

## USING VESTING STRATEGIES TO PROTECT APPROVALS

Michael D. Zarin, Esq.  
Zarin & Steinmetz  
81 Main Street, Suite 415  
White Plains, New York 10603  
(914) 682-7800  
mzarin@zarin-steinmetz.net

### I. Theory and Origin of “Vested Rights”

The doctrine of “vested rights” has its roots in the initial implementation of zoning, which rendered certain pre-existing uses “non-conforming” to the new zoning requirements. One of the initial issues planners and courts had to face with respect to zoning was what protection was afforded to these pre-existing “non-conforming” uses.

- a. *Retroactive Zoning Ordinances*, 39 YALE L. J. 735, 735, 736, 740 (1930).
  - “Property restriction by means of zoning being still in its formative stage, its limitations are as yet undefined. The problem is practically confined to use regulation, which may be subdivided into two phases – the prohibition of future non-conforming uses and the discontinuance of existing ones. It is the latter which at present causes the greater difficulty.”
  - “[W]hen municipalities attempt to revoke building permits issued before the enactment of a zoning ordinance, the courts will sustain the revocation provided there has been no ‘material’ action in reliance on the permit.”
  - “In holding ordinances invalid because of the extent of the diminution in value caused by their application, the courts speak of the operation of the ordinance as impairing the property owner’s vested rights or as constituting a taking which would require compensation.”
- b. *Constitutional Law – Vested Rights – Effect Of Change in Zoning Ordinance*, 41 HARV. L. REV. 667, 667 (1928).
  - “The fact that there is an interference with established user, or that expenditures have been made in reliance on previous action by the municipality may well serve to make the subsequent [zoning] action unreasonable.”
  - “Comprehensive zoning ordinances are now established as legitimate exercises of the police power. But though the plan as a whole may be valid, it may operate unreasonably in particular cases.”

- c. People v. Miller, 304 N.Y. 105, 108-9, 106 N.E.2d 34 (1952) (discussing derivation of New York’s vested rights from a non-conforming use theory).
  - “[V]ested right’ in [a] particular use . . . is but another way of saying that the property interest affected by the particular ordinance is too substantial to justify its deprivation in light of the objectives to be achieved by enforcement of the provision.”

## **II. Establishing Vested Rights**

### **A. Vesting Pre-approval**

#### **1. Development Agreements**

California, Colorado, and Arizona, among other states, have enacted statutes granting municipalities the authority to enter into a contract known as a development agreement with a landowner to freeze for a specified period of time in exchange for various promises by the developer.

a) California Development Agreements, Cal. Govt. Code § 65864, et seq. (enacted 1979).

- The Statute authorizes cities and counties to “enter into a development agreement with any person having a legal or equitable interest in real property for the development of the property as provided in this article.” § 65865(a)
- The Statute states that the content of a development agreement shall specify provisions for:
  - The duration of the agreement, the permitted uses;
  - The density of use, the maximum height and size of proposed buildings; and
  - Provisions for reservation or dedication of land for public purposes.
- The development agreement may include provisions for subsequent discretionary actions, as well as time specifications for completion of construction. § 65865.2.
- The Statute provides for the “freezing” of zoning at the time of the agreement:
  - “Unless otherwise provided by the development agreement, rules, regulations, and official policies governing permitted uses of the land, governing density, governing design, improvement and construction standards and specifications, applicable to development of the property subject to the development

agreement, shall be those . . . in force at the time of execution of the agreement.” § 65866.

- The Statute also provides for procedural requirements. § 65867.
- Requires there be a periodic review of the subject of the agreement every 12 months.
  - Requiring a showing of good faith compliance with the terms of the agreement.
  - Noncompliance could result in termination or modification of the agreement by the municipality.

b) Santa Margarita Area Residents Together, et al. v. San Luis Obispo County Bd. of Supervisors, 84 Cal.App.4th 221, 100 Cal.Rptr.2d 740 (2000).

