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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF EXETER BUILDING CORP.,

Appellant,

-against-

No. 20

TOWN OF NEWBURGH, et al.,

Respondents.

-----

20 Eagle Street  
Albany, New York 12207  
January 14, 2015

Before:

ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Official Court Transcriber

1 JUDGE PIGOTT: Case number 20, Matter of  
2 Exeter Building Corporation v. The Town of Newburgh.

3 Mr. Golden, good afternoon.

4 MR. GOLDEN: Good afternoon, Your Honor. I  
5 would like to reserve two minutes for rebuttal,  
6 please?

7 JUDGE PIGOTT: Okay.

8 MR. GOLDEN: May it please the court. What  
9 is at stake in this appeal is the continued viability  
10 and the contours of the common law vesting doctrine  
11 in this state, a doctrine that has been in place for  
12 over a hundred years, well before - - -

13 JUDGE STEIN: Do you agree with me that  
14 that - - - that that has sort of a two-part test?  
15 First, that the - - - that there has to be reliance  
16 on a lawfully issued permit, and then the question  
17 becomes whether there was a commitment to the purpose  
18 and - - - and the devotion of substantial actions and  
19 - - - and expenses? Do you - - - do you agree with  
20 that analysis, the two part - - -

21 MR. GOLDEN: I - - - I think, Your Honor,  
22 that the actual - - - a lot of times it's posed as a  
23 three-part test, but actually the three parts change  
24 from decision to decision. I think certainly both of  
25 those elements are part of the test.

1 JUDGE STEIN: Okay. So and my next  
2 question is, is I think one of the things we have to  
3 determine here is what - - - what do we mean by a  
4 "lawfully issued permit" or - - - or approval, right?

5 MR. GOLDEN: Correct.

6 JUDGE STEIN: And - - - and if we find that  
7 that does not exist here, we don't - - - we don't get  
8 to look at the extent of the actions and the  
9 expenditures, correct?

10 MR. GOLDEN: The - - - the common law  
11 vesting doctrine has never recognized that you could  
12 have protected rights when you're doing work that's  
13 not authorized.

14 JUDGE STEIN: Okay.

15 MR. GOLDEN: Okay? That's clear. That  
16 didn't happen in this case. And the Town concedes  
17 that the work that was done by Exeter was work that  
18 was authorized. There were three - - -

19 JUDGE STEIN: Okay, but the - - - the  
20 question is, is whether the - - - the law - - - the  
21 authorization has to be for the project as a whole or  
22 for just individual pieces of it, right? Isn't that  
23 the question?

24 MR. GOLDEN: Well, I think what it is, is  
25 that there - - - you - - - you can vest in a plan or

1 project if, in fact, you have other discrete  
2 approvals or other discrete building permits that are  
3 in furtherance of the plan. That has been consistent  
4 throughout the hundred years of this doctrine. We -  
5 - - in this case - - -

6 JUDGE STEIN: Because here - - - here you  
7 have a - - - an approval, but it's conditional. So -  
8 - -

9 MR. GOLDEN: Well, Your Honor, I don't  
10 think that's correct.

11 JUDGE STEIN: So we - - - do we - - - you  
12 don't?

13 MR. GOLDEN: No. I don't think that's  
14 correct at all. There was actually three resolutions  
15 of approval all of which related to the same plan.  
16 There was a final subdivision approval, and that  
17 final subdivision plat was filed with the county.

18 JUDGE PIGOTT: When was that? When was  
19 that?

20 MR. GOLDEN: That was 2005, and it was  
21 filed with the county in 2006. Then there was a  
22 resolution of final site plan. It wasn't  
23 conditional. It had conditions in it, but it wasn't  
24 conditional in the sense that those conditions didn't  
25 say that you don't have an approval until you have

1 satisfied all these conditions. What it - - -

2 JUDGE STEIN: Well, you couldn't get a  
3 building permit until you satisfied the conditions,  
4 correct?

5 MR. GOLDEN: No. What the - - - there were  
6 actually many conditions. And the ones that are  
7 complained of here are ones that say well, it's a  
8 condition precedent. But it's a condition precedent  
9 to sign - - - having the chairman of the planning  
10 board sign the site plan. The chairman has already  
11 signed this resolution of approval and said, yes, we  
12 approve of this plan.

