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## Vested Rights

by Brian W. Ohm, J.D.

The concept of "vested rights" refers to the permission to develop property that cannot be revoked by a governmental act. A right vests at the point in time when a proposed development is protected from changes in zoning, other regulations, or exaction demands by units of government with permit granting authority. The point in time when vesting occurs varies from state to state. Before a right to develop vests, the proposed project is subject to various modifications or outright denial by the units of government with authority over the project.

A recent decision by the Wisconsin Supreme Court, *Lake Bluff Housing Partners v. City of South Milwaukee*, \_\_\_ Wis.2d \_\_\_, 540 N.W.2d 189 (1995), clarifies the point in time at which development rights vest as well as other factors to be used when determining vested rights in Wisconsin. The case is discussed below.

### THE FACTS OF THE CASE

Lake Bluff Housing Partners (Lake Bluff) purchased a parcel of land for \$294,000 along the Lake Michigan shoreline in the City of South Milwaukee. Lake Bluff intended to construct low income multifamily housing. The parcel was zoned "C-2," a classification which allowed the construction of multi-family residential units.

The Wisconsin Housing and Economic Development Authority (WHEDA) awarded Lake Bluff a \$266,903 site-specific tax credit. Lake Bluff paid WHEDA a non-refundable fee of \$16,314 to reserve the credit. Lake Bluff had the property surveyed at a cost of \$1,150 and prepared plans for the project at a cost of

\$29,513. The City advised Lake Bluff that the proposed project required a bluff assessment to establish that the project would not cause bluff erosion. The City also advised Lake Bluff that the City's parking requirements had changed and that Lake Bluff would have to modify the plans to meet the new requirements. Lake Bluff modified the parking plans and commissioned a bluff erosion study for \$4,950.

Next, a neighboring landowner wrote a letter to a City alderperson requesting that Lake Bluff's land be rezoned from C-2 to R-A to allow single-family housing but not multi-family units. The City, by resolution, imposed a moratorium on the issuance of any building permits for Lake Bluff's property while the City considered the rezoning request.

The Wisconsin Department of Industry, Labor and Human Relations issued its conditional approval of Lake Bluff's plans. The approval enabled Lake Bluff to seek a building permit from the City to begin construction. Lake Bluff submitted an application for the permit to the City. The City's building inspector denied the permit because of the moratorium. The City subsequently rezoned the property from C-2 to R-A.

Lake Bluff then sued to compel issuance of the building

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\*In a footnote, the Supreme Court raised the issue of the legality of a moratorium imposed by resolution instead of by ordinance. Since the moratorium was never challenged in this case, the Court did not decide the issue of its validity. Nonetheless, communities imposing moratoria should do so by ordinance and not by resolution. Indeed, elsewhere in the country, the law requires that moratoria be established by ordinance. *See also* Wis. Stat. § 62.23(7)(da).

permit. The City responded by asserting that Lake Bluff's plans failed to comply with the set back requirements of the former C-2 zoning. The project plans also: did not comply with the parking requirements of the Americans with Disabilities Act; lacked proper connection to existing sewer, water and street systems for the collection and conveyance of storm water runoff; and provided insufficient detail to determine if the driveway approaches would conform to City standards. While the case was proceeding, Lake Bluff changed its plans to correct these defects. Neither the original nor the revised plans were in compliance with the new R-A zoning which prohibited multi-family housing.

In the lawsuit, Lake Bluff claimed that it had obtained vested rights in the project due to the various expenditures made prior to the moratorium. The City argued that a builder must submit an application for a building permit which conforms to applicable zoning and building code requirements in order to obtain vested rights. Because Lake Bluff never submitted a conforming application before the change in zoning, it never obtained vested rights. The trial court and the court of appeals agreed with Lake Bluff.

#### THE SUPREME COURT'S DECISION

The Wisconsin Supreme Court, however, agreed with the City and reversed the decision of the court of appeals. In its opinion, the Court held that a developer must at least apply for a building permit in order to obtain vested rights. According to the Court, the application for the building permit must be in strict and complete conformance with all applicable zoning and building code requirements in effect at the time of application. The court also held that the existence of vested rights is not to be determined through the use of equitable principles, such as the fact that builder may have incurred substantial expenses.

#### IMPLICATIONS

The Wisconsin Supreme Court's ruling in *Lake Bluff Partners* reflects the basic notion that a developer has no vested right in zoning until the developer applies for a building permit. The Court's holding that the application for a building permit must be in "strict and complete conformance" with applicable regulations, however, may lead to uncertainty in matters where a project's proponent thinks that the plans are in strict and complete conformance, but the local community interprets its regulations differently. The required level of conformance would not be met in this situation.

Other states use a more definite time of vesting, such as the date the building permit is issued.

The *Lake Bluff Partners* case raises some additional difficult issues. The concept of vested rights is designed to strike a balance between private expectations regarding development and the public's interest in regulating land use. Vested rights are an important component of the various property rights which a person has in land which they own or have some right to develop, especially in light of the current tensions over private property rights.

For the most part, however, vested rights evolved in a much simpler building environment--before, for example, the advent of planned unit developments which may be built in different phases over a period of time. The *Lake Bluff Partners* case shows the modern day complexity of obtaining financing for affordable housing as well as many other types of development. The case also raises the issue of the difficulties of locating affordable housing units and other locally unwanted land uses.

Another method for balancing private expectations and community needs is through a development agreement which guarantees some level of certainty in the rules and regulations applicable to developable land. Only a handful of states expressly authorize local governments to enter into development agreements. Wisconsin is not one of them. Absent such express authority, communities are often reluctant to enter into development agreements because of legal doctrines which prohibit local governments from contracting away their inherent governmental powers such as the police power. Wisconsin communities do enter into numerous agreements in the development context, such as agreements which are part of a planned unit development or planned development district; agreements for the provision of subdivision improvements--streets, sewers, etc.; and agreements for public/private partnerships. Nonetheless, express enabling authority for development agreements within a broader planning context could clarify the authority of Wisconsin communities and developers to specifically address the issue of vested rights and provide an amicable solution to situations such as that found in the *Lake Bluff Partners* case.

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