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THE DOCTRINE OF VESTED RIGHTS - A BRIEF SURVEY

By Attorney Matthew R. Serge

INTRODUCTION

"[A] property owner has no right to the continued existence of any particular zoning classification of his property, because all property is held in subordination to the police power of the municipality."(fn1) Indeed, in balancing the interests of the property owner and a municipality, the latter is afforded significant authority to adopt ordinances and regulations to protect the health, safety, morals and general welfare of the community.(fn2) RSA 674:16, I provides a municipality with authority, for example, to adopt zoning ordinance provisions to "regulate and restrict . . . [l]ot sizes, the percentage of a lot that may be occupied, and the size of yards, courts and other open spaces . . . [and] location and use of buildings, structures and land used for business, industrial, residential, or other purpose." These regulations are designed "to secure safety from fires, panic and other dangers; to promote health and the general welfare; to prevent the overcrowding of land; to avoid undue concentration of population; [and] to assure proper use of natural resources."(fn3)

Nevertheless, private property ownership rights have been recognized as fundamental rights under the New Hampshire and United States Constitutions.(fn4) Part I, article 12 of the New Hampshire Constitution provides that "no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people."(fn5) The same principle is embodied in the Fifth Amendment to the Constitution of the United States, which provides that "no person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."(fn6) One way in which a municipality may take private property is through the adoption of zoning ordinances or other regulations that have the effect of significantly limiting a landowner's use of property.(fn7)

To combat this potential deprivation of constitutional rights, a property owner is protected, or vested, from the retroactive application of a zoning ordinance provision, or other regulation, that may operate to prohibit a use of property that the owner has in good faith, begun to develop in the absence of the regulation. This is not to be confused with the doctrine of non-conforming uses, which is defined as:

A use of land which, at the time a restriction on that use went into effect, was established (or `vested'), and has not been discontinued or abandoned, can continue indefinitely, unless it includes activity which is a nuisance or harmful to the public health and welfare; but the use cannot be changed or substantially expanded without being brought into compliance.(fn8)

Like the doctrine of vesting, the doctrine of nonconforming uses evolved for the purpose of protecting property rights that antedated the existence of an ordinance from what might be an unconstitutional taking. *(fn9)* While the doctrines of vested rights and non-conforming uses are interrelated, they are mutually exclusive concepts, on a temporal level. Thus, at the point a particular project is deemed vested, the doctrine of non-conforming use takes over and governs the continuation of that use.

Developed in common law, the doctrine of vesting serves to insulate a property owner who has begun the task of developing his or her property for a use that was permitted at the time he or she received a building permit, or subdivision or site plan approval. In 1975, the New Hampshire legislature adopted RSA 674:39 (formerly RSA 36:24-a), which the New Hampshire Supreme Court has held codified the common law doctrine of vested rights. This statute, which has been the subject of only a handful of Supreme Court opinions, has been amended numerous times since its adoption. The purpose of this article is to track the evolution of the vesting doctrine, with a particular focus on RSA 674:39, to its present form. In examining both the common law and RSA 674:39, this article will question some of the Supreme Court's opinions and attempt to harmonize what some may consider to be an inconsistent jurisprudence.

THE EVOLUTION OF THE COMMON LAW DOCTRINE OF VESTED RIGHTS

The Beginning

In 1956, the doctrine of vested rights was adopted by the New Hampshire Supreme Court in *Winn v. Lamoy Realty*

Corp.(fn10) In that case, the question presented was whether a property owner, who had received a permit to build a commercial store in the City of Nashua, lost the right to develop the property as planned after the City adopted an amendment to its zoning ordinance prohibiting the project, 14 days after the landowner received the permit.(fn11) The Supreme Court, having not previously recognized the vesting doctrine, properly looked to holdings from other jurisdictions for guidance.(fn12) In examining these cases, the Supreme Court noted that "[t]he decisions in the different states . . . [were] by no means harmonious and even appear conflicting in some instances within the same jurisdiction."(fn13) Nonetheless, the cases did seemingly share the common ingredient that a landowner was deemed vested from a later zoning amendment if he or she incurred substantial expenditures or legal obligations relying in good faith upon the permit.(fn14)

Although the state had not previously adopted the vested rights doctrine, the Court found that its precedent supported, indirectly, the rationale of vested rights.(fn15) It is the seriousness of the restriction upon the private right, the Court recognized, that is to be considered in balance with the expediency of the public interest.(fn16) It is for this reason that the Court, in adopting the vesting doctrine, expressly rejected the suggestion in some cases that actual construction must be commenced before vesting relief may be granted.(fn17) The Court characterized this actual construction standard as "too rigid," and that in many instances the policy may deny relief where the owner has suffered great detriment because of his or her reliance on the permit, and allow it where his or her damage was slight.(fn18) Following the guidance of the out-of-state decisions, as well as its own precedent, the Supreme Court held that a landowner is vested from a later-enacted zoning ordinance amendment or other regulation that would prohibit the use, if "the owner, relying in good faith upon a permit and before it has been revoked, ha[d] made substantial construction on the property or ha[d] incurred substantial liabilities relating directly thereto, or both, the permit may not be cancelled."(fn19)

