2012 New England Regional Land Use Seminar
June 21- 22, 2012

Development Conditions

Work Session 9:
Troubled Developments
Vested Rights and Pending Approvals and Distressed Properties

By Attorney Daniel D. Crean, Crean Law Office, Pembroke, NH

Crean Law Office
Pembroke, NH
creanlaw@comcast.net
www.creanlaw.com

N. H. Municipal Lawyers Association
Executive Director/General Counsel
nhmlaadmin@comcast.net
www.nhmla.org

Vested Rights and Pending Approvals and Distressed Properties

Prepared by Attorney Daniel D. Crean, Crean Law Office, Pembroke, NH,

[Note: This paper was originally prepared in conjunction with a Crean Law Office/NHMLA CLE Seminar on Distressed Properties presented on June 2, 2010. It is used here with permission of the author.

I. Overview. In some respects, the first decade of the 21st century has been an "instant replay" of development pressures and economic conditions experienced nationally and in New Hampshire during the "boom and bust" years of several decades ago. Though some signs indicate a resumption of better economic conditions is in the offing for the second half of 2010 and beyond, the numbers of foreclosures, forced sales, and stalled developments remain at high levels. This segment of the Distressed Properties seminar seeks to provide guidance in handling land use regulation as applied to properties when economic and related conditions result in delays or other impediments to implementing development approvals.

At the outset, as a matter of basic law, New Hampshire court decisions have given limited, if any, protection to development approvals that have not been implemented. Merely obtaining some level of government permission to proceed with a development was not deemed to have created vested rights.1[1] As applied in the current context of distressed properties, the intersection of vested property rights and land use control and regulation may arise when development of property that has been approved in some manner does not occur as planned when the approvals were obtained. Development approvals often involve subdivision or site plan approval, but may also have been issued in the form of variances, special exceptions or conditional permits. Often these approvals are subject to conditions precedent or subsequent. In an economic climate such as that which has existed over the last few years, action to implement these approvals may have stalled, properties may have been abandoned, or proposals may no longer be feasible.

The primary question, then, is what rights to proceed with development exist for developers/property owners? Conversely, local governments may ask what powers they may exercise to review and/or reconsider approvals with an eye toward preventing development or at least applying perhaps upgraded development regulations to these projects.

As was the case twenty or so years ago, local land use planning and regulatory boards and authorities face issues regarding approved and pending development applications. The 21st century rendition of the interplay between economically distressed properties and vested rights and pending approvals led the New Hampshire Legislature to enact the following amendment to the statute governing vesting of development approvals:

> RSA 674:39, V. Notwithstanding the time limits established in paragraph I, every subdivision plat and site plan approved by the planning board on or after January 1, 2007 and prior to July 1, 2009 shall be allowed 36 months after the date of approval to achieve active and substantial development or building as described in subparagraph I(a) and every subdivision plat and site plan approved by the planning board on or after July 1, 2005 and prior to July 1, 2009 shall be allowed 6 years after the date of approval to achieve substantial completion of the improvements as described in paragraph II.

[1] See generally 15 N.H. Practice, Loughlin, Land Use Planning & Zoning, § 11.01.

It does not appear that the current Legislative session has amended this statute. Since July 1, 2009, has now come and gone, it is time to take another look at local government authority. For this seminar, the look will occur from the perspectives of constitutional and statutory vesting, local ordinances and regulations, and newly enacted statutory requirements regarding requirements to obtain other approvals.

II. Common Law & Constitutional Vesting and More. Common law vesting in New Hampshire arises out of the bar against taking property without just compensation. Mere intent or plans to develop property do not arise to protected rights, which are found to exist when a person (1) in good faith reliance, (2) on the absence of governing regulation, (3) incurs substantial liabilities (also described as irrevocable change of position).[2]

In general terms, therefore, neither the possession of a building permit or subdivision or site plan approval (or other development approval or permit) creates a vested right to proceed. When development rights exist solely "on paper," property remains subject to local land use controls and changes that subsequently may be enacted.[3]

The potentially harsh effects of the common law rule has led to legislative enactments as discussed in part III of this paper. As not all circumstances are covered by these statutes, and statutes are subject to interpretation, the common law vesting rules retain their validity in analyzing the manner in which distressed properties are to be treated.

