Coates' Canons Blog: But I Already Bought the Lot and Had the Plans Made

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Malcolm Tucker's troubles continue. Last year, shortly after he opened his new nightclub, Wally's-A-Go-Go, the town revoked his permits because a former town staff person had **erroneously issued zoning approvals**. Although convinced it was a raw deal, Tucker reluctantly concluded that the law just might be on the town's side so he closed the club and began looking for a new location. He worked hard, diligently trying to do it the right way this time around. But once again he came up short.

Malcolm Tucker

Tucker had spent several months looking around town for a suitable site for his nightclub after he closed Wally's. He consulted several real estate agents and investigated several potential locations. He eventually found a vacant lot on the edge of town for sale at a reasonable price. The lot looked promising, so Tucker went to town hall to meet with the planning staff about potential development of a nightclub on the site. The town planner told him the site was zoned for commercial uses and that a nightclub was one of the permitted uses. She gave him copies of the town standards for setbacks, off-street parking, and the like. She told him the planning board was working on some studies for that part of town and had some information he might find interesting.

Tucker took all this in and, after a couple of meetings with his banker and a local contractor, concluded it would be financially feasible to develop this site for his new nightclub. So he purchased the lot and began his detailed planning. He hired a local planning and engineering firm to develop site plans and his town application package. He hired a Charlotte architect to design the building. He later met with this development team several times to go over his ideas for design of the nightclub and how the site should be developed. Once he was satisfied they had worked out a solid plan for development, Tucker told his team to finalize all the plans. He then took off for his annual winter visit to Las Vegas to check out emerging trends in the nightclub world.

Six weeks later Tucker returned to town. Waiting on his desk were the construction plans for his new nightclub, the detailed site plan required for the town application, and a sizable bill for this work. After approving all of this, he glanced through the other mail that had accumulated during his trip. That's when he found a month-old letter from the town. It said that work on a new small area plan for the southern entryway to town had been completed and the town council would be holding a public hearing on new zoning rules to implement the plan recommendations. The hearing had been scheduled for last week. Since Tucker's recently acquired lot was right in the middle of this area, he had a sinking feeling. His fears were confirmed when he called the planning office for an update. The planner told him the zoning changes had indeed been adopted after the hearing last week, were now in effect, and that he should come in to get a copy of the new rules before submitting his nightclub application.

Tucker didn't like what he saw when he read the new rules later that afternoon. A number of the changes would directly and dramatically affect his plans. Nightclubs were still permitted, but would now require a special use permit. New design requirements for the facades of commercial buildings would require a complete redesign of his planned building. New landscaping and stormwater requirements would require a substantially revised site plan and some considerable expense to implement. Worst of all for Tucker, the proposed off-street parking requirements for businesses like the one he planned

could probably not be accommodated on the lot he had purchased.

The next day Tucker met with his lawyer. “Tell me the town can’t do this to me,” he implored. “What about all that grandfathering business we talked about last year? I went the extra mile this time – I went down to the town and made absolutely sure this land was ok for a nightclub before I bought it. I spent a lot to buy this land. And I’m out thousands of dollars on site plans and building designs that are worthless if I’m stuck with these new rules. Please tell me they can’t do this to me.”

Tucker’s lawyer took a deep sigh. “Well, Malcolm, I’m afraid they probably can. I spent some time learning about vested rights when we were fighting the town over Fife’s mistakes on your last nightclub. You’re close to legal protection, but I really think you’re not quite there.”

She went on to explain how landowners get “vested rights” in North Carolina land use law. “The statute says that if you already had a building permit for the new building, you’d be protected. But you need to have your zoning compliance and site plans approved before you can get a building permit and you don’t have that. The statute also says that if you had what the law calls a “site specific development plan” approved you would be ok, but in our town you have to have a special use permit to qualify for one of those. And you haven’t turned in the application for that yet. In short, these statutes just don’t apply in your situation.”

“What about all the money I already put into this rat hole?” Tucker sputtered. “I bought that lot based on the town planner telling me the zoning allowed my project. I had all my plans made to comply with the rules she gave me. I did everything she told me to do. Doesn’t that count for something?”

In the ensuing conversation, Tucker learned some painful details about the law on vested rights.

