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Closing the Bookends on Vested Rights

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The interface between a government's right to exercise police power and a citizen's right to use private property is one of the most celebrated topics in American constitutional jurisprudence. Judicial attempts to establish "bright lines" marking the boundaries of this interface have produced inconsistent rulings and confusing pronouncements of law. . . .

A vested right to use private property is a right that is immune to the governmental exercise of its police power. The exercise of regulatory police power that causes the diminishment of a vested right is one that goes "too far." Implicit in the past two sentences is the basis for much of the confusion in the law of vested rights.[1]

I. INTRODUCTION

As open space continues to disappear, developers face increasing community opposition as they grapple with the local government approval process. Even where full approvals have been obtained a development proposal is not immune from attack. When a local legislative body, responding to legitimate community concerns, amends the local zoning ordinance, the developer's previous approvals may be rendered ineffective because they are inconsistent with the zoning amendments. If, however, the developer can show that his rights have vested, the project may be finished and allowed to continue as a nonconforming use.[2] Because the vesting of rights is the triggering event that determines which side will ultimately prevail, an ongoing tension surrounds the issue of when rights should vest during the development process.

States treat the issue of vested rights differently. A minority of states say rights vest at the time of application for a permit, as long as the application is consistent with the building codes and ordinances then in effect.[3] The states of Georgia, Idaho, Maine, North Carolina, Pennsylvania, South Carolina, Tennessee, Utah, Vermont and Washington follow this rule.[4] This review lends the most stability to the development process and

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"Hazardous Substances and Male Reproductive Health," jointly sponsored by the Mount Sinai School of Medicine, the National Institute of Environmental Health Sciences/ Superfund Research Program and the New York City Academy of Medicine, New York City. Information: (212) 241-4785.

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WORTH READING

Spider Barbour, "Untapped Power: Rare Species in Utility Corridors," *News from Hudsonia,* Vol. 13, No. 1, Fall, 1997, at 1.

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Charles R. Foy, "Accessory Zoning Used: New Strategies Decrease Costs of Development," *New York Law Journal,* 11/10/97, at S1.

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Closing the Bookends on Vested Rights

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is the most favorable to the interests of the property owner or developer.

A number of other states have an intermediate view on when rights will vest. In Delaware, Florida, Hawaii, Illinois, Iowa, New Hampshire and Rhode Island, courts have held that vested rights accrue where "a landowner [has] experienced a substantial change of position, expenditure, or increase of obligation either pursuant to a building permit *or in reliance upon the probability of its issuance.*"[5] Under this approach, a court is free to consider expenditures incurred prior to the issuance of a permit. Thus, the issuance of a building permit, while important, is not necessarily the triggering event for the Court's review of facts to determine whether vested rights have been acquired.

New York is one of twenty two states that equate a vested right with a property right or interest.[6] These states are the least protective of developer's interests in the sense that rights there tend to vest later in the development process. In these states, the triggering event is the issuance of the permit. Everything that occurs before this point is irrelevant with respect to vested rights.[7] In these states, "[w]hen a zoning amendment becomes effective, the ordinary result is that all permits theretofore issued for uses or structures that the amendment prohibits are rendered ineffective, except where vested rights have been acquired."[8] Thus, even though the developer has acted in reliance on a permit that was valid at the time and has made a significant investment prior to the zoning amendment, his rights may not have vested and the project will be stopped dead in its tracks. In this instance, the developer may have no recourse.

The potential harshness of this approach to vested rights is only amplified by modern approval processes under which the property owners expend tremendous amounts of time and resources before the development actually commences. This is the case for large development projects in particular.

> Large scale projects may require a change of zone or an application for a special permit, the preparation of an environmental impact statement, and public hearings. They can also involve the services of attorneys, planners, engineers, appraisers, and environmentalists, and require approvals from various agencies before a building permit for the first structure can be applied for.[9]

However, balanced against developer's concerns are the legitimate interests of local governments to protect the public health, safety and welfare and to preserve the character and quality of life in the surrounding community. Would allowing rights to vest earlier in the development process eliminate a vital function of government, namely the ability to respond to the changing needs of the community it serves? It is an uneasy balance.

Proponents of developers' interests argue that the law of vested rights in New York is in need of change to protect and recognize the significant up-front investments required by the modern development review process. The difficulty is in knowing where to redraw the line. Any significant alteration in the vested rights doctrine requires a fundamental change in the precepts that support the doctrine as it exists today. Something less may be appropriate.

II. VESTED RIGHTS IN NEW YORK

A. The General Rule

> The New York rule . . . has been that where a more restrictive zoning ordinance is enacted, an owner will

> be permitted to complete a structure or a 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.[10]

The doctrine is said to be grounded both in common law and in equity,[11] and appears uncomplicated in the abstract. Two essential elements are substantial completion and substantial expenditures. A third element implicit in the quoted text is justifiable reliance; the property owner must have incurred expenditures and made improvements in reliance on a validly issued permit. There is also a time element—the window of opportunity for the developer to vest his rights is after the issuance of the permit but before the zoning amendment becomes effective.

The difficulty arises when the doctrine must be applied to a factual situation. What is meant by substantial construction and substantial expenditure? The answer depends on the particular facts presented by the case. It cannot be determined without considering the overall size of the project itself. In addition, the property owner must clearly delineate what expenditures were incurred and what improvements were made before the ordinance was amended.[12]

Definitive bright-line rules cannot be drawn for the application of the vested rights doctrine. Nevertheless, it is safe to say that "[d]emolition of existing structures and preparation of the land in other ways is not generally considered sufficient,"[13] because excavation and demolition rarely amount to a significant portion of the entire project.