13 The - - - the rest of those conditions are  
14 really administrative. And - - - and the important  
15 part of this is that the third resolution of approval  
16 that the planning board gave was a resolution with  
17 respect to the clearing and grading permit.

18 JUDGE PIGOTT: When was that?

19 MR. GOLDEN: That was 2008 or '9, Your  
20 Honor.

21 JUDGE FAHEY: So I'm clear, you're arguing  
22 that this wasn't a conditional permit?

23 MR. GOLDEN: That's correct. It wasn't a  
24 conditional - - - it was a - - - it was a final  
25 permit - - - a final resolution of approval - - -

1 JUDGE FAHEY: With conditions in it?

2 MR. GOLDEN: - - - with conditions. But  
3 conditions that said well, you have to do this. Some  
4 of those conditions said you have to install all of  
5 your sewer infrastructure. That doesn't mean that  
6 you don't have an approval.

7 JUDGE FAHEY: Well, it's - - - there's - -  
8 - I count eleven that - - - that - - - that had to be  
9 - - - just to follow up on Judge Stein's point, I  
10 count eleven conditions, and they include things like  
11 amended landscape plan, names of the roadways, condo  
12 bylaws, authorization for police to enter,  
13 streetscape and recreational plan - - - or no, that's  
14 under land - - - landscape security fee, storm water  
15 improvement security fee, water main extension, sewer  
16 main extension, inspections fees.

17 And you're saying the nature of all those  
18 fees is administrative?

19 MR. GOLDEN: That's correct. It's - - -  
20 it's as if the plans themselves had notes on the  
21 plans, which many of the plans do, on dif - - -  
22 additional conditions that have to be done. This is  
23 very typical in - - - in these things. The clearing  
24 and grading permit was actually the one that - - -  
25 that authorization and that clearing and grading

1 permit is - - - here it is, at the record at A - - -

2 UNIDENTIFIED SPEAKER: 374.

3 MR. GOLDEN: Thank you, Michael. A-374.

4 JUDGE PIGOTT: What - - - what - - - when  
5 was that? What's the date?

6 MR. GOLDEN: June 2008. That's the - - -  
7 the permit. And the resolution which follows it,  
8 beginning at A-376 - - -

9 JUDGE STEIN: But you can't build a  
10 subdivision based on - - -

11 MR. GOLDEN: - - - was July of 2008. I'm  
12 sorry.

13 JUDGE STEIN: - - - you can't build a  
14 subdivision based on that permit, can you?

15 MR. GOLDEN: You need lots of things in  
16 order to carry forward the subdivision. And many of  
17 them occur at the very end of the project. And those  
18 were man - - - many of those were listed. And in  
19 fact, there were conditions of conditions, because  
20 the conditions in that site plan - - - final site  
21 plan approval - - - it wasn't a conditional site  
22 plan, it was a final site plan - - - it just simply  
23 had conditions - - - said you also have to satisfy  
24 all the conditions of the water and sewer extension.

25 JUDGE PIGOTT: What's the significance of

1 the July 2005 notice by the - - - by the Town that  
2 they may be changing the zoning?

3 MR. GOLDEN: Nothing. I mean, because  
4 noting would - - - would happen, at that point in  
5 time. All - - - all they're saying is that we're  
6 thinking about changing the zoning. They may not  
7 complete CICA (ph.). CICA might be in such a way as  
8 to defeat that aspect of it. So all of it is, is  
9 sort of this, well, I'm thinking about changing it.  
10 And I think it's the - - - the height of hubris to -  
11 - - for a municipality to say well, as soon as I'm  
12 thinking about changing it, you can't do anything at  
13 all. You're prejudiced.

14 JUDGE PIGOTT: Is it - - - okay.

15 MR. GOLDEN: And I want - - -

16 JUDGE ABDUS-SALAAM: Well, but they didn't  
17 say that, did they? They said you can do it, but  
18 it's at your peril.

19 MR. GOLDEN: Well, everything is at our  
20 peril, if, in fact, we weren't able to come within  
21 the doctrine of common law vested rights. The third  
22 resolution - - - and I think it's very important - -  
23 - the third resolution of this clearing and grading  
24 permit also had conditions which were satisfied.  
25 They went out and did a lot of work. In fact, most

1 of the work, that goes toward the common law vesting  
2 was done under the clearing and grading permit. So  
3 they did that work. It was an authorized work. And  
4 it was substantial work. The Town doesn't contradict  
5 the fact that it was substantial modification to  
6 land. The town - - - the Town doesn't contradict the  
7 fact that there were substantial expenditures or that  
8 the changes to the land would be rendered valueless  
9 if - - - under the new zoning. So they satisfy the  
10 test.