- County contracted with the landowner of approximately 13,800 acres for a development agreement under the state statute involving a large-scale real estate development.
- The development agreement provided for a freeze in zoning for 5 years on the property “in return for the developer’s commitment to submit a specific plan for construction in compliance with County land use requirements,” and the dedication of lands.
  - Landowner to file a comprehensive application for approval of the development project.
  - Developer to dedicate land for a public swimming pool, sewer treatment plant, and cemetery expansion.
  - The County did not bargain away discretion in its review of the specific plan, but agreed to apply the current zoning and other land use regulations while it reviewed the project.
  - The development agreement did not provide for a right or obligation to construct the project, but required a good faith effort to negotiate a second development agreement with respect to the physical development of the project.
- Area residents challenged the development agreement, stating that it was invalid under the State statute because it covered the planning stage of the development prior to the design or approval of buildings or other structures.
- Court held it was a proper agreement under the Statute.

c) Colorado Vested Property Rights Statute, C.R.S. § 24-68-101, et seq. (added 1987).

- Grants authority to municipality to enter into an agreement with a landowner guaranteeing landowner that land use regulations applicable at the time of agreement will remain the same for a set period of time. § 24-68-101 (4)(a).
- While the Statute ordinarily contemplates a three-year vesting period following approval, a municipality and developer may agree to extend the vested rights period beyond the statutory three-year period “where warranted in light of all relevant circumstances, including, but not limited to, the size and phasing of the development, economic cycles, and market conditions.”
  - Allows for municipality and developer to negotiate provisions involving timing of construction, phasing, and environmental protections, for example, in exchange for the developer’s certainty that the municipality will not change the zoning for an agreed upon period of time.

d) Arizona Development Agreements, A.R.S. § 9-500.05(H)(1) (added 1988).

“Development Agreement’ means an agreement between a municipality and a community facilities district . . . a landowner or any other person having an interest in real property that may specify or otherwise relate to any of the following:

- (a) The duration of the development agreement.
- (b) The permitted uses of property subject to the development agreement.
- (c) The density and intensity of uses and maximum height and size of proposed buildings within such property.
- (d) Provisions for reservation or dedication of land for public purposes and provisions to protect environmentally sensitive lands.
- (e) Provisions for preservation and restoration of historic structures.
- (f) The phasing or time of construction or development on property subject to the development agreement.
- (g) Conditions, terms, restrictions and requirements for annexation of property by the municipality and the phasing or timing of annexation of property by the municipality.
- (h) Conditions, terms, restrictions and requirements of deannexation of property from one municipality to another municipality and the phasing or timing of deannexation of property from one municipality to another municipality.

- (i) Conditions, terms, restrictions and requirements relating to the governing body's intent to form a special taxing district pursuant to [Statute].
  - (j) Any other matters relating to the development of the property.”
- e) Washington State Development Agreements Statute, R.C.W. § 36.70B.180 (added 1995).
- “Unless amended or terminated, a development agreement is enforceable during its term by a party to the agreement. A development agreement and the development standards in the agreement govern during the term of the agreement, or for all or that part of the build-out period specified in the agreement, and may not be subject to an amendment to a zoning ordinance or development standard or regulation or a new zoning ordinance or development standard or regulation adopted after the effective date of the agreement. A permit or approval issued by the county or city after the execution of the development agreement must be consistent with the development agreement.”

## **2. Substantial Expenditure In Reliance Upon The Probability Of Permit Issuance**

Illinois has adopted a common law vesting rule, which grants a vested right in the existing zoning where a substantial sum has been spent in reliance upon a reasonable expectation of the issuance of the necessary permit.

- a) Cos Corp. v. City of Evanston, 27 Ill.2d 570, 190 N.E.2d 364 (1963).
- Developer brought mandamus proceeding to require issuance of building permit after City amended the zoning ordinance requiring more off-street parking, which resulted in plaintiff's development plans having an insufficient number of parking spaces.
  - The court held that “[p]laintiff's substantial change in position by expenditures in reliance upon the probability of the issuance of a building permit, based upon the existing zoning ordinance and the assurances of the city officials, entitles it to issuance of the permit.”
  - The “substantial change in position by expenditures” equated to the sum spent on purchasing land of approximately \$150,000, and approximately \$80,000 in architect and legal and organizational expenses. The estimated construction costs were \$1,200,000.