The line begins to blur when it comes to structural foundations. If the structure is projected to be one or two stories, then completion or substantial completion of the foundation would generally be sufficient (and is not always necessary) to support a vested rights claim.[14] In *Glenel Realty Corp. v. Worthington,*[15] for example, 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. The Town argued that substantial completion of the foundation only gave the developer a vested right to the foundation and not to the whole structure. The Court rejected the argument stating

> Such an argument is not only shocking to the sense of justice but also leads to a reductio ad absurdum. The foundation is an integral part of the whole structure; it is the foundation. Where, as here, the superstructure is a one-or two-story [structure] and part of the basement is to be utilized for rental purposes, the foundation may be said to be a major part of the whole structure.[16]

In the case of a thirty story building, however, the property owner will be on shaky ground once again.

In *Riverdale Community Planning Ass'n v. Crinnion*, 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. The court was also impressed by the fact that the property owner, with only excavation and foundation permits, proceeded "knowing the progress of the steps toward the adoption of the zoning resolution."[17]

In relation to "substantial expenditures," it is not enough that the expenditures be substantial in and of themselves. They "must be substantial in relation to the entire project."[18] Purchase of land alone is not enough to vest rights.[19] The same could be said of excavation work in preparation for construction. In *Reichenbach v. Windward at Southampton*, 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.[20] Thus, expenditures amounted to just over one percent of the estimated cost of the entire project, not enough to support a vested rights claim.

Further, a court will not consider a particular expenditure unless there is a "special connection" between the expenditure and the proposed use.[21] In *Town of Hempstead v. Lynne,* the court, in holding that there had not been substantial expenditures entitling the owner to finish a mall development, refused to consider $120,000 spent by the developer to widen a road to the site where the road, as widened, was also consistent with residential development which was allowed under the amended ordinance.[22]

B. Rights Will Never Vest Under an Invalid Permit

As discussed above, necessary to a vested rights claim in New York is proof that the property owner acted in justifiable reliance on a validly issued permit. The corollary is that vested rights will never accrue under an invalid permit.

> A permit issued for a use or structure which is prohibited by an ordinance is beyond the power of an officer to issue, whether its issuance was caused by an error relating to what the ordinance provided or an error relating to the facts of the case, and no matter how induced. *Consequently, the permit has no legal status and has no power to clothe its holder with any legal rights.*[23]

This may be a harsh lesson indeed for a developer, when after making significant progress on a development, he learns that his permit was illegal in the first instance. Under these circumstances, the developer faces a free-fall with no net below. The fact that the public official who issued the permit believed that the permit was valid at the time of issuance is of little importance. An error is an error, and all of the burden lies on the developer.[24]

Parkview Associates v. City of New York[25] is the most notable case to illustrate this harsh lesson. There, the developer was issued a building permit to construct a 19-story building rising to 31-stories at a portion of the building that was set-back more

than 100 feet.[26] Both the developer and the City Department of Buildings initially interpreted the applicable zoning maps incorrectly.[27] Subsequently, it became clear that the correct setback was 150 feet, not 100 feet.[28] In the meantime, construction on the building had proceeded. Ultimately, twelve stories of the structure had to be removed.

III. To What Extent Can Rights Vest

A. The Single Integrated Project Theory

The vested rights doctrine is modified somewhat for phased projects or developments. Large developments such as residential subdivisions are typically built in several phases. Under phased construction, the developer generally completes one phase of the overall project before making any significant progress on subsequent phases. For example, a 150-unit residential subdivision may proceed in three 50-unit stages. The completion and sale of Phase 1 units will provide funding for construction of Phase 2.

Quite often building permits are not sought for subsequent phases until the developer is ready to proceed. Under the general application of the vested rights doctrine, later phases would be subject to a zoning amendment. Consider the consequences of a significant zoning change in the district where our 150-unit subdivision is located taking place after Phase 1 has been completed but before Phase 2 and Phase 3 have commenced. Even though subdivision approval has been acquired for the entire 150-unit development and Phase 1 finished, building permits may not have been issued for Phase 2. Even if the developer procured the necessary permits for Phase 2, he may not have made the substantial expenditures or substantial construction so as to acquire vested rights to complete Phase 2 (or Phase 3 for that matter). Courts have developed the "Single Integrated Project Theory" to deal with the potentially harsh consequences that may arise under these circumstances.

Under the Single Integrated Project Theory, where a developer has sought approval for a project to be constructed in several stages, vested rights to the entire project will accrue even where later stages of the project have not been substantially constructed if the developer has substantially constructed and made substantial expenditures on earlier stages of the project, and, in doing so, made project improvements to support earlier stages of the project that also benefit later stages. Typically, infrastructure improvements relating to all phases of the project will be the focus of the court's inquiry.

In *Telimar Homes, Inc. v. Miller*,[29] the plaintiff acquired a large tract for development under a single overall plan. "[T]o facilitate orderly financing, development and selling, the tract was divided into four sections," however, "[t]he fact that the land was acquired for the development of a single integrated project was then and prior to [an] amendment of the zoning ordinance, repeatedly and definitely made known to various members of the Town Planning Board, Town Board and Zoning Commission as well as to the Town Supervisor."[30]

The original zoning ordinance required quarter acre minimum lot size allowing 500 homes for the entire tract. After the builder was granted approval for the first two stages of development, the zoning ordinance was amended to require a minimum lot size of one half acre instead of a quarter acre. Subsequently, the builder was denied approval for the last two stages of the project because the maps submitted provided for quarter acre building lots. The Appellate Division held the zoning amendment was unconstitutional as applied to the plaintiff.

