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The Bowditch & Dewey Real Estate Blog

Vested Rights in a Project: A Win for Project Developer's Rights in New England

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The Maine Supreme Judicial Court's ("the Court") ruling in *NECEC Transmission LLC et al v. Bureau of Parks and Lands et al*, 2022 ME 48 (August 30, 2022), that New England Clean Energy Connect ("NECEC") holds constitutionally protected vested rights to proceed with its proposed project to construct power lines that would deliver energy from Quebec through Maine and into Massachusetts ("the Project"), allows NECEC to proceed with construction under terms approved by Maine's Public Utility Commission ("PUC").

The Project obtained PUC approval under a Certificate of Public Convenience and Necessity ("CPCN") on May 3, 2019, the issuance of which the Court affirmed on March 17, 2020, subject to oversight by other entities such as the Bureau of Parks and Lands. Significant work on the Project was undertaken, which NECEC claimed cost \$450 million.

On November 2, 2021, Maine voters approved a ballot question (the "Initiative") retroactively banning the work proposed by the Project, without naming the Project itself. On November 3, 2022, NECEC sued the Bureau of Parks and Lands, the Maine Senate and House, among others, alleging that retroactive application of the Initiative was unconstitutional. The Court held that the Initiative was unconstitutional in its retroactive application *if* NECEC had acquired vested rights to proceed with Project construction, reasoning that the Maine Legislature does not have the power to enact retrospective laws that impair vested rights.

The Court's test for vested rights was:

- does the claimant hold a validly issued and final permit, not subject to further judicial review;
- if the law under which the permit was issued changed thereafter to apply retroactively, would the change strip the claimant of substantial rights to proceed with the activity authorized by the permit; and
- whether the claimant undertook substantial good-faith expenditures on the activity within the scope of the affected permit prior to the enactment of the retroactive legislation.

As to the third part of the test, the Court examined whether money was spent: a) in reliance on the affected permit; b) before the law changed; and c) according to a schedule that was not created or expedited for the purpose of generating a vested rights claim. The court held that NECEC met the requirements for #1 and #2 and remanded the case to the Business and Consumer Docket to answer #3 to determine good faith in further proceedings consistent with its opinion.

The Court's reasoning was that: 1) the PUC approval was considered final approval, even though the Project is subject to oversight from other entities; 2) the Initiative would strip NECEC of its rights authorized by the CPCN; and 3) because NECEC spent 43% of its total project estimate, its reliance on the PUC approval to initiate work was reasonable.

KEY TAKEAWAYS

Retroactively applied legislation cannot be used take away constitutionally protected, vested rights in certain circumstances. The Court's analysis provides a framework for evaluating whether a developer entity may hold vested rights in a project.