11 The Town objects on three very different  
12 points. The Town objects to say, one, well you  
13 didn't satisfy all the conditions of one of those  
14 approvals of the plan, and that's the site plan. So  
15 you have to satisfy all of those, every single one of  
16 them. The ZBA below said you have to satisfy all of  
17 those. We're not even going to consider common law  
18 vesting until you've satisfied every single  
19 condition.

20 JUDGE PIGOTT: And that's all of them,  
21 including the one Judge Fahey was talking about?

22 MR. GOLDEN: And - - - and more than just  
23 the eleven. Every single one of them, according to  
24 them.

25 JUDGE FAHEY: Well, there were - - - there

1 were eighteen total, but I didn't think all of them -  
2 - - only eleven under my count, had to do that.

3 You know, your time is getting short here,  
4 and - - - and in the Ellington case it refers to a -  
5 - - the requirement to establish vesting - - -  
6 vesting rights: substantial construction, which we  
7 don't - - - and a substantial expenditure. You've  
8 got to address that test, I think.

9 MR. GOLDEN: I - - -

10 JUDGE FAHEY: Go ahead. I want you to  
11 address that test, just and focus in. Because the  
12 way I looked at the expenditures, it depended under  
13 which R zoning plan you're going under One R zoning  
14 plan, the R-3 zoning plan, was about a 13-million-  
15 dollar project, according to your - - - the record.  
16 And R-1, which is where we ended up, is about a 2.5-  
17 million-dollar - - -

18 MR. GOLDEN: They had - - - it set forth in  
19 the opinion below in Supreme Court, all of the work  
20 that had been accomplished. The 34,000 square - - -  
21 cubic yards; the roads were graded to their proper  
22 grade, the subgrade; there were pads that were set  
23 out for all the houses in a portion of that first  
24 phase. They had put in the storm water management.  
25 They had put in erosion control.

1           There was substantial work that was done.  
2           And again, the - - - the Town did not dispute the  
3           fact that that was substantial work. It just said  
4           that's not why we're going against this. It's  
5           because you didn't do all of the conditions of that  
6           final site plan approval. That's the only reason  
7           they said it in the ZBA.

8           The Supreme Court said no, that's not it,  
9           and went through and heard testimony on all of the  
10          issues with respect to substantiality as to the  
11          construction, expense, and with respect to the value  
12          of the the sub - - -

13          JUDGE RIVERA: How long did you think you  
14          had to comply and satisfy all those conditions?

15          MR. GOLDEN: Well, because of the  
16          litigation involved, even though the statutory  
17          vesting gave us three years, we were down to ten  
18          months at the point of view that we were able to go  
19          forward. So we did this in the ten months that there  
20          was. And then we were told we had to stop by the  
21          Town. We were continuing to go ahead and work.

22          The conditions - - - talking - - - getting  
23          to the conditions, I think it's - - -

24          JUDGE RIVERA: I'm sorry, when you get the  
25          resolution, you understood there was this three-year

1 time period. You understood you had to work - - -

2 MR. GOLDEN: Yes.

3 JUDGE RIVERA: - - - within that three-year  
4 time period.

5 MR. GOLDEN: That's correct. And we worked  
6 - - -

7 JUDGE RIVERA: And if you had not completed  
8 it at the end of three years, your expectations were  
9 what?

10 MR. GOLDEN: Well, it - - - it wasn't that  
11 we had to complete everything.

12 JUDGE RIVERA: Continue to get extensions?  
13 Or - - -

14 MR. GOLDEN: No. If - - - we didn't have  
15 to complete everything. All we had to do was satisfy  
16 the three-part test of - - - of the substantial  
17 amount of changes that would be rendered valueless.

18 When we were doing this, we didn't know  
19 what - - -

20 JUDGE RIVERA: You're supposed to meet all  
21 the conditions?

22 MR. GOLDEN: No. You - - - it's never been  
23 the case to meet all the conditions. And in fact,  
24 Ellington had several conditions that it did not  
25 complete that it was supposed to make improvements to

1 a county road - - -

2 JUDGE FAHEY: Sure, because there - - -  
3 there could be impossible conditions. You - - - you  
4 - - - if the requirement was to complete all of them,  
5 that - - - it's substantial. We accept that.

