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Expired approvals and the right to build — When is enough, enough?

Final site plan approval protects a project from changes to zoning regulations for two years. Thus, a developer that obtains final site plan approval can rest assured that any zone change enacted in that two-year period will not affect its project. But what happens after that two-year period? What if the developer fails to obtain a building permit by the end of that period? What if the developer obtains the building permit but does not commence construction? Is the approval still valid? Is the project protected from a change to zoning requirements?

A developer that has failed to obtain a building permit within the two-year protection period should review a municipality's zoning ordinance to determine if it provides for the expiration of approvals if the developer has not obtained a building permit within a certain time period. Such a developer should be concerned if, for example, a municipality's ordinance states that final site plan approval expires if a developer fails to obtain a building permit within two years of final approval. The New Jersey Supreme Court has upheld a municipality's power to adopt such expiration provisions. *D.L.*



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Real Estate Holdings v. Planning Board.

Outside the two-year protection period, a developer does not vest its rights in a final approval the instant it obtains a building permit. *Burcam Corp. v. Planning Bd.; Krivant v. Cedar Grove; Morris v. Postma; Palantine I v. Planning Bd.; cf. Sun Oil Co. v. Clifton.* To vest its rights, a developer must proceed with construction to a point whereby it can claim that a municipality is estopped from applying new zoning requirements to the project. Under the "vested rights doctrine," courts have stated:

whether a building permit vests rights in a developer as to exempt a particular project from a zoning amendment depends on such factors as the nature, extent, and degree of the public interest to be served by the ordinance amendment and the nature, extent, and degree of the developer's reliance on the state of the ordinance under which he has proceeded, the extent to which his

undertaking has been approved or encouraged by official municipal action and the extent to which, under the circumstances and as objectively determined, he should have been aware that the municipality would be likely to change the ordinance before actual commencement of construction.

Urban Farms, Inc. v. Franklin Lakes.

No bright-line threshold exists to determine when a developer vests its rights. However, a developer can establish a good argument under the vested rights doctrine if the developer has expended a significant amount of money on site improvements along with other associated development costs. *Gruber v. Raritan Township; Tremarco Corp. v. Garzio; Sun Oil Co. v. Clifton; cf. Sandler v. Bd. of Adj.* Any additional funds expended pursuant to the permit and/or final approval, such as construction contracts and professional costs, would bolster this argument. In particular, the execution of a construction contract would give a developer a good argument that any zoning change prohibiting the construction as contracted would unjustly subject the developer to a breach of contract

claim by the construction company.

The developer must perform any work without knowledge of a likely change to the ordinance before actual commencement of construction. *Lake Shore Estates, Inc. v. Denville Township.* Further, a developer must ensure that the work affects the entire site and strictly conforms to the permit's requirements. A developer that fails to do so may lose its rights to the portions of a project that are incomplete as of the permit expiration date. *Palantine I v. Planning Bd.; Lehen v. Atlantic Highlands.*

By following these steps, a developer can vest its rights to construct its project in accordance with final site plan approval and can estop a municipality from applying new zoning regulations to the project, even if the final approval protection period of two years has expired.

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