- Adequate assurances for plaintiff’s reliance consisted of the building department officials viewing plaintiff’s development plan and stating it was in compliance with the city ordinance.
  - These assurances were sufficient for plaintiff to be “led to believe a permit would issue and to rely on the ordinance then in effect.”

b) But see Christian Assembly Rios De Agua Viva v. City of Burbank, 2011 WL 1227835 (Ill. App. 1 Dist. 3/31/2011).

- Church purchased property for \$900,000 in a commercial district, which allowed for religious uses by special use permit. There was a contingency in the contract for the Church to be satisfied with the zoning, as well as obtain approvals along with a schedule of payment.
- The Church proceeded with the application of the special use permit in October, claiming the church should be allowed as-of-right.
- The City published a notice in November for an amendment that would preclude churches in the zoning district.
- Court held there was no vested right to zoning where the plaintiff was not entitled to the use as-of-right, but rather subject to a special permit and proceeded knowing the proposed change in zoning.
- The court stated “the plaintiff expended more than \$40,000 in trying to purchase the property and obtain a special use permit, which would likely constitute a ‘substantial change of position.’” However, under these circumstances, there was no reasonable expectation that the municipality would approve the application.
- The Court made note of the Church’s ability to terminate the real estate agreement if it was not satisfied with the zoning, that it would be returned its “earnest money” minus the non-refundable portions under the payment schedule.

### 3) New York “Special Facts” Exception

- Ordinarily under New York law, a developer cannot obtain vested rights pre-approval. (See Orangetown v. Magee below.)
- Special Facts Exception may apply where “arbitrary and dilatory tactics of an administrative body delayed a property owner’s application pursuant to which that owner was entitled to a permit as a matter of right, in order to thereafter change a zoning ordinance and defeat the property owner’s rights and nullify the application.” Preble Aggregate Inc. v. Town of Preble, 694 N.Y.S.2d 788, 792 (3d Dep’t 1999) (citations omitted).

a) Pokiok v. Silsdorf, 40 N.Y.2d 769, 390 N.Y.S.2d 49 (1976).

- Petitioner applied for a building permit for an expansion of his residence in September 1972 which was denied and submitted a revised building permit application thereafter. Petitioner prevailed on motion to compel building inspector to act on the application in December 1973. Application was denied in March 1974. Village changed zoning in May 1974. ZBA denied Petitioner's appeal in August 1974.
- Petitioner had previously violated the zoning code by renting rooms without a license. The Village denied the permit, and changed the zoning to disallow additional rooms in Petitioner's house presupposing he would violate the ordinance again.
- Court found vested rights where petitioner demonstrated he was entitled to a building 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."
- Administrative officials "improperly delayed reviewing the application" until they could enact a zoning amendment, which barred the project. Petitioner "was denied this right by the unjustifiable actions of the village officials and by an abuse of administrative procedures."
- The Court held "this case fits into a 'special facts exception' . . . so that the zoning ordinance, as amended, does not apply and the arbitrary actions of the board may not prevail."

b) Caruso v. Town of Oyster Bay, 250 A.D.2d 639, 672 N.Y.S.2d 418 (2d Dep't 1998).

- Town refused to review the building permit application for the construction of a new home until there was a change in zoning. Court did not make note of the timing of Town's actions.
- The court held the refusal to review the building permit application was done "in bad faith and an attempt to delay the granting of the permit until the change in zoning had been enacted."
- It was proper for the lower court to review the application "pursuant to the zoning criteria which applied when he filed his original application."