6 MR. GOLDEN: But - - - but Ellington also  
7 had conditions that could have been completed but  
8 weren't. The - - - the changes to the county road,  
9 the - - - they only completed seven out of the nine  
10 of the first building permits - - - first lots in the  
11 first phase. But this court had said, well, that's  
12 all right. They still had to do those conditions,  
13 but that doesn't mean that they didn't satisfy the  
14 test of substantial construction, substantial  
15 expenditures and valuelessness of the construction  
16 that was done.

17 JUDGE PIGOTT: Thank you, sir.

18 MR. GOLDEN: I'll wait for the rebuttal.

19 JUDGE PIGOTT: Mr. Donnelly, good  
20 afternoon.

21 MR. DONNELLY: Judge Pigott, members of the  
22 court, Mr. Golden, good afternoon. My name is  
23 Michael Donnelly. With me is David Donovan.  
24 Together, we represent the Town of Newburgh.

25 The trial court made two essential errors

1 that the Appellate Division, I think, corrected. And  
2 I think they both warrant some attention. The first  
3 is, they left equity out of the equation of vested  
4 rights. And secondly, they held a trial where none  
5 was needed and none was authorized. I'd like to  
6 handle that second issue first, if I could.

7 The determination that Exeter lacked vested  
8 rights was made by the Appellate - - - by the Zoning  
9 Board of Appeals. The exclusive remedy for a  
10 challenge to a Zoning Board of Appeals decision is an  
11 Article 78 proceeding.

12 There are some exceptions. When you have a  
13 claim of over - - - beyond the record contentions, or  
14 where there's a need, like a reconstruction hearing,  
15 or a constitutional - - - a claim of a constitutional  
16 violation. There's no - - - beyond the record claims  
17 made here, there's no reconstruction. We have a 300-  
18 some-odd page record before the Zoning Board of  
19 Appeals.

20 There were constitutional claims, both  
21 substantive due process, denied; as well as First  
22 Amendment retaliation. There was no justification to  
23 hold a trial in this matter. The exclusive remedy  
24 was an Article 78.

25 JUDGE ABDUS-SALAAM: Well - - - well, what

1 - - - the combining the Article 78 with the  
2 declaratory judgment, did that change the - - -

3 MR. DONNELLY: I don't see how it could,  
4 Your Honor. I think it's a mista - - - it's a - - -  
5 it's an error in pleading to combine them into one.  
6 The Town did move pre-answer to dismiss that claim.  
7 I'm sorry, it wasn't pre-answer, it was on a summary  
8 judgment basis later on. The court denied it and  
9 held a - - - a trial.

10 JUDGE STEIN: Well, you could have a  
11 factual hearing in an Article 78.

12 MR. DONNELLY: Under 7804(h) you can. And  
13 I've explained it in the brief that the categories  
14 where those trials have been allowed relate to  
15 limited things like need, a reconstruction hearing or  
16 beyond-the-record claims. Those didn't exist here.  
17 The court held the trial on the ground that the  
18 record was not adequately robust in terms of the  
19 claim of substantial construction and vesting.

20 JUDGE ABDUS-SALAAM: And what - - -

21 MR. DONNELLY: I think - - -

22 JUDGE ABDUS-SALAAM: - - - would have been  
23 the remedy? Would it have been to - - -

24 MR. DONNELLY: A remand.

25 JUDGE ABDUS-SALAAM: Remand?

1 MR. DONNELLY: If in fact that was the  
2 case.

3 JUDGE ABDUS-SALAAM: To the zoning board.

4 MR. DONNELLY: That wasn't the case. But  
5 had it been, it should have been that the zoning  
6 board made a determination. And if it didn't do so  
7 properly, there could have been a remand to follow  
8 the direction of the court, and then a review on an  
9 arbitrary and capricious basis.

10 The problem here is once the court second  
11 guessed the zoning board, and they clearly did, they  
12 did it on a trial basis instead of the record-bound  
13 basis that it should have been. And they applied a  
14 standard that was incorrect.

15 Judge Stein, you indicated earlier that you  
16 need to show substantial construction and vesting.  
17 But as this court said in Glacial Aggregates, those  
18 two standing alone don't do the trick. There has to  
19 be - - -

20 JUDGE STEIN: Do you concede that - - -  
21 that that prong or those prongs were - - - that  
22 prong, at least, was met?

