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VESTED RIGHTS AND PUBLIC-PRIVATE REDEVELOPMENT PROJECTS

Michael D. Zarin and Brad K. Schwartz¹

This Article examines the vested rights doctrine in New York, and the potential for municipalities to adopt local zoning provisions conferring vested rights upon public-private, phased redevelopment projects.

Introduction

Long-term, multi-phased, public-private redevelopment projects frequently involve the economic revitalization of underutilized or blighted areas, including waterfront sites and former contaminated industrial uses. They are generally considered high risk development, requiring considerable up-front private and governmental financial and institutional investment. These developments also demand an increased level of cooperation between the private redeveloper and the host community regarding, for example, assembling the relevant property, infrastructure investment, multi-jurisdictional regulatory review, environmental remediation, and often more heightened public relations. Of particular relevance to this Article, public-private redevelopment projects often consist of multi-year build-outs, with tens of millions of dollars of investment phased over a not uncommon 10- to 15-year period.

Given the size, duration, and complexity of such projects, and the front-end investment and risk assumed by both the public and private entities, the sustainability of any long-term approvals and zoning is critical. Commonly, a project of this nature will receive initially a form of master

development plan approval by the legislative body. The approved master development plan generally outlines the responsibilities and commitments of the parties concerning the conceptual site plan for the project, the overall development program, infrastructure and public amenities, taxing and financing mechanisms, phasing, land acquisition and construction timetables, default provisions, and most of the other essential terms and conditions of the project. This process can take several years, involving a full coordinated environmental review under the State Environmental Quality Review Act ("SE-QRA"), as well as the negotiation of complex land disposition and other development agreements. Following master development plan approval, the redeveloper would seek site plan and subdivision approval for each individual phase over the multi-year term of the project.

The challenge for all parties in these types of projects is knowing that zoning and other applicable laws and approvals affecting the project will not change during the duration of the build-out. Most lenders, especially in this volatile economic climate, need this type of certainty. The private redeveloper needs to know that its investment cannot simply be overturned due to shifting public or governmental opinion. Finally, government needs to know that the time and resource commitments of one administration, as well as the municipality's credibility, will not be subject to the political or policy whims of future elected officials.

The problem is that there are limited statutory or common-law protections in New York State, which provide vested rights protection for such approvals short of substantial construction of the project. Also, private contracts between a redeveloper and a municipality establishing vested rights arguably are unlawful in New York State, absent express authorization from the State Legislature. Finally, while the New York State Legislature has been considering a form of vested rights legislation, there is currently questionable support for its adoption.

Thus, the most immediate viable avenue for enacting vested rights legislation to protect master development plan approval in these types of projects may be at the local level, although presently there is little precedent in New York State. This Article explores the legal theory and practical justification for such legislation, and concludes that there is sufficient legal rationale to consider such an approach.

Vested Rights in New York

In general, a vested right protects a landowner during the course of its build-out against any changes in zoning or other regulations in effect at the time of the project's approval, which would essentially render such use or approval void or impermissible.

1. Statutory

There is currently very limited statutory vested rights protection in New York State. The only known significant regulation relates to filed subdivision plats. The General City Law, Town Law and Village Law provide that zoning regulations increasing lot area, lot dimension, yard or set back requirements shall not apply to a previously filed residential subdivision plat for a period of time, usually three years, depending upon certain planning circumstances.² This rule does not protect filed plats from changes in "use" regulations. The purpose of this statutory protection is to provide a grace period during which a developer may vest its rights pursuant to the common-law test described below.³

2. Common Law

To acquire vested rights under New York common law, a developer must (i) show a legally issued permit or approval; and (ii) demonstrate "commitment to the purpose for which the permit was granted by effecting *substantial changes* and incurring *substantial expenses* to further the development."⁴ The Court of Appeals has explained that the doctrine of vested rights stems from the "constitutionally based common-law rule protect-

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ing nonconforming uses," as well as "principles of equitable estoppel."⁶ The doctrine of vested rights recognizes that at some point in the development process, the municipality should be estopped from changing those zoning regulations that would prohibit the completion of the project, or diminish the return on the developer's investment.

The threshold for what constitutes "substantial" changes and expenditure is demanding. Substantiality will generally be considered as "compared against the cost of the entire development."⁶ "[T]he landowner's actions relying on a valid permit must [also] be so substantial that the municipal action results in serious loss rendering the improvements essentially valueless."⁷ The determination of what constitutes sufficient "substantial" changes and expenditures requires a fact-intensive, case-by-case inquiry, which often requires costly and lengthy litigation to resolve. As a further practical matter, the point at which the landowner is able to substantially construct the project and incur the necessary expenses to obtain common-law vesting is so late in the process so as to render the protection meaningless, especially in public-private, phased projects.

