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NORTH CAROLINA LAW ON VESTED RIGHTS: WHICH ORDINANCE APPLIES?

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When a municipality, city, town, or county government adopts or changes an ordinance, questions arise as to how those changes may apply to specific properties. A common issue arises for properties recently approved for a rezoning or use permit, but that have not been developed or permitted. These circumstances create a gray area for property owners in assessing what rights they may or may not have and what use restrictions apply to their property. This is the situation where vested rights may come into play.

North Carolina has long recognized common law vested rights. A vested right permits a property owner to continue use of or complete construction/development on a property, even when the ordinance has been changed. Typically, municipalities will want to effectuate ordinance changes and to prevent uncertainty or inconsistency, those ordinance changes will take effect and, in theory, apply to all properties within the relevant jurisdiction. However, the state of North Carolina has recognized that equity and fairness dictate that some property owners, who relied upon the past ordinance (or lack of any ordinance) as to the development of the property, should be subject to the prior ordinance(or lack of any ordinance) based upon their reasonable reliance. Ultimately, it comes down to fairness and equity and weighing those against the purpose of the newly passed ordinances.

The question arises how exactly does one determine whether or not one has a valid claim to vested rights in light of any new ordinances? One establishes common law vested rights where: (1) substantial expenditures were made; (2) the expenditures were made in good faith; (3) the expenditures were made in reliance on valid government approval, if so required; and (4) the owner would be harmed without vested rights. Browning-Ferris Indus. Of S. Atl., Inc. v. Guilford County Bd. of Adjustment, 126 N.C. App. 168, 171-72, 484 S.E.2d 411, 414 (1997). This analysis explores each of the four factors in turn to assess how a property owner can determine if vested rights may apply.

1. Substantial Expenditure

Substantial expenditure requires that the owner demonstrate undue losses if required to comply with new requirements. To satisfy this factor, the owner must make substantial expenditures –of time, effort, labor, and/or money—in reliance of governmental approval (or the absence of any required governmental approval).

2. Good Faith

The preeminent case in North Carolina on the good faith requirement is Stowe v. Burke, 255 N.C. 527, 122 S.E.2d 374 (1961). In Stowe, the court ruled that a developer who made expenditures at an extraordinary pace to beat proposed rezoning had not acted in good faith and could not establish a vested right. Id. Simply, the property owner must seek governmental approval in the normal course of business and have made expenditures in a reasonable manner consistent with normal development. Factors to consider include whether the owner misled local officials or neighbors, rushed any applications or permitting in an attempt to circumvent a pending rule change, or departed from normal practice in order to demonstrate substantial expenditure. In sum, good faith hinges upon whether the developer has been forthright and transparent with the municipality.

3. Reliance on Valid Governmental Approval (If Required)

The third factor assesses whether the expenditures were incurred in reliance on actual, legitimate approvals for the project, including, but not limited to, building permits and special/conditional use permits. A showing of reliance is unnecessary where no such approval was required. In In re Campsites Unlimited, 287 N.C. 493, 215 S.E.2d 73 (1975), the campground developer held vested rights where substantial expenditures occurred prior to the county's adoption of zoning and permitting in the area. Therefore, one can meet this prong either by having legitimate governmental approval, or, alternatively, there being no such requirement for approval of any kind under a prior ordinance, or there was no existing regulatory regime.

4. Harm Absent Valid Governmental Approval

The fourth prong takes a broader view of the totality of harm a property owner may suffer if they are forced to comply with the recently passed ordinance. Factors considered in determining this prong are lost fees, lost deposits, future economic harm, lost profits, and others.

Summary

Common law vested rights operate to balance the legitimate interests of the landowner and the public interest. Any assessment must weigh the landowner's right to rely on a specific representation by the government with the public interest in having land use regulations uniformly applied. It can be a crucial tool for a property owner who relies upon a city or county ordinance, receives valid governmental approval or permitting, spends money to advance a project, and then is faced with the creation of or change in an ordinance that restricts, limits, or prohibits their planned development.

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