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Use It or Lose It

Timely Action Is Needed to Preserve Vested Rights

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ZONING AND LAND USE PLANNING

In New York, a property owner can acquire a "vested right" when, pursuant to a legally issued permit, the property owner demonstrates a commitment to the purpose for which the permit was granted by effecting substantial changes and incurring substantial expenses to further the development. The New York Court of Appeals, in *Town of Orangetown v. Magee*,[1] has made it clear that neither the issuance of a permit nor the owner's substantial improvements and expenditures, standing alone, establish a vested right. Rather, the Court has declared, the owner's actions relying on a valid permit must be so substantial that municipal action revoking or altering the permit results in serious loss to the owner, rendering the improvements essentially valueless.[2]

Town of Orangetown illustrates how courts analyze and apply the law relating to vested rights. In that case, Bradley Industrial Park Inc., acquired 34 acres of land in the Town of Orangetown in 1979 to construct a 184,000-square-foot industrial building. The town approved Bradley's plans the following year and the building inspector issued a permit. Bradley began clearing and developing the site shortly thereafter, but opposition to the project developed within the community. Ultimately, after Bradley had spent more than $4 million on improvements for the land and building, the town's supervisor directed the building inspector to revoke the permit and work was halted. The town then went to court to obtain an order compelling Bradley to remove a temporary building that it had erected for use during the preliminary stages of construction. Bradley counterclaimed for, among other things, an order compelling reinstatement of the building permit.

The trial court ordered reinstatement of the permit, and the Appellate Division affirmed. The dispute reached the Court of Appeals.

In its decision, the Court first noted that there was no dispute that the permit had been legally issued. It then found that the record supported the trial court's determination that Bradley had sufficiently committed the land to the use authorized by the permit prior to revocation to establish its vested right. Accordingly, it held that Bradley was entitled to reinstatement of the building permit in conformity with the zoning ordinances in effect at the time of the revocation.

Certainly, once vested rights are established, they continue, even for the benefit of a successor in title.[3] However, vested rights do not necessarily last forever. Indeed, New York courts are quite clear that a previously vested right can lapse.

Consider, for example, the recent decision by the Appellate Division, Second Department, in *Matter of RC Enterprises v. Town of Patterson*.[4] In the early 1970s, the predecessor in interest of RC Enterprises obtained from the Planning Board of the Town of Patterson, in Putnam County, final site plan approval to construct, in two phases, 330 multifamily rental units on a 79.2 acre site. In 1976, while Phase I consisting of 204 units was under construction, the town rezoned the property to allow only single family homes on 40,000-squarefoot lots. By January 1979, Phase I was completed consistent with the zoning in effect in 1972, with the construction of 204 units as well as certain infrastructure that would benefit all 330 planned units, such as a sewage treatment plant with extra capacity, 28-foot-wide roadways in the section occupied by the 204 existing units, and extra drainage capacity. RC purchased the property in February 1979.

In 1986, the planning board approved RC's request to subdivide the property into two parcels, with Parcel 1 containing the already constructed 204 rental units, which RC planned to sell as condominiums, and Parcel 2 reserved for future development. Then, in 1989, RC submitted a site plan application to construct 126 multifamily units on Parcel 2, in accordance with the site plan approved in 1972. The following year, however, it was determined that the sewage treatment plant was deficient for its current use and the planning board issued a positive declaration with respect to the State Environmental Quality Review Act ("SEQRA");[5] the project was not pursued.

In June 2003, over RC's objection, the town again rezoned the subject property to allow only single family homes on four-acre lots. In December 2004, RC applied for amended site plan approval to build 68 units of multifamily housing on Parcel 2. The planning board denied the application, finding that RC did not have vested rights to

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develop Parcel 2 pursuant to the site plan it approved in 1972. RC then filed an Article 78 proceeding. Supreme Court denied the petition and dismissed the proceeding on the ground that RC had abandoned the development of Parcel 2 in the 35 years since the original site plan approval, and RC appealed.

Rights Abandoned

The Second Department affirmed. It first found that RC had failed to establish vested rights, noting that although there was some evidence of extra expenditures, there was no evidence of substantial construction. The appellate court stated that although RC contended that certain improvements used by Parcel 1 were built with extra capacity to accommodate the development of Parcel 2, "these improvements have been used for the benefit of Parcel 1 for nearly 30 years, and, in the case of the sewage treatment plant have required upgrades." The appellate court did not rest its decision on that ground, however. It concluded that, in any event, RC had abandoned its plan to develop Parcel 2 "as demonstrated by its failure to act over a period of decades."

