CAO 2016-087

To: Peter Iglesias; Miriam Ramos; Cristina Suarez; Stephanie Throckmorton

From: Craig E. Leen, City Attorney for the City of Coral Gables

RE: Legal Opinion Regarding Zoning Application Process and Vested Rights

Date: October 20, 2016

Pursuant to section 2-201(e)(1) and (8) of the City Code, as well as section 2-702 of the Zoning Code, and in consultation with the Assistant City Manager/Building Official, I hereby adopt as a City Attorney Opinion the attached opinion from Craig Coller, special counsel for land use and zoning. As of the date of this City Attorney Opinion, the general rule for all amendments to the City Code, Zoning Code, and fee schedule, unless the City Commission expressly directs otherwise, is that any such amendments apply to all pending applications except the following: (1) applications that have obtained final Board of Architects approval (assuming the approval does not expire), (2) applications subject to a Development Agreement (the terms of the agreement apply), or (3) where applicable law requires.

Please note, as a general matter, this rule establishes the final Board of Architects approval as the key moment in determining whether a newly effective amendment applies to a pending application. If the final approval has been obtained prior to the amendment, the amendment would not apply. If the final approval has not yet been obtained at the time of the amendment, the amendment would apply. Of course, the City Commission retains the lawful discretion, as discussed in the memo, to select a different event or date for a specific amendment.

From:	Leen, Craig
To:	Paulk, Enga
Subject:	FW: Opinion Regarding Zoning Application Process and Vested Rights
Date:	Thursday, October 20, 2016 11:48:11 AM
Attachments:	Opinion Regarding Zoning Application Process and Vested Rights 9-17.pdf image002.png image001.png

Please publish.

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CORAL GABLES
THE CITY BEAUTIFUL
Celebrating 90 years of a dream realized.

From: Leen, Craig
Sent: Thursday, October 20, 2016 11:48 AM
To: Iglesias, Peter; Ramos, Miriam; Suarez, Cristina; Throckmorton, Stephanie
Cc: Craig Coller; Wu, Charles; Trias, Ramon
Subject: Opinion Regarding Zoning Application Process and Vested Rights

City Attorney Opinion

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Opinion Regarding Zoning Application Process and Vested Rights

You have requested an opinion on when in the zoning application process does an applicant acquire vested rights, and the extent of such rights upon vesting. You note the provision of Article 1, Section 111, of the Coral Gables Zoning Code regarding the time that an applicant upon receiving zoning approval has to submit a building permit application. That section provides:

> **Section 1-111. Time limitation of approvals.**
>
> A. Unless specified otherwise herein, approvals granted pursuant to these regulations shall submit an application for a building permit within eighteen (18) months from time of the approval. Failure to submit for a building permit shall render the approval null and void. Permitted time frames do not change with successive owners, provided however, one (1), six (6) month extension of time may be granted by the Development Review Official.

The City has established a procedure in its zoning code for an applicant to make a claim for vested rights. Article 3 Division 19, of the Coral Gables Zoning Code in summary requires that a request must be made in writing, requires that the claim demonstrate that expenditures were made on reliance of an authorized government act, that the claim for vested rights be reviewed at a public hearing of the City Commission, and that any City Commission approval of vested rights be the minimum relief necessary to provide the applicant a reasonable rate of return. Such vested right determination must be utilized within a 2 year period of time.

The provisions of the City's Zoning Code to establish vested rights are in line with Florida case law which provides that the mere issuance of a building permit does not vest rights. The Fourth District Court of Appeal in *City of Boynton Beach v. Carroll*, 272 So. 2d 171, 173 (Fla. 4th DCA. 1973) summarized that law as follows:

> We now turn to the second question: whether a vested right to a building permit was created by petitioner's application for a permit at a time when the proposed building was not in violation of the zoning ordinances. Florida law since 1945 has been clear **that Possession of a building permit does not create a vested right, and that a permit may be revoked where the zoning law has been amended subsequent to the issuance of the permit in the absence of circumstances**

