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# Vested Rights: Actions to Delay Application of New Zoning Laws

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Construction takes time, and money. When one of the worst economic climates since the Great Depression is added to the mix, it is easy to see why some projects that were conceptualized and begun some years ago have not yet been completed, even though, at the time, they were able to obtain various levels of municipal approvals and permits.

Now, with an improving economy and increasing demand, previously approved developments are being dusted off and, in many cases, property owners are considering whether and how to pick up where they left off. As a result, more and more developers are considering the implications of a land use planning concept known as "vested rights" to determine if they can continue and complete what they had previously started, notwithstanding the fact that a municipality's zoning laws may have since been amended to now prohibit the previously approved project.

### The Doctrine of Vested Rights

In New York, the doctrine of vested rights generally provides that where a more restrictive zoning ordinance is enacted, a property owner will be permitted to complete a structure or a development that the amendment has rendered nonconforming where the owner has undertaken substantial construction and made substantial expenditures prior to the effective date of the amendment.[1]

Moreover, an owner can acquire vested rights in developing a particular site under the "single integrated project" theory where substantial construction had not been undertaken on the site but the site is 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 that also benefited or bore some connection to the affected site.[2]

Finally, an owner who has acquired vested rights may be divested of them where there is abandonment, recoupment, or an overriding benefit to the public to be derived from the enforcement of the amended zoning ordinance.[3]

Recently, in *Matter of Exeter Building Corp. v. Town of Newburgh*,[4] the Appellate Division, Second Department, explored the law of vested rights in a case in which it ruled against developers that had incurred substantial expenses in furtherance of a particular development. This decision highlights the importance of all parties having a clear understanding of vested rights law in these circumstances.

### 'Exeter Building' Background

The case arose in December 2000 when Exeter Building Corp. and 17K Newburgh (together, the "plaintiffs") became the owners of approximately 29 acres of real property in the Town of Newburgh. The property was within the town's R-3 zoning district, which permitted multi-family housing. In 2002, the plaintiffs applied to the Town of Newburgh Planning Board for approval of a site plan for a proposed project to be known as Madison Green that was to consist of 34 residential buildings, each containing four single-family units, for a total of 136 units.

Meanwhile, the town was engaged in a rezoning effort. In April 2001, it commissioned the preparation of a draft comprehensive plan, and an initial draft was completed that month.

Over the course of several years, as the town refined its draft comprehensive plan, the plaintiffs appeared before the town planning board in furtherance of the final approval of the site plan for Madison Green. In December 2003, during the approval process, a consultant to the planning board recommended that the plaintiffs adjust a boundary line between their property and an adjoining property; the plaintiffs commenced negotiations with the owner of that adjoining property.

In the summer of 2005, the town board voted to revise the draft comprehensive plan to include a change of the zoning of various properties, including the plaintiffs' property, from R-3 to R-1, a more restrictive category.

That summer, after negotiating an exchange of land with an adjoining property owner, the plaintiffs submitted a proposal for a boundary adjustment to their property. The planning board approved the boundary adjustment and review of the site plan for Madison Green proceeded. On March 6, 2006, however, the town board adopted its comprehensive plan and enacted Local Law 3, which rezoned the plaintiffs' property from R-3 to R-1.

The plaintiffs went to court to invalidate Local Law 3. The Supreme Court, Orange County, invalidated the law but also ruled that the plaintiffs did not have vested rights to develop Madison Green under the R-3 zoning regulations. The parties appealed.

While the appeals were pending, the plaintiffs received preliminary site plan approval for Madison Green, subject to numerous conditions; the town's code compliance department granted the plaintiffs a permit authorizing the demolition of a single-family

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residence on the property; and the plaintiffs demolished the residence. Additionally, on Dec. 20, 2007, the planning board passed a resolution approving the plaintiffs' site plan provided the plaintiffs satisfied 18 conditions, including 11 that had to be met before the planning board's chairperson would be authorized to sign the plans. It is worth noting that from the submission of their application for approval until the resolution was approved, the plaintiffs had incurred $358,000 in engineering and review costs.

Four months later, in March 2008, the Second Department decided the appeals. It upheld Local Law 3 and agreed with the Supreme Court that the plaintiffs had not established that they had a vested right to proceed with Madison Green under the R-3 zoning regulations. The appellate court also held that the boundary adjustment that the plaintiffs had negotiated with an adjoining property owner, and which the town had approved, constituted a subdivision under Town Law §276(4)(a) and Town of Newburgh Code §163-2, the effect of which was to give the plaintiffs a three-year exemption from the rezoning of their property.[5] As a result, during that exemption period, which the parties agreed had begun in January 2006 and expired in January 2009, the plaintiffs were entitled to proceed with the approval process to establish a vested right to build Madison Green under the R-3 zoning regulations.

