

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2008-0700, Fred Lowell & a. v. City of Portsmouth, the court on April 17, 2009, issued the following order:

The petitioners, Fred Lowell and Al McElaney, appeal an order of the trial court ruling that they had neither a State nor Federal constitutional right to a driveway. They argue that: (1) the respondent, City of Portsmouth (City), exceeded its authority to regulate private property when it denied their driveway application permit; (2) the City's action was arbitrary and unreasonable; and (3) the City's action violated the petitioners' constitutionally protected rights. We affirm.

We briefly summarize the procedural history of this case. In 2006, the petitioners appealed decisions by the Portsmouth Planning Board and the Portsmouth City Council that denied their application for a driveway finding that as presently configured the proposed driveway would be unsafe. The superior court reversed the denial and the City appealed to this court. After hearing argument and reviewing the record, we concluded that the superior court had impermissibly substituted its judgment for that of the City. We further concluded that the City's factual finding that the driveway was unsafe was neither unreasonable nor unsupported by the evidence; we therefore found no error in this finding. See Merrimack Valley Wood Prods. v. Near, 152 N.H. 192, 201 (2005) (question decided on first appeal is known as law of the case and becomes binding precedent to be followed in successive stages of same litigation). Because the petitioners had also raised constitutional issues that the trial court had not addressed, we remanded the case to allow for review of those claims. On remand, the trial court ruled that the petitioners had no constitutional right to a driveway, finding that they had access to their property and reasonable use.

Because the issue before us is one of constitutional law, we review it *de novo*. See State v. Abram, 156 N.H. 646, 651 (2008). We have previously held that a "landowner's vested right of access consists only of access to the system of public highways not of a particular means of access." Merit Oil of N.H., Inc. v. State, 123 N.H. 280, 281 (1983) (quotations omitted). The converse is also true; a landowner's right of access to his property does not guarantee a particular means of access. In this case, the petitioners have access to their property; the access for which they seek approval does not currently exist. We thus find inapposite those cases cited by the petitioners that address preexisting nonconforming uses.

Nor are we persuaded by their argument that the City's denial of their driveway application violated their substantive due process rights. See Cnty. Res. for Justice v. City of Manchester, 154 N.H. 748, 756 (2007) (whether exercise of City's police powers is proper and thus able to survive a substantive due process challenge reviewed under rational basis test).

Having concluded that the petitioners have no constitutional right to a driveway, we turn briefly to their argument that because they have invested substantial sums in the renovation of their project, they have a vested right to a driveway. We note that the petitioners cite no evidence that the City ever indicated that it would approve their driveway application. The trial court found that "the expenditure of significant dollars on restoration alone does not give a property owner a vested right to a driveway nor does it permit this Court to find that a driveway is required to service this property." We agree. See Quirk v. Town of New Boston, 140 N.H. 124, 133 (1995) (property owner who invests in property improvements in face of regulatory impediments does not acquire a claim for vested rights if approval for improvements is denied).

Affirmed.

DALIANIS, DUGGAN and HICKS, JJ., concurred.

**Eileen Fox,
Clerk**