There is a line of authority in New York applying what the Third Department termed the "Single Integrated Project Theory." Under that theory, a developer may acquire vested rights to a site where substantial construction had not been undertaken, provided: (i) "the site is but a part of a single project," and (ii) "prior to the more restrictive [zoning] amendment, substantial construction had been commenced and substantial expenditures had been made in connection with other phases of the integrated project which also benefited or bore some connection to the affected site."⁸

Even when a common-law vested right is acquired, however, the protection is tenuous, and may be lost under certain circumstances. "An owner who has acquired vested rights may be divested of such rights where there is abandonment, recoupment, or an overriding benefit to the public to be derived from the enforcement of the amendment zoning ordinance."⁹ Abandonment may occur if sufficient time lapses following project approval, or between phases of a project. It requires the concurrence of two factors: (i) "an intention to abandon," and (ii) "some overt act, or some failure to act carrying the implication that the owner neither claims nor retains any interest in the subject matter of the abandonment."¹⁰ Second, a vested right may be

lost when the owner has recovered or recouped all or a part of its financial expenditures on the property without completing construction, or where the improvements or expenditures already completed could either be recovered or be equally useful under the new zoning.¹¹ Third, courts may divest vested rights where considerations of public safety, health and welfare demonstrate an overriding social benefit in enforcing the new, more restrictive zoning regulation.¹²

In summary, the common-law test does not afford the clear, timely and adequate protection parties may need in pursuing the risks of long-term, multi-phased redevelopment projects.

Contract Zoning

The general view is that redevelopers and municipalities in New York cannot enter into a contract, such as a land disposition agreement, providing for vested rights. Such an agreement arguably constitutes a form of illegal contract zoning.

In New York, "[u]nless specifically provided by statute or charter provisions, the [legislative body] cannot contract away or in any manner limit or impair the discretionary authority of future [bodies] in an area relating to governmental or legislative functions."¹³ The relevant case law emphasizes that a municipality may not enter into a contract which binds it "in advance to exercise its zoning authority in a bargained-for manner."¹⁴ A petitioner who asserts that a local government improperly bargained away its police power "must prove that the municipality either 'legislated pursuant to the terms of a contract or agreed in exchange for a predetermined consideration to provide an expedited and favorable determination.'¹⁵ There is a dearth of New York cases discussing contract zoning in the context of vested rights. A municipality would appear, however, to unlawfully bargain away its police power if it were to promise contractually not to change the zoning regulations applicable to a certain property absent express legislative authorization.

There is a view suggesting that a local government may be able to enter into such a contract pursuant to the Municipal Home Rule Law.¹⁶ Until such time as there is express enabling legislation in New York authorizing such contracts (as there is in other states, as discussed below), the more prudent approach for municipalities interested in creating certainty in the development process, and protect-

ing long-term master development plan approvals, would be to consider the adoption of a local vested rights zoning amendment.

Proposed NYS Vested Rights Legislation

There are two identical bills pending in the New York State Assembly and Senate related to vested rights, which may be applicable to the protections required by long-term, public-private redevelopment projects.¹⁷ They are sponsored by Assemblyman Bradley and Senator Valesky. These bills would amend the General Municipal Law, and add thereto a new Article 7-B, creating a rebuttable presumption that the zoning, planning and other regulations in effect *180 days after the submission of a complete site plan, subdivision, or other development plan application, together with an Environmental Assessment Form or Draft Environmental Impact Statement, shall remain applicable to the project for 6 years after the filing date, so long as the application is pursued with reasonable efforts.* This presumption may be rebutted by a municipality upon a detailed written finding showing, by clear and convincing evidence, that “a change in applicable Federal or State laws, rules, or regulations alters the relevant requirements,” or that “newly discovered information or changes in circumstances specifically related to the proposed project or its site, will establish that the project is likely to harm or endanger the public health, safety, or biological habitat,” and that such harm or endangerment would not be prevented by existing laws.

The supporting Memoranda for the proposed bill explain that current vested rights law allows a municipality to “continually modify existing codes, laws, rules and regulations at any stage in the SEQRA or site plan approval or subdivision or building permit process.”¹⁸ Recognizing that a developer makes a “substantial investment prior to the start of construction, both before and during the review process,” the Memoranda state that “it is unfair that after [a developer files its] application the municipality can change the ordinance at any time, preventing [the developer] from using the property as expected and relied upon, and absent the legitimate reasons and time frame covered by this legislation this should be prohibited.” The Memoranda further state that “at the same time, municipalities should be given a reasonable amount of time to respond to the filing of a completed application by considering and enacting legislation that would become effective

within 180 days of the filing of a completed application.”

There has been mixed reaction to the proposed vested rights bill. Municipalities, environmental groups and civic organizations generally oppose the bill. In their view, it unduly restricts a local government’s ability to implement zoning changes outside the six-month window. The Association of Towns of the State of New York issued such a Memorandum in Opposition, stating that “this legislation freezes planning and zoning provisions the moment a developer files an application and will therefore discourage sound planning and zoning while encouraging the practice of land speculating.”¹⁹ The Memorandum further states that “this legislation effectively strips local governments of legislative flexibility to address the public health, safety and welfare needs of the community at large for the benefit of a few.” The Environmental Advocates of New York claimed that the bill would “undercut municipal planning” since six months may not afford enough time to assess an application’s “consistency with community plans” and implement zoning changes if required.²⁰ The New York State Bar Association, Real Property Law Section, likewise submitted a Memorandum of Opposition, stating that the “present system wherein a developer’s claims of vested rights are decided on a case by case basis has worked.”²¹ The New York State Conference of Mayors and Municipal Officials, and others, have also issued memoranda echoing these same concerns, opposing the enactment of this law.²² Developers are generally in favor of the bill, although they would prefer that municipalities not have a 180-day period within which zoning amendments may be enacted after the filing of a complete application. Prior versions of the bill did not contain that provision.