23 MR. DONNELLY: I concede that the trial  
24 record demonstrated that.

25 JUDGE STEIN: Okay.

1                   MR. DONNELLY: The testimony before the  
2 zoning board was very conflicting. We had  
3 professionals testify that the work was not  
4 substantial in terms of the project size, and that it  
5 could have been - - - easily be reused for an R-1  
6 zoning district. That testimony was also offered at  
7 trial. The trial judge agreed with the expert of  
8 Exeter. But we didn't concede that there was  
9 substantial work. Had there not been a trial, the  
10 zoning board would have been free to decide it as  
11 they saw fit.

12                   JUDGE PIGOTT: Is there something that was  
13 going on here that we may not know? Because I did -  
14 - - I was curious as to why the building continued  
15 while all this litigation was going on, and why  
16 somebody didn't get a preliminary injunction or  
17 something? I - - -

18                   MR. DONNELLY: Well, I try to explain in my  
19 brief that I think the Town found itself in a very  
20 delicate position between a special rights claim and  
21 a vested rights claim. Had we held the Exeter at bay  
22 and not processed their application, not given them  
23 the ancillary permits that they would have been  
24 entitled to had they never even applied for site plan  
25 approval, then we'd be faced here with a different

1 claim, that through administrative procrastination or  
2 bad faith, we held them at bay so that we could  
3 rechange the zoning law.

4 We tried to tiptoe and straddle that fence.  
5 So instead, we processed their application. We  
6 warned them on five, six, seven occasions that their  
7 approvals, if they've received them, would not be  
8 good. Mr. Golden calls it hubris. I called it being  
9 fair.

10 JUDGE STEIN: What would - - - what would  
11 be necessary in your view to make this - - - the  
12 approvals that they got enough to meet the first part  
13 of the - - - the vested rights test?

14 MR. DONNELLY: I think what's more  
15 important than the number of approvals or whether  
16 there can - - -

17 JUDGE STEIN: Not only number, but what  
18 kind of approval?

19 MR. DONNELLY: I - - - I must concede that  
20 I agree with Mr. Golden that the issue of whether  
21 this was a final approval or a conditional final  
22 approval, though very relevant to whether there was  
23 good-faith reliance, isn't the sole test. I think  
24 what's important here is that there be some  
25 consideration of was there - - - as this court has

1 called it - - - municipally engendered - - - what's  
2 the term - - - municipally engendered expectation  
3 that what we have done is entitling you to your final  
4 project.

5 That quote is in Orangetown v. Magee. And  
6 there needs to be some type of innocent reliance,  
7 good-faith reliance that I'm not being - - - that the  
8 Town didn't sucker them in. That this developer  
9 thought everything was fine, and all they had to do  
10 was dot the I's, satisfy the conditions, and they  
11 could build their project. In the context of this  
12 case, none of that is true.

13 JUDGE ABDUS-SALAAM: Did they - - -

14 JUDGE STEIN: Why not?

15 JUDGE ABDUS-SALAAM: - - - even under - - -  
16 I'm sorry?

17 JUDGE STEIN: Go ahead.

18 JUDGE ABDUS-SALAAM: Even under the three  
19 years that they had before the zoning changed, did  
20 they have enough time to do this subdivision? Are  
21 you - - -

22 MR. DONNELLY: Well, the subdivision was  
23 done before - - -

24 JUDGE ABDUS-SALAAM: - - - is that what  
25 you're - - -

1                   MR. DONNELLY: - - - the three years. I  
2 think they had more than enough time to complete the  
3 - - - the requirements of the site plan.

4                   JUDGE ABDUS-SALAAM: Well, the entire  
5 project, then?

6                   MR. DONNELLY: They made a decision that  
7 they might lose during the appeal, and therefore they  
8 didn't complete those aspects. But they certainly  
9 had time to complete them.

10                  Judge Stein, you asked what things? The  
11 comprehensive plan committee was formed in 2001,  
12 before Exeter even applied. 2002, they signed a  
13 letter with the application packet acknowledging that  
14 there was a moratorium and their project was  
15 unbuildable.

16                  JUDGE STEIN: No, no, no. But they got to  
17 the point where it looked like everything was okay,  
18 you just had to do these eleven or eighteen things.