The Court found that, after approval of the first section, "roads were constructed, surveys and percolation tests were made, plans were prepared, model homes were built, and grade and drainage studies were made—*all on the basis that it was a single, over-all project.*"[31] In addition, "[a] water company was organized and construction of a water works, to cost $260,000, was commenced; it was planned to accommodate 500 homes—the number that could be built on quarter-acre lots on the entire tract."[32] The court concluded that, because substantial construction had commenced and substantial expenditures had been made that benefitted sections three and four, the builder had "acquired a vested right to a nonconforming use *as to the entire tract.*"[33]

A similar result was found in *Schoonamaker Homes v. Village of Maybrook*.[34] The owner of a 55-acre tract of land located in the Village of Maybrook proposed a single overall plan for a subdivision which was divided into four sections and consisted of 120 garden apartments, 278 town houses and 58 single family residences.[35] In 1972, the Planning Board granted final subdivision approval for the project.[36]

After all four sections of the plat were filed, the developer received site plan approval for construction of 126 garden apartments on 7.24 acres (the Garden Apartments site) of the 55-acre tract.[37] The site plan, as approved, complied with the existing zoning ordinance which required a minimum density for apartments of 2,500 square feet per unit with a minimum lot area of 5,000 square feet for each unit.[38] Twelve years later, the developer submitted an application for buildings permits for 24 apartments at the site. Shortly thereafter, the Village amended its zoning ordinance to increase the minimum density for apartments from 2,500 square feet to 5,000 square feet and to increase the minimum lot area for such use from 5,000 square feet to 20,000 square feet.[39] The effect of the amendment was to reduce the maximum allowable number of apartments on the 7.24-acre site from 126 units to 63 units. Relying on the amendment, the Building Inspector denied the application for the building permits.[40] The owner challenged the denial.

As a preliminary matter, the Third Department found that the statutory protection afforded developers of residential projects under the Village Law (see below) was inapplicable because the Village enacted the restrictive amendment more than three years after the subdivision plat was approved.[41] The Court noted that vested rights generally applied only to existing or in-progress developments and did not extend to "new, additional or different structures and developments."[42] However, that general rule must be considered in light the Single Integrated Project Theory. The Court noted

> Pursuant to that theory an owner might acquire vested rights to a site where substantial construction had not been undertaken where the site is but a part of a single project and where, prior to the more restrictive amendment, substantial construction had been commenced and substantial expenditures had been made in connection with other phases of the integrated project which also benefitted or bore some connection to the affected site.[43]

The Court found the theory applicable in this instance. From the start the developer intended to develop the entire tract as part of a single overall plan and made his intent known to the Village early on in the process. When the zoning regulations were changed, construction of 276 town houses and 58 single family houses was either in progress or had been substantially completed.[44] Most importantly, the developer had installed several infrastructure improvements which benefitted the Garden Apartments site.

> While no construction has yet been undertaken with regard to the Garden Apartments units, respondents admit that there have been expenditures for *infrastructure* in the amount of $657,000 which include, inter alia, sanitary, sewer, water and storm water systems as well as roads, *all of which benefit the Garden Apartments site.* Additionally, petitioner has expended $59,737 for such things as site grading and utility plans, interest on improvement bonds and general subdivision improvements, *all of which bare some connection to the affected site.*[45]

The Court concluded that the developer had acquired vested rights to develop all 126 units on the Garden Apartments site. However, that finding amounted to a pyrrhic victory for the developer because the Court found that his rights, having vested, were subsequently abandoned over the development's twenty year history.

Municipalities faced with such large scale developments should be aware that the path they are going down when they approve such projects may turn out to be a one-way street.

B. The "Over and Above" or "Equally Useful" Rule: Limiting the Single Integrated Project Theory?

The force of the Single Integrated Project Theory argument may be tempered somewhat by what could be termed the "Equally Useful" rule. Thus, while "a developer who improves his property pursuant to original subdivision approval may acquire a vested right in continued approval despite subsequent zoning changes . . . . if the improvements would be *equally useful* under the new zoning requirements, a vested right in the already approved subdivision may not be claimed based on the alterations."[46] While this rule may not be limited in its application to large phased projects or subdivisions, its impact is certainly the greatest in these situations.

Padwee v. Lustenberger[47] is a good illustration of the impact of the rule. In *Padwee,* the petitioner purchased a 3.9-acre parcel of land in 1972 for $185,000. In 1987, the petitioner was granted subdivision plat approval to divide the parcel into five lots, one of which contained his existing residence.[48] Subdivision approval was conditioned on the installation of a 285 foot road and water and sewer mains to support the five-lot subdivision.

In 1989, the Village of Irvington amended its zoning ordinance increasing the minimum lot size for property located in the petitioner's zoning district from one-half acre to one acre.[49] Subsequently, the developer sought a building permit for one of the undeveloped lots. The application was denied because it "raised a question with respect to the applicability of the zoning ordinance."[50] The Zoning Board of Appeals also rejected the petitioner's claim even though it found the developer had made "substantial expenditures to improve the land for subdivision purposes . . ."[51] On appeal, the Third Department held for the Village, finding

> that petitioner's ability to make use of the improvements installed, in a three-lot subdivision acceptable under the amended zoning ordinance, precludes him from claiming a vested right to complete the five-lot subdivision. On the basis of the factual and opinion evidence before it, the Board [of Appeals] found that a majority of the improvements made by petitioner would be "equally useful" in a three-lot development that would conform to the present zoning requirements, and that the cost of creating such a development would not have been significantly less than the amount petitioner expended to implement the five-lot subdivision.[52]

The Court focused on two related factual issues: whether the improvements would be equally useful in a development that conforms with the new zoning requirements, and whether the cost of improvements made under the amended ordinance would have been "significantly less than" what the developer expended under the original ordinance. On the second issue the pendulum can swing back to the developer's side. If the developer can show that the expenses he has incurred significantly outweigh what he would incur under the amended ordinance, he may defeat the challenge. Hence the alternative name for the rule is the "Over and Above" rule—two sides of the same coin.