Given the limited focus of this seminar, attention is now directed at how the general law of constitutional and common law vesting applies to distressed properties.[4] As to the good faith criterion, one factor may be the knowledge of the owner at the time of acting. Though this particular issue does not appear to have been specifically addressed in reported litigation, cases suggest that good faith may be challenged where an owner expends funds solely to try to demonstrate a change of position rather than to actually begin development.

Consider the following scenario:

> Developer knows that financing will not be available to implement development in accordance with approvals in a timely fashion (see statutory vesting discussion). Even knowing this, developer begins site work.

Aside from the question of the extent of the work completed, would action so taken meet the good faith component of vesting?

With respect to the absence-of-regulation factor, absent additional action by the owner, can intervening factors "beyond the control of the owner" (e.g., market conditions, inability to obtain financing) be seen as allowing the government to "change the rules" when it could not have done so absent these factors? Again, no clear judicial precedent exists, but one may question whether a court might find such an opportunity to stop development as violating the fundamental precept of "fairness" underlying cases such

[2] E.g., *Chasse v. Candia*, 132 N.H. 574 (1989); Loughlin, *supra,* at § 11.02.
[3] Loughlin, *supra*, Ch. 11 in general
[4] No single definition applies to these properties. In the context of this segment of the seminar, the term is meant to describe properties for which development approvals are not implemented due, primarily, to economic conditions. These may be market-related (e.g., lack of available financing for development, falling real estate values, lack of available buyers). They also may be related to the personal circumstances of the owner/developer (e.g., foreclosure or bankruptcy). In some cases, the property may be highly leveraged with financing or even may be in foreclosure or owned by a lending institution in whole or in part.

as *Henry and Murphy, Inc. v. Allenstown*, 120 N.H. 910 (1980) and *Piper v. Meredith*, 110 N.H. 291 (1970).

The third criterion similarly may become somewhat more elusive in the context of distressed properties. Reliance on expenditures for land acquisition, planning, and even engineering probably remains ill-placed as supporting vesting under common law rules. That result may be more likely where the expenditures are not tied to specific developments but may be "recycled" for use in a reconfigured or altered development. As there is not a true hard line demarcation, though, it is possible that a somewhat more fluid standard will be applied, particularly if the expenditures are closely tied to the approved project and cannot be applied to some other form of development and where the inability to proceed is more tied to outside factors than the developer's own actions.[5]

If ownership changes hands in this time frame, cases like *Morgenstern v. Rye*, 147 N.H. 558 (2002) caution against trying to analyze the matter by fragmenting ownership interests, suggesting instead a view that looks at overall impact. (See also comments above regarding expenditures.)

In conclusion, at this point, several matters are clear while others may require some greater degree of analysis when applying common law vesting to distressed properties. First, common law and statutory vesting are not identical. A review of cases suggests that common law vesting, notwithstanding some case law suggesting a limited view, may allow a somewhat more expansive view of property owner rights, at least where factors limiting the ability to proceed with development are not self-inflicted and truly arise out of matters beyond the reasonable control of the owner. This is not to suggest that the traditional common law tests no longer apply. Instead, aspects of the test may be given variable weight and a review of the facts with an eye toward a reasonable and fair result is in order. In turn, this suggests that courts may look also at the municipal motivation that lies at the heart of an attempt to limit or rescind development approvals.

III. Statutory Vesting and More. The primary vesting statutes are RSA 676:12 (Building Permits) and RSA 674:39 (planning board approvals). Another statute creating vested status is that which provides protected status for pre-existing, non-conforming uses, RSA 674:19. Full review of the law of non-conforming uses, even as they may apply to distressed properties, is beyond the scope of this seminar. One aspect of non-conforming use law is particularly relevant here and that is the generally held notion that intent to abandon such a use must exist in order to extinguish the right.[6] An interruption or cessation of use involving a distressed property may give rise to consideration of whether the use loses its protected status under common law or RSA 674:19. To some extent, it appears that the matter may be resolved, at least in some cases, by language in the zoning ordinance. Overlooked in some respects is language from non-conforming use cases stating that municipal treatment of non-conformities within the ordinance may apply even beyond the notion that cessation for a period of time may be used as an indicator of intent to abandon.