There remains a certain amount of interest in the proposed vested rights legislation despite some of the aforementioned opposition. This bill was referred out of the local government committee in the Assembly twice in the past three years and advanced to a third reading in the Senate three times. There is no expected timetable, however, for its adoption.

In any event, the proposed bill would not adequately address the concerns described above regarding the need to protect master development plan approvals in multi-phased, public-private redevelopment projects. Most fundamentally, six years from the filing of a “complete application” is

not a sufficient period to ensure protection of long-term redevelopment projects, especially when the time starts running from the date of a complete application, not approval. Moreover, as applied to these types of redevelopment projects, would the time start running from the "completed" master development plan application, or the site plan application for each phase? And what does it mean to pursue an application with "reasonable efforts?"

Local Vested Rights Zoning Amendments

1. Vesting Language

Model language for a local vested rights provision might read, as follows:

For fifteen (15) years following the approval of a Master Development Plan by the legislative body, an applicant, or its successor(s) in interest, shall retain vested rights to undertake and complete the development shown on said Plan, and under the terms and conditions of all approving resolutions and SEQRA findings. All local laws, ordinances, and enactments, and all other local zoning, planning, and environmental rules, requirements or regulations, which are in effect at the time of the approval of a Master Development Plan, shall remain applicable to said Plan for fifteen (15) years, absent clear and convincing evidence of a necessity directly relating to the public health, safety or general welfare. Upon the expiration of the aforementioned fifteen-year period, the legislative body shall have the right in its discretion to adopt a resolution extending the Master Development Plan Approval and the vested rights granted hereunder based upon the level of progress by the applicant, or its successor(s), in completing the full build-out of the Master Development Plan. Nothing in this provision shall prohibit, pre-empt or otherwise prevent in any way an applicant from obtaining vested rights to complete any part of its approved Master Development Plan by common law or otherwise.

The text of any such vested rights zoning amendment might also include language providing protection during the application process, not just post-approval.

To avoid long periods of inactivity under the vested rights amendment, a municipality and redevelop-

oper might consider including additional language in the proposed vesting amendment, or specific conditions in any of the approving resolutions, land disposition agreements, and/or SEQRA findings for the specific project, requiring that certain development benchmarks must be met to take full advantage of the fifteen-year vested rights period. Any local vesting legislation should also contain a detailed findings/purposes section, which describes the public policy rationale for enacting such legislation. The amendment could be enacted as a separate, stand-alone zoning change, or as part of the related overall zoning and other approvals for a particular redevelopment project. "Severability" language should always be included in the event that the vested rights language is challenged and overturned by a court.

2. Legal Authority

The legal authority for a local vested rights amendment is derived from several existing legal theories and doctrines.

a. Power to Adopt and Amend Zoning Regulations

The central issue is whether municipalities are authorized to adopt a vested rights zoning amendment. Local governments "have only the lawmaking powers the [State] Legislature confers on them."²³ As there is "no inherent power to enact zoning or land use regulations, an ordinance or local law provision for which legislative delegation of power cannot be found is ultra vires and void."²⁴ The "power to adopt provisions not expressly forbidden by the enabling authorization may, however, be implied where there exists independent justification for provisions within the spirit of the enabling legislation."²⁵

The State Legislature has delegated the zoning power to municipalities through the enactment of general enabling statutes. The General City Law, Town Law, and Village Law confer upon municipalities the broad power to adopt and amend zoning regulations.²⁶ Those provisions generally empower municipalities to regulate height, bulk, location of buildings, size of yards and other area restrictions, as well as to divide the municipality into districts. As a vested rights zoning amendment would govern the allowable use of land for a defined period, it would appear to be supported by the general grant of zoning authority in the aforementioned enabling statutes.