The rule may be nothing more than a reformulation of the general vested rights doctrine; however, when the argument is articulated in this way, it seems to provide opponents of a development proposal with additional arrow in their quiver. A developer who advances his case under the Single Integrated Project Theory and has a strong factual basis for making such a claim may find his argument short-circuited by a showing that most, if not all, of the improvements or expenditures made would be "equally useful" for the reduced development allowed under the amended zoning ordinance.

IV. STATUTORY PROTECTION TO ACQUIRE VEST RIGHTS FOR RESIDENTIAL SUBDIVISIONS

Once a developer has obtained subdivision approval, his

project can be particularly vulnerable to any change in local zoning requirements. "[S]atisfaction of the conditions of a subdivision approval and construction of improvements to the extent necessary to obtain vested rights often is a time-consuming matter. Without some form of statutory protection, a [municipality] could, in the intervening period of time, alter applicable bulk requirements, thereby effectively negating the validity of the subdivision approval."[53] The State Legislature has responded to this dilemma by providing a limited level of protection for developers who have acquired subdivision approval.

Town Law § 265-a, Village Law § 7-709 and General City Law § 83-a provide that where a subdivision plat for a residential development has been "duly approved" by a local municipality and "duly filed" with the county, any subsequent establishment or increase in minimum lot areas, lot dimensions, yard, or set-back requirements in excess of those shown on the approved subdivision plat "shall not, for the period of time prescribed in subdivision two of this section, be applicable to or in any way affect any of the lots shown and delineated on such subdivision plat."[54] In turn, subdivision two of each provision provides that where a zoning ordinance and planning board exist at the time of filing of the subdivision plat, the protective period is three years; where there is a planning board but no zoning ordinance, or a zoning ordinance but no planning board the protective period is two years; and where neither exists at the time of filing, the period is one year.[55]

The exemption only applies to residential subdivisions.[56] In *Ramapo 287 Limited Partnership v. Village of Montebello*,[57] the developer of a four-lot commercial subdivision sought a declaration that its development was statutorily exempted from a subsequent zoning amendment. The Supreme Court found in favor of the developer declaring the subsequent zoning laws "inapplicable to plaintiff's property."[58] The Third Department reversed, stating, "The unambiguous statutory language exempts only those lots identified for *residential use* in a subdivision plat filed before the zoning change. To extend this statute to include nonresidential uses would amount to impermissible judicial legislation."[59]

The purpose of these protective measures is to "reconcile the interests of home builders and developers who have made financial commitments relying on existing zoning ordinances, and the interests of towns and villages in not being duly restrained from upgrading zoning requirements."[60] Given the New York requirement of "substantial completion" for vesting rights, a developer will not have acquired vested rights at the time the subdivision is approved, but will invariably have made significant expenditures in reaching that point. Prior to the exemption provisions, "nothing cut off the period during which a developer could acquire vested rights after initial approval . . . and nothing prevented the municipality from subjecting the undeveloped lots in an approved subdivision to more stringent restrictions so long as vesting had not occurred."[61] The exemption statutes provide protection "which the decisional law of vested rights lacked: a specific period during which the developer could secure the right to complete the unfinished lots free from the requirements of the new, more restrictive ordinance and beyond which such right could not be secured."[62]

"If a property owner completes a subdivision within the applicable exemption period, [the provision] has fulfilled its function and no further issue exists."[63] However, these protective provisions do not by themselves confer vested rights on the developer to complete a subdivision project; rather, 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.[64]

Other than providing a developer with a guaranteed period of time to acquire vested rights, the statutory exemptions do not in any way alter the law of vested rights as it otherwise would pertain to a subdivision. In *Ellington Construction Corp. v. Zoning Board of Appeals of the Incorporated Village of New Hempstead*, the Zoning Board of Appeals argued the statute afforded "protection only for those lots in a filed subdivision *which an owner has completed or for which it has actually obtained a building permit during the exemption period.*"[65] The Court of Appeals rejected this argument, insisting that such a construction would leave a developer, which had done more than was required to acquire common law vested rights to complete the subdivision (i.e. under the Single Integrated Project Theory), subject to the new restrictions for any remaining lots.[66]

> We accordingly agree with the courts below that Village Law § 7-708(2) 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.*[67]

However, the statutory exemption only protects a developer against subsequent changes in zoning regulations. The Attorney General has opined, for example, that a duly approved residential subdivision was required to meet the more restrictive requirements of a subsequently enacted local wetlands ordinance.[68] The wetlands ordinance was adopted pursuant to the Environmental Conservation Law.[69] The Attorney General held that because the wetlands ordinance is different "in origin and nature from zoning ordinances" the statutory exemption did not protect the subdivision from the requirements of the wetlands ordinance.[70]

V. Losing Vested Rights: Abandonment, Recoupment and Public Welfare

Once vested rights are established, a developer may face another hurdle: a claim that those vested rights have been lost through abandonment, recoupment, or overriding considerations of public safety, health and welfare. In *Schoonamaker*, for example, even though vested rights had been acquired, the court still had to grapple with the issue of whether those rights had been lost over the 20 years that followed the initial subdivision approval. Courts have made it clear that the mere passage of

time will not support a claim that a property owner has relinquished his rights.[71] In reviewing the Zoning Board of Appeal's determination that there had been an abandonment in *Schoonamaker*, the Court's inquiry was whether there was "substantial evidence" to support the Board's conclusion.[72] This deferential standard of review tilts the analysis in the municipality's favor.