More to the point, though, the N.H. Supreme Court has now determined that a statement of time of nonuse of a non-conforming use may, in and of itself, be sufficient to terminate the use, *McKenzie v. Town of Eaton Zoning Board of Adjustment*, 154 N.H. 773 (2007). It remains to be seen if this rule will be extended to instances in which a period of non-use that would trigger such a zoning ordinance provision arises in the context of a distressed property.

---

[5] See *AWL Power, Inc. v. Rochester*, 148 N.H. 603 (2002) and *R.J. Moreau Companies. Inc. v. Litchfield*, 148 N.H. 773 (2002) contrasting common law and statutory vesting and noting manner in which expenditures and actions may be viewed.

[6] See, e.g. *Lawlor v. Salem*, 116 N.H. 61 (1976) and discussion at Loughlin, *supra*, Ch. 8.

The convoluted history of RSA 676:12 is beyond the purview of this seminar, but an understanding of its evolution is background information that may be helpful in applying it to current conditions.[7]

As currently written, RSA 676:12 is the operative section of the statue creating limited vesting as follows:

> VI. The provisions of paragraph I shall not apply to any plat or application which has been the subject of notice by the planning board pursuant to RSA 676:4, I (d) prior to the first legal notice of a proposed change in a building code or zoning ordinance or any amendment thereto. No proposed subdivision or site plan review or zoning ordinance or amendment thereto shall affect a plat or application which has been the subject of notice by the planning board pursuant to RSA 676:4, I (d) so long as said plat or application was the subject of notice prior to the first legal notice of said change or amendment. The provisions of this paragraph shall also apply to proposals submitted to a planning board for design review pursuant to RSA 676:4, II(b), provided that a formal application is filed with the planning board within 12 months of the end of the design review process.

Clearly this statute extends common law vesting far beyond the traditional 3-part test, and eliminates the "shovel" test (need for commencement of actual construction on the project). This statute appears to grant vesting rights that exceed even the limited vesting for approved plans under RSA 674:39 discussed *infra.* Presumably, the intent of RSA 676:12, VI is to "freeze" the zoning and regulatory environment within which an application is reviewed. Yet, the wording is not limited to planning board consideration of the application. The wording, though, seems to vest a property with immunity from amendments only with regard to changes in zoning and planning board regulations that are proposed while the application is pending before the planning board.

A significant concern, even if the statute applies with that limited scope, is the absence of any requirements for implementing the approval in a timely fashion unlike its counterpoint for vesting of approved plans (RSA 674:39). Thus, an immediate question that may arise with respect to distressed properties can be stated as asking: Does RSA 676:12, VI extend immunity from regulatory changes even if the active and substantial development does not occur within time frames as required by RSA 674:39? This subject is also discussed in the comments on the latter statute that follow.

Another portion of RSA 676:12 that may come into consideration for distressed properties is paragraph V which states:

> V. No building permit shall be denied on the grounds of uncompleted streets or utilities when the construction of such streets or utilities has been secured to the municipality by a bond or other security approved by the planning board pursuant to RSA 674:36, III or RSA 674:44, IV; provided, however, that on land which is part of a subdivision plat or site plan, no building shall be used or occupied prior to the completion of required streets and utilities, except upon such terms as the planning board may have authorized as part of its decision approving the plat or site plan.

In today's uncertain economy, both the installation of infrastructure and the continuation of surety for performance may be affected. Questions may arise in applying this statute when, for example, a surety is

[7] Originally, RSA 676:12 merely directed that a building permit not be issued if a pending zoning change would bar its issuance if adopted. Over time, paragraphs were added so that its second primary purpose now appears to vest rights in a building permit that is issued prior to the posting of notice of hearing on a zoning change.

temporarily revoked. Would such action negate this protection no matter how short the interval? Would the protection be lost only if the planning board were to rescind approval?