Municipal Home Rule Law ("Home Rule") provides an alternative source of zoning power. Section

10 of Home Rule authorizes local governments to adopt and amend local laws with respect to their "property, affairs or government," as well as in 14 other enumerated instances, so long as those laws are not inconsistent with the Constitution or any general law of the State.²⁷ One of the enumerated powers under Home Rule authorizes a city, town or village to adopt local laws to exercise the "powers granted to it in the *statute of local governments*."²⁸ Section 10(6) of the Statute of Local Governments grants municipalities the power to "adopt, amend and repeal zoning regulations."²⁹ There is no definition of "zoning regulations" in either Home Rule or the Statute of Local Governments. Home Rule and the Statute of Local Governments shall, however, be "liberally construed."³⁰

The authority to adopt a vested rights zoning amendment thus arguably may be found within the broad statutory and constitutional scheme permitting municipalities to adopt and amend zoning regulations. It does not appear that such a vested rights provision would be inconsistent or conflict with the State Constitution or statutes, especially since the proposed State legislation mentioned above has not been adopted.³¹ Furthermore, "as legislative acts, local laws pertaining to zoning matters are invested with a strong presumption of constitutionality."³² The aforementioned principles, taken together, would appear to provide a lawful basis for a local government to adopt a vested rights zoning amendment.

b. Urban Renewal Law

Additional support for a vested rights zoning amendment arguably may be found in the State Legislature's delegation to municipalities of authority over urban renewal projects. The issue of vested rights in phased, public-private redevelopment projects often arises in the context of urban renewal projects pursuant to Articles 15 and 15-A of the General Municipal Law.

Articles 15 and 15-A of the General Municipal Law are broad grants of power to municipalities to engage in projects in furtherance of restoring, rehabilitating, redeveloping, or otherwise improving run-down urban areas. The General Municipal Law expressly authorizes municipalities to "zone or rezone any area of the municipality or make variances to building codes or regulations," and to "do all things necessary or convenient to carry out the above powers and to insure the expeditious under-

taking and completion of an urban renewal program."³³ Articles 15 and 15-A are to be liberally construed.³⁴ Indeed, the public purpose of urban renewal under the General Municipal Law, and the overall public interest of a community affected by an urban renewal plan, has been deemed to transcend conflicting local laws.³⁵

Vested Rights in Other Jurisdictions

A number of states have enacted vested rights laws.³⁶ Other states have adopted legislation, expressly authorizing the use of "development agreements" to accomplish such objectives.

a. Vested Rights Statutes

In 1987, Colorado adopted the Vested Property Rights Act.³⁷ The statute's findings state that "it is necessary and desirable, as a matter of public policy, to provide for the establishment of vested property rights in order to ensure reasonable certainty, stability, and fairness in the land use planning process and in order to stimulate economic growth, secure the reasonable investment-backed expectations of landowners, and foster cooperation between the public and private sectors in the area of land use planning."³⁸ The law provides that an application for approval of a site specific development plan (defined in the statute to include a Planned Unit Development or any other preliminary or general development plan) shall be governed by the "laws and regulations in effect at the time the application is submitted to a local government."³⁹ The term "laws and regulations" is defined to include "any zoning or development regulations that have previously been adopted for the particular parcel described in the plan and that remain in effect at the time of the application for approval of the plan."⁴⁰ There is an exception allowing a new law to be enforced during the application process "when necessary for the immediate preservation of public health and safety."⁴¹

A vested property right is deemed to be formally established in Colorado upon the approval of a site specific development plan. "A vested property right shall attach to and run with the applicable property and shall confer upon the landowner the right to undertake and complete the development and use of said property under the terms and conditions of the site specific development plan including any amendments thereto."⁴² Significantly, the statute further provides that a vested property right shall remain vested for a period of 3 years, except that

local governments are authorized to enter into development agreements allowing for a period in excess of 3 years "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."⁴³ The statute also provides for certain exceptions to the prohibition against the application of subsequent zoning regulations, including, when the discovery of a "natural or man-made hazard" would "pose a serious threat to the public health, safety, and welfare."⁴⁴

North Carolina has closely followed the Colorado statute.⁴⁵ North Carolina's legislation includes the recognition that "city approval of land-use development typically follows significant landowner investment in site evaluation, planning, development costs, consultant fees, and related expenses."⁴⁶ The North Carolina legislation also establishes a vested right upon the approval "of a site specific development plan or a phased development plan," which shall remain vested for a period of 2-5 years depending upon the circumstances.⁴⁷

There are not many reported cases stemming from the vested rights statutes. Thus, "it is difficult to assess the degree to which they have accomplished their primary purpose of protecting development projects from subsequently enacted regulation that otherwise would prevent or impose additional standards on the projects."⁴⁸

b. Development Agreements

In New York, developers and municipalities are not expressly authorized to enter into contracts—or "development agreements," as they are formally known in some states—which specifically freeze the existing zoning regulations applicable to a property in exchange for certain public benefits.⁴⁹ The so-called development agreements that have been consummated in New York with respect to multi-phased, complex, redevelopment projects mostly set forth the development rights and obligations of the respective municipal and private parties, subject to any determinations, amendments, or even denials of all or a portion of an application, during the various public land use review processes.