For abandonment, there must be an intent to abandon in concurrence with an overt act implying that the developer is abandoning his vested rights.[73] In support of the Board's determination, the Court in *Schoonamaker* found that a number of residents in the proximity of the site testified at a public hearing that the developer had told them that site would be used for parkland or commercial use. In addition, advertisements for the overall development had specifically mentioned single-family homes and town houses but made no reference to apartments, and in a letter sent to the local legislature in 1986, the developer stated that it was "not locked into any firm number of units."[74] The letter continued, "In fact, we are really not interested in apartments in the traditional concept. We are interested in affordable condominiums for sale."[75]

Although there was some evidence to the contrary as well, the Court concluded that there was substantial evidence to support a finding of abandonment by the Board. Furthermore, the Court held that enforcement of the zoning amendment would also be an overriding benefit to the public because it would prevent intensification of density and open space problems as well as traffic and parking problems that had resulted from the construction of town houses on the same tract development.

Recoupment also provides a justification for enforcing a current zoning ordinance even though the developer may have acquired vested rights to develop his tract under the old ordinance. There, the issue is whether, during the time since the developer initially vested its rights, he has recovered all or part of its expenditures without completing construction.[76]

VI. EQUITABLE ESTOPPEL

A related issue to the vested rights doctrine is estoppel. Here, the developer claims that the municipality should be estopped from enforcing the amended zoning ordinance because he has been unfairly prevented from acquiring vested rights prior to the zoning amendment due to government action or inaction.[77] "The general rule is that a government cannot be estopped while acting in a governmental capacity."[78] However, a

> local government exercising its zoning powers will be estopped when a property owner, (1) relying in good faith, (2) upon some act or omission of the government, and (3) has made such a substantial change in position or incurred such extensive obligations or expenses that it would be highly inequitable and unjust to destroy the rights which he ostensibly had acquired.[79]

As with vested rights, estoppel is grounded firmly in equity and fairness.[80]

In *Pokoik v. Silsdorf*,[81] the Court of Appeals was asked to determine whether, because of improper actions of municipal officials, the petitioner was entitled to an order directing the issuance of a permit. The facts as recited by the Court show repeated abuses by certain municipal officials in their treatment of the petitioner's application for a building permit for an addition to his house. Petitioner was the owner of a four-bedroom house located in the Village of Ocean Beach. In March 1973, petitioner submitted an application for a building permit to construct an addition consisting of one bedroom, one bathroom, a den and a deck.[82] Six months earlier, an application by the petitioner for a building permit to add two bedrooms, a bathroom and a den had been denied "because he had previously violated the one-family zoning restriction by renting rooms in a residential district without a license."[83]

Two months after the second application was submitted, the Mayor informed the petitioner that no further action would be taken on his application because it was substantially the same as the one previously rejected.[84] The petitioner sought and was granted an order from the Supreme Court directing the building inspector to take action on the application. The building inspector eventually denied the second application for a permit in December 1973.[85] Petitioner then appealed the denial to the zoning board of appeals, which initially set a date for a hearing on June 15, 1974, but later rescheduled it for June 29, 1974.[86] In the meantime, the local legislature amended the zoning ordinance some months before the hearing to limit one-family houses to no more than four bedrooms.[87] Relying on the amended ordinance and the fact that petitioner had violated the zoning ordinance on previous occasions, the Board denied the appeal in August 1974, nearly two years after the first application had been made and 15 months after the second application.[88]

The Court of Appeals found the reasons for denying the permit applications without merit and rejected the dilatory tactics of the village officials, stating that it was "abundantly clear that at all times prior to the effective date of the amendment the petitioner was entitled to a permit."[89] And while the Court acknowledged that the general rule is that a case should be decided upon the law as it exists at the time of the decision, it concluded that

> this case fits within the "special facts exception" to that rule so that the zoning ordinance, as amended, does not apply and the arbitrary action of the board may not prevail. . . . The petitioner has demonstrated that he was entitled to the permit as a matter of right by full compliance with the requirements at the time of the application and that *proper action upon the permit would have given him time to acquire a vested right.* . . . The petitioner was denied this right by the unjustifiable actions of the village officials, and by abuse of administrative procedures.[90]

In *Pokoik*, the Court of Appeals simply held the amended ordinance to be inapplicable to the petitioner. Other courts have granted a slightly different remedy under similar circumstances.

In *Cooper v. Dubow*,[91] for example, rather than finding the amended zoning ordinance inapplicable to the landowner, the court ordered certain permits that had been improperly revoked reinstated for the period of time equal to that which was lost before the zoning amendment so that the landowners would have an opportunity to vest their rights.[92] This is not the open-ended remedy apparently granted by the Courts of Appeals in *Pokoik*.[93]

VII. CONCLUSION

The case law that has developed around the vested rights doctrine provides a coherent body of law. Not surprisingly, controversies and disagreements arise when courts are faced with close factual cases. This has prompted some to call for change in the vested rights doctrine. They point to the significant up-front costs faced by developers even before any permit or other approval is granted, most notably the environmental impact statement (EIS). Proponents of change argue that these costs were either insignificant or non-existent when the vested rights doctrine was first formulated and that for this reason the doctrine unfairly burdens property owners.

However, those who clamor for change ignore the principles that underlie the vested rights doctrine as it has developed in New York. In any event, a fundamental change in the doctrine is not necessary to address these concerns. The argument must first be placed in the proper context.

First, it is important to remember that, in New York, a vested right is equated with a property interest. Within the context of a vested rights claim, the property interest sought to be protected is not the right to use one's property, because presumably the zoning amendment still leaves the property owner with some economical use of his property.[94] Rather, the owner is seeking to protect his use of his property *in a certain way*—a use that does not exist yet.

Second, the up-front costs argument is generally meaningful only for large-scale developments. This is not to say that smaller developments face no up-front costs, but they generally comprise a lesser percentage of the overall project costs. For example, it is unlikely that a property owner who is proposing to make a small addition to his home will be required to prepare an EIS, whereas a proposal for a 150-unit residential subdivision will almost certainly require the preparation of an EIS.

