

## Vesting and Divesting

[Morgenstern v. Town of Rye](#), 147 N.H. 558 (2002)

In this case that parallels the US Supreme Court's decision in *Palazzolo v. Rhode Island* in 2001, the NH Supreme Court further staked out its position as a moderate court by dividing the baby. This is an unusually long and complex opinion, with a convoluted procedural history, much of which is relevant to the outcome of the case.

I'll outline the case with a timeline, and apologize in advance for the length of this commentary:

(Pay attention, there will be a quiz)

1967: Town approves 20-lot subdivision

1971: All subdivision roads complete and accepted by town

1975: All but four lots built or permitted; subject lot is unbuilt

1975: Town adopts new zoning standards, leaving subject lot with nonconforming size and frontage

1983: Prior owner of subject lot receives a tax abatement because the lot was unbuildable

1985: Town adopts zoning provision allowing for variances for construction of residences on non-conforming lots of record

1992: Plaintiff acquires lot for \$20,000

1993: Plaintiff applies for variance to build; ZBA denies request; no motion for rehearing

1994: Plaintiff applies for building permit, claiming that he didn't need a variance; permit denied

1995: ZBA upholds denial; rehearing denied; no further appeal

1997: Plaintiff files petition for declaratory judgment in superior court, claiming that the variance portion of the town's zoning ordinance was unconstitutional both on its face and as applied to his property

1998: Plaintiff files new application for variance; ZBA refuses to hear the case, stating that there was no material change from the previous variance request; plaintiff appeals to superior court, which joins the action with the petition for declaratory judgment; superior court rules for the town on all claims; plaintiff appeals to supreme court.

**Preliminary issue:** The Town argued that the petition for declaratory judgment on the constitutional issues was barred by the doctrine of res judicata ("the thing has been decided," so go away), given that the plaintiff failed to appeal the 1993 and 1995 ZBA decisions. This may sound weird, but the Court said that because the ZBA decisions weren't appealed, the issues were preserved! The Court said that if the plaintiff had appealed the earlier denials, he would have been required to raise all issues in the appeal, but that in the absence of an appeal, a declaratory judgment action asserting that the ordinance is unconstitutional could be taken at any time. This finding reflects the Court's understanding of the importance of constitutional issues, and the need to give opportunity to challenge allegedly bad laws.

**Facial Unconstitutionality** ("facial," meaning that it's a bad law, regardless of how it's applied): Addressing the 1985 variance provision in the zoning ordinance, the Court noted that "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." Absent from this opinion is a recognition that this section of the ordinance is irrelevant--the ZBA's power to grant variances does not come from any ordinance, but from RSA 674:33, I(b). This power acts as a safety valve to prevent unconstitutional takings of property through unreasonable imposition of zoning ordinances. Of course, the Town may have enacted this provision in response to property owners' claims and/or local administrative officials' practices that suggested that nonconforming lots of record are always buildable (a position that is ardently supported by property rights advocates). Regardless, the Court thought that the zoning provision was OK on its face.

**Unconstitutional as applied to plaintiff's property:** Among other things, the plaintiff asserted that he had vested rights to develop the property (this was probably also the basis of his applying for a building permit in 1994), because the subdivision had already been almost completely built out when the zoning was changed in 1975.

Reviewing past cases, the Court set itself up to agree with this argument, noting that "... the developer of a subdivision approved under a prior zoning ordinance that has undergone substantial construction under the approved plan acquires a vested right to complete the project in accordance with the original subdivision despite the subsequent adoption of a contrary ordinance ... This right may run to the developer's successors in interest." But first, the Court proposed a test: (1) was there a vested right? and (2) did it pass to the new owner? The key on remand is that the right must have vested prior to the 1975 change in zoning. Subsequent investments in the property don't count (e.g., plaintiff's purchase price) [Before you continue, go back to the time line and pick out the critical date for this case's vesting consideration. Correct guessers will get a prize!]

Next, the Court addressed the plaintiff's takings claim, which was based on the refusal of the ZBA to consider the new variance request. The superior court had agreed that although there were changes in the application, there were "no changes in the neighborhood or upon the plaintiff's property between the first and second applications which would constitute a material change in circumstances [a]ffecting the merits of the application." The Supreme Court instead focused on the changes to the application itself (engineering, site layout, etc) and found that these changes were sufficient. The Court went over many differences between the old and new variance applications, and concluded that the ZBA must consider the application on its merits (remember that the ZBA hadn't denied the application, it had simply refused to hear it). Without addressing the takings claim, the Court vacated the superior court's decision and remanded for further proceedings. So back it goes to the ZBA.

**Some observations:** The Court was clearly unhappy that the ZBA wouldn't consider the new variance application, given that there were changes made in response to the ZBA's earlier denial. I think the message the Court is sending is for boards not to shut out applicants who are making legitimate attempts at responding to earlier criticism or bases for denials. Of course, I'm sure there's another side to this story.

Remember the point about the ZBA's powers: the ordinance doesn't need to specify them, as they come from statute.

**For property owners:** That tax abatement can come back and bite you sometime. Today's choices are tomorrow's consequences.

*Ben Frost, Office of State Planning, April 2001*