Some states, such as Hawaii, California, and Florida, have enacted enabling statutes authorizing municipalities to enter into development agreements with some form of contractual vested rights.⁵⁰ Most of these statutes recognize that the "lack of certainty in the development approval process can result in a

waste of resources," and find that "under appropriate circumstances, development agreements could strengthen the public planning process, encourage private and public participation in the comprehensive planning process, reduce the economic cost of development, [and] allow for the orderly planning of public facilities and services and the allocation of cost."⁵¹ The critical element of these statutes relating to this Article is that they allow the public-private development agreement to mandate that the laws and regulations in effect at the time of execution of the agreement shall govern the development of the land for the duration of the agreement. The statutes provide for exceptions when enforcement of existing or new laws is necessary to ensure public health, safety or welfare. The overriding theory of such statutes is that since local governments retain some control over development agreements, the general view is that they do not impermissibly bargain or contract away their police power, but rather constitute a valid exercise of that power.⁵²

Conclusion

The difficulty in attracting credible private redevelopers, and implementing successful, high-risk, high-reward, public-private redevelopment projects, is daunting. There is no dearth of false starts, or projects, especially in this economic climate, that have either failed or are unable to sustain the necessary costs and financing. Local vested rights legislation is a viable tool to bring a higher level of certainty and assurance to these critical initiatives. It is not a cure-all, or without important policy questions and implications. It requires that the parties come to the table in a spirit of constructive partnership, with a pro-active mindset to explore the viability of such legislation. The risks are real, but the opportunity manifest.

NOTES

1. Michael D. Zarin is a Senior Partner of the law firm of Zarin & Steinmetz in White Plains, New York. He represents developers and municipalities in the areas of land use and environmental law, including public-private redevelopment and urban renewal, general land use litigation, multi-party environmental litigation, site remediation, and all aspects of environmental due diligence, counseling and general administrative law. He is currently a member of the Executive Committee of the New York State Bar Association's Environmental Section, and Co-Chair of the Land Use Committee. He has taught courses

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2. See N.Y. Gen. City Law § 83-a; N.Y. Town Law § 265-a; N.Y. Village Law § 7-709.
3. See *Ellington Const. Corp. v. Zoning Bd. of Appeals of Incorporated Village of New Hempstead*, 77 N.Y.2d 114, 564 N.Y.S.2d 1001, 1005, 566 N.E.2d 128 (1990).
4. *Town of Orangetown v. Magee*, 88 N.Y.2d 41, 643 N.Y.S.2d 21, 24-25, 665 N.E.2d 1061 (1996) (emphasis added).
5. *Ellington*, supra n.3, 546 N.Y.S.2d at 1005.
6. *Showers v. Town of Poestenkill Zoning Bd. of Appeals*, 176 A.D.2d 1157, 575 N.Y.S.2d 600, 602 (3d Dep't 1991).
7. *Town of Orangetown*, supra n.4, 643 N.Y.S.2d at 25.
8. See, e.g., *Schoonmaker Homes--John Steinberg, Inc. v. Village of Maybrook*, 178 A.D.2d 722, 576 N.Y.S.2d 954, 956 (3d Dep't 1991), citing *Telimar Homes, Inc. v. Miller*, 14 A.D.2d 586, 218 N.Y.S.2d 175 (2d Dep't 1961).
9. *Schoonmaker Homes*, supra n.8, 576 N.Y.S.2d at 956-57.
10. *Putnam Armonk, Inc. v. Town of Southeast*, 52 A.D.2d 10, 382 N.Y.S.2d 538, 542 (2d Dep't 1976).
11. *Putnam Armonk*, supra n.10, 382 N.Y.S.2d at 542; see also *Pete Drown, Inc. v. Town Bd. of Town of Ellenburg*, 229 A.D.2d 877, 646 N.Y.S.2d 205, 205 (3d Dep't 1996) (holding that "there has been no construction or other change to the land itself, and no indication that the improvements or expenditures made in reliance on the prior state of the law cannot be recouped in the marketplace or put to equal use despite the law's new requirements"); *Padwee v. Lustenberger*, 226 A.D.2d 897, 641 N.Y.S.2d 159, 161 (3d Dep't 1996) (holding that "petitioner's ability to make use of the improvements he 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").
12. See *Putnam Armonk*, supra n.10, 382 N.Y.S.2d at 542; *Schoonmaker Homes*, supra n.8, 576 N.Y.S.2d at 727.
13. *Quigley v. City of Oswego*, 71 A.D.2d 795, 419 N.Y.S.2d 27, 29 (4th Dep't 1979).
14. *Collard v. Incorporated Village of Flower Hill*, 52 N.Y.2d 594, 439 N.Y.S.2d 326, 329-30, 421 N.E.2d 818 (1981).
15. *Dillon v. Town of Montour*, 18 Misc. 3d 1109(A), 856 N.Y.S.2d 23, *14 (Sup 2007); see also *Church v. Town of Islip*, 8 N.Y.2d 254, 203 N.Y.S.2d 866, 869 168 N.E.2d 680 (1960) ("All legislation 'by contract' is invalid in the sense that a Legislature cannot bargain away or sell its powers.>").
16. John M. Armentano, "Development Agreements: Vehicle to Protect Developers Benefits Local Governments Too," 9/7/94 N.Y.L.J. 5 (col.2).
17. See A.3353 (2009) (available at: <http://assembly.state.ny.us/leg/?bn=a3353>); S.1988 (2009) (available at: <http://assembly.state.ny.us/leg/?bn=S01988>).
18. See, e.g., A.3353 Memo (available at: <http://assembly.state.ny.us/leg/?bn=a3353>).
19. Association of Towns of the State of New York, *Memorandum in Opposition*, May 8, 2009 (on file with authors).
20. Environmental Advocates of New York, *Opposes*, Memo 44 (on file with authors).
21. New York State Bar Association, Real Property Law Section, *Memorandum in Opposition*, April 24, 2009 (on file with authors).
22. New York State Conference of Mayors and Municipal Officials, *Memorandum in Opposition*, May 21, 2009 (on file with authors); see also Affiliated Brookhaven Civic Organization, Inc., *Letter to Members of the New York State Senate and Assembly*, June 17, 2009 (on file with authors).
23. See, e.g., *DJL Restaurant Corp. v. City of New York*, 96 N.Y.2d 91, 725 N.Y.S.2d 622, 624, 749 N.E.2d 186 (2001) (quoting *Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 548 N.Y.S.2d 144, 547 N.E.2d 346 (1989)).
24. *FGL & L Property Corp. v. City of Rye*, 66 N.Y.2d 111, 495 N.Y.S.2d 321, 324, 485 N.E.2d 986 (1985).
25. *FGL & L Property Corp. v. City of Rye*, 66 N.Y.2d 111, 495 N.Y.S.2d 321, 324, 485 N.E.2d 986 (1985).
26. See N.Y. Gen. City Law §§20(24), 20(25), 83; N.Y. Town Law §§261 et seq.; N.Y. Village Law §§7-700 et seq.
27. N.Y. Mun. Home Rule Law §§10(1)(i), (ii); see also N.Y. Const. Art. IX, § 2(c).
28. N.Y. Mun. Home Rule Law § 10(1)(ii)(a)(14) (emphasis added).
29. N.Y. Stat. Local Gov't Law § 10(6). Other enumerated powers under Home Rule grant cities, towns and villages the power to enact local laws for the "protection and enhancement of its physical and visual environment," and for the "government, protection, order, conduct, safety, health and well-being of persons or property therein." N.Y. Mun. Home Rule Law §§10(11), (12).
30. N.Y. Mun. Home Rule Law § 51; N.Y. Stat. Local Gov't Law § 20(5).