- c) Envirotech of America, Inc. v. Dadey, 234 A.D.2d 968, 651 N.Y.S.2d 778 (4th Dep't 1996).
- Petitioner wanted to expand its medical waste facility. It sought approval from the New York State Department of Environmental Conservation (the "DEC"). Petitioner made an informal presentation to the municipality during the DEC's public comment period.
  - Municipality did not initiate a desire to serve as lead agency for State Environmental Quality Review Act in response to DEC notice.
  - Following issuance of DEC's permit, municipality advised Petitioner to apply for a special use permit as a "noxious" use, and then amended the Code to specifically prohibit Petitioner's use in its zoning district.
  - Court held that the municipality's "deliberate delay until [the new local law] was enacted to bar the intended use requires that any application by petitioner be reviewed without regard to the enactment of [the new local law]."
- d) Our Lady of Good Counsel, Roman Catholic Church and School v. Ball, 45 A.D.2d 66, 356 N.Y.S.2d 641 (2d Dep't 1974), aff'd 38 N.Y.2d 780, 381 N.Y.S.2d 866 (1975).
- Court held "that where a [commercial bingo] license would have been granted under the law as it existed at the time the application for the license should have been passed upon, the application will not be subject to the onerous strictures of an amendment of the pertinent statute or regulation, or of a new statute or regulation, and that it matters not whether the application was *innocently or deliberately* filed and forgotten." (emphasis added).
- e) Golisano v. Town Bd. of Town of Macedon, 31 A.D.2d 85, 296 N.Y.S.2d 623 (4th Dep't 1968).
- Landowner sought permit to construct a mobile home park under the zoning code.
  - Ten months passed after the filing of the application before the first public hearing. Landowner obtained two court orders in his efforts to have the Town hold the first public hearing, and act on the application.
  - Special facts exception applied where it was "clear from [the] record that the Board purposefully delayed its decision while awaiting the adoption of an amendment which it designed to make the application a nullity" and "compounded its questionable action by trying to conceal the obvious and by groping for all kinds of reasons for denial, insufficient though they were [such that t]he result is a disregard of

petitioner's rights, an abuse of administrative procedure, and gives the appearance of a submission to an ulterior motive.”

- f) But see Preble Aggregate Inc. v. Town of Preble, 263 A.D.2d 849, 694 N.Y.S.2d 788 (3d Dep't 1999).
- Plaintiff applied for special use permit to mine on his property, in part, below the watertable. The Town zoning allowed mining by special use permit, but prohibited mining below the watertable.
  - Plaintiff challenged the Town's law prohibiting mining below the watertable as being superseded by State law.
  - While the suit was pending, the Town adopted a local law prohibiting mining on the area of land, which encompassed plaintiff's property.
  - Plaintiff challenged the rezoning alleging, *inter alia*, the special facts exception.
  - Court held that the exception did not apply where the Town “at all times fought plaintiff's application with ‘unrelenting determination’, as it was entitled to do. The Town's action in invoking the legal rights of its residents in order to contest plaintiff's application, however, was not the product of malice, oppression, manipulation or corruption.”
  - The Court also noted that the plaintiff was not otherwise entitled to the special use permit as it existed in the previous zoning as of right. Rather, the Town had discretionary approval authority.

## **B. Vesting Post-approval**

### **1. Vesting Occurs On A “Date Certain”**

Washington and Colorado, among other states, provide a set date when rights to develop vest under the existing zoning. This is done to provide certainty to developers as an alternative to the more subjective tests discussed later. In Washington, the right to develop pursuant to the existing zoning vests on the date a complete application is submitted for either a building permit or a plat application. In Colorado, the right to develop under the existing zoning vests on the date of approval for certain permits, determined by each municipality.

#### a) Washington

##### i. Wash. Rev. Code Ann. § 19.27.095 (West).

- “A valid and fully complete building permit application for a structure, that is permitted under the zoning or other land use control ordinances in effect on the date of the application *shall be considered under the building permit ordinance in effect at the time*

*of application, and the zoning or other land use control ordinances in effect on the date of application.” RCW § 19.27.095 (1) (emphasis added).*

- The requirements for a “fully completed application shall be defined by local ordinance” with minimum information set forth in the statute. RCW § 19.27.095 (2).
- ii. Wash. Rev. Code Ann. § 58.17.033 (West).
- Provides for vesting of rights under zoning laws in effect at time of submission of subdivision plat applications.

iii. Which regulations freeze at the time of filing of plat application?

Noble Manor Co. v. Pierce County, 133 Wash.2d 269, 943 P.2d 1378 (1997).