Third, it would be inappropriate to consider the cost of preparing an EIS for a vested rights claim. Such a result would defeat the entire purpose of the EIS process, which is to act as an information gathering tool *before* the agency makes its decision on a proposal. Generally, the EIS process leads to three possibilities: denial, approval, or approval with modifications. Certainly, for the EIS process to have any meaning, there can be no argument that there should be a vested rights claim based on EIS preparation and other costs when the agency rejects the project proposal. Thus, the issue should only arise when the agency approves (or approves with modifications) the application and there is a subsequent zoning change. At this point, the property owner has obtained full approval for the project and made significant expenditures but not so as to vest his rights under common law.

It is not necessary to alter the vested rights doctrine to protect the interests of the property owner under these circumstances. All that is required is for the State Legislature to expand the statutory protection periods afforded residential subdivisions to non-residential developments. Remember that for residential subdivisions with subdivision approval, the property owner has a guaranteed period of time in which to acquire vested rights. The application of this protection period could be extended other uses of property including mixed use. The protection period can reflect the type and size of the development. Each type of development can have an appropriate agency approval that triggers the protection period.

Such a move by the Legislature would respect the interests of a property owner without giving him carte blanche. If the property owner does not acquire common law vested rights within the protection period, his property will be subject to the any zoning amendment. Most importantly, the common law vested rights doctrine would remain intact.

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[1] Grayson P. Hanes & J. Randell Minchew, *On Vested Rights to Land Use and Development*, 46 Wash & Lee L. Rev. 373, 373-75 (1989).

[2] *See* Arden H. Rathkopf, et al., The Law of Zoning and Planning § 50.02[1] (1997).

[3] *See id.* at §§ 50.02[3][b][i][A], 50.04[1].

[4] *See id.*

[5] *See id.* at § 50.04[2](emphasis theirs).

[6] John J. Delaney & Emily J. Vaias, *Recognizing Vested Development Rights as Protected Property in Fifth Amendment Due Process and Takings Claims*, 49 Wash. U.J. Urb. & Contemp. L. 27, n.32 (1996). *See* Town of Orangetown v. Magee, 594 N.Y.S.2d 951, 960 (Sup Ct. 1992), *affirmed in part, reversed in part*, 215 A.D.2d 469, 626 N.Y.S.2d 511 (2d Dep't 1995), *modified by*, 218 A.D.2d 733, 631 N.Y.S.2d 166 (2d Dep't 1995), *affirmed*, 88 N.Y.2d 41, 665 N.E.2d 1061, 643 N.Y.S.2d 21 (1996). "Property interests are created and defined, not by the constitution, but by state law." Delaney & Vaias, *supra*, at 29.

[7] However, events prior to the issuance of a permit may be critical if the property owner is pursuing an estoppel claim. *See infra* part VI.

[8] Rathkopf, et al., *supra* note 2, at § 50.03[1].

[9] *Id.* at § 50.04[2].

[10] Ellington Construction Corp. v. Zoning Board of Appeals of the Incorporated Village of New Hempstead, 77 N.Y.2d 114, 122, 566 N.E.2d 128, 132, 564 N.Y.S.2d 1001, 1005 (1990) (citations omitted) (emphasis added).

[11] *See id.*

[12] *See* 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 owner claimed that it had expended over $33,000 on new facilities).

[13] Rathkopf, et al., *supra* note 2, at § 50.04[3][b]. *See e.g.*, Smith v. Speigel & Sons Oil Corp, 31 A.D.2d 819, 298 N.Y.S.2d 47 (2d Dep't 1969), *affirmed*, 24 N.Y.2d 920, 249 N.E.2d 763, 3012 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").

[14] *See* Riverdale Community Planning Ass'n v. Crinnion, 133 N.Y.S.2d 705 (Sup. Ct., Bronx County 1954), *affirmed*, 285 A.D.2d 1047, 141 N.Y.S.2d 510 (1st Dep't 1955), *appeal dismissed*, 1 N.Y.2d 689, 133 N.E.2d 839, 150 N.Y.S.2d 616 (1956).

[15] 4 A.D.2d 702, 165 N.Y.S.2d 635 (2d Dep't 1957), *appeal dismissed*, 3 N.Y.2d 924, 145 N.E.2d 880, 167 N.Y.S.2d 939 (1957).

[16] *Id.* at 703, 165 N.Y.S.2d at 639.

[17] *Riverdale Community Planning Ass'n*, 133 N.Y.S.2d at 712.

[18] Reichenbach v. Windward at Southampton, 80 Misc.2d 1031, 1035, 364 N.Y.S.2d 283, 288 (Sup. Ct., Suffolk County 1975), *affirmed*, 48 A.D.2d 909, 372 N.Y.S.2d 985 (2d Dep't 1975), *appeal dismissed*, 38 N.Y.2d 912, 346 N.E.2d 557, 382 N.Y.S.2d 757 (1976), *appeal dismissed*, 38 N.Y.2d 710, 346 N.E.2d 829, 382 N.Y.S.2d 1030 (1976) (citations omitted).

[19] Smith v. Speigel & Sons Oil Corp, 31 A.D.2d 819, 298 N.Y.S.2d 47 (2d Dep't 1969), *affirmed*, 24 N.Y.2d 920, 249 N.E.2d 763, 3012 N.Y.S.2d 984 (1969).

[20] *Id.* at 1035, 364 N.Y.S.2d at 288-89.

[21] Town of Hempstead v. Lynne, 32 Misc.2d 312, 316-17, 222 N.Y.S.2d 526, 530 (Sup. Ct., Nassau County 1961) (citation omitted).

[22] *See id.*

[23] Rathkopf, et al., *supra* note 2, at § 49.07[1](emphasis added).