19                  MR. DONNELLY: At the very meeting that  
20 that sub - - - that site plan approval was granted,  
21 Exeter was again warned: we are giving you your  
22 approval but you have a sunset coming fast. You have  
23 - - - you're at risk here.

24                  JUDGE STEIN: So but - - - but what - - -  
25 what more did they need to do in your view, to - - -

1 to give them a basis to reasonably rely on the fact  
2 that this was going to go through?

3 MR. DONNELLY: I think they chose to make  
4 this a race to the finish line. And if they won,  
5 they won. If they didn't - - -

6 JUDGE STEIN: But - - - but you're not  
7 answering my question. What more did they have to  
8 do? You're saying it's not a matter of whether it's  
9 conditional or not, it's a question of was there  
10 enough expectation. So we have to make a rule here.

11 MR. DONNELLY: Yeah.

12 JUDGE STEIN: We have to figure out whether  
13 there was enough or not. How do we make that rule?  
14 What more did they have to do, in your view - - -

15 MR. DONNELLY: I think you look at it - - -

16 JUDGE STEIN: - - - to - - - to make that  
17 expectation reasonable.

18 MR. DONNELLY: - - - under principles of  
19 equitable estoppel. If the fault was with the  
20 municipality because they misled or engendered an  
21 expectation that everything was fine, then the  
22 balance tips in favor of the developer. If the good-  
23 faith reliance was - - - was clearly there and Exeter  
24 thought I don't have any problem; when I get these  
25 things satisfied, I'm home free, but on the other

1 hand when they knew - - -

2 JUDGE STEIN: Isn't it more of the bad - -  
3 - isn't that more of the bad-faith question, then? I  
4 mean, aren't - - -

5 MR. DONNELLY: It's an unclean hands  
6 argument. You - - - you call it innocent reliance.  
7 I mean, the hallmarks of - - - of equitable estoppel  
8 have always been some kind of misrepresentation,  
9 reasonable reliance, or lack of unclean hands. I  
10 think all of those things apply here. So it's a  
11 fact-specific situation in each - - - each case.

12 Here, if Exeter had completed its  
13 conditions and the building permit was signed, and  
14 they started construction, they certainly were home  
15 free. But under the circumstances, nobody engendered  
16 an expectation that unless they satisfied the - - -  
17 those conditions, they could build - - -

18 JUDGE STEIN: What if they satisfied - - -

19 MR. DONNELLY: - - - their project.

20 JUDGE STEIN: - - - ten out of fifteen  
21 conditions? Would that be enough?

22 MR. DONNELLY: I think in this case it  
23 would not be, because they knew that the zoning had  
24 changed, that their statutorily-granted three-year  
25 exemption was there. If they wanted to have their

1 approval, they needed to satisfy those conditions.  
2 That wouldn't be true in every case. This isn't - -  
3 - isn't an absolute rule.

4 The very nature of all equitable remedies  
5 are fact-specific to the case at hand. Here, the  
6 municipality did nothing but warn them of what was  
7 coming.

8 JUDGE RIVERA: They - - - so if I'm  
9 understanding, you're saying that they took the risk,  
10 and it wasn't one that's based in anything that you  
11 suggested to them.

12 MR. DONNELLY: Right.

13 JUDGE RIVERA: It's based on their own - -  
14 -

15 MR. DONNELLY: Correct.

16 JUDGE RIVERA: - - - hopes that well, we'll  
17 get it done.

18 MR. DONNELLY: Absolutely.

19 JUDGE RIVERA: And if we don't, maybe it's  
20 good enough. And we can still get it done  
21 afterwards.

22 MR. DONNELLY: I think that's correct.

23 JUDGE FAHEY: Well, the problem is, is on  
24 their - - - the way I understand opposing counsel's  
25 argument is, is that the conditions that were

1 imposed, first off, really weren't substantive, they  
2 were administrative conditions. And there seems to  
3 be some merit to that.

4 MR. DONNELLY: Well, some of them required  
5 changes to the plans, that the plans were not in a  
6 form that anybody - - - Judge Fahey, probably the  
7 best example I can give you. Had that been true - -  
8 -

9 JUDGE FAHEY: Um-hum.

10 MR. DONNELLY: - - - Exeter would never  
11 have required a clearing and grading permit. Because  
12 if your site plan approval is an unconditional one,  
13 under the Code, you can do the work under the site  
14 plan. And they - - - in the appendix to the brief we  
15 showed the section that shows that exemption.