Applying the newly adopted standard to the facts before it, the Court held that the landowner had not achieved vested status because he had incurred expenses and liabilities of less than $1,000.(fn20) Further, actual physical construction was not started until four days after the amendment was passed, and the landowner's purchase of the lot was not based on receiving the permits.(fn21) The Court decided that that the landowners' expenditures and legal obligations were small in relation to the very substantial total cost of the proposed store and, therefore, he was not vested from the City of Nashua's zoning amendment.(fn22)

Thus, in *Winn*, the Court, while not advocating for an actual construction standard, was promoting, what appeared to be, a cost versus completion analysis. In doing so, the Court considered both whether the landowner performed any actual construction activities or spent money towards development, and then whether the amount of work performed or money spent was substantial when compared to the entire project. This analysis will be called into question, however, in subsequent cases when the Supreme Court interprets RSA 674:39.

DEFINING THE SCOPE OF THE COMMON LAW DOCTRINE

Piper v. Meredith

Another early and oft-cited case regarding the common law doctrine of vesting is *Piper v. Meredith*.(fn23) In *Piper*, a landowner purchased property and buildings for $160,000 and leased it to another company, owned by the landowner, to erect numerous condominium towers at the site.(fn24) Less than one month later, the citizens of Meredith petitioned for a special town meeting to adopt a local ordinance that would both limit the height of buildings in town to five stories, or seventy-five (75) feet; and require that no building exceeding three stories or 45 feet in height be erected within 50 feet of any other building or within 100 feet of the shore of any lake in Meredith.(fn25) The first special town meeting, which was held in 1968, passed the petitioned article but, because of intervening court action challenging the legality of the meeting, the Town held another meeting in April 1969 and ratified its October 1968 vote.(fn26)

Plaintiffs filed a petition for declaratory judgment, arguing that the newly enacted zoning ordinance was not enforceable.(fn27) The master agreed, ruling that the Town failed to follow the proper procedural steps for adopting a zoning ordinance.(fn28) The Supreme Court reversed, holding that the Town's regulation could be construed as a police-power regulation and, therefore, was adopted legally.(fn29) The Court then turned to the question of whether the project was vested from the terms of the newly adopted regulation.

In applying the vested rights doctrine, the Supreme Court reviewed the expenditures that had been made with respect to the project between the time of purchase (June 1968) and the adoption of the amended ordinance (April 1969). The Court noted that during the period from June 1, 1968 to October 1, 1968 (when the first special town meeting was held), the landowners "expended approximately $40,000 on the project for borings, surveys, a rendition of the proposed buildings, preliminary plans, land clearing, overhead, administration and sales expenses."(fn30) During the period from October 1, 1968 to May 1, 1969, the Court determined that the evidence showed that the landowners had "expended an additional $100,000, exclusive of the original

land acquisition, for a total of approximately $140,000, against the total cost of the project estimated to be $1,700,000 exclusive of land acquisition and engineering."(fn31)

In analyzing the vesting doctrine to the facts presented, the Court ruled that the money spent to purchase the property is not a factor to be considered.(fn32) The Court stated that

[m]oney spent for the purchase of land does not change its use nor create a right to use it for an intended, but not executed, use when restrictions are imposed. It is, rather, the amount of money spent on improvements to change the use of the land in a tangible way which if substantial enough and done in good faith will create a vested right which cannot be affected by the enactment of a restrictive ordinance.(fn33)

While the question of whether a landowner's expenditures are substantial enough to create vested rights is a case-by-case analysis, the ultimate objective, the Court said, is fairness both to the public and to the individual property owners.(fn34) Based upon the facts presented in *Piper*, the Court held that the master could properly find and rule that, as of April 15, 1969, when the ordinance was ratified, the plaintiffs had acquired no vested rights to continue the project except in accordance with the restrictions imposed by the ordinance.(fn35)

In dissent, Justice Grimes disagreed with, among other things, the majority's holding that the plaintiffs had not gained any vested rights prior to the enactment of the town ordinance.(fn36) Noting that the plaintiffs had reason to believe they could proceed with their development plans, Justice Grimes examined the value of the property that was purchased and stated that property would be worth only $85,000 if it could not be used for the purpose for which plaintiffs intended.(fn37) He noted that "[u]nder the circumstances of this case this diminution in value of the land should be considered in determining whether plaintiffs have incurred substantial liabilities."(fn38) Interestingly, Justice Grimes concluded by stating that "[t]hese sums certainly seem substantial to me and I don't think that when incurred liabilities reach the amounts here involved that they should be judged by comparison to the ultimate cost."(fn39) Justice Grimes' comments with respect to the scope of liabilities considered in a vesting analysis found their way into a subsequent opinion, written by Justice Grimes, known as *Henry & Murphy, Inc. v. Allenstown*.(fn40)