As mentioned above, another primary vesting statute is RSA 674:39. This statute has been in existence in one form or another since the 1970s (originally as RSA 36:24-a). Though still entitled "Four-Year Exemption," the law actually has two primary vesting components: the first creates a four-year period of time during which the property is protected from having to comply with changed zoning, subdivision, or site plan regulations to allow time to implement its development. The second creates a permanent vesting once certain improvements are completed. These summary descriptions, of course, need to be read in light of the statute as a whole in terms of actions required by the owner and the preservation of municipal authority to apply subsequently-enacted regulations and ordinances which expressly protect public health standards, such as water quality and sewage treatment requirements.[8]

The primary issue raised by RSA 674:39 with respect to distressed properties is that of the prerequisite for invoking the 4-year exemption that:

> Active and substantial development or building has begun on the site by the owner or the owner's successor in interest in accordance with the approved subdivision plat within 12 months after the date of approval, or in accordance with the terms of the approval, and, if a bond or other security to cover the costs of roads, drains, or sewers is required in connection with such approval, such bond or other security is posted with the city, town, or county in which there are located unincorporated towns or unorganized places, at the time of commencement of such development; [RSA 674:39, I (a)].

A second issue will involve the extent of action required to invoke the "permanent" vesting aspect of RSA 674:39 as set forth in paragraph II as follows:

> II. Once substantial completion of the improvements as shown on the subdivision plat or site plan has occurred in compliance with the approved subdivision plat or site plan or the terms of said approval or unless otherwise stipulated by the planning board, the rights of the owner or the owner's successor in interest shall vest and no subsequent changes in subdivision regulations, site plan regulations, or zoning ordinances, except impact fees adopted pursuant to RSA 674:21 and 675:2-4, shall operate to affect such improvements.

The matter of determining what level of action is sufficient to meet the statutory thresholds has been the subject of numerous court actions, notably the cases cited at note 5. The uncertainty of the meaning of the statutory language in light of these opinions led the Legislature to amend the statute in several respects, most importantly for present purposes, to read:

> III. The planning board may, as part of its subdivision and site plan regulations or as a condition of subdivision plat or site plan approval, specify the threshold levels of work that shall constitute the following terms, with due regard to the scope and details of a particular project:
>
> (a) "Substantial completion of the improvements as shown on the subdivision plat or site plan," for purposes of fulfilling paragraph II; and

[8] As briefly mentioned above, questions remain as to how this preservation of local authority will be read in light of the contrasting blanket exemption created by RSA 676:12. Perhaps the question will be resolved by application of the standard canon of statutory construction regarding the more specific statute governing. As yet, it does not appear that the issue has been addressed by the Court.

(b) "Active and substantial development or building" for the purposes of fulfilling paragraph I.

Thus, planning boards hold at least some of the keys to determining how vesting will apply under RSA 674:39. That authority is not open-ended, and regulations may not arbitrarily set unduly high standards. Notwithstanding the evident differences from common law vesting tests, the Supreme Court has noted that this statutory vesting is co-extensive with common law vesting. Therefore, in creating such thresholds, municipalities must keep in mind the property rights protections inherent in common law vesting.

With regard to distressed properties, municipalities may wish to consider threshold and timing standards that may apply when the ability to achieve "active and substantial development" or "substantial completion" are affected by economic, market or other conditions associated with distressed properties, particularly when those conditions can be viewed as beyond the reasonable control of the owner/developer.

Though not necessarily a model for inclusion into this local specification, it may be noted that the Legislature did address the issue, in some respects, by its amendment of RSA 674:39 to state:

> V. Notwithstanding the time limits established in paragraph I, every subdivision plat and site plan approved by the planning board on or after January 1, 2007 and prior to July 1, 2009 shall be allowed 36 months after the date of approval to achieve active and substantial development or building as described in subparagraph I(a) and every subdivision plat and site plan approved by the planning board on or after July 1, 2005 and prior to July 1, 2009 shall be allowed 6 years after the date of approval to achieve substantial completion of the improvements as described in paragraph II.