16 They needed the clearing and grading permit  
17 because their site plan approval was inchoate and not  
18 ready to go.

19 Perhaps the best example of a case that I  
20 can give you that discusses facts that are very  
21 similar to ours. In Glacial Aggregates, this court  
22 cited to a case called Preble Aggregates against the  
23 Town of Preble. It's - - - it's in your Glacial  
24 Aggregates decision.

25 There what happened is the developer was

1 found by the court to be indisputably aware that the  
2 Code had changed. And yet while he was challenging  
3 the Code, he went ahead and made, let's assume,  
4 substantial expenditures and substantial construction  
5 in furtherance of the ultimate project he wanted to  
6 build.

7 The court there denied vested rights,  
8 holding that he willingly proceeding with efforts and  
9 expenditures to move forward cognizant of the  
10 potential for an eventual legal ruling that the law  
11 he was challenging might be found valid, which would  
12 preclude the proposed use. He had no vested rights,  
13 because there was no good-faith reliance and no  
14 showing that enforcement of the amended law would be  
15 inequitable. It's the same facts here.

16 I don't know what general rule you want to  
17 announce. I think in Ellington, in Glacial  
18 Aggregates, in - - - in Orangetown v. Magee, you  
19 discuss the equitable nature of the relief. We're  
20 talking about fashioning a remedy between the  
21 absolute of a substantive due process claim where  
22 there is a protectable property interest, and that's  
23 a stingy standard, it's hard to achieve, and  
24 outrageous governmental conduct - - - nobody's  
25 claiming that here. Those claims were made, but they

1           were dismissed. And the case of a nonconforming use,  
2           something that's been in full flower for many years,  
3           and then the Code is changed and we look to the  
4           protections that are, again, generally of a  
5           constitutional nature, and a violation may arise to  
6           be taken.

7                         In that middle ground, where a project is  
8           before a board, where the municipality is talking  
9           about changes to the Code, what I think the test is,  
10          from what I've read of the decisions of this court  
11          and what I think it should be is, you look at the  
12          equities of the situation. Was the developer misled?  
13          Was the misleading the fault of the municipality?  
14          Was there good-faith innocent reliance? And if, on  
15          balance, there was no municipally engendered  
16          expectation of continued enjoyment, and there was no  
17          good-faith reliance, but an attempt to win the race,  
18          then there is no vested rights.

19                         But if there's fault on the municipality's  
20          part, they engendered an expectation, and unfairly  
21          pulled the rug out from under the developer at the  
22          last minute, then vested rights should come to the  
23          rescue as equitable remedies always do.

24                         JUDGE PIGOTT: Thank you, Mr. Donnelly.

25                         Mr. Golden?

1 MR. GOLDEN: Yes. What - - - what Mr.  
2 Donnelly is asking this court to do is to meld the  
3 special-facts exception on vesting and the common law  
4 vesting. They're very - - - two very separate  
5 things. And I believe, respectfully, that Mr.  
6 Donnelly is absolutely wrong that this is an equity  
7 test, that we must concentrate on the - - - on the  
8 equitable principles and that's what the common law  
9 vesting is, is an equitable.

10 The - - - the Court in Ellington said some  
11 say it's - - - it was the spe - - - the common law  
12 vesting is based upon equitable principles, some say  
13 it's based upon the common law and nonconforming  
14 uses. Whatever it happens to be, this is our test.  
15 So it's separate and apart from - - -

16 JUDGE PIGOTT: Well, when - - - when - - -

17 MR. GOLDEN: - - - a general equity  
18 requirement.

19 JUDGE PIGOTT: - - - when did you - - -  
20 when did you get your common law vesting? When did -  
21 - - when, in your view, was this vested and they  
22 couldn't do anything about it?

23 MR. GOLDEN: Sometime in that ten-month  
24 period, we achieved - - - we certainly - - - by that  
25 January date in 2009, we achieve that with the amount

1 of work that we had done.

2 JUDGE PIGOTT: Doesn't that play into - - -  
3 into what you - - - counsel's saying that it's a  
4 question of fact and we're not a fact court?

