental impact statement that was filed before the land use application. The proposed bill, if passed, would not apply to "applications requiring changes in zoning provisions that are sought by the applicant in connection with the proposed project prior to the adoption of any such changes." If the applicant makes any

[1] Assemb. 6023A, 2007 Leg., Reg. Sess. (N.Y. 2007)(Sponsor's memorandum); S. 3852, 2007 Leg., Reg. Sess. (N.Y. 2007).

substantial changes (other than in response to comments), then the application will be considered a new application.

Current Vested Rights Law

Under current law, the doctrine of vested rights protects property owners from changes in zoning when they have received a valid building permit and have completed substantial construction and made substantial expenditures in reliance on the permit. The court in *Ellington Construction Corp. v. Zoning Board of Appeals*, *of the Incorporated Village of New Hempstead*,[2] determined that the New York rule for vested rights is "where a more restrictive zoning law is enacted, an owner will be permitted to complete a structure or development which an amendment has rendered nonconforming only where the owner has undertaken substantial construction and made substantial expenditures prior to the effective date of the amendment." The property owner must also have incurred expenditures and made improvements in reliance on the validly issued permit. The rights must also vest after the issuance of the permit but before the zoning amendment becomes effective.[3] When a court finds that a property owner has vested rights to a validly issued permit, the effect is to immunize the approved project from all changes in zoning or other land use regulations. This judicially created doctrine is called "common law" vested rights.

In order to vest rights to the permit, the amount spent or the construction completed must be substantial in relation to the entire project. In *Riverdale Community Planning Ass'n v. Crinnion*,[4] the court ruled against a property owner who failed to show that the extent of completion of the excavation and the foundation constituted a substantial part of the entire project. In *Glenel Realty Corp. v. Worthington*,[5] the court held that the developer had acquired a vested right to complete a retail shopping center where it had almost completed the foundation work. In *Reichenbach v. Windward at Southampton*,[6] the court held that the property owner had not made substantial expenditures so as to vest rights to construct a motel prior to a zoning amendment that precluded motels. The owner had spent $3,150 on footing and foundation work and $3,345 on plans and surveys for the project, but the total estimated cost of the motel project was $600,000. Thus, expenditures amounted to just over 1% of the estimated cost of the entire project – not enough to support a vested rights claim.

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[2] 77 N.Y.2d 114, 566 N.E.2d 128, 564 N.Y.S.2d 1001 (1990).

[3]See also Town of Lloyd v. Kart Wheelers Raceway, Inc., 28 A.D.2d 1015, 283 N.Y.S.2d 756 (3d Dep't 1967) (holding that vested rights were not established even though the new owner claimed that it had expended over $33,000 on new facilities); Smith v. Spiegel & Sons Oil Corp., 31 A.D.2d 819, 298 N.Y.S.2d 47 (2d Dep't 1969), aff'd, 24 N.Y.2d 920, 249 N.E.2d 763, 301 N.Y.S.2d 984 (1969) (holding that "the purchase of property, the demolition of structures thereon, and the retaining of architects to prepare plans was not work of a substantial character").

[4] 133 N.Y.S.2d 706 (Sup. Ct. Bronx County 1954), aff'd, 285 A.D. 1047, 141 N.Y.S.2d 510 (1st Dep't 1955).

[5] 4 A.D.2d 702, 165 N.Y.S.2d 635 (2d Dep't 1957).

[6] 80 Misc. 2d 1031, 364 N.Y.S.2d 283, (Sup. Ct. Suffolk County 1975), aff'd, 48 A.D.2d 909, 372 N.Y.S.2d 985 (2d Dep't 1975).

The cost of the land, the demolition of existing structures, processing and consultant fees, or excavation work in preparation for construction is not enough to vest rights. A court will not consider a particular expenditure unless there is a "special connection" between the expenditure and the approved use. For example, in considering whether there had been substantial expenditures to entitle the completion of a mall, a court would not consider the expenditure of $120,000 to widen a road where the road would have had to be constructed to serve the residential development that was allowed under the amended law.[7]

There is also a more limited "statutory" vested rights rule in New York, adopted by the state legislature, which immunizes approved subdivision plats from changes in the dimensional or area requirements of zoning, but not use requirements, for a period of one to three years, depending on the circumstances.[8] Under the statutory protection provided to approved residential subdivisions, the landowner need not complete the entire subdivision during the prescribed period. The entire project will be vested, however, if the landowner has met the judicially prescribed standard of substantial expenditure and investment during the period.