As the July 1, 2009, deadline has passed, the statutory extension no longer applies and the Legislature has not, as of the date of this paper, seen fit to continue it. One might argue that the failure to extend it would not imply that municipalities may not do so. Further, such a blanket extension of the time may be easy to administer but does not consider the source of difficulties in meeting the 12-month deadline. Therefore, utilizing the authority to set thresholds may be a better approach to create some flexibility to reasonably address issues of diligence in implementing approved developments.

IV. Potential Impact of Chapter 39 of the Laws of 2010. Effective July 17, 2010, new provisions will govern procedures for local government approval of applications that involve issuance of permits or approvals from other governmental bodies. The impact of these revisions may be particularly acute when delays or difficulties in obtaining the "other" governmental permits or approvals arise due to the distressed nature of the properties in question.

The new procedures as amended by Chapter 39 are as follows (changes shown in italics):

> 39:1 Board's Procedure on Plats; Completed Application. Amend RSA 676:4, I(b) to read as follows:
>
> (b) The planning board shall specify by regulation what constitutes a completed application sufficient to invoke jurisdiction to obtain approval. A completed application means that sufficient information is included or submitted to allow the board to proceed with consideration and to make an informed decision. A completed application sufficient to invoke jurisdiction of the board shall be submitted to and accepted by the board only at a public meeting of the board, with notice as provided in subparagraph (d). ***An application shall not be considered incomplete solely***

because it is dependent upon the issuance of permits or approvals from other governmental bodies; however, the planning board may condition approval upon the receipt of such permits or approvals in accordance with subparagraph (i). The applicant shall file the application with the board or its agent at least 15 days prior to the meeting at which the application will be accepted. The application shall include the names and addresses of the applicant, all holders of conservation, preservation, or agricultural preservation restrictions as defined in RSA 477:45, and all abutters as indicated in the town records for incorporated towns or county records for unincorporated towns or unorganized places not more than 5 days before the day of filing. Abutters shall also be identified on any plat submitted to the board. The application shall also include the name and business address of every engineer, architect, land surveyor, or soil scientist whose professional seal appears on any plat submitted to the board. Since construction of any structure near streams or rivers downstream of a dam can increase the hazard classification of the dam established by the department of environmental services, the application shall identify the nearest dam upstream and include the name and address of the dam owners.

39:2 Board's Procedure on Plats; Conditional Approval. Amend RSA 676:4, I(i) to read as follows:

(i) A planning board may grant conditional approval of a plat or application, which approval shall become final without further public hearing, upon certification to the board by its designee or based upon evidence submitted by the applicant of satisfactory compliance with the conditions imposed. ***Such conditions may include a statement notifying the applicant that an approval is conditioned upon the receipt of state or federal permits relating to a project, however, a planning board may not refuse to process an application solely for lack of said permits.*** Final approval of a plat or application may occur in the foregoing manner only when the conditions are:

(1) Minor plan changes whether or not imposed by the board as a result of a public hearing, compliance with which is administrative and which does not involve discretionary judgment; or

(2) Conditions which are in themselves administrative and which involve no discretionary judgment on the part of the board; or

(3) Conditions with regard to the applicant's possession of permits and approvals granted by other boards or agencies or approvals granted by other boards or agencies***, including state and federal permits***.

All ~~other~~ conditions ***not specified within this subparagraph as minor, administrative, or relating to issuance of other approvals,*** shall require a hearing, and notice as provided in subparagraph I(d), except that additional notice shall not be required of an adjourned session of a hearing with proper notice if the date, time and place of the adjourned session were made known at the prior hearing.

It is premature to try to fully assess the impact of these changes in general. Discussion on the municipal lawyers' listserv has already addressed the general problems inherent in the statute. Those problems are likely to be even more evident when delays in obtaining approvals or permits involve distressed properties.