5 MR. GOLDEN: It - - - it is a question of  
6 fact. And the Supreme Court went through a factual  
7 hearing with respect to all of these, heard testimony  
8 and held that, in fact, all the - - - the three test  
9 - - - part test was satisfied, including the  
10 construction. You know - - -

11 JUDGE ABDUS-SALAAM: Counsel, why, in your  
12 view, was there a - - - a need to have a trial at  
13 Supreme Court and - - - and why wasn't the  
14 appropriate remedy to remand to the - - - the zoning  
15 board, if the court felt that the record was  
16 inadequate?

17 MR. GOLDEN: Because the - - - the court  
18 said that the zoning board, although they had a  
19 record before it, didn't refer to it all. They came  
20 out with a very simple explanation that had nothing  
21 to do with the common law vesting test. It said you  
22 didn't satisfy all the conditions in one of your  
23 resolutions of approval, the - - - the final site  
24 plan approval, therefore you're not - - - we don't  
25 even get to vesting. And the court therefore said -

1           - - and there are cases cited in my brief with  
2           respect to Article 78s - - - and they are allowed.  
3           And they - - - and there's - - - when there's factual  
4           determinations that need to be made, the court has  
5           that ability to do so.

6                         And that's why the - - - the court did  
7           that.

8                         This - - - the case of the race that  
9           several of you and Mr. Donnelly have referenced, I  
10          can't remember whether it's Ellington or one of the  
11          earlier cases of this court, is that it said the  
12          common law vesting was always a race. Initially  
13          before the statutory three years was put in place, it  
14          was whether the municipality raced first to get its  
15          zoning code in place or whether or not you got your -  
16          - - your project done or at least substantially done  
17          to satisfy the test.

18                        The three-year period gave a specific time  
19          frame that the zoning couldn't be changed as to your  
20          project. But it was always a race, and it's still a  
21          race. It's a race within that three-year period.  
22          But it's still a race as to who's going to get there  
23          first.

24                        It doesn't mean that you shouldn't start  
25          the race. That's what the Town says. The Town says

1 oh, I'm going to tell you that we - - - we may change  
2 your zoning, therefore you shouldn't even get into  
3 the race. We're stopping you from getting into the  
4 race right now. That's wrong. It's never been part  
5 of the common law vesting test.

6 JUDGE RIVERA: Was it realistic to believe  
7 you would complete these conditions within the three  
8 years?

9 MR. GOLDEN: Complete the conditions in the  
10 three years?

11 JUDGE RIVERA: Yes.

12 MR. GOLDEN: Maybe not. No. In fact, I  
13 would say it was never. Because of the way that the  
14 conditions were placed on here, that you - - - some  
15 of the conditions are that you basically had to  
16 complete the project before you could have some of  
17 those conditions, like with respect to all of the  
18 landscape in the project had to be completed before  
19 you could - - - they would sign the site plan.

20 JUDGE STEIN: Did you have any obligation  
21 to complain about that to the - - - to the board or  
22 to the Town?

23 MR. GOLDEN: We did complaint to the board  
24 that these were - - - were conditions that were - - -  
25 were onerous, including the fees and everything else.

1 But the - - - it was - - - it's the policy of this  
2 board in - - -

3 JUDGE RIVERA: Did you complaint about the  
4 time frame, though?

5 MR. GOLDEN: Excuse me?

6 JUDGE RIVERA: Even - - - putting aside  
7 whether or not they were onerous, did you complain  
8 about the time frame, that realistically that - - -  
9 there's no way to do that in three years?

10 MR. GOLDEN: I don't recall whether or not  
11 at the time - - - I wasn't the attorney for the  
12 entire process of that, and it - - - and it may have  
13 been. I don't know. But - - - but the fact of the  
14 matter is that this court has established a test.  
15 It's a test that has been longstanding. And now to  
16 say well, let's go ahead and change the test and - -  
17 - and sort of graft these equitable principles onto  
18 that, that have never been in there, and say we have  
19 to have this equity pre-test to see whether or not  
20 you're deserving of it.

21 The test that was requested just now is a -  
22 - - is a - - - a combination of the special-facts  
23 exception where you say that the municipality has  
24 done something wrong. That's not what we're asking  
25 for here, and it's not what was required, ever, in

1 over the hundred years of the common law vesting  
2 doctrine.

3 JUDGE PIGOTT: Thank you, Mr. Golden.

4 MR. GOLDEN: Thank you very much..

5 JUDGE PIGOTT: Thank you, gentlemen.

6 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Exeter Building Corp. v. Town of Newburgh, et al., No. 20 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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