- Developer submitted a plat application to subdivide property into three duplex lots.
- After the application had been submitted, but before it had been approved, County adopted an interim ordinance increasing the lot size for a duplex. The developer’s three lots were nonconforming under the new regulation.
- The Washington Supreme Court held that the plat application vested the right to develop the specified use under the zoning existing at the time of the application since it was specified in the application.
- If the plat application “is made for division of land *for a specified use*, then the applicant has the right to have that application for *that use* considered under the land use laws in effect on the date of the application.” (emphasis added). However, if the use is not specified, the regulations regarding the use will not vest; only those regulations governing the division of land vest at the time of application.

iv. Types of applications triggering vesting are solely those enumerated in the Washington Statute:

But see Abbey Road Group, LLC v. Town of Bonney Lake, 167 Wash.2d 242, 218 P.3d 180 (2009).

- No vested right to develop absent a complete building permit application under Washington’s statute.

- Court would not extend vested right to the submission of site plan application, which, it noted, “is part of the preliminary stage in the development process relative to the building permit application phase.”
- Court refused to expand the statutory rule, which would lead to a “case-by-case analysis of costs and reliance interests.” Instead, it relied upon the building permit, which evidences a substantial commitment to the development and the costs of “preparing and submitting . . . are often substantial.”

Deer Creek Developers, LLC v. Spokane County, 157 Wash.App.1, 236 P.3d 906 (2010).

- Developer submitted a “unified site plan” for a two-phase, large-scale residential development. Also, obtained a building permit for Phase One.
- County later rezoned the District prohibiting residential uses.
- Developer spent millions of dollars on infrastructure, roads, and utilities for both phases.
- Court held that the site plan did not vest rights for the second Phase under the State statute since there was no building permit application submitted for Phase Two.

v. Completeness of Application:

Lauer v. Pierce County, 157 Wash.App. 693, 238 P.3d 539 (2010), review granted 171 Wash.2d 1008, 249 P.3d 182 (2011).

- Property owners with land abutting stream and buffer submitted a building permit application to the County, and permit was issued.
- County argues rights did not vest because Applicant failed to properly reference stream on their application.
- Court rules against County, finding that while owners did not “expressly label” the stream on their property in the building permit application, there was substantial evidence of knowledge and communication regarding the issue on the part of the owner and County. With no misrepresentation regarding the stream in the application and the County’s approval of the building permit, the application was deemed complete.
- Court also finds significant that County failed to notify Applicant that its application was incomplete during the statutory time period, writing “the statute’s plain language that where a local government in receipt of a building permit

application does not provide written notice to the application within 28 days that the application is incomplete, the application is deemed complete as a matter of law. Here, there is no indication in the record that the County ever provided such notice to the [owners].”

- The complete application entitled the property owner to vested rights of the land use regulations as they existed at the time of the application, including the regulations for a fish and wildlife variance, which were more lenient than those at the time of the suit.

Adams v. Thurston County, 70 Wash.App. 471, 855 P.2d 284 (1993).

- Applicant challenges local requirement that environmental review be completed before rights can vest.
- In particular, County’s implementation of the State’s vesting doctrine stated that preliminary plat application was not “submitted” until the completion of the final environmental impact statement.
- Court held this conflicted with, and was preempted by state statutes, and thus was invalid. Development rights vested on the date of filing of preliminary plat application, irrespective of the environmental information required under the State Environmental Policy Act.
- The vesting of rights at the time of application of a permit does not take away the County’s discretionary approval authority with respect to the State Environmental Policy Act. “It can use the impacts identified in the EIS to condition or deny the project, even if the project is allowed under zoning and building ordinances frozen at the time of vesting.”
- The Court stated that “[s]ince the County has the responsibility to review the plat application, issue a determination of significance [under SEPA], establish the scope of the EIS, prepare and circulate a draft EIS, and then complete a final EIS, it is in a position to manipulate the date the EIS is completed. This interpretation would cause project proponents to lose the ability to fix the rules that govern their land development, contrary to the purpose of the vesting rule.”

b) Colorado Vested Property Rights Statute, C.R.S. § 24-68-101, *et seq.*

- Grants authority to a municipality to adopt a local vesting provision by ordinance or regulation. § 24-68-101(4)(a).

