

Vested Rights

Summary

A vested right is the right to continue a use or complete a project as it was approved, despite subsequent changes to the ordinance. Vested rights are founded on fairness and balancing interests—the public interest in uniform current rules and private interest in protecting good faith investments in property development. The general rule is that new regulations apply equally to all properties. There is no right that generally applicable rules will remain unchanged forever.¹ In some specific situations, however, vested rights protect those property owners who have relied on specific approvals from the local government.

In North Carolina, there are four paths for an owner to establish vested rights and each is discussed below:

- Common law vested right (reasonable time)
- Valid building permit (six months)
- Development agreement (up to twenty years)
- Site-specific development plan or a phased development plan (2-5 years)

Nonconforming structures and uses are a separate, but related topic. Nonconformities are the existing uses and structures that do not comply with new ordinance requirements. Local governments commonly allow nonconformities to remain, but not expand or intensify.

Common Law Vested Rights

North Carolina courts have long recognized vested rights and have set forth a test for establishment of vested rights.² In order to show vested rights, the owner must: (i) obtain a valid governmental approval; (ii) reasonably rely upon the approval; (iii) make a substantial expenditure; (iv) act in good faith; (v) experience detriment to comply.

Valid governmental approval. An owner must obtain an affirmative governmental action concerning the property or project. This could be a conditional use permit, a subdivision plat approval, a building permit, or some other site-specific affirmative action by the local government. This is more than merely relying on the general zoning district or advisory zoning

¹ McKinney v. City of High Point, 239 N.C. 232, 237, 79 S.E.2d 730, 734 (1954) (“The adoption of a zoning ordinance does not confer upon citizens living in a Residence A Zone, as therein defined, any vested right to have the ordinance remain forever in force, inviolate and unchanged.”)

² Town of Hillsborough v. Smith, 276 N.C. 48, 170 S.E.2d 904 (1969).

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compliance letter.³ If a permit was mistakenly issued, the permit is insufficient for establishing vested rights.⁴

Reasonable reliance. The expenditure must be in reasonable reliance on the valid governmental approval. In other words, the expenditure must be after the permit approval and dependent on the permit approval. Money spent in preparation for the application (prior to approval) does not count as an expenditure for the vested right.⁵

Substantial expenditure. The owner must make some substantial expenditure—of time, effort, or money—in reliance on the valid governmental approval. The expenditure must be substantial in relation to the overall project. Minor site work may be substantial for a small accessory building, but minor site work may not be substantial for a large-scale development.⁶ Actual construction is not necessary. Expenditures on binding contracts, construction materials, or equipment may be sufficient.⁷

Good faith. The owner must act in good faith to obtain a vested right.⁸ This means that the owner sought the governmental approval in the normal course of business and made expenditures to reasonably pursue the development. An owner would not be acting in good faith if the owner misled the local government or neighbors, rushed an application for a conditional use permit to beat a rule change, or hastily began site work for an appearance of substantial expenditure.⁹

³ Browning-Ferris Indus. Of S. Atl., Inc. v. Guilford Cnty. Bd. of Adjustment, 126 N.C. App. 168, 484 S.E.2d 411, 412 (1997); MLC Auto., LLC v. Town of S. Pines, 207 N.C. App. 555, 702 S.E.2d 68 (2010).

⁴ Mecklenburg Cnty. v. Westbery, 32 N.C. App. 630, 233 S.E.2d 658 (1977).

⁵ Warner v. W & O, Inc., 263 N.C. 37, 41, 138 S.E.2d 782, 785-86 (1964) (“Expenditures made for architect’s drawings, so that W & O might apply for a permit, were manifestly not made in reliance on the permit thereafter issued.”)

⁶ Sunderhaus v. Bd. of Adjustment of Town of Biltmore Forest, 94 N.C. App. 324, 327, 380 S.E.2d 132, 134 (1989) (“A significant amount of the labor needed to install the [satellite] dish was accomplished by the digging of the cable trench and by the laying of the PVC pipe. Therefore, the permissibility of this use of plaintiff’s yard is determinable under the [former] regulations.”)

⁷ Town of Hillsborough v. Smith, 276 N.C. 48, 54-55, 170 S.E.2d 904, 909 (1969) (“It is not the giving of notice to the town, through a change in the appearance of the land, which creates the vested property right in the holder of the permit. The basis of his right to build and use his land, in accordance with the permit issued to him, is his change of his own position in bona fide reliance upon the permit.”); See also, Randolph County v. Coen, 99 N.C. App. 746, 394 S.E.2d 256 (1990).

⁸ See Stowe v. Burke, 255 N.C. 527, 122 S.E.2d 374 (1961); Thomasville of N. Carolina Ltd. v. City of Thomasville, 17 N.C. App. 483, 195 S.E.2d 79 (1973).

⁹ See Warner, 263 N.C. at 43, 138 S.E.2d at 786-87.

Experience Detriment. The owner must show that he will suffer harm if required to comply with new rules. If the previously-approved project can comply with the new rules without any harm to the owner, then there is no basis for treating the owner differently.¹⁰

A vested right is a right to complete the project according to the approval. If building permits were granted for ancillary offices at a proposed quarry site, and then zoning was changed and quarries are no longer permitted at the site, the building permit may create a vested right in the office use, but not the quarry use unless the quarry itself was approved by permit.¹¹ Moreover, if project expenditures are phased over time, the expenditures may only create vested rights for the phase(s) for which expenditures have been made.¹²

No case states how long a common law vested right will last. Generally, it is safe to say that common law vested rights continue while the owner is pursuing the vested development and some reasonable time thereafter. If there is no activity or pursuit of development for an extended period of time, a vested right likely expires.