Henry & Murphy, Inc. v. Allenstown

In *Henry & Murphy, Inc*., the plaintiff filed a declaratory judgment petition to determine whether it had gained vested rights in its subdivision and, thus, would not have to comply with the Town's zoning ordinance regulating lot sizes.(fn41) The plaintiff purchased a tract of land located in the Town with the intention to subdivide and develop the land for 50 residential house lots.(fn42) After receiving subdivision approval, the plaintiff recorded the subdivision plan in September 1968 and began developing the project.(fn43) In 1970, the town adopted a zoning ordinance requiring lot sizes to be at least 40,000 square feet.(fn44) The plaintiff's lots were 10,000 square feet in size.(fn45) Despite the adoption of the zoning ordinance in 1970, the town planning board approved a number of changes to the subdivision plan from 1970 to 1975.(fn46)

As of June 1, 1978, the plaintiff had developed and sold 34 of the lots in the subdivision and had constructed the streets and the water and sewer systems necessary for those lots.(fn47) Sixteen lots remain undeveloped.(fn48) Since 1970, the town had taxed the plaintiff on each individual lot at the rates established for building lots.(fn49) Due to complications arising out the sale of the remaining 16 lots, the plaintiff sought declaratory relief that those lots were vested from the zoning ordinance regulating lot size.(fn50) In ruling that the remaining lots within the plaintiff's subdivision were vested, the Supreme Court rejected the Town's argument that each individual lot must be treated separately for vesting purposes, and defined the "project" as "an undertaking devised to effect the reclamation or improvement of a particular *area* of land."(fn51) In addition, the Court retreated somewhat from its position in *Piper v. Meredith*, and held that "[a]t least when the owner has undertaken construction on his land, . . . we think that the better rule is that when zoning restrictions substantially reduce the value of land by prohibiting its use for the purpose for which is was purchased, the diminution in value may also be considered in determining whether the plaintiff's rights have vested."(fn52)

The *Henry & Murphy* Court, therefore, carved out an exception to the rule set forth in *Piper* that the cost of the property bears no relevance in the vesting analysis. That said, *Piper* still appears to stand for the proposition that the purchase price alone, absent any actual construction or development, will not be considered in a vested rights analysis.

Piper thus expanded on the vested rights analysis by carving out a category of cost that is not to be considered when determining whether a landowner is protected from subsequent changes in local zoning. After *Piper*, it appeared that the line of demarcation for determining whether money spent on a property was to be considered in a vesting analysis was whether the cost was attributable "to improvements to change the use of the land in a tangible way." This might suggest that costs incurred for site clearing, grading and other preparatory work might be considered relevant in a vesting analysis since that work

could change or alter the use of the land in a tangible way. Any belief at that time that such work could be considered in a vesting analysis was called into question 12 years later by the Supreme Court in *Sanderson v Town of Greenland*.(fn53)

Sanderson v. Town of Greenland

As the common law doctrine of vesting took shape, the Court addressed various permutations of what expenditures were included in the vesting calculus. One significant case in this regard is *Sanderson v. Town of Greenland. (fn54)* In *Sanderson*, the property owners had subdivided their parcel into 18 lots, but had sold only two at the time a zoning amendment was adopted that precluded the use.(fn55) While the owners had not constructed any buildings, they had prepared the land for construction, in furtherance of their subdivision plans, by clearing it, building a rough road to serve the subdivision sites and digging drainage ditches.(fn56) They also installed the pipelines and connections to the public water system, and continued to improve the rough road.(fn57)

Regardless of these numerous and costly improvements, the Supreme Court, in a rather cursory fashion, affirmed the trial court's decision that the improvements were not to be considered in the vested rights analysis.(fn58) The trial court had concluded that all of the work that was performed was of a preliminary nature, involving only preparatory work.(fn59) The Supreme Court, in affirming the trial court, held that preliminary or preparatory work was not of the type recognized to trigger a vested rights analysis.(fn60) The landowners' rights to complete their project, therefore, did not vest.

Sanderson could be considered a departure from the Supreme Court's earlier precedent, as it severely restricted the scope of work that actually would be considered relevant in a vesting analysis. Indeed, the *Piper* Court, while understandably rejecting the idea that the purchase price for property alone was relevant in vesting, did state that costs incurred to change the land would be considered. The Court appeared to foster this principle in *Henry & Murphy* when it held that the value of property would be considered in vesting so long as some actual construction had occurred. Yet in *Sanderson*, the Court, by upholding the trial court's decision that the extent of work performed by the landowners in that case was not relevant, conceivably stands for the proposition that preliminary and preparatory work, regardless of its cost or scope, is not relevant to a vesting analysis. This ruling is arguably not only a deviation from *Piper*, but also *Winn*, where the Court sought to strike a balance between the interests or the landowner and the public.

Indeed, a sounder holding in *Sanderson* would have been that the work undertaken to prepare the site for development could be considered, but that the work must be substantial with respect to the construction and cost required to complete the entire project. The Court arguably applied such an analysis in *Dow v. Effingham*(fn61). In that case, the Court expounded upon the *Sanderson* decision and suggested that the site work undertaken in that case to prepare the property for a race track could be relevant to vesting, but that the cost of the work, which involved clearing trees and grading the land, was insubstantial when compared to the total expenditure which would be required to complete the proposed race track.(fn62) As *Dow* suggested, therefore, the more reasonable approach to analyzing whether a project is vested, is to consider all work undertaken, and costs incurred, towards a development and determine whether the work or cost of that work is substantial in relation to the entire project. In all likelihood, the actual work or cost for preparatory work will not rise to the level of satisfying the vested rights doctrine. Thus, while the result in *Sanderson* was undoubtedly the correct one, it could have been reached applying the vested rights doctrine as it had been applied in the past.

