

FILED

November 22, 2010
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Ketchum, J., dissenting:

I dissent because this Court should adopt the vested rights doctrine as it applies to property developers. My reasons, in the context of this case, are as follows:

RELEVANT UNDISPUTED FACTS

1) In 2001, the City of Hurricane (City) approved the appellee’s (the developer’s) subdivision plat. After approval, the plat was recorded in the office of the Clerk of the Putnam County Commission. The approval of the City and the recordation with the Clerk complied with *W.Va. Code*, 39-1-13 (1923) and *W.Va. Code*, 39-1-16 (1923), which concern the approval and recordation of subdivision plats.

2) The developer then spent substantial sums of money developing the subdivision’s lots, roads and infrastructure which totaled more than \$150,000.00. After obtaining building permits from the City, the developer built 41 houses in the subdivision.

3) Four years later, on June 6, 2005, the City enacted a stormwater management ordinance.

4) After the storm water management ordinance was enacted, the City refused to issue any more building permits to the developer, even though the developer has 30

remaining vacant lots in the previously approved subdivision plat. The City refused to issue building permits unless the developer agreed to build a \$25,000.00 stormwater retention pond on three of the subdivision's vacant lots. The developer's pro-rata vacant lot cost was approximately \$22,000.00, or a cost of \$66,000.00 for the three lots that would be taken for the pond.

5) The developer refused to build the stormwater retention pond because the subdivision plan was approved before the new stormwater ordinance was adopted. More than 50% of the subdivision development was completed at substantial cost when the stormwater ordinance was adopted.

6) The City's refusal to issue the building permits on any of the developer's 30 remaining vacant lots has prevented the developer from completing the subdivision.

**THE DEVELOPER'S "VESTED RIGHT" IN THE
SUBDIVISION'S COMPLETION**

The parties argued in the circuit court and in this Court about whether the subdivision was a nonconforming use and, therefore, grandfathered into the June 6, 2005 stormwater management ordinance. The developer should have argued that land-use law gives it a "vested right" to complete the subdivision without complying with the new stormwater management ordinance. Had this argument been developed, it could very well have lead the majority to the correct conclusion that the developer does have a "vested right" to finish his subdivision without complying with the new stormwater management

regulations.¹ Despite the parties' lapse in developing what I believe is the controlling issue, the majority should have adopted the vested rights doctrine.

Vested rights in land-use law deal with a developer's right "to continue with development of a proposed - but not yet final - use of land in the face of subsequent changes of law." John J. Delaney, *Vested Rights and the Development Chronology 2000 Update*, SF08 ALI-ABA 379 (2000). See also, John J. Delaney, *Vesting Verities and the Development Chronology: A Gaping Disconnect?* 3 *Wash. U. Journal of Law & Policy*, 603 (2000); Daniel R. Mandelker, *Vested Rights and Nonconforming Uses*, SK002 ALI-ABA 1103 (2004); Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, 84 *NYU Law Rev.* 1222 (2009).

¹Justices Cleckley and Davis teach that this Court has authority to address an issue not properly presented at the trial court level.

[A]lthough the rule requiring all appellate issues be [properly] raised first in the circuit court is important, it is not immutable: Our cases have made clear that the failure to [properly] raise issues below is not a jurisdictional prerequisite to an appeal but, rather, is a gatekeeper provision rooted in the concept of judicial economy, fairness, expediency, respect, and practical wisdom. Requiring issues to be [properly] raised at the trial level is a juridical tool, embodying appellate respect for the circuit court's advantage and capability to adjudicate the rights of our citizens.

Louk v. Cormier, 218 W.Va. 81, 86, 622 S.E.2d 788, 793 (2005), citing *State v. Greene*, 196 W.Va. 500, 505, 473 S.E.2d 921, 926 (1996).

Simply stated, vested rights of a subdivision developer deal “with the right to complete a development despite changes in land development regulations[.]” Daniel R. Mandelker, *Vested Rights & Nonconforming Uses*, *supra*.

The controlling issue is when does the developer’s use of the subdivision property vest or what does it take for the development right to vest? There are no West Virginia cases dealing with the vested rights doctrine. However, land-use law, where developed, generally holds:

A landowner obtains a vested right to complete construction on a specific development project when the landowner

- (1) obtains or is the beneficiary of an affirmative governmental act allowing development of a specific project, and
- (2) relying in good faith upon the affirmative governmental act,
- (3) makes a substantial change in position or incurs extensive obligations or expenses in the furtherance of the specific project in accordance with the affirmative governmental act.

Grayson P. Haynes and J. Randall Minchew, *On Vested Rights to Land Use and Development*, 46 Wash. & Lee L.R. 373, 386 (1989). *See also*, J. Spencer Hall, *State Vested Rights Statutes: Developing Certainty and Equity and Protecting the Public Interest*, 40 The Urban Lawyer 451 (2008).

John J. Delaney, a leading commentator on land-use law, notes that vested rights law in the United States can be confusing due to a hodge-podge of case-by-case judicial decisions. However, Delaney agrees that the general black letter rule for the acquisition of a vested right in a development (subdivision) occurs when (1) the landowner relies in good faith on an act or omission of the government, and (2) the landowner makes

substantial expenditures prior to the land regulation changes. John J. Delaney and William Komines, “He Who Rests Less, Vests Best: Acquisition of Vested Rights in Land Development,” 23 St. Louis Univ. Law Journal 219 (1979). *See also*, John J. Delaney, *Vested Rights and The Development Chronology 2000 Update*, SF08 ALI-ABA 379 (2000).

In 2004, our Legislature passed land-use legislation that specifically recognizes the vested rights doctrine. *See, W.Va. Code*, 8A-5-12 (2004). This new law does not apply to the City in this case. Nevertheless, it spells out the West Virginia Legislature’s thoughts on the vested rights of subdivision developers.

Specifically, *W.Va. Code*, 8A-5-12 (2004), provides:

(a) A vested property right is a right to undertake and complete the land development. * * *

(d) Without limiting the time when rights might otherwise vest, a landowner’s rights vest in a land use or development plan and cannot be affected by a subsequent amendment to a zoning ordinance or action by the planning commission when the landowner:

(1) Obtains or is the beneficiary of a significant affirmative governmental act which remains in effect allowing development of a specific project;

(2) Relies in good faith on the significant affirmative governmental act;

(3) Incurs extensive obligations or substantial expenses in diligent pursuit of the specific project in reliance on the significant affirmative governmental act.

Land-use law is rapidly developing because of urban sprawl. Our courts have had very few cases dealing with land-use law because we have been a rural state. However, land use is rapidly changing in this State. Lawyers dealing with these cases need to educate themselves, the trial courts, and any appellate court. Lawyers can no longer rely only on West Virginia precedent. They must consult decisions from other jurisdictions as well as the numerous articles and treatises on the subject. A good starting point is Daniel R. Mandelker, *Land Use Law* (5th ed. Matthew Bender 2003); Delaney, Abrams and Schnidman, *Handling the Land Use Case* (Thomson Reuters / West 3rd ed. 2010); and James A. Kushner, *Subdivision Law and Growth Management* (2nd ed. Thomson Reuters / West 2010).

I respectfully dissent. We should have taken this opportunity to examine and adopt the vested rights doctrine. I am convinced that the vested rights doctrine governs the developer's right to complete the subdivision.