31. Even if such a vested rights amendment were deemed inconsistent with State law, Home Rule further authorizes towns and villages to supersede State law in relation to various matters, which include planning and zoning regulations. N.Y. Mun. Home Rule Law §§10(1)(ii)(d)(3), 10(1)(ii)(e)(3); see Kamhi, *supra* n.23, 548 N.Y.S.2d at 147-49.

In addition, a local vested rights zoning amendment arguably could be preempted if the proposed State legislation regarding vested rights were enacted. In order for the State legislation to preempt, it would have to expressly state its intent to preempt local vesting legislation, or a court would have to find such intent to be implied in the legislation itself. See, e.g., *Cohen v. Board of Appeals of Village of Saddle Rock*, 100 N.Y.2d 395, 764 N.Y.S.2d 64, 67, 795 N.E.2d 619 (2003) (holding that the State preempted the field of area variance review when it enacted Village Law § 7-712-b(3)).

32. E.g., *Torsoe Bros. Const. Corp. v. Architecture and Community Appearance Bd. of Review for Town of Orangetown*, 120 A.D.2d 738, 502 N.Y.S.2d 787, 788 (2d Dep't 1986).
33. Gen. Mun. Law §§503-a(4)(e), 503-a(5).
34. See Gen. Mun. Law § 520.
35. See *Village Green Realty Corp. v. Glen Cove Community Development Agency*, 95 A.D.2d 259, 466 N.Y.S.2d 26, 28 (2d Dep't 1983) (holding that General Municipal Law § 503, authorizing the conveyance of a municipality's land in furtherance of an urban renewal program, supersedes General City Law § 20(2), relating to inalienability of waterfront land).
36. See generally Terry D. Morgan, "Vested Rights Legislation," 34 *Urb. Law.* 131 (Winter 2002) (discussing and comparing the various vested rights statutes, which, according to the article, have been adopted in at least seven states: California, Colorado, North Carolina, Pennsylvania, Texas, Virginia and Washington).
37. Col. Rev. Stat. §§24-68-101 to 24-68-106.
38. Col. Rev. Stat. § 24-68-101.
39. Col. Rev. Stat. §§24-68-102, 24-68-102.5.
40. Col. Rev. Stat. § 24-68-102.5.
41. Col. Rev. Stat. § 24-68-102.5.
42. Col. Rev. Stat. § 24-68-103(1)(c).
43. Col. Rev. Stat. § 24-68-104.
44. Col. Rev. Stat. § 24-68-105.
45. N.C. Gen. Stat. § 160A-385.1 (cities and towns); see also N.C. Gen. Stat. § 153A-344.1 (counties).
46. N.C. Gen. Stat. § 160A-385.1.
47. N.C. Gen. Stat. § 160A-385.1.
48. See Morgan, *supra* n.36, at 151.
49. See generally Armentano, *supra* n.16.
50. Haw. Rev. Stat. § 46-121; Cal. Gov't Code § 65865; Fla. Stat. §163.3220.
51. Haw. Rev. Stat. § 46-121.
52. See generally David L. Callies et al., "Bargaining for Development: A Handbook on Development Agreements, Annexation Agreements, Land Development Conditions, Vested Rights, and the Provision of Public Facilities," Environmental Law Institute (2003).