To qualify for a protection against changes in the regulations without meeting the statutes she had already mentioned, his lawyer explained that Tucker would need to show that *all* of these applied to him: (1) he had made substantial expenditures; (2) the expenditures were made in good faith; (3) the expenditures were made in reliance on valid government approval, if such was required; and (4) he would be harmed without a vested right. *Browning-Ferris Indus. of S. Atlantic Inc. v. Guilford County Board of Adjustment*, 126 N.C. App. 168, 171–72, 484 S.E.2d 411, 414 (1997).

Tucker clearly met most of these requirements. He made substantial expenditures. He acted in good faith. He would suffer some real losses in complying with the new rules. But three out of four is not good enough. His problem is that all if these actions were taken in reliance on the ordinance in general, not any specific project approval by the town. He bought the lot prior to getting any of the required regulatory approvals. He spent money on designs and plans need to secure approval. Since he has not yet even applied for permits for his nightclub, his work to date was not undertaken in reliance on the town’s approval of his project.

So what kind of approval did Tucker need for his expenditures to count towards establishing a vested right? The approval must be a site-specific review and formal approval mandated by law. Such approvals include building permits, special or conditional use permits, certificates of zoning compliance, and preliminary plat approvals.

What types of expenditures do not count? Sadly for Mr. Tucker, the kinds he made. Expenditures made in generalized reliance on the existing zoning and expenditures made in order to secure government approval are not considered. The requirement of reliance means that expenditures made before approval or as part of the approval process cannot be considered to establish a vested right.

Several cases illustrate this long-standing rule. In *Town of Hillsborough v. Smith* the court noted, “One does not acquire a vested right to build, contrary to the provisions of a subsequently enacted ordinance, by the mere purchase of land in good faith with the intent of building thereon.” 276 N.C. 48, 55, 170 S.E.2d 904, 909 (1969). Moving beyond land purchase to plan preparation does not in and of itself qualify either. In *Warner v. W & O, Inc*., 263 N.C. 37, 138 S.E.2d 782 (1964), the defendant had made substantial expenditures in securing financing and in designing a multifamily structure when the Asheville ordinance was amended to preclude multifamily housing on the site. In ruling that no vested right had been established, the court held that the expenditures for architectural drawings needed to secure a permit “were manifestly not made in reliance on the permit thereafter issued.” More recently, in *Griffin v. Town of Unionville*, No. 3:05-cv-514-RJC, 2008 WL 697634 (W.D. N.C. Mar. 11, 2008), the court similarly held that expenditures made on engineering studies and

state permit applications for expansion of a use create no vested right to that expansion.

Particular care is warranted when a landowner is relying on a “certificate of zoning compliance.” While some jurisdictions have a separate and distinct permit for zoning compliance, many jurisdictions incorporate zoning compliance reviews as part of building permit reviews and issue a single building permit that may include a verification or certificate of zoning compliance. Only a regulatory approval that is mandatory before construction or other site work commences can be relied upon for vested rights purposes. On the other hand, a letter from the town staff advising that a proposed use is consistent with current zoning, which is often secured by developers in the course of acquiring and financing land purchases, is not a mandated approval that authorizes a specific development project. These letters are merely statements of the current law, not a required permit and thus they cannot be relied upon to establish a vested right. *MLC Automotive, LLC v. Town of Southern Pines,* ___ N.C. App. ___, 702 S.E.2d 68 (2010).

So what should Mr. Tucker take away from this experience? One thing is a reminder that land development can be a speculative venture without guaranteed rates of return. It is important to be a prudent investor and to carefully study the regulatory environment before embarking on a project. Yet the regulatory environment is dynamic. It can change during the course of project planning. Here the town undertook and finished a new plan that resulted in the adoption of updated regulations to better address public concerns and interests. The law does allow for vested rights in order to balance the public interest in having the most current laws apply to all against the legitimate interests of developers in the predictability that comes from reliance on the existing rules. But that balance requires the developer to go through the approval process in order to become vested.

The fact that he almost got there before taking off for Las Vegas is just not good enough to allow Mr. Tucker’s personal interests in his nightclub development to trump the public interest in application of the new zoning. If he had gotten those plans submitted, approved, and the work underway before he left it would have been a different story. If his team had moved a little quicker and he already had a building permit. If someone on his staff had opened the mail and alerted him to the hearing. If he had made his land purchase contingent on getting zoning approval for his nightclub. “If, if, if.” Tucker muttered as he left his lawyer’s office. “Oh well, if a frog had wings . . . . I’m beginning to think this nightclub is **nothing but bad luck**.”

Links

- www.youtube.com/watch?v=26qBxol3Lx0