That rationale was the basis of the ruling by the Appellate Division, Third Department, in *Meilak v. Town of Coeymans*.[6]

In that case, the owner of property in the Town of Coeymans, in Albany County, alleged that, in July 1969, the town's zoning board of appeals approved his application and issued a permit allowing him to establish a mobile home park on the property; he also alleged that the approval was not conditioned upon his taking any action within any specified period of time. The property owner's next action in furtherance of his desire to establish a mobile home park occurred in April 1994 when he appeared before the town's planning board and requested that the board designate itself as lead agency for review of the mobile home park under SEQRA. The board determined that the 1969 approval was too old and refused to act upon the request, and he went to court for a declaration that the July 1969 approval was still in force and that he had the right to obtain the designation of a lead agency for review of his project. Supreme Court dismissed the action, and the property owner appealed.

The Third Department agreed with Supreme Court that the 25-year lapse in the furtherance of the project rendered whatever approval had been given in July 1969 "meaningless." In the appellate court's view, the property owner's "failure to act over such a long period of time" constituted an "abandonment per se of the rights" the property owner claimed he had been granted in 1969. As the Third Department explained, the factors affecting the welfare, quality of life and safety of the community that were considered by planning boards 25 years ago "have changed markedly in focus, intensity and in number" throughout New York. To require the property owner in this case to seek a new permit, under the circumstances of this case, was "not unreasonable," it added. Accordingly, it held, in the absence of any issue of fact, the town's cross motion for summary judgment had been properly granted.[7]

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Time Bar

Finally, it is important to keep in mind that the statute of limitations and doctrines such as laches also need to be considered in the vested right context. For example, in *Matter of Vecce v. Town of Babylon*,[8] the petitioner obtained a building permit for the construction of a detached garage on his property in 1993. The building permit was revoked in 1994, after the completion of the garage. Following a decision by the Town of Babylon Board of Appeals denying the petitioner's 2003 application to renew his building permit and for various area variances, the petitioner went to court seeking a review of the town board's decision denying his application for renewal of the building permit and for a judgment declaring that he had a constitutionally vested right to maintain the garage and that he was entitled to a certificate of occupancy for it. The town contended that the matter was time barred, but the Second Department disagreed.

As the appellate court explained, the petitioner's 2003 application to the board was for renewal of his building permit and for several area variances—it was "not one seeking to appeal the revocation of the building permit, in 1994." Consequently, the Second Department held, the Article 78 claim was timely commenced within 30 days after the filing of the board's determination in the office of the town clerk.[9]

Moreover, the Second Department also ruled that the petitioner's declaratory judgment claim also was timely because it in essence sought relief pursuant to Article 78. As the appellate court explained, the petitioner argued that he had a vested right to maintain the garage and that he was entitled to a building permit and certificate of occupancy for the garage; this claim was based on his belief that he was entitled to either area variances or a determination that the building was compliant with the zoning code as it existed at the time the garage was built. Accordingly, the Second Department held, the declaratory judgment action could have been resolved through the Article 78 proceeding. Thus, the 30 day statute of limitations was applicable to all the claims asserted in this case and they were not barred under the statute of limitations.

Conclusion

Vested rights are valuable to property owners and developers. Accordingly, as these decisions illustrate, they should make sure to commence and substantially complete construction in a timely manner so that rights vest in the first instance. It also is important not to delay acting on a permit or approval because even vested rights can lapse.

1. 88 N.Y.2d 41 (1996).
2. Id.
3. See, e.g., *Elsinore Prop. Owners Assn. v. Morwand Homes,* 286 App. Div. 1105 (1955).
4. 42 A.D.3d 542 (2d Dept. 2007).
5. Environmental Conservation Law Article 8.
6. 225 A.D.2d 972 (3d Dept. 1996).
7. See, also, *Dwyer v. McTygue*, 137 Misc. 2d 18 (Sup. Ct. Saratoga Co. 1987) (prior approvals of subdivision plans "valueless" where property owner failed to proceed with the development within a reasonable time after receiving approval).
8. 32 A.D.3d 1038 (2d Dept. 2006).
9. See Town Law §267-c(1).