RSA 674:39 - THE IMPACT OF STATUTORY VESTING

In 1975, the New Hampshire legislature adopted a statutory version of the vested rights doctrine. This law, originally codified at RSA 36:24-a, was later re-codified to RSA 674:39. The purpose of the statute is to exempt accepted and recorded site plans and subdivision for four years from changes in subdivision regulations or zoning ordinances to allow the landowner to permanently vest the project.(fn63) The statute has been described as allowing developers to rely upon the status quo of a municipality's zoning ordinances, even before they complete substantial construction on their projects.(fn64)

RSA 674:39 provides, in part, that

I. Every subdivision plat approved by the planning board and properly recorded in the registry of deeds and every site plan approved by the planning board and properly recorded in the registry of deeds, if recording of site plans is required by the planning board or by local regulation, shall be exempt from all subsequent changes in subdivision regulations, site plan review regulations, impact fee ordinances, and zoning ordinances adopted by any city, town, or county in which there are located unincorporated towns or unorganized places, except those regulations and ordinances which expressly protect public health standards, such as water quality and sewage treatment requirements, for a period of 4 years after the date of approval; provided that:

(a) 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 . . .;

. . .

(c) At the time of approval and recording, the subdivision plat or site plan conforms to the subdivision regulations, site plan review regulations, and zoning ordinances then in effect at the location of such subdivision plat or site plan.

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 first thing to note is that RSA 674:39 applies to site plans and subdivisions. Further, with respect to subdivisions, a project cannot be vested unless the plat is both approved by the planning board and properly recorded in the registry of deeds.(fn65) The statute does not provide four-year protection from changes in zoning, for example, to a landowner who simply wants to build a single-family home on his or her property. This distinction is logical given the size and scope of modern site plans and subdivisions, and the realities of financial constraints imposed by the economy that may prevent developers from substantially constructing a project in short order. This four-year window also protects the large-scale developer from sudden, reactionary, legislation that is adopted locally to thwart a particular project. Indeed, the legislature adopted another vesting statute, RSA 676:12, V, to prevent municipalities from "retroactively amending local land use regulations ... for the purpose of stopping proposed projects or developments while an application is under consideration."(fn66) It is also important to note that this right may run to the developer's successors in interest.(fn67)

As stated in the Introduction to this article, RSA 674:39 has been subject to a number of changes over the years. One of the more important changes involves the tumultuous topic of impact fees.

Impact Fees

Another important development in statutory vesting was the amendment of RSA 674:39 to allow municipalities to apply subsequent changes in an impact fee ordinance to a vested project.(fn68) This amendment appears to be in response to the Supreme Court's decision in *R.J. Moreau Companies v. Town of Litchfield (fn69)*, in which the Court held that RSA 674:39 (1996) barred the imposition of impact fees.(fn70) In *R.J. Moreau Companies*, the Court correctly held that the plain language of RSA 674:39 at the time made no distinction between zoning ordinances and other regulations or ordinances, such as impact fees adopted pursuant to RSA 674:21.(fn71)

This change to RSA 674:39, II now brings the legislation in line with the common law standard of vesting, which does not protect landowners from changes in an impact fee ordinance. While a landowner would no doubt argue that the imposition of an impact fee could have the effect of prohibiting a project due to financial constraints, the Court would likely hold that the common law standard applies to ordinances that, on their face, prohibit a project. It is important to remember, however, that a site plan or subdivision is still protected from changes in all ordinances, including impact fee ordinances, during the four-year exemption period under RSA 674:39, I. It is only after "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," that the project is then subject to changes in the impact fee ordinance. RSA 674:39, II.

As noted above, in order to be considered vested under RSA 674:39, a landowner must satisfy two tests. First, he or she must demonstrate that active and substantial construction or development has begun on the property within one year of subdivision or site plan approval. Second, the landowner must show that within four years of approval, he or she has substantially completed the improvements shown on the approved plan.

The Active and Substantial Test

In order to receive a four-year exemption from subsequent changes in regulations that may affect a project, active and substantial development or building has to begin on the site by the owner or the owner's successor in interest in accordance with the approved plan within 12 months after the date of approval. RSA 674:39, I (a). Unfortunately, the issue of what qualifies as "active and substantial" development or building has not been the subject of any major discussion in the Supreme Court over the years. Rather, in those cases where RSA 674:39 has been discussed substantively, the Court has typically addressed the second component of the vesting analysis - whether the landowner has achieved substantial completion of the improvements for a project within the four-year exemption period.(fn72)

RSA 674:39 allows for local planning boards to define what constitutes "active and substantial" development or building, which partly obviates the need for the Court to

define the phrase. It is likely, however, that the Court will not address the active and substantial test any time soon because RSA 674:39 has recently been amended to virtually remove the Court from having to define "active and substantial" development or building.(fn73) RSA 674:39 now provides that