FROM THE FEDERAL COURTS

Southern District of New York Finds Town Violated Telecommunications Act by Failing to Allow Provider to Fill Gap in Service

In 2002, Nextel (an Omnipoint/T-Mobile competitor) commenced litigation against the Town of LaGrange after the Town had denied Nextel's application to replace an existing radio tower with a new tower. The Nextel/Town lawsuit was settled in 2004, with the Town agreeing to allow Nextel to construct a new 150-foot monopole tower to replace the radio tower. In 2003, T-Mobile had attended a pre-application meeting with the Town to discuss three potential options for curing a gap in its coverage by the installation of new wireless facilities: (1) co-location on the ATC tower (which was then the subject of the ongoing litigation between Nextel and the Town); (2) construction of a new monopole tower at a different site; and (3) co-location on a Con Ed transmission tower. T-Mobile's engineers analyzed each potential option using sophisticated propagation tools, and determined that the ATC tower furnished the most complete remedy for the service gap. Nevertheless, and principally due to the ongoing litigation between Nextel and the Town, T-Mobile submitted an application to construct a new tower, which met with significant resistance.

After the Nextel/Town settlement, T-Mobile shifted its focus to the ATC tower, based on the Town zoning code's expressed preference for co-location over new tower construction (the zoning code contained a hierarchical structure which compelled co-location whenever possible). Notably, the code also contained a provision which prohibited all communications facilities within 500 feet of any occupied residential dwelling "unless expressly permitted, in writing, by all the inhabitants of the dwelling within a radius of 500 feet of the proposed

communication facility." As the court observed, this provision required an applicant to obtain "even the signatures of children (some of whom may not be able to write), or else to receive a variance [from the signature requirement] from the ZBA." On April 3, 2006, the Town building inspector informed T-Mobile that inasmuch as it had no chance of obtaining all the signatures required to authorize its co-location on the ATC tower, it had to obtain a variance from the signature requirement. T-Mobile applied for the variance under protest. After a series of public hearings in which the public comment centered on the failed (from the Town's perspective) Nextel litigation, and the alleged health impacts of radio frequency emissions (a prohibited concern under the Telecommunications Act), the Town denied the variance request. In other words, T-Mobile was precluded from co-locating on the ATC tower, and was relegated to its new tower proposal. The instant litigation ensued.

The court ruled that the Town acted appropriately in requiring T-Mobile to apply for a variance to authorize its proposed co-location of wireless facilities on the ATC tower, but further held that the Town's decision to deny the variance was not supported by substantial evidence in the administrative record when measured under the Telecommunications Act of 1996 (TCA) or Article 78 of the New York Civil Practice Rules. The Town failed to give written reasons for its denial as required by § 332(c)(7)(B)(iii) of the TCA, and the court found that every statutory factor required to be considered in the decision whether to grant a variance pointed in the direction of granting the request. The Court further noted that "public officials are supposed to carry out the mandate of the TCA and state law in face of community opposition," and that the unsubstantiated general community opposition present in this case could not form the basis of evidence to support denial of the variance. The court went on to say that the Town's decision would have the effect of prohibiting T-Mobile's provision of wireless service and causing unreasonable discrimination, both in violation of the TCA. *Omnipoint Communications, Inc. v. Town of LaGrange*, 2009 WL 2878010 (S.D. N.Y. 2009).

FROM THE STATE COURTS

Second Department Holds that Zoning Board Has Jurisdiction to Review Determination of Building Inspector

After receiving a building permit, the petitioners began construction of a house on their property, and subsequently they received a certificate of occupancy from the Town building official. Two years later, the petitioners were issued an appearance ticket alleging that the house violated two provisions of the Town Code: it exceeded the allowable gross floor area, and it did not comply with a sky exposure plane requirement. The petitioners were directed to appear in district court, but they applied to the zoning board for a determination that their current building permit and certificate of occupancy were valid as a matter of right under both the doctrine of equitable estoppel (they had been given a permit and a certificate of occupancy) and under a proper interpretation of the Town Code. In the alternative, the petitioners requested area variances necessary to maintain the house. The zoning board dismissed the application, stating that its jurisdiction was appellate only and that the applicants were not seeking review of the building inspector's determination. With respect to the petitioners' request in the alternative, the board ruled that their request for variances could not be considered until they filed an application to maintain the house and paid the requisite fees; if the application were denied, they could then appeal to the board. The petitioners then commenced a CPLR Article 78 action to review the zoning board's determination.

