

## **City's Attempt to Use Emergency Ordinance to Scuttle Unpopular Project Violates Developer's Vested Right**

In *Stewart Enterprises Inc., v. City of Oakland* (2016) 248 Cal.App.4th 410 the court of appeal provided important clarification on the limits of a local agency's ability to use an emergency ordinance to reach back and prohibit a previously-approved project.

Stewart Enterprises involved a proposed crematorium in Oakland. After obtaining administrative zoning clearance for the proposed use, the developer bought the property and applied for a building permit. Five days after the building permit issued – and due to public opposition to the crematorium – the city council adopted an emergency ordinance requiring a use permit for any new crematorium activity in the city.

The emergency ordinance was written to apply to "any building or structure for which rights to proceed with said building or structure have not yet vested pursuant to the provisions of State law. . ." Thus, the ordinance focused on vesting under the so-called "judicial" vested rights doctrine, which provides that a permit-based right does not "vest" until the developer has performed substantial work and incurred substantial liabilities in good-faith reliance on the permit. Having approved the emergency ordinance, the city notified the developer it could not proceed with the crematorium without first obtaining a use permit.

After the developer's administrative appeals failed, it filed suit, claiming among other things, that the emergency ordinance impaired its vested right to go ahead with the crematorium. That claim was not based on the "judicial" vested rights doctrine, however, but on the city's own permit-vesting ordinance, which provided, in part, that when a subsisting building permit has been lawfully issued "neither the original adoption of the zoning regulations nor of any subsequent rezoning or other amendment thereto shall prohibit the construction, or other development or change, or use authorized by said permit."

The trial court sided with the developer, finding that the city's permit-vesting ordinance precluded application of the emergency ordinance to require a use permit.

On appeal, the court evaluated three issues: (1) whether the developer had a vested right under the city's permit-vesting ordinance; (2) if so, whether the emergency ordinance impaired that right; and (3) if the developer had a vested right that was impaired, whether the impairment was justified based on the need to protect public health and welfare.

The court quickly determined that the developer had a vested right under the city's permit-vesting ordinance, since the ordinance precluded application of subsequently-enacted zoning regulations where application of the regulations would prohibit construction authorized under a given permit.

Next, the court found that application of the emergency ordinance would impair the developer's vested right based on the simple fact that it prevented construction of the crematorium under the building permit. The court was unpersuaded by the city's claim that the vested right was not impaired because the developer had the option of pursuing a use permit. The possibility the developer could regain the right to build the crematorium if it obtained a use permit does not, the court noted, change the fact that "a project can be 'prohibited' even if the fulfillment of certain contingencies might at some later date reauthorize it."

Lastly, the court considered the city's claim that impairment of the vested right was necessary in order to protect public health and welfare. While the courts have recognized that vested rights may be impaired when necessary to address a "menace to public health and safety or a public nuisance," such a finding must be supported by substantial evidence. The court found that letters of opposition to the crematorium and general comments expressing concern about the crematorium's potential effects on public health were insufficient to make the required showing. Although it declined to establish a bright line rule, the court indicated that to justify impairment of a vested right, the record would likely need to include "actual" evidence that the use poses an unmitigated risk to public health.

Stewart Enterprises does not cover new ground. However, the decision is an important reminder that a vested right—whether created as a matter of law or pursuant to a vesting ordinance – may not be impaired, no matter how unpopular the project, without the governing agency meeting a heavy burden of proof.

## Authors



### [Garrett Colli](#)

Partner

[GColli@perkinscoie.com](mailto:GColli@perkinscoie.com) [415.344.7160](tel:415.344.7160)

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