IV. Failure of a planning board to specify by regulation or as a condition of subdivision plat or site plan approval what shall constitute "active and substantial development or building" *shall entitle the subdivision plat or site plan approved by the planning board to the 4-year exemption described in paragraph I.* The planning board may, for good cause, extend the 12-month period set forth in paragraph I(a).(fn74)

While RSA 674:39, IV does eliminate the Court's involvement with respect to providing a general definition for "active and substantial" development or building, it is possible that a landowner could challenge a local planning board regulation defining "active and substantial" development or building on constitutional grounds.(fn75) Indeed, RSA 674:39, III states that when defining "active and substantial" or "substantial completion," the planning board must give "due regard to the scope and details of a particular project." Thus, the planning board must tailor the "active and substantial" requirement to each subdivision or site plan. Given this level of discretion, an applicant for subdivision of site plan approval could challenge a regulation defining "active and substantial" development or building on due process grounds, for example, claiming that a particular regulation is unconstitutional on its face, or as applied, to a particular project.(fn76)

What is more alarming, from the perspective of the municipality and planning board, is that failing to define the "active and substantial" test, either as a condition of a approval, or as a general regulation, automatically gives the landowner the four-year exemption to vest a project. This places a heavy burden on planning boards, which are primarily comprised of lay people, not lawyers, who are not generally savvy in understanding legislative changes. Because it is not uncommon for a planning board to grant subdivision or site plan approval without conditions, planning boards are well advised to either promulgate a regulation addressing this issue, or making certain that "active and substantial" development or building is a condition regularly included in every subdivision and site plan approval.

Even if a landowner has begun "active and substantial" development or building on the site, the property is not permanently vested from subsequent zoning ordinance amendment or other regulatory changes until the landowner has substantially completed the improvements shown on the approved subdivision plan or site plan.

The Substantial Completion Test

To the extent the Supreme Court has analyzed RSA 674:39, the focus has been on the meaning of the phrase "substantial completion."(fn77) Both *Morgenstern v. Town of Rye*(fn78) and *AWL Power, Inc. v. City of Rochester*(fn79) involved the application of what is now RSA 674:39, II and, as is evident from these cases, the analysis is incredibly fact-driven. In fact, the Supreme Court's interpretation of RSA 674:39, II has generated some confusion among the bench and bar when defining "substantial completion."

Morgenstern v. Town of Rye

In *Morgenstern*, the plaintiff purchased property in 1992 that included significant wetlands and was part of a residential subdivision that was approved by the town in 1967 and recorded in the registry of deeds.(fn80) Plaintiff purchased the property for $20,000.(fn81) By 1971, all of the roads in the development had been accepted by the town at town meeting.(fn82) By 1975, 16 of the 20 lots had either been developed or received building permits.(fn83) While plaintiff's property complied with the town's minimum square footage and frontage requirements in 1967, the town amended its zoning ordinance in 1975 and increased the required lot size and frontage, which rendered plaintiff's property nonconforming as to minimum size and frontage.(fn84)

The plaintiff, pursuant to a provision of the town's zoning ordinance, sought a variance in order to build a house on his property, but the Zoning Board of Adjustment denied the application, which was upheld by the superior court.(fn85) The plaintiff appealed his case to the Supreme Court, challenging, among other things, the requirement that he needed a variance to build a house on his property.(fn86) On appeal, he argued that he did not need a variance because his property was vested under RSA 674:39.(fn87) In analyzing the vested rights doctrine, the Court noted that "active and substantial" development or building was not at issue, but rather whether the plaintiff satisfied the "substantial completion" component of RSA 674:39.

When it addressed the issue, the Court stated that the question of whether the subdivision was substantially complete for purposes of RSA 674:39, II was analogous with the common law standard.(fn88) In reaching this conclusion, the Court did not analyze the plain language of the statute - the starting point for examining legislation - but rather looked directly to legislative history. While consideration of legislative history can be an appropriate tool when interpreting legislation, it is puzzling why the Court ignored long-established precedent that provides "[w]here statutory language is clear and unequivocal there

is no need to examine the legislative history for further illumination as to the legislature's intent."(fn89) This is not to say that the scope of vested rights under RSA 674:39 should not be considered equivalent to the common law. The problem, however, is that the *Mortgenstern* Court gave no consideration to the plain language of RSA 674:39, II and thus did not attempt to define "substantial completion" as that phrase as used in RSA 674:39. This would prove problematic in *AWL v. City of Rochester*.

Unfortunately, the Court did not examine the facts of *Morgenstern* and apply them in a vesting analysis because the trial court did not reach the issue. The Court remanded the matter for further proceedings. While the Court did not examine whether the plaintiff was vested, the Court did note that the trial court erred when it ignored the substantial construction and liabilities of the developer and instead focused only on plaintiff.(fn90) The Court stated that the trial court's analysis should have focused, instead, on (1) whether the original developer had acquired a vested right to build on the lot; and, if so, (2) whether that vested right transferred to the plaintiff, as a successor in interest.(fn91)

It is interesting to note that because RSA 674:39 was not adopted by the Legislature until 1975, and the subdivision that was at issue in *Morgenstern* was approved in 1967, the case raised the issue of whether RSA 674:39 applied retroactively to site plans and subdivisions approved prior to the law's passage.(fn92) By holding that RSA 674:39 was to be interpreted under the common law standard for vesting, the Supreme Court avoided the retroactivity issue.