[24] Bear in mind that the developer, relying on the public official's determination that the permit could be validly issued, may have been completely unaware of the questionable legality of the permit, or quite the opposite, willing to take advantage of an opportunity that presented itself, he may have been fully aware of the permit's questionable legality. We may sympathize with one but not the other, however, sympathy will play no role here; the permit being invalidly issued, the developer must suffer the consequences. The lesson, of course, is that with every development proposal comes the duty to exercise the utmost diligence.

[25] 71 N.Y.2d 274, 519 N.E.2d 1372, 525 N.Y.S.2d 176 (1988).

[26] *See id.* at 280, 519 N.E.2d at 1373, 525 N.Y.S.2d at 177.

[27] There was also some discrepancy between the maps relied upon. *See id.* at 280, 519 N.E.2d at 1373, 525 N.Y.S.2d at 177.

[28] *See id.* at 280, 519 N.E.2d at 1373, 525 N.Y.S.2d at 177.

[29] 14 A.D.2d 586, 701, 218 N.Y.S.2d 175 (2d Dep't 1961), *appeal denied*, 14 A.D.2d 701, 219 N.Y.S.2d 937 (2d Dep't 1961), *appeal denied*, 10 N.Y.2d 709 (1961).

[30] *Id.* at 586, 218 N.Y.S.2d at 176.

[31] *Id.* at 586-87, 218 N.Y.S.2d at 176 (emphasis added).

[32] *Id.* at 587, 218 N.Y.S.2d at 176.

[33] *Id.* at 587, 218 N.Y.S.2d at 177 (emphasis added).

[34] 178 A.D.2d 722, 576 N.Y.S.2d 954 (3d Dep't 1991), *appeal denied*, 79 N.Y.2d 757, 592 N.E.2d 801, 583 N.Y.S.2d 193 (1992).

[35] *See id.* at 723, 576 N.Y.S.2d at 955.

[36] *See id.* at 723, 576 N.Y.S.2d at 955.

[37] *See id.* at 723, 576 N.Y.S.2d at 955.

[38] *See id.* at 723, 576 N.Y.S.2d at 955.

[39] *See id.* at 723, 576 N.Y.S.2d at 955.

[40] *See id.* at 724, 576 N.Y.S.2d at 955.

[41] *See id.* at 726, n.1, 576 N.Y.S.2d at 957.

[42] *Id.* at 725, 576 N.Y.S.2d at 956 (citations omitted).

[43] *Id.* at 725, 576 N.Y.S.2d at 956 (citations omitted).

[44] *See id.* at 726, 576 N.Y.S.2d at 957.

[45] *Id.* at 726, 576 N.Y.S.2d at 957 (emphasis added).

[46] Ramapo 287 Limited Partnership v. Village of Montebello, 165 A.D.2d 544, 546, 568 N.Y.S.2d 492, 494 (3d Dep't 1991).

[47] 226 A.D.2d 897, 641 N.Y.S.2d 159 (3d Dep't 1996).

[48] *See id.* at 897, 641 N.Y.S.2d at 160.

[49] *See id.* at 897, 641 N.Y.S.2d at 160.

[50] *Id.* at 898, 641 N.Y.S.2d at 160.

[51] *See id.* at 898, 641 N.Y.S.2d at 160.

[52] *Id.* at 898-899, 641 N.Y.S.2d at 161. It is probably no coincidence either that the Court noted that during the three statutory exemption period (discussed below), the developer had sold his residence for $1.2 million and one of the other lots for $325,000. *See id.* at 898, 641 N.Y.S.2d at 160.

[53] Terry Rice, *Practice Commentaries*, Village Law § 7-709 (McKinney 1995).

[54] Town Law § 265-a(1) (McKinney 1987); Village Law § 7-709(1) (McKinney 1995); General City Law § 83-a(1) (McKinney 1989).

[55] *See* Town Law § 265-a(2) (McKinney 1987); Village Law § 7-709(2) (McKinney 1995); General City Law § 83-a(2) (McKinney 1989).

[56] *See* Town Law § 265-a(1) (McKinney 1987); Village Law § 7-709(1) (McKinney 1995); General City Law § 83-a(1) (McKinney 1989).

[57] 165 A.D.2d 544, 568 N.Y.S.2d 492 (3d Dep't 1991).

[58] 165 A.D.2d 544, 568 N.Y.S.2d 492 (3d Dep't 1991).

[59] *Id.* at 547, 568 N.Y.S.2d at 494 (emphasis added).

[60] Ellington Const. Corp. v. Zoning Board of Appeals of the Incorporated Village of New Hempstead, 77 N.Y.2d 114, 124, 566 N.E.2d 128, 133, 564 N.Y.S.2d 1001, 1006 (1990) (quoting 1960 McKinney's Session Laws of New York, Messages of Governor, at 2064).

[61] *Id.* at 120, 566 N.E.2d at 131, 564 N.Y.S.2d at 1004.

[62] *Id.* at 124, 566 N.E.2d at 132, 564 N.Y.S.2d at 1005.

[63] Terry Rice, *Practice Commentaries*, Village Law § 7-709 (McKinney 1995).

[64] *See* Freundlich v. Town Board of Southampton, 73 A.D.2d 684, 422 N.Y.S.2d 215, 217 (2 Dep't 1979), *aff'd*, 52 N.Y.2d 921, 419 N.E.2d 342, 437 N.Y.S.2d 664 (1981).

[65] *Ellington*, 77 N.Y.2d at 122, 566 N.E.2d at 132, 564 N.Y.S.2d at 1005 (emphasis added).

[66] *Id.* N.Y.2d at 123, 566 N.E.2d at 133, 564 N.Y.S.2d at 1006.