Before the expiration of the exemption period, the plaintiffs obtained a permit to remove water tanks on property adjoining the subject property and they removed the tanks and their foundation; they applied for and obtained a clearing and grading permit; and they performed clearing and grading on the property, including the installation of 170 feet of underground pipe. In all, from the planning board's approval of the resolution in December 2007 to the expiration of the three-year exemption period in January 2009, the plaintiffs incurred $46,581 in engineering and review costs, and $135,199 in construction costs, for a total cost during that period of $181,780. Significantly, many of the conditions set forth in the resolution had not been complied with by the plaintiffs when the statutory exemption period ended in January 2009.

In April 2009, the plaintiffs sought to amend the site plan but were told that the three-year exemption period had expired and that their property was subject to the R-1 zoning requirements; as a consequence, the planning board disapproved their amended site plan. The town's zoning board of appeals upheld the planning board's determination that the plaintiffs had not established a vested right to develop Madison Green under the R-3 zoning regulations.

The plaintiffs again went to court. The Supreme Court, Orange County, found that the plaintiffs had a vested right to develop Madison Green under the R-3 zoning regulations, and the dispute again reached the Second Department.

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### Second Department'

The Second Department reversed upon a finding that the zoning board of appeals' determination was neither arbitrary and capricious nor an abuse of discretion because the planning board had never granted unconditional approval of the plaintiffs' site plan. Indeed, it continued, because the plaintiffs had not fulfilled the conditions precedent that were delineated in the resolution, the chairperson was not authorized to sign the site plan. Accordingly, it held, the plaintiffs could not establish that they had vested rights to develop Madison Green under the resolution.

Moreover, the appellate court found that the plaintiffs could not ground a vesting claim on reliance on the "limited permits" that were issued to them. As the Second Department pointed out, none of those permits—which authorized demolition of the single family house and the water tanks, the erection of a sign, and regrading and clearing—either singly or together amounted to the town's approval of Madison Green. Thus, it found, the plaintiffs' expenditures and construction in reliance on those permits did not satisfy the prerequisite for vesting of the right to construct the entire project. At most, it continued, the permits authorized the plaintiffs to complete the work described in the permits themselves, which, if undertaken, would leave the property "in a condition amenable to development under the new, more restrictive R-1 zoning regulations."

Accordingly, the Second Department concluded, the zoning board of appeals' determination should have been confirmed, and the Supreme Court should have declared that the plaintiffs did not have a vested right to develop the property under the R-3 zoning regulations.

### Lessons Learned

The decision in *Exeter Building* should serve as a reminder of several key aspects of vested rights law.

First, property owners that incur substantial expenses in connection with a particular development do not necessarily acquire a vested right to proceed under prior zoning laws where they have failed to comply with the conditions of a prior approval before new zoning regulations were adopted.

Second, a vesting claim may not be grounded on a developer's expenditures and actions taken in reliance upon the issuance of limited permits authorizing work that was not necessarily related to the proposed development.

Third, to establish a vested right, a landowner's reliance on a valid permit must be so substantial that the municipal action renders the improvements essentially valueless.

Finally, regardless of the scope of work performed or the amount of money expended toward completion of a project, vesting cannot occur in the absence of a legally-issued permit for the project itself, which does not include conditional site plan approval or secondary permits for limited work.

1. See, e.g., *Matter of Ellington Construction Corp. v. Zoning Board of Appeals of the Incorporated Village of New Hempstead*, 77 N.Y.2d 114 (1990). See also *Matter of Vecce v. Town of Babylon*, 32 A.D.3d 1038 (2d Dept. 2006) (homeowner had vested right to building permit issued for a garage and permit could not be revoked after homeowner "made substantial improvements and incurred substantial expenses in reliance on the issued permit").

2. See, e.g., *Telimar Homes, Inc. v. Miller*, 14 A.D.2d 586 (2d Dept. 1961) (builder acquired vested right to nonconforming use as to entire tract where water system, roads, drainage system, model house construction, and advertising were laid out and designed for the benefit of all four sections of the property developed as a single, over-all tract).

3. See, e.g., *Matter of Schoonmaker Homes-John Steinberg, Inc. v. Village of Maybrook,* 178 A.D.2d 722 (3d Dept. 1991). See also *Matter of RC Enters. v. Town of Patterson*, 42 A.D.3d 542 (2d Dept. 2007) (affirming dismissal of petitioner's action on the ground that petitioner had abandoned the development of second part of parcel in the 35 years since the original site plan had been approved); *Meilak v. Town of Coeymans,* 225 A.D.2d 972 (3d Dept. 1996) (25-year lapse in furtherance of project rendered prior government approval "meaningless" in that failure to act over such a long period of time constituted an abandonment of the rights granted in the alleged permit).

4. 114 A.D.3d 774 (2d Dept. 2014).

5. See Town Law §265-a. For a discussion of Town Law 265-a, and its counterpart, Village Law §7-708(2), see Matter of Ellington, supra.