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If Permits are Wrong, You Won't Have a Right: Town's Erroneously Issued Permit Invalidates Application of "Vested Rights Doctrine"

For real estate developers, the issuance of a building permit should be cause for celebration at the end of an oft arduous application process. By definition, a "permit" means the developer has the right to proceed with the project. Going further, New York's "vested rights doctrine" enables a developer to complete a project for which it has validly issued permits, even if subsequent code amendments or zoning changes render the project impermissible. As a recent decision from the Appellate Division, Second Department demonstrates, the key phrase is "validly issued." A developer who unwittingly relies on erroneously issued permits has no vested rights at all.

The Case: ***In the Matter of C & B Realty #3, LLC v. Van Loan***

In 2014, the town of Oyster Bay issued a permit (which was renewed several times) to developer C & B Realty to construct commercial space in its parking lot. In 2017, the developer commenced construction, but shortly thereafter, the town issued a notice of violation and stop-work order. The reason? On further review (and notwithstanding the fact that the town had both issued and repeatedly renewed the permit), the town determined the proposed construction did not contain the number of parking spaces required by the town code. The developer applied to the town's Zoning Board of Appeals (ZBA) for a variance and, after it was denied, filed an Article 78 proceeding asserting that it had "vested rights" to carry out the planned construction. The lower court agreed, granted the petition and directed the ZBA to grant the variance. The Second Department reversed the decision on appeal, holding the doctrine inapplicable.

The vested rights doctrine protects a property owner from changes in local zoning laws that would prevent the continued or expected use of a property "in a way that was permissible before" such changes. "A vested right can be acquired when pursuant to a *legally issued* permit, the landowner demonstrates a commitment to the purpose for which the permit was granted by effecting substantial changes and incurring substantial expenses to further the development." However, invalid permits may not serve as the basis for application of the doctrine and a "mistaken or erroneous issuance of a permit does not [prevent correction by the Zoning Board], even where there are harsh results." Here, the town's original issuance of the permit was in error (because the developer did not have the correct number of parking spaces), and so the developer had no vested rights to the project, even though it had been in the works for *three years* and the permit had been renewed multiple times.

Takeaway

The valid issuance of a building permit vests a developer with the right to complete the project and protects the developer from intervening changes in the building code or zoning laws. An invalidly issued building permit, however, offers no such repose. In

such cases, the vested rights doctrine does not apply, and the courts will not estop local governments from halting a project, even in the face of extensive reliance by the developer.