AWL Power, Inc. v. City of Rochester

In the same year that *Morgenstern* was decided, the Supreme Court faced the issue of defining "substantial completion" in *AWL Power, Inc. v. City of Rochester*.(fn93) In *AWL*, plaintiff appealed a decision of the trial court upholding a Planning Board decision to revoke plaintiff's site plan and subdivision approvals.(fn94) The basis for the revocation was that plaintiff's projects had not vested and were no longer legal under the city's zoning ordinance.(fn95)

The facts of AWL are as follows. The plaintiff (developer**)** owned a 23.78-acre parcel of land in the City of Rochester.(fn96) On August 31, 1987, the planning board approved a site plan for plaintiff's predecessor in interest.(fn97) The plan called for the property to be subdivided into 19 parcels, consisting of 18 single-family homes and a 59-unit condominium.(fn98) The approval was subject to the condition that the developer construct, at his own expense, a number of public improvements on the property, including a sidewalk, a sewer line extension, a fence and a road.(fn99) During the three years following the approval, the developer built six of the 18 houses in its plan; spent $201,614 on the public improvements, finishing the sidewalk and sewer line construction; and paid the city a $50,000 impact fee for off-site improvements.(fn100)

In 1988, the city amended its zoning ordinance, which rendered the developer's proposed condominium and many of the proposed single-family houses non-conforming uses of the property.(fn101) The city, however, allowed the developer to continue the development according to the 1987 approved site plan.(fn102) In 1990, the developer ceased all construction on its property and did not seek to resume construction until April 2000.(fn103) The city determined that the project had not vested because the developer had completed 43.2 percent of the required public improvements, and 10.7 percent of all the total planned public and private improvements.(fn104) Plaintiff appealed the Planning Board's decision to the superior court, which determined that the developer had actually completed 70 percent of the required public improvements, but that the project had not vested because plaintiff spent only $201,614 on the improvements compared to the projected cost of the entire development: $6,432,384.50.(fn105) The superior court did not consider plaintiff's completion of six houses, but concluded that plaintiff had completed only about 3 percent of its project, and found that the percentage was insufficient to constitute the "substantial construction" necessary to vest the right to complete the project under the common law standard.(fn106)

On appeal, the Supreme Court, considering the common law standard for vesting, rejected the superior court's analysis of substantial construction, stating that the "interpretation is at odds with our cases, conflicts with the rationale of the standard, and would lead to anomalous results."(fn107) The Court noted that it has considered the percentage of project completion in prior cases, but has never held that it is the exclusive method by which the rights of a developer may vest.(fn108) The crux of the Court's analysis was that the trial court's "substantial construction" standard conflicts with the common law rationale for vesting. Citing the liberal construction courts give the vesting rule, the Court held that the trial court's requirement that a developer complete a certain percentage of the project is too rigid and resembled the "substantial completion" test used to determine whether a contract is performed.(fn109) Because vested rights are not based upon a contract theory, it would be improper to condition the vesting of rights solely on a standard derived from contract law. Ironically, the only time the Court utters the words "substantial completion" is when it refers to contract law, and never mentions that those same words are used in RSA 674:39, even though that is the precise phrase that was be scrutinized.

Indeed, the Court's position is inconsistent with RSA 674:39, which presumably controls the analysis. RSA

674:39 provides that in order to receive permanent vesting, a landowner must achieve "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." This plain language is unambiguous and does not warrant consideration of "legislative history." Given the usage of the words "substantial completion" in RSA 674:39, it appears that the statute indeed envisions an analysis that is objective and measures the percentage or degree of work accomplished against the entire project.

In fact, despite the Court's opinion to the contrary, a survey of the common law in this state does support the position that a percentage-of-completion test is the predominant factor when examining vested rights. In the seminal case of *Winn v. Lamoy Realty Corp*., for example, the Supreme Court arguably analyzed the vested rights issue from the perspective of whether the cost spent and work performed were substantial as compared to the cost and work required to complete the entire project.(fn110) In *Piper v. Meredith*, Justice Grimes noted in his dissenting opinion that he interpreted the Court's vesting analysis as comparing the actual construction or costs against the cost of entire project.(fn111)

RSA 674:39 distinguishes between "active and substantial construction or development" and "substantial completion" for a reason. These words all have meaning, and the legislature is not presumed to have used superfluous words.(fn112) Construing the plain language of RSA 674:39, the cases the Court relies upon to support its definition of "substantial completion" appear to support the meaning of "active and substantial" construction or development. Both the *Town of Hillsborough v. Smith (fn113)* and *Tantimonaco v. Zoning Board of Review (fn114)* were cited for the proposition that to be permanently vested under RSA 674:39 a landowner or developer need only make a substantial beginning of construction and incur therein substantial expense to vest or initiate construction in some reasonably substantial measure. This sounds a lot like "active and substantial" construction or development, not substantial completion. If the test just described were truly the analysis to measure "substantial completion," it is unclear whether there is any threshold to achieve "active and substantial" construction or development.