Building Permit

As long as an owner has a valid building permit, the owner has a vested right to develop the property as set forth in the building permit.¹³ Any change to the ordinance which conflicts with the building as permitted is not applicable. If the building permit expires or is revoked, the vested right expires as well. Typically a building permit is valid for six months from issuance. If the owner begins the project, a permit expires after 12 months of no activity.

Development Agreements

A development agreement is a formal contract between the landowner and the local government concerning a development project and can create long-term vested rights in the zoning rules in effect at

¹⁰ Browning-Ferris Indus. Of S. Atl., Inc. v. Guilford Cnty. Bd. of Adjustment, 126 N.C. App. 168, 172, 484 S.E.2d 411, 415 (1997) (“There is nothing in this record to show that BFI would be prejudiced or harmed if the amended Ordinance is held to apply to its efforts to construct and operate the transfer station. The mere requirement (in the amended Ordinance) that BFI acquire a special use permit prior to construction and operation of the transfer station is not itself supportive of an argument that BFI has been prejudiced by the amended Ordinance.”)

¹¹ Sandy Mush Properties, Inc. v. Rutherford Cnty. ex rel. Rutherford Cnty. Bd. of Comm'rs, 181 N.C. App. 224, 638 S.E.2d 557 review allowed and remanded sub nom. Sandy Mush Properties, Inc. v. Rutherford Cnty., 361 N.C. 569, 651 S.E.2d 566 (2007)

¹² Appeal of Tadlock, 261 N.C. 120, 134 S.E.2d 177 (1964); Transland Properties, Inc. v. Bd. of Adjustment of Town of Nags Head, 18 N.C. App. 712, 198 S.E.2d 1 (1973).

¹³ G.S. § 160A-385 (“Amendments in zoning ordinances shall not be applicable or enforceable without consent of the owner with regard to buildings and uses for which either (i) building permits have been issued pursuant to G.S. 160A-417 [or G.S. 153A-357] prior to the enactment of the ordinance making the change or changes so long as the permits remain valid and unexpired pursuant to G.S. 160A-418 [or G.S. 153A-358] and unrevoked pursuant to G.S. 160A-422 [or G.S. 153A-362]”)

the time of the agreement.¹⁴ A development agreement sets forth the nature and phasing of the buildings, public improvements and investments, and private improvements and investments.

A development agreement is a useful but particular tool. Projects must be greater than 25 acres, plans must be reasonably detailed, and the planning and legal costs for the developer and local government can be substantial.

Site Specific Development Plans and Phased Development Plans

The General Statutes recognize vested rights in relation to particular development approvals: site specific development plans and phased development plans (referred to in this discussion as “specific plans” and “phased plans”).¹⁵ Approval of such plans gives the owner the “right to undertake and complete the development and use of said property under the terms and conditions of the site specific development plan or the phased development plan.”

A specific plan is an application for a development approval submitted by the owner and approved by the city. As the name implies, the specific plan gives a fairly clear picture of the proposed development. It describes aspects like boundaries, natural features, intensity of uses, building size and location, and infrastructure. Each local government defines by ordinance what qualifies as a specific plan that creates vested rights. The statute identifies examples: planned unit development plan, preliminary or final subdivision plat, preliminary or general development plan, a conditional or special use permit, and conditional or special use district zoning plan.

A phased plan is like a specific plan but has less detail and certainty about the proposed project. The developer may come back with more details as the development progresses. For phased development plans—which have less detail than the site specific plans—a local government can set the ordinance so that the approved phased development plan creates vested rights in the zoning classification, but the owner must still seek approval of site specific development plans for each phase, approved in accordance with the vested zoning classification. Unlike specific plans, vested rights for phased plans are optional—some local governments may not recognize them.

There are certain procedural requirements and limitations for vested rights for specific plans and phased plans. A vested right is established upon valid approval of the plan, which is defined as the effective date of the city action or ordinance. In order for a specific plan or a phased plan to qualify for the vested right, the approval process must include notice to the public and a public hearing. A document that serves to create vested rights must be identified as such. These vested rights for specific plans and phased plans last at least 2 years from the approval. Rights may vest longer—up to five years—if desired by the local government based on relevant factors like the size of the development, market conditions, and level of investment. Vested rights terminate at the end of the vesting period for buildings and uses for which no valid building permits have been filed. Even with vested rights in

¹⁴ G.S. § 160A-400.20 *et seq.*; § 153A-349.1 *et seq.*

¹⁵ See, generally, G.S. § 160A-385.1.

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approved plans, the owner must still comply with conditions of those plans. A city may revoke an approval (and thus vested rights) for failure to comply with the conditions of approval.

Vested rights for specific plans and phased plans are not absolute. They may be limited or revoked in the case of: a serious threat to public health, safety, and welfare; compensation to the owner for costs incurred after development approval; misrepresentation by the owner; enactment of state or federal law that prevents the development as approved. Additionally, general ordinances may still apply to a vested project. An overlay zoning which imposes additional requirements but does not affect the allowable type or intensity of use may still apply. Ordinances of general application—like plumbing or electric codes—may still apply. A local government may still adopt ordinances to address nonconforming situations.

Conclusion

Vested rights attempt to balance public and private interests—the public interest in uniform current rules and the private interest in securing reasonable investment-backed expectations. Generally, new rules apply equally to all properties. Vested rights, however, protect those property owners who have relied on specific approvals from the local government. In North Carolina, there are four paths for an owner to obtain vested rights: common law vested rights, valid building permits, development agreements, and site-specific development plans and phased development plans. Each of these has specific requirements and terms of vesting.