> **which would give rise to equitable estoppel.** Sharrow v. City of Dania, 83 So.2d 274 (Fla.1955); Miami Shores Village v. Wm. N. Brockway Post No. 124, 156 Fla. 673, 24 So.2d 33 (1945); State ex rel. Jaytex Realty Co. v. Green, 105 So.2d 817 (Fla.App.1958); City of Fort Lauderdale v. Lauderdale Industrial Sites, 97 So.2d 47 (Fla.App.1957); 101 C.J.S. Zoning s 261 (1958); 8 E. McQuillan, Municipal Corporations, Zoning ss 25.155-56 (3d Ed. Rev.1957); See Broach v. Young, supra; but see City of Hollywood v. Pettersen, 178 So.2d 919 (Fla.App.1965). **It follows then, and it has been so held, that if the possession of a building permit does not create a vested right, then a mere application for a building permit cannot create a vested right.** [Citations Omitted][Emphasis Supplied]

The Florida Supreme Court in *City of Hollywood Beach Hotel v. City of Hollywood,* 329 So. 2d 10, 15–16 (Fla. 1976) explained under what circumstances a vested right would be acquired upon the issuance of a building permit:

> As correctly stated by the Fourth District in City of Hollywood… the doctrine of equitable estoppel will preclude a municipality from exercising its zoning power where
>
> '. . . (A) property owner **(1) in good faith (2) upon some act or omission of the government (3) has made such a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the right he acquired.** Salkolsky v. City of Coral Gables, 151 So.2d 433 (Fla.1963) [Emphasis Supplied]

Ordinarily where a permit has been issued erroneously the City will not be bound by such permit and a building permit recipient will not be able to make a claim for vested rights. In *Metro. Dade Cty. v. Fontainebleau Gas & Wash, Inc.,* 570 So. 2d 1006-1008 (Fla. 3rd DCA. 1990) held:

> Owners are deemed to purchase property with constructive knowledge of applicable land use regulations. Namon v. Dept. of Environmental Regulation, 558 So.2d 504, 505 (Fla. 3d DCA 1990), review denied, 564 So.2d 1086 (Fla.1990). See Allstate Mortgage Corp. of Florida v. City of Miami Beach, 308 So.2d 629 (Fla. 3d DCA), cert. denied, 317 So.2d 763 (Fla.1975), citing McDaniel v. McElvy, 91 Fla. 770, 108 So. 820, 831 (1926).

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> Resolution Z–93–75 demonstrates on its face that construction of a gas station would be illegal and that the property is limited to use as a bank or savings and loan. **Therefore, while building permits were subsequently issued by government officials, estoppel will not lie for prohibited acts.** *Dade County v. Gayer,* 388 So.2d 1292 (Fla. 3d DCA 1980), *review denied,* 397 So.2d 777 (Fla.1981); *see Greenhut Constr. Co. v. Henry A. Knott, Inc.,* 247 So.2d 517 (Fla. 1st DCA 1971); *City of Miami Beach v. Meiselman,* 216 So.2d 774 (Fla. 3d DCA 1968); *cert. denied,* 225 So.2d 533 (Fla.1969) (city was not estopped to revoke "roof sign" building permit which was in violation of city ordinance).[Emphasis Supplied]

The doctrine affirmed in *Fontainebleau Gas & Wash,* is not without limits, particularly as it applies to code enforcement. In, *Castro v. Miami-Dade Cty. Code Enf't*, 967 So. 2d 230 (Fla. 3rd DCA 2007) an individual property owner purchased a home that had an addition built with permits over 25 years ago that apparently was determined by the County to be in violation of setbacks. Notwithstanding that the addition had been built with building permits and subsequent building permits had been issued to modify the addition, the County argued that it had the right to require the present owner to tear the addition down based on a violation of setbacks. The Third District Court of Appeal found equitable estoppel preventing the code enforcement action:

> The doctrine of equitable estoppel, however, may only be applied against a governmental entity under exceptional circumstances. *Monroe County v. Hemisphere Equity Realty, Inc.*, 634 So.2d 745, 747 (Fla. 3d DCA 1994). We find that the County's issuance of the required permits to the original owners, well before the Castros purchased their home from them with the addition already built; the Castros' continued use of the addition; and, the Castros' reliance upon the validity of the permits issued during a period of over twenty-five years, presents such an exceptional circumstance….The fact that the County initially issued permits for the construction of the family room addition, and subsequently issued additional permits for the improvement and maintenance of the family room addition over the last twenty-five years, with the knowledge that the Castros were incurring a substantial investment of time and money in reliance that the building permits were properly issued, establishes that it would be grossly unfair to deny the Castros the doctrine of equitable estoppel. At this stage of the game, it would be grossly inequitable to allow the County to repudiate its prior conduct and require the Castros to demolish their family room addition.