[67] *Id.* N.Y.2d at 125, 566 N.E.2d at 134, 564 N.Y.S.2d at 1007 (emphasis added). In *Wesley Chapel, Inc. v. Van Den Hende*, 32 A.D.2d 565, 300 N.Y.S.2d 803 (2d Dep't 1969), the Second Department held that the statutory exemption period could not be defeated where a subdivision had been duly approved and filed under applicable town zoning requirements even though the subdivision fell within the boundaries of a newly incorporated village which had amended the applicable zoning requirements. [B]ecause of the Town Planning Board's approval, petitioner's plat became exempt from the operation of the newly enacted Village ordinance for a period of time fixed by statute (Town Law, § 265—a; Village Law, § 179, subd. 2); and appellants could not constitutionally take away this exemption by the enactment of a Village ordinance that was more restrictive than the predecessor Town Code (N.Y.Const., art. 9, § 2, subd. (c)). Section 179 (subd. 2) of the Village Law, which gives this exemption for various periods of time up to three years, is virtually the same as section 265—a of the Town Law, except that each statute applies to a separate entity, so that it does not matter

under which of them petitioner acquired those rights. *Id.* at 565, 300 N.Y.S.2d at 804.

[68] 1990 N.Y. Op. Inf. Att'y Gen. (No. 90-10) 1014.

[69] *Id.*

[70] *Id.* "[E]nvironmental regulations are inherently different from zoning regulations and serve different purposes and goals. Zoning regulations seek to regulate a community's development in accordance with a plan, while environmental regulations seek to protect the ecology and preserve the biosphere. *Id.*

[71] *See e.g.*, 202 Developers, Inc. v. Town of Haverstraw, 175 A.D.2d 473, 573 N.Y.S.2d 517 (3d Dep't 1991). In *202 Developers,* the Court rejected the Town of Haverstraw's argument that the developer had lost its right to develop certain property because it "did nothing to develop the property for 11 years after it gained site plan approval." *Id.* at 475, 572 N.Y.S.2d at 519. The Court remanded the case to the Supreme Court to develop the record further.

[72] *Schoonamaker*, 178 A.D.2d at 727, 576 N.Y.S.2d at 957.

[73] Putnam Armonk, Inc. v. Town of Southeast, 52 A.D.2d 10, 15, 382 N.Y.S.2d 538, 542 (2d Dep't 1976).

[74] *Schoonamaker*, 178 A.D.2d at 727, 576 N.Y.S.2d at 957.

[75] *Id.* at 727, 576 N.Y.S.2d at 957.

[76] *Putnam Armonk*, 52 A.D.2d at 15, 382 N.Y.S.2d at 542.

[77] "Estoppel focuses upon whether it would be inequitable to allow the government to repudiate its prior conduct; vested rights upon whether the owner acquired real property rights which cannot be taken away by government regulation." Walter F. Witt, Jr., *Vested Rights in Land Uses: A View from the Practitioner's Perspective,* 21 Real Prop. Prob. & Tr. J. 317, 320 (1986).

[78] Barry R. Knight & Susan P. Schoettle, *Current Issues Relating to Vested Rights and Development Agreements*, 25 Urb. Law. 779, 781 (1993).

[79] *Id. See also* Hanes & Minchew, *supra* note 1, at 384 (1989)(quoting David G. Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes*, 15 Urb. L. Ann. 63, 66 (1971). Vested rights may not be organized under an unlawfully issued building permit. However, the harsh and sometimes unjust results of the "no estoppel" rule as applied to unlawfully issued permits has led some courts, under the facts of particular cases, to reach a different result. Rathkopf, et al., *supra* note 2, at § 49.07[3].

[80] *See* Hanes & Minchew, *supra* note 1, at 383.

[81] 40 N.Y.2d 769, 358 N.E.2d 874, 390 N.Y.S.2d 49 (1976).

[82] *Id.* at 770, 358 N.E.2d at 875, 390 N.Y.S.2d at 50.

[83] *Id.* at 770, 358 N.E.2d at 875, 390 N.Y.S.2d at 50. The Mayor of the Village had also informed petitioner that the application was rejected because he "had not explained to the satisfaction of the village why he required additional rooms." *Id.* at 770, 358 N.E.2d at 875, 390 N.Y.S.2d at 50.

[84] *Id.* at 770, 358 N.E.2d at 875, 390 N.Y.S.2d at 50.

[85] *Id.* at 771, 358 N.E.2d at 875, 390 N.Y.S.2d at 50.

[86] *Id.* at 771, 358 N.E.2d at 875, 390 N.Y.S.2d at 50.

[87] *Id.* at 771, 358 N.E.2d at 875, 390 N.Y.S.2d at 50.

[88] *Id.* at 771, 358 N.E.2d at 875, 390 N.Y.S.2d at 50.

[89] *Id.* at 772, 358 N.E.2d at 876, 390 N.Y.S.2d at 51.

[90] *Id.* at 772-73, 358 N.E.2d at 876, 390 N.Y.S.2d at 51 (citations omitted) (emphasis added).

[91] 41 A.D.2d 843, 342 N.Y.S.2d 564 (2d Dep't 1973).

[92] *See also* Faymor Development Co., Inc. v. Board of Standards and Appeals of the City of New York, 57 A.D.2d 928, 394 N.Y.S.2d 732 (2d Dep't 1977) (granting developer an additional 103 days to vest its rights despite zoning change where permit was improperly revoked before zoning amendment).

[93] Factually, in *Pokoik*, the landowner was never granted a permit whereas, in *Cooper*, the landowners had permits initially but the permits were revoked. In both cases, the court found that the municipal officials acted improperly. It appears that the remedy fashioned it left to the discretion of the court.

[94] Indeed, if the property owner is left with no economically viable use of his property, then the issue is not one of vested rights but one of whether there has been a constitutional taking.

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