Given the structure of RSA 674:39, and the fact that it allows a landowner or developer four years to permanently vest a project, it is more logical to interpret "active and substantial" construction or development as the phrase implies - that the landowner or developer make a substantial beginning of construction - and interpret "substantial completion" as that phrase implies - that the landowner or developer has completed a substantial portion of the improvements shown on the subdivision or site plan. The purpose of vesting is to strike a balance between a municipality's ability to amend its ordinance for the common good, and the private landowner's right to use property for a purpose rendered illegal by the zoning amendment.

The Court was careful, of course, not to completely abandon the express language of RSA 674:39 or the common law, and noted that "the correct standard for substantial construction vesting considers not only construction measured against the entire plan, but also whether the amount of completed construction is per se substantial in amount, value or worth."(fn115) This second element of the test appears to derive from Justice Grimes' dissenting opinion in *Piper v. Meredith* where he suggested that some costs are so substantial in and of themselves that they should not be compared to the cost of the entire project**.**(fn116)

The "*per se*" test, at first blush, sounds reasonable and no doubt fulfills the liberal purpose of the vesting doctrine. But is the test consistent with the language of RSA 674:39? The statute requires the Court to determine whether the project is substantially complete to be permanently vested, not to determine whether the work that has been done cost a certain amount of money. Indeed, the Court's reliance upon Justice Grimes' thoughtful dissent is troubling because he was discussing the common law, not RSA 674:39.

This *per se* test presents a rather troubling scenario for parties faced with a vesting issue for a few reasons, not least of which is that the test is too subjective. Reviewing a project's completeness is a logical test because it involves an objective analysis of the facts without allowing personal opinion to interfere. The *per se* test calls for judges to be independent arbiters of what amount of money they consider substantial in any given case. Given the various experiences of judges, it is not hard to imagine that many will have a different opinion as to what is a "substantial" amount of money. Judges are, of course, called upon to make judgment calls all the time and subjectivity does enter into their minds when making decisions. But employing the *per se* test for vesting does nothing more than allow the personal predilections of a judge to determine the outcome. This *per se* test can have the effect, as it did in *AWL Power, Inc.*, of allowing a project to vest even though a developer has accomplished only a minimal amount of the entire project. Such a result is contrary to the express language of RSA 674:39.

Based upon the plain language of RSA 674:39, the trial court arguably applied the proper analysis in the case. That said, however, the trial court's decision may have been incorrect nonetheless. While the amount of money spent on a particular project is perhaps relevant, it cannot be

considered in vacuum, without any regard for the entire project, as suggested by the Supreme Court in *AWL Power, Inc.* To do so renders RSA 674:39's requirement of "substantial completion" meaningless. The statute does not set a limit on what is "substantial." What the *AWL* Court should have done is apply RSA 674:39, as written, and hold that the Court must determine whether the amount of work completed, or costs incurred, are substantial when considered against the entire project. That said, however, the Court will judge "substantial completion" on a sort of sliding scale that is dependent upon, among other things, the size and scope of the project undertaken. This would be similar to the mandate in RSA 674:39, III that municipalities give due regard to the scope and details of a particular project when defining "active and substantial" construction or development or "substantial completion" of improvement on an approved plan.

CONCLUSION

As is apparent from the Court's opinions and the legislative changes over the years, the interpretation of vested rights - a concept that initially appears straightforward - is constantly changing. Being fact-driven, the doctrine of vested rights will no doubt be further modified as different cases are brought forward. _____ Footnotes:

1. *Morgenstern v. Rye*, 147 N.H. 558, 562 (2002).

2. *Taylor v. Town of Plaistow*, 152 N.H. 142, 145 (2005).

3. RSA 674:17.

4. *See e.g. Merrill v. Manchester*, 124 N.H. 8, 14 (1983).

5. *Opinion of the Justices*, 139 N.H. 82, 87 (1994).

6. *Id*.

7. *See e.g. Quirk v. New Boston*, 140 N.H. 124, 130 (1995).

8. *Cohen v. Henniker*, 134 N.H. 425, 427 (1991) (quoting Waugh, "*Grandfathered*"*-The Law of Nonconforming Uses and Vested Rights*, 31 N.H.B.J. 17, 19 (1990)).

9. *Town of Surry v. Starkey and Starkey*, 115 N.H. 31, 32 (1975).

10. *Winn v. Lamoy Realty Corp*. 100 N.H. 280, 281 (1956).

11. *Id*. at 280.

12. *Id*. at 281.

13. *Id*.

14. *Id*.

15. *Id*.

16. *Id*. (quoting *Stone* v. *Cray*, 89 N.H. 483)

17. *Id*.

18. *Id*.

19. *Id*. (citing *Herskovits* v. *Irwin, supra; Lower Merion TWP*. v. *Frankel, supra*; *Omaha* v. *Glissmann*, 151 Neb. 895).

20. *Id*.

21. *Id.*

22. *Id*.

23. 110 N.H. 291 (1970)

24. *Id*. at 292.

25. *Id*.

26. *Id*. (There was question of whether of not the proposed amendment was a zoning measure and thus subject to the prerequisites for the enactment of such an ordinance).