The Appellate Division held that the zoning board did have jurisdiction to review the building inspector's determination that the house was in violation of the Town Code, as articulated through the appearance ticket. Further, the zoning board had authority to grant area variances resulting from an appeal of the building inspector's determination, and the petitioners were not required to file a new application and pay fees in order to obtain such variances. *Anayati v. Board of Zoning Appeals of Town of North Hempstead*, 65 A.D.3d 681, 2009 WL 2619256 (2d Dep't 2009).

Second Department Rules that Board's Denial of Request to Restore Residence and Garage Was Arbitrary and Capricious

An appeals court held that the denial by a zoning board of appeals of a petitioner's application to restore more than 50% of the floor area of a residence and semi-detached garage was arbitrary and capricious. The Court noted that the residence and garage had been lawfully connected since 1992 by an enclosed breezeway, and that the garage's non-compliance with applicable side-yard restrictions predated the zoning ordinance. The Court held that the noncompliance did not have an undesirable or detrimental effect on the neighborhood, noting that the surrounding neighbors supported the application to restore the structures. Further, the Court noted that the proposed restoration would take place within the existing footprint of both structures. *Dolphin v. Zoning Bd. of Appeals of Town of Shelter Island*, 64 A.D.3d 777, 882 N.Y.S.2d 716 (2d Dep't 2009).

Third Department Holds Farm Worker Dwellings Are Within the Definition of "Agricultural Use Structures" and Therefore Exempt from Adirondack Park Agency Jurisdiction

The owner-operators of an organic farm, located within the Adirondack Park and an agricultural district therein, obtained a building permit from the town of Essex to construct three single-family dwellings on the farm to provide housing for farm workers. A long and protracted disagreement between the owner-operators and the Adirondack Park Agency (APA) ensued, resulting in, inter alia, the issuance of a cease and desist order by the APA prohibiting the owners from completing the construction, as well as the imposition of a \$50,000 civil penalty for constructing the farm housing without a permit from the Agency.

The Appellate Division noted that the statute creating the APA creates a comprehensive land use plan that classifies all land within the Adirondack Park into six categories, and sets forth the primary and secondary compatible uses for each category. The farm in question was located in a "resource management" area where agricultural use structures are primary compatible uses, and were

exempt from APA jurisdiction and permit requirements so long as they were located a required distance from neighboring shorelines. Where (as in the instant case) there is no approved land use program, the construction of single-family dwellings in a resource management area generally requires a permit from the APA. However, "agricultural use structures" that otherwise comply with regulatory requirements are exempt from the permit requirements. At issue was whether the dwellings constructed on the farm as farm worker housing were exempt as agricultural use structures.

The Court looked to the plain meaning of the statute, examining the definition section, which defines a "single family dwelling" as "any detached building containing one dwelling unit, not including a mobile home." Executive Law § 802[58]. The statute defines an "agricultural use structure" as "any barn, stable, shed, silo, garage, fruit and vegetable stand, or other building or structure directly and customarily associated with agricultural use." Executive Law § 802[8]. The Court noted that the implementing regulations for the applicable River Systems Act used the same definition for "agricultural use structure."

The Appellate Division agreed with the court below that no deference was owed to the APA's interpretation of the APA Act or the River Systems Act, since pure legal interpretation of clear and unambiguous statutory terms required no reliance on any special expertise on the APA's part. The Court also agreed with the court below that the disputed housing units on the property were "agricultural use structures" within the meaning of the APA Act. The Court explained that since a "single family dwelling" is included within the statutory definition of "structure," and since an "agricultural use structure" includes any building primarily associated with agricultural use, it was rational to conclude that a single-family dwelling that is directly and customarily associated with agricultural use fits the statutory definition of "agricultural use structure" and is therefore exempt from regulation by the APA. The Court noted further that the Agriculture and Markets Law provides that farm worker residences contribute to agricultural operations, and that the state's highest court had, in another case, determined that farm worker housing was part of farming operations exempt from local zoning. Even though the farm worker residences here were single-family dwellings, the Court said

that they were also agricultural structures exempt from APA jurisdiction. *Lewis Family Farm, Inc. v. New York State Adirondack Park Agency*, 64 A.D.3d 1009, 882 N.Y.S.2d 762 (3d Dep't 2009).

Opinions of the Committee on Open Government Names of Applicants for Master Plan Comprehensive Committee Must Be Disclosed

A Freedom of Information Law request was submitted to a town board, seeking the names of all applicants requesting appointment to the Master Plan Comprehensive Committee. The town denied the request, asserting that it was an unwarranted invasion of personal privacy. The New York Committee on Open Government opined that there is a

distinction, in the effects of disclosure, between situations in which persons apply for employment and those in which they volunteer to serve in uncompensated positions. Disclosure of an application for employment would constitute an unwarranted invasion of privacy, inasmuch as the applicant's present employer might not be aware that the applicant is seeking other employment, and learning of the application could lead to retribution. Such retribution, however, is unlikely when a person volunteers to be appointed to an unpaid position on a committee. Therefore, although certain personal information regarding applicants for voluntary committees may be withheld, the names of such persons must be disclosed. *NYS Committee on Open Government, FOIL - AO - 17478 (1/2/2009)*.