

SUBDIVISION PERMIT DOES NOT VEST RIGHTS UNDER ZONING

The Vermont Supreme Court recently issued a rather complex decision defining vested rights under subdivision and zoning law. *In Re Appeal of Taft Corners Assoc.*, Vt. No. 99-431 (Aug. 11, 2000). The Court's holding is that a *subdivision* permit does not create a vested right to develop the lots under the provisions of the *zoning* bylaws in effect at the time the permit was issued.

This case started in 1987 when Taft Corners Associates (TCA) received a subdivision permit for 223 acres of land it owned in Williston. The permit was issued based on an application for "mixed uses, retail and light industrial that would complement each other." The land was located in districts that allowed mixed uses.

In 1990 the Williston Town Plan was modified as a result of citizen opposition to TCA's development plans. The Town was considering zoning amendments that would restrict retail use in the TCA subdivision. In July 1990, TCA and the Town entered into a five-year compromise agreement. The agreement recognized TCA's position that it desired to have vested rights dating from the time of subdivision approval and the Town's desire to have the lots developed for those uses contemplated under the new plan and proposed new bylaws.

In 1997, after the agreement had expired, the Town adopted interim zoning bylaws making retail uses conditional, with retail use being allowed only by vote of the selectboard, using the conditional-use criteria in the new bylaws. Taft Corners Associates took the position that it was not bound by interim zoning because it had vested rights. However, it applied for zoning permits for two new buildings. The selectboard denied conditional-use permits because the new buildings "would only exacerbate the very problem sought to be addressed [by the interim bylaws]" and were inconsistent with the ability of the Town to provide necessary fire and police services.

Taft Corners Associates appealed the selectboard's decision to the Environmental Court which held that:

- TCA did not have vested rights;
- TCA was subject to the conditional-use regulations; and
- TCA had no right to consideration of the proposed buildings as permitted uses.

The Supreme Court heard this interlocutory appeal on the sole issue of "whether TCA has a vested right to develop its subdivision under the zoning ordinance as it existed in 1987, when the subdivision permit was issued."

The Court started with an analysis of the pertinent statutes, pointing out that although there is some overlap between subdivision and zoning bylaws, "where a landowner is both dividing a parcel into smaller ones and developing those smaller parcels, he or she will need both a subdivision permit and a zoning permit. The subdivision permit will allow the owner to divide the land and create infrastructure. The zoning permit will allow the landowner to develop the parcels by placing one or more structures on them." *Id.* at 3

Based on that fundamental law, the Court then addressed vested rights. The leading case in this filed is *Smith v. Winhall P.C.*, 140 Vt. 178 (1981). In that case, a developer applied for a subdivision permit to create nine lots of more than one acre but less than five acres each. The planning commission denied that permit because of an *anticipated* change in the subdivision regulations that would increase the minimum lot size to five acres. The Court overturned the planning commission's decision, saying that the applicant had vested rights according to the regulations which existed at time of the application.

The present case differs from *Winhall*, the Court said, because in this case the application for the zoning permit was filed after the zoning bylaws had actually been changed. The fact that the subdivision permit had been issued years before was not pertinent to the zoning bylaws or application for a zoning permit.

Taft Corners Associates argued that rights should have vested when the subdivision permit was issued because the planning commission had "necessarily addressed compliance of the subdivision with the zoning ordinance...." The Court called that "at best, an exaggeration" and said that it "is not an accurate statement of Vermont's land use regulatory process."

The Court did point out that in a case where the legality of dividing land necessarily depended on a provision in the zoning regulations, the possessor of such a subdivision permit would have the right to have their zoning permit considered under the zoning bylaw as it existed at the time of the subdivision permit. However, that is not the situation in this case.

Taft Corners Associates cited *In Re Molgano*, 163 Vt., 25 (1994) to support its argument that when an applicant is vested under one set of criteria (town plan), such vesting must carry over to other applications (Act 250). The Court pointed out that *Molgano* differed because in it the question was whether the Act 250 permit would conform to the town plan, so it was necessary to apply the town plan that was in effect when the town issued its permit.

A more pertinent case, the Court said, was *In Re Ross*, 151 Vt. 54 (1989). In *Ross*, it was held that no rights vested at the time of the original application because “the landowner submitted a general and sketchy Act 250 application solely to protect itself against an [anticipated] amendment to the town plan.” *Id.* at 6. This is analogous to TCA’s subdivision review which was “based only on a general statement that it wanted to have mixed retail and light industrial uses.” Such “inadequate specificity” is not sufficient to create vesting.

Next, TCA argued that it should have vested rights because of the millions of dollars it had invested in the project in reliance on the subdivision permit. The Court pointed out that it had rejected that argument when, in *Winhall*, it adopted the “minority rule” which vests rights “as of the time when proper application is filed.” *Id.* at 6.

Finally, the Court said that its principles of vesting must be based on the competing interests of the landowner and the municipality and its citizens. “[T]he balance of competing policy interests would be against giving holders of subdivision permits vested rights to zoning permits under the zoning ordinance applicable when the subdivision permit was sought or obtained.” *Id.* at 7.

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