The statutory grace period merely grants the developer a specified time in which to vest his rights. If the developer fails to acquire vested rights within the prescribed time, then subsequent zoning requirements will apply to his property.[9] In *Ellington Construction Corp. v. Zoning Board of Appeals, of the Incorporated Village of New Hempstead*,[10] the zoning board of appeals argued that the statute afforded "protection only for those lots in a filed subdivision that an owner has completed or for which it has actually obtained a building permit during the exemption period." The court disagreed, holding that the statute "was intended to permit a developer to secure the right to complete a subdivision in accordance with existing zoning requirements by manifesting a commitment to the execution of the subdivision plan through completing improvements and incurring expenditures in connection therewith, during the exemption period, sufficient to constitute vesting under common-law rules."

Purpose

There are dual purposes for the current doctrine of vested rights. One is to protect the investment of landowners who have made significant expenditures and completed significant construction in reliance on a valid land use permit. When landowners have undertaken substantial construction and expenditure, they are no longer subject to zoning changes; this protects the owner's investment from confiscation. The second is to preserve municipal authority to protect the health, safety, and welfare of the community. The New York vested rights rule gives local governments some flexibility to

[7] Town of Hempstead v. Lynne, 32 Misc. 2d 312, 222 N.Y.S.2d 526, (Sup. Ct. Nassau County 1961).
[8] Town Law § 265-a, Village Law § 7-709, and General City Law § 83-a.
[9] Freundlich v. Town Board of Southampton, 73 A.D.2d 684, 422 N.Y.S.2d 215 (2d Dep't 1979), aff'd, 52 N.Y.2d 921, 419 N.E.2d 342, 437 N.Y.S.2d 664 (1981).
[10] 77 N.Y.2d 114, 566 N.E.2d 128, 564 N.Y.S.2d 1001 (1990).

change the rules to protect the public from the time a permit has been issued until a substantial investment under that permit has been made.

If the proposed bill is passed, local governments' flexibility will be severely limited and applicants will have increased protection from changes in land use regulations. The justification for the proposed bill is to protect property owners who have invested money in an application before and after the review process from having their project derailed by a change in zoning. "[M]unicipal action which changes the rules midstream, when it is not based on legitimate concerns, constitute an impairment of a property owner's rights by preventing the owner from having the liberty to use his land, it often devalues the property and causes substantial additional expenses to the property owner."[11]

Application of Current Law in Recent Case

In *Exeter Building Corp. v. Newburgh*, the court held that the applicant acquired statutory vested rights when it was granted a lot-line change, and thus could pursue the development of its property under the prior zoning regulations.[12] On March 6, 2006, Town of Newburgh enacted Local Law No. 3 (2006) which rezoned residential R-2 and R-3 areas to residential R-1. This law affected the property owned by Exeter in such a way that it would no longer be possible for Exeter to develop the property as a condominium complex as it had intended. The appellate division held that although Exeter had failed to establish "substantial improvements and expenditures" to support its claim of common law vested rights, it had established statutory vested rights under Town Law § 265-a when it sought and received a lot-line change from the planning board. The lot-line change constituted a "subdivision" within the meaning of Town Law § 276(4)(a) and Town of Newburgh Code § 163-2, and therefore Exeter had statutory vested rights and was immunized from the zoning change for a period of three years following the subdivision approval. Under the new bill, Exeter's rights would have vested at the time it filed its application and thus Local Law No. 3 would not have applied to Exeter's application.

Limitations and Concerns of Current Vested Rights Law

Rights Will Never Vest Under an Invalid Permit

A landowner's rights will never vest under an invalidly issued permit. The doctrine of vested rights assumes that the property owner acted in justifiable reliance on a validly issued permit. Property owners should insure that they have a valid permit before claiming vested rights. In *Parkview Associates v. City of New York*,[13] the developer was issued a building permit to construct a 31-story building. The applicable zoning, which allowed a maximum of 19 stories, was misinterpreted by the builder and the City

[11] Assemb. 6023A, 2007 Leg., Reg. Sess. (N.Y. 2007)(Sponsor's memorandum).

[12] Exeter Building Corp v. Town of Newburgh. 2008 WL 740561 (N.Y.A.D. 2 Dept.), 2008 N.Y. Slip Op 02586.

[13] 71 N.Y.2d 274, 519 N.E.2d 1372, 525 N.Y.S.2d 176 (1988).