Castro, at 233–34.[1]

Accordingly, a vested rights determination is a highly intensive fact inquiry and a decision can only be made on a case-by-case basis. The procedure established in Article 3 Division 19 affords the City Commission the opportunity to review a particular situation. The existence and the extent of the vested right provided to an applicant must be measured by the particular permit issued and the specific reliance that an applicant is able to demonstrate.

You have asked what the general rule would be for building permit applications where the local government enacted fees and whether such pending applications would be subject to a fee. Prior to the enactment of Section 163.31801, Florida Statutes, the law on when inpact fees can be imposed was governed by *City of Key West v. R.L.J.S. Corp.*, 537 So. 2d 641. (Fla. 3rd DCA 1989). In that case, the City of Key West enacted impact fees and imposed those fees to building permits previously issued. The developer in that case argued vested rights claiming that it had already sold a number of condominium units and lost the opportunity to pass the fee on to its buyers of such units.

The Third District Court of Appeal rejected the developers vested rights claim holding:

> **It thus clearly appears that government can constitutionally impose burdens which are unexpected whether or not the burdens are susceptible to being passed on to another person.** *See Westfield-Palos Verdes Co. v. City of Rancho Palos Verdes,* 73 Cal.App.3d at 494, 141 Cal.Rptr. at 42 ("The imposition of a new tax, or an increase in the rate of an old one, is simply one of the usual hazards of the business enterprise."); *648 *John McShain, Inc. v. District of Columbia,* 205 F.2d 882, 883 (D.C.Cir.1953) (same). Even if the developers in this case could show that the costs could not be passed on to what they call "users," they would still be liable to pay the impact fees.
>
> We acknowledge that the result we reach may seem harsh. To be sure, the developers sold most of the units in the condominium and only later found out that they had to pay more money to the City. **But as we have said, absent a contractual agreement, one may not justifiably assume that taxes will remain the same or that an impact fee will not be imposed.** The imposition of an

[1] In *Monroe County v. Carter*, 41 So.3d 954(Fla. 3rd DCA 2010) the Third District chose not to find equitable estoppel and apply its *Castro* decision emphasizing the lack of exceptional circumstances.

> impact fee resulting in an unanticipated increase in a developer's cost may seem harsh, but it is not unconstitutional. [Emphasis Supplied][2]

*I*d at 647-648.

Section 163.31801, Florida Statutes however, has restricted somewhat a local government's discretion when in the development process an impact fee may be imposed. This section provides: **"that notice be provided no less than 90 days before the effective date of an ordinance or resolution imposing a new or increased impact fee."** [Emphasis supplied] In any event, as a practical matter it would be best for the City to impose the fee on developers prior to the issuance of the building permit, and absence specific language in an ordinance to the contrary, applying any new fee to those building permit applications filed subsequent to a particular ordinance's effective date would not be an unreasonable interpretation. Imposing the fee on developers subsequent to issuance of the building permit may create practical enforcement difficulties for the City.

Staff requests, for purposes of administration, that the law in effect at the time a development proposal receives final approval from the Board of Architects, should govern when such development applies for a building permit. This is a reasonable interpretation and well within the parameters outlined above for determining what law applies to a particular building permit application where ordinances are silent on when in the development process those laws apply. Of course, where the City Commission adopts an ordinance and expressly indicates when in the develop process the ordinance should apply, that expression by the City Commission would govern.

Conclusion

Staff's request in processing building permits to look to those City ordinances in effect as of the date that a development receives Board of Architects approval is a reasonable interpretation where ordinances are silent when in the development process such laws should apply. As noted, in the event that the City Commission has adopted an ordinance expressing a specific time for an ordinance's application, those provisions would govern processing building permits.

[2] Of course, any impact fee as the Third District Court of Appeal noted still requires consistency with the law governing impact fees. *Id* at 648 fn.10.