- If local government does not adopt such an ordinance described above, “the right will vest upon approval similar to that listed in the Act.” § 24-68-103.
- Property rights vest upon approval, or conditional approval, following notice and public hearing in municipality. § 24-68-103.
- Statutory vesting period of three years for freezing of zoning laws.
- Statute creates exceptions for certain actions necessary to protect the public health, safety, and welfare. § 24-68-105(1)(b).
- Jordan-Arapahoe, LLP v. Bd. of Cty. Comm’rs of Cty. of Arapahoe, 633 F.3d 1022 (10<sup>th</sup> Circ. 2011).
  - The County had adopted an ordinance pursuant to the Vested Property Rights Act (VPRA) in which it did not allow for vesting of development rights until the approval of a “final development plan,” in which it had discretion following a “preliminary development plan.”
  - Plaintiff obtained approval of a Preliminary Development Plan for its property and acted in reliance on the approval. The County thereafter adopted a moratorium while it changed the zoning, creating a setback, which zoned out plaintiff’s desired use.
  - Plaintiff sought recovery under common law and VPRA. The Court held the County was permitted under VPRA to change the zoning insofar as it affected plaintiff’s property until the final approval was granted in accordance with the statute and local code.

## 2. Valid Permit, Substantial Construction And Substantial Expenditure

The rule in the majority of states is that a developer can secure vested rights to existing zoning by obtaining a valid permit and implementing “substantial construction and substantial expenditures.”

a) Orangetown v. Magee, 88 N.Y.2d 41, 643 N.Y.S.2d 21 (1996).

- “In New York, a vested right can be acquired when, [1] pursuant to a legally issued permit, [2] the landowner demonstrates a commitment to the purpose for which the permit was granted by effecting substantial changes and incurring substantial expenses to further the development.”
- Making the permitted improvements on the land (land clearing, footings, and foundation of 34-acre industrial park) and placing a temporary building for use during the construction process constituted “substantial changes.”
- Incurring costs in excess of \$4 million constituted “substantial expenses,” where the estimated project costs was \$3 million.

- Court emphasized that “[t]he landowner’s actions relying on a valid permit must be so substantial that the municipal action results in serious loss rendering the improvements essentially valueless.”
- b) Glacial Aggregates, LLC. v. Town of Yorkshire, 14 N.Y.3d 127, 897 N.Y.S.2d 677 (2010).
- Court held mining company acquired vested rights due to lack of zoning in place at time of initial filing and substantial expenditures and construction.
  - Court considered municipality’s lack of zoning “unqualified” permission from Town to utilize land as mining site.
  - \$500,000 spent in obtaining DEC permit constituted substantial expenditures; the court noted these soft costs “represent a significant portion of the investment necessary for a landowner to devote real property to quarrying.”
  - “Substantial construction” comprised of removing and testing 400 tons of sand and gravel; removing timber on property; staking and surveying property; drilling test holes; and preparing for necessary bridge. Substantiality was viewed in light of the fact that “little needed to be built for mining to take place at the property.”
- c) Showers v. Town of Poestenkill Zoning Bd. of App., 176 A.D.2d 1157, 575 N.Y.S.2d 600 (3d Dept 1991), app. denied, 79 N.Y.2d 754, 581 N.Y.S.2d 655 (1992).
- Plaintiff built one of two phases in project, zoning was changed, and plaintiff sought vested rights to build the second phase.
  - Road and utilities used for the first 18 homes of a 30-lot subdivision did not constitute “extensive improvements,” viewed in light of the entire project.
  - The amount spent on the first phase was not a “substantial expenditure” when viewed in light of the cost of the entire project.
  - The court found most of the improvements were useful under the new zoning.
- e) 1350 Lakeshore Assoc. v. Randall, 401 Ill.App.3d 96, 928 N.E.2d 181 (2010).
- Developer did not have a vested right to the previous zoning since there was no substantial expenditure in reliance of zoning.