Department of Buildings. When the mistake was realized, construction was nearly complete. The court sustained the city's order to demolish 12 stories because the "original permit in this case was invalid inasmuch as it authorized construction . . . in violation of [the] New York City Zoning Resolution." The property owner's argument that the City should be estopped from enforcing the law because of the department's mistake and the nearly completed construction was not successful.

The Single Integrated Project Theory

Where a developer completes one or more phases of a development, vested rights to the entire project may accrue. Where the later stages of the project have not been substantially constructed but the developer has made substantial project improvements in earlier project stages that support and benefit later stages, a court may find that rights to the entire development have vested. In *Telimar Homes, Inc. v. Miller*,[14] the court held that a zoning law amendment that required a minimum lot size of one half acre as opposed to a quarter acre did not apply to the plaintiff. The builder had been granted approval to subdivide the land into quarter-acre lots. Following this approval, construction of roads began, "plans were prepared and model homes were built . . . all on the basis that it was a single over-all project." The court concluded that because substantial construction had commenced and substantial expenditures had been made, the builder had "acquired a vested right to a nonconforming use as to the entire tract."

In *Schoonamaker Homes v. Village of Maybrook*,[15] a planning board granted subdivision approval for property that was to be divided into separate sections for apartments, townhouses, and single-family residences. The townhouse and single-family sections of the project were developed. Twenty years later, when the developer applied for building permits to construct the apartments, the village amended its zoning law to decrease the density permitted for apartments and denied the permits because the application did not meet these new requirements. The developer challenged the denial based on the single integrated project theory. Under this theory, a developer who seeks approval for a project to be constructed in several stages has vested rights to the entire project even if the later stages of the construction have not been started where substantial infrastructure construction on the first phases serves the later stage. The court held that the developer had acquired vested rights to develop all apartment units, but that the developer had abandoned those rights during the 20-year delay; overt acts of abandonment by the developer were shown.

Losing Vested Rights by Abandonment

Property owners may lose vested rights by abandonment. The court may find that a landowner has abandoned his vested rights if the completion of the project is delayed for a long period and there is some overt act implying that the developer has abandoned the vested rights. For abandonment of vested rights, there must be intent to abandon in

[14] 14 A.D.2d 586, 218 N.Y.S.2d 175 (2d Dep't 1961).
[15] 178 A.D.2d 722, 576 N.Y.S.2d 954 (3d Dep't 1991).

addition to an overt act implying that the developer is abandoning his vested rights.[16] In *202 Developers, Inc. v. Town of Haverstraw*,[17] the court rejected the town's argument that the developer had lost its right to develop certain property because it "did nothing to develop the property for eleven years after it gained site approval." There was no overt act or other evidence of intent to abandon other than the passage of time. To determine if a zoning board's conclusion that vested rights have been abandoned is valid, the court must consider whether the conclusion was based on "substantial evidence."[18]

Equitable Estoppel Rule

A community may encounter difficulties if an owner is prevented, by arbitrary delaying tactics, from obtaining a valid building permit and vesting his rights under it. In such a case, the municipality may be prevented from applying the changed regulations and denying an owner a permit under the previous regulations. The issue in *Pokoik v. Silsdorf*,[19] was whether, because of improper actions of municipal officials, the petitioner was entitled to an order directing the issuance of a permit. Plaintiff had wanted to build a two-bedroom addition to his four-bedroom house. The application was denied and plaintiff appealed. While the appeal was in process, the local legislature amended its zoning law to limit one-family homes to four bedrooms. The final denial was based on this amendment. The court found repeated abuses by certain municipal officials in their treatment of the plaintiff's application and that the reasons for denying the earlier permit applications were meritless. It held that it was "abundantly clear that at all times prior to the effective date of the amendment the petitioner was entitled to a permit." The court concluded that the delay in this case was a "special facts exception" to the rule that "a case must be decided upon the law as it exists at the time of the decision," and therefore "the zoning law as amended, [did] not apply and the arbitrary action of the board may not prevail."

[16] See Putnam Armonk, Inc. v. Town of Southeast, 52 A.D.2d 10, 382 N.Y.S.2d 538 (2d Dep't 1976).
[17] 175 A.D.2d 473, 573 N.Y.S.2d 517 (3d Dep't 1991).
[18] See Schoonamaker Homes v. Village of Maybrook, 178 A.D.2d 722, 576 N.Y.S.2d 954 (3d Dep't 1991).
[19] 40 N.Y.2d 769, 358 N.E.2d 874, 390 N.Y.S.2d 49 (1976).