27. *Id*. at 293-94.

28. *Id*. at 294.

29. *Id*. at 298.

30. *Id*.

31. *Id*.

32. *Id*. at 299.

33. *Id*.

34. *Id*. (citing *Tremarco Corporation* v. *Garzio*, 32 N.J. 448, 457, 161 A.2d 241, 245).

35. *Piper*, 110 N.H. at 299-300.

36. *Id*. at 303 (Grimes, J., dissenting).

37. *Id*. (Grimes, J., dissenting).

38. *Id*. (Grimes, J., dissenting).

39. *Id.* (Grimes, J., dissenting).

40. 120 N.H. 910 (1980).

41. *Id*. at 911.

42. *Id*.

43. *Id*. It is noteworthy that the plaintiff's subdivision had to be approved by the Board of Selectmen because the Town had not empowered a planning board to exercise subdivision review authority.

44. *Id*.

45. *Id*. at 912.

46. *Id*.

47. *Id*.

48. *Id*.

49. *Id*.

50. *Id*.

51. *Id*. at 913 (emphasis in original).

52. *Id.*

53. 122 N.H. 1002 (1982).

54. 122 N.H. 1002 (1982).

55. *Id*.

56. *Id*.

57. *Id*.

58. *Id*.

59. *Id*.

60. *Id*. at 1005.

61. 148 N.H. 121 (2002).

62. *Id*. at 131.

63. *See Rall v. Belmont,* 138 N.H. 172, 174 (1993).

64. *R.J. Moreau Co., Inc. v. Town of Litchfield*, 148 N.H. 773, 775 (2002).

65. *See Chasse v. Candia*, 132 N.H. 574, 579 (1989) (ruling that development could not be vested because subdivision plat was not approved or recorded).

66. *Rall v. Belmont*, 138 N.H 172, 175 (1993) (quotation and brackets omitted).

67. *Morgenstern v. Town of Rye,* 147 N.H. 558, 564 (2002).

68. RSA 674:39, II.

69. 148 N.H. 773 (2002).

70. *See id*. at 775.

71. *Id*. (stating that "if the legislature wanted to exempt impact fees, it could have included them in the statutory exceptions).

72. *See A.W.L. Power, Inc. v. City of Rochester*, 148 N.H. 603 (2002); *Morgenstern v. Town of Rye*, 147 N.H. 558 (2002).

73. RSA 674:39, III and IV.

74. RSA674:39, IV.

75. In determining whether an ordinance is a proper exercise of the town's police power, and thus able to withstand a substantive due process challenge under the State Constitution, the Court applies the rational basis test, *Dow v. Town of Effingham*, 148 N.H. 121, 124 (1999), which asks whether the ordinance constitutes a restriction on property rights that is rationally related to the municipality's legitimate goals. *Taylor v. Town of Plaistow*, 152 N.H. 142, 145 (2005).

76. "In a facial challenge to an ordinance, [the Court] will not rule the ordinance unconstitutional unless it could not be constitutionally applied in any case. An as-applied challenge solely questions the constitutionality of the ordinance in the relationship of the particular ordinance to particular property under particular conditions existing at the time of litigation." *McKenzie v. Town of Eaton Zoning Bd. of Adjustment*, __ N.H. __ (decided January 31, 2007) (quotations omitted).

77. *AWL Power, Inc. v. City of Rochester*, 148 N.H. 603 (2002); *Morgenstern v. Town of Rye*, 147 N.H. 558 (2002).

78. 147 N.H. 558 (2002).

79. 148 N.H. 603 (2002).

80. *Id*. at 559.

81. *Id*.

82. *Id*.

83. *Id*.

84. *Id*.

85. *Id*. at 560.

86. *Id*.

87. *Id*.

88. *Id.* at 563.

89. *State v. Johnson*, 134 N.H. 570, 576 (1991).

90. 147 N.H. at 564.

91. *Id*.

92. *Id*. at 564.

93. 148 N.H. 603 (2002).

94. *Id.* at 603.

95. *Id.*

96. *Id*. at 604.

97. *Id*.

98. *Id*.

99. *Id*.

100. *Id*.

101. *Id*.

102. *Id*.

103. *Id*. at 605.

104. *Id*.

105. *Id*.

106. *Id*.

107. *Id*. at 606.

108. *Id*.

109. *Id*.

110. *Winn v. Lamoy Realty Corp*., *supra*, at 281.

111. *Piper*, 110 N.H. at 303 (Grimes, J., dissenting).

112. *See Binda v. Royal Ins. Co.*, 144 N.H. 613, 616 (2000) (legislature is presumed not to have used superfluous words).

113. *Town of Hillsborough v. Smith*, 276 N.C. 48, 170 S.E.2d 904, 909 (1969)

114. *Tantimonaco v. Zoning Board of Review*, 102 R.I. 594, 232 A.2d 385, 387 (1967)

115. *AWL Power, Inc*., 148 N.H. at 608.

116. *Piper*, 110 N.H. at 303 (Grimes, J., dissenting).

Author

Matthew R. Serge is an attorney at the law firm of Upton & Hatfield, LLP in Concord, NH, and concentrates in municipal law.