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Article 17

Public Law - Effect of Zoning Ordinance Amendments on Building Permits

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take from or enlarge the meaning of a statute by reading into it language which will, in the opinion of either, correct any supposed omission or defect,[18] and since the legislature in its new enactment departed substantially from the expression of policy as stated in the Descent Act[19] without any indication that this departure was unintentional, the court seems justified in assuming that the departure was intentional.

Thus it can be seen that Illinois has progressed from the strict rule of the common law which denied inheritance entirely, into a very liberal policy, and then seemingly, has dropped back one notch in the cycle. It will now be up to the legislature in the next session to determine whether or not Illinois will follow the law as interpreted by the Supreme Court or will follow the trend toward liberalization of the rules regarding illegitimates, by revising the Probate Act.

PUBLIC LAW–EFFECT OF ZONING ORDINANCE AMENDMENTS ON BUILDING PERMITS

The plaintiffs sought judicial declaration that the defendant company had no vested right by virtue of its building permit to construct a manufacturing building in an area zoned for family dwellings. The plaintiffs contended that the building permit had been subsequently revoked by an ordinance amendment. However, prior to the effective date of the amendatory ordinance, the defendant, relying upon a building permit issued in accordance with the zoning regulations then in force, had caused substantial work to be done on the premises. The Appellate Court of Illinois held that the defendant had acquired a vested right under the permit. The subsequent amendment could not effectively revoke the building permit. *Deer Park Civic Assoc. v. City of Chicago,* 347 Ill. App. 346, 106 N.E. 2d 823 (1952).

The problem here presented is a controversial one, and the courts are not in complete agreement as to how it should be resolved.[1] Although they agree that a person should be protected against an amendatory ordinance revoking his building permit where he, in reliance upon such permit, has caused substantial work to be done on his premises, there is a

[18] American Steel Foundries v. Gordon, 404 Ill. 174, 88 N.E. 2d 465 (1949).

[19] Ill. Rev. Stat. (1939) c. 39, § 2.

[1] Brett v. Building Commissioner of Brookline, 250 Mass. 73, 145 N.E. 269 (1924); Fitzgerald v. Merard Holding Co., 110 Conn. 130, 147 Atl. 513 (1929); Crow v. Board of Adjustment of Iowa City, 227 Iowa 324, 288 N.W. 145 (1939); City of Omaha v. Glissmann, 151 Neb. 895, 39 N.W. 2d 828 (1949); Howe Realty Co. v. Nashville, 176 Tenn. 405, 141 S.W. 2d 904 (1940); Fairchild Sons v. Rogers, 246 App. Div. 555, 282 N.Y. Supp. 916 (S. Ct., 1935); Southern Leasing Co. v. Ludwig, 168 App. Div. 233, 153 N.Y. Supp. 545 (S. Ct., 1915); Rice v. Van Vranken, 132 Misc. 82, 229 N.Y. Supp. 32 (S. Ct., 1928).

wide range of disagreement as to what amount of work constitutes substantial work done.[2]

In a New York decision it was stated that:

> Where a permit to build a building has been acted upon, and where the owner has proceeded to incur obligations and in good faith to proceed to erect the building, such rights are then vested property rights protected by the federal and state constitutions.[3]

This same case held that while it was unfortunate for the residential owners in the immediate sector of the apartment building being built, since a building permit had been issued for the construction of the apartment building, and the innocent purchaser of the real estate had acted in good faith upon the permit to his detriment by surveying the land and having the excavation work done, the purchaser of the property acquired vested rights under his permit to complete the apartment building, and the zoning law could not be subsequently amended so that the building permit would be thereby cancelled.

Another New York decision held that an amendatory zoning ordinance which prohibited the erection of a gasoline filling station in a certain region did not preclude the owner or lessee of such premises from proceeding under a permit issued prior to the amendment, since great hardship would have been imposed had the building permit been revoked after the permittee had spent so much money in reliance thereof.[4]

In *Crow v. Board of Adjustment*[5] a veterinarian wished to build an animal hospital in a certain neighborhood. Relying upon the advice of the building inspector and upon a building permit, the veterinarian purchased a lot, cleared it, and otherwise relied upon the permit to his detriment. Later the adjoining land owners brought action to have the permit cancelled. The permit was cancelled; however, on appeal the decision of the board was reversed and the permit sustained. The court held that the permit had a valid inception, and since construction work was begun, the resulting change in status gave the permittee a vested right to continue under the permit as issued, and because of this, the permit was irrevocable.

In the case of *City of Omaha v. Glissmann*[6] the court went even further in presenting the more equitable rule. The court stated:

[2] Authorities cited note 1 supra.

[3] Pelham View Apartments v. Switzer, 130 Misc. 545, 546, 224 N.Y. Supp. 56, 58, (S. Ct., 1927); To the same effect: Sandenburgh v. Michigamme Oil Co., 249 Mich. 372, 228 N.W. 707 (1930).