- Developer spent \$272,022.18 prior to the change in zoning; total projected cost of project was between \$72 and \$76 million. Court noted the amount spent was less than ½ of 1% of the total projected costs.
  - “Only those expenditures made in good-faith reliance on the prior zoning classification are included in the substantiality determination.” The purchase price of the property was not included in the Court’s substantial expense calculation, because the property was purchased 26 years before the relevant prior zoning was enacted.
  - There must be *either* substantial expenditures *or* substantial construction in reliance of municipal zoning to acquire a vested right.
- f) Schubiner v. West Bloomfield Twp., 133 Mich.App. 490, 351 N.W.2d 214 (1984).
- Property owners’ site plan had been approved for an office building. Before it expired, they applied for an extension. Zoning was changed during the extension process.
  - There must be a validly issued building permit, a substantial sum expended, and actual construction commenced.
  - Preparatory plans, demolition of building, and landscaping did not amount to “actual construction,” but rather mere preparations to construct.
  - The property owners had no right to expect an extension of the site plan approval.
- g) Jordan-Arapahoe, LLP v. Bd. of Cty. Comm’rs of Cty. of Arapahoe, 633 F.3d 1022, No. 09–1501 (10<sup>th</sup> Circ. 2011).
- County approved a preliminary development plan to rezone plaintiff landowner’s property to include “Automotive Sales and Repair” as a permitted use. Plaintiff prepared to sell the land and obtain a final development plan. Under the County’s Code, the County maintained full discretion in the final development plan. County adopted a moratorium, and subsequently rezoned the area, including plaintiff’s parcel, not allowing the planned car dealership.
  - Court held landowner did not have a vested property right to the current zoning under Colorado common law where the general rule is whether (1) a building permit has been issued and (2) plaintiff has taken substantial action in reliance on the permit to his detriment, or the limited exception where (1) the municipality has made a representation or affirmative action that rights have vested and (2)

plaintiff has taken substantial action on such action in reliance to his detriment.

- Court found there was substantial action by plaintiff in reliance by spending \$2.6 million on street construction, site preparation and grading, water channel drainage improvements, and sanitary sewer installation in preparing to sell the land as a car dealership.
- However, there was no building permit issued, and the Court held that approval of the preliminary plan was not a sufficient affirmative action by the municipality that rights have vested since the Code is clear the Board maintains discretion over the final approval.

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

- Developer completed two phases of a four phase subdivision project. The remaining phases were determined to have vested rights under the zoning that existed at the time of approval.
- The remaining two phases were completely undeveloped at the time. Court held, however, that the rights were vested under the “single integrated project theory.” The project, although in phases, was viewed as a whole.
- A successor in interest filed new subdivision plats based on the original zoning. The Town rejected the plats, stating they needed to be in compliance with the new zoning.
- Court held that the rights could be divested where (1) the expenses were recouped, (2) abandoned by the plaintiff or its predecessor in interest, or (3) if “considerations of public health, safety and welfare override petitioner’s . . . interest in development of the tract” with the original zoning.
- Whether lack of sewage facilities for the latter half of the project, a failed water source, and overburdened storm drains were considerations of public health, safety and welfare, which would override petitioner’s interest in development, were matters of fact to be determined on remand.

### **3. “Good Faith” Requirement**

a) Sykesville v. West Shore Commc’ns, 110 Md.App. 300, 677 A.2d 102 (1996).

- Vested rights where developer effected “significant excavation and stockpiling of materials” over the weekend following the acquisition of a building permit and zoning certificate, knowing there was a strong

likelihood of a change in local law the following week, which would prevent construction of the project.

- There was actual physical commencement of some significant and visible construction.
- Commencement was undertaken in good faith with the intention to continue and carry through to completion.
- Commencement of construction was pursuant to a validly issued building permit.

b) Sahl v. Town of York, 2000 ME 180, 760 A.2d 266 (Sup. Jud. Ct. Me. 2000).

- Developers phased construction of motel at the behest of the Town. Developers completed work on Phase One with no work on Phase Two.
- Completion of the first phase was sufficient to equate to “substantial changes.” Developer had incurred “substantial expenses” in the context of the completion of the entire project.
- “The construction was undertaken in good faith as supported by the later phasing agreement.” Petitioners “relied upon” the ordinance at the time the permit was issued and the agreement to phase the project.

c) But see Ross v. Montgomery County, 252 Md. 497, 250 A.2d 635 (1969).

