

## AWL Power, Inc. v. Rochester

The Supreme Court decided [AWL Power, Inc. v. City of Rochester](#) on December 9, 2002, and added a bit to our knowledge of how vested interests in a development are determined.

First, the statute central to the case is [RSA 674:39](#), the four year exemption (quoted here in relevant part):

**Every plat or site plan approved by the planning board and properly recorded in the registry of deeds shall be exempt from all subsequent changes in subdivision regulations, site plan review regulations, and zoning ordinances ... for a period of 4 years after the date of recording; provided, however, that once substantial completion of the improvements as shown on the plat have occurred in compliance with the approved plat, 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 or zoning ordinances shall operate to affect such improvements; and further provided that:**

**I. 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 plat within 12 months after the date of approval, or in accordance with the terms of the approval ...**

What happened here is that a 24-acre parcel was approved in 1987 for subdivision and site plan for 18 single family homes and a 59 unit condominium complex. There were several public improvements required of the developer, including sidewalks, sewer line extension, fencing, and a road. In the first three years, 6 of the houses were built, and the developer invested a little over \$200,000 in the public improvements (including finishing work on the sidewalk and sewer line). The developer also paid a \$50,000 impact fee for off-site improvements. The projected cost (2002 dollars, I think) of the entire project was over \$6.4 million.

In 1988, Rochester amended its zoning ordinance, rendering the proposed condominium and many of the proposed single family houses non-conforming uses. The developer was allowed to continue work under the original approvals, apparently having met the 12-month criterion in RSA 674:39,I (there's no dispute over that). Work on the development stopped in 1990.

The developer attempted to resume work on the project in 2000. The planning board determined that 43.2% of the required public improvements and 10.7% of all planned improvements had been completed. Based on this, the planning board determined that the project had not vested and that the developer was precluded from finishing the project. In essence, the board was saying that the developer had not met the standard of "substantial completion of the improvements shown on the plat ..." which confers permanent vesting of an approval (I use the word "permanent" loosely, as there are always some circumstances that might intervene to "kill" a vested right).

To measure what is "substantial completion," the court turned to its own definition of vesting in *Piper v. Meredith*, 110 NH 291 (1970), which has no time limit:

**"[A]n owner, who, relying in good faith on the absence of any regulation which would prohibit his proposed project, has made substantial construction on the property or has incurred substantial liabilities relating directly thereto, or both, acquires a vested right to complete his project in spite of the subsequent adoption of an ordinance prohibiting the same."**

So the essence of this dispute is how to measure "substantial completion" or "substantial construction" (the court says they're the same thing). The developer said that the improvements completed should

only be measured against the public improvements required. Rochester maintained that improvements completed should be measured against the total cost of the project, including private improvements. Using the developer's method, the trial court found that 70% of the improvements were complete; using Rochester's, only 3%. The court sided with Rochester, and found that the project hadn't vested. On appeal, the supreme court rejected the superior court's analysis:

**"... we have never held that completion of a certain percentage of construction is the exclusive method by which the rights of a developer may vest.**

**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. ... In cases where construction expenditures amount to large sums, construction need not 'be judged by comparison to the ultimate cost' of the project".**

So it seems that the standard of "substantial construction" is not a relative one, but an absolute one, though the court did state that judgment as to what is "substantial" would vary with circumstances. Yes, this is a tough nut to crack. In this particular case, the supreme court determined that the completed public improvements (sidewalks, sewer), combined with the 6 houses that had been built met the common law standard of "substantial construction" and so the project is vested. Conclusions: this case does clarify things a little, by helping planning boards understand how to gauge "substantial completion" of projects. It's not an exercise in advanced mathematics, but rather an assessment of whether or not a lot of money has been spent or liabilities incurred. Well, OK, it's not clear to me, either. I guess it's something of a duck test.

Moral: The importance of this case is not in the opinion itself, but in what it should encourage planning boards to do. Take a look at the final paragraph of RSA 674:39:

**IV. As part of its approval of a plat or plan, the planning board may, with due regard to the scope and details of a particular project, specify the threshold level of work which shall constitute "active and substantial development or building" for purposes of fulfilling paragraph I of this section, or may, for good cause extend the 12-month period set forth in paragraph I.**

Take this section seriously, folks. It wouldn't have made a difference in this case, but can be a great help to you in others--and to the developers, who want predictability almost as much as they want an approval.

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