[4] New York Investing Co. v. Brady, 214 App. Div. 592, 212 N.Y. Supp. 605 (S. Ct., 1925).

[5] 227 Iowa 324, 288 N.W. 145 (1939).

[6] 151 Neb. 895, 39 N.W. 2d 828 (1949).

If after a purchase or leasing thereof, a permit is obtained to use lands for a use then permissible under the zoning ordinances and either substantial construction is made thereon or substantial liabilities are incurred relating directly thereto, or both, before the permit is cancelled or revoked then the right to such use has become established and vests as a permissive nonconforming use which cannot be affected by a subsequent change.[7]

However, the court held that since the only work done was some grading, and digging, no vested right existed in the permittee and his permit could be revoked.

The element of hardship is an important factor in these cases and, in the absence of such a showing, the courts will generally enforce the amendment and cancel the pre-existing permit.[8] Such a result occured in the case of *Fitzgerald v. Merard Holding Co.*[9] The court in that case held that the possession of a permit to build, commencement of construction, or the fact that contracts entered into with third parties might be affected, did not constitute a vested right, the invasion or deprivation of which by amendatory ordinance would invalidate the amendment on constitutional grounds. The court implied that had the building been substantially in the course of construction, the building permit might have been sustained.

In the leading case of *Brett v. Building Commissioner*[10] the court held that persons to whom permits for the construction of two-family dwellings had been issued would not be protected and would be affected by subsequent amendments prohibiting such structures to be built, although they had started work pursuant to their permits. The court held that the excavation, engineering work, and forms constructed did not constitute work done, i.e., existing structures within the meaning of those words in the statute.[11] Although the decision of this case was proper under the peculiar statute of Massachusetts, the result seems most unjust and inequitable. Certainly excavation, engineering work, and forms set up for pouring foundations are an integral part of the construction of buildings. The costs incurred should be and are considered costs in building construction. Where such work is done on large buildings, it will entail tremendous costs, much more than the total construction costs of smaller buildings. A person incurring such costs in good faith should be protected. The cost of pouring the concrete foundation should hardly be considered work done any more than excavation or form setting for the foundation. It is general knowledge in the construction field that very

[7] Supra, at pp. 899, 834.

[8] City of Omaha v. Glissmann, 151 Neb. 895, 39 N.W. 2d 828 (1949); Brett v. Building Commissioner of Brookline, 250 Mass. 73, 145 N.E. 269 (1924).

[9] 110 Conn. 130, 147 Atl. 513 (1929).

[10] 250 Mass. 73, 145 N.E. 269 (1924). [11] Mass G.L. (1932) c. 40, § 29.

often it costs more money to excavate the land and set up the forms for the foundation than to pour it.

In Illinois the precise issue raised by the present case had not previously been before the courts. However, in earlier cases the courts had applied equitable estoppel where an owner, in reliance upon affirmative acts of the city, had made expensive improvements or had otherwise relied upon such acts to his detriment.[12] In the present case, the defendant had relied upon his building permit and caused the building site to be rough graded, excavations for foundations and footings dug and pumped dry, underground sewer, drainage, water, and gas lines installed, and form work for column and line wall footings and foundations installed. The defendant had incurred liabilities upon the construction contracts amounting to approximately $600,000.00. Most of the work had been done upon contracts entered into before the permit was even issued. However, the court made no distinction between the work done upon contracts entered into before and upon those entered into after the permit was issued. The Illinois Court followed the more equitable rule of the *Glissmann* and *Crow* cases.

The result obtained in the present case would seem to be the more reasonable and equitable one in a society where zoning regulations are so important. It protects a person when he should be protected, namely, where he has relied upon existent zoning ordinances in undertaking construction contracts and work upon his premises. In states strictly following the rule of the *Brett* case that zoning laws are not contracts by the government and may be amended unless a great deal of work has been done, the property owner will be forever waiting for subsequent amendments before undertaking construction. Even after all the wasteful waiting, an amendment may still be passed affecting the property before construction is "far enough along" so as to give the owner a vested right. This will result in much unfairness and the purposes of the zoning ordinances will be defeated because people will be less inclined to rely upon them in fear of subsequent amendments.

PROPERTY–PUBLIC POLICY AND ITS EFFECT ON THE PROOF OF PAROL GIFTS CAUSA MORTIS

Plaintiff was a nurse who, in the course of her employment, frequently visited Emily Collinson, aged sixty-nine and in ill health. When Emily Collinson's health took a turn for the worse, the plaintiff arranged to admit her to a hospital. During the ride to the hospital, Emily Collinson said to the alleged donee, "Here is a box, I am giving it to you, and if I die, it is yours. I don't want anyone else to have it." Emily Collinson died

[12] Hurt v. Hejhal, 259 Ill. App. 221 (1930); The People v. Thompson, 209 Ill. App. 570 (1918).