- Property owners purchased land to use as an apartment hotel, submitted plans, were issued a building permit, had an architect prepare plans, and did minimal construction.
- In the midst of property owner’s development process, County changed zoning to make apartment hotel an impermissible use in zone. The County Code provided that a building permit expired after six months if construction had not begun.
- In the fifth month after the building permit was issued, property owner invited the building inspector to the site and poured a single footing on the property.
- The property was inspected after nine months, no further work had been conducted and the property was being used as a parking lot.
- County instructed property owner that the building permit was invalid due to the inactivity.
- While a “substantial sum” of \$56,000, had been spent on the project, mostly for architectural fees, only \$190.81 had been spent on

construction, the Court stated, “there was nothing spent in good faith on construction.”

- In holding that there was no vested right in the zoning, Court agreed with the lower court in finding that the single piling did not constitute a good faith commencement of construction with the intention to finish, stating it was “merely ‘window dressing’ for the benefit of the County’s building inspector.”

### **III. Summary: Strategies For Protecting Development Projects**

#### A. Date Certain Approach

- Balance giving advance notice to municipality about application with benefit of meeting with municipal officials at the outset of the process.
  - It is generally beneficial to meet with municipal officials in advance of submitting applications. At such pre-application meetings, the developer and the municipality can identify, discuss, and come to understandings of application requirements, acceptable development parameters, mitigations, etc. This can significantly help expedite the process.
  - The benefit of meeting in advance needs to be considered if there is concern that the municipality might try to alter its zoning requirements once it is apprised of a potential application.
- Ensure application is complete.
  - What constitutes a complete application?
  - Does it include compliance with the state environmental law review procedures?
  - Comprehensive applications for multi-phased projects.
- Seek determination of completeness to lock in vested rights.
- Develop administrative record regarding responsiveness and timeliness of communications with officials.
  - Record should include, for example, submissions of applications, request for meetings, and clarification of methodologies, together with responses, or lack thereof, by municipal officials.
  - The knowledge that you are creating record can often influence municipal officials to treat application fairly.

#### B. Permit and Substantiality Approach

- For multi-phased projects, approval/permit should cover entire project.

- Case-by-case analysis to show “substantial expense” and “substantial construction.”
  - At what point would lack of vested rights render re-zoning fundamentally unfair to a developer’s legitimate investment backed expectations?
  - Document legitimate investment expectations – i.e., project feasibility, etc.
- Expenditures and/or construction may be viewed in light of total costs of project.
- The more work is uniquely tied to the project the more likely vesting may be found.
  - For multi-phased projects, show infrastructure or other project improvements would serve entire project.
- Consider drafting local vesting provisions.
  - In states where municipalities are not specifically authorized to adopt a local vesting provisions, look for authorization in other provisions of state law.
  - In New York, for example, the authority to adopt a vested rights zoning amendment may be found within the statutory and constitutional scheme permitting municipalities to adopt and amend zoning regulations.
  - Section 10 of the New York Municipal Home Rule Law (“MHRL”) authorizes local governments to adopt and amend local laws with respect to their “property, affairs or government,” as well as in fourteen other enumerated instances, so long as those laws are not inconsistent with the Constitution or any general law of the State. N.Y. Mun. Home Rule Law §§ 10(1)(i), (ii); *see also* N.Y. Const. Art IX, § 2(c).
  - One of the enumerated powers under the MHRL authorizes a city, town or village to adopt local laws to exercise the “powers granted to it in the statute of local governments.” N.Y. Mun. Home Rule Law § 10(1)(ii)(a)(14).
  - One example of a local vesting provision:
    - Town of Dover, New York § 145-16(I)
      - “Vested rights. For 15 years following the approval of a master development plan by the Town Board, an applicant, or its successor(s) in interest, shall obtain vested rights to complete the development shown on said master development plan. All Town local laws, ordinances, and enactments, and all other Town zoning, planning, environmental rules, requirements or regulations, which are in effect at the time of the Town Board

approval of a master development plan, shall remain applicable to said master development plan for 15 years, absent clear and convincing evidence of a necessity directly relating to the public health, safety or general welfare.”

D. Good Faith Requirement

- Create record of actions evidencing intent to complete and/or build project.